

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS
[2023] EWHC 1371 (TCC)

Case No. HT-2022-000384

Technology & Construction Court
The Rolls Building
7 Rolls Buildings
Fetter Lane
London
EC4A 1NL

Thursday, 16th February 2023

Before:
THE HONOURABLE MR JUSTICE WAKSMAN

B E T W E E N:

ALTIATECH LTD

and

BIRMINGHAM CITY COUNCIL

MR J BARRETT (instructed by Greystone, Solicitors) appeared on behalf of the Applicant
MR S KOSMIN (instructed by Weightmans LLP, Solicitors) appeared on behalf of the
Respondent

APPROVED JUDGMENT

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MR JUSTICE WAKSMAN:

Introduction

1. This case concerns a procurement challenge made by Altiotech Ltd (“Altiotech”), against the defendant, Birmingham City Council, (“the Authority”), in respect of the Authority’s direct award of a contract to a supplier under a framework agreement to which Altiotech was not a party. That supplier was Softcat plc (“Softcat”). Both Altiotech and Softcat were resellers of a cyber security software product developed by an American company called SentinelOne Inc., which was incorporated in Delaware and based in California.

The Product

2. The core application before me is made by the Authority to strike out Altiotech’s claim and/or obtain summary judgment to dismiss it.
3. On 2 July 2021, the Authority made a call-off agreement with Altiotech to supply the product for three years, pursuant to the G-Cloud framework agreement (“the G Cloud framework”). However, on 29 March 2022, the Authority terminated its agreement with Altiotech (“the Altiotech agreement”), on 90 days’ notice on the basis of a termination for convenience clause, i.e. a termination which did not require cause. A revised termination notice was served on 29 July 2022. As a matter of contract, and indeed as a matter of procurement law, it is common ground that the Authority was entitled to take such a step.
4. Then on 15 July 2022, the Authority issued a direct award to Softcat by means of a call-off under a different framework agreement called The North of England Framework Agreement (“the NEF”). The Authority had become a party to the NEF in May 2022. The award to Softcat, the new agreement, was for the provision of the same Sentinel product that Altiotech had previously provided.
5. On 7 September the Authority published a contract award notice in respect of the award of the new contract. Altiotech complained about the termination of the Altiotech agreement, and then when it found out about the award of a supply agreement to Softcat there was correspondence between Altiotech, or its solicitors, and the Authority starting in late April 2022, which set out or began to set out those complaints. It will be necessary to examine with some care below exactly what that correspondence amounted to and what it shows about Altiotech’s state of knowledge, about the facts underlying, or potentially underlying its complaints.

The Claim

6. On 19 October 2022 Altiotech issued the Claim Form in these proceedings sent by post to the Authority on 24 October. In the absence of any evidence as to when it was actually received by the Authority, which the Authority has not provided, the deemed date of service was for these purposes 26 October. The Claim Form alleged breach by the Authority of its equal treatment and

transparency obligations under Regulation 18 of the Public Contracts Regulation 2015 (“the PCR”) in particular, its duties under Regulation 18(1), 18(2) and 18(3), not to structure a procurement such that it would favour or disfavour particular economic operators. The appropriate relief sought in the Claim Form included a declaration of ineffectiveness (“DOI”), under Regulation 99 and a financial penalty order.

7. Other than to say that Altiotech was a provider of various technical related services, that is essentially all that the Claim Form said. The particulars of claim were posted on 8 November and again in the absence of any evidence about when they were actually received by the Authority they are deemed to have been served by 10 November. That means that they were served 15 days after service of the Claim Form. It is now necessary to refer to some parts of the Particulars of Claim.
8. Paragraph 5 says that they set out the claimant’s case as fully as presently able to do in circumstances where the Authority had not yet disclosed a clear and transparent explanation of its conduct and reasons and relevant documentation. Paragraph 6 to 14 then set out the background, much as I have done above. And then we come to paragraph 16 to 18 which I will need to read:

“On 7 October the defendant provided for the first time stating the reasons explaining the termination notice and its conduct relating to the new contract. In summary it said:

1. An internal complaint was made against the senior member of the defendants staff relating to conflict of interest, personal links with certain economic operators which resulted in an internal investigation by the defendant. As a result of the findings of the investigation between 28 January and 11 February 2022 the defendants chief information officer decided to terminate all contracts which the staff members in questions had been engaged in. There were no established links between the claimant and the said member of staff, nor any other adverse findings against the claimant as a result of the investigation. The defendant considered it reasonable to terminate all contracts associated with the said member of staff due to the findings of the investigation, including those where there were no adverse findings against them. The defendant has not confirmed whether all economic operators with which the member of staff had their contracts terminated is put to proof.
2. At paragraph 18 the claimant understands and infers that the defendant subsequently designed and conducted the procurement relating to the new contract in such a manner as to avoid contracting with or to disadvantage the claimant and to advantage other economic operators.”

9. There are then set out relevant parts of the PCR and principles of procurement law, which include the public law of duties including to take a decision in a manner which is lawful, reasonable, proportionate, procedurally fair, and substantively fair.
10. It is then alleged that the Authority was in breach of the duties which have just been set out. The breaches are particularised in paragraphs 22 to 23 as follows:

“22. The Claimant’s case is that the Defendant structured the procurement in a manner that breached its obligations owed to the Claimant under (inter alia) reg. 18(1), (2) and (3) of the PCR 2015. Without prejudice to the generality of the foregoing averments the Defendant designed and implemented the procurement to (i) avoid contracting with the Claimant, (ii) seek to prevent the Claimant from being

awarded the New Contract, and/or advantage other economic operators. Further or alternatively, this was the effect of the Defendant's decisions and/or conduct and this breached the Defendant's obligations, including but not limited to the obligations of transparency, non-discrimination and equal treatment.

23. Neither the Claimant nor any other supplier of the Solution are party to the New Framework. It is averred that the Defendant's decision to purport to use the New Framework to directly award the New Contract to the New Supplier breached regs. 18(2) and (3) of the PCR 2015 and/or the duties of transparency and equal treatment, in that the design of the procurement was made with the intention of artificially narrowing competition and/or the intention of unduly favouring or disadvantaging certain economic operators. Without prejudice to the generality of the foregoing averments, the Claimant will refer to the Documents and the Investigation which indicate that the Defendant formulated its requirements in such a way that only the New Supplier could meet them."

11. Paragraph 24 then says:

"Having regard to the aforementioned facts and matters, including in particular (i) the statement of reasons of 7 October 2022, (ii) the content of the Award Reports contained within the Documents, and (iii) the Defendant decision to purport to award the New Contract to the New Supplier and its decision to terminate the Contract, it is averred that the Defendant was in breach of the requirements of reg. 24 of the PCR 2015 and/or vitiated by apparent bias and/or in breach of duties of transparency or equal treatment"

12. Loss and damage is set out at paragraphs 25 and 26 on the footing that in the absence of the unlawfulness alleged, Altiatech would or might have been awarded a further contract under a further procurement and not Softcat. The orders sought by Altiatech at paragraph 29 included at sub-paragraph 29(3) a declaration of ineffectiveness and that declaration again forms part of the prayer. Nothing was said about the declaration of ineffectiveness other than to seek it.
13. Following service of particulars of claim the parties originally negotiated an extension of time for the service of the Authority's defence. In particular an extension of 14 days was sought and agreed up to 21 December which was later extended to the 23 December. In the event no defence was served because without warning on 23 December the Authority instead filed its present applications. However, they were not served on Altiatech until 12 January 2023.
14. The Authority's applications seek to strike out or obtain summary judgment against the claim on four bases. I take these in the order in which they were argued before me:
1. The Claim Form was issued more than 30 days after Altiatech had acquired, or should have acquired, the relevant knowledge about the claim as stipulated by Regulation 92(2). Accordingly, the Regulation 18 claims which were referred to in the Claim Form, and indeed in the Particulars of Claim, are time-barred ("the Limitation Point").
 2. The particulars of claim were themselves served out of time in breach of CPR 7.4(1) and (2), as affected by Regulation 92(2) ("the Particulars of Claim point").
 3. Paragraph 24 of the Particulars of Claim which alleges a breach of Regulation 24 should be struck out as it discloses no reasonable ground for a claim under that provision ("the Regulation 24 Point").

