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Case No: HT-2023-000379

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (KBD)

Rolls Building, Fetter Lane, London, EC4A 1NL

Date: 20/05/2024

Before :

MR ANDREW MITCHELL KC (sitting as a Judge of the High Court)

Between :

ORACLE SECURITY SERVICES LIMITED

Claimant

- and -

(1) BARTS HEALTH NHS TRUST
(2) PLACE GROUP LIMITED

Defendants

Mr Peter Knox K.C. (instructed by St John Legal) for the Claimant
Mr Joseph Barrett K.C. (instructed by Bevan Brittan LLP and Browne Jacobson LLP) for the Defendants

Hearing dates: 13 March 2024

Approved Judgment

This judgment was handed down remotely at 10.30am on 20th May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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JUDGMENT

MR ANDREW MITCHELL KC (sitting as a Judge of the High Court) :

A. INTRODUCTION

1. This is the hearing of an application for summary disposal of a statutory procurement claim on the basis that it is out of time.
2. The action concerns two claims for damages, one for breach of contract at common law and the other for breach of Regulation 33(7) of the Public Contracts Regulations 2015 (“PCR”). I will refer to the latter as the procurement claim, which is pleaded at paragraphs 22-24 of the Particulars of Claim. By application notice dated 21 November 2023, the Defendants jointly apply for summary judgment on or strike out of the procurement claim, on the ground that it is time barred pursuant to Regulation 92 of the PCR. No such application is made in relation to the breach of contract claim, pleaded at paragraphs 2-21 of the Particulars of Claim.
3. The Claim Form was issued on 18 October 2023. It was issued in the name of Oracle Securities Limited. As part of its application notice dated 27 November 2023, the Claimant applied to amend the Claim Form (and Particulars of Claim) to give its correct name, Oracle Security Services Limited. The Defendants consented to this amendment, which I have adopted in the heading to this judgment.
4. I heard argument on 13 March 2024 and gave permission for supplemental written submissions, which were served by the Claimant and Defendants on 14 March and 26 March 2024 respectively.
5. There is no dispute as to the test to be applied on this summary application, so I can deal with it shortly. I have in mind the well-known principles summarised in Easyair Ltd v Opal Telecom Ltd [2009] EWHC 339 (Ch), the essence of which for relevant purposes is that the Court must consider, without conducting a mini-trial, whether the Claimant has a realistic, as opposed to fanciful, prospect of defeating the limitation argument. A realistic defence is one that carries some degree of conviction and is more than merely arguable. Unless the evidence relied upon by a respondent is implausible, or obviously lacks real substance, the existence of a dispute of relevant fact is likely to prevent summary disposal.
6. In the procurement context, Elias LJ in Sita v. GMWDA [2011] 2 CMLR 32 (a limitation case) approved of the following approach taken by Mann J. at first instance [40]:

“... a claim should not be struck out unless it can be demonstrated sufficiently clearly that it was bound to fail as a matter of law and/or fact, and that I should not determine the serious live issue of fact which requires oral evidence, or which requires a full scrutiny that a trial will bring to bear. ...

The real question for me is whether it is clear enough, at this stage, that the claim is bound to fail on limitation grounds, and that a trial (or a fuller hearing of a preliminary issue) would not change that situation. Any doubt about it would have to be resolved in favour of the claimant. When I make any determination in this matter whether of fact law or discretion, I should be taken to be doing so on the footing that the point has been clearly established, and that the same result would clearly be reached at trial.”

7. It was not suggested that there is any distinction in approach between striking out and summary judgment: and I note this was accepted in Siemens Mobility Limited v High Speed Two (HS2) Limited [2022] EWHC 2451 (TCC) at [67].

B. BACKGROUND

8. This dispute concerns three contracts. First, a Framework Agreement made between the Defendants. Second, a contract made between the Defendants and the Claimant which was a call-off contract under that framework. And third, a contract made between the Defendants and a company known as Assist, which the Defendants say was another call-off contract under the same framework, but which the Claimant says was purportedly within but was in fact outside the framework.

The Framework Agreement

9. In August 2020, a Framework Agreement was entered into between East of England Broadband Network (the Authority) and the Second Defendant. The Framework Agreement set out the basis upon which the Authority (on behalf of User Bodies, which include the First Defendant NHS Trust) was able to purchase, and the Second Defendant was obliged to provide, certain facility management services on a call-off basis. The Call-Off Contract award procedures, and the terms and conditions of any such Call-Off Contract, were set out in the Framework Agreement. The Framework Agreement permitted the Second Defendant to sub-contract, with the consent of the Authority on terms set out in clause 26. There is no procurement challenge to the Framework Agreement, which would in any case be far out of time.

Call-Off Contract with the Claimant

10. Pursuant to the Framework Agreement, the First Defendant placed an order dated 21 October 2022 for certain specified Security Services to be provided by the Second Defendant, via the Claimant as sub-contractor. This gave rise to a Call-Off Contract directly between the Claimant and the First Defendant, on terms which included the Call-Off terms and conditions set out in the Framework Agreement (“**the Call-off Contract**”).
11. This is the contract, pleaded in paragraphs 2-7 of the Particulars of Claim, which the Defendants are said to have breached. The Defendants do not seek summary disposal of the breach of contract claim, and therefore accept, at least at this stage, that it is a claim with real prospects of success. In those circumstances, it is unnecessary to examine it in any detail, but it is relevant context to a proper understanding of the procurement claim, as there is considerable factual overlap between the two causes of action.

The Assist Contract

12. The circumstances leading to this contract are in dispute and are not to be resolved on this application. The Claimant’s allegations (set out in paragraphs 8-21 of the Particulars of Claim) can be summarised as follows:

- 12.1. On or about 5 February 2023, the First Defendant (acting on behalf of both Defendants) wrongly asked the Claimant to cease providing fire warden security

services at the Royal London Hospital, which were being provided pursuant to the Call-Off Contract; and wrongly appointed Assist Services Group Limited (“**Assist**”) to provide those services in its place.

- 12.2. On or about 28 March 2023, the Defendants wrongly sought to terminate and/or did terminate the Claimant’s services at St Barts Hospital with effect from 10 April 2023, and immediately thereafter appointed Assist in its place.
 - 12.3. In so doing, the Defendants breached the Call-Off Contract, including because Assist had not been selected through any proper public procurement process; in particular, had not been selected pursuant to the Framework Agreement; and had not been chosen pursuant to an independent or impartial selection process (see paragraphs 11 and 18(2) of the Particulars of Claim).
 - 12.4. On 9 June 2023, the Defendants wrongly awarded Assist a written contract, backdated to February 2023, purportedly pursuant to the Framework Agreement (“**the Assist Contract**”).
13. In terms of documents relating to the Assist Contract which are before the Court:
- 13.1. There is an Order Form dated 7 June 2023 between the First and Second Defendants, and Assist (or rather Assist Security Limited) as sub-contractor, which stated that it was placed pursuant to the Framework Agreement (the same framework agreement under which the Call-Off Contract with the Claimant was made). It is in a similar form and style as the order relating to the Claimant’s contract.
 - 13.2. The Court has also seen a print-out from the “Contracts Finder” gov.uk website, with a “published date” of 3 July 2023. This refers to the award of a contract with the Second Defendant on 21 June 2023 (with a backdated start date of 6 February 2023) in relation to fire warden services, and describes it as being a call-off from the Framework Agreement. The Defendants say this was a notice in respect of the Assist Contract. It is apparent from the circumstances that it was at least intended by them to be such a notice. The Claimant however points out that Assist is not identified as being the sub-contractor in the publication and alleges that there were other deficiencies and errors in the notification. I shall have to come back to that ‘publication’ in due course.
14. For their part, although there is currently no defence in this action, the Defendants accept that Assist was appointed in February 2023 to provide fire warden services; and that on 9 June 2023 Assist was awarded a contract as sub-contractor which was backdated to February 2023, and which (the Defendants contend) was a call-off contract pursuant to the Framework Agreement, in much the same way as the Call-Off Contract with the Claimant had been.

C. THE PROCUREMENT CLAIM

15. The allegation of breach of contract, summarised above, that the Assist Contract was awarded without there having been a proper and impartial procurement process and that, whilst Assist was purportedly appointed pursuant to the Framework Agreement, it was in

fact selected outside the terms of that agreement, is developed into a freestanding claim for a single breach of Regulation 33(7) of the PCR, at paragraph 6 of the Attachment to Claim Form, and paragraphs 22-24 of the Particulars of Claim.

16. It is common ground that the PCR apply to the award of the Assist Contract. Regulation 33 of the PCR concerns Procurement Framework agreements. Contracts “based on a framework agreement” must be awarded in accordance with the procedures laid down in the Regulation (Regulation 33(4)). Regulation 33(7) reads, so far as relevant, as follows:

“Awarding contracts based on a framework agreement

Where a framework agreement is concluded with a single economic operator

—
(a) contracts based on that agreement shall be awarded within the limits laid down in the framework agreement; and ...”

17. The Claimant alleges that the Assist Contract was purportedly awarded pursuant to the Framework Agreement but was in fact outside the limits of that agreement.
18. Although the breach of contract and procurement claims are separate causes of action and may give rise to different heads of loss (compare paragraphs 21 and 24 of the Particulars of Claim), there is a considerable degree of overlap. For example, the alleged failure to conduct a proper and impartial procurement process, and the allegation that Assist was purportedly appointed pursuant to the Framework Agreement, but in fact selected outside the terms of that agreement (being allegations at the heart of the procurement claim), are also relied upon as constituting breaches of contract (see paragraph 12.3. above). Even if the procurement claim was itself time barred, the fundamental contention that the award to Assist was outside the Framework Agreement is part of the breach of contract claim, in respect of which there is no summary application.

D. OUTLINE OF THE PARTIES’ POSITIONS

The Defendants’ case on the Application

19. The Defendants rely on Regulation 92(2) of the PCR which reads as follows:

“92.— General time limits for starting proceedings

(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.”

