Neutral Citation Number: [2023] EWHC 1569 (TCC)

Case Nos: HT-2023-BHM-00008
and CO/898/2023

THE HIGH COURT OF JUSTICE
KINGS BENCH DIVISION
BIRMINGHAM DISTRICT REGISTRY
TECHNOLOGY AND CONSTRUCTION COURT
AND ADMINISTRATVE COURT

Birmingham Civil Justice Centre
33 Bull Street, Birmingham, B4 6DS

Before:

HIS HONOUR JUDGE TINDAL
(sitting as a Judge of the High Court)

- -

Between:

DUKES BAILIFFS LIMITED **Claimant**

- and -

BRECKLAND COUNCIL

Defendant

- -

Brendan McGurk (instructed by Walker Morris) for the **Claimant**
Joseph Barrett (instructed by Birketts) for the **Defendant**

Hearing date: 6 June 2023

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Redacted Judgment

REDACTIONS HAVE BEEN MADE TO THIS PUBLIC VERSION OF THIS JUDGMENT TO TAKE ACCOUNT OF PRIVATE MATTERS
I direct that pursuant to CPR PD 39A para. 6.1 no official shorthand note shall be taken of this Judgment and copies of this version as handed down may be treated as authentic.

HIS HONOUR JUDGE TINDAL

HHJ TINDAL:

Introduction

1. This case is about Public Procurement Law and the relationship between the Public Contract Regulations 2015 ('PCR 15') and Concession Contracts Regulations 2016 ('CCR 16'). From the researches of expert Counsel Mr McGurk for the Claimant and Mr Barrett for the Defendant, there is no case on this point yet, (indeed I only found eight cases on the CCR 16 in total). The question is whether a local authority contracting-out enforcement of its debts like Council Tax is governed by the PCR 15 or the CCR 16; or alternatively is amenable to Judicial Review. So, while this is a sequel to *JBW Group v MoJ* [2012] EWCA Civ 8 and *Newlyn v WFLBC* [2016] EWHC 771, both pre-dated the CCR 16, so I must consider the matter afresh.

2. The Claimant, Dukes Bailiffs Ltd, is an Enforcement Agent company which has been on a 'Dynamic Purchasing System' ('DPS 953') arrangement for public procurement since 2019. At that time, it became the enforcement provider for the Anglia Revenues Partnership ('ARP'), a consortium of East Anglian local authorities. In December 2022, in a re-tender competition for providers within DPS 953, ARP through its member Breckland Council – the Defendant - issued an Invitation to Tender ('ITT') to provide debt enforcement services. The Claimant tendered but on 27th January 2023, the Defendant told the Claimant that it had lost out by 2.5% on the scoring to a rival bidder 'Bristow & Sutor' ('Bristow'). The Claimant considers it should have been successful rather than Bristow and criticises: the Defendant's tender scoring; the reasons it gave for its decision; and 'apparent bias' of one of the Defendant's four tender evaluators (she denies it and I call her Ms H) in favour of Bristow owing to alleged connections with its manager who used to work for the Claimant (Mr J).

3. The Claimant has made these allegations in two separate claims. Firstly, it has brought a CPR 7 claim issued on 24th February 2023 in the Technology and Construction Court ('TCC') contending the Defendant breached the PCR 15 due to Ms H's apparent bias and its inadequate reasons and erroneous scoring and seeking an order requiring the Defendant to award the contract to the Claimant ('the TCC Claim'). Secondly it issued a CPR 54 Judicial Review claim on 10th March 2023 in the Administrative Court to pursue what it called 'two public law analogue claims' which did not depend on the PCR 15 applying, namely apparent bias and failure to give reasons ('the JR Claim').

4. However, in the Defendant's Defence to the TCC claim of 30th March 2023, it contended the PCR 15 did not apply to the contract awarded that was a 'concession contract' under the 'CCR 16', relying on *JBW* and *Newlyn* under the predecessor provisions in the Public Contracts Regulations 2006 ('the 2006 Regs'). The Defendant contended the Claimant's claim was not actionable under the CCR 16 as the contract value was below the minimum threshold and in the alternative, denied the TCC Claim allegations. Furthermore, in the Defendant's Summary Grounds of Resistance ('SGR') to the JR Claim dated 4th April 2023, it contended the Defendant's tender contract award was not amenable to Judicial Review and in any event was not vitiated by the grounds of challenge in the Claimant's Statement of Facts and Grounds ('SFG').

5. Accordingly, the Defendant invited the Administrative Court to refuse permission to claim Judicial Review and on 6th April 2023 applied to the TCC to strike out the TCC Claim or alternatively enter reverse summary judgment on it. The TCC Claim was originally issued in London, but on 7th March 2023 O'Farrell J ordered it be transferred to Birmingham as the JR Claim was issued here. It was clear these issues should be adjudicated urgently (as the Defendant had now awarded the contract to Bristow) and together. Therefore, I decided permission for the JR Claim under CPR 54.4 should be considered not on the papers, but at a hearing at the same time as the Defendant's application in the TCC Claim. So, on 21st April 2023, I made orders on both the TCC Claim and JR Claim listing a combined hearing on 6th June (the first date available). However, as the Claimant complained the Defendant had not disputed the applicability of the PCR 15 until its Defence, I granted it permission to amend its Particulars of Claim and to file a Reply in the JR Claim and consequently to the Defendant to amend its Defence and application. Both parties took the opportunity to do so.

6. In the TCC claim, the Claimant's Amended Particulars of Claim ('APOC') dated 20th April 2023 denies the Defendant's tender contract award was governed by the CCR 16 and maintains it was governed by the PCR 15 (at ps.6A-D, 9A-B, 10A-E and 13) whilst also maintaining the breaches of the PCR 15 previously alleged. However, it also pleads in the alternative (at ps.61A-D) that even if the PCR 15 did not strictly apply, the Defendant had either expressly or impliedly contracted with the Claimant to award the tender contract as if the PCR 15 applied and so breaches of it were breaches of contract. Moreover, at ps.61E-F, the APOC allege the entry of the Defendant into the contract with Bristow on 6th April 2023 was unlawful for breach of the prohibition on contracting under Reg.95 PCR and so ineffective and void under Reg.99(5) PCR. However, it is not pleaded in the TCC Claim that the labelling of the new contract with Bristow as a 'services concession' was a deliberate change by the Defendant to stymie the TCC claim under the PCR 15. The Defendant in its amended Defence dated 2nd June 2023 maintains its position that the PCR 15 never applied either formally on its own terms or indirectly by contracting that it would be applied as if it did. Nevertheless, in the Defendant's amended application for strike-out and reverse summary judgment it accepts the Claimant's new contract point is arguable and will have to proceed to trial.

7. In the JR Claim, the Claimant's Reply dated 20th April 2023 not only contends the PCR 15 not the CCR 16 applied and the Defendant's decision was amenable to Judicial Review, but also added two further grounds. It alleges breach of legitimate expectation that the Defendant's tender (or 'call off') contract would be awarded in accordance with the requirements of PCR 15, in substance similar to its contract point in the TCC Claim. However, unlike that claim (as just noted), the Reply in the JR Claim also alleges a 'breach of the *Ermakov* principle' (that a decision-maker cannot defend a decision with reasons it has not relied on at the time). It is alleged the Defendant's contract award to Bristow as a 'services concession' contradicted the fact it had run the procurement on the basis the PCR 15 applied and the labelling of the new contract a 'services concession' was 'concocted after the event by lawyers in response to the issue of the current proceedings'. The Defendant disputes that and contends permission should be refused on all grounds: both the original ones and these two new grounds in the Reply.

8. In the course of the various applications and responses, the Defendant has provided statements from Tracey Mellor its Contracts and Procurement Manager; and Sarah Wolstenholme-Smy its Legal Services Manager; whilst the Claimant has provided two statements from Sarah Naylor its Sales Director. Whilst of course I have not heard live evidence on a strike-out application on the TCC claim and a (contested) hearing of permission on the JR claim, I have carefully considered these witness statements and the documents in the TCC claim bundle prepared by the Defendant and JR claim bundle prepared by the Claimant (which overlap to a significant extent).

9. I also had the benefit of very helpful Skeleton Arguments and submissions from specialist and skilled Counsel: Mr McGurk for the Claimant and Mr Barrett for the Defendant and an agreed Bundle of Authorities on both claims running to over 30 items, including not only legislation but also many domestic and ECJ/CJEU authorities. However, given the complexity of the issues, I also carried out a little research of my own and referred Counsel to the EU Concessions Directive 2014/23/EU ('Concessions Directive' or 'CDir') and four other cases to ensure all issues were fully ventilated.

10. I shall structure this judgment by considering these matters in order:
    (i) Firstly, the legal and factual background relevant to the issues (certain parts of which I have redacted due to commercially-sensitive information) (paras 11-35);
    (ii) Secondly, the law on 'public contracts' and 'concession contracts' (paras 36-65);
    (iii) Thirdly, the strike-out / summary judgment application in the TCC Claim: especially whether the PCR 15, CCR 16, or neither applied (paras. 66-99);
    (iv) Fourthly, given the decision on that issue, a brief discussion of the Claimant's contract point in the TCC Claim (paras.100-104), relevant to the next issue.
    (v) Fifthly, whether to give permission for the JR Claim: i.e. whether the decision was amenable to Judicial Review and arguability of the grounds (paras. 105-127);
    (vi) Finally, the next steps in the litigation given my conclusions (paras. 128-130).

Background

My approach to the evidence

11. As Mr McGurk said, in relation to the strike-out application, CPR r.3.4(2)(a) provides that the Court may strike out a statement of case if it appears to the Court that it 'discloses no reasonable grounds for bringing or defending the claim'. As Warby J (as he was) said in *Duchess of Sussex v AN* [2020] EWHC 1058 para.33(2)

> "CPR r.3.4(2)(a) calls for analysis of the statement of case, without reference to evidence. The primary facts alleged are assumed to be true. The Court should not be deterred from deciding a point of law; if it has all the necessary materials it should 'grasp the nettle'. But it should not strike out under this sub-rule unless it is 'certain' the statement of case, or part under attack, discloses no reasonable grounds of claim…Even then, the Court has a discretion…[if] the defect might be cured by amendment it may refrain from striking out and give [that] opportunity."

In short, with strike-out under CPR 3.4(2)(a), the Claimant's factual case is assumed to be true and the burden is on the Defendant to meet that test on those assumed facts.

12. However, Mr Barrett suggested different principles applied for a reverse summary judgment application under CPR 24.2, which states (relevantly in this context):

> "The court may give summary judgment against a claimant…on the whole of a claim or on a particular issue if (a) it considers that (i) the claimant has no real prospect of succeeding on the claim or issue…and (b) there is no other compelling reason why the case or issue should be disposed of at a trial."

The basic test for reverse summary judgment is whether the Defendant can prove that the Claimant's claim has only a fanciful as opposed to realistic chance of success: *Swain v Hillman* [1999] EWCA Civ 3053. In *Three Rivers No 3* [2001] UKHL 16, it was held that for a case to be fanciful, it must be entirely without substance and clear beyond question that it is contradicted by all the documents or other material. Mr Barrett also relied on the summary of the principles for summary judgment by Lewison J (as he then was) in *Easyair v Opal Telecom* [2009] EWHC 339 (Ch) at para.15, as often subsequently endorsed by the Court of Appeal (citations omitted):

i) The court must consider whether the claimant has a "realistic" as opposed to a 'fanciful' prospect of success;

ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable;

iii) In reaching its conclusion the court must not conduct a 'mini-trial';

iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions, particularly if contradicted by contemporaneous documents;

v) However….the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus, the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case;

vii) On the other hand, it is not uncommon for an application under Pt 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. If the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim…

> If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up…"

I need only respectfully add that the same approach applies in procurement cases: see *Stagecoach v SoSTI* [2019] EWHC 2047 (TCC) paras.11-13.

13. By contrast, with the JR Claim, Mr Barrett submits the Court should proceed on the basis of the factual evidence of the Defendant unless it cannot be correct, citing several authorities, the effect of which was recently summarised in a procurement case: *R(Good Law Project) v Cabinet Office* [2022] PTSR 933 (CA) para.86:

> "The general rule is that the evidence of a witness is accepted unless given the opportunity to rebut the allegation made against them, or there is undisputed objective evidence inconsistent with that of the witness that cannot sensibly be explained away so that the witness's testimony is manifestly wrong. A court hearing a judicial review will generally accept the evidence of the public authority: and will not normally decide contested issues of fact."

14. I accept Mr Barrett's point that there is a distinction between the approach to evidence on strike-out and reverse summary judgment. So, strike-out would focus on the Amended Particulars of Claim and 'assume the primary facts alleged to be true' 'without reference to evidence'; whereas reverse summary judgment also entails consideration of statements and contemporaneous documents, as well as the evidence that can be reasonably expected to be available at trial, albeit not as a 'mini-trial'. It seems to me fairer to the Claimant to adopt the summary judgment approach, but in so doing to assume the primary facts alleged (as opposed to the legal or conclusory contentions) in the Amended Particulars and Ms Naylor's statement to be true. This would also enable me to take into account other potential evidence the Claimant may deploy which is not currrently before me, such as its previous contract with the Defendant or its tender bid. Whilst the Defendant relies heavily on the contract awarded to Bristow, that was made after the TCC Claim had been issued. So, quite aside from the Claimant's allegations as to the Defendant's tactical motives for 'labelling' it a 'concession contract' (which are not pleaded in the TCC Claim but are in the JR Claim), it seems to me preferable to look at all the evidence, not just this (extremely contentious) contract. However, whilst I will therefore apply the summary judgment approach albeit also assuming the primary facts the Claimant alleges to be true, I will also consider strike-out as a 'cross-check'. In that way, even if the issue is a mixed question of fact and law, if I am 'certain' the PCR 15 does not apply on the Claimant's own assumed facts and no amendment could change that, I should 'grasp the nettle' now and strike out. If not, this issue must proceed to trial with the contract issue. In fairness to the Claimant, whilst the 'general rule' in Judicial Review is different, I will take a similar approach with the JR Claim.

Legal Background

15. Bailiffs (or to give them their modern title, Enforcement Agents) are absolutely central to the Civil Justice system. Their office goes back almost as far as that of judges, certainly to Norman times. Once a Judge (or Magistrate) decides a sum is owed by a party and other enforcement means such as charging orders and attachment of earnings orders are not available or prove ineffective, it is up to Bailiffs to enforce the judgment. If the debtor either 'can't pay' or 'won't pay', Bailiffs commonly enforce by taking control of goods (often cars or other valuable items). In some cases, the creditor may well think that what the Judge decides is only as good as what the Bailiff recovers.

16. The old distinction between High Court 'Sheriffs' and County, Crown and Magistrates Court 'Bailiffs' is preserved under the Courts Act 2003 ('CA') which governs the former who are now called 'High Court Enforcement Officers' ('HCEO's); and the Tribunals, Courts and Enforcement Act 2007 ('TCEA') which governs the latter, who are now called 'Enforcement Agents' ('EAs'). This case concerns EAs, who are strictly self-employed and must be authorised by the Court as its officer, being satisfied of their qualifications, good character and possession of insurance, but often work through agencies, which I will call 'EA Agencies' (see *Kafagi v JBW* [2018] EWCA Civ 1157).

17. Whilst Courts traditionally contracted directly with 'Bailiffs' (as they then were), it is now very common to 'contract out' provision of enforcement services to EA agencies. This engages issues of Procurement Law which is largely derived from EU Law (so a 'new kid on the block' compared to the venerable old office of 'Bailiff'). Whilst I shall come back to more recent EU legislative history in much more detail later, EEC (as it then was) public procurement rules derived from EEC Treaty provisions, designed to encourage fair competition and create what became 'The Common Market' and given more specific expression in a specific Public Procurement Directive in 1977. This introduced requirements for certain contracts entered into by public authorities to be advertised Community-wide and for objective selection criteria and reasons. This Directive was amended and supplemented in the 1980s and 1990s and was consolidated into the 'Public Sector Procurement Directive' 2004/18 ('the 2004 Directive'), which required implementation in domestic law, with the replacement of the Public Supply Regulations 1995 with the Public Contracts Regulations 2006 ('the 2006 Regs').

18. Some of this legislative history was considered in January 2012 in *JBW*, (the same EA Agency as in *Kafagi*). It concerned a contract tender in 2009 by the Ministry of Justice for (then) Bailiffs to enforce unpaid Magistrates Court fines under the 2006 Regs which implemented the 2004 Directive, covering 'public works contracts', 'public supply contracts' and 'public services contracts' but excluding 'services concession contracts'. It suffices for now to note Elias LJ's clear and simple distinction in *JBW* at paras. 40-41

> "…[T]he paradigm case of a service contract is where the applicant performs a service for the authority and is paid an agreed fee for that service. It is important to emphasise that such a contract is not necessarily risk-free. Like any contracting party, the contractor may find he has struck a bad bargain; the cost of providing the service to an authority may prove to be greater than the remuneration received

> The paradigm case of a concession is where the applicant is put in possession of a business opportunity which he can exploit by providing services to third parties and charging them directly for those services. The contractor then bears the risks of running the business which are typically greater than those involved in performing a contract for a fixed fee."

19. Whilst the MoJ in other respects (e.g. cleaning or security contractors) often enters into straightforward 'service contracts', in *JBW* it had not done so with agencies for enforcement services. This was because Bailiffs have long been permitted (but not required) to charge fees to debtors against whom they enforce judgments. For the unpaid fines in *JBW*, their authorisation to do so was under the terms of the Court's 'warrant of distress' (the old and unfortunately often accurate terminology for seizure of goods) and Criminal Procedure Rule 52.8. The Bailiffs would therefore be paid either by the debtors for the outstanding fine (returned to the creditor) and their fee, or ultimately by the Bailiffs seizing the debtors' goods, selling them and repaying the fine to the creditor, retaining their fees and returning any balance to the debtor. Therefore, the contract in *JBW* did not provide for any payment from the MoJ to the agency, but rather regulated the way enforcement was to be done by its Bailiffs; how any money they recovered from debtors or sale was to be handled; and in particular how the fine amount was to be repaid to the MoJ before the Bailiffs took their fees from any proceeds recovered. As I discuss later, Elias LJ in *JBW* decided this was a 'concession contract' not governed by the 2006 Regs, even though the level of control over Bailiff conduct the MoJ reserved to the Courts under the contracts meant it was not a paradigm case of a 'services concession'. This meant that JBW as the unsuccessful bidder for that contract had no remedy in Procurement Law. Moreover, Elias LJ also held its claim in contract failed. I return to *JBW* in detail later, not least as Mr Barrett contends the analysis in that case should also be applied in this case. However, in the four years after *JBW* was decided, both the law on EAs and on Procurement changed substantially - and effectively contemporaneously.

20. Firstly, in 2013, the old miscellany of statutory and common law powers for Bailiffs were streamlined in the Taking Control of Goods Regulations 2013 ('TCGR 13'), made under the TCEA for the various types of debt enforcement outside the High Court by EAs (as they now were). Their effect was summarised in the Explanatory Note:

> "These Regulations make provision relating to the procedure for taking control of goods under Schedule 12 TCEA. The Act provides a new statutory code in relation to taking control of goods in order to sell them to enforce the payment of debts (formerly known as "distress"). By section 62 of the Act, the Schedule 12 procedure is available where an enactment, writ or warrant confers the power to use the procedure [I interpose to say this is true of all relevant debts in this case]. Part 1 of the Regulations provides for general interpretation (regulation 2), application of the Regulations (regulation 3) and for those categories of goods which are exempt from enforcement under Schedule 12 (regulations 4 and 5). These broadly reflect the necessities of life….

