



Neutral Citation Number: [2024] EWHC 3059 (TCC)

Case No: HT-2024-000136

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

Royal Courts of Justice, Rolls Building  
Fetter Lane, London, EC4A 1NL

Date: 28 November 2024

Before :

Sir Vivian Ramsey

Between :

Airwave Solutions Limited

Claimant

- and -

The Secretary of State for the Home Department &  
another

Defendant

Lord Wolfson KC and Henry Hoskins (instructed by Quinn Emanuel Urquhart & Sullivan  
LLP) for the Claimant

Joseph Barrett KC, Stephen Kosmin and Benjamin Tankel (instructed by TLT LLP) for the  
Defendants

Hearing date: 6 November 2024

**APPROVED JUDGMENT**

This judgment was handed down by the court remotely by circulation to the parties' representatives by email and released to The National Archives. The date and time for hand-down is deemed to be 28 November 2024 at 10:30am.

**Sir Vivian Ramsey:**

**Introduction**

1. This judgment deals with the Claimant’s application for the trial of a Preliminary Issue in this case.
2. These proceedings concern the dedicated UK emergency services mobile communications network (the “Current Emergency Network”), which is owned and operated by the Claimant. The Claimant, in these proceedings, challenges the conduct of the Defendants in purporting to extend the time for which the Claimant will be required to operate the Current Emergency Network under the so-called “Blue Lights Contracts” by a further three years, from 31 December 2026 to 31 December 2029, by the issuance of a Deferred National Shut Down Notice dated 13 March 2024 (the “2024 DNSDN”). The Claimant’s case is that the 2024 DNSDN was issued in breach of the Defendants’ obligations under the Public Contracts Regulations 2015 (the “PCR”), and also in breach of contractual obligations owed by the Defendants to the Claimant.
3. The Defendants are currently developing the Emergency Services Network (the “ESN”), which they intend will replace the Current Emergency Network if and when it becomes operational and all users of the Current Emergency Network have transitioned to the ESN.
4. The First Defendant ran an initial procurement process for the ESN between April 2014 and September 2015. Three main contracts were awarded to provide the relevant services, which were referred to as Lot 1, Lot 2 and Lot 3. Motorola Solutions UK Ltd (“MSUK”) was awarded the Lot 2 Contract, which was a contract for “User Services” and the First Defendant and MSUK entered into a contract in respect of Lot 2 on 18 December 2015, which they then agreed to vary by entering into an amended and restated contract on 14 May 2019 (as amended, the “Lot 2 Contract”).
5. Subsequently, a number of disputes arose between the First Defendant and MSUK regarding the Lot 2 Contract. Some were resolved at an earlier stage and the remaining disputes were resolved fully and finally by the First Defendant, MSUK and Motorola Solutions Inc. (“MSI”) entering into a settlement agreement on 19 December 2022 (the “Settlement Agreement”) under which the Lot 2 Contract was also terminated by consent.
6. The proposed Preliminary Issue concerns the impact of certain provisions in the Settlement Agreement on contentions pleaded by the Defendants in what is now their Amended Defence in these proceedings.

## **Background**

7. In their Defence, served on 23 May 2024, the Defendants pleaded in paragraphs 2(9), 2(31), 27(4)(d), 36, 41A(2)(i), 82(4)(a) and 86(7) various allegations referring to the performance of “Motorola” under the Lot 2 Contract.

8. In its Reply, served on 24 June 2024, the Claimant pleaded as follows:

“15. The Defendants make various prejudicial and highly contentious allegations in relation to Motorola’s conduct in performing and exiting the Lot 2 ESN Contract (paragraphs 2(3), 2(4), 2(9), 2(16), 2(18), 2(31), 20(8), 20(9), 27(4), 36). The allegations should be withdrawn. They are of no legal relevance to the Claim and they have been raised in breach of a settlement agreement relating to a dispute which is outside the scope of the Claim. For completeness and the avoidance of doubt, they are denied.

16. The Defence identifies no basis as to how or why these allegations in relation to the performance and termination of the Lot 2 ESN Contract are of any relevance to the issues in the Claim, which concern the Defendants’ procurement law obligations.

17. The Defendants are in any event precluded by contract from making such allegations in the Claim. A number of disputes arose between Motorola and the First Defendant, relating to dissatisfaction on the part of each party regarding performance and delivery by the other under the Lot 2 ESN Contract (“the Lot 2 Dispute”). Those parties settled their differences about the Lot 2 Dispute and agreed terms for the full and final settlement of the Lot 2 Dispute, including the early termination of the Lot 2 ESN Contract and any payments due to Motorola as a result, and they recorded the terms of settlement, on a binding basis, in the Lot 2 Settlement Agreement and Release dated 19 December 2022 (the “Lot 2 Settlement Agreement”). The Lot 2 Settlement Agreement relevantly includes the following terms:

- a. Clause 6.3 provides [...]
- b. Dispute is defined as: [...]
- c. Reserved Claims is defined as: [...]

18. In accordance with the Lot 2 Settlement Agreement, the Claimant makes no allegations against the Defendants in the Claim in relation to issues covered by the Lot 2 Dispute (but reserves the right to do so, and to take any other measures it deems appropriate, if the Defendants pursue their equivalent allegations in breach of the Lot 2 Settlement Agreement).

