



Neutral Citation Number: [2019] EWCA Civ 2259

Case No: A1/2019/2091, A1/2019/2092, A1/2019/2093, A1/2019/2095

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**TECHNOLOGY AND CONSTRUCTION COURT**  
**MR JUSTICE STUART-SMITH SITTING AS A JUDGE OF THE ADMINISTRATIVE**  
**COURT AND THE TCC**  
**HT-2019-000158; HT-2019-000160; HT-2019-000173; HT-2019-000187**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 18/12/2019

Before:

**LORD JUSTICE NEWEY**  
**LORD JUSTICE COULSON**  
and  
**SIR RUPERT JACKSON**

Between:

<b>THE SECRETARY OF STATE FOR TRANSPORT</b>	<b><u>Appellant</u></b>
<b>- and -</b>	
<b>ARRIVA RAIL EAST MIDLANDS LTD ("ARRIVA")</b>	<b><u>Respondent</u></b>
<b>-and-</b>	
<b>STAGECOACH EAST MIDLANDS TRAINS LTD</b>	<b><u>Interested</u></b>
<b>ABELLIO EAST MIDLANDS LTD</b>	<b><u>Parties</u></b>
<b>THE SECRETARY OF STATE FOR TRANSPORT</b>	<b><u>Appellant</u></b>
<b>-and-</b>	
<b>STAGECOACH EAST MIDLANDS TRAINS LTD</b>	<b><u>Respondent</u></b>
<b>("SEM TL")</b>	
<b>-and-</b>	
<b>ARRIVA RAIL EAST MIDLANDS LTD</b>	<b><u>Interested</u></b>
<b>ABELLIO EAST MIDLANDS LTD</b>	<b><u>Parties</u></b>
<b>DEPARTMENT FOR TRANSPORT</b>	<b><u>Appellant</u></b>
<b>-and-</b>	
<b>WEST COAST TRAINS PARTNERSHIP LTD ("WCTP")</b>	<b><u>Respondent</u></b>
<b>&amp; ORS</b>	
<b>-and-</b>	
<b>MTR WEST COAST PARTNERSHIP LTD ("MTR")</b>	<b><u>Interested</u></b>

**FIRST TRENITALIA WEST COAST LTD (“FIRST”)** **Parties**

**THE SECRETARY OF STATE FOR TRANSPORT** **Appellant**

**-and-**

**STAGECOACH SOUTH EASTERN TRAINS LTD &** **Respondent**  
**ORS (“SSETL”)**

**-and-**

**SOUTH EASTERN RAILWAYS LTD (“SERL”)** **Interested**  
**LONDON AND SOUTH EAST PASSENGER RAIL** **Parties**  
**SERVICES LTD (“GOVIA”)**

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**Rhodri Thompson QC, Fionnuala McCredie QC, Anneli Howard, Fiona Banks & Alfred Artley (instructed by DLA Piper UK LLP) for the Appellant**  
**Philip Moser QC, Joseph Barrett & Jack Williams (instructed by Stephenson Harwood LLP) for Arriva**  
**Tim Ward QC & Daisy Mackersie (instructed by Herbert Smith Freehills LLP) for SEMTL and SSETL**  
**Jason Coppel QC & Patrick Halliday (instructed by Ashurst LLP) for WCTP**

**The Interested Parties did not appear and were not represented**

Hearing dates: 20<sup>th</sup> & 21<sup>st</sup> November 2019

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**Approved Judgment**

## **LORD JUSTICE COULSON :**

### **1 INTRODUCTION**

1. The issue in this appeal is the applicable time limit for the bringing of claims arising out of a public procurement process which is not governed by the Public Contracts (and similar) Regulations. It raises the stark contrast between the 3-month time limit required for an application for judicial review, and the 6-year limit for a claim for breach of statutory duty provided by the Limitation Act 1980. It also raises an issue as to the correct approach to the 3-month limit where the public law issues arise not from a one-off decision, but an ongoing process.
2. The appellant is responsible for running competitions for rail franchises, including recent competitions for the East Midlands, South Eastern and West Coast rail franchises. The respondents are experienced train operating companies: where it is necessary to refer to them individually, I shall call them Arriva, SEMTL, SSETL and WCTP.
3. On 9 April 2019 the appellant notified Arriva and SEMTL that they had been disqualified from the competition for the East Midlands franchise; he notified SSETL that they had been disqualified from the competition for the South Eastern franchise; and he notified WCTP that they had been disqualified from the competition for the West Coast franchise. Subsequently, the respondents commenced both judicial review and proceedings under CPR Part 7 against the appellant, seeking to challenge their disqualification and make other claims – including claims for damages - consequential upon this public procurement exercise.
4. Following a contested case management conference<sup>1</sup>, the judicial review proceedings were stayed and Stuart-Smith J (“the judge”) used the Part 7 proceedings as a convenient vehicle to address the various procedural issues that had arisen between the parties. On 1<sup>st</sup> and 4<sup>th</sup> July 2019, the appellant made applications to strike out various elements of the respondents’ Part 7 claims. Those elements arise from what might neutrally be called the appellant’s pension requirements. The appellant said that, despite the fact that these are Part 7 proceedings, those elements of the claims should have been brought within the 3-month time limit referable to judicial review proceedings, and that this time limit was triggered earlier than the disqualification letters of 9 April 2019.
5. In a judgment dated 31 July 2019, the judge refused to strike out those elements of the claims. Permission to appeal was granted on 5 September 2019. There is an underlying need for urgency because the trial of the issues arising out of the appellant’s pension requirements is due to be heard by the judge in January 2020.
6. Accordingly, the principal issue which arises on this appeal is the applicable time limit in which these Part 7 claims should have been brought. The appellant maintains that the judge should have imposed a 3-month time limit by analogy with the procedure for judicial review in CPR Part 54, notwithstanding the fact that these are

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<sup>1</sup> The appellant argued that it should be the Part 7 proceedings which were stayed; the respondents argued that it should be the judicial review proceedings. The judge agreed with the respondents.

Part 7 proceedings seeking private law remedies such as damages, declarations and injunctions. The respondents argue, and the judge found, that the applicable time period for these Part 7 claims (subject to potential exceptions, as explained below) was 6 years.

## **2 THE BACKGROUND FACTS**

7. The original invitations to tender (the “ITT”) were issued for the respective franchises as follows:
  - a) 29 November 2017 (South Eastern);
  - b) 27 March 2018 (West Coast);
  - c) 7 June 2018 (East Midlands).

The appellant calls the sending out of the ITTs collectively “Decision 1”.

8. The ITTs were sent out against a background of correspondence and dialogue between the appellant and the respondents (as existing train operating companies) about the need for an industry-wide solution to various pension issues, and in particular the possibility of a minimum 25% increase in technical provisions identified by the Pensions Regulator. The Regulator was carrying out a detailed investigation into these matters which was still ongoing as at June 2018. It is the respondents’ case that, as a result of this, the ITTs did not provide sufficient clarity or certainty and that “the full scope of the pensions liabilities of a successful bidder arising as a result of the Pensions Regulator’s investigation were unknown and unascertainable” (see paragraph 42 of SEMTL’s Particulars of Claim).
9. The respondents submitted their tender bids during the period of the investigation by the Pensions Regulator. Some of the respondents suggest that they were asked to rebid on more than one occasion. However, for present purposes, the appellant’s Re-Bid Instructions were:
  - a) 19 September 2018 (South Eastern);
  - b) 7 November 2018 (West Coast);
  - c) 9 November 2018 (East Midlands).

The Re-Bid Instructions were primarily concerned with changes to the appellant’s pension requirements. The appellant calls these Re-Bid Instructions collectively “Decision 2”. It is the Respondents’ case that the Pensions Regulator’s investigation was still pending at the time of Decision 2 and that, in consequence, they “did not contain any firm indication of the total likely exposure of the winning bidder” (see paragraph 50 of SEMTL’s Particulars of Claim).

10. In late 2018 the respondents considered the Re-Bid Instructions, and submitted updates to their tender responses, addressing (insofar as they felt able) the appellant’s updated pension requirements. The precise nature of these responses was different in each case, but it appears clear that it was the nature of those responses to the pension

requirements which led to the disqualification of each of the respondents on 9 April 2019. The appellant calls the disqualification decisions collectively “Decision 3”.

11. Proceedings were commenced as follows:
  - a) On 8 May 2019, Arriva issued its Part 7 proceedings in respect of the East Midlands franchise. On 22 May 2019, Arriva issued judicial review proceedings in materially identical terms.
  - b) On 8 May 2019, SEMTL issued its Part 7 proceedings in respect of the East Midlands franchise. On 31 May 2019, SEMTL issued judicial review proceedings in materially identical terms.
  - c) On 6 June 2019, SSETL issued its Part 7 proceedings in respect of the South Eastern franchise. On 7 June 2019, SSETL issued judicial review proceedings in materially identical terms.
  - d) On 23 May 2019 WCTP issued its Part 7 proceedings. On 3 June 2019, WCTP issued judicial review proceedings in materially identical terms.
12. It will therefore be noted that each of the eight sets of proceedings with which this litigation is concerned was commenced within three months of the disqualification letters of 9 April 2019 (Decision 3). However, as explained below, the focus of the appellant’s application is the respondents’ pleaded complaints about Decisions 1 and 2. No proceedings of any kind were issued within 3 months of either of those earlier decisions (if that is what they were). That is at the focus of the appellant’s application to strike out. It is therefore necessary to look in a little more detail at the individual pleadings.

### **3 THE PLEADED CLAIMS**

#### **3.1 Arriva’s Claims**

13. Arriva’s claim is in respect of the East Midlands franchise. Arriva plead that the appellant was in breach of his various obligations in respect of the procurement, and expressly state at paragraph 103 of their Particulars of Claim that the appellant’s conduct of the procurement was unlawful. The pleaded breaches run from paragraphs 104 – 121. Within those breaches are various allegations in relation to the ITT and the Re-Bid Instructions, primarily in respect of the pension requirements.
14. As to the relief claimed, Mr Moser QC made plain that Arriva’s basic claim was for damages. He said he was “relaxed” about Arriva’s other claims for discretionary relief, such as the claim for a declaration that the competition was unlawful and a declaration that, if he had acted lawfully, the appellant would have determined that Arriva should have been awarded the East Midlands franchise. Although Arriva had originally sought orders that the procurement be quashed and the contract awarded to

Arriva, those claims have been deleted by amendment. Furthermore, Mr Moser properly accepted that paragraph 108 of the Particulars of Claim, which asserted that “the Pension Requirements must be set aside”, should also have been deleted, and this court granted him permission to delete it.

### **3.2 SEMTL and SSETL’s Claims**

15. SEMTL and SSETL are both companies in the Stagecoach group. SEMTL’s claim is in respect of the East Midlands franchise and SSETL’s claim is in respect of the South Eastern franchise. The claims themselves are in similar form, so I take SEMTL’s claim as an example of their structure and substance. The pleaded breaches run from paragraphs 72 – 80 of the Particulars of Claim but, with numerous sub-paragraphs, they cover a total of 17 pages. Within the pleaded breaches are various references to the ITT and the Re-Bid Instructions, which Mr Ward QC said were “integral to our claims”.
16. The SEMTL Particulars of Claim set out in some detail the two-way discussion and exchange process between the appellant and the respondents in relation to the appellant’s pension requirements both before and during the relevant competitions. As pleaded (which is of course the relevant starting point for any application to strike out) an impression is created of all parties doing their best in difficult circumstances, as the Pensions Regulator investigated the problem and solutions were tentatively proposed. In addition, SEMTL’s evidence was that they were surprised to be disqualified, because they thought it was an iterative process taking place against what Mr Ward called “a shifting background”.
17. Although, in SEMTL’s Particulars of Claim, there is at paragraph 82 a suggestion that the contract awarded to Abellio in respect of the East Midlands franchise “is void”, there was no corresponding injunction sought in the prayer. However, in addition to the damages claims, both SEMTL and SSETL seek discretionary relief in the form of injunctions requiring the appellant to revoke the disqualification decision. Declarations are also sought to the effect that the appellant acted unlawfully and in breach of statutory duty in disqualifying SEMTL/SSETL from the respective competitions.
18. In respect of the East Midlands franchise there is an additional declaration sought by SEMTL that the appellant acted unlawfully in awarding the rail franchise to Abellio and/or not awarding it to SEMTL. There is no equivalent plea in respect of the South Eastern franchise, primarily because no bid from any other company has been accepted. Mr Ward noted that no part of the application to strike out takes issue with the relief sought by either Stagecoach company.