4. There was no realistic or proper basis for the claim for a DOI which should be struck out for that reason (“the DOI point”).
15. On 27 January 2023 Altiotech sought an extension of time and relief from sanctions in respect only of the late service, or allegedly late service, of the Particulars of Claim. It does not make any such application in relation to the issue of the Claim Form. It is common ground that if the Authority succeeds on the limitation or the Particulars of Claim points that is the end of this claim. If they do not succeed there still remain the more discrete issues raised by Regulation 24 and the DOI points.
16. In the period leading up to the hearing before me certain correspondence was adduced by the Authority which Altiotech said it was without prejudice or should be treated as such and so was not admissible. The Authority resisted that suggestion and on 2 February Altiotech made a further application to remove certain paragraphs of the relevant witness statements served by the Authority which referred to the content of such correspondence. In the event both sides were content that I should read the correspondence *de bene esse* and resolve the issue of its admissibility or not, if necessary, as part of this judgment.

The Evidence

17. For the Authority there were adduced two witness statements from Mr Richard Curran, a partner in Weightmans Solicitors dated 23 December 2022 and 1 February 2023, and a witness statement from Mr Conroy, another partner at Weightmans dated 3 February.
18. For Altiotech there were two witness statements from Mr Usamah Himdy, a consultant with Greystone, Altiotech’s solicitors, dated 27 January and 22 February 2023, together with a witness statement from Mr Monsur Ali, a director of Altiotech dated 5 February 2023.
19. I now turn to discuss each of the four issues.

The limitation point.

20. Regulation 92 provides as follows:

“92.—(1) This regulation limits the time within which proceedings may be started where the proceedings do not seek a declaration of ineffectiveness.

(2) Subject to paragraphs (3) to (5), such proceedings must be started within 30 days beginning with the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen.”

21. Regulation 93(2) provides that where proceedings were seeking a declaration of ineffectiveness there is a longstop date for service of six months from the date after the contract complained of was entered into, i.e. 15 July 2022, so that the limitation period would expire here apply six months in that effect on 15 January 2023.”

22. The Authority contends that since there is in truth no viable claim for a DOI, the limitation period of up to six months is irrelevant and the position is governed exclusively by Regulation 92(2), i.e. the 30 day limit. As to that, the Authority contends, that the relevant knowledge was or ought to have been acquired by Altiotech on 7, alternatively 14 September 2022. If that is right then the Claim Form was issued too late.
23. In response Altiotech relies first on the six month period set out in respect of proceedings where there is a claim for a DOI. However, it further contends that its claim for a DOI is not liable to be struck out. However, and in any event it contends that the relevant date for knowledge here is not 7 or 14 September but 7 October. In which case the Claim Form was issued in time.
24. I proceed here on the basis that the relevant time limit is 30 days and I deal separately with the DOI point below.

The law.

25. I start with the helpful summary given by HHJ Eyre QC, as he then was, in the case of *Bromcom Computers Plc v United Learning Trust & Anor* [2021] EWHC 18 (TCC), of the key principles to be drawn from the well-known cases of *Uniplex v NHS Business Services Authority* [2010] PTSR 47 and *SITA UK Ltd v Greater Manchester Waste Disposal Authority* [2011] EWCA Civ 156 at paragraphs 12 to 17 of his judgment. He says:

12 In *Sita UK Ltd v Greater Manchester Waste Disposal Authority* [\[2011\] EWCA Civ 156](#), [\[2011\] 2 CMLR 32](#) the Court of Appeal set out the approach to be taken in determining both the matters of which knowledge is required for the purposes of regulation 92(2) and the degree of knowledge required. The majority of the Court approved the test formulated by Mann J at first instance namely: "the standard ought to be knowledge of the facts which apparently clearly indicate, though they need not absolutely prove, an infringement".

1. I derive assistance in applying that test from the context of its approval and adoption by the Court of Appeal. Thus at [22] and [23] Elias LJ referred to the range of degrees of confidence which a potential claimant may have in its prospects. It may know variously that it has "an arguable case, a reasonably arguable case, a strongly arguable case, or even a certain case". At [30] Elias LJ rejected the contention that time did not run until a claimant knew that it had "a real likelihood of success". He drew a distinction between knowledge of "the detailed facts which might be deployed in support of the claim" and of "the essential facts sufficient to constitute a cause of action" indicating that knowledge of the latter rather than the former would be sufficient to start the 30 day period. It was in that context that Elias LJ drew attention to "the principle of rapidity" which is "at the core" of the timetable laid down by the Regulations.

1. It is also important to note that the members of the Court of Appeal were agreed that the starting point was the test laid down by the ECJ in *Uniplex (UK) Ltd v NHS Business Services Authority* [2020] 2 CMLR 47 at [30] – [31] namely that time runs from when a claimant has: "...come to an informed view as to whether there has been an infringement of the applicable provisions and as to the appropriateness of bringing proceedings."

1. The division between the members of the Court of Appeal was as to whether any elaboration or clarification of that test was needed. Arden LJ took the view that elaboration was not required. The other

members, however, concluded that the test as formulated by the ECJ did not of itself explain "what degree of knowledge is sufficient to provide that informed view that a legal claim lies" (per Elias LJ at [23]) or "how well informed the informed view has to be" (per Rimer LJ at [92]). So it is to be remembered that the test formulated by Mann J and approved by the majority of the Court of Appeal is a test for the purpose of determining the degree of knowledge necessary to form that informed view.

1. It follows that what is needed is knowledge of material which does more than give rise to suspicion of a breach of the Regulations but that there can be the requisite knowledge even if the potential claimant is far from certain of success. Answering the question whether the facts of which a potential claimant was aware were such as to "apparently clearly indicate" a breach of duty by the contracting authority will require consideration of the nature of the procurement exercise; of the nature of the particular breach alleged; and of the nature and extent of the particular factual material.

2. At [36] – [38] Elias LJ explained that a breach by a contracting authority of its duty of transparency will not prevent the start of the thirty-day period if the potential claimant has sufficient knowledge notwithstanding that breach. Conversely if the withholding of information by the contracting authority means that a potential claimant does not have the requisite knowledge then time will not begin to run. In that regard and generally it is to be remembered that the focus is to be on what the potential claimant knew at the relevant time "and not on what it did not know" (per Elias LJ at [75]).”

26. In paragraph 44.9 of my own judgement in *Bromcom Computers Plc v United Learning Trust I* added, following on from my citation of HHJ Eyre QC, that while the observations of Mann J in *SITA* were adopted by the majority as helpful clarification of the degree of knowledge required, the nature of the knowledge in question remains as set out in *Uniplex v NHS Business Services*. That is to say knowledge as to whether there had been an infringement and then the appropriateness of bringing proceedings.

27. I should also cite two particular passages from the judgment of Elias LJ in *SITA* not quoted by HHJ Eyre QC, but which are pertinent here. In paragraphs 24 and 25 he quoted the case of *Haward & Ors v Fawcetts (a firm)* [2006] 1 WLR 682 where Lord Nicholls said:

“9. Knowledge does not mean knowing for certain and beyond possibility of contradiction. It means knowing with sufficient confidence to justify embarking on the preliminaries to the issue of a writ, such as submitting a claim to the proposed defendant, taking advice, and collecting evidence. Suspicion, particularly if it is vague and unsupported, will indeed not be enough, but reasonable belief will normally suffice..

10. It is not necessary for the claimant to have knowledge sufficient to enable his legal advisers to draft a fully and comprehensively particularised statement of claim. One should ask in broad terms whether the claimant had knowledge of the facts on which his claim is made”.

28. Then at paragraph 32 Elias LJ dealt with the contention that the test would necessarily be satisfied if the proposed claimant had enough material to issue a statutory letter before action. Under the 1993 Regulations (but not now), this was required under Regulation 32.4(a). The judge accepted that it may not be so if the letter which informs the Authority of the breach and threatens proceedings does not state the writer’s genuine belief but is deliberately exaggerating its perception of the facts, alleging breach where it had no proper grounds for suspecting that there may be one.

29. However, he goes on to say this at paragraph 33:

“Even where the letter is genuine, it is logically possible for the claimant to have adopted the wrong test for determining whether there was enough material to justify alleging there was a breach, and accordingly mistakenly to have asserted that there was in the statutory letter time does not run because a claimant mistakenly things that it does”.

an observation which is pertinent in this case in my view.

30. He went on to add that:

“On any view a claimant who issued the statutory letter indicating it to be a genuine statement of its belief that there has been a breach of the regulations and proposing to commence proceedings, will find it difficult to deny that he had sufficient knowledge of the start time running at least as regards the breach or breaches identified in the letter”.

31. What follows from the last two paragraphs is this: in some cases it may be necessary to identify with some care what are the facts which need to be alleged in order to constitute a valid claim, as opposed to the means by which such facts might be proved. In many, perhaps in most cases, this is not a matter in issue. However, as Elias LJ pointed out it is at least possible that while a letter before action is genuine and not intended to exaggerate the position, the author may have got it wrong as to what needs to be shown for a valid cause of action.”