19. Without prejudice to the general objections set out above, the Claimant denies that the Defendants’ allegations, either overt or oblique, in relation to Motorola

- and the legality of its performance of and exit from the Lot 2 ESN Contract (paragraphs 2(3), 2(4), 2(9), 2(16), 2(18), 2(31), 20(8), 20(9), 27(4), 36) are justified.”
9. On 28 June 2024 the Claimant wrote to the Defendants contending that parts of the original Defence breached the Settlement Agreement and inviting the Defendants to withdraw those pleas, reserving the right to take any measures it deemed appropriate, if the Defendants declined to do so.
  10. On 11 July 2024, the Defendants replied to the Claimant’s letter saying that they would not withdraw those pleas and asserting that the Settlement Agreement did not preclude them from referring to Motorola’s failures and/or breaches of contract under the Lot 2 Contract for the purposes of explaining and justifying the lawfulness of the 2024 DNSDN as a matter of public procurement law.
  11. At a Case Management Conference (“CMC”) on 23 July 2024, I directed that there should be an expedited trial of these proceedings. At that CMC there were references to the Claimant’s invitation to the Defendants to withdraw the pleas and the Defendants’ refusal to do so and a reference, in the context of this and other disputes, to disputes being likely to need resolution at a further hearing or hearings in autumn 2024.
  12. On 26 July 2024 the Claimant served an Amended Particulars of Claim, on 22 August 2024 the Defendants served an Amended Defence and on 10 September 2024 the Claimant served an Amended Reply.
  13. On 10 September 2024 the Claimant again wrote to the Defendants and invited them to withdraw the relevant pleas.
  14. On 16 September 2024 the Defendants replied to the Claimant’s letter saying that their position remained as stated in their letter of 11 July 2024. They requested the Claimant, if it intended to pursue this issue, to set out its proposals.
  15. On 24 September 2024 the Claimant wrote to the Defendants to say that it was preparing an application for an order directing the trial of a preliminary issue relating to the Settlement Agreement.
  16. On 30 September 2024 the Claimant issued an application in which it stated that “For the reasons set out in the attached Third Witness Statement of Katherine Alice Vernon, the Claimant seeks an order that the Defendants’ allegations in paragraphs 2(9), 2(31), 27(4)(d), 36, 41A(2)(i), 82(4)(a) and 86(7) of the Amended Defence, identified in the attached draft order, be dismissed as follows:

- (1) Determined and dismissed by way of a preliminary issue pursuant to the Court's general case management powers in CPR r 3.1 (in particular subparagraphs (i), (j), (k), (l) or (m));
- (2) Struck out on pursuant to CPR r 3.4(2); further or alternatively
- (3) Summarily dismissed on the grounds that the Defendants have no real prospect of succeeding on those issues, and there is no other compelling reason why those issues should be disposed of at trial, pursuant to CPR r 24.3." ("the Lot 2 Application")
17. On 15 October 2024, the Defendants served the Fourth Witness Statement of Craig Thompson in response to the Lot 2 Application.
18. At a CMC on 16 October 2024, directions were given for a CMC to take place on 6 November 2024 to consider the Lot 2 Application and for the Claimant to serve a witness statement and skeleton argument which was to: "(i) define with full particularity the preliminary issue which the Claimant invites the Court to answer, (ii) particularise any facts which the Claimant contends are, or need to be, agreed in order to enable the determination of a preliminary issue, (iii) specify what witness evidence the Claimant intends to serve in support of its position in the application, or confirm that the Claimant does not seek to serve witness evidence." The Defendants were then to serve their skeleton argument.
19. On 23 October 2024, the Defendants issued an application to re-amend their Defence ("the Amendment Application").
20. In the event, on 28 October 2024 the Claimant served its skeleton argument and on 4 November 2024 the Defendants served their skeleton argument.
21. On 6 November 2024 I held a CMC at which I heard oral submissions concerning the Lot 2 Application and the Amendment Application.
22. On 7 November 2024 I notified the parties that the Lot 2 Application was dismissed and I gave directions for the hearing of the Amendment Application, stating that reasons would follow. This judgment now contains those reasons.

### **The Lot 2 Application**

23. As set out above, the Lot 2 Application referred to the third witness statement of Ms Vernon and sought an order that the allegations in certain paragraphs of the Amended Defence should be dismissed by way of a preliminary issue pursuant to the Court's general case management powers in CPR r 3.1; struck out pursuant to CPR r 3.4(2); further or alternatively summarily dismissed, pursuant to CPR r 24.3.