> Part 2 of the Regulations relates to the procedure for taking control of goods. Regulations 6, 7 and 8 make provision as to the notice that must be given to a debtor prior to the taking of control. Regulations 9 to 15 deal with the actual taking of control, both regarding goods on premises and goods on a highway. Particular protection is given to children and vulnerable persons…Regulations 9 to 13 deal with the time limit for taking control, the circumstances in which control should not be taken, and the days and hours when control of goods may be taken….Regulations 30 to 35 concern the procedure following entry and taking control of goods. These regulations provide for notice requirements, the provision of an inventory to the debtor and any co-owner of the goods, and care and valuation of the controlled goods. Part 3 (regulations 36 to 43) provides for the sale of the controlled goods (save for those which are securities). Provision is made for notice to the debtor and any co-owner of the sale (regulations 37 to 40), and for the conduct of the sale (regulations 41 to 43)…Part 5 (regulation 47) relates to abandonment of the goods, providing a procedure to be followed where the enforcement agent makes the controlled goods which are now abandoned available for collection by the debtor. Regulation 47 provides that, where the debtor fails to collect the goods within 28 days, the court may make orders concerning the disposal of the goods."

21. Secondly, whilst the TCGR 13 did not make any provision for payment of EAs by debtors, this was implemented in the Taking Control of Goods (Fees) Regulations 2014 ('the Fees Regs'). Again, their effect is summarised in the Explanatory Note:

> "These Regulations apply whenever an enforcement agent uses the Schedule 12 procedure (regulation 3). Regulation 2 makes general interpretative provision. Regulations 4 to 7 concern the recovery of fees from debtors out of the proceeds (defined in regulation 2). Fees are recoverable by reference to stages of the enforcement procedure as defined in regulation 5 for cases where the enforcement power is derived other than from a High Court writ, and in regulation 6 for High Court writs. Fees are recoverable on a fixed basis for each stage, but in certain situations an additional fee is recoverable as a percentage of the value of the sum to be recovered (regulations 4 and 7). The levels of fixed fees, and the relevant percentages to be applied, are provided for in the Schedule. Where the enforcement agent and the debtor enter into a controlled goods agreement which the debtor complies with, only the first enforcement stage fee is payable. However, if the debtor does not enter into such an agreement, or does so but breaches the agreement, both the first and second enforcement stage fees are applicable. Disbursements are also recoverable from the debtor out of the proceeds, and are addressed in regulations 8, 9, and 10. They may only be recovered in accordance with those regulations (regulation 8(1)). Regulation 8 provides for common disbursements regarding storage of goods, hire of locksmiths to enter and to secure premises, and court fees for various applications relating to the Schedule 12 process where the enforcement agent's application is successful. Regulation 9 provides for costs of sale, including by public auction.

> Regulation 10 permits application to the court for permission to incur or recover exceptional disbursements (for example, the cost of insuring a valuable or rare item whilst it is out of the debtor's control). Regulations 11 and 12 make specific provision to protect debtors. Regulation 11 requires enforcement agents to minimise the fees and disbursements charged where they act in relation to more than one enforcement power. Where practicable, they are expected to deal with the goods together and on as few occasions as possible. Regulation 12 makes provision to protect vulnerable debtors. The enforcement agent is required to give such a debtor an adequate opportunity to obtain assistance and advice prior to removal of the goods. The enforcement stage fee (or fees) is not recoverable unless such an opportunity has been given. Regulation 13 provides for the order of application of the proceeds where the amount recovered is less than the amount outstanding. Any fees and expenses owed to an auctioneer, and the compliance stage fee for the enforcement agent, are prioritised, with the remaining proceeds being divided pro rata between payment of the debt and payment of the remaining fees and disbursements due to the enforcement agent. Regulation 14 requires the enforcement agent to provide the debtor and any co-owner with specified information relating to sale or disposal of the goods, and equivalent provision is also made for the situation where the debtor has paid, or seeks to pay, the amount outstanding prior to sale or disposal. Regulations 15 and 16 make provision for disputes about a co-owner's share of proceeds, and about the amount of fees and disbursements recoverable by the enforcement agent, to be referred to the court for resolution. Regulation 17 prevents recovery of fees or disbursements by an enforcement agent in relation to any enforcement stage during which the enforcement power ceases to be exercisable…."

Given the significance of EA fees to this case, it is also important actually to cite Regs.4 and 5 and the Schedule to the Fees Regs on the fees EAs may charge debtors:

> "**4.**—(1) The enforcement agent may recover from the debtor the fees indicated in the Schedule in accordance with this regulation and regulations 11, 12, 13, 16 and 17, by reference to the stage, or stages, of enforcement for which enforcement-related services have been supplied.
>
> (2) The fees referred to in paragraph (1) may be recovered out of proceeds.
>
> (3) The enforcement agent may recover under this regulation the whole fee provided in the Schedule for a stage where the amount outstanding is paid after the commencement, but before the completion, of that stage.
>
> (4) For the purposes of this regulation, the relevant stage of enforcement is determined according to regulation 5 or 6 as appropriate….
>
> **5.**—(1) The relevant stages of enforcement under an enforcement power which is not conferred by a High Court writ are as follows (a) the compliance stage, which comprises all activities relating to enforcement from the receipt by the enforcement agent of instructions to use that procedure in relation to a sum to be recovered up to but not including the commencement of the enforcement stage;

(b) the enforcement stage, which comprises all activities relating to enforcement from the first attendance at the premises in relation to the instructions up to but not including the commencement of the sale or disposal stage; (c) the sale or disposal stage, which comprises all activities relating to enforcement from the first attendance at the property for the purpose of transporting goods to the place of sale, or from commencing preparation for sale if the sale is to be held on the premises, until the completion of the sale or disposal (including application of the proceeds and provision of the information required by regulation 14).

Schedule - Enforcement other than under a High Court Writ

Fee Stage	Fixed Fee	Percentage fee (regulation 7): percentage of sum to be recovered exceeding £1500
Compliance stage	£75.00	0%
Enforcement stage	£235.00	7.5%
Sale or disposal stage	£110.00	7.5%

22. The figures in the Fees Regs in 2014 were a slight uplift to those proposed in a 2009 MOJ report by the economist Alexander Dehayen ('the Dehayen Report'). (So, whilst I am not interpreting the Fees Regs as such, this would be admissible background to interpreting them: *R(PRCBC) v SSHD* [2023] AC 255, paras 29-31). The Dehayen Report recommended a fee of £75 at compliance stage, £230 with 7.5% on debts above £1,000 at enforcement stage and £105 with 7.5% on debts above £1,000 at sale or disposal stage. He noted at section 4 that while the enforcement industry met many of the economic criteria for normal competition which in other sectors could properly be left to the market to regulate the price, statutory capping was required because payment was not made by the beneficiary of the service (the creditor) but by its target (the debtor) and so creditors' demand for the service was unaffected by price and therefore did not reach equilibrium with supply in the ordinary way. At section 5, he noted the miscellany of fees and lack of clarity of fee structure led to the potential for abuse and confusion and recommended a new fee structure simplified as between different types of debt, with the distinction drawn only between more complex High Court and less complex non-High Court debt (as he explained at section 7). At section 6, Mr Dehayen explained the economic methodology of price-capping, in essence as calculating an 'allowable rate of return' as a target profit 'mark-up' on the costs of performing the service. At sections 8-10 Mr Dehayen set out the consultation process and at section 11 summarised the main stages and frequencies of typical enforcement activities. At section 12, he noted that whilst there were statistics for the debt recovery rate, there were only limited statistics about the fee recovery rate which he had to estimate based on such information as he had from creditors and EA agencies. Whilst the report did not average this Fee Recover Rate, by my calculation it gives an average across the following debt-types of about 22.75%:

Debt-Type	Debt Recovery Rate	Fee Recovery Rate
Council Tax	24.8%	22.8%
CSA	15.6%	14.4%
HMCS	18.2%	16.8%
RTA	15.2%	14.0%
Commercial Rent	40.2%	37.0%
NDR	36.1%	33.2%
High Court Writs of Fi Fa	-	21.0%

At sections 13 and 14 Mr Dehayen explained how he calculated average costs of enforcement to EA Agencies given that limited fee recovery rate, suggesting average revenue of about £33 and average cost of about £30 for each case conducted (whether or not fees were recovered) suggesting the average pre-tax profit was about 8.6%. In section 15, in a passage relied on by Mr Barrett, Mr Dehayen said this:

> "….EACs are experiencing mixed fortunes in the current market. There are indications however…that these fortunes are not linked to size of firm, but rather to efficiency. It may be that even after an amendment to the Fee Structure some inefficient EACs continue to perform badly in terms of profitability, or even make a loss. When there is such a wide range of profitability this is inevitable, except in the case where a Fee Structure allows even the least efficient EAC to be profitable. The unavoidable effect of such an approach, of course, would be that the most efficient EAC would then be able to generate very large profit margins. In a typical competitive industry where industry members have a broad range of different efficiency levels, it would not be unusual to see the least efficient members of the industry forced to exit. This would usually be achieved by the efficient firms reducing their prices, still making healthy profits due to their superior cost efficiency, and forcing the less efficient firms to reduce their price until the point that they can no longer exist profitably. The mechanism for such a process in a competitive industry would be the price. Of course, in an industry where price is regulated this mechanism does not exist as a market force, but rather is a result of the regulated price. A Fee Structure is necessary in the Enforcement industry…[It] has many objectives, which have been discussed throughout this paper, its essential role however is to set a price in the absence of effectively functioning competitive forces, which would otherwise act to set the price. The Fee Structure should assist in replicating competitive forces, and therefore it may be the case that the least efficient firms cannot operate profitably with that Fee Structure. The Fee Structure should not be seen as a mechanism to protect all firms in the industry, beyond ensuring that a reasonable level of profit can be earned by an averagely efficient company within the industry."

23. Mr Dehayen, having reviewed the options, concluded that a new Fee Structure should aim for a pre-tax profit margin of 10% on the basis of a mark-up on total costs of 10% In section 16, he recommended three stages: compliance, enforcement and sale/disposal (adopted in Fees Regs). In section 17, he noted different non-High Court debt categories led to different fee levels to achieve 10% mark-up on costs due to the different amounts of activity required for each debt type and the different fee recovery rates. So, Mr Dehayen recommended a 'one size fits all' fee structure for all non-High Court debt types on the highest fee output (RTA debt of £77, £234 and £104) because:

"[I]t is essential that an EAC be able to provide a profitable and sustainable Enforcement service for each of the different debt-types, even if the EAC were to enforce only a single debt-type in isolation. Therefore, the single fee point would need to be selected so that even the least profitable (lowest Enforcement Rate) of debt-types could be enforced sustainably. This implies that the single fee level needs to be selected to accommodate RTA Enforcement, which has the lowest Fee Recovery Rate and therefore the highest model output fee levels. The [recommendation] as to proposed fee level is set out at section 18.

MoJ Proposed Fees for non-High Court Enforcement			
Fee Stage	**Fixed Fee**	**Percentage Fees**	
		£0 - £1,000	**>£1,000**
Administration	**£75.00**	*0%*	*0%*
Enforcement	**£230.00**	*0%*	*7.5%*
Sale	**£105.00**	*0%*	*7.5%*

Fee Structure Features	
Stage Triggers	
Administration	Warrant received by EAC.
Enforcement	First attendance by EA to debtor's premises/ "door step".
Sale	Debtor's goods sold.
Creditor Guaranteed Fee	None.

At section 19, Mr Dehayen 'impact tested' this model both on a fee scenario basis and a 'profitability test', the latter indicating for Council Tax debt, the profit margin was 34.8%; for Court judgments 11.7%; for RTA penalty charges 6.9%; for Child Support 48.9% and for non-domestic rates ('NDR') 64.3% (though he adjusted that down to 10%). However, despite the risk of 'cherry-picking' more lucrative types of debt, Mr Dehayen justified his recommended fees by recommending monitoring and regulation and suggesting higher costs with some debt types (including NDR). In any event, he also recommended in section 20 (as summarised in the executive summary):

"The legislation potentially introducing the Proposed Fee Structure must be clearly worded to avoid misunderstandings or misinterpretations (deliberate or otherwise) that could result in improper use of the new fees. Pre-implementation testing and a transition period leading up to the potential introduction of the Proposed Fee Structure are recommended. The report recommends the Fee Structure undergoes a full review at intervals of four years….Between review dates the various fee levels should be indexed to RPI, and updated annually, with Percentage Fee thresholds updated periodically."

However, there have been no such reviews since 2014 and no such indexation since the fee levels were set in the 2014 Fees Regs; and they remain now as they were set:

- Compliance stage - £75 with no percentage fee
- Enforcement stage - £235 with 7.5% on debts above £1,500
- Sale stage - £110 with 7.5% on debts above £1,500.

Mr Barrett suggests with the current 'cost of living crisis' and higher costs, EA agencies' profit margins will have eroded away. Mr McGurk suggests it could work the other way, with more debt to enforce so more fees to charge. I have no evidence from either party as to what has happened to profitability over the last year during 'the cost of living crisis'. I am also conscious the statistics Mr Dehayen had in 2009 on costs and so profit are now nearly 15 years old, so approach them with care.

24. Similarly, from 2014 the legal landscape on procurement also changed significantly. As I shall explain in more detail below, in 2014 the Public Contracts Directive 2014/24/EU ('PCDir'), the Concessions Directive (and the Utilities Directive) came into force, which promoted 'service concessions' from being an exception to public procurement rules to having their own directive with a distinct regulatory regime. So, domestic legislation had to change and the 2006 Regs were replaced with the PCR 15 and CCR 16. However, as explained in the Crown Commercial Service Handbook, there are important differences between the two regimes, including that:

24.1 The two regimes cover two different types of procurement contract involving public authorities, as this case concerns. In brief for now, the PCR 15 covers 'public contracts', namely 'public service contracts', 'public supply contracts' and 'public works contracts'; whilst the CCR 16 covers 'concession contracts', namely 'works concession contracts' and 'service concession contracts'. In a saving provision, Reg.117 PCR 15 also excludes 'services concession contracts within the meaning of the 2006 Regs', defined there as: 'A public services contract under which a consideration given by the contracting authority consists of or includes the right to exploit the service or services to be provided under the contract'.

24.2 There are very different financial thresholds for application of the PCR 15 and CCR 15. Under the PCR 15, there are different sub-thresholds under Reg.5: £5,336,937 for 'public works contracts'; £138,760 for 'public supply contracts' and 'public service contracts' awarded by central government; £213,477 for such contracts awarded by 'sub-central contracting authorities and £663,540 for 'public service contracts for social and Sch.3 services'. The boundaries between these different 'public contracts' was discussed in *Adferiad v ABUHB* [2021] EWHC 3049 (TCC). However, in the CCR 16, there is only one financial threshold under Reg.9: £5,336,937.

24.3 The PCR 15 specifies different procurement procedures. These include 'Framework Agreements' under Reg.33 whereby 'contracting authorities' and one or more economic operators agree contractual terms in a potential procurement (e.g. as to price, quantity etc) in a period not more than 4 years. Relevantly here, they also include 'Dynamic Purchasing System' 'DPS') under Reg.34: a completely electronic process akin to a 'providers' register' which is unlimited in duration. During a DPS, eligible providers ('economic operators') can join (or leave) and all in a given category under it must be invited by public authorities ('contracting authorities') to tender in a 'call- off process': either proposing using the DPS' standard contract terms or their own contract terms the operators can choose to bid for or not. The DPS also streamlines the procedural steps otherwise required by the PCR 15, e.g. relieving authorities of duties to give reasons for awards under Reg.86(5) PCR 15. By contrast, the CCR makes no mention of any DPS mechanism – indeed the CCR only has one procedure, although Reg.30 leaves it to authorities to design subject to the basic points in Regs.31-37, including a formal concession notice published online throughout the EU.

24.4 The permissible selection criteria under Reg.58 PCR 15 are strictly limited and indeed Reg.67 PCR 15 requires a cost/quality approach. By contrast, the permissible selection criteria under Reg.41 CCR 16 are much more open, namely: 'objective criteria which comply with the principles set out in regulation 8' (i.e. the principle of equal treatment, non-discrimination and transparency) and ensuring 'effective competition' for 'overall economic advantage for the authority'.

24.5 The format of the process under a DPS within the PCR 15 is entirely electronic and as noted does not have to give reasons for an award decision. By contrast, the CCR 16 process need not be electronic and reasons for a decision must be given under Reg.40 (although further detail must be provided on request). But provisions for a 'standstill period' after a decision and court remedies are similar as between the PCR 15 and the CCR 16.

25. In the transitional period between the coming into force of the PCR 15 in February 2015 and the CCR 16 in April 2016, Coulson J (as he then was) decided *Newlyn*. It turned on Reg.117 PCR 15 because it concerned a procurement process in late 2015 to early 2016. Mr Barrett appeared for the defendant in *Newlyn* and told us the Fees Regs were cited there (although Coulson J did not refer to them) but the Dehayen Report was not. Through Reg.117 PCR, *Newlyn* turned on the same definition of 'services concession contracts' under the 2006 Regs as *JBW*. However, *Newlyn* factually differed from *JBW* as it did not concern contracting-out enforcement of Court judgments, but rather debts owed to local authorities (there, Waltham Forest LBC 'WFLBC') like Council Tax (following liability orders by Magistrates' Courts) and Non-Domestic Rates, just as in this case. The claimant there, Newlyn, had been the incumbent provider, just like the Claimant here. The procurement exercise was run pursuant to a DPS curated by the national local authority procurement company 'Yorkshire Purchasing Organisation' ('YPO'), like the Claimant here. Then WFBC sent out an 'invitation to tender' ('ITT') and despite Newlyn's incumbency, it lost out to other bidders and issued a claim, just as with the Claimant here (although no contract was awarded pending it). However, despite those similarities to this case being factual differences from *JBW*, Coulson J considered *JBW* indistinguishable and so the contract was a concession contract under the 2006 Regs. Mr Barrett told us Counsel for Newlyn conceded this during argument given Coulson J's views. Emboldened by his victory there, Mr Barrett here now argues this case is indistinguishable not only from *JBW* but even more so from *Newlyn*. Nevertheless, as Mr McGurk points out, two weeks after *Newlyn* was decided, the CCR 16 came into force and, as I shall describe, it ostensibly significantly changed the definition of 'concession contract'. Indeed, I would add since then, Brexit (which had not even been voted on when *Newlyn* was decided) has been implemented legally by the (amended) European Union (Withdrawal) Act 2018 ('EUWA') and as discussed in *Adferiad*, this has affected procurement. Later I analyse whether those changes mean the law has substantially changed since *Newlyn*. If so, I must apply the new law to these assumed facts entirely afresh. If not, I must consider whether those assumed facts are distinguishable from *JBW* and *Newlyn*.