(i) July case

20. They submit, first, that the Claimant had actual or constructive knowledge within the meaning of Regulation 92(2) to bring the procurement claim by 20 July 2023, and therefore that the 30 day period which is triggered by such knowledge had expired long

before the Claim Form was issued on 18 October 2023. They rely in that regard on a letter from the Claimant's solicitors dated 26 July 2023. I will refer to this as the "**July case**".

(ii) 18 September letter

21. Alternatively, the Defendants submit that the Claimant had actual or constructive knowledge on 18 September 2023 as a result of the information in a letter emailed to its solicitor, Mr Lobo, by the First Defendant's solicitors on 18 September 2023 ("**the 18 September letter**"). Therefore, time expired on 17 October 2023, and the Claim Form was issued one day late.

(iii) Day 1 point

22. Critical to that alternative argument is the question whether the 30 days include the 18 September, as the Defendants submit, or whether, as the Claimant contends, time runs from the day after the letter, namely 19 September. If the Claimant is right on that point, then the Claim Form was in time, even if (which the Claimant does not accept) it had sufficient knowledge on 18 September 2023. I will call this the "**Day 1 point**", i.e. what day counts as the first of the 30 days.

The Claimant's response to the Application

(i) Regulation 92(3)(c)

23. The Claimant's primary position, or at least what became its primary position by the time of the hearing, is that the 30 day period never applied or started running at all (and still has not started running), but in any event has not expired, as a result of Regulation 92(3)(c), to which Regulation 92(2) is expressly subject. I set out the terms of Regulation 92(3)(c) at paragraph 47. below.

(ii) Regulation 92(2) – the July case

24. If that is wrong, and Regulation 92(2) and the 30 day period does apply, it objects to the Defendants seeking to run the July case on this application, on grounds that no or insufficient notice was given of it. But in any event, it would deny that it had the necessary knowledge then.

(iii) Regulation 92(2) – 18 September letter

25. As regards September 2023, the Claimant submits that there is a real prospect of it showing that it did not have either actual knowledge or constructive knowledge, within the meaning of Regulation 92(2), on 18 September 2023 itself, as opposed to a day or so later. That is largely a factual contention, at least as regards actual knowledge. If that is right, then whether the 30 days would have included or excluded the 18 September itself - the Day 1 point - is moot.

(iv) Day 1 point

26. If the Claimant did have sufficient knowledge on 18 September, then on the Day 1 point, it submits that on its true construction, time did not start running under Regulation 92(2) until at the earliest 19 September, such that the Claim Form issued on 18 October was in time. This is on the basis that the 30 days excludes the day on which sufficient knowledge was acquired.

E. PROCUREMENT LAW

27. I should start by setting out the law so far as relevant to the Application.

The Remedies Directive

Overview and implementation

28. Directive 89/665/EEC, as amended in 2007 by Directive 2007/66/EC, (“**the Remedies Directive**”) concerns various minimum requirements as regards legal review procedures and remedies for breaches of procurement law in respect of public works contracts. It applies to public supply and public works contracts falling within the directive containing the substantive regulations concerning public procurement, which was Directive 2004/18/EC but is now to be read as a reference to Directive 2014/24/EU. Such contracts include framework agreements.
29. The Remedies Directive, in its amended form of 2007, was implemented in the UK by the Public Contracts (Amendment) Regulations 2009. The PCR of 2015 implemented the new procurement directive to which I have referred (2014/24/EU), and following the revocation of the 2009 Amendment Regulations, re-enacted the relevant provisions concerning remedies as they then stood.
30. Regulation 92(2) and 92(3) of the PCR therefore contain the regulations on limitation which seek to implement the Remedies Directive, in the context of which they must be construed. For the primacy of the Remedies Directive when interpreting the Regulations, see International Game Technology PLC v The Gambling Commission [2023] EWHC 1961 TCC [2024] PTSR 65 (Coulson LJ) (a decision under the Concession Contracts Regulations 2016).

Rapidity

31. Article 1 of the Remedies Directive required Member States to ensure that decisions taken by contracting authorities could be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f.
32. The principle of rapidity is a key part of procurement law, which underpins the regulations on limitation. It is a useful principle to have in mind when considering whether a party’s contentions on limitation are, or are not, consistent with it.

Article 2(1)(b)

33. Article 2(1) required Member States to ensure that review procedures were put in place and included a power to award damages; and to “*either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure*” (Article 2(1)(b)). The Claimant does not seek by its procurement claim to set aside the award of the Assist Contract, but this provision is relevant to its case on the true construction of Regulation 92(3)(c), as will be seen below.

Standstills

34. An important aspect of the amendments made to the Remedies Directive in 2007 was to require a standstill period between the time a decision was made to award a contract and that contract being concluded. The purpose of this was explained in the recitals to the Remedies Directive, see e.g. (4) and (6).
35. The new Article 2a(2) provided that:

“A contract may not be concluded following the decision to award a contract falling within the scope of Directive 2004/18/EC before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned if fax or electronic means are used or, if other means of communication are used, before the expiry of a period of either at least 15 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned or at least 10 calendar days with effect from the day following the date of the receipt of the contract award decision.”

36. The communication must be accompanied by a summary of the relevant reasons for the decision.
37. It can therefore be seen that the standstill period depends on whether the contract award decision was sent to the tenderers and candidates by fax/electronically or not. If it was, then the period is at least 10 days after the date of sending; if not electronic, then the period is at least 15 days after sending or 10 days after receipt. (It is plain in this context that the date of sending, or receipt if applicable, is not included in the calculation of the specified days.)
38. The Claimant’s procurement claim does not raise any issue of standstill. However, this provision has a resonance in Article 2c, which provides for time limits.

Time limits under the Remedies Directive

39. Article 2c of the Remedies Directive provides as follows (emphasis added):

“Time limits for applying for review

Where a Member State provides that any application for review of a contracting authority’s decision taken in the context of, or in relation to, a contract award

procedure falling within the scope of Directive [2014/24/EU] must be made before the expiry of a specified period, this period shall be [A:] at least 10 calendar days with effect from the day following the date on which the contracting authority's decision is sent to the tenderer or candidate if fax or electronic means are used or, if other means of communication are used, this period shall be [B:] either at least 15 calendar days with effect from the day following the date on which the contracting authority's decision is sent to the tenderer or candidate or at least 10 calendar days with effect from the day following the date of the receipt of the contracting authority's decision. The communication of the contracting authority's decision to each tenderer or candidate shall be accompanied by a summary of the relevant reasons. [C:] In the case of an application for review concerning decisions referred to in Article 2(1)(b) of this Directive that are not subject to a specific notification, the time period shall be at least 10 calendar days from the date of the publication of the decision concerned.

40. I have added [A], [B] and [C] to the above text for ease of reference.
41. Article 2c does not prescribe the limitation period for procurement claims as such, which is a matter for the national court. It does however require minimum periods in certain situations. This is apparent from Article 2f(2):
- “... the time limits for the application for a review shall be determined by national law, subject to the provisions of Article 2c.”*
42. Where there has been a competitive exercise involving tenderers and candidates, Article 2c provides that the limitation period must be at least 10 or 15 days, depending on the circumstances: see [A] and [B] above in the text above. The time limits mirror the standstill provisions in Article 2a(2). However, both the Claimant and the Defendants now agree that these time limits do not apply, because the award of the Assist Contract did not involve a competitive process in respect of which tenderers/candidates and the Claimant were involved.
43. The Claimant instead relies on the final sentence of Article 2c [C]. It says that its application for review, i.e. its claim for damages, concerns a decision “*referred to in Article 2(1)(b)*”. It interprets that reference as being to any unlawful decision, irrespective of whether a claimant is seeking to set it aside. I shall come back to that when looking at the PCR and examining how that aspect of Article 2c was implemented.

Time limits under the PCR

Overview

44. Regulation 92 sets out the general time limit for starting proceedings, where (as here) those proceedings do not seek a declaration of ineffectiveness. The basic rule is found in Regulation 92(2): proceedings must be started within 30 days beginning with the date when the claimant first knew or ought to have known that grounds for starting the proceedings had arisen. I have set out the text in paragraph 19. above.

45. The basic rule in Regulation 92(2) is expressly subject to Regulation 92(3) to (5).
46. Sub-paragraphs (4) and (5) provide that the Court may extend time where there is a good reason for doing so, but not beyond 3 months after the date of knowledge under Regulation 92(2). The Claimant, at times, suggested that sub-paragraphs (4) and (5) were provisions which prescribed the limitation period. In my judgment, that is not so. The limitation period is as set out in Regulation 92(2), to be read subject to sub-paragraph (3).

Regulation 92(3)

47. Regulation 92(3) provides:

“Paragraph (2) does not require proceedings to be started before the end of any of the following periods:—

(a) where the proceedings relate to a decision which is sent to the economic operator by facsimile or electronic means, 10 days beginning with—

(i) the day after the date on which the decision is sent, if the decision is accompanied by a summary of the reasons for the decision;

(ii) if the decision is not so accompanied, the day after the date on which the economic operator is informed of a summary of those reasons;

(b) where the proceedings relate to a decision which is sent to the economic operator by other means, whichever of the following periods ends first:—

(i) 15 days beginning with the day after the date on which the decision is sent, if the decision is accompanied by a summary of the reasons for the decision;

(ii) 10 days beginning with—

(aa) the day after the date on which the decision is received, if the decision is accompanied by a summary of the reasons for the decision; or

(bb) if the decision is not so accompanied, the day after the date on which the economic operator is informed of a summary of those reasons;

(c) where sub-paragraphs (a) and (b) do not apply but the decision is published, 10 days beginning with the day on which the decision is published.”

48. This scheme reflects the Remedies Directive. As Article 2f(2) of the Remedies Directive makes plain, the limitation period is a matter for the national court (this is Regulation 92(2)), subject to the minimum time periods identified in Article 2c. Regulation 92(3) is designed to implement the requirement for those minimum periods.