### **3.3 WCTP’s Claims**

19. In a similar way to the other respondents, WCTP group the various breaches into the unlawful design of the procurement (paragraphs 94 – 103 and 105 – 106 of their Particulars of Claim) and then, from paragraphs 109 – 119c, make various allegations about the unlawful assessment of the bids. Paragraph 109 expressly links back to the allegations about the unlawful design of the procurement, but the remainder of those paragraphs are concerned with the bid itself, and the appellant’s assessment of it.

20. In the sections of WCTP's Particulars of Claim dealing with the alleged unlawful design of the procurement, there are repeated allegations about the ITT and the Re-Bid Instructions. Those are therefore brought into the allegations of breach, although they are only part of WCTP's case. They also had a separate claim about the involvement of a third party as a 'key subcontractor', but this has now been deleted by way of amendment.
21. As to the relief claimed, again in addition to damages, WCTP seek various declarations about the design of the procurement (which are now the subject of the appellant's application to strike out) and other declarations in relation to the disqualification decision and the treatment of other bids (which are not the target of the strike out application). They also seek an injunction requiring the appellant to revoke the disqualification decision and to terminate the franchise agreement entered into with the successful bidder. Those too are not the subject of the strike out application, even by way of amendment, although I address them in paragraph 110 below for reasons which I explain.

### **3.4 The Appellant's Objections**

22. The appellant's objections to these pleaded cases, and the basis of his application to strike out, are twofold. The first, and in my judgment much the most important, is the appellant's objection to any criticisms of or adverse comments about either the ITT (Decision 1) or the Re-Bid Instructions (Decision 2). The appellant says that the failure on the part of the respondents to challenge Decisions 1 and 2 within three months of those Decisions means that *any claim* which the respondents now make must accept the lawfulness and binding nature of both Decisions 1 and 2. That has become Ground 1 of the appeal.
23. The boldness of the appellant's position emerges less coherently from the application to strike out than it might have done, because at least some of the claimed declarations/injunctions which might be thought to go to Decisions 1 and 2 (such as WCTP's claim for injunctions revoking the disqualification decision and terminating the subsequent contract with a third party) are not the subject of the application. But the significance of the underlying point cannot be over-emphasised. When it was put to Mr Thompson in argument, he eventually accepted that, on his case, even the respondents' claims for *Francovich* damages could not seek to go behind Decisions 1 and 2. To that extent, therefore, the appellant contends that the relief claimed by the respondents is irrelevant because, whatever relief they seek, the appellant maintains that they can only do so by reference to Decision 3, and that for these purposes Decisions 1 and 2 are, to all intents and purposes, inviolable.
24. As Mr Coppel QC noted on behalf of WCTP, in a submission supported by all the other respondents, such a stance is without precedent: there is no authority for the proposition that, to take the obvious example, a *Francovich* damages claim can be circumscribed in this way.
25. The appellant's second objection to the respondents' pleaded cases is based on the premise that all the claims in respect of Decisions 1 and 2 must have regard to the judicial review time limit of 3 months, and that this limit was automatically triggered by the dates of those two Decisions, and could not be extended merely because Decisions 1 and 2 were part of an ongoing competition process. The appellant

maintains that, as a matter of law, Decisions 1, 2 and 3 must be treated separately, with the 3-month period operating separately for each. That has become Ground 2 of the appeal.

#### **4 THE JUDGMENT**

26. The judgment is at [2019] EWHC 2047 (TCC). It has been reported with commendable speed in Volume 185 of the Construction Law Reports at page 163. Having set out a detailed analysis of the claims made, the judge said at [19]:

“19. The fact that the Claimants have issued both Part 7 proceedings and judicial review proceedings reflects the fact that the conduct of the franchise competitions engages both public and private law rights and obligations. It would be wrong to view this area of law through a purely public law prism or a purely private law prism. Public and private law coexist as elements of English law and there is no a priori reason of principle that demands primacy for one or the other. It is beyond the scope of this judgment to try to set out the history of the development of either; but that history demonstrates the flexibility of the common law and its ability to recognise rights and fashion remedies to meet particular situations. It also shows the willingness of Parliament to set the bounds of the law which the judges are to interpret and apply where and when it considers it appropriate to do so.”

27. Having then set out the various time limits for claims in contract and tort from the Limitation Act 1980, CPR Part 54, and the particular provisions applicable to procurement law, the judge summarised the position at paragraph [36] in the following terms:

“36. Pausing at this stage, I summarise the position as follows:

- i) When dealing with duties such as are alleged in the present litigation, the same facts and matters that are alleged to constitute breach of duty may give rise to both public law challenges and private law claims;
- ii) There is no legislative requirement that private law claims be brought by judicial review proceedings, though judicial review proceedings may in some circumstances be used as the vehicle for claiming private law remedies such as damages, declaratory relief and injunctions as well as public law remedies;
- iii) By ss. 2 and 5 of the Limitation Act 1980 the limitation period for an action founded on tort or on simple contract is six years;
- iv) By CPR Rule 54.5, an application for judicial review must be brought promptly and in any event within three months;
- v) There has been legislative intervention to impose specific time limits for claims arising under the PCR and the UCR. Despite the

longstanding existence of Regulation 1370/2007, it has not been implemented by regulations or otherwise in the United Kingdom and there is no specified legislative time limit for bringing private law claims to which Regulation 1370/2007 might apply;

vi) The principle of effective protection requires the Court to operate domestic law provisions such as those considered in *Uniplex* in a way that allows a claim based on EU law grounds of challenge to be brought by reference to the date when the claimant knew or ought to have known of the alleged breach of EU law.”

28. The judge then addressed the appellant’s submissions which, as he rightly said at [37], sought to target events (Decisions 1 and 2) which occurred more than three months before the commencement of the various proceedings. He said at [38] that the appellant’s submission in relation to the targeted public law claims was simple: because the facts giving rise to those claims arose and were known to have arisen more than three months before the issue of proceedings, the public law claims were time barred by virtue of CPR 54.5.

29. The judge then went on, starting at [39] to deal with the main issue which was in respect of the targeted private law claims. He rightly said that the appellant’s submission on that point was “less straightforward”. The heart of the judgment for the purposes of Ground 1 is at [47] – [53] which were in the following terms:

“47. During submissions the Defendant articulated his submission in relation to the Claimants’ private law claims concisely on a number of occasions of which two will suffice. The first was adopting an image for which credit appears to be due to Professor Finnis: see *R (Miller) v Secretary of State for Exiting the European Union* [2017] 1 WLR 1373 at [63]-[65]:

‘The point we are making is if the initial phase of proving breach is precluded as a matter of public law, then the reservoir of rights in the EU doesn’t contain a right to damages and so nothing flows down the conduit pipe. That’s the basic point.’

The second, in reply, was:

‘What we are saying is that in these circumstances a successful public law challenge is a pre-condition for a successful private law claim for *Francovich* damages.’

48. I am unable to accept this submission, however phrased. In my judgment it reflects a view through a purely public law prism that is supported by neither principle nor authority.

49. The starting point must be the established fact that a claim for damages arising from breach of duties derived from EU law should be regarded as a claim for breach of statutory duty, albeit one that is subject to *Francovich* conditions: see [15] above. That being so, s. 2

of the Limitation Act is directly applicable and provides a limitation period of 6 years. It is therefore necessary to see if there is any reason to disapply that limitation period and to apply another one.

50. The Defendant's arguments that rely upon the time limits laid down in instruments concerning procurement law are, in my judgment, misconceived. The submission (set out above) that the UK legislator has "consistently" applied a much shorter limitation period to reflect the particular character of the EU-based claim is factually incorrect, since the UK legislature has declined to implement the Railway Regulation and has chosen to exclude railway franchise procurements from the scope of the PCR and the UCR. The Court does not know why the legislature has decided to treat railway franchise procurements differently, but it has. There is therefore no basis for either transposing the time-limits laid down by the PCR and UCR or relying upon them by way of an analogy. Those regulations, where they apply, provide carefully calibrated and balanced bundles of rights and obligations including, for example, the automatic suspension provisions at regulation 95 of the PCR and regulation 110 of the UCR. Given the carve-out which excludes railway franchise procurements from those regulations, it would be impossible to describe provisions for automatic suspension as being "consistently" applied in procurement cases or to argue that they are to be implied in railway franchise procurements. Thus, in the circumstances prevailing at present, all that can be said is that procurement cases are not all treated the same and that railway franchise cases are deliberately treated differently from other categories by the legislature of the United Kingdom.

51. A further submission that was made more than once and which appears fundamental to the Defendant's position was that:

‘We say that it's a basic principle of administrative law that a public law measure is valid if it is not challenged within the relevant time period and as such it cannot form the basis for an action for damages under EU law if it is in fact valid.’

52. This submission is correct when viewed through a purely public law prism. However, as a matter of principle, it seems to me to ignore the fact that a public authority's acts or omissions may, at least in theory, give rise to enforceable private law rights and remedies without being unlawful in the public law sense of justifying judicial control of administrative action by judicial review. Furthermore, to suggest that a person may not exercise their acknowledged private law rights (which may themselves be contingent upon the continued existence of the behaviour that is criticised) without undertaking and discharging the burden of "invalidating" the offending act of the public authority seems to me to be grossly unfair, particularly if allied to the short time-limits of judicial review. I would not accept such a

denial of access to justice unless compelled to do so by binding authority. The Defendant has not identified any authority in either English or European jurisprudence that begins to justify such a conclusion.

53. The submission also seems to me to confuse the purposes of public law and the private law of torts. At one point the Defendant submitted that a longer limitation period for private law claims was unsatisfactory because, with a limitation period of six years, the state would "have to take account of the court's views which may be in several years' time." I do not shrink from that prospect; but what an adverse finding in a tort claim in several years' time will *not* do is "invalidate" the underlying act as it may be "invalidated" after a process of judicial review. If and to the extent that either the prospect or the reality of an adverse tort claim discourages a tortfeasor from repeating the conduct that is held to constitute a breach of duty or persuades him to change his approach to a particular issue, it will be serving its intended and beneficial function, whether the tortfeasor is a public body or a private individual. This consideration is not, in my judgment, weakened by the fact that (as is often the case) the Defendant in the present case is charged by s. 4(1) of the Railways Act 1993 with promoting improvements in railway service performance or otherwise protecting the interests of users of railway services or otherwise acting in the public interest."

30. Thereafter, the judge dealt with various other submissions and other authorities relied on by the appellant in respect of the private law claims, but reiterated his view that, not only was there no authority to support the appellant's case but that it was also contrary to binding authority.
31. The judge dealt much more briefly with the public law claims. His analysis started at [72]. As to those claims, the judge found that, although the 3-month time limit was the starting point, there was a question ([75]) as to whether and to what extent a claimant mounting a public law challenge against a later act or decision could refer to and rely upon alleged breaches of public law duties in an earlier act or decision which itself could have been the subject of a public law challenge. Having considered some of the authorities on that point the judge said:

"77. In the present proceedings, it appears to be at least arguable (for the purposes of the strikeout applications) that the principles laid down in *Burkett* and *Eisai* may have application in relation to the public law challenges now mounted by the Claimants against the decision to disqualify them from the franchise procurements. WCTP's skeleton argument puts the point succinctly for all Claimants. Its case is that it "complains here of a decision taken on the basis of a process which was itself unlawful.