The Procurement Exercises

26. The Claimant has been a family-run EA Agency for 30 years. In February 2019, it contracted with the Defendant to provide enforcement and debt collection services following a competitive tender under a framework agreement. At the time, Ms Naylor was Bid Manager. Whilst she has dealt with contracts explicitly within the CCR 16 (for Walsall and Stoke Councils), 43 exercises she has conducted stated the PCR 15 applied, 27 through YPO. On 11th April 2019, before starting the first ARP Contract ('the First Contract), it was admitted as a supplier onto DPS 953 by YPO through a contract ('the DPS Contract'), which as the APOC pleads, materially stated:

26.1 Recital (D): "All Providers indicated in their Requests to Participate that they will comply with the relevant Legislation, Codes of Conduct and Regulations governing the provision of these Goods and/or Services (as applicable)." 'Regulations' were defined as the PCR 15.

26.2 Clause 1.2.10: "The Provider shall perform all Contracts entered into with a Contracting Authority in accordance with: (a) The requirements of this Agreement; and (b) The terms and conditions of the Call-Off Contract. (c) The relevant Legislation, Codes of Conduct and Regulations governing the supply of Enforcement Agency Services."

26.3 Clause 3: "This Agreement governs the relationship between YPO and the Provider in respect of the provision of the Goods and/or Services by the Provider to YPO and to Other Contracting Authorities."

26.4 Clause 4: "YPO admitted the Provider to the Dynamic Purchasing System as a potential Provider of Goods and/or Services and the Provider shall be eligible to be considered for award of Orders for such Goods and/or Services by YPO and Other Contracting Authorities during the Term." Clause 7.1 summarised the effect of a DPS and clause 7.2 stated DPS 953 itself was set up by YPO in accordance with the provisions of the PCR 15.

26.5 Clause 8.1.4 stated that the Claimant warranted to YPO that it would ensure compliance with all relevant legislation, including the PCR 15.

26.6 Clause 11.1 set the 'Call-Off' process for contracting authorities to follow:

> "There are 5 steps…:(a) Contracting Authorities shall invite all admitted Providers to submit a tender for each specific procurement under the DPS…. (b) The Invitation to Tender document setting out the Contracting Authority's requirements will be issued and will contain further information and also a deadline by which the Tender response must be submitted. (c) All submissions received within the Invitation to Tender deadline will be evaluated in accordance with the criteria set in the Invitation to Tender documentation (d) Once evaluation is complete the preferred Provider(s) will be selected and all will be notified of the award decision and [given] feedback relating to their submission. (e) Contracting Authorities will be advised to implement a voluntary standstill period of 10 days."

26.7 Clause 15 set out the process to be followed for a Call-Off award:

> "15.1 The Contracting Authority shall select a Provider for Orders in accordance with the criteria outlined in the Invitation to Tender documents…15.3 [It] shall respond to any reasonable request for information from the Provider. 15.4 The Contracting Authority shall ensure that all Orders are awarded in accordance with the Public Contracts Regulations 2015." (my underline)

26.8 Schedule 1 of the DPS Contract described the services under DPS 953:

> "YPO are looking for providers to be appointed onto a Dynamic Purchasing System (DPS) for the provision of Enforcement Agency Services including High Court Enforcement. This includes the collection of all debt types which a Contracting Authority may have a requirement to collect and other services an Enforcement Agent can typically provide. Examples of the debt types include but are not limited to; council tax, parking fines, non-domestic rates/business rates, road traffic fines, sundry debt, housing benefits overpayments, social care debts and university accommodation fees. Examples of other services may include but are not limited to repossessions, evictions, tracing services and debt collection advice/consultancy. It will be expected that Contracting Authorities will have the appropriate authority and orders to allow the Enforcement Agents to carry out the services. Examples include, but are not limited to, Liability Orders, Writ of Control or Repossession Orders. All providers must be registered Enforcement Officers and/or High Court Enforcement Officers and comply with The Taking Control of Goods Regulations 2013, The Taking Control of Goods (Fees) Regulations 2014 and The Certification of Enforcement Agents Regulations 2014"

So, pausing there, the assumption in the DPS Contract was that enforcement services were required to comply with the 2014 Fees Regs, which presupposing the charging of fees to debtors under the TCGR procedure.

26.9 Schedule 4 provided a form to be submitted by the contracting authority to YPO for a 'call off' process, which stated (my underline):

> **TO BE COMPLETED BY THE CONTRACTING AUTHORITY**
> Before conducting any activity under this YPO Dynamic Purchasing System, please complete this form and return it (by email) to [YPO]
> **AGREEMENT:** I/we confirm that the organisation detailed below intends to participate in the above mentioned YPO Dynamic Purchasing System, and that in doing so will act in accordance with the guidance and instructions set out in the relevant YPO User Guide and in accordance with the Public Contracts Regulations 2015."

26.10 Schedule 9 contained YPO's draft terms and conditions of the contract to be awarded under the Call-Off process, which provided at clause 16.1 that the provider was independent of the contracting authority. It did not mention concessions. There was also reference to (undefined) 'regulations' applying at clauses 16.1, 20.2.4, 48.1.12 and 49.4.2. Importantly, Sch.9 also said this:

> "THE CUSTOMER [i.e. the contracting authority] HAS THE OPTION TO USE EITHER:- THE CALL-OFF TERMS AND CONDITIONS OUTLINED [here]; [or] THEIR OWN TERMS AND CONDITIONS; [or] ONE OR MORE OF THE ABOVE WHERE THERE IS JUSTIFICATION TO DO SO.
> THE FORM OF CONTRACT TO BE USED WHEN CALLING OFF THIS AGREEMENT SHALL BE MADE KNOWN TO THE SUPPLIER AT THE INVITATION TO TENDER STAGE."

It is perfectly clear all this contractual documentation under DPS 953 prepared by YPO assumed the PCR 15 applied to the DPS itself and to any Call-Off process under it. In April 2019, Mr J was still working for the Claimant and signed the DPS Contract.

27. As the First Contract between the Claimant and Defendant progressed between 2019 and 2022, I will assume the truth of Ms Naylor's evidence that the Claimant made a healthy profit. The later ITT Specification at p.2.12 stated the total amount of debt for the Council's current external provider(s) (it is unclear if this was only the Claimant):

> "Council Tax 1 April 2021 to 31 March 2022: 4885; 1 April 2022 to 30 Sep 2022: 3280 Overall Total 8165; Non-Domestic Rates 1 April 2021 to 31 March 2022: 361; 1 April 2022 to 30 Sep 2022 124; Overall Total 485."

These were among the most lucrative debt-types in the Dehayen Report in terms of Fee Recovery rates (22.8% and 33.2% respectively) and Council Tax had a 34.8% profit margin on profitability testing. As Mr Dehayen had admitted at p.19.2.1 of his report:

> "Since the proposed EA Fees were set to allow all debt-types to be sustainably and profitably (with a target profit margin of 10%) enforced, any debt-types with Enforcement Rates exceeding the lowest debt-type Enforcement Rate, are likely to result in profit margins which exceed the sustainable profit margin target."

Ms Naylor provided evidence (which is commercially-sensitive, so I have redacted it in the public judgment) detailing the revenue generated and estimating the costs for the Claimant over the four years of its operation of the ARP contract from April 2019 to March 2023. It suffices to say in this public judgment that the Claimant was more efficient than the average in recovering its fees and made a substantial profit from it.

28. Therefore, when the Defendant announced an Invitation to Tender ('ITT') for the contract in December 2022, Ms Naylor, as Sales Director of the Claimant (Mr J was with Bristow by then), was doubtless very confident of the Claimant's success. The ITT referenced DPS 953 and stated (my underline):

"**1 Outline Requirement**

….The Anglia Revenues Partnership (ARP) is a group of five Local Authorities working together to provide a shared service to the residents of Breckland Council, East Cambridgeshire District Council, East Suffolk Council, Fenland District Council, and West Suffolk Council. The partnership is responsible for the provision of the Revenues and Benefits service for the whole of this area. This area extends over three counties and is predominantly rural with several large towns. The number of dwellings is 346,280 and the number of Non-Domestic properties is 29,440. The [ARP] has established its own Enforcement Agency for the collection of Council Tax, Non-Domestic Rates, Housing Benefit Overpayments, Sundry Debts and former tenant arrears within and immediately beyond the seven Districts. It also collects debts for other Councils…: currently Broadland District Council, South Norfolk District Council and Norwich City Council. There may be additional authorities who will join the partnership in the future. External support is required to collect those debts which are beyond the immediate area of the partnership. ARP also collects car parking debt for the Enforcement of Parking Penalty Charge Notices for East Suffolk Council and West Suffolk Council….

This document is being sent to all the select suppliers on YPO DPS 953…. This Mini-Competition Document sets out the Information and Instructions, the Scope and Specification of requirements for the Contract….Whilst retaining individual political and legal identity, Breckland Council will act as the Contracting Authority on behalf of Anglia Revenues Partnership and its partner Authorities, delivering the procurement and subsequent award of the contract. The Contract is for 2 years with an option to extend for a further 1 year

[Having referred in section 2 to the Specification, it continued]….**3 Evaluation**:

Part one – RFQ response Quotes received will be awarded on the basis of the most economically advantageous proposal, evaluated by the following criteria; Appendix A listed at the back of this document has full details of price and quality scoring methodology. Quotes will be evaluated and responses to each tender sent to within the dates stated in the procurement timetable. Section Award Criteria Weighting (%)

Quality (70%) 1 *Knowledge and Understanding* 20% 2 *Technical and Professional Ability* 25% 3 *Experience and References* 15% 4 *Innovation and Added Value* 10%

Price (30%) 4 *Percentage Commission Charges for 1-3 on the Pricing Schedule* 15% 5 *Total Charges for 4-9 on the Pricing Schedule* 15%....

4. Procurement Timetable

RFQ sent out Wednesday 14 December 2022 15:00 hours Clarification questions deadline Thursday 22 December 2022 12:00 hours Deadline for return of RFQ Thursday 12 January 2023 12:00 noon Evaluation of RFQs Monday 16 January 2023 – Friday 20 January 2023 12:00 noon Final results & feedback Friday 20 January 2023 Standstill period Friday 20 January 2023 – Monday 30 January 2023 23:59 hours Contract Award Tuesday 31 January 2023 Contract Start Date Monday 27 February 2023 A 10 day standstill period will take place. During this period, tenderers can contact the Council with any questions about the process.

Supplier Declaration…..□ I agree that Breckland District Council's Terms and Conditions will apply to any contract formed by acceptance of this quotation. □ The Supplier will be bound by the said Terms and Conditions and no variation will be valid unless agreed by both parties in writing [my underline].

Appendix A – Evaluation Criteria Methodology

All tenders will be scored out of 100, split into two main criteria; quality and price. The amount of points available from the price and quality criteria is determined by the importance of these criteria to the goods, services or works being purchased and is dependent on the risk and value of the contract to be awarded. Quality – 70% The quality response is broken down into 5 questions which have a total weighting of 70%, so the maximum score would be 50 points. All responses will be marked from 1-10, on the following criteria: 0 Completely unsatisfactory response – Nil response to question. 1 Unsatisfactory response – Limited information or Respondent would not have ability in delivering to the required standard. 2 Poor response – Respondent would only meet some of the requirements of the contract some of the time. 3 Acceptable response – Respondent would be likely to meet basic contract standards but further work may be required to ensure standards are met consistently. 4 Good response – clearly indicating Respondent has fully understood and can consistently apply and deliver all the required contract standards. 5 Excellent response – Comprehensive understanding of the requirements and demonstrates that they are likely to exceed the required standards of the contract. Scores will be adjusted using a weighting to give the overall score. Price – 30% Price has a total weighting of 30%, therefore the maximum marks available for this part of the RFQ will be 30 and will be awarded to the lowest commission charges / prices submitted by the potential supplier. The remaining suppliers will receive marks on a pro rata basis from the cheapest to the most expensive price. The calculation used is Score = ((Lowest Tender Price/Tender Price) x 30(Maximum marks))

…Appendix B – Questionnaire

The information supplied in this section will be used to assess how your organisation meets the Specification and will be assessed by the evaluation panel. This Section is worth 70% of the final score. Knowledge and Understanding

3.1 Please provide us with a Method Statement on how you intend to carry out this Contract in line with our Specification including monitoring processes and complaints procedure. Weighting: 20% Technical and Professional Ability

3.2 Listing examples from your previous contracts, please outline how you plan to keep good Communications with both the Debtors and the Council throughout the Contract? Weighting: 12.5% Technical and Professional Ability

3.3 Listing examples from previous contracts, please outline how you plan to collect debts / goods with due care from vulnerable debtors ? Weighting: 12.5%

Experience and References 3.4 Please provide full details of how you propose to resource and manage this project, with regards to there being no guarantee as to the number or value of Liability Orders…passed to the successful supplier and the location of the cases….Include in your response the CV's of key personnel, their relevant and appropriate experience and how you ensure the continued professional development of your Enforcement Agents. Weighting: 10%

Experience and References 3.5 Supply up to 3 Case Studies including details of the reference for similar Contracts. Ideally, these should have been performed in the last 3 years…Weighting: 5% Innovation and Added Value Weighting: 10% Bidder to demonstrate how they can provide innovation and added value. Bidders to show examples where innovation and/or added value has been implemented **Commercial Questionnaire** See attached Enforcement and Debt Collection Pricing Schedule. This price does not include any element of Value Added Tax and is for the full duration of the Contract."

That attached pricing schedule asked several questions as to whether the bidder would charge ARP for various actions: recovery of 'sundry debtors', 'housing benefit overpayment', 'former tenant rent arrears', training for the in-house ARP EAs, bulk tracing services, attachment of earnings or benefits enquiries, execution of Magistrates Warrants, service of Court papers and for a trace and collect service.

29. The Specification noted at section 2 of the ITT stated as is material (my underline):

"**2.1 Current Service Provision**

 The Anglia Revenues Partnership (ARP) has established its own Enforcement Agency for the collection of Council Tax, Non-Domestic Rates and other sundry debts within and immediately beyond [it]. It also collects debts for other Councils; currently South Norfolk District Council, Broadland District Council, Norwich City Council and car parking debt for [East and West Suffolk Councils].

 The ARP issues approximately 20,000 Liability Orders each year and the car park fines to Enforcement Agents, the majority of which will be to the in-house team, however, external support is required.

2.2 New Service Provision

A service provider is required specifically for the collection of Council Tax, Non-Domestic rates and Business Improvement District levies, for which the Council's (within the ARP and other Councils detailed above) will have obtained a Liability Order in the Magistrates Court, as well as the Enforcement of Parking Penalty Charge Notices for East Suffolk Council and West Suffolk Council, from debtors who have moved out of the area (out of area is defined as being outside the District boundaries of the ARP and the immediately surrounding area). Support is also required where; i. the in-house enforcement service has been unsuccessful in collecting the debt ii. there has been unexpected high level of demand locally, but resources have been affected (e.g. team depletion through absence) - The service provider will also be required to collect Sundry Debts, Housing Benefit Overpayments and Former Tenant Arrears in the circumstances described above….The Council gives no guarantee as to the number or value of Liability Orders that will be passed to the Contractor in any period.

2.3 Accounting Procedures

2.3.1 All money received from Debtors by the Contractor shall be paid into the Client Account within one Day of receipt from the Debtor.

2.3.4 The Contractor shall…each month pay cleared funds held in the Client Account at the end of the previous month to the Council's bank account…

2.5 Communication Systems

2.5.1 The Contractor shall at no cost to the Council provide and maintain the following communication systems dedicated to the Services:-

 local rate telephone lines for Contractor/Debtor communication…

2.8 Fees and Charges

2.8.1 The enforcement agents' charges shall not exceed such sums as are set out in legalisation [sic], depending on the nature of the debt being recovered.

2.8.2 Fees and charges shall not be applied to the debtor's account outside of legislative rules and where related action has taken place.

2.8.3 The enforcement agent shall not make any charges to the debtor for the posting of letters or for receiving payments.

2.8.4 Where instructions are received from the ARP to suspend action the enforcement agent shall ensure that the debtor and ARP incur no further costs of any kind during the suspension period.

2.8.5 In order to secure payment the service provider may enter into any arrangement with a debtor providing it is firm but realistic and the duration of the arrangement is no longer than six months.

2.8.6 To enter an arrangement of a greater duration the service provider must obtain the agreement of the ARP's Authorised Officer in each instance….

2.9 Management Information and Returns

2.9.1 The Contractor shall provide the Council with the following reports, in a form to be approved by the Supervising Officer, giving a comprehensive account of ongoing actions and result:- A Monthly Report, to be submitted by the 10th of each Month for the previous month, to show:- all returned orders and the reason for their return a schedule of all cases held with current balances…

2.9.3 Any unpaid Liability Orders returned to the Council shall be properly certified and accompanied by full details of visits made to the property….

2.11 Ancillary Services

The ARP will require the contractor to carry out the following additional services:- i. Provide training for the in-house enforcement team (e.g. conflict management, legislation etc.) ii. Provide bulk tracing services to establish a current postal address of any person, company, firm or organisation. iii. Conduct enquiries to enable the Council to attach a Debtor's earnings or benefit. iv. The execution of warrants of arrest obtained from the Magistrates' Court by the Council, with or without bail. v. Service of court papers, including but not limited to service of statutory demands. vi. Provide trace and collect service, establishing current address of person, company or organisation…"

Clause 2.12 quoted the levels of external provider debt quoted in p.27 above.

30. Standing back from all the detail (but noting the points I have underlined), it seems to me that as this was a 'call-off' from a Dynamic Purchasing System, on proper consideration of the DPS Contract and its appendices, including the draft 'call-off' terms at Sch.9, the ITT and the Specification, that it would have been apparent to any company on the DPS considering tendering that the Defendant, as contracting authority for ARP, was proposing a contract with the following features:

30.1 Firstly, whilst the ITT was announced under DPS 953, it referred to the Defendant's *own* 'terms and conditions'. Those were not provided in full, but the ITT set out the 'information and instructions, scope and specification for the *contract*…'. The ITT itself set out some proposed contract terms, including the duration (2 years with an option to extend for a year) and the service specification. Nevertheless, the reference to DPS 953 would have suggested the generic contract terms would have been similar to the draft in Sch.9 DPS 953 and the context of the DPS Contract itself would have suggested the applicability of the PCR 15 to the contract.

30.2 Secondly, the contract proposed by the ITT and Specification was plainly for a contractor to *supplement* ARP's own in-house team for the collection principally *of out of area debt*. So, while ARP had c.20,000 liability orders per year, only 8650 debt cases passed to external providers (either the Claimant or including it) in 18 months. The Specification stated explicitly: *'The Council gives <u>no guarantee</u> as to the number or value of Liability Orders that will be passed to the Contractor in any period'* (my underline).

30.3 Thirdly, the Specification plainly envisaged that at least all Liability Orders (so including all the core debt of Council Tax and Non-Domestic Rates) sent out to the contractor would be enforced by it. Para 2.9.1 stated it would be required to submit a monthly report showing all returned Liability Orders and the reasons for that and para.2.9.3 stated any unpaid Liability Orders returned had to be certified and accompanied by details of visits to the property. In other words, the contractor could not 'cherry pick' the debts as Mr Dehayen had feared: they would have to at least try and enforce at least every Liability Order debt, even if ultimately they were unsuccessful.