F. THE DISPUTE CONCERNING REGULATION 92(3)

Preliminary

49. There are a number of preliminary points which arise.

50. First, Regulation 92(3) does not in my judgment prescribe or identify the limitation period as such: it merely provides that proceedings need not be started before the end of certain minimum periods, if those are applicable.
51. It was, at times, suggested by the Claimant in argument that, if the proceedings fell within Regulation 92(3), then the basic rule in Regulation 92(2) did not apply or, as it was sometimes put, ‘*time did not run*’. The more accurate reading of these provisions, in my judgment, is that the 30 day period does apply to each of the situations in sub-paragraphs (a)-(c); time always runs from knowledge; but there are in effect certain minimum time periods and proceedings do not need to be started before the end of them. Regulation 92(3) does not necessarily mean that proceedings must be commenced at the end of any applicable minimum period. At that point, a claimant may not have the relevant knowledge, or 30 days of knowledge may not have elapsed. Or more than 30 days may have elapsed. In other words, the limitation period is still to be found in Regulation 92(2), subject to the minimum periods in sub-paragraph (3).
52. Secondly, just as it might be said that the Defendants’ case has developed since the Application was issued, by virtue of the July case, it is also apparent that the same is true as regards the Claimant’s response. Mr Barrett KC, who appeared for the Defendants, is right to point out that what has now become the Claimant’s primary argument, concerning Regulation 92(3), was not its first thought. If the point is technically right, it is none the worse for being raised late; but it is perfectly fair to note, on the Claimant’s own evidence, that its view at the time, based on legal advice, was that the 30 day period did apply.

Regulations 92(3)(a) and (b)

53. The Claimant did seek in its written evidence to rely on Regulation 92(3)(a) and (b). However, this was disavowed in its skeleton argument. As both parties accepted, at least by the time of the hearing, Regulation 92(3) (a) and (b) are inapplicable, because they are concerned with competitive situations involving a claimant, where candidates and tenderers seek to challenge a procurement, reflecting the passages within Article 2c of the Remedies Directive at [A] and [B]. The minimum time limits reflect the standstill provisions applicable in those situations, as implemented by Regulation 87(2) and (3) of the PCR (see paragraphs 34.-38. above). The Claimant did not have the status of either tenderer or candidate. This was not an award by competition but (purportedly) a call-off award under a framework agreement, which was not subject to the mandatory standstill: see Regulation 86(5)(c) of the PCR.

Regulation 92(3)(c)

54. The Claimant instead relies on Regulation 92(3)(c), which it says seeks to implement the time limit at [C] of Article 2c. For ease of reference, I set out both passages again:

Article 2c:

“..... [C:] *In the case of an application for review concerning decisions referred to in Article 2(1)(b) of this Directive that are not subject to a specific*

notification, the time period shall be at least 10 calendar days from the date of the publication of the decision concerned.”

Regulation 92(3)(c):

“...
(c) *where sub-paragraphs (a) and (b) do not apply but the decision is published, 10 days beginning with the day on which the decision is published.*”

55. The words in Article 2c of the Remedies Directive “*concerning decisions referred to in Article 2(1)(b) that are not subject to a specific notification*”, followed by a reference to the publication of the decision, are seemingly implemented, albeit different language is used, through the Regulation’s reference to “*where sub-paragraphs (a) and (b) above do not apply but the decision is published*”. It was not suggested that the different formulations had different meanings, or that the Regulation did not properly implement the Remedies Directive in this respect.
56. Article 2(1)(b) is the provision that requires Member States to ensure that there is a review procedure for ensuring that decisions “*taken unlawfully*” can be set aside: see paragraph 33. above. Mr Knox KC, appearing for the Claimant, submits that, although that is the context of the cross-reference, “*decisions referred to in Article 2(1)(b)*” simply means any decision taken unlawfully. An unlawful decision can occur both within and outside the competitive context of sub-paragraphs (a) and (b). Regulation 92(3)(c) therefore can apply where there is an unlawful decision, falling outside the competitive context of sub-paragraphs (a) and (b).
57. The Defendants submit that Regulation 92(3) is not applicable at all, on the basis that it is concerned only with competitive situations, and that the situation “*where sub-paragraphs (a) and (b) above do not apply*” are still concerned with competitive tenderer/candidate situations, but ones where there has been no communication with the claimant, electronic or otherwise, but there has instead been a publication.

Specific Notification

58. If that is wrong, and if Regulation 92(3)(c) can apply in the non-competitive situation, the Defendants submit (by reference to the wording in [C] of Article 2c) that there was a “specific notification” to the Claimant in this case, by the 18 September letter, and therefore sub-paragraph (c) does not apply for that reason. The basic rule in Regulation 92(2) therefore applies: time runs from knowledge (and they contend the Claimant had knowledge by reason of the 18 September letter). The Claimant does not accept this letter was a “specific notification”, as that phrase (and the implementing Regulation) is properly to be construed.

Publication

59. Further, and in any event, the Defendants submit that Regulation 92(3)(c) cannot apply where there has been no publication. Since the Claimant alleges that there was no publication of the decision to award the Assist Contract, on its own case the Regulation cannot apply.

60. The Claimant's case is indeed that there has been no publication but submits that there should have been one; and the Defendants cannot get round Regulation 92(2)(c) by failing to publish what they should have done. Even where a claimant might have the necessary knowledge that grounds for a procurement claim had arisen (pursuant to Regulation 92(2)), Regulation 92(3)(c) has the effect of preventing time from running, or at least ever expiring, if there was no publication when there should have been one; or where there was a purported publication, but one which was inadequate or incorrect in some way.
61. The Defendants would contend (if necessary) that there was, in fact, a publication within the meaning of the Regulation of the decision under challenge, which occurred on 3 July 2023 by way of the entry on the Contracts Finder (see paragraph 13.2. above). Alternatively, there was a publication by the 18 September letter. This is the argument advanced in paragraph 7 of Ms Heard's second witness statement. Accordingly, any reliance on Regulation 92(2)(c) does not assist the Claimant. In either case, any applicable minimum 10 day period under the Regulation expired before the Claim Form was issued; and, in the case of the Contracts Finder publication, well before then.
62. The Claimant denies that the Contract Finder entry amounted to a publication, within the meaning of the Regulation. The 30 day period (under Regulation 92(2)) did not and does not begin to run until the unlawful decision was published. That has never occurred. The procurement claim was therefore started before time started running. If that seems an odd position, that is simply the result of the rules. In answer to the point that his submissions had the effect that there was no limitation period at all, or one which would likely never expire, Mr Knox suggested that the long stop (in Regulation 92(5)) would still apply or the ordinary limitation period for breach of statutory duty would provide a deadline.

G. DISCUSSION AND DECISION ON REGULATION 92(3)(c)

63. In my judgment, the correct analysis is as follows.
64. As I have explained in paragraph 51. above, time runs from knowledge pursuant to Regulation 92(2). (It is necessary to be more precise as to the date upon which time starts to run when considering the Day 1 point, but for present purposes it is sufficient to describe this in general terms.) Regulation 92(2) is subject to Regulation 92(3)(c), but it is wrong to say that the 30 days did not begin to run until the decision was published, as the Claimant alleges. The 30 days run from knowledge, subject to, in effect, any minimum period that might be applicable under Regulation 92(3)(c).

'Specific Notification'

65. Is Regulation 92(3)(c) arguably engaged?
66. The Claimant says, straightforwardly, that since (as is common ground) sub-paragraphs (a) and (b) do not apply, (c) is in principle engaged. The Defendants seek to avoid this conclusion by relying on [C] in Article 2c of the Remedies Directive and contending that there was a 'specific notification' by the 18 September letter.

67. In my judgment, the sentence at [C] of Article 2c is to be read in the context of the Article as a whole, and ‘specific notification’ (although not defined) is intended to be a reference to communications sent to the tenderer or candidate in a procurement competition, which are referred to in the earlier part of the Article; and which are the subject matter of Regulation 92(3)(a) and (b). The draftsman of Regulation 92(3)(c) did not use the language of ‘specific notification’ at all; they must have equated this to a situation where sub-paragraphs (a) and (b) do not apply. It is common ground that there were no such communications in this case (and that the 18 September letter, whilst a communication to the Claimant, was not a notification of a decision within or following a tendering process involving the Claimant).
68. That conclusion might well suggest that the Defendants are right to say that the whole of Regulation 92(3)(c) is concerned with the situation of tenderers and candidates. But I am prepared to assume in the Claimant’s favour, without deciding the point, that Regulation 92(3)(c) can in principle apply to cases which did not involve a claimant as tenderer or candidate, principally on the basis that the reference within Article 2c to Article 2(1)(b), although a somewhat obscure cross-reference, might suggest that it applies to any situation of unlawful decision howsoever it arose.
69. In other words, I will proceed on the basis that sub-paragraphs (a) and (b), as construed in line with the Remedies Directive, “do not apply”, and that the Claimant gets through this initial part of the gateway in Regulation 92(3)(c).
70. But importantly this is subject to the issue of publication.
71. I am prepared to make these assumptions on a summary application because, as will be seen, I do not consider that Regulation 92(3) assists the Claimant, even if it is engaged.

Is a publication necessary?