78. The potential relevance of *Burkett* and *Eisai* was illustrated by Stagecoach in their oral submissions by reference to [30]-[60] of SSETL's Part 7 Particulars of Claim (which are, so far as I have been

able to tell, replicated by [34]-[64] of SSETL's Statement of Facts and Grounds). The pleading portrays the process leading up to the disqualification decision as an iterative and ongoing discussion which, despite the apparently hard-edged terms of the ITT and Re-bid instructions, rendered the process fluid and, in *Burkett* terms, uncertain. One aspect of this approach that Stagecoach emphasised in oral submissions is that SSETL pleads that it had submitted a first rebid in August 2018 which was not compliant, but which did not cause the Defendant to disqualify it.

79. I am not in a position to rule at all on the facts and the case being advanced by the Claimants save to say that the Defendant has not shown to the necessary standard for a strikeout that the Claimants' case discloses no reasonable grounds for relying upon the principles established in *Burkett* and *Eisai* or that the Claimants' prospects of success in relation to those principles are fanciful. In reaching this conclusion I have regard to the fact that, in a not-entirely settled area of the law, the final determination of the Court will be fact sensitive and that it is plain from the materials now before the Court that there is evidence (on both sides) that can reasonably be expected to be available at trial that is not available now.”

This passage gives rise to Ground 2 of the appeal.

32. Finally in his judgment, the judge dealt with whether or not it would be an abuse of process to use private law remedies to achieve the result that should properly be sought and, if appropriate, obtained by way of judicial review ([80]). This point, he said, applied to what he called the ‘cross-over’ remedies, namely the respondents’ claims for injunctions and declaratory relief. As to that separate issue, the judge’s conclusions are at paragraphs 86 and 87 as follows:

“86 However, the principle still stands that public law challenges to the validity of public acts, which are subject to the full force of the considerations outlined in *O’Reilly v Mackman* and [20] of *Trim* should be brought by judicial review and not otherwise. Once a degree of precision is introduced to discriminate between public law challenges and private law claims, this should pose no difficulty in practice. I would re-state the principle in [20] of *Trim* by saying that it would be an abuse of process to use private law remedies in an attempt to replicate the effect of a public law challenge that s. 31 requires to be brought by an application for judicial review without submitting to at least the substance of the judicial review procedure laid down by CPR Part 54 including, in particular CPR Part 54’s provisions as to time limits and permission. In the present case it may be said that the Court’s case management decision to stay the judicial review means that it is neither automatically nor necessarily an abuse of process to pursue a public law challenge in the Part 7 proceedings; but the general principle is clear and is aimed at preventing the use of private law remedies to try to replicate and in that sense bypass the

mandatory provisions of s. 31 and CPR Part 54 without submitting to the substance of the usual restraints of time limits and permission.

87 This does not mean that to include a claim for a declaration or an injunction as a private law remedy is necessarily or even probably an abuse of process in a case that engages both public law and private law rights and remedies. Two reasons support this conclusion. First, the cross-over remedies are discretionary and, provided their deployment is not merely an attempt to bypass s. 31 and CPR Part 54, may prove to be useful (or not) at the conclusion of a case, particularly when it is a case as complicated as the present one. Second, it is clear that one reason why the Claimants have, to a greater or lesser extent, pleaded the kitchen sink *and* issued both Part 7 and judicial review proceedings is to avoid just the sort of jurisdictional wrangling that has ensued: see *Clark v University of Lincolnshire and Humberside* [2000] 1 WLR 1988 at [27]-[37] per Lord Woolf MR.”

33. Thereafter, the remainder of the judgment consisted of the judge applying those principles to the individual claims before him. That led to the striking out of one or two of the various claims (which decisions are not challenged) but the retention of the vast bulk of the original pleadings, as analysed above. It is the judge’s refusal to strike out those component parts of the claims concerned with Decisions 1 and 2 which has led to the current appeal.

## **5. THE SCOPE OF THE APPEAL**

34. As I have said, the appeal seeks to challenge the judge’s judgment in two principal ways. First, (Ground 1), it is said that the judge was wrong to allow any claims to be heard which sought to impugn what the appellant called Decisions 1 and 2. As explained at paragraph 23 above, that submission does not turn on the relief being claimed: it is the appellant’s case that, whatever relief is sought, the respondents are bound to accept the lawfulness of Decisions 1 and 2.
35. If the appellant is right about that, then all of the respondents’ pleaded claims would be subject to the 3-month judicial review time limit. As noted at paragraph 31 above, the judge said at [78] that, even if that were the case, it can be difficult, in this sort of fluid process, to identify precisely when the 3-month time limit started to run. In my experience, that is an age-old problem in this sort of ongoing public law process. The judge concluded that, even if the 3-month time limit applied, he was not prepared to strike out the claims by reference to Decisions 1 and 2 until he had considered all of the evidence at trial.
36. It is the appellant’s case that he was wrong so to decide (Ground 2), and that the 3-month period was a black-and-white mechanism which had to be applied to each of Decisions 1 and 2, without any wider considerations. Accordingly, the second part of the appeal focuses on whether or not the appellant is right in that submission or whether the judge was entitled to exercise his discretion not to strike out the claim in respect of Decisions 1 and 2 until he had considered all the evidence.

37. I propose to deal with the Grounds of Appeal in the following way. In Section 6, I set out the different time limits applicable to different public procurement situations. In Section 7, in order to deal with Ground 1 of the appeal, I consider in detail the time limits applicable to the respondents' Part 7 claims. There is a summary of my views on Ground 1 in Section 8. In Section 9, I go on to consider Ground 2 of the appeal, and whether or not the judge was entitled to exercise his discretion not to strike out the public law claims, assuming that the 3-month time limit applied. There is a summary of my views on Ground 2 in Section 10. I am very grateful to all counsel for their submissions.

## **6. TIME LIMITS IN PUBLIC PROCUREMENT DISPUTES**

### **6.1 The Requirement for Rapidity**

38. Public procurement law derives from EU law. There is no doubt that the various EU Directives stress the need for rapidity in dealing with challenges to public procurement decisions.
39. So, by way of example, the important Directive 2007/66/EC refers at recital 2 to the need for "effective and rapid remedies" and Article 1 refers to the need for the review to take place "as rapidly as possible".
40. In addition, Regulation 1370/2007 (known as "the Railway Regulation", which eventually came into force between the appeal hearing and the preparation of this judgment following its original publication 12 years ago), refers at Article 5(7) to the need for Member States to ensure that decisions in respect of railway franchises were reviewed "effectively and rapidly". Despite the appellant's pleaded defences to the effect that the relevant provisions were not in force and so were of no application to the present case, the appellant relied on the Railway Regulation during the submissions of both Mr Thompson QC and Ms Howard.
41. This emphasis on rapidity is of course no more than common sense. If an unsuccessful bidder wishes to seek a review of a public procurement process or decision in order to challenge the lawfulness of the process whilst it is ongoing and/or to undo the result, then there is a clear need for a swift challenge and a prompt resolution. Otherwise, public procurement would grind to a halt, and contracts could not be let, whilst challenges to the underlying tender process took years to pass through the court systems of the Member States.
42. On the face of it, it might be thought that rather different considerations apply to claims for *Francovich* damages arising out of a public procurement dispute. A claim for damages assumes that the wrong has occurred and does not try and undo what has happened. Instead the claimant accepts what has been done and seeks compensation for it by way of damages. In those circumstances, it might be thought that there is not the same need for rapidity. That issue, however, lies at the heart of Ground 1.

### **6.2 The Public Contracts Regulations 2015 ("PCR")**

43. The need for speed in public procurement generally can be seen in the Procurement and Utilities Directives (2014/24/EU and 2014/25/EU) and the Remedies Directive (89/665/EEC, as amended by Directive 2007/66/EC). Those Directives were

implemented in the UK respectively in the PCR, the Utilities Contract Regulations 2016 (“the UCR”) and the Concession Contracts Regulations 2016 (“the CCR”).

44. The best-known UK authority about the need for rapidity under these Regulations generally is *Jobsin Co UK PLC v Department of Health* [2001] EWCA Civ 124, a decision of this court under an earlier iteration of the PCR. I deal with that case in some detail in paragraphs 124-126 below.
45. The speed required for public procurement challenges under the PCR/UCR/CCR should not be underestimated. Take the PCR as an example: regulation 92 (2) provides that proceedings under the PCR:

“... must be started within 30 days beginning with the date when the economic operator knew or ought to have known that grounds for starting the proceedings had arisen.”

In other words, any claim for an alleged breach under the PCR expires 30 days after the economic operator was first aware (or should have been aware) of the grounds of their claim. That is one third of the time prescribed for judicial review, itself the tightest time limit commonly applied in the UK courts, and can start to run despite the operator’s lack of actual knowledge that it had grounds for starting a claim.

46. It is important to emphasise three things about the PCR. First, proceedings under the PCR (and the UCR/CCR) encompass all claims (whether for damages, or injunctions to quash the competition, or orders to reinstate the claimant and prevent the contract being let to a third party), whether separately capable of categorisation as private or public law claims. In other words, the distinctions in the present case between public and private law rights and remedies simply do not arise under the PCR, UCR and CCR.
47. Secondly, any cause of action under the PCR, UCR and CCR arises very early. Regulation 91 (1) of the PCR makes plain that a breach is actionable “by any economic operator which, in consequence, suffers, or risks suffering, loss or damage”. The cause of action is therefore complete when there is a **risk** of suffering loss or damage. That is different to the date of accrual of a cause of action for judicial review, a distinction expressly made in *Jobsin*.
48. Thirdly, of course, there is the agreed fact that the PCR do not cover rail franchising procedures. That is because Regulation 10 (1(i)) of the PCR (and Regulation 21(1)(g) of the UCR and Regulation 10(4)(b) of the CCR) expressly exclude rail franchising procedures from those Regulations. I accept Ms Howard’s submission, on behalf of the appellant, that this can be traced back to the particular difficulties with rail franchises recognised in the Directives (the “distinctive features” of transport are referred to in Article 91 of the Treaty on the Functioning of the EU), and the different way in which such franchising procedures have been treated as a result. This may also explain why the Railway Regulation has taken 12 years to come into force.
49. But that point cannot be taken too far. I accept Mr Coppel QC’s submission that the absence of any express timetable for challenges and the like in domestic law (which could easily have been introduced, as noted in paragraph 52 below) is at least in part

because the appellant wishes to retain the maximum flexibility and control over the process.

### **6.3 The Railways Act**

50. Mr Thompson was at pains to point out that the appellant ran this competition and made his decisions under Section 26 of the Railways Act 1993. That provides:

“26. Invitations to tender for franchises

(1) Unless the Secretary of State otherwise directs, the person who is to be the franchisee under any franchise agreement shall be selected by the Franchising Director from among those who submit tenders in response to an invitation to tender under this section for the right to provide, or to secure that a wholly owned subsidiary provides, services for the carriage of passengers by railway under that franchise agreement.

(2) The Franchising Director shall prepare any such invitation to tender and shall issue that invitation to such persons as he may, after consultation with the Regulator, think fit.

(3) The Franchising Director shall not issue an invitation to tender under this section to (or entertain such a tender from) any person unless he is of the opinion that the person has, or is likely by the commencement of the franchise term to have, an appropriate financial position and managerial competence, and is otherwise a suitable person, to be the franchisee.”

51. Mr Thompson said that this gave the appellant a wide discretion, and so it does, but it is not my understanding that he was suggesting that the usual obligations (derived from EU law) as to transparency, fairness and equality were said not to apply to any decision under Section 26. They plainly do apply. Moreover, although Mr Thompson criticised the judge for not referring expressly to this provision, it does not seem to me that that is of any relevance to the appellant’s application to strike out, and therefore of no relevance to this appeal.
52. It would of course have been possible, even desirable, for the UK to implement domestic regulations in relation to rail franchise competitions, of the type set out in the PCR, the UCR and the CCR. It could simply have removed the express exclusions in the PCR/UCR/CCR, noted above. In the alternative, since the appellant has stressed the importance of the Railways Act, a clear timetable could have been introduced by way of amendment to that Act. But the UK has chosen not to do any of these things: as Ms Howard put it, “we have not done that because we did not have to”. But that has meant that the parties in the present case have been driven back to rules which are not specific to public procurement: what Mr Thompson called “the old law”<sup>2</sup>. What are the relevant ingredients of that?