32. If such case does arise, and as I have indicated, it may do here, it seems to me that whether the author was mistaken or not has to be considered objectively and by reference to what the true legal position is.

33. I now turn to examine the relevant correspondence.

The Correspondence

34. This can be taken relatively shortly so far as any correspondence before late August 2022 is concerned, since, for these purposes the Authority accepts that Altiotech did not have, or may not have had, the relevant actual or constructive knowledge until 7 or 14 September. Following the issue of the first termination notice Mr Ali of Altiotech wrote to the Authority on 22 April. He said that if the services which had been provided by Altiotech were now the subject of a further procurement exercise which it would not go on to win, it would consider bringing a contractual claim for its losses under an indemnity provision in the Altiotech agreement. He added that “We remain at odds...”, which I think means “we are at a loss”, “as to why the Council want to take the step of termination given the heavily discounted pricing it enjoyed from Altiotech”. In its reply of 26 April, the Authority challenged the effect of the indemnity clause, but it did not say why it had chosen to terminate the Altiotech agreement.

35. One then comes to the supposed without prejudice letter of 9 May from Altiotech’s solicitors to the Authority on which it has sought to rely. It is headed ‘Without Prejudice Save as to Costs’. After further correspondence Altiotech’s solicitors sent to the Authority another letter dated 22

August which the Authority chose to put in evidence, but which is again headed, ‘Without Prejudice Save as to Costs’. Altiotech have now positively relied on the terms of that letter, not as going to any question of their liability or admissions thereof but rather as to its state of knowledge. The Authority’s response to that letter included a reference to an offer, albeit it is not headed ‘Without Prejudice. The Authority relies on the content of that letter as going to knowledge. Finally in this sequence Greystone’s response to that letter which is dated 14 September again makes a brief reference to an offer. Although Altiotech originally objected to the admission of that letter it did in fact positively rely on it in its written and oral submissions. It seems to me that in those circumstances both sides have effectively waived any right to privilege in that collection of correspondence for the purpose of the present issue, which is the state of Altiotech’s knowledge at different dates. Accordingly, I shall refer to their contents below as appropriate.

36. In its letter of 22 August Greystone, among other things, said this:

“Our client is further concerned that a replacement supplier has been appointed as a reseller of SentinelOne for the same service as our client supplied, where no performance issues were raise with our clients supply of services. The information is yet to be published on the publicly available G-Cloud expenditure dashboard. As such our client will be making a Freedom of Information application for the same.”.

37. The next day, as intimated, Altiotech made a Freedom of Information request under the Freedom of Information Act 2000 (“the FOIA request”).

38. On 7 September, the first date of Altiotech’s relevant knowledge as proffered by the Authority, the Authority issued a contract award notice; its content made clear that a new contract had been awarded by way of a call-off from a framework agreement to one supplier, namely Softcat. The contract’s start date was 24 July, and the end date was 23 July 2024. That more or less covered what would have been the remainder of the three year period of the Altiotech contract. The value of the new contract was £470,208.

39. It was described thus in that notice “Provision of continued support of the SentinelOne end point protection response solution and in the framework agreement NOE”. The latter is the North of England commercial procurement collaborative framework. On the same day the Authority wrote to Greystone. It said that the Authority had an undisputed right to terminate the Altiotech contract and that the Authority’s position was unassailable. It added this:

“As previously stated were your client to issue proceedings the Council would apply to strike that claim out. It would be highly likely to be successful and your client will bear all the costs. Secondly, you express concern about a replacement supplier when no performance issues were raised with your client’s supply but that is nothing to the point. The undisputed entitlement of the Council to terminate the contract was one of the rights for the price agreed and was not predicated upon performance issues”.

40. On 13 September the Authority responded to the FOIA request. In essence it referred Altiatech to the contract award notice. Accordingly, if Altiatech had not already been aware of the issue and content of that notice, it was now. Greystone responded to the Authority's letter of 7 September by its letter on 14 September. The questions asked in this letter clearly arose from the facts set out in the contract award notice. I need to refer to some of this letter in detail. To begin with it says:

"Our client has reason to believe that it was intentionally excluded from the procurement of the product. The Council has breached its duty to treat economic operators equally and without discrimination and to act in a transparent and proportionate manner.

Our client is considering its position in relation to a claim additionally against the Council for breach of the PCR. We will provide particulars of such claim in due course".

41. So this was the first time that a potential claim under the PCR was intimated. I then go on to read the following:

"In the interim and in line with the overriding objective pursuant to CPR 1.1, please provide answers to the following questions.

1. What was the basis upon which the Council decided to terminate our client's contract prematurely given that it subsequently procured the exact same SentinelOne service via Softcat at a similar price? Please provide any supporting documentation relating to such decision.

2. Why did the Council change frameworks' ie from G-cloud, which included both Softcat and our client, to the North of England Commercial Procurement Collaborative Framework which excluded our client but included Softcat?

3. Did Softcat place a bid on the initial procurement SentinelOne End-Point Detection Response Solution of 2021 ie the one which was awarded to our client?

4. Was the procurement for the provision of continued support of the SentinelOne End-Point Detection Response Solution awarded to Softcat by way of Direct Award or was there a mini-competition? If Direct Award, please provide the justification for this and any supporting documentation."

42. It ends by saying:

"Failure to provide answers will lead to a further request under FOIA or an application for pre-action disclosure under 31.16 of the CPR. Please provide answers within 7 days."

43. Questions 3 and 4 as I have just read out essentially refer to matters of detail, albeit significant detail. Questions 1 and 2 really reiterate the question, why has the Authority done all of this? On 22 September Greystone wrote a further letter in these terms, there having been an email response on 21 September when the Authority said it would take instructions and revert. It says this and I quote:

"You will be aware of the strict time limits on claims relating to breaches on PCR, as such we must stress that the requested information be provided to us by close of business on Monday 26 September so we can determine our clients position. We are unable to do so in the absence of the requested information.

Should the client fail to comply with the request we will have to resort to formal proceedings where we will seek to recover our costs.

Given the Council has been in discussion with our client for some time it is reasonable to assume that relevant individuals within the Council are aware of the matter and as such obtaining the requested information will not be burdensome."

44. By its letter of 26 September the Authority, among other things, sought to answer the questions raised by Greystone in its letter of 14 September in this way. The first question they said did not go to the proposed additional claim under the PCR. It presumed a justiciable basis to review the Council's reason to exercise its undisputable right to terminate when there was none. It was also predicated on the basis that the Council had to have a reason to terminate the contract. Or that if it did have a reason, the Council was obliged to disclose the same. That was not the case.

45. As for questions 2-4:

“2. The formation of the framework was completed through a compliant OJEU procurement process (to the best of our knowledge), and information pertaining to the formation of this framework is in the public domain.

As with all frameworks, commercial organisations have the ability to submit a bid for inclusion on the framework. If Altiotech missed this opportunity, elected not to bid for it, or was unsuccessful in their bid for it, that is their remit and not the issue of the Council.

The Council is also, provided it follows the provisions of the Public Contracts Regulation (2015) free to undertake the selection of procurement methods – including applicable and available frameworks – as it deems necessary.

Since there is no legal or contractual obligation on the Council to utilise a CCS framework for procurement (or re-procurement) of a requirement, the Council's assessment of the NOE CPC framework deemed it a viable procurement route to utilise for the procurement of a reseller of the Sentinel One EDRS Solution.

3. Softcat PLC did not submit a bid regarding the tender exercise in question.

4. NOE CPC is a framework available to public sector bodies to use to procure IT infrastructure hardware, software and services.

The framework permits call off by way of direct award or mini competition.

The basis for direct award pursuant to the framework is where the selected Supplier offers the most economically advantageous supply in accordance with framework tender information supplied by NOE CPC in the Framework Pack. This criterion was fulfilled in this instance and a direct award made to Softcat accordingly.”

46. Notably in my view the actual reason as to why the Authority had decided to do all of this was not given. The only really new information in that letter was that the new contract was indeed directly award to Softcat, and not let under a mini competition, and in fact it had not been a tenderer in the earlier procurement for the framework to which Altiotech was a party.

47. On 29 September Altiotech wrote to the Authority in these terms, referring back to the 26 September letter:

“2. This is a pre-action letter relating to a proposed claim under the PCR in relation to the unlawful direct award of the New Contract.