72. The next issue concerns the meaning of “*but the decision is published*”.
73. On this, I accept the Defendants’ submission that Regulation 92(3)(c) only applies if the decision has been ‘published’. That is what the Regulation says on its face: the gateway to its application opens if sub-paragraphs (a) and (b) do not apply *but* there is a publication. It contemplates a publication of a decision, and then provides for a minimum period following that publication.
74. In my judgment, the rationale for Regulation 92(3) is that any limitation period must allow a claimant at least a short time to consider any relevant communications sent to it (sub-paragraphs (a) and (b)) or (if no such communications took place) after any publication that may have occurred. If there are no relevant communications or publications, then the limitation period is the basic one under Regulation 92(2), which is dependent on a claimant’s knowledge as to whether grounds for a claim had arisen.
75. The Claimant submits that it cannot be right that an authority can avoid the 10 day period by failing to publish its decision, and if it does not do so, it justifiably suffers the consequence that there is no limitation period running; and if it never publishes, there is effectively no limitation period at all. Mr Knox says that this is the purposive construction, bearing in mind the Remedies Directive, which provides (he contends) that time cannot run until 10 days after a publication. Although hardly consistent with any principle of rapidity, Mr Knox submits that this is the true construction of the Regulation, given that the illegal making of direct awards is the most serious breach of procurement law (as e.g. recital (13) to the Remedies Directive says), and it is entirely appropriate that if an authority wants to avoid the effective absence of a limitation period, they should publish their wrongdoing and not conceal it.
76. I do not accept this, or that this is the rationale and purpose of Regulation 92(3)(c). Much was made of the point by the Claimant that one must construe the PCR in light of the Remedies Directive, and the minimum standards it requires, and adopt a purposive approach (see e.g. Coulson LJ in IGT [57-58] and [60]). I agree and have this point well in mind throughout this judgment, but doing so does not support the Claimant’s argument.
77. Where a decision has not been published (and assuming that it should have been been), but instead has been concealed, the authority may well find that time is not running against it. But that is because absent publication, a claimant may not have the necessary knowledge that grounds for a procurement claim have arisen, under Regulation 92(2). However, a claimant might well have such knowledge independently, without a publication having been made (for example, from a whistleblower); consistent with the principle of rapidity, there is no reason at all why such a claimant should not commence such a claim within the 30 days; and every reason why it should. That to my mind is a conclusion which is consistent with the purposes and intentions of the Remedies Directive. If it had been intended to provide that there must be a publication in all cases of unlawfulness before time ran or could expire, the Remedies Directive would have expressed this stark rule in terms.

Was there a publication?

78. “Published” is not defined, but I see no reason not to give it its ordinary meaning; and, given its context, a meaning which is different from a specific notification to a particular economic operator. Namely, a notification of a decision in a form intended for public information.
79. If there were a publication, the obvious candidate would be the entry on the Contracts Finder website, which has a “Published Date” of 3 July 2023, as Ms Heard for the Defendants contended.
80. The Claimant was keen to say that the Contracts Finder notification was not a publication, and certainly not a publication of a direct award to Assist. That was because, if it had been, the minimum time limit under Regulation 92(2)(c) would have expired in July 2023.
81. The Claimant’s argument for why this did not amount to a publication may be summarised as follows. An application for summary disposal on the grounds of limitation must assume in a claimant’s favour that breach has been made out. That much is uncontroversial. There was therefore an unlawful decision. It then submits:
- 81.1. For there to have been a publication, the Defendants would have had to publish the fact that it had made a direct award outside the limits laid down in the Framework Agreement. This has never happened. The ‘publication’ of 3 July 2023 gave notice of a decision to award a contract pursuant to the Framework Agreement, a purportedly lawful decision. That was not a publication of an (unlawful) decision directly to appoint Assist: it needed to have stated that the Assist Contract was awarded direct, outside the terms of the Framework Agreement, and to have identified Assist as a party.
- 81.2. Further, the ‘publication’ of 3 July 2023 contained a number of errors and/or inadequacies and/or did not comply with the notice requirements set out in Part D of Annex V to the Public Contracts Directive (2014/24) and in particular the requirement to justify the decision to make a direct award. The unlawful decision was, in the words of the Claimant’s solicitor Mr Lobo, not published or “properly published”. Mr Knox accepted that in the case of framework agreements, authorities are not bound to submit a notice for contracts based on such an agreement (Regulation 50(4)), but he says that it must be assumed that the Assist Contract was outside the framework, and therefore a notice had to be published.
- 81.3. Mr Lobo sets out in his first witness statement (paragraph 28) a number of respects in which it was alleged that the Contracts Finder information was inaccurate and/or incomplete. In summary: first, the contract value was stated to be £0 (although, the Claimant says confusingly, also stated to be between £1m and £2m in a different part of the entry) and the supplier was identified as the Second Defendant; there was no mention at all of Assist. Secondly, it was suggested that the Second Defendant had been appointed pursuant to a normal competitive bid process when there was in fact none. Third, it was stated that the contract was a call-off from the Framework Agreement whereas it was in fact a direct award to Assist outside the framework. Fourth, no reasons were given for the decision to award the contract to Assist in the way it was, or at all.

82. The Defendants accept there was an error (the contract award value was wrongly stated to be zero in one part of the notification, although stated as between £1m and £2m in another part); they say that there was no need to refer to Assist, the sub-contractor since the contract was formally awarded to the Second Defendant as main contractor and properly notified as such (they point out that the Claimant was familiar with the Framework Agreement having itself been appointed under it); they also deny that the formality requirements of Annex V fall to be written into the requirement for 'publication' in Regulation 92(3)(c), as Mr Knox submitted.
83. My conclusion on this aspect is as follows. First, I have already decided that a publication was required for Regulation 92(3)(c) to be engaged. If as the Claimant contends, there was no publication, for any of the reasons it suggests, it obtains no assistance from any minimum period under this Regulation, which does not apply.
84. Secondly, if it were necessary to go further, I would not accept that there was no publication for the purposes of the Regulation.
85. Where an authority considers (albeit as the Court may later determine, wrongly) that its decision was a call-off agreement within the limits of a Framework Agreement, and publishes it as such, as here, it is in my judgment fallacious to suggest it has not given public notification of its decision. Whether its decision was lawful (in this case, whether the award was in fact within or outside the framework limits) will be for a Court to determine in due course. There would be no need for such a determination, if the Claimant is right that the authority must publish at the outset, what is in effect, a confessional admission (or at least a statement of fact contrary to its own position), that the award was outside the limits of the framework, before time can even run. This does not make any sense. The Claimant's case is not supported by the wording of the Regulation (which says no such thing). The Regulation presupposes, simply, a publication of the decision which is under challenge.
86. Even if the Claimant is right to say that the publication was defective in the respects identified, that does not mean it was a nullity, such that it can be regarded as not having occurred at all. It would simply be a defective or inadequate notice. I was referred to no authority which would justify a conclusion that it was a nullity, and the mere fact that a notice is defective does not by itself mean that there was no notice at all. Nor am I persuaded in any case that any (if any) applicable notice requirements of Annex V must be read into the requirement of publication. The Regulation does not say this; and to do so, would mean that the slightest error of formality would, on the Claimant's case, mean that there was, in effect, no limitation period. Again, the Claimant's submissions in this respect are not consistent with the principle of rapidity in procurement law or the fundamental general rule that time runs from knowledge.
87. The attempt to soften the consequence of its argument by relying on Regulation 92(5), to answer the point that there would in effect be no limitation period on the Claimant's case, is misconceived. That regulation does not prescribe the limitation period, but rather provides a fetter on the Court's ability to extend time. Similarly, the attempt to find refuge in the general limitation period applicable to breach of statutory duty or, as Mr

Knox put it, to an action on a specialty. The whole point about Regulation 92 is that there is a distinct limitation regime for procurement claims.

88. That is not to say that any defects in a publication are not without any significance. Defects in a publication – e.g. the absence of reference to material information – might well be highly relevant in principle to the question whether and when a claimant had the necessary knowledge to start proceedings, under Regulation 92(2). This was in fact the essential point made in the alternative by the Claimant, at paragraph 29 of Mr Lobo’s first witness statement. For example, if a publication had failed to include (or misrepresented) matters which a claimant would have needed to know before it could be said to have known that grounds for a claim had arisen. Or if the publication was so defective that a reader of the Contracts Finder would fail to realise that the contract award affected it.
89. In this case, though, the Claimant says it was unaware of the Contracts Finder entry and had not considered it before it brought proceedings, and if that is right (which must be assumed for present purposes) plainly therefore nothing about the entry (defective or not) impacted on whether it considered it had grounds to sue. By the same token, the Defendants do not rely on Contracts Finder at least on this application, in support of their contention that the Claimants had knowledge.
90. If necessary, therefore, I would consider that the Contracts Finder entry amounted to a public notification, i.e. a publication of the decision made by the Defendants, within the Regulation. It is common ground that it was, in fact and objectively, concerned with what has been termed the Assist Contract, i.e. a contract for fire warden services awarded in June 2023 to the Second Defendant as main contractor. I would not have found that the 18 September letter was a publication, the Claimant’s fall-back case, since that was a private communication.
91. The consequence in my judgment is that the Claimant must bring its procurement claim within the time required by Regulation 92(2), since either there was no publication (as the Claimant contends) with the consequence that, even if other aspects of the gateway were established, Regulation 92(3) does not apply. Or, alternatively, any minimum period applicable by reason of Regulation 92(3)(c) would have expired in July 2023. The Claimant is not prejudiced by that expiry, or the alleged inadequacy of any publication, or even the alleged absence of publication, since time depends on its own knowledge, actual or constructive.

H. REGULATION 92(2) - Introduction

The test

92. In Sita, the Court of Appeal was considering a limitation challenge under predecessor regulations (regulation 32(4)(b) of the Public Service Contracts Regulations 1993), which sought to implement Directive 89/665. Under that regulation, as properly construed in a manner consistent with EU law, time ran from the date on which the claimant knew or ought to have known of the infringement of the procurement rules.

93. The Court of Appeal approved of a distinction between knowing sufficiently that grounds for a claim had arisen and having the evidence available necessary to prove such a claim. The former is key: once a claimant has sufficient knowledge to put him in a position to take an informed view as to whether there has been an infringement, and concludes that there has, time starts to run [22].
94. The Court of Appeal also held that the degree of knowledge or constructive knowledge required to start time running was “*knowledge of the facts which apparently clearly indicate, though they need not absolutely prove, an infringement*” ([26], [31]).
95. The Sita test has recently been expressed in these terms by Eyre J as follows:
- “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...The court is to focus on what the potential claimant knew at the relevant time and "not on what it did not know"”: Siemens Mobility Limited v High Speed Two (HS2) Limited [2022] EWHC 2451 (TCC) at [57-61].*
96. It was not disputed before me that this was the test to be applied as regards actual or constructive knowledge of there being grounds for starting proceedings under Regulation 92(2) of the PCR.
97. As was also recognised in Sita, and as was common ground, underpinning the relevant limitation rules in procurement, is the principle of rapidity (see paragraph 32. above). Claims must be brought promptly and time limits must be strictly applied.