### **6.4 Judicial Review**

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<sup>2</sup> It must follow that, in procurement cases, “the old law” is not considered to be as satisfactory or as clear as the PCR/UCR/CCR: if it were, there would have been no need for those Regulations.

53. Section 31 of the Senior Courts Act 1981 is concerned with applications for judicial review. It contains no mandatory time limits. However, Section 31(6) provides, in respect of “undue delay”:

“Where the High Court considers that there has been undue delay in making an application for judicial review, the court may refuse to grant –

(a) Leave for the making of the application; or

(b) Any relief sought on the application,  
If it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.”

54. The relevant procedural rules are set out in CPR Part 54. CPR 54.5 provides as follows:

“(A1) In this rule —  
'the planning acts' has the same meaning as in section 336 of the Town and Country Planning Act 1990 'decision governed by the Public Contracts Regulations 2015' means any decision the legality of which is or may be affected by a duty owed to an economic operator by virtue of regulations 89 or 90 of those Regulations (and for this purpose it does not matter that the claimant is not an economic operator); and 'economic operator' has the same meaning as in regulation 2(1) of the Public Contracts Regulations 2015.

(1) The claim form must be filed –

(a) promptly; and

(b) in any event not later than 3 months after the grounds to make the claim first arose.

(2) The time limits in this rule may not be extended by agreement between the parties...

(6) Where the application for judicial review relates to a decision governed by the Public Contracts Regulations 2015, the claim form must be filed within the time within which an economic operator would have been required by regulation 92(2) of those Regulations (and disregarding the rest of that regulation) to start any proceedings under those Regulations in respect of that decision.”

55. It is important to note that the 3-month period in r.54.5(1)(b) is not set in stone: the court can, in an appropriate case, extend that period by reference to CPR 3.1(2)(a). That is explained in greater detail in the notes in Volume 1 of the White Book 2019 at paragraph 54.5.1 and the cases there cited.

56. Accordingly, in general terms, Section 31 of the Act and CPR Part 54 operate together to ensure that challenges to public acts or omissions are brought promptly and are subject to a relatively quick procedure in order to strike the necessary balance between the needs of administrative efficiency, on the one hand, and the requirement that a public law challenge can be brought effectively, on the other. But it is noticeable that this period is longer than the 30 days set out in the PCR and does not encompass the ‘risk of harm’ test noted in paragraph 47 above.
57. Before leaving Part 54, one further point should be made. CPR 54.2 states that “the judicial review procedure **must** be used in a claim for judicial review where the claimant is seeking, amongst other things, a mandatory order or a prohibiting order or a quashing order” (my emphasis)’. On the other hand, r.54.3 provides that “the judicial review procedure **may** be used in a claim for judicial review where the claimant is seeking (a) a declaration or (b) an injunction” (my emphasis)’. In other words, the judicial review procedure is only mandatory in certain limited respects: it is a procedure which **may** be used for declarations or injunctions or, pursuant to r.54.3(2), a claim for damages. It therefore follows that, in general terms, the Part 7 procedure may also be used, not only for damages claims, but for claims where the claimant is seeking a declaration or an injunction.

### **6.5 Other Relevant Time Limits**

58. Sections 2 and 5 of the Limitation Act 1980 provide that the limitation period for an action founded on tort or contract respectively is 6 years. Of course, the accrual date for such claims may be different: in contract, the cause of action accrues at the date of the breach, whilst the cause of action in tort does not crystallise until damage has been suffered. Thus if a claim arising from the same facts can be put in both contract and tort, the claim in contract may be statute-barred, but the action will not necessarily be struck out if there is an alternative claim in tort (even if it arises from the same facts and matters) because that claim accrues later, and may not be statute-barred: see *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp* [1979] Ch 384 and *Pirelli General Cable Works Ltd v Oscar Faber & Partners* [1983] 2 AC 1.

## **7. GROUND 1: THE APPLICABLE TIME LIMITS IN RESPECT OF THE RESPONDENTS’ PART 7 CLAIMS**

### **7.1 General**

59. The application before the judge, and therefore this appeal, is concerned solely with the respondents’ Part 7 claims. It is not concerned with the claims for judicial review, which have themselves been stayed. On the face of it, therefore, save by analogy, CPR Part 54 (and in particular r.54.5) is irrelevant.
60. I set out the applicable law in Section 7.2 below. Thereafter (contrary to the appellant’s approach), I consider that it is helpful to look at the individual types of relief claimed by the respondents to analyse their different characteristics. This is because potentially different considerations may apply to a claim for damages on the one hand (Section 7.3 below), and the claims for what the judge called ‘cross-over relief’ (declarations and injunctions) on the other (Section 7.4 below).

61. I note that this was the approach adopted by this court as long ago as *Davy v Spelthorne BC* [1983] 81 LGR 580 (and not overturned by the House of Lords at [1984] AC 262). Although Mr Ward suggested that *Davy* would be decided differently today, he did not elaborate on that submission and I do not accept it. I regard *Davy* as simply an example of the working-out of a practical solution, on the particular facts of that case, to the potential conflict between public and private law rights.

## 7.2 The Law

62. The parties cited numerous authorities to this court in their written submissions and at the hearing of the appeal. In my view it is unnecessary and unhelpful to set out all of them. The principal strand of authorities which is relevant to this appeal concerns what is sometimes called ‘procedural exclusivity’. That is because the appellant submits that any claim based on a challenge to a public law decision is or requires a judicial review claim and therefore the exclusive province of CPR Part 54 (and thus the 3-month time limit).
63. The starting point is *O’Reilly v Mackman* [1983] 2 AC 237. In that case, four prisoners sought to bring private law claims against the board of visitors of Hull Prison rather than pursue what was described as their “only proper remedy” which was by way of judicial review. Lord Diplock set out at page 284 his view that the claimants had sought to evade the procedural safeguards and the discretionary nature of the remedies available by way of judicial review (offered by what is now Part 54) by making “groundless, unmeritorious or tardy harassment” claims. He said at page 285:

“Now that those disadvantages to applicants have been removed and all remedies for infringements of rights protected by public law can be obtained upon an application for judicial review, as can also remedies for infringements of rights under private law if such infringements should also be involved, it would in my view as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of Order 53 for the protection of such authorities.

My Lords, I have described this as a general rule; for though it may normally be appropriate to apply it by the summary process of striking out the action, there may be exceptions, particularly where the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law, or where none of the parties objects to the adoption of the procedure by writ or originating summons. Whether there should be other exceptions should, in my view, at this stage in the development of procedural public law, be left to be decided on a case to case basis — a process that your Lordships will be continuing in the next case in which judgment is to be delivered today [*Cocks v. Thanet District Council* [1983] 2 A.C. 286].”

64. *Cocks* was a case in which the claimant said that the defendant was in breach of its duty to house him permanently under the Housing (Homeless Persons) Act 1977. Again, that claim was advanced by way of an injunction and damages, rather than as a claim for judicial review of the decision not to house him. Lord Bridge said:
- “... But it is inherent in the scheme of the Act that an appropriate public law decision of the housing authority is a condition precedent to the establishment of the private law duty.”
65. In those two cases, the private law claims were found to be an abuse of process because what was at issue was solely the validity of the public law decision (which in both cases the claimants wished to undo). They can perhaps be regarded as the high-water mark of procedural exclusivity. The remainder of the authorities on this topic represent a retreat from such a black-letter law approach, either by way of a greater emphasis on the exceptions expressly identified by Lord Diplock in *O’Reilly v Mackman*, or by way of distinguishing these two cases on an increasingly wide number of grounds. So for example:
- a) In *Davy v Spelthorne Borough Council*, a planning case with a challenge to an enforcement notice and a claim for damages, the Court of Appeal decided that “the claims for relief must be considered separately”. The claims for an injunction were held to be a remedy operating in the field of public law and should have been brought by way of judicial review. The claim for damages was said to be a private law claim and was not subject to the same rule.
  - b) In *Roy v Kensington and Chelsea & Westminster Family Practitioner Committee* [1992] 1 AC 624 Lord Bridge himself modified the general rule in these terms:

“It is appropriate that an issue which depends exclusively on the existence of a purely public law right should be determined in judicial review proceedings and not otherwise. But where a litigant asserts his entitlement to a subsisting right in private law, whether by way of claim or defence, the circumstance that the existence and extent of the private right asserted may incidentally involve the examination of a public law issue cannot prevent the litigant from seeking to establish his right by action commenced by writ or originating summons...”
66. The trend against what has been called the ‘rigid’ rule in *O’Reilly v Mackman* can be seen in the judgment of Lord Woolf MR in *Trustees of the Denis Rye Pension Fund and Another v Sheffield City Council* [1998] 1 WLR 840, particularly at page 848, and in *Boddington v British Transport Police* [1999] 2 AC 143, Lord Steyn observed:
- “The *general* rule of procedural exclusivity judicially created in *O’Reilly v. Mackman* [1983] 2 A.C. 237 was at its birth recognized to be subject to exceptions, notably (but not restricted to the case) where the invalidity of the decision arises as a collateral matter in a claim for infringement of private rights. The purpose of the rule was stated to be prevention of an abuse of the process of the court, and that purpose is of prime importance in determining the reach of the general rule: compare *Mercury Communications Ltd. v Director General of*

*Telecommunications* [1996] 1 W.L.R. 48, 57e, per Lord Slynn of Hadley. Since *O'Reilly v Mackman* decisions of the House of Lords have made clear that the primary focus of the rule of procedural exclusivity is situations in which an individual's sole aim was to challenge a public law act or decision. It does not apply in a civil case when an individual seeks to establish private law rights which cannot be determined without an examination of the validity of a public law decision. Nor does it apply where a defendant in a civil case simply seeks to defend himself by questioning the validity of a public law decision. These propositions are established in the context of civil cases by four decisions of the House of Lords: *Roy v Kensington Family Practitioner Committee* [1992] 1 A.C. 624; *Chief Adjudication Officer v Foster* [1993] A.C. 754; *Wandsworth London Borough Council v Winder* [1985] A.C. 461 and in particular at pp. 509–510, per Lord Fraser of Tullybelton; *Mercury Communications Ltd v Director General of Telecommunications* [1996] 1 W.L.R. 48 and in at p.57b–e, per Lord Slynn of Hadley.”

67. In similar vein, in *Trim v North Dorset District Council* [2011] 1 WLR 1901, CA, Carnwath LJ (as he then was) said of *O'Reilly v Mackman*:

“Subsequent experience has shown that a clear division between public and private law is often difficult to maintain, and the rigidity of the rule has had to be relaxed accordingly. *Wade & Forsyth, Administrative Law*, 10th ed (2007), pp 570–581 gives a valuable description of this evolutionary process, leading to the emergence of “signs of liberality”, and to some abatement of the “rigours of exclusivity” under the new Civil Procedure Rules. A particular area of difficulty was in relation to private law disputes involving public authorities, for example employment and contractual relations: p 572. In *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee* [1992] 1 AC 624, the scope for relaxation of the rule was acknowledged by the House of Lords, when they accepted that private law rights could be enforced by civil action, even though they might involve a challenge to a public law decision or action.”

68. There are also a number of authorities dealing directly with the procedural position in a *Francovich* damages claim arising out of a public law decision. In the best-known, *Phonographic Performance Ltd v Department of Trade and Industry* [2004] EWHC 1795 (Ch) (“PPL”), the claimant sought to issue proceedings for *Francovich* damages and declaratory relief on the basis that the UK was in breach of its obligations under EU law. The defendant said that the claim was inherently a public law claim and should be pursued by way of judicial review, inviting the court to strike out the Part 7 claim as an abuse of process.
69. The defendant's arguments were rejected by Sir Andrew Morritt V-C who said:

“36. Each side accepts that this claim could have been brought by an application for judicial review or by ordinary action; they differ in the appropriateness of one type of proceeding over another. In my

view it was to just this situation that the judgments of Lord Woolf and Sedley LJ in *Clark* were directed. I conclude that the jurisdiction to which they referred exists where the remedies both of judicial review and of ordinary action are available. The choice of either may be an abuse of the process. How to exercise that jurisdiction will depend on all the relevant circumstances including matters occurring before the proceedings were instituted and which remedy is in the circumstances the more appropriate...