24. In her third witness statement Ms Vernon says that the Lot 2 Application “raises a narrow legal point as to the correct construction of the express terms of the Settlement Agreement.” [Redacted]
25. [Redacted]
26. [Redacted]

### **The Claimant’s Submissions**

27. As set out above, the Claimant served a skeleton argument in advance of the CMC on 6 November 2024 at which I was to decide whether to direct the hearing of the Preliminary Issue and, if so, to give directions and also to consider directions for the Amendment Application. It sought a one-day hearing in November/December 2024 to deal with the applications.
28. The Claimant submitted that resolving the Lot 2 Application would have two very significant benefits. First, it would uphold the commercial purpose of the Settlement Agreement, by ensuring the parties were not compelled to incur the time, expense and risk of reputational harm involved in re-litigating up to the end of trial the very issues they agreed to, and did, settle and would suffer significant prejudice which could not be compensated by costs if those issues were put off until trial. Secondly, if upheld, it would dispose of the vague allegations of breach, which have already been ruled to be insufficiently particularised to give rise to disclosure, yet remain on the face of the pleadings and the status of those allegations should be resolved before trial.
29. In relation to an issue raised as to the timing of any appeal, given the expedited hearing in April 2025, the Claimant said that the Court of Appeal listing office had confirmed that there was good availability to hear an expedited appeal in December 2024 or January 2025 following a decision at first instance in late-November 2024.
30. The Claimant also said that the eight day trial listing would not allow a day to be spent deciding the Lot 2 Application. Nor, it submitted, is it sufficient to determine the complex allegations of breach of the Lot 2 Contract which the Defendants were now pursuing. The Claimant therefore considered that the expedited trial would need to be extended if the Preliminary Issue was not determined.
31. In relation to a complaint raised by the Defendants that the Claimant had delayed in bringing the Lot 2 Application, the Claimant submitted that the application had been made promptly, in a period when the parties have been heavily occupied with issues of disclosure and case management. The Claimant had said at the first CMC in July that, absent agreement, this point was likely to require a hearing in the autumn. Far from objecting, the Defendants pressed on with their proposal for the

expedited timetable, and said that, if the Claimant wished to pursue an application the matter could be listed and determined at a short hearing in the usual way. The Claimant said that this is exactly what the Claimant now proposes. But even if there had been some delay, the Claimant submits that this is no reason to delay the Lot 2 Application to the end of trial.

32. In relation to the Preliminary Issue, the Claimant proposed a new formulation in these terms:

“Whether the allegations in paragraphs 2(9), 2(31), 27(4)(d), [18], 36, 41A(2)(i), 82(4)(a) and 86(7) of the Amended Defence (identified in para 1 of the draft order) are precluded by the Settlement Agreement. In particular:

- (i) [Redacted];
- (ii) [Redacted];
- (iii) What are the consequences for these parts of the Amended Defence.”

33. It summarised its contentions on these issues as follows:

- (i) The Defendants’ pleaded allegations that MSUK breached the Lot 2 Contract are in breach of Clauses 6.1 and/or 6.3 of the Settlement Agreement.
- (ii) Airwave is entitled to enforce the Settlement Agreement [Redacted] In any event, to avoid a sterile debate about this point, MSUK has assigned its rights under Clause 6 of the Settlement Agreement to Airwave by an Assignment Agreement made on 25 October 2024, which entitled Airwave to enforce the agreement by that further route.
- (iii) The Defendants now appear to be suggesting that some principle of public law exists which prevents the Court giving effect to the Settlement Agreement, though they have not identified this principle or clearly articulated this argument, and the Claimant is not aware of any such principle but if the Defendants persist in this point, the Claimant will contend that no such principle applies.

34. The Claimant submits that the Preliminary Issue concerns a narrow legal question as to the proper interpretation and effect of a contract. It says that it does not require any agreed facts by way of factual matrix, beyond the existence and terms of the Lot 2 Contract and the Settlement Agreement, which are common ground.

35. On this basis, the Claimant submits that the Lot 2 Application meets the criteria for a preliminary issue. First, it says that it raises self-contained narrow legal issues which require no factual evidence. Secondly, deciding the Lot 2 Application would avoid a day of trial for which there is no space in the eight day hearing. More fundamentally, it would resolve a significant element of the proceedings, significantly reducing their scope and cost and the Court would not need to deal with the complex provisions of the Lot 2 Contract, nor to decide factual or technical issues related to breaches, nor to consider whether any breach led to termination of the Lot 2 Contract. These matters would then not be the subject of

written or oral submissions and there was a good prospect that they would not need to be the subject of witness statements due on 17 January 2025 or reply witness statements on 2 February 2025. It says that these benefits are all the more desirable where the pleadings are defective and inadequate.

36. Thirdly, the Claimant says that resolving the Lot 2 Application is also capable of significantly improving the possibility of a settlement of the whole proceedings, by clearing away complex and hotly contested issues. The Claimant rejects the Defendants' contention that similar factual allegations regarding the parties' performance of the Lot 2 Contract would need to be decided, even if their allegations of breach were dismissed or struck out. In so far as this relates to allegations regarding MSUK's "conduct", the Claimant says that the conduct alleges breaches and, in so far as it relates to the Defendants' reliance of the CMA Decision, there was no finding of breach and that decision did not decide which party was at fault in delaying Lot 2 and the ESN.
37. Fourthly, the Preliminary Issue would avoid having to deal with the issues before and during the trial and also would avoid the need to extend the trial.
38. Fifthly, the Claimant says that there is sufficient time for the Defendants' large legal team to deal with the Preliminary Issue alongside preparation for trial and that any appeal could be dealt with, without affecting the trial date in April 2025.
39. Sixthly, the Claimant says that it brought the Lot 2 Application promptly on 30 September 2024. After pleadings closed with the Claimant's Reply on 24 June 2024, which raised this issue at paragraphs 15 to 17, on 28 June 2024, the Claimant says that it wrote to the Defendants seeking to resolve this point by agreement. The point was raised at the first CMC in July 2024 as one which, unless agreed, was likely to be required to be resolved at a further hearing or hearings in autumn 2024. Far from objecting, the Defendants pressed ahead with their proposed expedited timetable, and said that any application could be listed and determined at a short hearing in the usual way.
40. Amendments on both sides closed with the Claimant's Amended Reply of 10 September 2024 and the Claimant sought again to resolve the Lot 2 Application issue in correspondence on the same day but the Defendants on 16 September 2024 refused to withdraw their allegations of breach of the Lot 2 Contract, and invited the Claimant to make an application which it did on 30 September 2024.
41. In paragraph 72 of its submissions, the Claimant says that, as set out in paragraph 24 of Ms Vernon's third witness statement, the Lot 2 Application initially sought strike out of paragraphs in the Amended Defence (paras 84(2)(a) and 86(7)) on the ground they are inadequately particularised and incoherent. It then says that it "will advance that same argument for striking out all the parts of the Amended Defence