I. REGULATION 92(2) - THE JULY CASE

98. The Defendants say that the Claimant had the relevant knowledge by 20 July 2023, relying on a letter which was written by the Claimant’s solicitors dated 26 July 2023, which included the following statement:
- “We are instructed that the fire warden contract and appointment of Assist took place towards the end of June, without any due or proper process having been undertaken as required or at all. Furthermore, that the contract is backdated to February 2023. Our client became aware of this on 20th July 2023, although no formal notification has been given.”*
99. The following aspects of this letter are noteworthy.
100. First, the letter informed the First Defendant’s solicitors that conduct of the matter had now been passed to Mr Lobo in the litigation team. This was no doubt intended to communicate an escalation of matters from the previous communications between the firms. That prior correspondence is not in evidence. It may however be fairly said that litigation of some sort was in contemplation by this point.
101. Secondly, as can be seen, the letter made express reference to Assist, the June date and the backdating to February, and there being no “due or proper” process as required or at all. The source of this information is not explained or identified, nor does it otherwise

appear from the evidence before the Court at this stage. The Claimant does say that the source of its knowledge as at 20/26 July was *not* the 3 July publication, which indeed did not refer to Assist at all and which the Claimant says it had not read at this stage. And it is the Claimant's case that *the Defendants* had not told them about the contract award to Assist; all it knew was that in February and March 2023 the Claimant's services had been dispensed with (in the circumstances pleaded in the Particulars of Claim). So then, what was the source for the information set out in the letter of 26 July?

102. It was in answer to that enquiry that Mr Knox told the Court that there had been a whistle-blower (and that the Defendants were aware of this). I take the point that the Defendants' Application is brought on the basis of the letter's contents on its face, and they are no doubt indifferent as to the source of the information, but given the way the arguments have developed, it is perhaps unfortunate, bearing in mind the importance of what the Claimant knew, and when (and the question of how it knew might well cast light on both those questions), that none of this is in evidence, if the Defendants are relying on knowledge in the period up to and by July 2023. Neither is the prior correspondence referred to the letter of 26 July before the Court. This may well be because, as I explain below, the Defendants' Application was issued on the basis that the relevant date of knowledge was September, not July 2023, and that had provided the focus for the evidence.

103. The Claimant indeed objects to the Defendants running the July case on this summary application. Mr Knox says that the Claimant has been taken by surprise and has not had the opportunity or a proper opportunity of addressing a July case through the necessary investigations and evidence.

103.1. Mr Knox points out that the Defendants' Application Notice relied on only the content of Ms Heard's witness statement dated 21 November 2023, and that statement only advanced a limitation defence based on the claim being time barred on 17 October 2023, and therefore out of time by a day (see paragraphs 7-8 of her witness statement). The pre-Application letters between solicitors dated 15 November 2023 and 17 November 2023, exhibited by Ms Heard, likewise addressed only such a case. Mr Knox also points out that the Claimant's application to extend time, if needed, was brought on the basis that it was needing to justify an extension of only one day, and it has not sought to address the need for a greater extension of some two months. The Defendants did not serve evidence in response to the extension application, or otherwise indicate that the Claimant needed to address and justify a much longer extension from July.

103.2. That much is true, although in Mr Lobo's first witness statement, served in response to the Application and Ms Heard's witness statement, he himself referred to and exhibited the Claimant's letter of 26 July 2023, when summarising the correspondence between the Claimant and First Defendant which had led up to the 18 September letter (paragraph 9). Further, in Ms Heard's second witness statement (29 February 2024), albeit in the context of dealing with the Claimant's arguments based on Regulation 92(3) and therefore Mr Knox says a different topic, she stated "*For completeness, I also refer to the Claimant's earlier letter of 26 July 2023 which indicates that the Claimant had knowledge of what it says are the material facts at that date*". She then quoted the relevant part of that letter,

including the assertion that the Claimant was aware of the matters referred to on 20 July 2023 (paragraph 5).

- 103.3. Mr Barrett therefore submits that, through that second witness statement, the Defendants made it clear that they were relying on a July case as well; and that the Claimant had the opportunity of meeting that case, explaining why there was no relevant knowledge in July, if it had wished to do so; and despite serving two further responsive statements from Mr Lobo (his third and fourth statements, on 4 March and 12 March respectively), it had failed to take that opportunity. Mr Knox says in essence that this further evidence was all directed with a September date in mind.
104. If the July case was open to the Defendants, then Mr Knox submitted that the letter does not prove that the Claimant had the necessary knowledge. In that connection, he sought to rely on the discussion at Sita at [32]-[33], where Elias LJ acknowledged that a letter written by a claimant might not be a genuine reflection of its true belief, might exaggerate a threatened claim, or be written on a mistaken basis. There is no evidence of this before the Court, but as I understood the submission, that was rather Mr Knox's point: he was seeking to illustrate the importance of having evidence of the context and circumstances of that letter, which was not available. He said that the Claimant would have served further evidence had they appreciated the July case was in issue.
105. As to the content of the letter, and without the benefit of evidence, Mr Knox submits that the letter did not refer to the PCR at all and as at July 2023 no letter or other communication had been sent to the Claimant from the Defendants saying that there had been a direct award. He points out that, in correspondence following the letter of 26 July, the Claimant was asking certain questions, which were only answered by the 18 September letter. He submits that the fact that questions (particularly question 4) were being asked shows that the Claimant did not know the necessary information until September, and not in July. He submits that, although the Claimant had some information, it would not have been possible to issue proceedings in July with the necessary statement of truth.
106. I remind myself that this is a summary application where form and proper process are important, and I think it is a fair observation from Mr Knox that the Defendants moved the goalposts through the course of the application. The Claimant's excuse for not dealing with the new pitch layout is however somewhat thin, although it is a fair observation that the July case was only initially advanced as part of the rather distracting arguments concerning Regulation 92(3). I am sceptical as to whether the Claimant was really taken by surprise, as it claims.
107. That said, standing back, I am not confident that I have the full story as to the Claimant's knowledge in July, in order to be able to evaluate its submission that it did not in fact have sufficient knowledge to bring the statutory claim under Regulation 37, despite the terms of its letter. A letter, particularly one sent as part of a continuum of correspondence, needs to be seen in its context. There is plainly further material leading up to the July letter which may be relevant, which may well show, for example, that a statutory claim was in contemplation and/or that despite the form of subsequent correspondence being expressed in terms of questions, the Claimant already had sufficient knowledge to bring the procurement claim (remembering that this is not the

same as having assembled the evidence necessary to prove the case: Sita [22]). Whilst it may be true that the Claimant was not informed by the Defendants about the Assist Contract until September, the Claimant plainly had learned of this from external, unidentified sources.

108. I have reached this conclusion with some reluctance because on the face of the letter of 26 July, the Defendants have a compelling case of limitation, despite the absence of an express reference therein to the PCR, or to the Framework Agreement and its alleged application, and despite the fact that the Claimant seemingly felt it necessary to seek further information in subsequent correspondence. But the question whether a claimant had sufficient actual or constructive knowledge (of the facts apparently clearly indicating an infringement) is an intensely factual question, to be considered in context, and the Claimant has done just enough to persuade me that further enquiry is required.
109. Accordingly, despite my strong suspicion at this stage that the Claimant had the necessary knowledge, for the purposes of Regulation 92(2) by 20 July 2023, possibly well before, I am not prepared to determine that issue summarily.
110. There is a further reason for this conclusion. Had I found in the Defendants' favour on the July case, then I would have wanted at least to consider an application for an extension of time, albeit one seeking an extension of two months. No doubt Mr Barrett would say that it is the Claimant's fault that it has made no application on that basis, and it might well be fairly said that such an application would have very formidable, or even insuperable, difficulties in its way. But the fact remains that there has been no evidence or submissions made on that basis, and given this is a summary application, in my judgment it would not be fair to shut the Claimant out.
111. It follows that the Defendants' Application must fail, unless I am satisfied that the time started to run solely as a result of the 18 September letter.

J. REGULATION 92(2) - THE 18 SEPTEMBER LETTER

112. The Defendants rightly point out that the procurement claim is, on its face, made on the basis of information contained in the 18 September letter. This can be seen from an analysis of the Claim Form, to which there is a reasonably detailed endorsement in the form of an 'Attachment to Claim Form'.
113. By paragraph 6 of the Attachment, it was alleged that the Assist Contract was outside the limits of the framework agreement, contrary to Regulation 33(7). The only particular identified (that a "Direct Award" process had been used without justification) was expressly stated to be based on the 18 September letter.
114. This allegation was developed in a little more detail in the Particulars of Claim (paragraph 22), but still relying on the information provided by the 18 September letter. The Claimant alleged, in summary, that the Assist Contract was awarded by a "direct award" process under the Framework Agreement, which commenced with a "Direct Award Invitation Request" on 9 May 2023 and concluded a month later with the awarding of the contract on 9 June 2023, such information having been provided in the letter.

115. In paragraph 23 of the Particulars, the Claimant alleges that it is to be inferred that the “above process” (i.e. that revealed by the 18 September letter) by which the Assist Contract was awarded was not and could not have been within the limits of the Framework Agreement, within the meaning of Regulation 33(7) of the PCR. The Claimant felt able to plead that inference without (at that stage) having a copy of the Framework Agreement itself.
116. In support of that allegation, as well as relying on the 18 September letter, and an earlier letter dated 14 September (and, of course, its own knowledge as to what allegedly had occurred in February-April 2023), the Claimant also relies in paragraph 23 on the content of a later letter (than 18 September) from the First Defendant’s solicitors (namely, their letter of 17 October 2023), or rather the alleged absence therein of any, or any adequate, explanation and justification for the direct award process revealed in the 18 September letter. It was also suggested that the letter of 17 October mentioned for the first time that the decision to appoint Assist was because of urgency. However, I note that, insofar as that was a material matter, urgency had been mentioned in the 18 September letter.
117. In the event, Mr Knox accepted, in my judgment correctly, that the content of the 18 September letter would have given the reader sufficient information and knowledge that grounds for starting the proceedings had arisen. Indeed, in the response to the letter, the Claimant’s solicitor stated on 25 September 2023 that it was working with Leading Counsel to produce a pre-action protocol complaint Letter of Claim with full particulars of the claim. In fact, Leading Counsel had advised on the case before 18 September.
118. The Claimant however says that the 18 September letter was not read on 18 September, other than being ‘skim read’ by its solicitor Mr Lobo that day, and there was therefore no actual knowledge, for the purposes of Regulation 92(2), on that date. Further, it contends, in the factual circumstances, that it was not unreasonable not to have (properly) read the letter until after 18 September, such that it should not be fixed with constructive knowledge on that day. The Defendants accept (subject to their July case) that if there was the necessary knowledge only after 18 September, the procurement claim was in time.