47. I start with a consideration of the nature of the proceedings. The decision of the Divisional Court in *Factortame V* to which I have referred in paragraph 12 was considered by the Court of Appeal ([1998] EuLR 456) and the House of Lords ([2000] 1 AC 524), but not with regard to the claim for exemplary damages which had been abandoned. In both those courts there was clear recognition that the effect of *Francovich* and subsequent cases was to subject Member States to an obligation under Community Law to compensate individuals who have sustained consequential loss if they satisfy the conditions identified by the ECJ in those cases. Such an obligation gives rise to a correlative right in one who has suffered such damage. Such a right is not discretionary.

48. Nor in my view can such a right be categorised as a public law right even though the Crown's obligations under Community Law and how to discharge them fall to be considered. As in the context of the Limitation Act, the remedy is for damages for breach of a statutory duty arising under Article 8.2 of the Rental Directive and s. 2(2) European Communities Act. This is recognised by the relief sought in the form of a declaration and damages. Counsel for PPL accepted that a declaration was a discretionary remedy but offered to abandon it if that mattered.

49. Neither party referred me to the provisions of CPR Part 54. Nevertheless it appears to me that though the nature of the proceedings might fall within the definition of a claim for judicial review in Rule 54.1(2)(a) if the claim for a declaration is abandoned it would be excluded by Rule 54.3(2). I do not suggest that the form of the proceedings can govern their substance but, to my mind, this confirms the view that the proceedings are essentially private law proceedings which can and prima facie should be brought by an ordinary claim."

70. Similarly, in *Delaney v Secretary of State for Transport* [2015] 1 WLR 577, the claimant's original claim failed because the MIB agreement excluded liability where the "vehicle was being used in the course or furtherance of a crime". The claimant then sued the Secretary of State for *Francovich* damages on the basis that this exclusion was incompatible with the applicable EU Directive and that therefore the UK was in breach of EU law. The trial judge found in favour of the claimant and the Secretary of State's appeal was dismissed. Although the whole case turned on whether the exclusion was compatible with the Directive (and of course, if it was not,

the public law decision to permit the incompatible exclusion was a breach of EU law), this was found to be a *Francovich* damages claim and there was no question of the application of the 3-month judicial review time limit.

71. Accordingly, I consider that there is ample authority for the proposition that a private law claim for damages arising out of the decision of a public body or authority will not automatically be categorised as a “purely public law act” (as it was called in *Trim*) in order to activate the vastly truncated limitation period applicable to judicial review. That conclusion is unchanged by the Irish case of *Express Bus Ltd v National Transport Authority* [2018] IECA 236, a case referred to in the appellant’s latest skeleton argument but not in Mr Thompson’s oral submissions. As counsel for the respondents were quick to point out, that was a case about a different legal regime which was not obliged to (and did not) have regard to any of the principles or binding authorities to which I have referred in this sub-section of the judgment. Although on one view it might be regarded as inconsistent with the authorities noted above (such as *Boddington*), it is unnecessary for me to say any more about it<sup>3</sup>.

### **7.3 The Claims for Damages**

#### *7.3.1 The Legal Basis of the Respondents’ Claims*

72. It appears to be common ground that the respondents’ claims for damages arise under Section 2(1) of the European Communities Act 1972 (“ECA”) for breach of EU law duties. That is a claim in tort for breach of statutory duty: see *PPL* at paragraphs 11-12 and *Energy Solutions v NDA* [2017] 1 WLR 1373 at paragraph 38. Arriva have an alternative claim for breach of an implied contract.
73. Claims for breach of statutory duty are subject to the 6-year limitation period noted in Section 2 of the Limitation Act 1980: see *PPL* at paragraphs 12-13 and 23, and *ex parte Factortame Ltd (No 7)* [2001] 1 WLR 942 at paragraphs 143-158. Claims for breach of contract also have a 6-year limitation period pursuant to Section 5 of the Limitation Act.
74. It is of course right that claims for damages in these circumstances are subject to what can conveniently be called the *Francovich* conditions, as recently articulated by the Supreme Court in *Energy Solutions*, namely that:

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<sup>3</sup> For completeness, I should also mention the decision of this court in *Stancliffe Stone Company Limited v Peake District National Park Authority* [2005] EWCA Civ 747. This was a planning dispute concerned with whether, as a matter of construction, a letter from the planning authority granted a single planning permission or four separate planning permissions. Mr Thompson made a number of references to this case during his oral submissions although he did not take us to the judgments. Having re-read it, I am of the view that this case identifies no principle relevant to the present appeal and I have not found it of any assistance in resolving any of the issues before this court.

- (1) The rule of law infringed must be intended to confer rights on individuals;
- (2) The breach must be sufficiently serious;
- (3) There must be a direct causal link between the breach of the obligations and the damage sustained by the injured party.

Nonetheless, the mere fact that the claim for damages is circumscribed in this way cannot affect the relevant time limits, nor does the appellant suggest otherwise.

75. On the face of it, therefore, claims for damages arising out of the appellant's alleged breach of statutory duty have a limitation period of 6 years. That is what the judge found. So the critical question is whether there is a reason of principle or a rule of law, or some strand of authority, which suggests a different answer. For the separate and cumulative reasons explained below, I am in no doubt that the answer to this question is in the negative.

### *7.3.2 The False Premise Underlying The Appellant's Submissions*

76. In my view, there is a false premise at the heart of the appellant's submissions. Once it is identified and understood, much of the debate on Ground 1 of this appeal falls away.
77. It is the appellant's case that the respondents' claims for damages must be viewed as arising only in consequence of their challenge to Decisions 1,2 and 3. The argument is that, whatever relief is sought, the underlying claim is a challenge to the decisions of a public body, and therefore a public law challenge.
78. In my view, that analysis is misconceived. A private law claim under Section 2 of the ECA is not a claim based directly on a challenge to the underlying decision. A claim for damages is not an attempt to undo the event which gives rise to the damages: as noted in paragraph 42 above, a claim for damages accepts that the breach has occurred and seeks compensation for its consequences. It is not a public law challenge which necessitates the commencement of judicial review proceedings.
79. Mr Thompson repeatedly submitted that the respondents "want to set aside Decision 1 and Decision 2". On my analysis of their pleaded cases in these Part 7 proceedings, the respondents do not want to do any such thing: for each of them, their primary claim is a claim for damages as a consequence of a decision they accept that they cannot change.
80. This difference can be neatly illustrated by one of the many older cases relied on by Mr Thompson, *Mercury Energy Ltd v Electricity Corporation of New Zealand* [1994] 1 WLR 521. In that Privy Council case, Lord Templeman described judicial review as involving "interference by the court with a decision made by a person or body empowered by parliament or the governing law to reach that decision in the public interest". But that is precisely what a claim for *Francovich* damages is not seeking to do: such a claim does not seek to interfere with, much less undo, the underlying decision. It is instead a claim for damages by reason of the unlawfulness of that decision. It is therefore a very different sort of claim.

81. This distinction can also be directly related to the public procurement field. There are numerous cases where an unsuccessful bidder has sought to prevent the lifting of the suspension which otherwise prevents the contracting authority from entering into a contract with the successful bidder. The rules which apply to such debates are derived from *American Cyanamid Co v Ethicon Ltd* [1975] AC 396. Very often, because the court will decide that the balance of convenience favours the completion of the contract with the successful bidder, or because damages are seen as an adequate remedy for the unsuccessful bidder, the court will lift the suspension and the contracting authority will be free to enter into the contract. But in so doing the court will not have reached any conclusions on the merits of the underlying decision, and that is by no means the end of the unsuccessful bidder's action. That then proceeds as a claim for *Francovich* damages.
82. Perhaps the best-known example of that process is *Energy Solutions*, a case which, on some aspects of the procurement, went all the way to the Supreme Court. The claimant sought damages (and the case was ultimately settled by the payment of a substantial sum to the claimant) pursuant to its *Francovich* claim. The time for setting aside the underlying public procurement decision had long passed, but that did not and could not prevent the making of the damages claim.
83. Late on in this appeal, by way of the supplemental skeleton argument (and paragraphs 27-28 in particular), the appellant suggested that a claim for damages in this situation could only be permitted if it was not accompanied by any other sort of claim. I reject that submission. That was not the case in *Energy Solutions*, at least when that action first started. It was not the case in *AG Quidnet v LB Hounslow* [2013] P.T.S.R. 828, a procurement case where the claims were for damages and a declaration. In other areas of law, it has not been the case either: for example, in *Bloomsbury International Ltd v Sea Fish Industry Association* [2009] EWHC 1721 (QB), a case relied on by the appellant, a claim for restitution was permitted as well as a claim for damages.
84. Part of Mr Thompson's argument to support this late submission was to suggest that injunctions and declarations were what he called "Administrative Court remedies" and that this somehow distinguished them (either as a matter of law or as a matter of procedure) from other sorts of claim. That is wrong: I have referred at paragraph 55 above to CPR 54.3 which makes plain that claims for injunctions and declarations "may" be brought by way of judicial review and, therefore, may instead be brought by way of Part 7 proceedings. Just because they are discretionary remedies does not make them the exclusive province of judicial review.
85. Another feature of Mr Thompson's underlying submission was to point out that no loss was pleaded by any of the respondents arising out of Decisions 1 and 2, and that therefore the damages claim was confined to Decision 3. In my view that is too simplistic. It overlooks the respondents' detailed pleadings as to the way in which Decisions 1 and 2 crystallised in Decision 3. Furthermore, it is perhaps unsurprising that the respondents had not suffered a loss at the time of Decisions 1 and 2; on one view, the loss only arose when then they were disqualified from the competition. Hence it is Decision 3 that is the principal trigger for the damages claim, and not Decisions 1 and 2. Of course, the position might have been different if the PCR had applied because, there, the cause of action accrued on the risk of harm.

86. Accordingly, I conclude that the appellant is wrong in principle to say that a claim for damages in these circumstances requires, as some sort of condition precedent, the pursuit of a claim for judicial review, or that, in making these claims for damages, the respondents are seeking to overturn or undo Decisions 1 and 2. That submission is based on a false premise and a misunderstanding of the law, and amounted to a fundamental flaw in the appellant's strike out application.

### 7.3.3 Equivalence

87. It was not entirely clear whether the appellant was advancing a formal equivalence argument – that Section 2 of the Limitation Act had to be modified to provide an equivalent procedural time limit to that envisaged in the EU Procurement Directives – or whether it was a looser submission that sought to incorporate the 3-month judicial review time limit by way of analogy. However, in my view, both ways of putting the point are incorrect.
88. First, I do not consider that an equivalence argument is open to the appellant as a matter of law. An EU citizen can rely on the general principle of equivalence: for a domestic example, see *Byrne v Motor Insurers' Bureau and Another* [2008] EWCA Civ 574; [2009] QB 66. There Flaux J found (and the Court of Appeal agreed) that the aim of the relevant EU Directive would not be adequately achieved unless the victim of an uninsured driver could obtain protection from the MIB equivalent to the protection that he would have obtained in the national court if he had brought a claim in tort against an insured driver. Because the MIB agreement did not provide that equivalent protection (in particular, it failed to provide for a mechanism to suspend the limitation period in cases involving minors) the principle of equivalence applied. But the principle does not work the other way: the State cannot shorten a statutory time limit against an individual in the way advocated by the appellant. The appellant does not enjoy the same rights as an individual.
89. In any event, I do not consider that the appellant can seek to use the principle of equivalence to argue that the 6-year period is *too long*, particularly in circumstances where the respondents (who are the claimants) do not seek any adjustment of the period. The judge made this point at [59]-[61] of his judgment. He considered *Matra Communications S.A.S v Home Office* [1999] 3 All ER 562, where the Court of Appeal concluded that there was no suitable comparator that was sufficiently similar to a claim under the PCR as to require the time limit laid down by the PCR to be overruled. As the judge rightly noted, that situation is not analogous to the present case, “where no question of revising a short statutory time limit by reference to the principle of equivalence arises, since none has been enacted for the relevant private law claims”.
90. I should add that, to the extent that the appellant sought to rely on the 30-day period in the PCR for this part of the argument, there can be no equivalence argument in respect of that particular timetable, because it has deliberately not been introduced to apply to railway franchising competitions (see paragraphs 48-49 and 52 above) and because the time limit is just a part of a whole package of provisions in the PCR (with a very early accrual date for the cause of action, by reference to risk of harm) which do not arise here. I do not consider that the appellant can cherry-pick parts of the PCR to support an equivalence argument.