3. Your letter confirms that having terminated the Previous Contract with our client, the Council proceeded to identify and purport to use a framework agreement to which our client was not party to directly award the New Contract. Notably, both our client and the incumbent supplier were party to the previous

framework (G-Cloud). The New Contract comprised in substance the same services and utilised the sub-contractor previously identified and provided by our client. Your client has accepted that our client's performance of the Previous Contract was satisfactory.

4. It appears clear that the Council's decisions and conduct breached its duties of equal treatment and transparency pursuant to reg. 18(1) of the PCR and also breached its duties, inter alia, under Regs. 18(2) and (3) not to structure a procurement in a way that would favour or disfavour particular economic operators ...

5. As matters stand, our client is minded to commence proceedings in the High Court seeking appropriate relief, including (inter alia) a declaration of ineffectiveness and financial penalty order.

6. Our client however, has no wish to pursue proceedings if the Council's contemporaneous records demonstrate that the Council's process was conducted in compliance with its legal obligations.

7. Accordingly, we request that you provide by 4pm on 3 October 2022 at the very latest:

1. A copy of the New Contract.

2. The report(s) (and related records) prepared by the Council relating to the award of the New Contract.

3. The report(s) (and related records) prepared by the Council relating to the award and termination of the Previous Contract.

8. If this material demonstrates that the Council has proceeded lawfully then it is obviously in the interests of all parties that this information be disclosed as soon as possible, in order that unnecessary legal costs and disruption can be avoided. Conversely, if the Council refuses unreasonably to provide this essential material our client can only assume that it is because the documents confirm that its serious and legitimate concerns are well-founded.

9. We look forward to receipt of your response and the requested documents by the deadline stated above. Absent a satisfactory response, all of our client's rights are necessarily fully reserved and our client may be left with no alternative but to issue proceedings and apply for specific disclosure pursuant to the well established principles in *Roche Diagnostics Limited v The Mid-Yorkshire Hospitals NHS Trust* [2013] EWHC 933 (TCC). In the event that such an application is required our client will seek to recover its costs in full."

48. The Authority responded by a letter dated 3 October and it continued to deny any liability. It also disclosed four redacted documents, the new contract, the strategy report related to the new contract, the award report related to the Altiotech contract, and the termination report. The redactions were all said to relate to commercial information about the new provider, i.e. Softcat, or other third parties. These documents provided certain further details about the termination of the Altiotech agreement and the making by direct award of the new contract, although, on their face, at least some of the redactions did not appear to relate to commercial information concerning Softcat or any third party.

49. Greystone's letter responding to these documents dated 7 October made the point that Altiotech was continuing to claim that it had been intentionally excluded from the provision of the procurement and Softcat had been unfairly advantaged by the direct award of the new contract to it. It went on to say the Authority used the NEF as part of its procurement strategy in a way that disadvantaged and excluded Altiotech. The letter then challenged the redactions by reference to a detailed commentary on the four documents and suggested that what was being redacted was the Authority's reasoning for doing all of this. Its final paragraphs read thus:

“We look forward to receipt of your response and the requested documents by the deadline stated above. Absent a satisfactory response, all of our client’s rights are necessarily fully reserved and our client may be left with no alternative but to issue proceedings as set out in our previous letter. In such event that such an application is required our client will seek to recover its costs in full.”

50. That letter then provoked an important email in response from the Authority sent later the same day. It provided material and new information about why the Authority had acted as it did, and in particular why it had terminated its ongoing relationship with Altiotech. It is necessary to read a substantial section of that email which came from Mr McCosker at the Authority to Mr Himdy, as follows:

“Notwithstanding how you may seek to make it appear, the Council did not structure its procurement in such a way as to intentionally exclude your client, and advantage Softcat.

It is not proposed at this stage to give further disclosure of documents, redacted or otherwise, because the same is highly sensitive and confidential, concerning as it does a prior senior staff member working for the Council and other third-party organisations. We shall however, so you can be satisfied that despite the narrative you/your client are presenting the Council has not acted unlawfully as alleged or at all, set out the Council’s reason for terminating the contract with Altiotech. We must reiterate again, a point which has not been meaningfully or otherwise disputed, that there is no basis of challenge to the Council’s decision to exercise an unqualified and undisputed right under the Contract to terminate the same by the giving of notice, which it did. If you assert to the contrary, you should at the least state a basis prior to suing the Council so it is aware of the case it may have to meet.

There was a complaint received by Council Management from legal services some time prior to 2nd November 2021 which was dealt under the Council’s Whistleblowing and Serious Misconduct Policy. This complaint, so far as material, concerned potential conflict of interest/personal links between said senior staff member at the Council engaged in the appointment of economic operators, and certain economic operators. So far as material, this aspect of the complaint was investigated and was upheld. This led to the dismissal of said staff member, and several staff members.

As such between the 28th January and 11th February 2022, following the result of investigation into the above complaint being shared with the same, at one of the regular weekly meetings on Cyber the Chief Information Officer for the Council decided to terminate the contracts on which these staff members had been engaged.

Whilst Altiotech were not an organisation with whom any established links had been proven, the result of the investigation shook confidence in all of the decisions made by this senior staff member and their team and reasonably required, in the Council’s view, a reset of its cyber strategy and associated procurement decisions. Following initial review of Cyber products, the Council still required the solution, but the reason the decision was taken to terminate the Contract, was as set out here.”

51. It went on to say that this showed that there was no basis for challenging the Authority’s exercise of its right to terminate and Altiotech had not been intentionally excluded. It went on to say this:

“The decision to procure in the way that the Council did was reasonably predicated on ensuring the Council had a clean slate because of a clear issue of trust between it, its former senior staff members and the matters with which they were engaged.”

52. Again, they said that they trusted that this would now be an end to the matter. That email in turn elicited a response that the Authority had indeed acted unreasonably since it had intentionally excluded Altiotech on a baseless accusation from which Altiotech itself had been absolved. It

added that Softcat must have been encouraged by the Authority to obtain the product as reseller, so that it could then be awarded the contract to supply.

53. On 8 October Mr McCosker sent a further email effectively stating that while the Authority had said there was no “proven” link to those engaged in the improper conduct it had been entitled to do what it did and there is no breach of the PCR. It also said that limitation had expired on 7 October. That in turn provoked a further letter from Greystone, unsurprisingly. It questioned whether the Authority’s use of the word “proven” was a reference to simply there being insufficient evidence so far as Altiotech was concerned, or whether there was in fact some further accusation against Altiotech yet to be named. It disagreed with the Authority’s position on limitation and made a further point, with which I agree, that the supposed justification for the redactions in the forwarded document was not true, at least in respect of a number of instances. The letter also then alleged the breach of Regulation 24. There the correspondence effectively ended with the Claim Form being issued on 19 October.

Analysis

54. The key question which arises is whether Altiotech’s knowledge of the matters disclosed by the Authority on 7 October was such that without it and on the basis only of what it knew previously, Altiotech did not know that grounds for starting proceedings (as interpreted in the case law referred to above) had arisen. Altiotech says that it did not have the necessary knowledge prior to 7 October. The Authority says that, while it undoubtedly provided more material or evidence for Altiotech, this was not necessary for the required state of knowledge. It contended that it was enough for Altiotech to think that it had been intentionally excluded as an economic operator to the advantage of Softcat. The reason for any such exclusion was not required information. Thus what it knew prior to 7 October was enough.
55. It is at this point important to understand what was necessary in order to support a claim for breach of the PCR in this case. Mr Barrett for Altiotech submitted that in fact and in law, a claim which merely said that an economic operator had been intentionally excluded by reference to a lawful termination of its contract, and that there was a lawful direct award which followed of a contract to provide the same thing under a different framework was not sufficient. Such a claim was liable to be struck out. It was only with the disclosure of why the Authority had undertaken the exercise at all that Altiotech could then allege, as it has done in the Particulars of Claim, that the procurement had been designed and implemented to avoid continuing to contract with Altiotech and to advantage other operators that these were then breaches of the relevant procurement obligations.
56. As a matter of analysis and whether strictly Altiotech would have a valid cause of action without pleading the particular reason why the Authority had acted as it did, the relevant information was obviously highly material; so material, in my view, that the Authority had decided effectively to stonewall Altiotech’s request for an explanation until it felt that it had to, in an attempt, as it hoped, to forestall proceedings and bring the matter to a close.