identified in the Lot 2 Application, as an alternative to reliance on the Settlement Agreement.” It then sets out the grounds in paragraph 73 of its submissions.

42. The Claimant also refers to the Amendment Application and submits that it is a late and problematic attempt to cure the Defendants’ defective pleadings and raises further allegations based on matters that have been settled. As it raises substantially overlapping issues to the Lot 2 Application, the Claimant says that the just and appropriate course is to decide the Amendment Application alongside the Lot 2 Application, because the Claimant’s objections to the amendments are bound up with that application. The Claimant also says that it needs time to investigate and respond to the new issues raised.

### **The Defendants’ Submissions**

43. In relation to the context of the Lot 2 Application, the Defendants state that an important element of a number of their justifications for the lawfulness of the 2024 DNSDN as a matter of procurement law for the purposes of the PCR, pursuant to regs. 32 and/or 72, is that the extension of the Blue Light Contracts effected by the 2024 DNSDN was caused by MSUK’s failures and/or delay in delivery of the Lot 2 Contract and/or breaches of contract in delivery of the Lot 2 Contract.
44. The Defendants refer to reg. 32(2)(c) of the PCR 2015 which provides that the negotiated procedure without prior publication may be used for the relevant contracts “(c) insofar as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for the open or restricted procedures or competitive procedures with negotiation cannot be complied with.” Reg. 32(4) then states that “(4) For the purposes of paragraph (2)(c), the circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting authority.”
45. As the Defendants rely on reg. 32(2)(c), they say that this requires that the extension is “strictly necessary” and “for reasons of extreme urgency”; that the reasons for the “extreme urgency” have been “brought about by events unforeseeable by the contracting authority”; and that “the circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting authority.”
46. The Claimant pleads, in respect of reg. 32(2)(c), in its Amended Particulars of Claim at paragraph 77 that:  
“(ii) the Home Office has not shown the existence of an unforeseeable event giving rise to the existence of extreme urgency....the risk of delay to the ESN is foreseeable and has been for some time; and  
(iii) the circumstances invoked to justify extreme urgency are attributable to the Home Office, so reliance on Regulation 32(2)(c) is excluded by Regulation 32(4).”

47. As the Claimant positively avers that the delays to delivery of the Lot 2 ESN Contract and/or the ESN are “attributable” to the Defendants and therefore not attributable to MSUK and the Defendants are not entitled to rely on reg. 32 because the risk of delay to the ESN was “foreseeable”, the Defendants say that their case is that: (i) the delays to the delivery of the Lot 2 ESN Contract and the delivery of ESN as a whole were caused, or materially caused, by MSUK’s failures and/or breaches of contract in respect of the Lot 2 ESN Contract, and (ii) the nature and extent of MSUK’s failures and/or breaches of contract were not foreseeable. The Defendants say that they also rely on these facts and matters as a significant part of their case under a number of the other provisions of the PCR.
48. In those circumstances, the Defendants refer to a number of matters which, they submit, are factors against there being the determination of the Preliminary Issue in this case. First, they say that the Claimant has engaged in at least 4 months of delay in issuing and pursuing the Application. The consequence of this delay is that the proposed Preliminary Issue hearing cannot fairly, prudently or appropriately be listed or determined in late November or December 2024.
49. Secondly, the Defendants point out that these proceedings are advancing to expedited trial with disclosure to be given on 15 November 2024; witness statements to be served on 17 January 2025 and an expedited trial to commence on 22 April 2025. Acceding to the Claimant’s proposals would, they say, cause them substantial, irremediable, prejudice, which cannot be justified in circumstances where it is the Claimant’s delay that is the cause of the prejudice.
50. Thirdly, the hearing of the Preliminary Issue would impose substantial additional burdens and risks on both the Court and the parties, in circumstances where that hearing would not be likely to realise significant benefits and would imperil the expedited trial date. The Defendants say that they bear the overwhelming burden in respect of disclosure work which has been ordered by 15 November 2024 and they anticipate that the Claimant will vigorously make and pursue further requests for information and documents arising from disclosure. They also say that their leading counsel is fully engaged in another expedited trial with a Pre-trial Review on 15 November 2024 and an expedited trial commencing in the week commencing 16 December 2024.
51. Fourthly, the Claimant advances unrealistic assumptions as to the hearing of the Preliminary Issue. It suggests that the Preliminary Issue could fairly be determined in less than a day when at least 1.5 days and likely two or, as finally submitted, three full days would be required.
52. Fifthly, the Defendants says that Claimant’s assumption that the Court of Appeal would definitely order expedition of any appeal, immediately hear any appeal, and