91. As for any looser analogy with judicial review, the authorities set out in sub-section 7.2 above demonstrate that whether or not that time limit applies will depend on the nature of the underlying claim. I am dealing in this part of my judgment with a claim for *Francovich* damages. That is a private law claim which, as I have explained, is not a challenge to, and does not seek to undo, a public law decision. It has no applicable timetable other than the 6 years in the Limitation Act. There is therefore no analogy and no legitimate basis to shorten the statutory period (see also paragraph 95 below).

#### 7.3.4 Effectiveness

92. The appellant alternatively complains that the judge's decision that the claim for damages is subject to the ordinary limitation period fails to ensure the effectiveness of the EU public procurement regime. There are a number of answers to that.
93. First, for the reasons set out above, the reason why these claims fall outside the ordinary procurement regime is because the UK government has chosen to exempt railway competitions from the PCR, and has not brought forward any other legislation setting out some sort of specific timetable for railway franchise competitions. The judge was therefore obliged to apply the law as it is in the light of that omission.
94. Secondly, again for the reasons already stated, the EU public procurement regime is aimed at challenges to the validity of the decision of the public body which seek to affect or change the decision itself. It is not aimed at claims for damages.
95. Thirdly, the argument that, in order to further the principle of effectiveness, the courts should apply a shortened limitation period is missing a critical component. Even under EU law, statutory time limits (such as that in the Limitation Act 1980) can only conceivably be reduced if there was a "judicially determined practice" that was sufficiently foreseeable to the economic operator: see *Case 201/10 Ze Fu Fleischhandel and Vion Trading* [2011] CMLR 11 at [29] - [34], as explained by this court in *FMX Food Merchants Import Export Co Limited v HMRC* [2018] EWCA Civ 2401 at [42].
96. In the present case, it has never been suggested that the 6-year period should, in these sorts of circumstances, be shortened, and/or that there is a clear judicial practice to that effect. No authority in support of those propositions was cited. Indeed, I consider that the contrary is correct: for example, in *AG Quidnet* at [87], it was found in the procurement context that the breach of statutory duty occurred when a final decision was taken and that there was then a limitation period of 6 years. No other, shorter period has been "judicially determined" or could be said to be foreseeable.

#### 7.3.5 Procedural Exclusivity and 'Inextricably Mixed' Claims

97. In my view, the procedural exclusivity argument – which underpins Ground 1 of this appeal - does not apply to the damages claim in this case; indeed, an application of the principles set out in Section 7.2 above explains why the application to strike out the claim for damages on this basis was doomed to fail. First, what is in issue are not "purely" public law rights (*Trim*); even putting the appellant's submission at its highest, this is a case "where private law rights could be enforced by civil action

even though they might involve a challenge to a public law decision or action” (*Roy*, as described by Carnwath LJ in *Trim*).

98. Secondly, I consider that, from *Boddington* onwards, there is a clear line of authority to the effect that, procedural exclusivity “does not apply in a civil case when an individual seeks to establish private law rights which cannot be determined without an examination of the validity of a public law decision”. In this way, the mere fact that the act of a public body has not been challenged within three months does not mean that it is exempt from any challenge at all. *PPL* is one example; *Delaney*, *Bloomsbury* and *Recall Support Services Ltd v Secretary of State for Culture, Media and Sport* [2014] 2 CMLR 2 are others<sup>4</sup>. Accordingly, I regard it as wrong in principle to suggest that a claim for damages cannot be based on a public law decision which was not challenged within 3 months.
99. But thirdly and in any event, there is specific authority for the common sense proposition that, where claims for damages are ‘inextricably mixed’ with public law issues, the judicial review period will not apply. Perhaps the best example of this is *An Bord Baine Co-Operative Ltd v Milk Marketing Board* [1984] 2 CMLR 584. In that case, the Irish Dairy Board sought damages and an injunction to restrain the Milk Marketing Board from selling at different prices milk for making butter, according to whether the butter was to be sold to an intervention agency or into the UK domestic market.
100. Sir John Donaldson MR referred to *Davy v Spelthorne* in the Court of Appeal as authority for the proposition that the mere fact that there are claims in public law and claims in private law does not of itself mean that all the claims must be allowed to stand, or that all must be struck out. He then went on to say:

“15. Against this background we can express our reasons for dismissing the appeal in a very few words. The Irish Dairy Board's claim for damages is admittedly based upon alleged private law rights whether or not it is also based upon public law rights. If it can make good its case on the facts and the private law, the court will have no discretion whether or not to grant relief. The Order 53 procedure is wholly inappropriate to any non-discretionary claim and the prosecution of such a claim by the procedure of an action is in no way an abuse, or as we prefer to style it 'a misuse', of the process of the court. It is a completely proper use of that process. The claim for an injunction does indeed enable the court to exercise a discretion, but only as to the choice of remedy, *i.e.* damages or injunction, not as to granting any remedy at all. Although the plaintiffs would, if necessary, have contended that there are no public law issues, we assume for present purposes that Neill J. was right to reject this contention. However, we can see no way in which they can be severed from the private law issues and, if they can, we do not think

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<sup>4</sup> Although I accept that there are important factual differences between this case and *Recall*, I note that at [220] Rose J (as she then was) accepted the submission that “the case law shows that a person who is adversely affected by a breach of EU law is not required to challenge the illegality of the measure in proceedings before the national court before bringing a claim for *Francovich* damages.”

that they should be. As it was put in argument, the public and private law issues were not even collateral one to another. They are inextricably mixed— 'homogenised' is the term which springs to mind in the context of the subject matter of the dispute.”

101. I regard that reasoning as directly applicable to the present case. It would be nonsensical to hobble the respondents' claims for damages, which are themselves based on a single overall tender process, by ruling that there are some elements of that process which they can dispute (such as Decision 3), and other elements which – even in respect of their claims for *Francovich* damages - they are bound to accept (such as Decisions 1 and 2). That would be an unjust result, because the issues and claims are inextricably mixed. The private law claim for damages must be allowed to continue in the ways in which the respondents have pleaded: anything else would be contrary to the interests of justice.
102. That same result follows by reference to the reasoning of Sir Andrew Morritt V-C in *PPL* (see paragraph 69 above) which, on this point, is indistinguishable from the present case. Indeed, the judge said about *PPL*:

“68. I should follow the decision of the Vice-Chancellor unless I were convinced that he was wrong, which I am not. On the contrary, I respectfully agree with his reasoning and the result, both of which were substantially endorsed in *Energy Solutions*. It reinforces my view that the Defendant is wrong in his submissions to characterise the Claimants' private law claims as “quintessentially a public law claim.” When pressed by the Court to explain what this phrase meant, the Defendant's answer was that: “all the obligations on which the claimants rely, apart from the implied contract, are in substance binding on the Secretary of State as a public body performing the role that that public body is required to perform under Regulation 1370.” In failing to recognise that the same source of rights and obligations may give rise to separate causes of action in private law and public law respectively, I consider that the Defendant in the present case has fallen into error that goes to the heart of his submissions on these applications.”

I consider that that analysis is sound and provides an unanswerable rejection of the appellant's contentions on Ground 1.

103. Standing back for a moment, I should add that the proposition that the issues and claims in this case are inextricably mixed is supported by an analysis of the strike out application itself. When the court was taken to the original applications, towards the end of the second day of the appeal, it became apparent that, unlike most conventional applications to strike out, these applications did not identify particular paragraphs, either of the body of the individual Particulars of Claim, or the prayer. Instead, the application was related to subject matter.
104. Accordingly, if the application had been successful, it would then have been necessary for the parties (and, in case of dispute, the judge) to go through each of the lengthy Particulars of Claim, identifying, phrase by phrase and line by line, what parts stayed and what parts had to be deleted. That is an extremely unusual approach

to a strike out application. In my view, it was the only approach open to the appellant in this case because the claims and issues are so inextricably mixed that they could not be properly or cleanly untangled. That only confirms my view that the respondents' damages claim was not an appropriate case for a strike out.

#### **7.4 The Claims For Cross-Over Relief**

105. That leaves the respondents' claims for what the judge called 'cross-over relief', namely the claims for declaratory relief and/or injunctions. In respect of these, the judge had in mind that potentially different considerations might apply. In particular, a claim for an injunction, if it was aimed at seeking to undo the public law decision, may very well be an abuse of process if it was commenced outside the 3-month limit, particularly if the court concluded that the claim was being made in order to circumvent that strict timetable. The judge's conclusions to that effect are at [86]-[87], set out at paragraph 32 above.

106. I consider that the correct approach to the cross-over relief is set out in *Clark v University of Lincolnshire and Humberside* [2000] 1 WLR 1988, where Sedley LJ explained that this was ultimately a matter of case management, saying at 1994 B-D:

“...as Lord Woolf M.R.... explains in his judgment, the CPR now enable the court to prevent the unfair exploitation of the longer limitation period for civil suits without resorting to a rigid exclusionary rule capable of doing equal and opposite injustice. Just as on a judicial review application the court may enlarge time if justice so requires, in a civil suit it may now intervene, notwithstanding the currency of the limitation period, if the entirety of circumstances – including of course the availability of judicial review – demonstrates that the court's processes are being misused, or if it is clear that because of the lapse of time or other circumstances no worthwhile relief can be expected.”

107. In the same case, Lord Woolf said:

“34. The courts approach to what is an abuse of process has to be considered today in the light of the changes brought about by the CPR. Those changes include a requirement that a party to proceedings should behave reasonably both before and after they have commenced proceedings. Parties are now under an obligation to help the court further the over-riding objectives which include ensuring that cases are dealt with expeditiously and fairly (CPR 1.1(2)(d) and 1.3). They should not allow the choice of procedure to achieve procedural advantages. The CPR are as Part 1.1(1) states a new procedural code. Parliament recognised that the CPR would fundamentally change the approach to the manner in which litigation would be required to be conducted. That is why the Civil Procedure Act 1997 (Section 4(1) and (2) ) gives the Lord Chancellor a very wide power to amend, repeal or revoke any enactment to the extent he considers necessary or desirable in consequence of the CPR.

35. While in the past, it would not be appropriate to look at delay of a party commencing proceedings other than by judicial review within the limitation period in deciding whether the proceedings are abusive this is no longer the position. While to commence proceedings within a limitation period is not in itself an abuse, delay in commencing proceedings is a factor which can be taken into account in deciding whether the proceedings are abusive. If proceedings of a type which would normally be brought by judicial review are instead brought by bringing an ordinary claim, the court in deciding whether the commencement of the proceedings is an abuse of process can take into account whether there has been unjustified delay in initiating the proceedings...

38. Where a student has, as here, a claim in contract, the court will not strike out a claim which could more appropriately be made under Order 53 solely because of the procedure which has been adopted. It may however do so, if it comes to the conclusion that in all the circumstances, including the delay in initiating the proceedings, there has been an abuse of the process of the court under the CPR. The same approach will be adopted on an application under Part 24.

39. The emphasis can therefore be said to have changed since *O'Reilly v Mackman*. What is likely to be important when proceedings are not brought by a student against a new university under Order 53, will not be whether the right procedure has been adopted but whether the protection provided by Order 53 has been flouted in circumstances which are inconsistent with the proceedings being able to be conducted justly in accordance with the general principles contained in Part 1. Those principles are now central to determining what is due process. A visitor is not required to entertain a complaint when there has been undue delay and a court in the absence of a visitor should exercise its jurisdiction in a similar way. The courts are far from being the ideal forum in which to resolve the great majority of disputes between a student and his or her university. The courts should be vigilant to ensure their procedures are not misused. The courts must be equally vigilant to discourage summary applications which have no real prospect of success.”