30.4 Fourthly, the main part of the debt enforcement proposed to be contracted was those out of area Council Tax and Non-Domestic Rate debts. This was clear from Specification para. 2.12 which only gave those as 'debt sent to the Council's external provider over the last 2 years' and in the ITT itself. Neither it nor the Specification set any price, indeed in relation to those core debts it was envisaged the contractor would be paid by charges to debtors not exceeding that in legislation – i.e. the 2014 Fees Regs (and pay money in a client account to return to ARP any debts recovered after fees). Whilst bidders could quote to be paid for other types of debt and services, the latter were explicitly 'ancillary' under para 2.11 and it seems from para 2.12 little of that non-core debt was sent out. Moreover, if a contractor had quoted, it may have lost marks on price. Certainly, neither Bristow nor the Claimant did. Ms Naylor (who knew the costs) felt they could be absorbed.

30.5 Finally, as to the procurement process itself, the ITT detailed the selection criteria, weighted to 30% on Price (with that pricing schedule) but 70% on quality, sub-weighted in ascending order: Experience and References 15%; Knowledge and Understanding 20%; and Technical and Professional Ability 25%. The latter had two questions (12.5% each), one of which related to communication with debtors and under para 2.5.1 of the Specification, the contractor had to offer 'local rate telephone lines'.

The Decision and Dispute

31. I have not seen the Claimant's, or indeed Bristow's, tender documents. However, on 27th January 2023, the Defendant wrote to Ms Naylor saying (my underline) (I have redacted some of the detail of the correspondence that followed as it is sensitive):

> "I regret to inform you that following the evaluation process, your offer in relation to the proposed contract was unsuccessful. The Proposed Contract will be awarded to Bristow & Sutor. [They] scored 90.50% based on their quality (60.50%) & price (30.00%) response.…The Evaluation Criteria Methodology was outlined in the Tender documents. Your score against those criteria was 88.00% based on your quality (58.00%) & price (30.00%) response."

So, the Claimant lost out by 2.5% on the tender scoring to Bristow. As made clear later, the Claimant and Bristow got exactly the same scores in every category except criteria 3.2 on 'communication' with debtors and the council. On that criterion, the Claimant scored 10/12.5: as a 'Grade 4': 'Good response – clearly indicating Respondent has fully understood and can consistently apply and deliver all the required contract standards'. However, Bristow got 12.5/12.5 as a 'Grade 5' out of 5 meaning 'Excellent response – Comprehensive understanding of the requirements *and demonstrates that they are likely to exceed the required standards of the contract'*. As the Defendant later explained, Bristow *went beyond* the Specification in clause 2.5.1 on 'communication'. Ms Naylor considers this was decisive. I also note that assuming (as the Claimant alleges, but Ms H denies) Mr J had previously accompanied Ms H to functions and lunches and arranged to sit together on trains, her score on criteria 3.2 was the same as the other evaluators and while she gave the lowest grade overall (84%, the next highest being 88%) with a low '3' on innovation, this was moderated up by the other evaluators to a 5 – the same as Bristow.

32. Those scoring matrices for the Claimant were not supplied with that decision letter, although the margin with Bristow and a broad summary explaining the different scores was set out. Nevertheless, as the Claimant had been a successful incumbent, Ms Naylor was doubtless surprised by the result and sought further explanation in a letter of 31st January 2023, referring to the scope of the duty to give reasons under Reg.86 PCR. She therefore asked no fewer than 15 questions which I need not set out. In the Defendant's response on 7th February, its Procurement Officer Mrs Butcher (who had also written the decision letter) answered each of those questions and in particular confirmed that the only difference in score between the Claimant and Bristow was on 'communication' in question 3.2 where the Claimant got 10/12.5 (i.e. 4/5 or 'good') whilst Bristow got 12.5/12.5 (i.e. 5/5 or 'excellent'). As some details are commercially-sensitive, I will not quote it in this public judgment. Mrs Naylor then responded on 10th February 2023, moving on from criticising the clarity of the Defendant's reasons to the legitimacy of its reasoning for the scoring. Specifically, Ms Naylor argued that as the sole difference in score was 'communication', that the Claimant too should have score a '5/5' for exceeding the Specification in various respects. Mrs Naylor then requested the evaluation sheets. On 16th February, Mrs Butcher provided these (which I have summarised above) and rejected Mrs Naylor's criticisms of the score, suggesting its bid was not clear enough.

33. The Claimant then turned to litigation. On 20th February (before it received that letter of 16th February), the Claimant's lawyers wrote to the Defendant pointing out that the 30-day limitation period to issue proceedings under Reg.92 PCR expired on 27th February and made various criticisms of the scoring process (now elaborated in the APOC). On 21st February, the Defendant's lawyers responded pointing to its letter of 16th February and said it would defend proceedings. The 16th February letter did not satisfy the Claimant whose solicitors wrote back on 22nd February. After that, as I set out in the Introduction, on 24th February the Claimant issued the TCC Claim and on 10th March the JR Claim. I need not repeat the procedural history further.

34. However, at the time those proceedings were issued, the Defendant's voluntary 'standstill' in awarding the contract to Bristow remained. As noted above, once proceedings are issued, if the PCR apply, Reg.95 prohibits award of the contract until the Court orders otherwise or determines the proceedings. Nevertheless, on 4th April, after not only the TCC Claim but the JR Claim were issued and the Defence and SGR in response to them respectively were filed by the Defendant disputing the applicability of the PCR 15, it informed the Claimant it was proceeding to award the contract. Whilst Ms Naylor objected the same day, the Defendant seems to have entered the contract with Bristow on 22nd March with effect from 31st March 2023.

35. That 'Bristow contract' is obviously based on the DPS Sch.9 draft and incorporated the ITT Specification, but with three key differences:

35.1 Clause 4 described it as a 'services concession' - not in the Sch.9 draft.

35.2 Clause 12.2 was new: "The consideration for carrying out the Services is the right to exploit the Services by applying charges to third parties subject to enforcement action. There shall be no payments by the Customer to the Provider in respect of the Services. The Provider carries [them] out and the operational risks and profits or losses of doing so are the Provider's."

35.3 That passage was also added to p.2.2 of the Specification incorporated.

I accept the Defendant made these changes to the Sch.9 draft clearly to 'label' the contract as a 'services concession' and this was the first time in the procurement process that had been explicitly said. If Ms Naylor, with her considerable experience of multiple procurement exercises over several years, as she put it: 'did not give a thought to the precise procurement regulations that would be applied', it may well be that Mrs Butcher and Mrs Mellor did not do so until the dispute erupted and their lawyers advised them of the difference. *For present purposes*, I proceed on the basis they had assumed until that point the PCR 15 applied and the new 'label' in the Bristow contract was an afterthought, if not a deliberate tactic. Nevertheless, I must still decide whether or not this new 'label' reflected the legal reality.

The legal distinction between 'Public Contracts' and 'Concession Contracts'

The distinction and why it matters

36. If procurement staff in local authorities - and managers experienced in public procurement at a large company - do not fully understand the significance of the legal distinction between the PCR 15 and CCR 16, it may help to clarify it. I summarised at para.24 above the key differences between the PCR 15 and CCR 16.

    36.1 It is common ground that *if Reg.2 PCR 15 applies*, the procurement contract was above the threshold for 'public service contracts' in Reg.5 PCR 15 so the obligations and remedies of the PCR apply, e.g. as pleaded here apparent bias under Reg.24 PCR 15, inadequate reasons under Reg.86 PCR, failure to apply correct criteria under Reg.34(23) PCR 15, or 'manifestly erroneous' scoring for the purposes of Reg.67 PCR 15. *If the PCR apply* and any of those allegations succeed, as the contract was awarded to Bristow after the TCC Claim was issued, that would violate the standstill period (see Reg.95). The remedies provision in Reg.98 PCR would then require the Court to make a declaration of ineffectiveness (see Reg.99(5)) unless the limited grounds in Reg.100 apply, as well as potentially ordering penalties and damages.

    36.2 By contrast, *if the contract is a 'concession contract' under Reg.3 CCR 16*, it would not be a 'public contract' under Reg.2 PCR. Indeed, that concession contract would fall under the £5.3m threshold for application of the CCR 16 under its Reg.9 so none of the (rather less stringent) obligations and remedies in the CCR 16 would apply. Moreover, for the reasons explained by HHJ Keyser QC in *Adferiad* at ps.122-9 (a case I raised with Counsel involving a procurement process after Brexit was implemented on 31st December 2020), the effect of the Freedom of Establishment and Free Movement of Services (EU Exit) Regulations 2019 ('The Two Freedoms Regs') is that the Claimant could not rely on the EU Treaty principles of 'equal treatment, non-discrimination and transparency' outside the PCR/CCR.

    36.3 Whilst the APOC p.13 pleaded in passing that a 'concessions contract' under Reg.3 CCR 16 if below-threshold was not excluded from being a 'public contract' under Reg.2 PCR, Reg.2 states it 'does not include concession contracts within the meaning of [CCR 16]', not that it 'does not include contracts to which the CCR 16 apply'. Moreover, as Mr Barrett says, this would make no sense as it would mean below-threshold concession contracts would be subject to more intensive regulation under the PCR 15 than above-threshold concession contracts under CCR 16. Mr McGurk did not press this.

    So, there is a real 'cliff-edge' between the PCR 15 and CCR 16 for contracts less than £5.3m in value. If the PCR 15 apply, there are strong statutory remedies. If not, as the CCR 16 do not, there are no statutory remedies. Whilst the Clamant can still pursue a common law contract claim, this is limited to damages for lost opportunity, it cannot reverse the contract grant to Bristow. This is the reason why the Claimant here has also brought the JR Claim, seeking a Quashing Order. However, unlike Reg.98 PCR, JR remedies are discretionary and also restricted by s.31 Senior Courts Act 1981. Moreover, I return to the limitations of the JR Claim when addressing it at the end.

37. So, the Claimant's case is that the PCR 15 applies as it contends that the contract here was a 'public contract' (or its subset a 'public services contract') under Reg.2 PCR:

> "'public service contracts' means public contracts which have as their object the provision of services other than…'public works contracts' [which it is not]…
> 'public contracts' means contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services but does not include concession contracts within the meaning of the Concession Contracts Regulations 2016'."

So, for the PCR to apply, the contract: (i) *must be* a 'public contract' under the PCR 15 and (ii) *must not be* a 'concession contract' under the CCR 16. Mr Barrett confirmed the Defendant contends (i) it *is* a 'concession contract' under the CCR 16 or (ii) not a 'public contract' under the PCR 15 anyway. I consider both arguments.

38. However, the exclusion from the definition in Reg.2 PCR of 'public contracts' of 'concession contracts' under the CCR 16 leads to the definition of them in Reg.3 CCR 16. Given its centrality, I quote Reg.3 in full now and return to analyse it below:

> "(1) In these Regulations, "concession contract" means a works concession contract or a services concession contract within the meaning of this regulation.
> (2) A "works concession contract" means a contract— (a) for pecuniary interest concluded in writing by means of which one or more contracting authorities or utilities entrust the execution of works to one or more economic operators, the consideration for which consists either solely in the right to exploit the works that are the subject of the contract or in that right together with payment; and (b) that meets the requirements of paragraph (4).
> (3) A "services concession contract" means a contract—(a) for pecuniary interest concluded in writing by means of which one or more contracting authorities or utilities entrust the provision and the management of services (other than the execution of works) to one or more economic operators, the consideration of which consists either solely in the right to exploit the services that are the subject of the contract or in that right together with payment; and (b) that meets the requirements of paragraph (4).
> (4) The requirements are—(a) the award of the contract shall involve the transfer to the concessionaire of an operating risk in exploiting the works or services encompassing demand or supply risk or both; and (b) the part of the risk transferred to the concessionaire shall involve real exposure to the vagaries of the market, such that any potential estimated loss incurred by the concessionaire shall not be merely nominal or negligible.
> (5) For the purposes of paragraph (4)(a), the concessionaire shall be deemed to assume operating risk where, under normal operating conditions, it is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services which are the subject-matter of the concession contract."

As this may be one of the first judicial considerations of the dividing line between the PCR 15 and CCR 16, as it may make such a difference in many cases and as I have the benefit of such experienced and expert Counsel, I will analyse it in some detail.

The approach to interpreting Reg.2 PCR and Reg.3 CCR

39. Whilst Mr McGurk distinguishes *JBW* and *Newlyn* on the basis that both pre-dated Reg.3 CCR, Mr Barrett submits that Reg.3 has not changed the underlying principles they applied. This raises the question whether Reg.3 CCR has changed the existing principles or simply codified them and indeed the anterior question of how to interpret domestic legislation implementing EU Law, especially post-Brexit. Whilst neither Counsel submitted that Brexit made a difference to the distinction between PCR 15 and CCR 16, as that distinction makes such a difference, it is necessary to consider it with care. Indeed, it also goes to the heart of Counsel's debate about the weight to be attached to *JBW* and *Newlyn*. For example, as it was the first Court of Appeal case on the CCR 16, indeed on Reg.3, I raised *Ocean v HFLBC* [2020] PTSR 639 (CA). At para 52, Coulson LJ placed no reliance on *JBW*, as it did not address the expression 'contract for pecuniary interest', pre-dated the Concessions Directive and 'concerned whether the dispute fell under the 2006 Regs'. At para.10 of *JBW*, Elias LJ had said:

> "The 2006 Regulations are designed to implement the 2004 Directive. They do not precisely replicate the language of the Directive but both parties accepted that since the[y]..have to be read consistently with the Directive (and no-one suggested they could not..) we should simply focus on the terms of the Directive."

Therefore, Elias LJ's analysis actually depended on the 2004 Directive, which he then applied to the 2006 Regs – I come back to the significance of that point below. Yet when Coulson J (as he then was) in *Newlyn* applied the reasoning in *JBW* to the saving provision in Reg. 117 PCR for 'concession contracts' under the 2006 Regs, he did not refer to the Directive, doubtless because the point was conceded. Coulson LJ's own approach in *Ocean* was to focus on the domestic regulations - the CCR 16, but as he observed at para.13, it was common ground there were no material differences between them and the Concessions Directive and his analysis drew on that and the only CJEU case so far which has addressed its definition of 'concession', namely *Promoimpresa v Consorzio* [2017] 1 CMLR 22. Therefore, I not only referred Counsel to *Ocean*, but to the Concessions Directive and *Promoimpresa* as well.

40. So, *JBW* pre-dated the Concessions Directive, CCR 16 and the PCR 15, *Newlyn* applied the PCR 15 but (just) pre-dated the CCR 16 and the implementation date of the directive; and *Ocean* applied the directive and the CCR 16, but as decided in 2019, both *Ocean* and *Amey v West Sussex* [2019] PTSR 1995 (TCC) Mr McGurk relied on, pre-dated the legal implementation of Brexit with effect from 31st December 2020 (the 'IP Completion Date') under 'EUWA'. So where does Brexit leave the status of *JBW*, *Newlyn* and indeed *Ocean* as well ? This is the main reason I also referred Counsel to *Adferiad* (on interpretation under EUWA for a procurement in 2021) and *Brent LBC v Risk Management Partners* [2011] 2 WLR 166 (SC), pre-Brexit but applying orthodox domestic interpretative principles to legislation implementing EU Law. In short, my view is the legal position remains as in *Ocean* which binds me, but it concerned a rather different aspect of reg.3 CCR; and that on the key aspects of Reg.3 here, *JBW* and *Newlyn* are still 'highly persuasive'. Given its importance in this case and generally, I will explain why in a little detail.

41. A convenient starting-point to examine this issue is the CCR 16 themselves. Reg.2 CCR 16 lists a number of defined expressions, including 'concession contract', which 'has the meaning given by regulation 3'. However, Reg 2(2) CCR 16 states:

> "Any other expression used both in these Regulations (other than in Part 5) and in the Concessions Directive has the meaning that it bears in that Directive."

However, this does not mean the Concessions Directive is irrelevant to the definition of 'concessions contract' in Reg.3 CCR 16. The CCR 16 were enacted in April 2016, before 'Brexit' had even been the subject of a referendum, under s.2(2) European Communities Act 1972 ('ECA 72'), just as the predecessor of the PCR 15 and CCR 16 - the 2006 Regs - had implemented the 2004 Directive and before that, the Public Supply Regulations 1995 implemented a 1980s Procurement Directive. It was considered in *R(Cookson & Clegg) v MoD* [2005] EWCA Civ 811 where Buxton LJ said at p.14, the approach following *C-106/89 Marleasing (1990*) was to interpret domestic legislation implementing an EU Directive 'in the light of the wording and purpose of the Directive'. The ECJ in *Marleasing* put it like this at p.8:

> "In applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter..."

In EU Law, this is known as 'indirect effect' of EU Directives, as opposed to their 'direct effect' against 'emanations of the state' if 'clear, unconditional and sufficiently precise'. However, with 'indirect effect', as is apparent from the ECJ's formulation in *Marleasing,* this applies not only to legislation *implementing* the EU Directive concerned, but to *all other* national legislation, *before and after* it. This is one aspect of the EU Law principle of the 'supremacy' of EU over domestic law.

42. In this way, EU 'Indirect Effect' interpretation goes well beyond the normal domestic approach to statutory interpretation as recently re-stated by the Supreme Court in *R(PRCBC),* paras 29-31, summarised recently by the Supreme Court at para.35 of *Merton LBC v Nuffield Health* [2023] UKSC 18 at p.35 as: 'focusing on the words used in that provision in the context in which they were enacted, and taking account of the purpose for which they were introduced'. An example of that entirely orthodox domestic approach being taken to EU-derived domestic legislation is *Brent.* A council started a procurement process for insurance but terminated it as it placed cover with a mutual insurance company it and other London councils collectively controlled. The lower courts held this was a contract between separate legal entities in English law, so a 'public services contract'. However, the Supreme Court disagreed, applying the '*Teckal* exception' the ECJ had implied into the word 'contract' in a 1990s Procurement Directive where the other 'party' was controlled by the public body, even though that exception was not explicit in the directive. Lord Hope at p.25 explained why the same exception should be implied into the 2006 Regs:

> "As for the meaning and effect of the 2006 Regulations, I think it would be wrong to apply a literal approach to the words and phrases used in it, such as in the definitions of 'public contract' and 'public service contract'.

> A purposive approach should be adopted. As Lord Diplock indicated in *Kammins v Zenith* [1971] AC 850, 881, this means that regard must be had to the context in which the Regulations were made, to their subject matter and to their purpose…. Having regard to the background of EU law against which the Regulations were made, the definitions in the Regulations can be taken to express the same idea as those in the Directive. Thus, something which amounts to a contract in domestic law can nevertheless be held, without doing undue violence to the words of the Regulations, not to be a relevant contract for the purpose of the [Regulations]."

Importantly, this was not an application of EU 'indirect effect', but ordinary domestic purposive interpretation. *Kammins* even pre-dated the UK's entry into the (then) EEC. So, this home-grown 'purposive approach' to domestic legislation implementing EU Directives can survive Brexit. (It will be interesting to see how far it may apply by analogy in the future to domestic legislation not *implementing* EU Law but *mirroring* it, as with some parts of the Procurement Bill currently going through Parliament, including clause 8 with its slightly different definition of 'concession').