The evidence

119. In Mr Lobo’s first witness statement (27 November 2023), it was said that the 18 September letter was received by his firm at 11.23 am that day and forwarded to both directors at 12.13pm. He explained that the directors had told him that they first read the letter on 21 September.
120. In his second witness statement (19 December 2023), Mr Lobo explained that he was out of the office on 18 September, having recently returned to the UK from honeymoon, and was not due back in the office until 19 September. The email sent to the directors on 18 September (at 12.13) is not in evidence, but Mr Lobo’s evidence is that he told the directors that he was out of the office and would return the next day and “go through the letter”, and that he sought “comments and instructions on the letter” in the meantime. Mr Lobo’s evidence is that he read and properly considered the letter only on 19 September, and that he had further communications with the directors then; he also contacted Leading Counsel’s clerk that day to arrange a consultation.

121. In a fourth witness statement, served on the eve of the hearing following skeleton arguments, Mr Lobo confirmed that he did open the attachment (i.e. the 18 September letter) on 18 September, but that he only gave it a “quick skim” then, and did not properly consider it until the 19 September.
122. Both directors have served witness statements. Both said they were out of the office on 18 September:
- 122.1. Mr Harjeet Bhandal was dealing with other business of an urgent nature that day; he accepted that he saw the 12.13 pm email during the afternoon of 18 September (that is, the email from Mr Lobo asking for comments and instructions), but he did not open/read the attachment to the email, namely the 18 September letter itself, which was the document in respect of which those comments and instructions had been requested. He said that he did not download or read the letter until 19 September; he gave it a “quick read” at that point; but he says he did not consider it “properly” until 20 September. That is not consistent with what Mr Lobo said in his first witness statement (which said the letter was not read until 21 September).
- 122.2. The other director, Mr Hardeep Bhandal, was away on annual leave until 20 September. He says he did not see the 18 September letter until he downloaded it on 21 September. It is not entirely clear whether he was aware of Mr Lobo’s email of 18 September, and reminder of 19 September, before then; but the substance of his evidence suggests not.
123. The communications between the Claimant directors and Mr Lobo’s firm in relation to the 18 September letter are not in evidence. Mr Knox told the Court that the Claimant had not sought (and was not seeking to rely on) privilege in respect of the communications, but that they had not been produced simply because the Defendants had not requested disclosure.
124. It is unfortunate that the Court does not have a copy of the 12.13 pm email, and other communications, since that might well cast light on (for example) the degree to which Mr Lobo had read and digested the contents of the 18 September letter, and whether it substantiates, contradicts or is neutral as regards his allegation that he merely skim-read the letter at that point. Be that as it may, at a summary stage, the Court must proceed on the basis of the factual evidence of the Claimant, unless it is fanciful or inherently incredible, which the Defendants rightly do not suggest.

The Submissions

125. The Defendants did not suggest that the Court could at this stage go behind the evidence served by the Claimant, at least as regards actual knowledge of the 18 September letter on that day.
126. They did however contend that if the Claimant did not bother to read correspondence, or otherwise chose not to read the 18 September letter on the date of receipt (properly or at

all), as it claimed, that was a deliberate decision which it took; and was an unreasonable one – the letter should have been read on receipt.

127. They submit that the correct perspective is that of a ‘normally diligent tenderer’ (or in this case, putative tenderer) who has actively engaged in formal pre-action legal correspondence: see Siemens Mobility Limited v High Speed Two (HS2) Limited [2022] EWHC 2451 (TCC) at [64-68]. Such an entity does not choose, or does not act reasonably if he so chooses, not to read a letter that is attached to an email from his solicitor which he has received. Drawing on the principle expressed in The Brimnes [1975] QB 929 at 966H, they say that the email was sent in business hours, was an accepted mode of communication used by the parties, and the Claimant cannot rely on its own failure to act in a ‘normal and businesslike manner’ in respect of taking cognisance of it that day.
128. The Claimant submits, in essence, that there was no deliberate or unreasonable decision not to read the letter; it just was not read that day, and this was not unreasonable, given the circumstances explained in the evidence. As Mr Knox put it, there was no dereliction of duty in not reading the letter until the following day.
129. The Claimant also says that a company is entitled to have at least a day, or two, to consider information to know whether there were any grounds for a complaint and relies on a comment allegedly to that effect in paragraph 22(g) of Akenhead J’s judgment in Mermec UK Ltd v. Network Rail Infrastructure Ltd [2011] EWHC 1847 (TCC).

Discussion and Decision

130. My conclusions on this aspect of the case are as follows.
131. Starting with Mermec, this involved an application for summary judgment on the basis that the claim for breach of the Utilities Contracts Regulations 2006 was time barred. The regulation in that case required, on its proper construction, that a claim must be served within 3 months from the time when the claimant knew or ought to have known of the alleged infringement. The issue was a factual one. In summary, Akenhead J found that the basic facts supporting the complaint were clear from a letter dated 23 September 2010. As the Judge noted, there was no suggestion that the letter was not seen, read and its ramifications considered on that day. The proceedings were not served until 30 December 2010.
132. It was in that context that Akenhead J made the comment, with emphasis added: “I can see no reason why I should conclude anything other than that on 23 September 2010 *or possibly one or two days at the outside thereafter* [the claimant] as a company had a knowledge of the basic facts which would indicate, objectively, that it had any arguable claim. ... The test articulated by Mr Justice Mann in the Sita case is met as at 23 September 2010 *or within one or two days at the outside*”. The Sita test being referred to is that set out in paragraph 94. above.
133. The case illustrates the point that mere receipt of information in a letter does not, necessarily, equate to the recipient having knowledge on the date of receipt that grounds for a claim had arisen. In some cases, depending on the facts, a recipient may need some

further time to assimilate the information provided before it can be said to have the necessary knowledge. As I read the judgment, the Judge was saying no more than that: even if, on the facts of that case, one allowed a day or so for assimilation and consideration, then the claim would still be time barred. He was not articulating a principle of law that a grace period of a day or two should be allowed for a party to digest the contents of a letter. Nor that a day or two post receipt should generally be allowed in all cases for consideration. Such a conclusion would be inimical to the purpose of having a fixed, and certain, limitation period, with extensions of time only being available in exceptional cases.

134. Turning to the evidence in this case, I will start with actual authority. First, given the evidence, there is a triable issue (by which I mean in this judgment an issue with realistic and not fanciful prospects) as to whether either of the directors read the letter on 18 September and thereby had actual knowledge on that day that grounds had arisen. They say that they did not. Insofar as that might be disputed, this cannot be resolved summarily. Secondly, Mr Lobo says that he only skim read the letter on that day, and he did not read the letter properly until the following day, by which I understand his evidence to be that he did not read it sufficiently on 18 September to know that grounds had arisen. His evidence was that he was going to ‘go through’ the letter on 19 September and did not do so before then. Again, there is a triable issue as to his actual knowledge on 18 September, even if his knowledge is to be attributed to the company, as the Defendants submit. It may be that the communications between him and his client around this time, once disclosed, will be relevant to that question, as I have indicated above. Thirdly, I would add that, although I am at this part of the argument considering the 18 September letter on its own, that letter of course formed part of a continuum of correspondence going back to July and possibly before; and it may well be that the previous correspondence, and the July case when resolved on the facts, will be relevant to what was actually known on, or by, 18 September, by the Claimant directors or its solicitor. The letter was not sent or received in isolation.
135. As to constructive knowledge, the issue is what the Claimant ought to have known. This is not, however, one of those cases where it is said, for example, that a claimant knew certain facts and through reasonable enquiries it ought to have known other facts too. That is because, as the Claimant accepts, the contents of the 18 September letter, once read properly, were sufficient in themselves to give rise to knowledge. The case of constructive knowledge in this case therefore amounts to a submission that the Claimant’s directors, or their solicitor, or at least one of them, ought to have read the letter, and done so, properly *on the day of receipt*.
136. As to the law, the passage relied upon by the Defendants in Siemens is not authority for any proposition of law that a letter must be read immediately; but rather that the test is one of reasonableness, to be determined objectively, on the evidence in any case. Similarly, I do not read The Brimnes as setting out a rule of law or principle that it will be a failure of ‘normal businesslike’ behaviour not to read an email sent in business hours on the day of receipt. It depends on all the circumstances.
137. As to that evidence, as I have set out in more detail above, Mr Lobo was out of the office that day, having recently returned from honeymoon, and as I understand his evidence he was (formally at least) only back at work on 19 September. Mr Harjeet Bhandal was out of the office that day, on other business, and only considered the letter the following day.

Mr Hardeep Bhandal was out of the office on leave. In my judgment, if this evidence and the explanations are correct, which I must assume (and it is not suggested they are implausible), then it is hard to say that their individual decisions (insofar as they made them – and this may not apply to Mr Hardeep Bhandal) not to read the letter (or not to read it in any detail, as regards Mr Lobo) on that day, as opposed to shortly thereafter, were unreasonable. The reasons given for not reading (or perhaps seeing) the letter that day are all, in themselves, at least arguably reasonable and understandable, even in an era of instant messaging where it seems to be assumed that people are permanently glued to their phones.