108. On this basis, in respect of claims for cross-over remedies, where there is a debate about whether or not they are an abuse of the process, what matters is “all the circumstances” of the case. The CPR allow the court to be flexible when considering this test, and Lord Woolf obviously had in mind that, in most cases, the issue could be dealt with at an interlocutory hearing. But there will be cases where the complexity – the interleaving of the factual issues – is such that the judge is unable to do justice as between the parties without considering the issue by reference to the evidence at trial. Since in the present case the judge will be considering that evidence anyway (as a result of the claim for *Francovich* damages) there can be no difficulty or prejudice in the judge’s decision to consider this issue, in the context of any cross-over relief, as part of the trial.

109. In respect of the claims for injunctions, however, I would wish to emphasise one point. In the present case, following the amendments, most of the injunctions that were originally sought by the respondents in the Part 7 proceedings have been deleted. That seems to me to be wise because, for the reasons that I have given, a claim for an injunction which seeks to set aside the underlying public law decision is a very different thing to a claim for *Francovich* damages. If I were the trial judge in this sort of situation, I would take some convincing that the 3-month period did not apply to claims for such injunctions (subject of course to any extension of time under r.3.1(2)(a)).
110. But there remain pleaded claims for injunctions by all the respondents except Arriva. WCTP claim injunctions requiring the appellant “to revoke the Disqualification Decision” and to terminate the Franchise Agreement entered into with another contractor, whilst SEMTL and SSETL both claim injunctions requiring the revocation of Decision 3. I accept at once that none of those claims are the subject of the strike out application and may have been brought within the 3-month period anyway. But it is, I think, consistent with my reasoning above if I indicate that, as a matter of principle, such claims for an injunction may well be subject to the 3-month time limit.
111. In consequence, I do not accept the argument of principle put forward by Mr Coppel and Mr Ward in support of their respective Respondent’s Notices. Certainly, on one reading, those Notices suggest that the 6-year time limit derived from Section 2 of the Limitation Act should automatically apply to all the claims for cross-over relief. For the reasons that I have given, I reject that proposition.
112. For completeness, I should say that, in my view, declarations are generally dissimilar in nature and effect to injunctions. Most claims for declarations are, in effect, no more than staging posts on the way to a successful claim for damages. Such claims would not, on their face, give rise to any public law constraints. To that extent at least, they are not dissimilar to the parallel claim for restitution in *Bloomsbury*. On the other hand, a declaration that might affect the rights of third parties, would – or might – fall on the wrong side of the line.
113. Accordingly, although it seems to me that the judge was right to recognise that these matters will turn on a consideration of the facts, I would wish to emphasise that, in any procurement case not covered by the PCR/UCR/CCR, the judge should be astute to ensure that (in particular) claims for injunctions are not used as a means of circumventing the 3-month time limit applicable to judicial review applications.

## **8. SUMMARY ON GROUND 1**

114. The appellant’s application to strike out was always ambitious: there is no reported authority in which a *Francovich* damages claim was found to be subject to the 3-month time limit referable to judicial review. For the reasons set out above, I reject that contention. The same result is likely to apply to the respondents’ claims for declarations. Conversely, any extant claims for injunctions may well fall on the other side of the line although, in this case, that will ultimately be a matter for the trial.

## **9. GROUND 2: TO THE EXTENT THAT THE 3 MONTH TIME LIMIT APPLIES, WHEN WAS IT TRIGGERED IN THIS CASE?**

## **9.1 The Issue**

115. For the reasons set out above, the 3-month time limit does not apply to the respondents' *Francovich* damages claims. Nor is it likely to apply to any claims for declarations, again for the reasons set out above. But, if and to the extent that any of the respondents seek to claim injunctions then, for the reasons set out at paragraphs 105-111 above, the 3-month time limit may be applicable, in order to protect the appellant against claims which would otherwise be an abuse of process. I deal with Ground 2 of the appeal on that limited basis.
116. When does the 3-month period start to run in this case? It is the appellant's case that there is an automatic, hard-edged rule of law that, in relation to Decisions 1 and 2, any attempt to impugn those decisions had to be brought within 3 months of the decision itself, and that therefore the public law claims that involve Decisions 1 and 2 in these proceedings are out of time. The respondents say that the judge was right to conclude that he could not decide these issues, in a complex procurement debate such as this, without having regard to the evidence at trial<sup>5</sup>. Inherent in that response is the contention that this is not a hard-edged principle of law, but a more flexible and fact-sensitive exercise.
117. There is one other procedural caveat to be made at this stage. Under CPR Part 54, it is possible for a party claiming judicial review to seek an extension to the 3-month time limit: see r.3.1(2)(a). There is a good deal of learning on this topic. However, the court was not referred to any of these authorities. That is doubtless because, as I emphasised at the outset, the judge's judgment, and this appeal, arises only in the Part 7 proceedings. Accordingly, when Mr Thompson submitted that the respondents had not sought any extension in relation to their judicial review proceedings, the obvious riposte was that they had had no need to, because the judicial review proceedings had themselves been stayed. Accordingly, the analysis provided below deals with the application of the 3-month rule *simpliciter* and does not have any regard to any possible extensions of that period.

## **9.2 The General Law**

118. The claim form in a judicial review case must be filed "not later than 3 months after the grounds to make the claim first arose" (r.54.5(1)). Thus, in a simple case, (and subject to any extension under r.3.1(2)(a)) the 3 months would start to run on the date of the decision or other public law act which is the subject of the judicial review challenge.
119. What happens if there is an ongoing process in which, at least theoretically, more than one decision may fall to be challenged? This was considered by the House of Lords in *R (Burkett) v Hammersmith LBC* [2002] 1 WLR 1593. In that case, the local planning authority resolved on 15 September 1999 that outline planning permission should be granted, despite the fact that the environmental statement was subsequently shown to be inadequate. The outline permission was conditional. In February 2000, the Government Office for London decided not to call in the application and on 6 April the applicants sought permission to apply for judicial

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<sup>5</sup> The judge's conclusions to this effect are set out in paragraph 31 above.

review of the resolution of 15 September 1999. Both at first instance and in the Court of Appeal it was found that the application was out of time, but the House of Lords allowed the appeal, finding that the grounds first arose on the date when permission was actually granted, which was actually after the application for judicial review, and not at the time of the conditional outline permission. The claim was therefore not out of time.

120. Lord Steyn held [32] that the resolution of 15 September created no legal rights and that it was only upon the fulfilment of the conditions precedent and the grant of planning permission that rights and obligations as between the local authority, the developer and affected individuals came into existence. When dealing with the broader principle, Lord Steyn said:

“42. The core of the reasoning of the Court of Appeal is that “the impugned environmental impact statement was as necessary to the resolution as to any subsequent steps [and] the logic of measuring time from the resolution seems inescapable”. In my view there is no such inevitable march of legal logic. In law the resolution is not a juristic act giving rise to rights and obligations. It is not inevitable that it will ripen into an actual grant of planning permission. In these circumstances it would be curious if, when the actual grant of planning permission is challenged, a court could insist by retrospective judgment that the applicant ought to have moved earlier for judicial review against a preliminary decision “which is the real basis of his complaint” (the *Greenpeace* case, at p 424). Moreover, an application to declare a resolution unlawful might arguably be premature *and be* objected to on this ground. And in strict law it could be dismissed. The Court of Appeal was alive to this difficulty and observed that “an arguably premature application can often be stayed or adjourned to await events”. This is hardly a satisfactory explanation for placing a burden on a citizen to apply for relief in respect of a resolution which is still devoid of legal effect. For my part the substantive position is straightforward. The court has jurisdiction to entertain an application by a citizen for judicial review in respect of a resolution before or after its adoption. But it is a jump in legal logic to say that he *must* apply for such relief in respect of the resolution on pain of losing his right to judicial review of the actual grant of planning permission which does affect his rights. Such a view would also be in tension with the established principle that judicial review is a remedy of last resort...

45. First, the context is a rule of court which by operation of a time limit may deprive a citizen of the right to challenge an undoubted abuse of power. And such a challenge may involve not only individual rights but also community interests, as in environmental cases. This is a contextual matter relevant to the interpretation of the rule of court. It weighs in favour of a clear and straightforward interpretation which will yield a readily ascertainable starting date. Entrusting judges with a broad discretionary task of retrospectively assessing when the complaint could first reasonably have been made

(as a prelude to deciding whether the application is time barred) is antithetical to the context of a time limit barring judicial review.

46. Secondly, legal policy favours simplicity and certainty rather than complexity and uncertainty. In the interpretation of legislation this factor is a commonplace consideration. In choosing between competing constructions a court may presume, in the absence of contrary indications, that the legislature intended to legislate for a certain and predictable regime. Much will depend on the context. In procedural legislation, primary or subordinate, it must be a primary factor in the interpretative process, notably where the application of the procedural regime may result in the loss of fundamental rights to challenge an unlawful exercise of power. The citizen must know where he stands. And so must the local authority and the developer. For my part this approach is so firmly anchored in domestic law that it is unnecessary, in this case, to seek to reinforce it by reference to the European principle of legal certainty.”

121. In *R (on the application of Eisai Ltd) the National Institute for Health and Clinical Excellence (“NICE”)* [2008] EWCA Civ 438, it was found that NICE’s refusal to make available to consultees a fully executable version of an economic model relating to the cost effectiveness of a particular drug, rather than a read-only version, was procedurally unfair. The point was taken that the challenge was out of time because it should have been brought at the time that the model was sent out, rather than at the end of the consultation. Richards LJ dealt with this argument in the following terms:

“69. That brings me to the question of relief. It is at this point that I must consider Mr Giffin's submission that Eisai should be refused relief under s.31(6)(b) of the Supreme Court Act 1981 on grounds of its delay in applying for judicial review. The argument is that the refusal to supply the fully executable version was the subject of a clear decision by NICE which was capable of being challenged at the time; yet Eisai waited some 18 months, until the end of the appraisal process, before mounting its challenge. There was a failure to apply within the time limit laid down in CPR 54.5(1) ("promptly and in any event not later than 3 months after the grounds to make the claim first arose"), and there was therefore "undue delay" within the meaning of the statute. Had a prompt challenge been made, the court would have entertained it at that time, rather than allowing the appraisal process to continue for over a year in circumstances of doubt as to its lawfulness.

70. I do not accept that the court would have viewed an early challenge in that way. It is more likely that such a challenge would have been considered premature and inappropriate. At the time when NICE refused to release the fully executable version, it was uncertain what the outcome of the appraisal process would be. The Final Appraisal Determination might have proved to be acceptable to Eisai, in which case the issue concerning release of the fully executable

version would have been academic. Further, and very importantly, Eisai had a right of appeal to the Appeal Panel against that determination, and the grounds on which such an appeal lay included procedural unfairness. That might well have been viewed as providing an appropriate alternative remedy, rendering a judicial review challenge inappropriate at that stage.

71. Even if there had been undue delay in applying for judicial review, it would only be a factor to be taken into account in the exercise of the court's discretion as to the grant of relief; and in the light of the matters set out below it would in my view be of no materiality.”

122. Beyond observing that each case turned on its own facts, and that the answer in both permitted the claims to be made despite the passage of time, I am wary of extracting too many specific principles from these two authorities. They each demonstrate a certain amount of flexibility in their approach. Thus in *Burkett*, it was held that the court had jurisdiction to consider an application for judicial review in respect of a conditional resolution both before or after its adoption, and that it was “a jump in legal logic” to say that the claimant *must* apply for such relief before its adoption on pain of losing his right to judicial review of the actual grant of planning permission. The fact that rights and obligations were not created by the conditional resolution was clearly a highly relevant factor, but the creation of such rights and obligations was not said by Lord Steyn to be determinative of the issue (and if it had been, *Eisai* would have been decided the other way). Taking both cases together, it seems to me that, when deciding when the 3-month time limit was triggered, general principles to be taken into account are, on the one hand, the fact that judicial review is a remedy of last resort and that an early challenge should not generally be made before the final outcome is known (because any such challenge may prove to be unnecessary, as Richards LJ pointed out in *Eisai*); and, on the other hand, the need for a readily ascertainable starting date, and the detrimental effect of a judicial discretion that is too broadly based.