- also deliver an ex tempore judgment on the appeal are not assumptions that the Court could, or should, properly make when considering whether or not to order the trial of the Preliminary Issue. Given the scope of the issues raised by the Preliminary Issue, the Defendants submit that an assumption that the first instance judgment would even be available in mid to late January 2025 may not be appropriate and there would not be sufficient time in the timetable before final trial preparation and commencement of the expedited trial for this Court safely or prudently to assume that appeals to the Court of Appeal would be resolved in the limited time that remains available. The Defendants also raise the possibility of an appeal to the Supreme Court, which has not been addressed by the Claimant.
53. Sixthly, the proposed Preliminary Issue trial would not resolve the proceedings or a significant part of the proceedings. The scope of the Preliminary Issue is confined to whether MSUK's failures in respect of the delivery of the Lot 2 Contract constituted breaches of its contractual obligations. If the Claimant were ultimately the successful party in respect of the Application, the Defendants say that the only consequence would be that they would be precluded from alleging that MSUK's failures in respect of the Lot 2 Contract comprised breaches of contract. This would not determine any of their pleaded grounds of defence, it would merely weaken, to a degree that it is currently difficult accurately to assess, the strength of their case on certain grounds of their defence and strengthen the Claimant's case.
  54. Seventhly, the Defendants submit that the Claimant's purported reliance on upholding the commercial purpose of the Settlement Agreement simply begs the question whether or not the Settlement Agreement on its true construction precludes the Defendants from referring to MSUK's failures and/or breaches of contract under the Lot 2 Contract for the purposes of explaining and justifying the 2024 DNSDN, as a matter of procurement law.
  55. Eighthly, the Defendants refer to the Claimant's suggestion, without any reasoned explanation, that ordering the Preliminary Issue would increase the prospects of settlement. They say that they cannot at present see any basis on which the determination of the proposed Preliminary Issue would be likely to lead to or increase the prospects of settlement of the proceedings.
  56. In relation to the wording of the Preliminary Issue, the Defendants do not agree with the Claimant's proposed formulation, which they say is not adequate and is a further compelling reason, why the application for the Preliminary Issue hearing should be rejected.
  57. The Defendants submit that the Preliminary Issue trial would need to address and determine at least the following matters, although they say that further particularity would be required:

- a. [Redacted]
  - b. If so, what are the implications of that breach for: (i) the Claimant's alleged entitlement to seek to enforce the terms of the Lot 2 Settlement Agreement, and/or (ii) any relief to which the Claimant might be entitled if it established a breach of the Lot 2 Settlement Agreement by the Defendants?
  - c. [Redacted]
  - d. [Redacted]
  - e. [Redacted]
  - f. If (quod non) the Lot 2 Settlement Agreement had the effect contended for by the Claimant, do each of the relevant pleas within paragraphs 2(9), 2(31), 27(4)(d), 36, 41A(2)(i), 82(4)(a) and 86(7) of the Amended Defence breach the Lot 2 Settlement Agreement?
  - g. If (quod non) the Lot 2 Settlement Agreement had the effect contended for by the Claimant, is the Claimant entitled to the remedy of specific performance i.e. that the relevant parts of these paragraphs of the Amended Defence are struck out?
58. At this stage, I pause to note that I understand that, on 5 November 2024, the Claimant provided the Defendants with a revised formulation of the Preliminary Issue based on all of these issues.
59. In terms of factual matrix, the Defendants state that there are no agreed facts and the Claimant has not engaged with the issue of factual matrix. They refer to Ms Vernon's third witness statement which states that the parties' underlying disputes as to the alleged breaches of the Lot 2 Contract and the reasons it was terminated are factually complex. The Defendants say that, notwithstanding this statement, it is then asserted that the Court can, and should, proceed on the footing that no factual matrix or knowledge is necessary to determine the narrow issue of construction.
60. Like any contract, the Defendants submit that the Settlement Agreement falls to be construed against the backdrop of the factual matrix that was known to both parties at the time of the agreement. Proceeding as the Claimant contends would, the Defendants say, render it almost inevitable that the parties' competing trial skeleton arguments would advance factual propositions which have not been agreed or been the subject of witness evidence or the Court may require some evidence by way of factual matrix to determine the Preliminary Issue. This is why the Court will usually only order a preliminary issue trial where both parties agree to it or, at the very least, where there are clear agreed facts.
61. The Defendants say that they have not yet been able to take client instructions on, or properly explore, this question but that it currently considers that there are likely to be a number of aspects of the factual matrix that are, or may, be relevant to the correct construction of the Settlement Agreement.