43. Indeed, in my judgement, 'indirect effect' also survives Brexit, at least in relation to: (i) provisions of domestic legislation; (ii) implementing EU Directives; (iii) all enacted before the end of 2020; (iv) not amended since; together with (v) case-law in the ECJ/CJEU or domestically before the end of 2020. All this is true with Reg.2 PCR 15 and Reg.3 CCR 16, the Public Contracts Directive 2014 and Concessions Directive 2014; and all relevant ECJ/CJEU authorities up to *Promoimpresa* and indeed *JBW*, *Newlyn* and *Ocean*. Whilst 'indirect effect' potentially raises great legal complexities in other cases (see the interesting article by Asif Hameed, Fellow of Selwyn College, Cambridge: *"UK Withdrawal from the EU: Supremacy, Indirect Effect and Retained EU Law"* (2022) 85(3) MLR 726-754), here this conclusion is comparatively clear:

43.1 As Reg.2 PCR 15 and Reg.3 CCR 16 implemented the two 2014 Directives, the former two are 'EU-derived domestic legislation' under s.2 EUWA and so are included in the definition of 'retained EU Law' under s.6(7) EUWA; and importantly also unmodified since IP Completion Day on 31st December 2020.

43.2 Therefore, Reg.2 PCR 15 and Reg.3 CCR 16 are governed by s.6(3) EUWA:

> "Any question as to the validity, meaning or effect of any retained EU law is to be decided, so far as that law is unmodified on or after IP completion day and so far as they are relevant to it—(a) in accordance with any retained case law and any retained general principles of EU law, and (b) having regard (among other things) to the limits, immediately before IP completion day, of EU competences.

43.3 On s.6(3)(b), Public Procurement Law generally and the definitions of 'public contract' and 'concession contract' specifically in Reg.2 PCR 15 and Reg.3 CCR 16 respectively are (and were before 31st December 2020) well within 'EU competencies', indeed one of its core fields of operation for many years.

43.4 On s.6(3)(a), I must decide the 'meaning' of (i.e. interpret) Regs.2 PCR 15 and Reg.3 CCR 16, unamended since Brexit, so far as relevant 'in accordance with any retained case law and any retained general principles of EU law':

43.4.1 'Retained case law' under s.6(7) EUWA includes both: (i) 'retained EU case law' i.e. ECJ/CJEU decisions before Brexit, including here all the ECJ/CJEU decisions up to and including *Promoimpresa* in 2017; and 'retained domestic case law' i.e. domestic decisions relating to what is now retained EU Law, including *Brent*, *JBW*, *Newlyn* and *Ocean*, but not *Adferiad* as it post-dates Brexit. (Indeed, it may even include CJEU decisions since 2021 if relating to a UK reference prior to 2021: *HMRC v Perfect* [2022] 1 WLR 3180 (CA)).

43.4.2 'Retained general principles of EU Law' given s.6(7) and para.2 Sch.1 EUWA mean principles recognised as such by the ECJ/CJEU before 31st December 2020. They do not give rise to a cause of action (para.3 Sch.1) as HHJ Keyser QC found in *Adferiad*, dismissing a claim based upon them following the disapplication by the Two Freedoms Regulations of the ability to rely on the EU Treaty for cases falling below the threshold in the PCR 15. However, give the analyses of HHJ Keyser QC in *Adferiad* at para.117 and indeed of Green LJ in *Lipton v BA City Flyer* [2021] EWCA Civ 454, the effect of para.2 Sch.1, if not alone then at least taken in combination with s.5(5) and/or s.6(3) EUWA, is to preserve 'retained general principles'. One such principle is that of 'indirect effect', at least for Directives and domestic legislation prior to the end of 2020 unamended since it.

43.5 Alternatively, as the PCR 15 and CCR 16 have not been materially amended since 31st December 2020 the 'indirect effect' of the Directives is preserved by para.5 Sch.1/s.5(2) EUWA as an aspect of preserved 'supremacy of EU Law':

> "5(2)…[T]he principle of the supremacy of EU law continues to apply on or after IP completion day so far as relevant to the interpretation….of any enactment or rule of law passed or made before [it]."

As discussed in *R(PRCBC)* paras.29-31, light on what Parliament 'intended' or meant by ambiguous statutory expressions can be cast by reference to Explanatory Notes, so in respectful disagreement with Mr Hameed, I suggest part of what Parliament meant in s.5(2) is shown by Explanatory Note 104:

> "The principle of supremacy also means that domestic law must be interpreted, as far as possible, in accordance with EU law. So, for example, domestic law must be interpreted, as far as possible, in light of the wording and purpose of relevant directives. Whilst this duty will not apply to domestic legislation passed or made on or after [IP Completion Day, s.5(2)] preserves this duty in relation to domestic legislation passed…before [it]."

Indeed, that 'indirect effect' forms part of 'EU supremacy' has effectively been said by the European Court of Justice ('ECJ') in Luxembourg (now to avoid confusion with the European Court of Human Rights in Strasbourg, the Court of Justice of the EU ('CJEU')). For example, see the judgment of the Grand Chamber of the CJEU in *Poplawski v Openbaar Ministerie* Case C-573/17 (24th June 2019) paras.52-79.

Whilst this case is different, all this is consistent with Green LJ's analysis in *Lipton*.

44. Therefore, because not only all relevant EU and domestic legislation was enacted before the end of 2020 and not amended since; but also all relevant EU and domestic case-law was decided before the end of 2020, I agree with Counsel that Brexit has not altered the approach I should take to the interpretation of the PCR 15 and CCR 16. In short, I will interpret each of them in accordance with (and as consistent with) the purpose and wording of the two 2014 Directives they implement. This was in effect the approach taken by Coulson LJ in *Ocean*, as opposed to Elias LJ 'simply focussing on the terms of the 2004 Directive itself' in *JBW*. Indeed, the approach I take is not only consistent with the principle of 'Indirect Effect' (it not being argued the Directives have 'direct effect' against the Defendant in this case), especially as focussed on domestic implementing legislation. It is also consistent with the far less muscular domestic principle of purposive interpretation in *Brent*. Fortunately, in this case, because there is no inconsistency between Reg.2 PCR 15 and Reg.3 CCR 16 and the respective 2014 Directives (indeed the former often effectively copy the latter), there is no real difference in the 'indirect effect' and 'purposive' approach, even if there may well be in other cases where there is less consistency of language.

45. In short, I will interpret Reg.2 PCR 15 and Reg.3 CCR 16 in accordance with the 2014 EU Directives. As Elias LJ's analysis in *JBW* was based on the 2004 Directive rather than the domestic 2006 Regs, whilst not binding, it remains persuasive (as does *Newlyn* based on it) to the extent that the meaning in the 2014 Directives 'public contract' and 'services concession' is the same as the meaning of the related expressions in the 2004 Directive which Elias LJ considered in *JBW*. Since as I shall now show, the meaning of those concepts – and in particular that of a 'concession' - is effectively the same in the 2014 Directives as in the 2004 Directive as interpreted by the ECJ prior to the 2014 Directive in the cases Elias LJ reviewed in *JBW*, it follows that his analysis remains not just persuasive but 'highly persuasive'.

The EU / ECJ approach to 'public contracts' and 'concessions'

46. I turn to Elias LJ's detailed analysis in *JBW* of the EU Law on this issue up to 2012 (so just before the Public Contract and Concessions Directives in 2014). I simply propose to cite that but just add a few details on certain points only insofar as relevant to those later Directives. I briefly noted above EEC procurement law history and pre-2004 Directives. In *JBW*, Elias LJ explained at para.9 they excluded, but did not define, 'concession contracts':

> "…Directive 92/50/EEC…regulated the procedures for awarding public service contracts. [It] did not contain a definition of a service concession although the ECJ held that a concession fell outside the terms of that Directive. In *Telaustria Verlags GmbH v Telekon Austria AG* (C-324/98) [2000] E.C.R. I-10745 the ECJ pointed out the Commission had originally included public concession contracts in that Directive but these were removed from its scope by the European Council. The [2004] Directive puts beyond doubt that they are excluded. Earlier case law on the meaning of concession in relation to the 1992 Directive remains relevant not least because the first recital of the 2004 Directive states in terms that the Directive is 'based on Court of Justice case-law'.

47. In *JBW*, Elias LJ went on to discuss that pre-2004 Directive case-law at paras.23-7:

> "23 One of the earliest cases was *Commission of the European Communities v Italy* (C-272/91) [1994] E.C.R. I-1409; [1995] 2 C.M.L.R. 673, in which the installation and running of a computer system for the operation of the Italian national lottery was contracted to a third party. The payment was a percentage of the gross receipts…..The Italian Government claimed that this was a concession and therefore fell outwith the scope of the Directive. The court rejected that submission. It held that the contract was of a technical nature; that there was no transfer of responsibility to the concessionaire for the various operations inherent in running the lottery; and the fact that annual payment was related to revenue did not convert the contract into a concession.
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> 24 In *Gemeente Arnhem v BFI Holding BV* (C-360/96) [1998] E.C.R. I-6821; [2001] 1 C.M.L.R. 6 Advocate General La Pergola identified two particular criteria which distinguished concessions and service contracts caught by the 1992 Directive. The first was that the recipient of the service in a concession is a third party which receives the service rendered; and the second was that the remuneration derives wholly or in part from the provision of that service to the beneficiary. He added that 'the concessionaire automatically assumes the economic risk associated with the provision and management of the services'.
>
> 25 This approach was followed in *Telaustria* [2000] E.C.R. I-10745 where the contractor was given the right to produce telephone directories and electronic databases of subscribers. The authority took a 40 per cent stake in the operation. The court held that it was a services concession since the contractor obtained the right to exploit for payment its own service….Advocate General Fennelly in his opinion rejected an argument the concept of service concession should be construed narrowly as an exception to the general rule. Concessions were not…. an exception to the rules; they were simply not covered by them…
>
> 27 In *Parking Brixen GmbH v Gemeinde Brixen* (C-458/03) [2005] E.C.R. I-8612; [2006] 1 C.M.L.R. 3 the public authority granted a contractor the right to manage a public car park in consideration for which he was remunerated by sums paid by third parties for the use of the car park. The ECJ confirmed an important distinction between a standard public services contract and a concession is that under the former the provider is remunerated directly by the contracting authority whereas in the latter his remuneration comes from third parties using the service. The court noted ([40]) that: "That method of remuneration means that the provider takes the risk of operating the services in question and is thus characteristic of a public service concession…." Not surprisingly on the facts the ECJ found that this was a concession and fell outside the terms of the Directive. There were the two interrelated aspects of third-party payment and the risk inherent in running a service of this kind."

Whilst *Parking Brixen* post-dated the 2004 Directive, its facts pre-dated it (and I also observe in passing, also concerned the '*Teckal* exception' considered in *Brent*).

48. In *JBW* at paras.5-8, Elias LJ summarised the key provisions of that 2004 Directive:

> "5… Article 1 of [the 2004] Directive defines public contracts as follows: "(a) *public contracts* are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive."
>
> 6 A public service contract is then defined as a public contract other than a public works or supply contract which has as its object the provision of services referred to in Annex II of the Directive….
>
> 7 Article 1(4) defines a service concession as: "...a contract of the same type as a public service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in this right together with payment."
>
> 8 Art. 17 provides the Directive does not apply to service concession contracts."

49. In *JBW*, Elias LJ analysed the CJEU cases under the 2004 Directive (which I slightly re-order so they are chronological):

> "31….[I]n *Oymanns… v AOK* (C-300/07) [2009] E.C.R. I-4779. The claimants were an orthopaedic footwear company who submitted a tender for the manufacture and supply of footwear suitable for diabetic foot syndrome. The services provided were divided into the provision of footwear for different groups, and tenderers had to submit prices for the cost of footwear for each group. Payment for the services was made by a social security scheme to which the patients would make some contribution. The quantity of shoes supplied was not fixed and depended upon the number of patients who had the appropriate documents, including a medical prescription, choosing to contact the successful tenderer. The orthopaedic footwear had to be individually tailored to the patient and advice had to be given both prior to and after its supply about its use.
>
> 32 The court concluded that it was a mixed supply and services contract but went on to consider whether, if the provision of services was regarded as the more important element, it should be regarded as a service concession or a service contract….The court emphasised that the legal classification depended on a careful analysis of the factors in any particular case and continued ([71]):
>
> "…. it flows from the above-mentioned definition of a service concession that such a concession is distinguished by a situation in which a right to operate a particular service is transferred by the contracting authority to the concessionaire and that the latter enjoys, in the framework of the contract which has been concluded, a certain economic freedom to determine the conditions under which that right is exercised since, <u>in parallel</u>, the concessionary is, <u>to a large extent</u>, exposed to the risks involved in the operation of service…" (my underline)

I interpose to stress 'to a large extent' relates to the extent of exposure to such risks as there are, as opposed to the extent of risks themselves. I underline 'in parallel' as it is relevant to the 2014 Directive and indeed Elias LJ mentioned it in *JBW*: he continued:

"33 The court held the successful tenderer would not enjoy the degree of economic freedom which was the mark of a concession holder. Nor was it exposed to a significant risk connected with the provision of the services. Accordingly, this was a contract to which the Directive applied. The court recognised this did not mean that the business was risk-free. It said this at 74:

> "..[T]he trader [was] exposed to a certain risk in as much as insured persons may not avail themselves of its products and services. However, that risk is limited. [It] is spared the risk connected with the recovery of payment and the insolvency of the other party to the individual contract since, in law, the statutory sickness and insurance fund alone is responsible for paying the trader. In addition, it…does not have to incur inconsiderable advance expenditure before a…contract with an insured person is concluded..".

[As] the tenderer did not bear the principal burden of the risk associated with the carrying on of the activities the court concluded that this was an agreement and not a concession. The assumption...[was]...the freedom to exploit rights conferred by the contract necessarily creates the risk—it is 'in parallel' as the court put it..."

"28 [In]….*WAZV Gotha v Eurawasser* .....(C-206/08) [2009] E.C.R. I-8377..the contract under consideration….involved the distribution of drinking water and the disposal of sewage. The terms of the tender were that a successful tenderer would supply the services on the basis of private law contracts in its own name and on its own account to user residents and it would be paid directly by those users. It could fix the prices but subject to certain limits set by local municipal rules.

29 The court approved the grounds for distinguishing a service contract and a concession…in *Parking Brixen*. The court held that receiving remuneration from third parties was one means of exploiting the service and necessarily meant that the provider was taking the risk of operating the service. In view of that, it did not find it necessary to consider precisely what constituted 'the right to exploit'.

30 The court also rejected a submission to the effect that if the risks involved in running the service were small (as was alleged to be the case here) there would be no concession even if there was a transfer of a service. The court noted that in certain sectors of activity, in particular the public utilities, rules of public law often limit the degree of risk. Nonetheless, as long as there is a transfer of all or at least a significant share of such risks as arise in the operation of the service, that will suffice to establish that a concession had been transferred."

I only add, again as it is relevant to the later Concessions Directive and indeed to the expression 'to a large extent' in *Oymanns*, the ECJ in *Eurawasser* said:

66.….[R]isk is inherent in the economic operation of the service.

67 If the contracting authority continues to bear all of the risk by not exposing the supplier to the vagaries of the market, the awarding of the right to operate the service requires that the formalities provided for in Directive 2004/17 be applied, with a view to safeguarding transparency and competition.

68 In the complete absence of a transfer to the service provider of the risk connected with operating the service, the transaction….is a service contract…

> 72 It is not unusual that certain sectors of activity, in particular sectors involving public service utilities, such as the distribution of water and the disposal of sewage, are subject to rules which may have the effect of limiting the financial risks entailed.
>
> 73 [D]etailed rules of public law, to which the economic and financial operation of the service is subject, facilitate the supervision of how that service is operated, and scale down..factors which may threaten transparency and distort competition.
>
> 74 [I]t must remain open to the contracting authorities, acting in all good faith, to ensure the supply of services by way of a concession, if they consider that to be the best method of ensuring the public service in question, even if the risk linked to such an operation is limited.
>
> 75 Moreover, it would not be reasonable to expect a public authority granting a concession to create conditions which were more competitive and involved greater financial risk than those which, on account of the rules governing the sector in question, exist in that sector.
>
> 76 In such circumstances, as the contracting authority has no influence on the detailed rules of public law governing the service, it is impossible for it to introduce and…to transfer risk factors which are excluded by those rules.
>
> 77 In any event, even if the risk run by the contracting authority is very limited, it is necessary that the contracting authority transfer to the concession holder all, or at least a significant share, of the operating risk which it faces, in order for a service concession to be found to exist..”

This is why the reference in *Oymanns* to the concessionary being ‘to a large extent exposed to the risks involved’ must be read as being ‘to a large extent exposed *to such risks as are involved*’, even if they are very limited. The ECJ in *Eurawasser* concluded:

> “In relation to a contract for the supply of services, the fact that the supplier does not receive consideration directly from the contracting authority, but is entitled to collect payment under private law from third parties, is sufficient for the contract in question to be categorised as a ‘service concession’ within the [Directive]… where the supplier assumes all, or at least a significant share, of the operating risk faced by the contracting authority, even if that risk is, from the outset, very limited on account of the detailed rules of public law governing that service.”

50. Then in *JBW*, Elias LJ later turned to the then-most recent relevant ECJ authority:

> “35….*Stadler v Zweckverband* (C-274/09) [2011] P.T.S.R. D43…concerned the provision of rescue services…The contract was unusual in a number of respects. The contractor could charge a usage fee upon all the persons and bodies which called upon the service. The amount of the fee was agreed not with the contracting authority but with social security institutions….The payments by third parties did not go directly to the contractor [but to] a central settlement office which in turn paid the contractor. Most of the users were covered by compulsory insurance but some were either subject to private insurance or were uninsured. The contractor took the risk that they would not be able to meet their liabilities.

In the light of the previous case law the court concluded the arrangement constituted a concession. The court considered that it was immaterial that the payment was made via a third-party body: it observed 'the fact remains that the remuneration obtained by the provider of the services comes from persons other than the contracting authority which awarded it the contract'. Furthermore, the court applied the *Eurawasser*.... case in finding ([33])

> "[W]here the remuneration of the provider comes exclusively from a third party, the transfer by the contracting authority of a 'very limited' operating risk will suffice in order for a service concession to be found."

I would only add to that in *Stadler* at paras.34-7, the ECJ continued in this way:

> "34 It is not unusual that certain sectors of activity…are subject to rules which may have the effect of limiting the financial risks entailed. It must in particular remain open to the contracting authorities, acting in all good faith, to ensure the supply of services by way of a concession, if they consider that to be the best method of ensuring the public service in question, even if the risk linked to such an operation is very limited (*Eurawasser*, paras. 72 and 74).
>
> 35 In such sectors, the contracting authority has no influence on the detailed rules of public law governing the service, and thus on the level of the risk to transfer, and it would not, moreover, be reasonable to expect a public authority granting a concession to create conditions which were more competitive and involved greater financial risk than those which, on account of the rules governing the sector in question, exist in that sector (see *Eurawasser*, paragraphs 75 and 76)….
>
> 37 [T]he risk of the economic operation of the service must be understood as the risk of exposure to the vagaries of the market (*Eurawasser*, paras.66-7), which may consist in risk of competition from other operators, risk that supply of the services will not match demand, risk that those liable will be unable to pay for the services provided, risk that the costs of operating the services will not fully be met by revenue or for example also risk of liability for harm or damage resulting from an inadequacy of the service (see… *Oymanns*, para.74).
>
> 38 By contrast, risks such as those linked to bad management or errors of judgment by the economic operator are not decisive…[of] classification as a public service contract or a service concession, since those risks are inherent in every contract, whether it be a public service contract or a service concession…."