### **9.3 The Procurement Cases**

123. Reference was made during argument on Ground 2 to a number of procurement cases. I identify the most significant below. However, it is important to note at the outset that, in the main, these cases were not dealing with the 3-month time limit applicable to judicial review proceedings, but the periods prescribed by different versions of the PCR, which provide a different date for the accrual of a different cause of action.
124. I have already mentioned *Jobsin Co UK Plc v Department of Health* [2001] EWCA Civ 1241. Under that version of the PCR the time period was a maximum of 3 months from when the services provider “suffers, or risks suffering, loss or damage”. It is axiomatic that any cause of action which is complete when there is a risk of harm is likely to accrue earlier than a cause of action based on the suffering of actual loss.
125. The facts were that on 14 August 2000, the defendant invited proposals for the development and management of an online recruitment service for the NHS. Jobsin

submitted a tender on 3 October 2000 but were informed that they had not been shortlisted on 17 November. On 5 March 2001 Jobsin started judicial proceedings under the then current PCR, although it was accepted that the defendant could not take any point based on the failure by Jobsin to start proceedings after 12 December 2000 because it accepted that it might have indicated to Jobsin that it was proposing to restart the tender process. The question, therefore, was whether Jobsin's cause of action arose on 17 November (when the claim would have been within time) or 14 August, when it would not have been.

126. In dealing with the limitation point, Dyson LJ (as he then was) made plain the importance of the accrual of the particular cause of action under the then applicable version of the PCR, and noted at [23] that a service provider's knowledge is plainly irrelevant to the question whether he has suffered or risked suffering loss or damage. He then went on:

“26. I cannot accept that the right of action alleged by Jobsin first arose on 17th November. In my view, it arose on or about 14th August. It is clear that, as soon as the Briefing Document was issued without identifying the criteria by which the most economically advantageous bid was to be assessed, there was a breach of regulation 21(3). I do not understand Mr Lewis to dispute this. Moreover, it was a breach in consequence of which Jobsin, and indeed all other tenderers too, were then and there at risk of suffering loss and damage. It is true that it was no more than a risk at that stage, but that was enough to complete the cause of action. Without knowing what the criteria were, the bidders were to some extent having to compose their tenders in the dark. That feature of the tender process inevitably carried with it the seeds of potential unfairness and the possibility that it would damage the prospects of a successful tender.

27. Mr Lewis submits that neither the loss nor the risk of loss was caused by the breach of regulation 21(3) until Jobsin was excluded from the tender process on 17th November. I reject that submission for the following reasons. First, it gives no meaning to the words "risks of suffering loss or damage" in regulation 32(2). It seems to me that those words are of crucial significance. They make it clear that it is sufficient to found a claim for breach of the regulations that there has been a breach and that the service provider may suffer damage as a result of the breach. It is implicit in this that the right of action may and usually will arise before the tender process has been completed.

28. That brings me to the second reason. It would be strange if a complaint could not be brought until the process has been completed. It may be too late to challenge the process by then. A contract may have been concluded with the successful bidder. Even if that has not occurred, the longer the delay, the greater the cost of re-running the process and the greater the overall cost. There is every good reason why Parliament should have intended that challenges to the lawfulness of the process should be made as soon as possible. They can be made as soon as there has occurred a breach which may cause one of the bidders to

suffer loss. There was no good reason for postponing the earliest date when proceedings can begin beyond that date.”

127. *Jobsin* is therefore authority for the proposition that, in a straightforward procurement case under the PCR, a cause of action may well arise when the original invitation to tender is sent out. The present case is very different on the facts: not only is this not a case where any cause of action accrued on the risk of harm, it is also factually much more complex. Whilst in *Jobsin* nothing happened between the invitation to tender and the rejection of the bid, here there was an ongoing and extensive dialogue between the appellant and the respondents.
128. Another example of the *Jobsin* approach that was cited to us is *Gleave and Son Ltd v Secretary of State for Defence* [2017] EWHC 238 (TCC); [2017] PTSR 607. In that case, the ITT identified relevant product lines by reference to a manufacturers’ part number (“MPN”) and the claimant challenged the lawfulness of those tender documents because, it said, the use of the MPNs effectively ruled it out of being able to tender. The dispute was about whether the trial should be expedited. There was no suggestion that the claim was out of time. When dealing with the need for speed in procurement cases, I said:

“13. The vast majority of procurement disputes arise either from a challenge to the legality of the tender documents, or a challenge to the award of a contract following the tender process. If there is a challenge to the legality of the tender documents, then the challenger must commence proceedings within 30 days. Indeed, it is vital that such a challenge is made in that time because the challenger's cause of action accrues when the defective tender documentation is published, not when a contract is awarded on the basis of that unlawful documentation: see *Jobsin* ...

15. Of course, from a procedural point of view, a party seeking to challenge the lawfulness of the tender documentation may have a difficult decision to make. Assuming its court proceedings challenging the tender documents are up and running within the 30 days, the challenger then has to decide whether or not to seek an injunction to prevent the process from continuing on the basis of documents which it contends are unlawful. In my experience, applications for interlocutory injunctions at that early stage are relatively rare. That may be because the challenger will often remain involved in the tender process and is content to await the outcome of that process before seeking urgent relief from the court, or it may be because the challenger has accepted that the alleged illegality has excluded him from the contract award process and is content to seek damages as a remedy.

16. The infrequency of applications for interim injunctions at the tender stage may also be explained by a more pragmatic factor. It is only in the more straightforward cases that a challenger will be able to demonstrate, on an interlocutory basis, the unlawfulness of the tender documentation and that very often, an interim challenge may face something of an uphill struggle.”

In *Gleave* there was no debate about the 3-month time limit and no argument about when it was triggered. Indeed, such a debate would have been superfluous because, on the facts, Gleave knew that they could not take part in the second stage of the tender process. They did not need to wait until they were inevitably disqualified<sup>6</sup>.

129. Of greater relevance to the present case is *MLS (Overseas) Ltd v The Secretary of State for Defence* [2017] EWHC 3389 (TCC), another claim under the PCR. There, one of the many points taken by the defendant was that the claimant should have challenged the ITT, and not waited until its tender had been rejected. That argument was rejected in short order by O’Farrell J at paragraph 78:

“78. The MOD submits it is not open to MLS to base its case on any ambiguity in the ITT because such complaint was not pleaded and would be out of time. However, that is a mischaracterisation of MLS’s case. MLS submits that it was unlawful for the MOD to reject its tender based on criteria that were not set out clearly, or at all, in the ITT.”

130. It appears that, because the procurement challenge was upheld in *MLS*, the party who had been awarded the contract sought permission to intervene as an interested party, and sought to reopen the delay issue before O’Farrell J. The judge was therefore obliged to deal with the point again at [2018] EWHC 1303 (TCC). She reached the same view, saying:

“17. I reject SCA's submission that the claim is statute-barred. On a proper construction of the ITT, it identified the criteria by which the most economically advantageous tender would be assessed. The identified criteria did not include Question 6.3. Further, the ITT did not make it clear to the RWIND tenderer that a "pass" on Question 6.3 was required to make the tender compliant. The relevant breach was the MoD's failure to assess the tenders and award the contract in accordance with the published criteria.

18. The decision in *Jobsin* can be distinguished on its facts. In that case, the relevant breach of the regulations was that the ITT did not contain any criteria by which the tenders would be assessed as MEAT, a fact that would be immediately apparent to the bidders and gave rise to an immediate risk of loss and damage. Likewise, in the other authorities cited by SCA, the deficiencies relied on by the claimants as constituting the relevant breaches occurred, and were apparent, on the face of the ITTs. In contrast, the ITT in this case was not in breach of the Regulations. The relevant breach was the MoD's failure to apply the criteria set out in the ITT.”

## 9.4 Analysis

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<sup>6</sup> In the earlier case of *Matra Communications S.A.S v Home Office* [1999] 1 WLR 1646, the Court of Appeal found that the claim was out of time again because it had been clear to the plaintiffs 15 months before they issued their writ that they were suffering or might suffer damage as a result of the terms of the tender. On the salient points, therefore, the case is indistinguishable from *Jobsin* and *Gleave*.

131. The procurement authorities set out above demonstrate that it is perfectly possible for a cause of action, at least under the PCR, to arise on the issue of an ITT, or on some other decision taken before the formal completion of the procurement competition. That is particularly apposite in a simple case such as *Jobsin*, where nothing happened between the invitation to tender and the rejection of the bid, and in a case like *Gleave*, where the ITT effectively ruled out the challenger from the next stage of the bidding process. Furthermore, there are sound policy reasons to encourage bidders who consider that there is or may be something wrong with the ITT to make a challenge then and there, before a potentially tainted tender process goes any further.
132. But the authorities also show that, in an ongoing tender process, the cause of action may not accrue at the time of the ITT or other tender instructions and that it may only be when the claimant's tender is refused or rejected that the cause of action crystallises. *MLS* is the clearest recent example of that. What is more, I consider that the approach in the procurement cases reflects the general law, as set out in *Burkett* and *Eisai* (paragraph 122 above).
133. Accordingly, I reject the appellant's contention that there is a hard-edged rule of law which provides that a judicial review challenge is automatically triggered by the provision to prospective tenderers of a tainted ITT (Decision 1) and/or, in this case, later Re-Bid Instructions which are themselves criticised (Decision 2). The relevant cause of action may be complete at that stage, but in an ongoing process, it may not be. That is a fact-sensitive issue and, depending on the complexity of the process, may not be capable of being decided summarily on a strike out application. That was what the judge concluded in this case.
134. The common sense that underpinned the judge's approach in this case became apparent during the appeal hearing itself. On behalf of the appellant, Ms Howard submitted that Decisions 1, 2 and 3 were "a series of separate decisions" and that Decisions 1 and 2 were irrevocable and "almost impossible to change". In contrast, by reference to their pleadings, counsel for the respondents sought to demonstrate the ongoing and ever-changing nature of the pension requirements as part of these franchise competitions, that very little was irrevocable and most of it was subject to change. They pointed out that, for example, even before the ITT, the appellant had written to the respondents to tell them that the question of a potential pension shortfall in the railway industry was a matter that was being considered by the Government. Thus, when the ITT was issued, that topic was still an unknown quantity.
135. It would be wrong for me to go further into the facts in this judgment, in part because the judge was careful not to do so, and in part because they will be the subject of his detailed consideration at the trial in January. Moreover, at appellate level, I am very conscious that the court may have a necessarily shaky grasp of the detail. But it does seem to me from the parties' polarised submissions that this is a case where the trigger date for the 3-month period (to the extent that it is relevant at all) is unusually susceptible to the particular facts surrounding the procurement exercise. It is quite impossible to resolve such issues summarily.
136. In those circumstances, I conclude that this is a case in which the judge had no realistic option but to rule that this issue would have to await the evidence at trial. Indeed I note that, during the course of her excellent oral submissions, Ms Howard

on behalf of the appellant, when asked by my Lord, Lord Justice Newey why, if the position was as irrevocable at the time of Decisions 1 and 2 as she claimed, the respondents had put in any bids at all. She said that that was “a matter for evidence”. So it was: but her frank answer illustrated why these issues could not be fairly decided on a strike out application.

## **10 SUMMARY ON GROUND 2**

137. For the reasons set out above, I conclude that there is no hard-edged rule of the kind contended for by the appellant. To the extent that the 3-month time limit is applicable at all, it will be a matter for the judge to decide at the trial whether and to what extent any part of Decisions 1 and 2 fell the wrong side of the line. By reason of the outcome on Ground 1 of this appeal, this argument will not of course arise in relation to the damages claims in any event.

138. Accordingly, if my Lords agree, I would dismiss this appeal.

### **SIR RUPERT JACKSON:**

139. I agree.

### **LORD JUSTICE NEWEY:**

140. I also agree.