57. I do not regard the information provided on 7 October as merely useful evidence which goes to support any claim which was made. Similarly I consider that the pleading out of such matters in the Particulars of Claim was a vital step in making the claim. It was not simply a matter of a more detailed, considered or sophisticated way of articulating the essential claim.
58. Accordingly, and without regard to the other correspondence, I take the view that until Altiotech had that information, it did not have “knowledge of the facts sufficient to constitute a cause of action” which, as it was put in *Uniplex*, was such as to enable the claimant to “come to an informed view as to whether there has been an infringement of the applicable provisions and as to the appropriateness of bringing proceedings.” See paragraph 25. above.
59. Having said that, it is necessary to consider the nature and effect of some of the correspondence which came before 7 October which is relied upon by the Authority lest it should somehow make a difference. I do not think I need to refer back to the letter of 9 May. That is because the Authority relies on it only by way of a background matter, rather than containing knowledge which it said Altiotech had by 14 September. In any event what Altiotech knew can be gleaned from later pre- 7 October correspondence.
60. The Authority says that Altiotech did not receive any further information relevant to its putative claim between 13 September and 29 September when it wrote what it described as the pre-action letter. That is true, save that Altiotech did not know that the new contract followed a direct award rather than a mini competition.
61. Returning to the letter of 14 September I do not think that it shows that Altiotech had knowledge of the essential facts sufficient to constitute a cause of action. It is perfectly true that it says it had reason to believe that it was intentionally excluded, and that it was now considering a claim under the PCR with particulars to follow in due course. On the other hand it then also went on to ask the four questions referred to above. Two of them went directly to the question as to why the Authority acted as it did, and indeed intimated an application for pre-action disclosure if they were not answered.
62. Taken as a whole I think that Altiotech’s actual position was equivocal. To the extent relevant, it did not itself subjectively think that it had all of the essential facts to constitute an informed view of the Authority’s unlawfulness or as to the appropriateness at that stage of bringing proceedings.
63. As for the letter of 22 September it does show that Greystone was aware of the running of time, and it said that it must have the information by 26 September. Taken by itself, that suggests an awareness on the part of Altiotech that time had already started to run, although it did not say from when. On the other hand, it said that without the information requested Greystone could not determine its client’s position. However, then it went on to say that if the information was not provided, Altiotech would have to resort to formal proceedings. Given the previous point made and what it said in the letter of 14 September this is probably a reference again to pre-action disclosure rather than starting substantive proceedings. The latter would be inconsistent

with what had just been said by Greystone in the same letter about being unable to determine Altiotech's position. I do not think that this letter, in truth, adds very much.

64. One then comes to the pre-action letter. This came after the Authority's letter of 26 September which was the deadline specified by Altiotech for answering the questions, and in particular stating that Softcat had received a direct award. Otherwise there was nothing new. The substance of the 29 September letter was in my view to intimate an intention (the phrase used was "our client is minded to"), though perhaps not a very strong one, initiate proceedings. However it went on to seek further information which might determine that, notwithstanding the exclusion of Altiotech and the direct award to Softcat, the Authority had acted lawfully anyway. If the latter was the case, then there would be no need for proceedings.
65. It is also significant that without actually knowing why the Authority acted as it did, Altiotech's position was the Authority's unreasonable refusal to provide the requested information could lead to an assumption, or inference, that Altiotech's serious concerns were in fact well-founded. The end of the letter is also important. It says, that in absence of a satisfactory response, Altiotech may be left with no alternative than to issue proceedings and seek immediate specific disclosure. While the letter had started by saying it was a pre-action letter, overall there is again some equivocality here in my view. In the event of course, Altiotech was not put to the test because the requested information came just over a week later.
66. I accept that the letter could be viewed in two possible ways. Either Altiotech had (and thought it had) the essential information it needed to commence proceedings but wanted to see if the Authority might in the end have some defence to them, in which case it might be said that Altiotech did have all the information it needed but wanted to establish whether the claim might in the event fail. That might mean that for the purpose of Reg. 92(2) it already had the required knowledge. Alternatively it could be viewed as a case where the further information sought was in truth necessary for Altiotech to have, in order to have an informed view as to whether it really had the grounds to start the proceedings at all, and that they were appropriate.
67. I think that objectively, it is the latter, even if proceedings were being threatened now in the absence of information from the Authority albeit moving straight to this specific disclosure application. In any event the fact remains that Altiotech still did not know the underlying reason for the Authority's conduct. Even if Altiotech thought it had information to start a claim, in truth it did not. I do not consider that this is one of those cases in which the very existence of a letter before action demonstrates that the claimant had sufficient knowledge at that point of the relevant breaches (*pace* paragraph 33 of the judgment of Elias LJ in *Sita*).
68. In my judgment the Authority itself understood the potential importance of the reasons for what it did. That is why I think they were very reluctant to disclose those reasons until it felt it had absolutely no choice, and that is illustrated by what happened after the letter of 29 September. As already noted, on 3 October the Authority provided certain documents, but they were redacted, and not simply on the basis of sensitive commercial information. It was only after

Greystone's letter of 7 October that the Authority finally disclosed the information revealing why it had done what it did.

69. In my judgment it was only at that point on 7 October that Altiatech was able to come to an informed view as to whether it had a claim and it was appropriate to bring the proceedings which followed, shortly after, on 19 October.
70. I do not consider that the language used by Altiatech in the pre-action letter in proof showed sufficient knowledge. Of course, if it had done so, that itself would not be a problem because the Claim Form would still have been issued in time. That said, I do accept that not much had changed from 14 September save for the knowledge obtained on 26 September that there had been a direct award. However, for the reasons already given, Altiatech's knowledge was itself insufficient then and before.
71. The information as to reasons was not in my judgment therefore, simply further evidence to support the claim. It contained an essential fact that enabled Altiatech to plead its case which effectively involved an allegation of unfair treatment by the Authority in breach of its obligations of equal treatment among other things. In some cases, I accept, a lack of transparency on the part of an Authority could not stop time running if the time had already started to run because the claimant already had the required knowledge. However it had not started to run here for the reasons I have given.
72. The Authority contends as a matter of substance that the Altiatech contract did not require reasons for its termination. I agree, but that is irrelevant. This is not a claim for breach of contract. Whether the procurement claim that has been started here will ultimately succeed is another matter, but I consider that the reason why the Authority acted as it did towards Altiatech should be viewed as an essential fact, and one which effectively formed the basis for alleging breach of duty in relation to equal treatment and procedural and substantive fairness which had been set out at paragraph 20 to 23 in the Particulars of Claim. Accordingly this first element of the Authority's application to strike out must fail. The Claim Form was issued in time.

Service of the Particulars of Claim

The correct time limit

73. There is an initial issue between the parties as to when the Particulars of Claim should have been served. Altiatech says it is 14 days from the date of service of the Claim Form, itself served on 26 October, which would mean it had to be served on 9 November, in which case the Particulars of Claim were at worst served one day late. The Authority says it is 7 days from the date when the Claim Form had to be served. Since it had to be served on 26 October and happened to have been served by that date, it means that when the Particulars of Claim were served on 9 November they were 15 days late. For reasons given below, I do not think that this issue effects the

outcome. However, I will deal with it since there is no direct authority on this point which has been fully argued.

74. Regulation 94 provides as follows:

1. Where proceedings has started the economic operator must serve the Claim Form on the contracting party within 7 days after the date of issue.

75. Then there is the reference to where the proceedings contain a DOI. Then:

5. In this regulation “serve” means serve in accordance with rules of court, and for the purpose of this regulation a Claim Form is deemed to be served on the day on which it is deemed by rules of court to be served.

76. This provision is relevant, not because the Claim Form was served out of time (it was not), but because of the relevance of this Regulation to the issue over the time in which it is necessary to serve the Particulars of Claim. CPR 7.4 reads as follows:

“Particulars of claim must –

(a) be contained in or served with the claim form; or

(b) subject to paragraph (2) be served on the defendant by the claimant within 14 days after service of the claim form.”

77. That is immediately followed by the following:

“(Rule 7.5 sets out the latest time for serving a Claim Form).”

78. Both sides agree that sub-paragraph (1) provides for 14 days in which the Particulars of Claim must be served, being 14 days from service of the Claim Form. However, the Authority argues first that this must be read subject to sub-paragraph (2), which, as far as it goes, is obviously correct. However, the Authority goes on to say that sub-paragraph (2) is to be interpreted as here imposing a shorter time period of 7 days from the last day for service of the Claim Form. That is because Regulation 94(1) says that is when the Claim Form must be served, being 7 days from the date of issue. The usual position, of course, as prescribed by CPR 7.5, is that a domestic Claim Form can be served up to four months after issue. Accordingly, in the usual case one would expect 7.4(2) to come into play only where a claimant has chosen to serve the Claim Form towards the end of the four month period.