Having analysed the exposure to risk of the rescue contractor, the ECJ said:

> "48…[W]here the economic operator selected is fully remunerated by persons other than the contracting authority which awarded the contract concerning rescue services, where it runs an operating risk, albeit a very limited one, by reason inter alia of the fact that the amount of the usage fees in question depends on the result of annual negotiations with third parties, and where it is not assured full coverage of the costs incurred in managing its activities in compliance with the principles laid down by national law, that contract must be classified as a 'service concession' within the meaning of Article 1(4) of Directive 2004/18."

51. Just as the definition of 'service concession' in the 2004 Directive considered in *Stadler*, *Eurawasser* and *Oymanns* was strongly influenced by the earlier ECJ caselaw noted in *JBW*, so those three cases in turn strongly influenced the new definition of 'concession' in the Concessions Directive 2014 (CDir') as is clear from these recitals:

> "(18) Difficulties related to the interpretation of the concepts of concession and public contract have generated continued legal uncertainty among stakeholders and have given rise to numerous judgments of the [CJEU]. Therefore, the definition of concession should be clarified, in particular by referring to the concept of operating risk. The main feature of a concession, the right to exploit the works or services, always implies the transfer to the concessionaire of an operating risk of economic nature involving the possibility that it will not recoup the investments made and the costs incurred in operating the works or services awarded under normal operating conditions even if a part of the risk remains with the contracting authority or contracting entity. …[S]pecific rules governing the award of concessions would not be justified if the contracting authority ….relieved the economic operator of any potential loss, by guaranteeing a minimal revenue, equal or higher to the investments made and the costs the economic operator has to incur in relation with performance of the contract. At the same time, it should be made clear that certain arrangements which are exclusively remunerated by a contracting authority….should qualify as concessions where the recoupment of the investments and costs incurred by the operator for executing the work or providing the service depends on the actual demand for or the supply of the service or asset.

This reflected the emphasis on operating risk and its 'parallel' relationship with exposure to potential loss emphasised in *Oymanns* and then developed in *Eurawasser* by reference to the 'vagaries of the market', then by *Stadler* examining whether the contractor is 'assured full coverage of the costs incurred in managing its activities'.

> "(19) Where sector-specific regulation eliminates the risk by providing for a guarantee to the concessionaire on breaking even on investments and costs incurred for operating the contract, such contract should not qualify as a concession within the meaning of this Directive. The fact that the risk is limited from the outset should not preclude the qualification of the contract as a concession. This can be the case for instance in sectors with regulated tariffs or where the operating risk is limited by means of contractual arrangements…[for] early termination [due] to the contracting authority or…force majeure."

This recital contrasts the effective elimination of risk by guaranteed payment in *Oymanns* with the real risk of loss even with regulated tariffs as in *Eurawasser*.

> "(17) Contracts not involving payments to the contractor and where the contractor is remunerated on the basis of the regulated tariffs, calculated so as to cover all costs and investments borne by the contractor for providing the service, should not be covered by this Directive."

This recital seems to combine the effect of *Eurawasser* and *Oymanns* by positing a situation where regulated tariffs near-guarantee recovery of costs so eliminating risk.

> "(20) An operating risk should stem from factors which are outside the control of the parties. Risks such as those linked to bad management, contractual defaults by the economic operator or to instances of force majeure are not decisive for the purpose of classification as a concession, since those risks are inherent in every contract, whether it be a public procurement contract or a concession. An operating risk should be understood as the risk of exposure to the vagaries of the market, which may consist of either a demand risk or a supply risk, or both a demand and supply risk. Demand risk is to be understood as the risk on actual demand for the works or services which are the object of the contract. Supply risk is to be understood as the risk on the provision of the works or services which are the object of the contract, in particular the risk that the provision of the services will not match demand. For the purpose of assessment of the operating risk the net present value of all the investment, costs and revenues of the concessionaire should be taken into account in a consistent and uniform manner."

This recital draws on the analysis of the different forms of 'operating risk' discussed in *Stadler* (para.37) which developed the discussion in *Oymanns* and *Eurawasser*.

52. Against the context of those recitals, Art.5(1)(b) CDir expanded significantly on the definition of 'service concession' in the 2004 Directive which examined whether the 'consideration' for the contract consisted 'either solely in the right to exploit the service or this right together with payment'. As Recital 18 explains, the new definition in Art.5 'clarifies' that by focussing on the concept of 'operational risk' (by incorporating previous ECJ cases into it, as I have explained):

> "'services concession' means a contract for pecuniary interest concluded in writing by means of which one or more contracting authorities or contracting entities entrust the provision and the management of services other than the execution of works referred to in point (a) to one or more economic operators, the consideration of which consists either solely in the right to exploit the services that are the subject of the contract or in that right together with payment.
>
> The award of a works or services concession shall involve the transfer to the concessionaire of an operating risk in exploiting those works or services encompassing demand or supply risk or both. The concessionaire shall be deemed to assume operating risk where, under normal operating conditions, it is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services which are the subject-matter of the concession. The part of the risk transferred to the concessionaire shall involve real exposure to the vagaries of the market, such that any potential estimated loss incurred by the concessionaire shall not be merely nominal or negligible."

53. The only ECJ (now CJEU) authority so far Counsel or I could find on Art.5 CDir is *Promoimpresa* cited by Coulson LJ in *Ocean*. In *Promoimpresa,* that Directive arose obliquely as the case concerned EU Directive 2006/123 on use of state-owned property on natural land (the concessions were on the shores of the Italian lakes and seas), which only applied if the Concessions Directive (i.e. Directive 2014/23) did not. In holding that it did not, the CJEU said at ps.45-47:

"45….[T]he provisions of Directive 2006/123 relating to authorisation schemes cannot apply to concessions of public services capable…of falling within the scope of Directive 2014/23.

46 In that regard, the Court notes that a services concession [under Directive 2014/23] is characterised, inter alia, by a situation in which the right to operate a particular service is transferred by the contracting authority to the concessionaire and that the latter enjoys, in the framework of the contract which has been concluded, a certain economic freedom to determine the conditions under which that right is exercised and, in addition, is, to a large extent, exposed to the risks of operating the service (see, to that effect, *Oymanns*….. at [71]).

47 However, in the cases in the main proceedings, as the Commission notes, the concessions do not concern the provision of a particular service by the contracting entity, but an authorisation to exercise an economic activity on State-owned land. It follows the concessions..do not fall within the category of service concessions."

54. Therefore, the CJEU in *Promoimpresa* not only did not say there was any significant change in the approach to the definition of 'concessions' in Art.5(1) CDir, it effectively treated Art.5(1) as the same as the approach in the cases under the 2004 Directive, typified by the first such case, *Oymanns*. This makes clear that Art.5(1) CDir is a *codification* of the established approach of the CJEU on this definition rather than a change. Moreover, para.71 of *Oymanns* was also quoted by Elias LJ in *JBW* and key to his analysis. This all suggests the analysis in *JBW*, based on ECJ cases like *Oymanns*, *Eurawasser* and *Stadler*, it is also consistent with the Concessions Directive, as it also based on them as I have explained.

55. I am greatly fortified in that view as it is also the view of Professor Arrowsmith in *'The Law of Public and Utilities Procurement'* (2018) (not in the authorities bundle but which both Counsel mentioned), which states at Vol 1 p.6.72-3 (my underline):

"The basic definitions [of works and services concessions].. are contained in Art.5(1) and <u>are based on the definition of concession</u> in the 2004 Public Sector Directive. …However, the definition is further amplified in the legislation by a specific requirement of transfer of substantial operating risk as set out and elaborated in the final paragraph of Art.5(1)….<u>[S]ince the basic definition of 'concession'…is the same as that of a concession in the 2004 Directive, it appears this is intended as a codification of the current jurisprudence regarding the requirement of operating risk</u>….Art.5(1)… then also goes on to provide that: 'The concessionaire shall be deemed to assume operating risk where, under normal operating conditions, it is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services which are the subject-matter of the concession' but also that: 'The part of the risk transferred to the concessionaire shall involve real exposure to the vagaries of the market, such that any potential estimated loss incurred by the concessionaire shall not be merely nominal or negligible'. <u>Again, it has been suggested that this is codification of the existing position</u>…it indicates….there is no concession when there is a guarantee of recoupment of all investment apart from a small (nominal or negligible) part."

That 'earlier jurisprudence' Professor Arrowsmith discussed included *Telaustria, Eurawasser* and *JBW*. In Volume 2 at p.14-22, she linked that to the CCR 16:

> "The earlier definition of a concession that is used in the Concessions Directive (and in the CCR 2016 in the UK) is based on the definition of concession in the 2004…. Directive, which has been elaborated extensively in the jurisprudence, and it also partly codifies, and also elaborates on, the relevant jurisprudence… The underlying conception of the 2014 directives is that concessions are covered by the Concessions Directive but are *not* within the scope of the 2014 Public Procurement Directive and 2014 Utilities Directive, but this is not stated expressly in the latter two…. [This] can probably be derived from the principle of *lex specialis* giving priority to the specific regime created by the Concessions Directive, and/or from a conception of concessions as being outside the concept of procurement altogether and therefore not within the scope of covered public contracts/contracts under the other directives."

The only 'elaboration' as opposed to 'codification' in the Concessions Directive Professor Arrowsmith discusses is at Vol.1 p.6.74: i.e. the mismatch between the previous ECJ cases since *Parking Brixen* saying concession remuneration comes at least in part from third parties and Recital 18 envisaging it could come *exclusively* from the authority. That issue does not arise here. I also suggest below there is a slight lowering of the hurdle for concessions on 'operating risk' and 'potential estimated loss'. This may be linked to Professor Arrowsmith's other point on 'exceptions'. As Elias LJ noted in *JBW* at p.25, AG Fennelly in *Telaustria* suggested concessions were not an 'exception' but simply not covered by 'public contracts'. Now concessions have their own regulatory regime, their definition is indeed no longer an *exception,* but a *qualification*. Save for those minor points, I respectfully agree that Art.5(1) CDir is a 'codification' of the ECJ case-law on the 2004 Directive.

The 2006 Regs, JBW and Newlyn

56. Under the 2006 Regs, 'services concession contracts' were defined by Reg.2 as:

> *"services concession contract"* means a public services contract [defined by Reg.2 as a contract, in writing, for consideration (whatever the nature of the consideration) under which a contracting authority engages a person to provide services' not including public works or public supply contracts]…under which the consideration given by the contracting authority consists of or includes the right to exploit the service or services to be provided under the contract."

This definition is obviously not as elaborate as in Reg.3 CCR 16 so Mr McGurk argued *JBW* and *Newlyn* had been superceded. However, as discussed, in *JBW*, Elias LJ did not base his analysis on the 2006 Regs but on the 2004 Directive and the cases on it such as *Oymanns*, *Eurawasser* and *Stadler*. Since, as I have just shown, Art.5(1)(b) CDir 'codified' those cases as Professor Arrowsmith puts it, in my judgment Elias LJ's application in *JBW* of the principles in those cases to the Bailiff context remains 'highly persuasive' for the Concession Directive which has been implemented by Reg.3 CCR (indeed, largely in the same language, as I have said). For those reasons, I accept Mr Barrett's submission *JBW* remains 'highly persuasive'.

57. In *JBW*, on the facts relating to contracting out of Court Bailiff services prior to the TCGR 13 which I summarised earlier in this judgment, Elias LJ said at paras.52-5:

> "52 I confess that I have found this a very difficult question. Taking all the relevant factors into account as the EU case law requires me to do and bearing in mind that this is an autonomous concept of EU law, I have concluded that this is a concession and not a public service contract.
>
> 53 In reaching this conclusion I have born in mind the following considerations. First, there can be no doubt that insofar as the undertaking of risk is concerned, the risks transferred here are all those involved in running and managing the bailiff service. The MoJ is released even from the costs incurred in unsuccessfully failing to execute a warrant. Secondly, there is no direct payment by the MoJ for the performance of the service. The fact that this is an unwilling payment by third parties because the CPR 58 empowers the bailiff to distrain for the cost of enforcement does not alter that fact. Thirdly, whilst it is true that the MoJ benefits from the performance of the service in a different and additional way to that found in a normal concession, it does not alter the fact that a service is also provided to third parties. Fourthly, although the beneficiaries are not willing recipients of the service, that is equally the case in other circumstances where a concession has been found to exist, e.g. those who have to take advantage of rescue services in *Stadler*. It ought not to preclude a concession arising.
>
> 54 The most powerful arguments against this conclusion are two interrelated points: first, the MoJ has preserved much greater control over the performance of the contract than is normally the case where the right to exploit a service is granted; and second, that the scope for exploitation is extremely limited. As to the latter, however, it can be said that in cases like [*Eura]wasser* and *Stadler* there was little opportunity to improve the client base. It is inherent in the nature of the service being performed.
>
> 55 I see the force of the point that the MoJ seeks to retain real controls over the way the bailiff's powers are exercised. But I have concluded that this is not enough to outweigh the contrary considerations so as to cause me to characterise the arrangement as a service contract, even when combined with the inherent restrictions on the ability to exploit the service."

58. Whilst *Newlyn* concerned Reg.117 PCR 15 preserving the exclusion on 'concession contracts' in the 2006 Regs, Coulson J (as he was) found *JBW* 'indistinguishable', so in my judgement, *Newlyn* also remains persuasive, even though based on a concession (albeit in argument as Mr Barrett said), not a reasoned conclusion.

> "10. In *JBW…*the Court of Appeal had to decide whether the provision of bailiff services to Magistrates Courts by a third-party contractor was a services concession contract and therefore outside the PCR. They concluded that it was. One of the principal reasons for that conclusion was that the contractor performing the enforcement agency services retained part of the sums recovered, which went towards its costs and profit. In other words, the contractor had the right to exploit the services being provided.

> 11. On the face of it, it did not seem to me to be possible to distinguish *JBW* from the present case. That is because, in the present case, it is the contractor appointed by WF who retains the monies made from the enforcement of the council tax and other similar debts. I therefore asked Mr Patterson, counsel for Newlyn, whether he said that there were any grounds for distinguishing *JBW*. He confirmed that there were no such grounds.
>
> 12. For the reasons that I have already given, I consider that this concession was rightly made. In the light of Regulation 117 and *JBW*, I am therefore obliged to conclude that the proposed contract for enforcement agency services in the present case was a services concession contract and therefore outside the PCR."

Deconstructing Reg.3 CCR

59. As the Technology and Construction Court on occasion should not be adverse to a little light 'deconstruction', last in my legal analysis I disaggregate Reg.3 CCR, which I repeat (as is material, underline and then analyse in the light of my discussion):

> "(1) In these Regulations, "concession contract" means a works concession contract or a services concession contract within the meaning of this regulation….
>
> (3) A "services concession contract" means a contract— (a) for pecuniary interest concluded in writing by means of which one or more contracting authorities or utilities entrust the provision and the management of services (other than the execution of works) to one or more economic operators, the consideration of which consists either solely in the right to exploit the services that are the subject of the contract or in that right together with payment; and (b) that meets the requirements of paragraph (4).
>
> (4) The requirements are: (a) the award of the contract shall involve the transfer to the concessionaire of an operating risk in exploiting the works or services encompassing demand or supply risk or both; and (b) the part of the risk transferred to the concessionaire shall involve real exposure to the vagaries of the market, such that any potential estimated loss incurred by the concessionaire shall not be merely nominal or negligible.
>
> (5) For the purposes of paragraph (4)(a), the concessionaire shall be deemed to assume operating risk where, under normal operating conditions, it is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services which are the subject-matter of the concession contract."

In the context of a 'services contract', Reg.3 therefore breaks down into five stages.

60. Firstly, the Court must identify the relevant *contract*. Both Reg.3 CCR 16 and Art.5 CDir require 'concession contracts' and 'services concessions' respectively to be 'contracts concluded in writing' of the type they then describe. As Mr Barrett submits, the consistent practice of the ECJ/CJEU (and the Court of Appeal in *JBW* and *Ocean*) has been to focus on that concluded written contract actually awarded through the procurement and to consider whether that is a 'public contract' or 'concession contract'. However, there are three provisos to this point:

60.1 A ‘contract’ under a directive is not necessarily the same as a ‘contract’ in domestic law but that should be interpreted in accordance with the meaning in the directive: *Brent*. Whilst the ‘*Teckal* exception’ has now been codified in Art.12 Public Contracts Directive (‘PCDir), other distinctions in meaning of ‘contract’ may persist, though it is not suggested that they do in the present case.

60.2 The Court’s focus should be on the relevant contract as a whole and its *substance*, not its *form*, as Coulson LJ said at p.56 of *Ocean,* citing the Court of Appeal in *R(Faraday) v West Berkshire Council* [2019] PTSR 1346 ps.38/47 in turn citing the ECJ decision in *Helmut Muller* [2011] PTSR 200 ps.81-2. Now, Reg.2 PCR 15 (and Art.2(5) PCDir) both speak of a ‘public contract’ as one ‘with the *object* of the provision of services’, not that ‘label’ or ‘form’. Likewise, Reg.3 CCR and Art.5(b) CDir focus on the nature of the contract *in substance* not its ‘form’. For example, in *Ocean,* the *substance* of the lease of two buildings next to the Hammersmith flyover in London used for advertising was nevertheless a lease rather than an advertising concession (especially as the lease did not oblige advertising). Similarly, in *Oymanns*, the ECJ analysed the substance not the form of the contract to supply and support use of bespoke orthopaedic shoes in considering whether in substance it was a supply or a service contract and if predominantly the latter, whether a concession or not (holding it was not). However, it would be just as wrong for a contract’s ‘label’ that the PCR 15 applied to be determinative that it did if the actual contract was in substance a ‘concession contract’, as the wording inserted in the Bristow contract to be determinative that it was if in substance it was not. There was no suggestion in *Oymanns* the parties could ‘contract-in’ to the 2004 Directive. Certainly, in domestic law parties cannot apply legislation to themselves by agreement, only that they will act ‘as if’ it applied as Gloster LJ said in *NRAM v McAdam* [2015] EWCA Civ 751 para.54.:

> “Whilst the cases (and indeed the article by Mr Robert Megarry (as he then was)…do not rule out the possibility that parties can, by appropriate wording in their contract, agree that particular provisions of, for example, the Rent Acts may be incorporated into their contracts, with the result that one party will be treated *as if* he enjoyed particular rights conferred by the relevant Act, parties cannot, as it were on a wholesale basis, validly contract that the agreement *is* regulated by the 1974 Act and that the provisions apply. As Mr Megarry said in the article: “The difference is between saying, ‘The Acts shall apply' and saying, ‘I agree to your having by contract the same rights as if the Acts applied'.”

60.3 Whilst a focus on substance rather than form applies generally, it is particularly important where the ‘contract’ is said to have changed significantly between the tender and the award, as here. However, it has not been suggested that ‘*the design of the procurement* was made with the intention of excluding it from [the PCR]’: see Reg.18(2) PCR 15. Instead, the question is whether I should simply focus (as would be usual) on the eventual contract to Bristow as Mr Barrett argued, or also the procurement documents as Mr McGurk responded.