138. I am sure Mr Lobo appreciated that it was an important letter – hence forwarding it to the clients – but it was not an urgent letter or marked as such, in the sense that it required action that day (or even within a few days), so the decision (insofar as there was a deliberate decision) to deal with it when he and others were back in the office is understandable. Again, as noted above, the facts may look different, and less favourable to the Claimant once the facts including the July case are tried.

139. I do not therefore consider that this is a case where it can be fairly said, at least on current material, that the Claimant ‘*did not bother*’ (the language of Akenhead J in Mermec) to look at the 18 September letter that day.

140. For those reasons, at the summary stage, and in light of the particular evidence served concerning the circumstances, I am not able to say that the Claimant, through its agents, whether directors or solicitor, should have read the letter on the date of receipt, and therefore should have known, that day, that grounds for a claim had arisen.

Attribution

141. It is not necessary in these circumstances for me to determine the Defendants’ argument that the knowledge of Mr Lobo, as the Claimant’s solicitor, should be attributed to the company. I will however deal with the arguments briefly.

142. The Defendants submitted that Mr Lobo had been appointed by the Claimant for the specific purpose of seeking and receiving information from the Defendants in respect of the Assist contract, and therefore his knowledge as agent within the scope of that appointment and purpose was to be attributed to the company. They relied upon El Ajou v Dollar Land Holdings plc [1994] 2 All E.R. 685 at 701-702 per Hoffmann LJ, and both parties relied on the well-known Meridian principles [1995] 2 AC 500.

143. The Claimant submitted that Mr Lobo was not instructed or authorised to take decisions on behalf of the company, that was only a matter for the directors, and that only the directors could have taken the decision to commence the procurement claim. That is no doubt correct, but that does not mean that knowledge that there were grounds to bring such proceedings can only be that of the *de jure* directors, and not that of an agent specifically instructed to obtain information.

144. It was said, applying *Meridian* principles, that it is plain that only directors’ knowledge counts for the purposes of the Regulation, because the purpose of the PCR is to give economic operators (i.e. the company itself, through its board) sufficient information to

make an informed decision to bring proceedings. In my judgment the purpose of this Regulation is to ensure that proceedings are brought promptly after a claimant has sufficient actual or constructive knowledge, and I see no reason in principle why the knowledge of agents of a company, including its solicitor, cannot be taken into account in circumstances where they have been instructed with the very task of obtaining and receiving relevant information.

145. In my judgment, there is no doubt that Mr Lobo had been instructed to enter into, and receive, correspondence from the Defendants and receive answers to the questions concerning the procurement exercise which his correspondence had raised. Accordingly, had it arisen, I would have found that Mr Lobo's knowledge of the grounds to bring a claim, whatever that knowledge was, would be attributed to the Claimant for the purposes of the Regulation 92(2).

K. DAY 1 POINT

146. The Day 1 point does not, then, arise for determination, since there is a triable issue as to whether sufficient knowledge was only acquired after 18 September (or by July), which cannot be summarily determined. However, in deference to the argument of counsel, and because it is said that there is a conflict of authorities at least at first instance, I will deal with the main arguments briefly.

The Submissions

147. The Defendants submit that:

147.1. The wording of Regulation 92(2) is clear. Proceedings must be started within 30 days of actual or constructive knowledge, and the Regulation states, in terms, when the 30 days start: proceedings must be started “within 30 days beginning with the date when the economic operator [had the relevant knowledge]”. Day 1 is therefore the date of knowledge, whenever that may be. This is the natural and ordinary meaning of the provision.

147.2. This construction of Regulation 92(2) was accepted by Fraser J (as he then was) in SRCL Ltd v National Health Service Commissioning Board (also known as NHS England) [2019] P.T.S.R. 383. In that case, knowledge came about on the day of an auction, which was won by an abnormally low bid. Fraser J considered (albeit *obiter*) that the date of the auction was expressly to be counted as one of the 30 days [144].

147.3. Regulation 2(4) of the PCR provides that where a time limit expires on a weekend, then expiry takes effect on the next working day. In such a case, it might appear that time expired at a later point than 30 days, but that does not show that Day 1 is excluded. The cases relied upon by the Claimant (see below) to suggest otherwise are all explicable on the basis of Regulation 2(4), which reads:

“In Parts 2 and 3, any reference to a period of time which is expressed otherwise than in hours is to be interpreted subject to the requirement that where the period—

(a) is to be calculated by counting forwards in time from a given date or event, and

(b) would (but for this paragraph) have ended on a day which is not a working day,

the period is to end at the end of the next working day.”

147.4. In construing legislative provisions of this sort, English law recognises a distinction between cases where legislation requires an act to be done within a fixed period of time “beginning with” a specified day, on the one hand, and where an act must be done “from” or “after” a specified day, on the other. In the latter case, the specified day is excluded; but in the former, it is included: see Zoan v Rouamba [2000] 1 WLR 1509 [23-24] (per Chadwick LJ); Wang v University of Keele [2011] ICR 1251 at [21-23]; Stevenson v General Optical Council [2015] EWHC 3099 (Admin) at [15-19]; and Trow v. Ind Coope (West Midlands) Ltd. [1967] 2 Q.B. 899, 923.

148. The Claimant submits:

148.1. On its true construction, and in its statutory context, and/or as a matter of everyday English, the phrase in Regulation 92(2) “*beginning with the date when*” means the same as “*from the date when*” and, therefore, excludes the date itself.

148.2. The legislative history, in particular the original 2006 Regulations, and their amendment in 2009 and 2011, is instructive. The Claimant submits that when the “beginning with” wording was introduced in 2009, by way of amendment to the PCR 2006, there was no intention to change the start date, which under the PCR 2006 had required proceedings to be brought within 3 months “from” the relevant date. “Beginning with” (in the 2009 and 2011 amendments, and the PCR) therefore was intended to mean the same as “from”; and where time runs “from” a date, that date is to be excluded.

148.3. As a matter of law, where knowledge occurs in the course of a day (in this case, on the assumed facts at this stage of the argument, upon the reading and consideration of the 18 September letter at some point that day), the rest of the day is ignored, since it is said that the law ignores fractions of a day: see Matthew v Sedman [2002] AC 299 (SC). This is the general rule when a statute provides that time runs “*after*”, or “*from*”, or “*beginning from*”, and the Claimant submits the same should also apply to legislation which uses the phrase “*beginning with*”.

148.4. Three judges at first instance have assumed (albeit without argument) that Day 1 is excluded under Regulation 92(2): Stuart-Smith J in Amey Highways Ltd v. West Sussex County Council [2018] PTSR 455 at [37]; HH Judge Eyre Q.C. (as he then was) in Bromcom Computers plc v. United Learning Trust and another [2021] EWHC 18 (TCC) at [11] and [30]; and Waksman J in Bromcom Computers plc v. United Learning Trust and another [2022] EWHC 3262 at [426].

- 148.5. A conclusion that Day 1 is to be included produces a bizarre or irrational result, which is that a claimant has one day less for bringing a claim in damages under Regulation 92 than for bringing a claim for a declaration of ineffectiveness under Regulation 93.
- 148.6. Such a conclusion would also be inconsistent with the ECJ's ruling in Uniplex v. NHS Business Services Authority (Case C 406-08), in which the ECJ held that the then current 2006 regulations, which required proceedings to be brought from the date of grounds arising, rather than from the date when the claimant knew or ought to have known that grounds existed, contravened the objective laid down in Article 1(1) of the underlying Directive (no. 89/665) of guaranteeing effective procedures for review of infringements in public procurement. That objective could "*be realised only if the periods laid down for bringing such proceedings start to run only from the date on which the claimant knew, or ought to have known, of the alleged infringement of those provisions*" (emphasis added): see paragraphs [32], [35] and [48].
- 148.7. The Day 1 point was recently considered by Mr Justice Constable in Boxxe Limited v. Secretary of State for Justice [2023] EWHC 533 (TCC), when the Secretary of State took the point that the claimant's claim, complaining about the award to a competitor, was out of time under regulation 92(2) and therefore fell to be struck out, as the award to the competitor was made on 13 December 2022 and the claim was not issued until 12 January 2023. It is said that Mr Justice Constable held that there was a serious issue to be tried on the proper construction of regulation 92(2). In other words, Mr Knox submits that it has been recognised that the issue of construction cannot be summarily determined.

Discussion

149. As I say, the Day 1 point does not arise at this stage, and since it may do on a later occasion, I will keep my observations as brief as possible.
150. First, to my mind, the plain and natural meaning of Regulation 92(2) is clear, as the Defendants submit. It provides, in clear and unambiguous terms, the answer to the question as to which date is to be counted as day 1. The 30 days begins with the date of knowledge. That is the answer, provided by the Regulation itself.
151. The Claimant submitted that a citizen, when considering what the law is, is entitled to look at the relevant words in the context of the statute itself (citing Lord Hodge in R(O) v Secretary of State for the Home Department [2023] AC 255 at [29]). If that test were applied, and giving proper weight to the statutory language, the answer is plain from the wording of Regulation 92(2).
152. I respectfully therefore agree with Fraser J's approach in SRCL that the date of knowledge is included. But I note it is unclear what argument was heard on the point.
153. As to the three first instance decisions relied upon by the Claimant (see paragraph 148.4. above), to alleged contrary effect, these are all explicable as being applications of

Regulation 2(4). Mr Knox accepted this, although made the fair point that there is no explicit explanation of that being so. The cases do not therefore support even an assumption, let alone a reasoned conclusion, that day 1 is excluded.