### **The basis on which a preliminary issue might be ordered**

62. The parties have referred to a number of grounds which can be argued in favour of or against ordering the trial of a Preliminary Issue. The guidance on these grounds is dealt with in the relevant parts of Section 8 of the TCC Guide as follows:
- “8.1.3. At the first CMC the Court will expect to be addressed on whether or not there are matters which should be taken by way of Preliminary Issues in advance of the main trial....
- 8.2.1 The Significance of the Preliminary Issues
- The court would expect that any issue proposed as a suitable PI would, if decided in a particular way, be capable of:
- resolving the whole proceedings or a significant element of the proceedings; or
  - significantly reducing the scope, and therefore the costs, of the main trial; or
  - significantly improving the possibility of a settlement of the whole proceedings.
- 8.6.1 If a party wishes to seek a PI hearing, either at the first CMC or thereafter, that party must circulate a precise draft of the proposed preliminary issues to the other parties and to the Court well in advance of the relevant hearing.
- 8.7.1 When considering whether or not to order a PI hearing, the Court will take into account the effect of any possible appeal against the PI judgment, and the concomitant delay caused.”
63. I consider that the guidance in the authorities which is particularly relevant to this case is as follows:
- (1) The general approach to the hearing of preliminary issues was summarised in *McLoughlin v Grovers (A Firm)* [2001] EWCA Civ 1743 at paragraph 66 as follows:
    - “(a) Only issues which are decisive or potentially decisive should be identified.
    - (b) The questions should usually be questions of law.
    - (c) They should be decided on the basis of a schedule of agreed or assumed facts.
    - (d) They should be triable without significant delay, making full allowance for the implications of a possible appeal.
    - (e) Any order should be made by the court following a case management conference.”
  - (2) In *Steele v Steele* [2001] CP Rep 106, Neuberger J (as he then was) identified a non-exhaustive list of questions for the Court in deciding whether to order a Preliminary Issue Trial:
    - “The first question the court should ask itself is whether the determination of the preliminary issue would dispose of the case or at least one aspect of the

case...The second question...is whether the determination of the preliminary issue could significantly cut down the cost and time involved in pre-trial preparation or in connection with the trial itself...Thirdly, if, as here, the preliminary issue is an issue of law, the court should ask itself how much effort, if any, will be involved in identifying the relevant facts for the purpose of the preliminary issue. The greater the effort, self-evidently the more questionable the value of ordering a preliminary issue...Fourthly, if the preliminary issue is an issue of law, to what extent is it to be determined on agreed facts? ...Fifthly, where the facts are not agreed, the court should ask itself to what extent that impinges on the value of a preliminary issue....That, indeed, is effectively a sixth factor which the court should at least take into account when considering whether or not to order or to determine a preliminary issue, namely whether the determination of a preliminary issue may unreasonably fetter either or both parties or, indeed, the court, in achieving a just result which is, of course, at the end of the day what is required of the court at the trial....Seventhly, the court should ask itself to what extent there is a risk of the determination of the preliminary issue increasing costs and/or delaying the trial. Plainly, the greater the delay caused by the preliminary issue and the greater any possibility of increase in cost as a result of the preliminary issue, the less desirable it is to order a preliminary issue. However, in this connection, I consider that the court can take into account the possibility that the determination of the preliminary issue may result in a settlement of some sort. In other cases the court may well decide that, although the determination of a preliminary issue would not result in a settlement, it will result in a substantial cutting down of costs and time....Eighthly, the court should ask itself to what extent the determination of the preliminary issue may be irrelevant. Clearly, the more likely it is that the issue will have to be determined by the court, the more appropriate it can be said to be to have it as a preliminary issue...Ninthly, the court should ask itself to what extent is there a risk that the determination of a preliminary issue could lead to an application for the pleadings being amended so as to avoid the consequences of the determination...Tenthly, the court should ask itself whether, taking into account all the previous points, it is just to order a preliminary issue.”

- (3) In *Rossetti Marketing Limited and another v Diamond Sofa Company Limited* [2012] EWCA Civ 1021 at paragraph 1, Lord Neuberger MR (as he then was) stated:

“This...represents yet another cautionary tale about the dangers of preliminary issues. In particular, it demonstrates that (i) while often attractive prospectively, the siren song of agreeing or ordering preliminary issues should normally be resisted, (ii) if there are nonetheless to be preliminary issues, it is vital that the issues themselves, and the agreed facts or assumptions on which

they are based, are simply, clearly and precisely formulated, and (iii) once formulated, the issues should be answered in a clear and precise way.”