79. The notes in the White Book at 7.4.3 describe the combination of sub-paragraphs (1) and (2) of CPR 7.4 as a “trap for the unwary”. This is because a claimant will then not have 14 days to serve the Particulars of Claim if, for example, the Claim Form itself was served, say, 10 days before the end of the four month period. The Particulars of Claim must themselves be served by the end of that four month period as well, even though this is less than 14 days from the date of service of the Claim Form. One can nonetheless see the logic for this, where the claimant has a long period in which to serve the Claim Form but choices to leave it until the last moment. The

logic is less clear where Regulation 94(1) applies, since on any view a claimant only has a very short period to serve the Claim Form, namely 7 days from the date of issue.

80. Moreover, and as Altiatech points out, there is a particular trap for the unwary here because what needs to be done within the four month period in order to constitute timely service of the Claim Form is that it should, for example, be posted on the last day as opposed to being served by the last day, under the usual rules. See CPR 7.5(1). On the other hand service of the Particulars of Claim if by post is deemed to occur only two days after posting, - see CPR 6.26. Accordingly, if CPR 7.4(2) requires in the PCR context that the Particulars of Claim be served no later than the time required for service of the Claim Form, which is 7 days after issue, the Particulars of Claim must be posted only five days after issue, even though the Claim Form itself could be posted on the seventh day. However, even without that anomaly, the effect would be that the time for service of the Claim Form and the Particulars of Claim would be the same in all cases.
81. As against that the Authority makes the point that:
 - a) It is always open to the claimant to make an immediate application for an extension of time in which to serve the Particulars of Claim.
 - b) Where service by email can be effected because one or more provisions of paragraph 4.1 of PD6A operate, the distinction between service of a Claim Form and the Particulars of Claim becomes irrelevant.
 - c) Although 7 days for the service of the Particulars of Claim is short, it accords with the overall tight timetable prescribed and considered appropriate for procurement claims, not least because of the automatic suspension provisions.
82. Altiatech then takes the point that one needs to give weight to the reference in parentheses to CPR 7.5, i.e. for service of the Claim Form within 4 months of issue, and that comes immediately after 7.4(2). Altiatech says that what this means is that sub-paragraph (2) only really operates in, as it were, the classic case of Claim Forms with a four month time limit. I see the force of that but on the other hand, other claims forms in other contexts, for example claims for judicial review and in planning cases, may have a shorter service time. Also it would be odd to stress the four month period here when in fact the four month period does not govern service of the Claim Form here.
83. It is true that Regulation 94 is only expressly dealing with service of the Claim Form but not service of the Particulars of Claim. However, there is a connection because of 7.4(2) and the time limit in Reg. 94(1) even though it is 7.4 which governs the time for service of the Particulars of Claim.
84. Finally it is worth citing two cases. The first is the case of *Cemex v Network Rail* [2018] PTSR 824, which deals with an application to extend time for the service of the Particulars of Claim. The issue before me here was in point there, but it was not argued it seems. However, at paragraph 9 of his judgment Coulson J, as he then was, said as the Claim Form was issued and served on 19 July, pursuant to the CPR the Particulars of Claim had to be served within 7 days,

being 25 July. This coincided with the date by which the Claim Form had to be served, and it happened there to have been served on the date of issue.

85. Then at paragraph 12 he notes:

“The application is made pursuant to CPR 3.1(2)(a). The Court’s power to extend time for compliance with 7.4(2), requires a claimant to serve its particulars of claim no later than the latest time for service of the Claim Form. In this case the Claim Form was issued on 18 July so the latest date for the service of the particulars are 25 July.”

86. Those observations may not be strictly binding on me as they seem to have been agreed by the parties as well as the Court. Nonetheless the view of the judge obviously should be given respect.

87. The second case is *Citysprint UK Ltd v Barts Health NHS Trust* [2021] EWHC 2618 (TCC), where again the point does not seem to have been argued, but at paragraph 64 Fraser J said this:

“Consideration is therefore require in a situation regarding the Particulars of Claim. This should have been served within 7 days of the issue of the Claim Form”.

Again the view of the judge should be accorded weight.

88. Having considered all of the above, and while the point is not free from difficulty, I take the view that the effect of Regulation 94(1) and CPR 7.4(2) is that the Particulars of Claim must be served within 7 days of the issue of the Claim Form. That is very tight but not impossible. In addition of course in many cases the relevant 30 day limitation period can and will be used, not merely to draft up a Claim Form but also the Particulars of Claim. The effect of that is that the Particulars of Claim here were indeed served 15 days late. They should have been served on 26 October which was the final date for service of the Claim Form. They were not and were not deemed to have been served until 10 November.

89. It is against this backdrop that I then have to consider Altiotech’s retrospective application for an extension of time in which to serve the Particulars of Claim, to which I now turn.

The Extension Application

The Law

90. As already noted above, initially the Authority took no point on the late service of the Particulars of Claim and originally was going to file a Defence by 23 December pursuant to an agreed extension. Its application to strike out and/or for summary judgment which included the point on late service of the Particulars of Claim was not served on Altiotech until 12 January. Altiotech then made its application for an extension on 27 January, so 15 days later. It is common ground that the application for an extension here should be determined according to *Denton* principles.

However, in this context Altiotech contends that in relation to late service of those Particulars of Claim, in contrast, for example, to seeking an extension of time in which to serve a Claim Form, the late service is not always to be regarded as inherently serious and significant for the purpose of *Denton* stage 1.

91. Here reliance is placed on the decision that Popplewell J, as he then was, in the case of *Viridor Waste Management Ltd v Veolia ES Ltd* [2015] EWHC 2321 (Comm). In that case the Particulars of Claim had been served one, two or three days late (it did not make a difference which it was for the purposes of the Judge).

92. At paragraph 19 he said:

“It must be remembered although there are formal rules for service which are to be complied with, the ultimate purpose is to bring the relevant documents to the attention of the relevant person on the other side, in circumstances where the other person knows a procedural step has been taken...When one is assessing the significance of the default in complying with the letter of the rule involving service it is important to focus of the purpose of the rule. The significance of a default in complying with a rule or order as to service where what has happened nevertheless fulfils the purpose which underlies a rule or order will usually be small. The significance of the default is properly to be judge by reference to a delay measured in hours not in days. The default is not one which has any real impact on the court and the litigation or between the parties or the court. It does not impair with any further stages of the litigation. It has not in any significant respect disrupted the process, save as a result of the application, and the resistance to the application which has been made... It has had no significant impact on the course of this litigation and it has had no significant impact on other court users”

93. Then at paragraph 23 the learned judge says:

“Ms Bingham QC argued that in relation to service of Particulars of Claim any delay is always serious and significant, even a delay of hours or indeed minutes. She submitted that this followed from the fact that there was a generous period permitted for service of Particulars of Claim following service of the Claim Form, after in the normal course, pre-action correspondence to comply with pre-action protocols; and given the fact, which she emphasised, that the Particulars of Claim are an important document in identifying the grounds of claim. Although it is right to say that Particulars of Claim are generally an important document, I regard the submission that any delay even of seconds or minutes must always be significant or serious as unrealistic and not in accordance with the clear guidance that has been given in *Denton*.”

94. Then he says this:

“24...As I understand it, Ms Bingham’s argument is first an extension would be tantamount to extending the limitation period; and secondly that because *Viridor* left it until the last moment to issue the Claim Form and to serve the Particulars of Claim, any delay in the service of Particulars of Claim is significant because the claim was stale and comes after the expiry of the limitation period.

25. I cannot accept that these matters made the delay significant or serious. It is the issue of the Claim Form which stops the running of time for limitation purposes. Service of the Particulars of Claim is a subsequent step in the proceedings which does not validate or invalidate the effect of issue of the Claim Form for limitation purposes...”

95. However, the Authority also prays in aid the tight timetable prescribed for procurement challenges, and it is true that in this context Coulson J said in *Cemex* the following at paragraphs 15 and 16:

“15 It should be noted that, in the context of procurement challenges, everything has to be done in accordance with a very tight timetable from first to last...An application for an extension of time to serve the particulars of claim which, on the facts of this case, would have the effect of delaying the service of the particulars of claim by a minimum of seven weeks, must therefore be seen in the context of the required tight timetable in cases of this sort.

16 Perhaps for this reason, applications to extend time for the service of the particulars of claim in a procurement dispute are rare. In my view, given the other time constraints, it is certainly not the sort of application that this court should encourage. In addition, the new vigour with which relief from sanctions is now enforced should also serve to discourage such applications. In my view, in the present case, CEMEX embarked on a risky course when it chose to apply for more time to serve its pleading linked to the provision of extensive documents rather than doing the best it could on the information available to it.”