This question is analogous to balancing the written contract and the 'background matrix of fact' in domestic contractual interpretation. It is not considered in the cases that I have seen. The closest is *Amey*, where Stuart-Smith J (as he was) held where an operator had an accrued cause of action under Regs.89 and 91 PCR 15, that was not removed by a lawful decision by the authority to abandon the procurement. If a cause of action under the PCR 15 is not lost by abandoning the exercise, why should it be removed by a contract award outside the PCR 15 ? This led Mr McGurk to focus on construing the 'procurement documents' such as the DPS Contract, the Sch.9 draft contract, the ITT and the Specification. In my judgement, this is legitimate, not least as the whole scheme of the 2014 Public Contracts and Concessions Directives presupposes obligations on contracting authorities in relation to *proposed* contracts *to be* concluded in writing. Indeed, Art.5 CDir examines what 'the award of the contract *shall involve*', echoed in Reg.3(4) CCR 16. I agree with Mr Barrett that this is an 'a priori' not 'a posteriori' question. In English rather than Latin, the assessment of what the contract 'shall involve' is assessed prospectively, not retrospectively. But I therefore accept Mr McGurk's submission the Court is not limited to examining the final contract awarded and can consider the contract terms proposed in the 'procurement documents'. Those are also defined by Reg.2 PCR 15 (see *Adferiad* para.69) and include a contract notice (and/or here, DPS documents), the ITT, the Specification and any proposed terms. This is not based on parties' subjective views, but on the objective perspective of the 'reasonably well-informed and normally diligent tenderer' ('RWIND' tenderer': see *Adferiad* ps.63-4 citing *Healthcare at Home v CSA* [2014] UKSC 49 paras.3,7,8,14), not dissimilar from domestic interpretation. However, of course that does not mean the eventual contract is ignored. To marry Mr McGurk's aphorism with another one, in 'distinguishing substance from form', the Court can examine whether an authority has 'contracted what it competed'.

61. Secondly, under Reg.3(3)(a) CCR 16, this 'contract' must be one where a 'contracting authority' 'entrusts the provision and the management of services' to an economic operator' for 'pecuniary interest'. This requires a legally-enforceable obligation on the contractor, to perform services which the authority would otherwise provide itself. Those were two separate issues in *Ocean*, but they can be considered together – especially as neither are in dispute in this case. In *Ocean*, Coulson LJ explained at para.50 that unlike a paradigm concession contract where the contractor commits to provide a service to third parties in place of the authority (e.g. a car park or leisure centre), the contractor-tenant had no obligation to advertise but did have to pay fixed rent irrespective of advertising. Coulson LJ endorsed this analysis at para.53:

> "The concept of a contract for pecuniary interest…was considered in *Helmut Müller…*and by Hickinbottom J in *R (Co-operative v Birmingham City Council* [2012] LGR 393….. at para 101, [he] said: "to fulfil the purpose of the directive, a required element is a commitment by the contractor, legally enforceable by the contracting authority, to perform relevant works. It is insufficient if, legally, the contractor has a choice and is entitled not to perform the works."

Moreover, the Council had no duty or interest to advertise and so was not 'entrusting the management' of its 'services' to the tenant as Coulson LJ said at para.39:

> "…*Promoimpresa*….makes it clear that, at least as a matter of general principle, the services which are the subject of the Concessions Directive (and therefore the Regulations) are services which would otherwise be provided by the contracting authority as part of its statutory obligations or…its strategic objectives."

Coulson LJ then added this at para.41, which is of some significance in this case:

> "A local authority like the Council will enter into a myriad of different contracts every year. Some may be caught by the Regulations; most will not. It is for Ocean to prove the Leases fall within the ambit of the Regulations, not for the Council to displace some sort of presumption that, because it is a public authority, all of its contracts are caught in one way or another by the public procurement rules."

However, for summary judgment, the burden is on the Defendant as I have explained.

62. Thirdly, Reg.3(3) CCR 16 provides that the 'consideration' for the contract in question must consist: 'either solely in the right to exploit the services that are the subject of the contract or in that right together with payment', which directly repeats part of Art.5(b) CDir, which is very similar to the definition of 'concession' in the 2004 Directive. The latter was considered in *Oymanns* where, as Elias LJ noted in *JBW*, the ECJ considered a contract between a statutory insurance fund and an orthopaedic footwear company to supply tailor-made shoes for disabled people. As noted, the ECJ plainly focussed on the substance of the contract, not its form:

62.1 Firstly, the ECJ in *Oymanns* ruled at p.66, as it was a mixed 'supply' and 'services' contract, its categorisation depended on the respective value of each element (p.66). For such mixed contracts which are objectively not separable, that is now reflected in which is 'the main subject matter of the contract' being determinative, both in Art.4 PCDir and Reg.4 PCR 15; and in Art.20(5) CDir and Reg.20(4)(a) CCR 16.

62.2 Secondly, the ECJ in *Oymanns* ruled at p.76 that if predominantly a 'service contract', it would be a concession contract. It was of fixed duration, the insurer paid the provider (albeit from contributions from members) so there was no risk of non-payment for work (and all consideration from the authority); there was limited irrecoverable cost and while the work was not fixed, it was forecastable.

62.3 Thirdly, Recital 18 CDir now suggests even exclusive payment from the contracting authority is not necessarily inconsistent with a 'concession' where recoupment of costs depends on actual demand or supply. That is the one difference with the 2004 Directive which Professor Arrowsmith notes, but it does not arise here. Closer to home, in *JBW* at p.53, three of Elias LJ's four reasons for deciding the debt enforcement contract was a services concession related to: (i) the absence of direct payment from the MoJ, (ii) the MoJ 'benefitted' as well as third parties; and (iii) the fact those 'beneficiaries' (perhaps more the targets) of the services were unwilling did not matter as the same was true of those needing rescuing in *Stadler*.

63. Reg.3(4) CCR 16 then states the award of the contract 'shall involve': (a) 'transfer of operating risk' (subject to the deeming provision in Reg.3(5)); and (b) 'real exposure to the vagaries of the market such that any potential estimated loss incurred by [it] shall not be merely nominal or negligible'. I make these observations about Reg.3(4):

63.1 Firstly, while at first sight, the two 'requirements' of Reg.3(4) may seem quite different, it is the 'part of the (operating) risk transferred' in (a) that 'shall involve' what is described in (b). In short, (b) is a consequence of (a). This reading is consistent with the approach of the ECJ and the Concessions Directive. In *Oymanns* at p.71, as Elias LJ noted in *JBW* at p.34, the ECJ said operating risk and economic 'freedom' go 'in parallel'. The ECJ in *Eurawasser* too, at p.67 contrasted 'exposure to the vagaries of the market' with the authority 'continuing to bear all the risk'. In *Stadler* at p.37/48, the ECJ suggested 'exposure to the vagaries of the market' included 'not being assured of full coverage of costs'. 'Operating risk' and 'economic exposure' are therefore seen as two sides of the same coin: Recital 20 CDir summarises: 'An operating risk should be understood as the risk of exposure to the vagaries of the market'. Likewise, at Recital 18: 'the main feature of a concession' is 'an operating risk of an economic nature involving the possibility it will not recoup costs and investments'. Indeed, in Art.5(1), there is one explanatory paragraph (for both 'works' and 'service' concessions'), not two totally distinct requirements. However, this does not mean Regs.3(4)(a) and (b) CCR 16 are exactly the same. The former is concerned with the extent of the operating risk, the latter with the extent of economic/market exposure in terms of potential estimated loss incurred by the part of that risk transferred. In some cases, operating risk and potential estimated loss are not exactly 'in parallel'. 'Operating risks' in Art.5(1) are very varied, including 'demand or supply risks or both' as explained in Recital 20 and illustrated in *Stadler* at p.37-8, including competition, risk of non-payment, supply not matching demand or liability risk: but excluding bad management and force majeure etc. So, in *Oymanns* at p.74 there was 'limited' operating risk (albeit more than enough for Reg.3(4)(a) given *Eurawasser/Stadler*), as the amount of shoes to make and fit was not fixed and there were some up-front costs. But in the terms of the Concessions Directive now, the 'potential estimated loss' in *Oymanns* was 'negligible': as those costs were predictable and the contractor *was paid by the authority* for all shoes actually made. It is these sorts of cases, with limited operating risk but no real exposure to potential estimated loss, that this part of Art.5(1) and Reg.3(4)(b) CCR 16 (which must be read consistently: *Brent*) are intended to catch: cases where 'concessions' *in form* are really 'public contracts' *in substance*. As Recital 18 states:

> "…[S]pecific rules governing the award of concessions would not be justified if the contracting authority ….relieved the economic operator of any potential loss, by guaranteeing a minimal revenue, equal or higher to the investments made and the costs the economic operator has to incur in relation with performance…" (my underline)

63.2 Secondly, this explains why Art.5(1) has calibrated the extent of operating risk and exposure to potential loss needed for 'services concession' at such a low level, indeed slightly lower than the previous case-law. Not content *Eurawasser* and *Stadler* saying operating risk need only be 'very limited', Art.5(1) 'deems' it to have been 'assumed' where 'under normal operating conditions the concessionaire is *not guaranteed* to recoup investments or costs'. Given risk and potential loss are 'in parallel', this effectively 'eliminates the risk' (see Recital 19 which gives an example of such a 'guarantee', as does Recital 17). It is not enough if the contractor is 'likely', 'very likely' or even 'almost certain' to break even. Moreover, rather than say the corresponding 'potential estimated loss' can be 'very limited', Art.5 says it 'shall not be merely nominal or negligible', again a *lower hurdle*. This is unsurprising given the shift from the definition being an *exception* under the 2004 Directive to a *qualification* under the 2014 one. (However, I stress this point makes no difference at all to my conclusion in this case).

63.3 Reg.3(4) CCR largely copies the language of Art.5(1). However, (a) and (b) make clearer what is implicit in Art.5 - that the focus is on *the contract* rather than whether the contractor will happen to make a profit or a loss:

(i) This interpretation is more consistent with the language of Reg.3 CCR itself, where Regs.3(2) and 3(3) define a 'works concession contract' and 'services concession contract' as 'meaning a contract' of those respective kinds, but also a contract 'meeting the requirements in Reg.3(4)' qualified by Reg.3(5). The language of the provision is the primary source in its interpretation: *R(PRCBC)* ps.29-31. The language of Reg.3 CCR 16 focusses on the *'contract'*.

(ii) Checking this conclusion on the 'internal' statutory language with 'external aids' (*R(PRCBC)* p.30), it is clear (not least from the near-identical language), Reg.3 CCR 16 was intended to implement Art.5(1) Concessions Directive. So, following *Brent*, Reg.3 should be 'taken to express the same idea' as Art.5(1). As explained, the focus of Art.5 in the light of Recitals 17-20 is whether 'the award of the contract' 'shall involve' the operational risk and exposure to vagaries of the market, assessed prospectively, not the operation of the contract in practice assessed retrospectively. This echoes the ECJ's approach: even after all relevant events, they have focused not on what actually happened with operation of the contract but on *the contract itself*.

(iii) Moreover, this 'contractual, not factual' interpretation of Reg.3(4) CCR, implements 'the purpose of the directive to achieve the result pursued' ensuring its 'indirect effect'. If it turned on what happened in practice (e.g. whether incumbent made a profit or the winner ends up doing so), it would not be apparent to any bidder (except any incumbent), even possibly the authority itself, whether the definition of concession is or is not met in advance. This would create *uncertainty* as to which (if either) Directive governs the procurement, yet as Recital 18 states, Art.5 is intended to *clarify* the definition.

64. So, I turn fourthly to Reg.3(4)(a) and (5) CCR 16. Whilst the language is taken from the paragraph in Art.5(1) CDir (and clearly intended to implement it: *Brent*), in Art.5(1) the deeming provision is sandwiched between 'operating risk' and 'real exposure'. The effect of Reg.3(4)(a)/(5) read with Art.5(1) is to ask:
(1) Is the contractor 'guaranteed' (under the contract or in the sense contemplated in the Recitals) 'under normal operating conditions' to recoup costs and investments in operating the services under the contract ? If not, the contractor is deemed to assume 'operating risk' by Reg.3(5) CCR and one can go on to Reg.3(4)(b) CCR.
(2) Even if there is such a 'guarantee', shall the award of the contract involve transfer of (part of – see Reg.3(4)(b)) the 'operating risk' in the sense of a demand or supply risk or both (as explained in the Recitals) ? If not, it is not a concession.

So, 'operating risk' is deemed as assumed if there is 'no guarantee' of breaking even in 'normal operating conditions'; but if even if there is, such risk can still be *proven*.

65. Finally, Reg.3(4)(b) CCR 16 asks whether: 'The part of the risk transferred to the concessionaire shall involve real exposure to the vagaries of the market, such that any potential estimated loss incurred by [it] shall not be merely nominal or negligible'. Mr McGurk focusses on the phrase 'potential estimated loss'. However, a statutory phrase must be read in the context of the provision as a whole (*R(PRCBC)* p.29 and the Directive it implements: *Brent*). Reg.3(4)(b) does not ask whether the contractor *estimates* its potential loss as merely negligible, or indeed its risk of *any* loss. It asks whether the part of the risk transferred to it involves real exposure to market forces *such that potential* estimated loss is more than negligible. This is clarified by Recital 18 CDir (the only relevant reference to 'potential loss' in the recitals I have found) stating it would not be justified *'if the contracting authority ….relieved the economic operator of any potential loss by guaranteeing a minimal revenue, equal or higher to…costs'*. Professor Arrowsmith puts it as 'there is no concession when there is a guarantee of recoupment of all investment apart from a..nominal or negligible part' (the practical effect, not a paraphrase). In other words, Reg.3(4) is not concerned with likelihood of profitability, but real exposure to market risk of more than negligible potential estimated loss. Such a guarantee avoids such exposure. Just because a business estimates it is very likely to make a profit, does not mean it is not exposed to market risk of making more than negligible loss (as any concessionaire renewing a previously lucrative office coffee stall in February 2020 would confirm). Moreover, as the Recital also makes clear, as discussed above at para.63.3, the focus of Art.5 and Reg.3(4) is on the risk transferred *by the award of the contract*, not whether the contractor happens because of the particular factual circumstances to make a profit or loss, or whether any incumbent has or has not done so. If the award of *the contract* involves 'Reg.3(4)(b) exposure', it does not matter if it turns out to be a 'plumb gig' where irrespective of the contract, there never actually proves to be any real exposure to potential loss in operating it, or that it is possible for a contractor by efficiency to only run a minimal risk of a loss. As Recital 20 observes (stemming from p.38 of *Stadler* where again the ECJ focussed on the 'potential loss' inherent in the contract itself), any risks stemming from 'bad management', including inefficiency, are inherent in every contract. This reinforces that the 'real exposure' described in full by Reg.3(4)(b) (which I will call 'Reg.3(4)(b) exposure') must stem from *the contract*.

Did the contract in this case fall within Reg.2 PCR 15 or not ?

My approach

66. So, I must now turn to applying those principles to the particular contract in this case. I therefore come to my conclusion on the reverse summary judgment application which having set out the assumed facts and reviewed the law in some detail, I can express more briefly. I remind myself whilst I am considering summary judgment on the principles summarised above, in fairness to the Claimant I am also assuming the primary facts it alleges to be true; and will also consider strike-out as a 'cross-check'.

67. Indeed, the significance of the distinction between the two approaches is clear in this case. As I have explained, strike-out focusses not on the evidence but on the statement of case, here the Amended Particulars of Claim ('APOC'). The Claimant's amended pleading that the PCR 15 applies, save for a brief reference to the ITT at p.13 APOC, is firmly based at ps.6-11 APOC on the terms of *the DPS Contract*. The material parts of the Specification I have discussed are not pleaded. On a purist approach to strike-out, I would have to focus on the DPS Contract but then if I find that is 'the wrong contract' for Reg.3 CCR 16 (which as I will explain, I think it is), I would then have to consider whether the APOC would need further amendment to refocus on the ITT or Specification for the terms of the contract, which were the main focus of Mr McGurk's oral submissions. That would seem somewhat artificial and too focussed on the *form* of the Claimant's case rather than on its *substance*. I will therefore decide the strike-out issue on the entirety of the background I set out above, albeit I may not necessarily refer to every part of it, I have taken it fully into account.

68. Indeed, the starting-point is precisely this issue of what the relevant 'contract' is. That is not only the first question posed by Reg.3 CCR as I have explained, but also by Reg.2 PCR, which the Claimant pleads it satisfies (and which I repeat as material):

> "'public contracts' [including 'public services contracts'] means contracts for pecuniary interest concluded in writing between…economic operators and… contracting authorities and having as their object…the provision of services but does not include concession contracts within the meaning of the CCR 16."

So with both Reg.3 CCR 16 and Reg.2 PCR 15, the first step is to identify the relevant 'contract'. I therefore address that issue first as it must be addressed whichever applies (or neither). Second, I will examine whether the relevant contract was 'for pecuniary interest and having the object of provision of services' within Reg.2 PCR 15. That is a convenient point to consider Mr Barrett's fall-back submission that even if the 'contract' did not fall within Reg.3 CCR 16, it did not fall within Reg.2 PCR 15 anyway. If I am against the Defendant on that point, it follows the PCR 15 applies unless the contract was a 'services concession contract' under Reg.3 CCR 16. So thirdly, I will consider whether the contract fell within Reg.3(3)(a) CCR 16. Fourthly, I will consider whether it fell within Reg.3(4)(a) read with Reg.3(5) CCR. Fifthly, I will consider whether it fell within reg.3(4)(b) CCR 16. Finally, I will then stand back and consider in the light of my conclusions whether to grant reverse summary judgment under CPR 24 and/or whether to strike out under CPR 3.4(2)(a).

Which was the relevant 'contract' ?

69. The first step is to identify the 'contract', or at least the proposed 'contract terms' relevant to Regs. 2 PCR 15 and Reg.3 CCR 16, since some of the terms of the contract will not be relevant to its categorisation as a 'public services contract', 'services concession contract' or indeed a different form of contract. There seem to me to be three realistic contenders in this case. As I said, the Claimant's pleaded case is based on the DPS Contract. The Defendant's pleaded case is based on the Bristow contract actually granted. However, in argument both Counsel also focused more on the ITT and Specification as indicative of the categorisation of the contract.

70. The Claimant's pleaded case focusses on the DPS Contract between itself and YPO. I can understand why the APOC and Mr McGurk focussed on this given its significance for Ms Naylor and her colleagues. On the assumed facts, they would feel aggrieved the Defendant had 'changed horses' in the procurement. This will be central to the contract claim that I discuss in the next section. However, as explained in *McAdam*, legislation cannot apply by agreement, still less assumption. As I said in argument, in legal terms 'public contracts' and 'concession contracts' are apples and pears. Just because a supermarket labels a pear as an apple and a customer buys it thinking it is an apple, it does not turn the pear into an apple. The fact Ms Naylor may well have tendered many times on the basis that the PCR 15 applied – many through DPS 953 – does not mean it does either, especially as she and others appear to have only *assumed* that. Indeed, she accepts other (similar, if much larger) local authority debt enforcement contracts for the Claimant with Stoke and Walsall were run under the CCR 16 and *JBW* and *Newlyn* would have doubtless been common knowledge among procurement lawyers, if not the procurement managers in large Enforcement Agent companies. Presumably, YPO would also have been aware of those cases, which does make DPS 953 three years after *Newlyn* rather puzzling, although of course, it would be open to authorities to contract with EA Agencies by orthodox price-based contract to which the PCR 15 clearly did apply, which may have been YPO's intention for its use (if in reality YPO gave it much thought to the issue at all, given the sloppy draft Sch.9 term on the suggested 'provision of goods').