### **Discussion**

64. I have come to the conclusion that the proposed Preliminary Issue is not one which I should order to be tried in this case.
65. First, I am concerned by the way in which the Preliminary Issue has developed and is likely to develop. Originally, the pleaded case in paragraphs 15 to 17 of the Reply relied solely on Clause 6.3 of the Settlement Agreement and there was no reference to Clause 6.1. There is now reference to Clause 6.1 and also more recently to Clause 12 as being the basis for the Claimant to be able to rely on Clause 6. In addition, there has now been an assignment as recently as 25 October 2024, which the Claimant contends gives it rights under the Settlement Agreement. In turn, these were challenged by the Defendants, in particular just before the hearing, the Defendants raised a contention that the Lot 2 Application by the Claimant on 30 September 2024 was an abuse of process.
66. The proposed Preliminary Issue which was set out in Ms Vernon’s third witness statement and was the subject of the Lot 2 Application has now changed. As discussed in argument, there has been no proper case put forward based on the particular wording of Clauses 6.1, 6.3 or 12. Rather, the issue is phrased in broad terms “does either Clause 6.1 or Clause 6.3 of the Lot 2 Settlement Agreement preclude” the Defendants from “referring to [MSUK’s] failures and/or breaches of contract”. For instance, as explored in argument, what is it that the Claimant says that the Defendants are seeking in terms of [Redacted]? Such matters need to be properly considered and the issues fully identified before any preliminary issue can be ordered. Otherwise, the issues will only become apparent when the parties put in their submissions for the preliminary issue hearing.
67. Part of the problem in this case is caused by the fact that reliance on the Settlement Agreement only occurred in the Reply and therefore there has been no answer by the Defendants to the Claimant’s limited contentions in paragraphs 15 to 17 of the Reply. This proposed Preliminary Issue is therefore, for both parties, being formulated on the basis of arguments which are only now being developed. Experience shows that proceeding on preliminary issues which have not been properly developed and expressed with the necessary particularity only leads to problems before and at the hearing. On no view is this a simple issue of the construction of a clause of a contract. In my judgment, this in itself is a sufficient reason for not ordering the trial of this developing Preliminary Issue.
68. An associated problem is that until the parties have agreed the preliminary issue (or the Court has determined it), it is difficult to see the scope of the factual matrix.

It may be that it is limited to documents referred to in the recitals but often those have to be considered in context. At the very least it would be necessary for the parties to discuss, consider and preferably agree the relevant facts.

69. Secondly, I agree with the Defendants that there has been a delay in the Claimant bringing this aspect of the case forward. The point was raised by the Claimant in the Reply at paragraph 15 on 24 June 2024 and it was clear that the Defendants would not withdraw the relevant allegations by 11 July 2024. Whilst some comments by the Defendants at the CMC on 23 July may have suggested that this question could be determined in the autumn, I consider that, if that were to be done, the application should have been made at that stage and not two months later. Given the work which needed to be done on disclosure for the expedited trial and the August period, the Claimant's delay may be explainable but the fact is that the Claimant now makes the application some two to three months later than it might have done. This has meant that consideration of the immature Preliminary Issue has now only started in November 2024.
70. The impact of the delay is that the Defendants are now concentrating on the task of disclosure where they have the greatest burden and which is due on 15 November 2024. The month up to and after 15 November is likely to be busy even for a large legal team engaged by each side. Senior members of the solicitor and counsel team will necessarily be involved in that task and any effort which is diverted onto a trial of the Preliminary Issue is bound to affect the preparation for the expedited main hearing.
71. The possible timetable for dealing with the Preliminary Issue was discussed at the CMC. I regard the Claimant's proposed timetable of a 2 day hearing on a day after 22 November as unrealistically short. The Defendants' proposed timetable to allow a period for agreement of the Preliminary Issue, consideration of any necessary factual matters, with sequential submissions a week apart is more realistic. Even ignoring the need for disclosure and witness evidence and reducing the period of 2 to 3 weeks to agree facts, this would lead, at the earliest, to a hearing sometime in mid to late December 2024 with a judgment in mid to late January 2025, at the earliest. This would have a serious impact on the preparation for the expedited trial.
72. Thirdly, this is a case where there is every likelihood that there would be an appeal against the judgment. In those circumstances, I see little prospect of having an appeal heard and determined much, if at all, before the April 2025 expedited trial date, ignoring any issue which might justify an appeal to the Supreme Court. The reality is that the witness evidence would have to proceed without the decision on the Preliminary Issue and the preparation for the hearing would have to proceed on the basis that the decision on the Preliminary Issue might be reversed. As a result, there might well be little benefit in having a decision on the Preliminary Issue.



73. Fourthly, whilst the issue of the performance of MSUK under the Lot 2 Contract is an important issue in the case, it will not determine the whole case or even part of the case. It will, at most, have an impact on the matters that can be relied on for that part of the case. It could reduce the costs and time taken at the expedited hearing but this would have to be balanced against the increased costs and time of the separate Preliminary Issue hearing. I do not, therefore, consider that this Preliminary Issue, as it is developing, comes into the category of issues which would generally justify a preliminary issue, with its attendant cost and time and the diversion of resources to it. Nor, on any objective view of matters does it seem to be an issue which would lead to settlement as, for the reasons set out above, it is not an issue which appears to be the key to resolving the case.
74. Fifthly, in principle, I accept that it is important to uphold settlement agreements. However, I consider that this factor carries less weight on the facts of this case where there is an important prior issue as to the applicability of the terms of the Settlement Agreement to these proceedings between different parties.
75. Sixthly, the point was raised by the Claimant that the whole expedited trial was listed for eight days and, if as predicted by the Defendants, the preliminary issue would take three days or even two days as estimated by the Claimant, it was said that this would make it impossible for the expedited trial to be completed in the eight day estimate, particularly as the allegations relating to the Lot 2 Contract would have to be dealt with. In my judgment, dealing with issues at a trial of preliminary issues necessarily takes longer than it would do if those issues were subsumed within all the other issues in the case. There is a greater focus on those issues when they are heard as preliminary issues than if they are dealt with as part of the multiple other issues in this case. That is one reason why the court has to be satisfied that the additional time and cost of dealing with issues as preliminary issues has to be justified. In this case, I currently do not see any need to revise the estimate for the length of the expedited hearing.
76. For all those reasons, I do not consider that in the context of these proceedings with an expedited trial it would be just to order the determination of the Lot 2 Application as a preliminary issue in this case. Therefore that part of the Lot 2 Application which seeks the determination and dismissal of certain paragraphs of the Amended Defence by way of a preliminary issue is dismissed.