96. However the context there was that the clamant sought an extension of time at the last minute, in fact on the day when the Particulars of Claim had to be served and it was a significant extension as Coulson J said, of at least 7 weeks. This was because it was meant to be until particular specific disclosure had been provided by the defendant. That is completely different from the circumstances of the extension sought retrospectively here.
97. In *Citysprint* there were various questions concerning the time and mode of the Claim Form. Part of Fraser J’s judgment was to declare under CPR 3.10 that service of an unsealed Claim Form counted there as proper service. That meant it had been served in time. There was no need to consider an extension of time and therefore whether the exceptional reasons said to be necessary for an extension of time existed. The reason why they otherwise would have been required was in that context because of the effect of what is now Regulation 94(1) on the time for service of a claim form. The issue was the extent to which an extension of time to be granted under the CPR could affect the statutory time limit imposed by the PCR. That is not a matter which arises in the case before me.
98. Fraser J then ultimately had to come to the question of the late service of the Particulars of Claim having regularised the service of the Claim Form, so that it did not break the 7 day time limit.
99. In the rest of the paragraph 64 to which I have already referred he makes a reference to the retrospective extension of time. He says this:

“The claimants application also seeks a retrospective extension of time and/or relief from sanctions under 3.9 in respect of its late service of the Particulars of Claim. I do not consider relief from sanctions is relevant. An extension of time required. I accept that exceptional circumstances are required.”

100. Then he goes on to deal with the facts. I have to say I am not sure that I entirely follow the reference to exceptional circumstances there, because unlike Regulation 94(1) (and as I have held above) that Regulation does not govern service of the Particulars of Claim, CPR 7.4 does. Further, it seems to me that the position where there is a retrospective application for an extension of time is governed essentially by *Denton* principles as both sides have agreed here. I cannot myself see why there should be an exceptional test gloss or overlay when one considers retrospective extensions of time for the service of the Particulars of Claim.
101. In the event of course Fraser J actually granted the extension anyway, holding that there was a mistake by the court which led to or contributed to a two day delay in the service of the sealed Claim Form and the Particulars of Claim, and this did form part of the exceptional circumstances.
102. In my view the correct approach is to apply the usual *Denton* principles. On the one hand I bear in mind what Popplewell J said in *Viridor* and I also bear in mind the counter-point about the need generally for a tight timetable in procurement cases.

Analysis

103. I turn to the first *Denton* question, namely whether the delay of 15 days was serious or significant. Here I do not think that it was either. This is principally because the Authority itself did not seem to think it was, since it raised no point about the late service of the Particulars of Claim until 23 December (not seen by Altiotech until 12 January), even though the correct service date was 26 October, some two months earlier. Instead the Authority sought to obtain extensions of time. Mr Corran in his second witness statement says that nonetheless the delay prejudiced his client, first, because there was some unavailability of staff. But this was not mentioned at the time. Rather his letter of 23 November 2022 seeking the extension said only that his firm has just been instructed and he therefore needed 14 days.
104. Mr Corran also referred to the uncertainty because of the application for a DOI. However, I do not see how late service of the Particulars of Claim contributed to that. Also, he referred to the amount of work needed for the Defence. However (1) that would be needed in any event, and (2) assuming that the Authority was correct on its strike-out application it could have saved itself that work by taking a point as to late service of the Particulars of Claim at the very start but chose not to do so. He also made reference to an accrued limitation defence but that is a bad point, - see the observations of Popplewell J in *Viridor* to which I have already referred.
105. If I am wrong and the delay was serious and significant, for example, simply because of the mere number of days late, then in my view it was very much at the lower end of significant and seriousness.
106. As to stage two, whether there is good reason for the default, Altiotech's solicitor Mr Himdy frankly accepts that he misunderstood the time for service of the Particulars of Claim, notwithstanding the references to this as being 7 days from the date when the Claim Form had to

be served in *Cemex* and in *Citysprint*. However, I think it is at least understandable why Mr Himdy took the view that he did. As I have already indicated the analysis of Regulation 94 and its impact on 7.4(2) is not straightforward. The Authority says that when Mr Himdy referred the Particulars of Claim to Counsel just before service for approval, Counsel must have mentioned the correct time limit to him. I am not prepared to speculate myself on that or on what Counsel's view might have been. Indeed if one wishes to go down that road one could more strongly infer that the view of Weightmans was that a longer time limit applied, otherwise again, one questions why they did not take the point themselves at any stage after 26 October until 23 December.

107. An error of law by a solicitor is generally not considered to amount to good reason. In this context, I was referred to *Holterman v Electrium* [2020] EWHC 3915 (TCC) at paragraph 77, although that was not a case about the operation of 7.4(2) in the context of Regulation 94 since it was not a procurement case. In any event the Particulars of Claim there were served 13 days late, and part of the strike-out application concerned that late service. In the event, the Judge did not strike out the claim and granted a retrospective extension of time.
108. However, in this case, the reason for the default should, in my view, be given at least some weight when one considers the overall circumstances to which I now turn.
109. As to the overall circumstances of the case, here I shall take into account that the application for relief was not made until 15 days after Altiotech had been appraised of what the Authority was contending. That is a fair point, although of course the strike-out application which had been made encompassed very much more than simply a point on the Particulars of Claim, and so Greystone was having to deal with a number of matters. There is no basis for saying, as the Authority does, that Altiotech's application for relief was made 80 days late. That would assume it should have been made on or after 26 October, but that is completely unrealistic when for two months the Authority never took the point. Therefore, Altiotech could not have known that such a point was going to be taken, and which it did not know until 12 January.
110. The Authority then says that Mr Himdy compounded the delay because he held off posting the Particulars of Claim for a day while he consulted Counsel. I see that, but in the overall scheme of things it is not material. On the other hand what I think might have enabled the whole action to have started much earlier is if the Authority had been open at the outset about the underlying reason for its actions, which I have dealt with above. Its reluctance to explain its position led to a delay of much more than 15 days in my view.
111. Finally, not to grant relief from sanctions here where I upheld that the Claim Form had been served in time would in my judgment be grossly disproportionate because it would deprive Altiotech of a claim of some substance. I accept that in *Holterman* one fact taken into account by the Judge at stage three was that even if the strike out for late service of the Particulars of Claim was successful the claimant could simply start again as there was no limitation problem. I see that, although I think to an extent, this runs against the views of Popplewell J about the relevance of limitation in paragraph 25 of his judgment in *Viridor*.

112. In any event the fact that if the relief is not granted the claimant would lose the entire claim is a point which a claimant can and does make here on the question of proportionality which I have just addressed. So *Holterman* does not really assist.
113. Accordingly for all those reasons I would grant relief from sanctions here and extend the time for the service of the Particulars of Claim retrospectively.
114. My two conclusions on the issue of the Claim Form and the service of the Particulars of Claim mean that there is no basis for striking out the claim as a whole. I therefore turn to the other two discrete aspects of the strike out application which I can deal with more briefly.

The Regulation 24 point.

115. Here the Authority says that it is very hard to see how Regulation 24 claim can work because if it is based on a conflict of interest of the Authority what Mr Barrett said was that Altiatech understood or inferred that the same person or persons who decided to terminate its contract also directly awarded the new contract to Softcat. He goes on to say that this should not have happened because, as it were, the person who terminated the contract was already predisposed against Altiatech, when it came to the direct award in favour of Softcat. This detail only came out in submissions. It was not articulated in the Particulars of Claim at paragraph 24. I have to say that even if it was the same person, this claim under Regulation 24 seems highly artificial because the whole of Altiatech's case is that the Authority's scheme of both terminating the Altiatech contract and then, as it had to, approving someone else through a different framework to create the new contract because it wanted to sever ties with Altiatech, was itself unlawful. I do not see how there is a separate point about apparent bias or a conflict of interest.
116. Moreover, insofar as paragraph 24 of the Particulars of Claim also alleges lack of equal treatment that does not add anything to the Regulation 18 claim. In any event, I now have a note from the Authority dealing with the factual position which of course could not have been discerned or investigated before Mr Barrett explained the Regulation 24 case in his oral submissions. So as far as that is concerned that note says that on instructions:

“a. The former decision [i.e. the decision to terminate the Altiatech contract] was made by the Authority's Commercial Director.

b. As to the latter decision [i.e. to enter into the contract with Softcat], a report recommending the award of the New Contract was addressed to the Director of Digital and Customer Services ... The recommendation to award the New Contract was approved by a number of directors and assistant directors at the Authority (“the Directors”) ...

c. For avoidance of doubt, the Authority's Commercial Director was neither the Director of Digital and Customer Services nor one of the Directors.”