154. Secondly, such a conclusion is consistent with long-established authority, outside Regulation 92. As held by the Court of Appeal (per Chadwick LJ) in Zoan v Rouamba [2000] 1 WLR 1509 at [23-24]:

“23. *Where, under some legislative provision, an act is required to be done within a fixed period of time “beginning with” or “from” a specified day it is a question of construction whether the specified day itself is to be included in, or excluded from, that period. Where the period within which the act is to be done is expressed to be a number of days, months or years from or after a specified day, the courts have held, consistently since Young v Higgon (1840) 6 M&W 49, that the specified day is excluded from the period; that is to say, that the period commences on the day after the specified day. Examples of such an “exclusive” construction are found in The Goldsmith's Company v The West Metropolitan Railway Company [1904] 1 KB 1 (“the powers of the company for the compulsory purchase of lands for the purposes of this Act shall cease after the expiration of three years from the passing of this Act”) and in re Lympe Investments Ltd [1972] 1 WLR 523 (“the company has for three weeks thereafter neglected to pay”). In Stewart v Chapman [1951] 2 KB 792 (“a person ... shall not be convicted unless ... within fourteen days of the commission of the offence a summons for the offence was served on him”) Lord Goddard, Chief Justice, observed, at pages 78-9, that it was well established that “whatever the expression used” the day from which the period of time was to be reckoned was to be excluded.*

24. *Where, however, the period within which the act is to be done is expressed to be a period beginning with a specified day, then it has been held, with equal consistency over the past 40 years or thereabouts, that the legislature (or the relevant rule making body, as the case may be) has shown a clear intention that the specified day must be included in the period. Examples of an “inclusive” construction are to be found in Hare v Gocher [1962] 2 Q.B. 641 (“if within [the period of two months beginning with the commencement of this Act] the occupier of an existing site duly makes an application ... for a site licence”) and in Trow v. Ind Coope (West Midlands) Ltd. [1967] 2 Q.B. 899 (“a writ ... is valid ... for 12 months beginning with the date of its issue”). As Salmon L.J. pointed out in Trow v. Ind Coope (West Midlands) Ltd., at p. 923, the approach adopted in the Goldsmith's Co. case [1904] 1 K.B. 1 and Stewart v. Chapman [1951] 2 K.B. 792 can have no application in a case where the period is expressed to begin on the specified date. He observed, at p. 924, that “I cannot . . . accept that, if words have any meaning, 'beginning with the date of its issue' can be construed to mean the same as 'beginning with the day after the date of its issue.’”*

155. Regulation 92(2) is an example of the situation referred to in paragraph 24 of Chadwick LJ’s observations.

156. Thirdly, as to legislative history, the phrase “beginning with the date” was introduced in 2009 (when the date in question was when grounds for the bringing of the proceedings first arose). The same phrase was maintained in the 2011 amendments (when the date in question was amended to the date of actual or constructive knowledge, in light of Uniplex). Even if it were correct to construe the former “from the date” wording (2006) as meaning the day *after* the date, it is simply not possible in my judgment, to construe “beginning with the date” (of knowledge), as being the same as “beginning with the day *after* the date” (of knowledge). That is, if ‘words have any meaning’, as Salmon LJ observed in Trow v Ind Coope (West Midlands) Limited [1967] 2 QB 899, at 924.
157. The Claimant submitted that no change of start date was intended by the new language, but apart from that being essentially assertion, legislative intention is to be determined primarily from the wording, which I consider is not ambiguous. I would not accept the submission that these very different formulations are used interchangeably. Much was made of the purpose of the 2009 Amendment Regulations being to improve the rights of claimants. But I see no impairment of claimant rights, or anything inconsistent with the Remedies Directive, by a rule that provides that the day of their knowledge is the first day for limitation purposes.
158. Fourthly, as to whether fractions of day are ignored, Matthew v Sedman was concerned with a limitation period which expired 6 years “from the date” on which the cause of action accrued. The negligence was the failure to bring a claim by a deadline of 2 June. The cause of action accrued at the very end of 2 June, a so-called ‘midnight deadline’ case, with the result that 3 June counted as the first day of the 6 years. The Supreme Court recognised a general rule (to which midnight cases were an exception) that the day of accrual of a cause of action is excluded from the reckoning of time, on the basis that the law rejects a fraction of a day. Time runs from the following complete day. But this is in the context of a limitation period which runs “from the date” of accrual. Although Zoan was not cited, the cases relied upon in support of the general rule included two referred to by Chadwick LJ in his paragraph 23 (The Goldsmiths’ case and Stewart v Chapman).
159. In Wang v University of Keele [2011] ICR 1251, the issue was when the right to bring an employment claim expired. A claim had to be brought within three months “beginning with the effective date of termination”. Judge Hand QC summarised the authorities, helpfully identifying the following points, including as regards the relevance of fractions of time:
- “
...
(d) *in computing any period within which something must be done or by which something is to take effect a start date must be identified;*

(e) *where that start date is relative to the happening of an event, the fundamental question is likely to be whether the period starts on the day of the event or the day after the event;*

(f) *that will depend, in the context of a statutory provision, on the interpretation of the language in that provision and, in the context of a contract, lease, will or other legal document, on the construction of the*

language of the document; difficulties can arise if either the written material is completely silent on the point or there is no writing;

(g) where the statutory or contractual language means that the day of the event is to be included in the computation of the period, then time starts to run at the start of that day, irrespective as to the time of day that the event took place; the law takes no account of fractions of a day;

(h) where the statutory or contractual language means that the day of the event is not to be included, then time starts to run at the start of the following day, irrespective as to the time of day that the event took place, because, in this context also, the law takes no account of fractions of a day; ...”

160. The ‘fractions of a day’ argument does not therefore assist the Claimant in this case, which concerns a provision that states that time begins to run on a date. That date is counted, regardless of when, on that day, knowledge accrued.
161. Fifthly, as to Boxxe, the case concerned an application to lift the automatic suspension in place pursuant to Regulation 95(1) of the PCR in relation to a competition in which the claimant had been unsuccessful. The test to be applied in that connection was *American Cyanamid*, the first stage of which is determine whether there is a serious issue to be tried. The defendant submitted there was no serious issue to be tried, because the claim had been brought outside the 30 day limitation period under Regulation 92(2). The defendant had also issued a strike-out application on limitation grounds. The limitation question turned on the Day 1 point.
162. Despite what he described as a formidable line of authority (that day 1 was included), which I note did not include Fraser J’s judgment in SRCL, Constable J declined to summarily determine the issue in the context of the application to lift the suspension. But that was not because it was incapable of summary disposal in principle; it was rather because the claimant had not had the opportunity to present full argument on the point, and that limitation was best resolved as part of the strike-out application in due course. It was in that context that the Court noted that the matter was not so clear cut at that stage, i.e. to conclude that there was not a serious issue to be tried [31]. Boxxe is therefore not authority for the proposition that the true construction of Regulation 92(2) cannot be determined summarily. It is however a useful decision which summarises some of the arguments which might be developed in this claim on a future occasion.
163. Sixthly, as to Regulation 93, this provides a special time limit for seeking a declaration of ineffectiveness. That Regulation provides that such proceedings must be brought within 6 months “beginning with the day after the date on which the contract was entered into”, but in some circumstances by an earlier time, namely within 30 days “beginning with the relevant date”. That relevant date is then identified as being either (where a relevant contract award notice has been published) “the day after the date on which the notice was published” or (where the economic operator has been given the specified information by the authority) “the day after the date on which [information was provided]”. It can be seen therefore that the wording of Regulation 93 is quite different. In each of the scenarios referred to, the Regulation is express that time begins with the day *after* the entry into of the contract, or *after* the publication, or *after* the provision of information (as the case may be). I can see no basis for assuming that the draftsman

intended the start date under Regulation 92 and 93 to be the same, when quite different words are used in each regulation. Regulation 93 is far from being an aspect of the general time limit for procurement claims (such as to support an argument that Regulations 92 and 93 are dealing with the same sort of claim and should be interpreted to have the same effect), but on the contrary is a “special time limit”, which applies to a particular type of procurement claim which seeks a remedy affecting third party interests.

164. Seventhly, as to Uniplex, the ECJ was dealing with the issue whether a regulation that provided that time ran from the date of grounds arising, rather than knowledge, was consistent with the Directive. In the passages relied upon by the Claimant, the ECJ did refer to time running “from” the date of knowledge, but the ECJ was not addressing the Day 1 point at all. I see nothing in its judgment which is inconsistent with Day 1 being included; the key point being made by the ECJ was that time should run from knowledge; and in my judgment counting the date of knowledge, far from being inconsistent with that requirement, would advance that objective. Further, the word “from” is, by itself, ambiguous as to when time starts; but Regulation 92(2) is not. It is express in stating that the start date begins with the date of knowledge.

L. EXTENSION OF TIME

165. By its application notice dated 27 November 2023, supported by Mr Lobo’s first witness statement of that date, the Claimant seeks an extension of time of one day for issuing the Claim Form, if the Claim Form issued on 18 October 2023 was out of time. This application and the supporting evidence were on the basis that time had expired on 17 October 2023, and not in the summer. It did not purport to justify an extension, if one was required, on the basis of time running in July 2023.

166. The application for an extension does not arise at this stage. The application of the test to the facts as they are found is a matter for another occasion, to the extent relevant.

M. CONCLUSION

167. For the reasons explained above:

167.1. Time runs for the procurement claim beginning with the date of actual or constructive knowledge under Regulation 92(2) of the PCR.

167.2. Regulation 92(3) either does not apply in this case at all, or if it did, any minimum period of time thereunder would have expired before the Claim Form was issued.

167.3. There are triable issues of fact as to whether the Claimant had actual or constructive knowledge for time to start running under Regulation 92(2) by 20 July 2023, alternatively by or on 18 September 2023, as alleged by the Defendants.

168. Since it is realistically arguable that the Claimant did not have the necessary knowledge until 19 September 2023 (in which case it is common ground that the Claim Form would

have been issued in time), the Defendants' application for summary disposal of the procurement claim therefore fails.

169. I invite Counsel to agree an order. I will hear argument as to costs, as necessary. Although successful in the outcome, I have an open mind as to whether the 'usual' costs order in favour of the winning party is appropriate, including because of the number of time-consuming issues which the Claimant raised unsuccessfully.
170. If the parties are unable to agree costs, I invite them to agree either that I can resolve any dispute on the basis of written submissions; or if they prefer, they should contact Listing to arrange for a short hearing to take place remotely.