#### **The alternative of strike out or summary judgment**

77. The alternative application to strike out or to obtain dismissal by way of summary judgment appears to be put in two different ways. First, the Claimant seeks to strike out the relevant paragraphs of the Amended Defence or have them summarily dismissed on the same grounds as the determination of the Preliminary

Issue. Given that I have decided that the hearing of the Preliminary Issue is not appropriate in these proceedings leading to an expedited hearing and that the issues that arise on a preliminary issue would require further development and detailed argument, I consider that it is not appropriate to deal with the alternative applications which would themselves need a determination of the same issues as those raised by the Preliminary Issue. As a result, those parts of the Lot 2 Application are adjourned generally.

78. The second way in which the strike out application is put, is set out in paragraph 24 of Ms Vernon's third witness statement. There she says:

“Alternatively, if the Defendants were now to contend that paragraphs 82(4)(a) and 86(7) are not intended to allege a breach of the Lot 2 Contract after all (contrary to their own previous submissions mentioned above), then they are inadequately particularised, incoherent and make no sense and therefore fall to be struck out for that alternative reason under CPR r 3.4(2).”

79. In its skeleton argument for the CMC on 6 November 2024, the Claimant submits as follows:

“69 As an alternative and independent ground, the Lot 2 Application also seeks to strike out the Defendants' allegations of breach of the Lot 2 Contract on the basis they are inadequately particularised and incoherent.

70 The Claimant denied from the outset that these allegations had any legal relevance to the claims: original Reply, e.g. para 15. That is not least because these allegations are inadequately particularised, and the Amended Defence fails properly to plead any link between the allegations of breach and the PCR.

71 As the Defendants' case has been tested through the disclosure process, it has become increasingly clear that the paragraphs of the Amended Defence which appear to make vague allegations of breach do not provide a coherent or sufficiently particularised basis for their claimed relevance.

72 The Lot 2 Application initially sought strike out of paragraphs in the Amended Defence (paras 84(2)(a) and 86(7)) on the ground they are inadequately particularised and incoherent: as set out in Vernon 3, para 24. The Claimant will advance that same argument for striking out all the parts of the Amended Defence identified in the Lot 2 Application, as an alternative to reliance on the Settlement Agreement.

73 In summary, [the Claimant] will argue as follows as part of the Lot 2 Application (though the Court is not asked to decide this point at the 6 November hearing)...”.

80. It is evident that the Claimant now seeks to expand the scope of the strike out application to encompass the other paragraphs referred to in the Lot 2 Application. The Defendants respond to this at paragraphs 107 to 112 of their skeleton argument, objecting to this basis of strike out, disputing that the impugned pleas

are “incoherent” and stating that they will provide a further draft Re-Amended Defence addressing the specific points which the Claimant has raised. On that basis, it is likely that the adequacy of the Defendants’ pleaded case will arise on the Amendment Application and, to the extent that it does not, it is convenient to deal with it then.

### **The Amendment Application**

81. I consider that this application by the Defendants should now be listed for hearing as soon as possible. As the Defendants now intend to put in a further draft Re-Amended Defence, I consider that this is the first step. The Claimant must then have time to respond to this further draft. In addition, as set out above, in paragraph 18 of the Amended Reply the Claimant reserved the right to respond to the Defendants’ allegations, if the Defendants sought to pursue them. As those allegations are now going to be dealt with, the Claimant should now apply for permission to make any amendments to its Amended Reply, in response to the Defendants’ allegations.

### **Conclusion**

82. Accordingly, for the reasons set out above, that part of the Lot 2 Application which seeks the determination and dismissal of certain paragraphs of the Amended Defence by way of a preliminary issue is dismissed.
83. To the extent that the Lot 2 Application seeks to have certain paragraphs of the Amended Defence struck out and/or summarily dismissed on the same grounds as the determination of the preliminary issue, those parts of the Lot 2 Application are adjourned generally.
84. In relation to the Amendment Application, it will be the subject of the following directions:
- (1) The Defendants shall by 15 November 2024 provide a further draft Re-Amended Defence setting out the full extent of the amendments sought;
  - (2) The Claimant, by 22 November 2024, may provide a draft Re-Amended Reply setting out draft replies to the amendments sought by the Defendants and shall make any application in respect of any other draft amendments to the Amended Reply which it seeks permission to make, in particular, pursuant to its reservation in paragraph 18 of the Amended Reply.
  - (3) The parties shall serve submissions in relation to the amendments in subparagraphs (1) and (2) above, by 29 November 2024.
  - (4) The Claimant shall, to the extent that, as part of its Lot 2 Application, it seeks to strike out any parts of the pleadings on the grounds that they are “inadequately particularised, incoherent and make no sense”, serve any further

submissions in support with its submissions in sub-paragraph (3) above, by 29 November 2024.

- (5) The parties shall serve submissions in reply to the submissions in sub-paragraphs (3) and (4), by 6 December 2024.
  - (6) A hearing shall take place on a date to be fixed.
85. I give liberty to apply and reserve the costs in relation to the Lot 2 Application.