117. There is an offer to put that in a witness statement, but I do not think it is necessary.

118. For all of those reasons I do not think that paragraph 24 of the Particulars of Claim discloses a claim under Regulation 24 as against the Authority which has a real prospect of success, and it should be struck out or dismissed.

The DOI claim.

119. The claim for the DOI is in the barest of terms. It does not even state which of the grounds for ineffectiveness in Regulation 99 are said to apply, let alone why. Irrespective of whether these details needed to be pleaded at the outset it is remarkable that in the face of the Authority's application to strike out the claim for a DOI no particulars were then furnished. All the Authority said was that it would provide particulars if asked. That is an unsatisfactory position to take.

120. The consequence was that the basis for the claim for DOI only emerged when Mr Barrett was asked to explain it in oral argument. That led to a situation where the Authority was not able properly to respond to it in the hearing. Moreover it contradicted what Mr Himdy had said in his first witness statement, which was that "At present all of the relevant documents and information are within the sole knowledge of the defendant" which was why Altiotech could not plead effectively a positive or at least a particularised case.

121. The upshot was that without prejudice to the Authority's position that the DOI claim was liable to be struck out anyway for want of particularity, I permitted Mr Barrett to set out clearly in writing Altiotech's case on the third ground of Regulation 99 which he said was the correct one, and then the Authority could respond to it. As agreed between the parties Mr Barrett's submissions were sent on 8 February and were responded to by the Authority on 10 February. As to the Authority's first point that the plea should be struck out without more because it is devoid of particulars, in principle I agree with that, especially in circumstances where they could at least have been provided at any stage before the hearing. In general I consider that a bare claim for a DOI is insufficient and is liable to be struck out. Either the claimant can allege a particular basis for the DOI sought by reference to the grounds in Regulations 99, or it cannot.

122. This is especially important where, as here, it is said that in truth the claim for a DOI was only made so as to avoid the 30 day time limit. As it happens I do not accept that this was the reason for the claim made here. But whether a claim for a DOI is made for that reason or just because it is regarded as something as a routine plea, this will not do in the future. Practitioners should therefore note the above.

123. However, given how matters have unfolded in this case I do not consider it appropriate to strike out the claim for the DOI on that ground alone. I therefore turn to consider the other points of issue. Altiotech's essential point is that there was no basis for the Authority to make a direct award to Softcat, rather than use a mini competition under the NEF. It invokes the third ground set out in Regulation 99(6), which operates where the contract under a framework agreement is awarded "...in breach of any requirement imposed by one Regulation 33(11)". The estimated

value of the contract award must also equal or exceed the relevant threshold, but it is common ground that it did here.

124. One therefore turns to Regulation 33 and first to sub-paragraph 8. This provides as follows:

“(8) Where a framework agreement is concluded with more than one economic operator, that framework agreement shall be performed in one of the following ways:—

(a) following the terms and conditions of the framework agreement, without reopening competition, where it sets out—

(i) all the terms governing the provision of the works, services and supplies concerned, and

(ii) the objective conditions for determining which of the economic operators that are party to the framework agreement

shall perform them, which conditions shall be indicated in the procurement documents for the framework agreement;...

(c) where not all the terms governing the provision of the works, services and supplies concerned are laid down in the framework agreement, through reopening competition amongst the economic operators which are party to the framework agreement.”

125. I can ignore sub-paragraph (b) of 33(8) because that concerns a hybrid award which is not relevant here.

126. In summary, therefore, an authority can proceed by way of a direct award provided that the terms of sub-paragraph 8(a) are observed. Otherwise a mini competition under 8(c) must be run. If there is a mini competition, which there was not here, then the additional requirements set out in sub-paragraph 11 would have to be observed.

127. Altiatech argues that the conditions for a direct award under sub-paragraph 8(a) has not been met. In this respect it says that 33(8)(a)(ii) does not permit a contracting authority simply to unilaterally decide which of the economic operators it considers is the most economically advantageous and then simply make a direct award. It refers to the Authority’s letter of 26 September which said the basis for the direct award was where the selected supplier offers the most economically advantageous supply, and in accordance with the framework information in the framework pack, this criterion was fulfilled. Altiatech says this indicates the call-off was not in compliance with (a)(i) and (ii). So a mini competition was required, the Authority has not complied with the requirements of 33(11), and therefore a DOI could be sought.

128. I follow the argument about the lack of compliance with sub-paragraph 8(a)(i) and (ii) but not the point that this then involves a breach of 33(11). That provision only deals with mini competitions, not direct awards. Altiatech obviously considered that it had to allege a consequential breach of 33(11) because breach of that provision is the only basis on which the third ground in Regulation 99 could be invoked here. On the face of it therefore, and as the Authority submits, the third ground claim cannot succeed because in truth there is no breach of 33(11), whatever else may be broken. That is the Authority’s argument.

129. I see the force of that point, although it would perhaps appear odd if the case where an Authority makes a direct award where it was not entitled to could not itself be a ground for a DOI. There may be an answer to this oddity, but I have not been treated to a more extensive examination of the interrelationship between Regulation 33 and Regulation 99. That of course is itself because Altiatech never particularised its DOI claim in the first place. For the present purposes, let it be supposed that there could still somehow be a breach of 33(11) due to a direct award which the Authority was not entitled to make, what then?

130. Here the Authority says that in fact the requirements of 8(a)(i) and (ii) were met. As to that and by way of preliminary I go to Mr Kosmin's note where he says this:

“15. By Regulation 33(a)(i), “all the terms governing the provision of the works, services and supplies concerned” must be set out in the framework agreement. The terms that must be set out comprehensively are only those terms “governing the provision of the works, services and supplies concerned”. The Claimant's §5 is incorrect to assert a far more onerous requirement that “all of the terms included in the call-off contract [must be] fixed in the initial framework agreement”. To the extent that there is a difference between the parties on this point of construction, it is academic: the Claimant has not identified any fact or matter to suggest it is material to the determination of its claim.

16. By Regulation 33(8)(a)(ii), the framework agreement must set out “the objective conditions for determining which of the economic operators that are party to the framework agreement shall perform them, which conditions shall be indicated in the procurement documents for the framework agreement”. Although, at §5 of the Email, the Claimant has referred to examples of “objective conditions” going to the distribution of contracts among economic operators on a framework agreement, conditions of that nature are far from the only “objective conditions” to which Regulation 33(8)(a)(ii) relates. For example:

a. The quintessential “objective condition” is that contracting authorities should base the award of public contracts on the “most economically advantageous” tender: see Regulation 67(1) PCR2 and Recital 90 to the Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC (“the Directive”). 3 The basis on which the Claimant asserts that the application of a “most economically advantageous” criterion ceases to be an “objective condition” for the purposes of Regulation 33(8)(a)(ii) PCR is not understood.

b. Another example of an “objective condition” is where there is a “situation of objective exclusivity”, i.e. where there is objectively only one economic operator under the framework that can perform the call off contract: see Recital 50 to the Directive. A direct award is permitted in a like situation under Regulation 32(2)(b) PCR.”

131. Against that background the Authority says that the requirements under Regulation 33(8)(a) were satisfied. The contract was awarded to Softcat in a position of objective exclusivity as the only licensee under Lot 2 of the NEF. Softcat Plc offered the most economically advantageous supply of SentinelOne. The Authority invited the Court to consider first the briefing document about the NEF, which said that it was anticipated in the selection of a framework supplier it would be made in the following way:

“A direct award can be made to a supplier on the result and framework agreement providing the contracting authority can demonstrate that the supplier offers the most economically advantageous supply using the framework tender information.”

132. Then secondly the Award Report which of course, by 3 October Altiatech through its solicitors had in fact seen, and which contained an extensive section headed ‘Justification for use of a Direct Award’ in paragraph three. In particular it says:

“3.2.17 SentinelOne have limited resale of delivery partnerships in the UK. It was confirmed that the highest level of discount had been offered. Softcat are the only provider of the lock 2 enterprise software. Therefore the criteria for using the direct award mechanism, mainly a direct award can be made to a supplier on the resulting framework agreement providing the contracting authority can demonstrate it offers the most economically advantageous supply using the framework tender information.”

133. On that basis as it seems to me there is no real prospect of the claim for the DOI succeeding at trial in any event.
134. For all of those reasons therefore I will strike out the claim for a DOI. As it happens that I do so makes no difference to the limitation point since I have assessed that question by reference to the 30 day time limit anyway.
135. That concludes my judgment.