71. Be all that as it may, none of it makes the DPS contract almost four years before the procurement process between one of the bidders and YPO the relevant 'contract' under Reg.2 PCR and/or Reg.3 CCR. For a start, the Defendant is not even a party to *that contract* (as opposed to the DPS 953 scheme) and the passing assertion in the APOC that YPO was the 'agent' of the Defendant is inconsistent with the terms of the DPS Contract. Its structure, consistent with Reg.34 PCR 15 on Dynamic Purchasing Systems, is that YPO has set up DPS 953 and admitted the Claimant to it as an authorised provider, which means that contracting authorities *such as the Defendant, but not exclusively the Defendant* can use it for procurement exercises, on condition those authorities follow the rules of DPS 953. So far as it is relevant, in domestic law terms, YPO is not an agent, but an intermediary. The DPS Contract is made at the start of a procurement process to streamline it and is not the contract awarded at the end - or even that put out to tender during it.

72. The Defendant's pleaded case is that the 'contract concluded in writing' is the Bristow contract. That certainly seems a more promising contender. It is certainly a 'contract concluded in writing' under Reg.2 PCR 15 / Reg.3 CCR 16 and both relevant Directives. As discussed, the contract actually awarded has also been the consistent focus of the ECJ/CJEU and indeed the Court of Appeal. However, in none of those cases did the terms of the contract awarded significantly differ from those apparent from the ITT/Specification, as the Bristow contract did here. It is different from the 'call off terms and conditions' draft contract in Sch.9 DPS 953 on which it is clearly based. Moreover, contrary to Sch.9, the Defendant did not make clear at ITT stage it proposed to use a different contract. However, while Mr McGurk stresses there are no references to the PCR 15 in the Bristow Contract, there seem to be none in the Sch.9 draft contract either: it refers to 'regulations' applying but without naming them. It is also hardly surprising that the Bristow contract differed in some ways from the Sch.9 draft, which at clause 12 spoke of 'provision of goods'. This appears to be an instance of sloppy drafting by YPO, doubtless cut and paste from one of its precedent draft supply contracts. (Equally sloppily, in the Bristow contract itself, clause 17 fails to correct its numbering of '20' to account for the removal of clauses 13, 14 and 15 in the Sch.9 contract, all also about goods, but nothing turns on this). However, much more importantly, as I noted at para.35 above:

72.1 Clause 4 described it as a 'services concession' - not in the Sch.9 draft.

72.2 Clause 12.2 was new: "The consideration for carrying out the Services is the right to exploit the Services by applying charges to third parties subject to enforcement action. There shall be no payments by the Customer to the Provider in respect of the Services. The Provider carries [them] out and the operational risks and profits or losses of doing so are the Provider's."

72.3 That passage was also added to p.2.2 of the Specification incorporated.

I am assuming the Defendant made these changes to the Sch.9 draft clearly to 'label' the contract as a 'services concession' and this was the first time in the procurement process that had been explicitly said. *For present purposes,* I proceed on the basis that given DPS 953, everyone had assumed until that point the PCR 15 applied and the new 'label' in the Bristow contract was an afterthought, if not a deliberate tactic.

73. However, the Bristow Contract was not totally different. In other respects, it was materially similar to the Sch.9 draft, as supplemented by the ITT and Specification. As discussed above at para.30, what would have been apparent to a RWIND Tenderer during the competition from the 'procurement documents' would have been this:

73.1 Firstly, whilst the ITT was announced under DPS 953, it referred to the Defendant's *own* 'terms and conditions'. Those were not provided in full, but the ITT set out the 'information and instructions, scope and specification for the *contract*…'. The ITT itself set out some proposed contract terms, including the duration (2 years with an option to extend for a year) and the service specification. Nevertheless, the reference to DPS 953 would have suggested the generic contract terms would have been similar to the draft in Sch.9 DPS 953 and the context of the DPS Contract itself would have suggested the applicability of the PCR 15 to the contract.

73.2 Secondly, the contract proposed by the ITT and Specification was plainly for a contractor to *supplement* ARP's own in-house team for the collection principally *of out of area debt*. So, while ARP had c.20,000 liability orders per year, only 8650 debt cases passed to external providers (either the Claimant or including it) in 18 months. The Specification stated explicitly: *'The Council gives no guarantee as to the number or value of Liability Orders that will be passed to the Contractor in any period'* (my underline).

73.3 Thirdly, the Specification plainly envisaged that at least all Liability Orders (so including all the core debt of Council Tax and Non-Domestic Rates) sent out to the contractor would be enforced by it. Para 2.9.1 stated it would be required to submit a monthly report showing all returned Liability Orders and the reasons for that and para.2.9.3 stated any unpaid Liability Orders returned had to be certified and accompanied by details of visits to the property. In other words, the contractor could not 'cherry pick' the debts as Mr Dehayen had feared: they would have to at least try and enforce at least every Liability Order debt, even if ultimately they were unsuccessful.

73.4 Fourthly, the main part of the debt enforcement proposed to be contracted was those out of area Council Tax and Non-Domestic Rate debts. This was clear from Specification para. 2.12 which only gave those as 'debt sent to the Council's external provider over the last 2 years' and in the ITT itself. Neither it nor the Specification set any price, indeed in relation those core debts it was envisaged the contractor would be paid by charges to debtors not exceeding that in legislation – i.e. the 2014 Fees Regs (and pay money into a client account to return ARP any debts recovered after fees). Whilst bidders could quote to be paid for other types of debt and services, the latter were explicitly 'ancillary' under para 2.11 and it seems from para 2.12 little of that non-core debt was sent out. Moreover, if a contractor had quoted, it may have lost marks on price. Certainly, neither Bristow nor the Claimant did so and Ms Naylor (who knew the costs) felt they could be absorbed.

73.5 Finally, as to the procurement process itself, the ITT detailed the selection criteria, weighted to 30% on Price (with that pricing schedule) but 70% on quality, sub-weighted in ascending order: Experience and References 15%; Knowledge and Understanding 20%; and Technical and Professional Ability 25%. The latter had two questions (12.5% each), one of which related to communication with debtors and under para 2.5.1 of the Specification, the contractor had to offer 'local rate telephone lines'.

Both Mr McGurk (and in reply, Mr Barrett) focussed on the DPS Contract, the Sch.9 draft, the ITT and its Specification more than the Bristow Contract – indeed their very different readings of these 'procurement documents' (and the reading I have set out is rather closer to Mr Barrrett's) effectively became each of their 'alternative case' as to the contents of the relevant 'contract'. Given their wealth of experience and the way that argument developed, I am content to proceed on the basis that these 'procurement documents' as a whole, which I have only summarised above – and ignoring those three key differences with the Bristow Contract - can be analysed as what I will call the 'Proposed Contract'.

74. However, I am not convinced this is the right method in this sort of situation where there are significant differences between the terms of the contract proposed in the tender and the final contract awarded. As I have said, albeit in cases where this issue has not arisen, the usual focus in the final contract, most recently in *Ocean*. However, Coulson LJ's emphasis there on 'substance not form' (drawing on both ECJ and Court of Appeal authority) provides the answer. In my judgement, the best method is indeed to focus on the contract awarded – the Bristow contract, which save in those three key respects in clause 4, clause 12.2 as repeated in the Specification – and absence of any charges for ancillary matters – was materially the same as 'the Proposed Contract'. However, given it was finalised after the issue of the TCC Claim, I will treat clauses 4, 12.2 and the similar wording added to the Specification as 'labels' applied to the contract – a change of form but not of substance *which can simply be ignored*. Whilst that does not apply to potential charges in the pricing schedule neither Bristow nor the Claimant proposed, in fairness to the Claimant I am prepared to assume that too. Whilst in those material respects listed above it is identical to 'the Proposed Contract', I will call this adjusted version of the Bristow Contract 'the Adjusted Contract'.

Does Reg.2 PCR apply ?

75. Mr Barrett's alternative submission is that there was no contract falling within Reg.2 PCR 15 anyway, irrespective of whether the CCR 16 applied. It seems to me that depends on which 'contract' you are looking at. In fairness, this submission was in response to the Claimant's pleaded case which focusses on the DPS Contract. I agree with Mr Barrett the DPS contract is not a 'public services contract' within Reg.2 PCR, it is a contract to join a Dynamic Purchasing Scheme under Reg.34 PCR 15. Specifically, it is not a '(i) contract concluded in writing (ii) for pecuniary interest (iii) between…an economic operator and…contracting authority…(iv) having as its object…the provision of services…' for three different reasons:

    75.1 Firstly, the DPS Contract is not between an 'economic operator' and a 'contracting authority', it is between an 'economic operator' (i.e. the Claimant) and YPO, which the definitions clause in it makes clear is not a 'contracting authority'. YPO are managing a Dynamic Purchasing System for future procurement, not conducting a procurement exercise themselves.

    75.2 Secondly, the DPS Contract is not a 'contract for pecuniary interest'. That phrase also appears in Reg.3(3) CCR and was considered in *Ocean* as connoting 'a commitment by the contractor, legally enforceable by the contracting authority, to perform relevant [services]. It is insufficient if, legally, the contractor has a choice and is entitled not to perform the[m]'. There is no obligation on the Claimant in the DPS Contract even to bid for future procurements within DPS 953, let alone actually to perform services. Therefore, the DPS Contract is not one for 'pecuniary interest'.

    75.3 Thirdly, even if that is wrong, for similar reasons, the DPS Contract does not 'have as its object the provision of services', but rather for the participation of the Claimant in DPS 953 which enables it to bid for any procurements any 'contracting authority' chooses to run through DPS 953.

76. In relation to the 'Proposed Contract', I am prepared to accept for the purposes of this application that it was a proposed contract, to be concluded in writing, between a contracting authority and economic operator, which would be for 'pecuniary interest' in the sense of imposing obligations on the operator to perform the service (*Ocean*). I also am prepared to accept on the same basis that its 'object was the provision of services', for reasons which I will elaborate on for the 'Adjusted Contract' now.

77. In my judgement, the 'Adjusted Contract' would also fall within the scope of a 'public services contract' under Reg.2 PCR 15 unless a 'services concession contract' under Reg.3 CCR 16. I reject Mr Barrett's alternative submission. As Coulson LJ said in *Ocean* at p.41, not all contracts public authorities enter will be caught by the public procurement rules and some contracts (like the lease in *Ocean* itself) 'fall between the two stools' of the PCR 15 and CCR 16, as Mr McGurk warned against. This is because, as Professor Arrowsmith discussed, as AG Fennelly noticed back in *Telaustria* and as now made clear by the two 2014 Directives, these may be thought not so much as one a true 'exception' to the other, but two different regulatory schemes. However, the Adjusted Contract is (i) 'a contract…concluded in writing'; (ii) between an economic operator and a contracting authority; (iii) 'for pecuniary interest' as it creates obligations on the contractor; and (iv) it has as its object…the provision of services…'.

78. On that point (iv), there is no exclusion for contracts where consideration comes from third parties. Under the 2004 Directive, 'concession' was defined as (my underline):

> "...[A] contract of the same type as a public service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service <u>or in this right together with payment</u>."

At first sight, this seems to mean contracts where all consideration comes from third parties would be 'concessions'. However, as discussed in *Eurawasser*, the ECJ also stressed such a contract was not a 'concession' unless there was also transfer of some operating risk. In other words, third party payment *alone* does not exclude a contract from being a 'public services contract' under the 2004 Directive and the 2014 Public Contracts Directive and Concessions Directives take a similar approach.

79. Therefore, I proceed on the basis that the suggested 'Adjusted Contract' and the 'Proposed Contract' each fell within Reg.2 PCR 15 unless each were a 'concession contract' under Reg.3 CCR 16. In other words, the question is whether the Defendant can show both the 'Adjusted Contract' and 'Proposed Contract' actually fell within the 'concessions exception' in Reg.2 which is defined by reference to Reg.3 CCR 16. I do not regret reaching that conclusion. Of course some procurement contracts will 'fall between the two stools' of the PCR 15 and CCR 16 (and given the threshold, the number of contracts to which the CCR 16 will apply will not be too numerous). But it is consistent with the underlying scheme of the Directives and both sets of Regulations that the scope of 'public contracts' is relatively wide subject to the explicit exclusion of 'concessions'. It ensures the wider scope of the regulatory rules overall, even if there are very different thresholds and regimes in the two Directives and Regulations.

Does Reg.3(3)(a) CCR 16 apply ?

80. So, I now turn to the Defendant's primary submission, on which Mr Barrett placed most weight – that the contract (as I prefer, the Adjusted Contract) was a 'services concession contract' within Reg.3 CCR 16 so the PCR did not apply. I repeat the material parts of Reg.3(3)(a) CCR 16, again sub-numbered for clarity:

> "[i]….A contract for pecuniary interest concluded in writing; [ii] by means of which [a] contracting authority…entrust[s] the provision and the management of services (other than the execution of works) to [an] economic operator; [iii] the consideration of which consists either solely in the right to exploit the services that are the subject of the contract or in that right together with payment;

This issue straddles the second and third steps in my 'deconstruction' of Reg.3 above, but it is convenient to deal with them together because: on (i) I have already decided the 'Adjusted Contract' and 'Proposed Contract' would be 'a contract for pecuniary interest concluded in writing'; and on (ii) there is no dispute here (unlike in *Ocean* where (i) and (ii) were in issue) that whatever the contract terms were in either, they involved the 'entrusting of provision and management of services' in the sense of transferring the Defendant (and ARP's)'s own debt enforcement provision to the tenderer (although yet again, the DPS Contract would not as discussed). The real issue under this heading is whether (iii) 'the consideration consists either solely in the right to exploit the services in the contract or in that right together with payment'.

81. This element was an intrinsic part of the 2004 Directive, because it had already been established by the earlier ECJ case-law such as *Telaustria* and *Parking Brixen* and as I have just noted, in *Eurawasser*, the ECJ noted it was part (along with transfer of operating risk) of the definition of 'concession'. It was unsurprising that in *Oymanns*, payment of the contractor directly by the authority for shoes made (albeit -funded from member contributions) militated against the contract being a 'concession'. However, in *JBW*, Elias LJ extended this principle beyond consensual payment from beneficiaries of the service to enforced payment from unwilling targets of the 'service', i.e. the enforcement of Court fines. In *Newlyn*, based on the then-similar definition in the 2006 Regs, Coulson J indicated his view (albeit it was conceded) that this extended to enforcement of local authority debts, as in the present case. I respectfully agree: in the Adjusted Contract, just as in *JBW* and *Newlyn*, the consideration for Bristow consists *solely* in payments from third parties.

82. Mr McGurk skilfully tried a different tack with the Proposed Contract. He pointed out the ITT enabled bidders to tender on the basis of payment from the Defendant for the activities on the pricing schedule. So, construing it on the RWIND tenderer basis, I accept it would not necessarily be a term of the contract concluded in writing that no payment would come from the Defendant. However, that makes no difference here:

82.1 Firstly, both Reg.3(3)(a) CCR 16 and Art.5(1)(b) Concessions Directive (like the 2004 Directive before them) both explicitly say that for a concession, consideration can be solely from 'the right to exploit the service' (i.e. third parties) or that 'together with payment'. Indeed, as Prof Arrowsmith notes, Recital 18 envisages *exclusive* payment by the authority.

82.2 Secondly, as discussed above, the pricing schedule read with p.2.11 of the the Specification would make clear to the RWIND Tenderer not only would they lose marks on 'Price' if they quoted for such payment, but also that it was only 'ancillary' and did not cover the core debt of Council Tax or Non-Domestic Rates. Therefore, such minor side payments were not the highest by value (see *Oymanns*) and indeed as they were objectively non-separable, did not change 'the main subject-matter of the contract' Reg.20(4) CCR 16). There was no option for any tenderer to bid for a full direct payment.

82.3 Thirdly, direct payment would not have featured in the contract even if it had been awarded to the Claimant. It is artificial for it now to argue this purely theoretical prospect that the 'contract concluded in writing' could have included direct payment means it could not have been a 'concession'.

For both the Proposed Contract and the Adjusted Contract, Reg.3(3)(a) CCR applies.

Do Reg.3(4)(a) / (5) apply ?

83. I turn to the question under Reg.3(4)(a) and (5) CCR 16 of the transfer of operating risk and whether there was a guarantee 'under normal operating conditions' of recovery of costs for the service (i.e. breaking even). As stressed in *Stadler* p.37, that can be a demand risk (those liable will not pay for the services) or a supply risk (e.g. the risk that costs will not be met by revenue), or both; and the risk need only be 'very limited' although as stated in *Eurawasser*, a significant part (or large extent as it was put in *Oymanns*) of whatever operating risk there is must transfer.

84. As Mr McGurk says, the Defendant has not provided evidence as to whether it considered the CCR 16 at the time and indeed, I am proceeding on the basis that they and all the tenderers assumed, due to DPS 953, that the PCR 15 would apply to the contract. However, Regs.3(4) and (5) CCR 16 are not concerned with what anyone *thought* (still less YPO four years earlier). As I have said, a common assumption between parties that legislation applies does not mean it does: *McAdam* – and there is no indication it does in EU Law either – quite the contrary given the focus on *substance*. Even if Ms Naylor's assumption the PCR 15 applied was reasonable due to the DPS Contract, that does not make it the relevant 'contract' for Reg.3 CCR.

85. Mr McGurk's other point was based on Ms Naylor's evidence about operating risk:

> "We knew from experience…that our model would cover all of our costs and generate a profit on our provision of the services'. As a matter of fact, Dukes always recovers [a redacted percentage] of the fees it charges to debtors and this is always more than enough to cover its operating costs. The risk (to the extent there is any) and amount of any potential loss is therefore nominal or negligible."

Ms Naylor later clarified this rate was the approximate rate of recovery' for fees overall not per debtor. Mr McGurk submitted that whether there was a guarantee was an issue of fact for trial and the most credible indicator for prospective risk was the (lack of) previous risk.

86. Whilst this evidence is important to the related issue of 'potential estimated loss' below, it does not really answer the Defendant's point on operating risk. Indeed, rather than considering the more complex question of whether assumption of operating risk is 'deemed' under Reg.3(5), I prefer to consider first whether the Defendant has proved beyond realistic argument that operating risk transferred by the award of the Proposed or Adjusted Contracts. In my judgement, not only can the Defendant prove that, Ms Naylor's statements themselves prove it. As the incumbent under the ARP contract, Ms Naylor admits the Clamant has an 'approximate rate of recovery of their fees overall'. She does not suggest this was any different for the ARP contract. It follows for the debt cases transferred from ARP, the Claimant did not recover a substantial proportion of its fees. I cannot understand how this is not an 'operating risk'. If the Claimant *manages* this operating risk and stays profitable through efficiency, it is to its credit and I return to this point on 'potential estimated loss'. However, it still means the Claimant takes on a substantial operating risk of not being paid a proportion of its fees, whether categorised as a 'demand' or 'supply' risk.

87. It may be Ms Naylor's misapprehension about this point in her own statement stems from her misunderstanding of 'operating risk' in it at p.5.1 that a 'contractor is to effectively take on all the operating risk'. That is not what Reg.3(4) CCR 16 – or indeed Art.5 Concessions Directive – says. As made clear as long ago as *Eurawasser*, only a 'significant share' of the risk must transfer. In any event, with debt enforcement on the basis that debtors pay, effectively all of the risk does transfer to the enforcement agent, as Elias LJ said in *JBW* at para.53, as the creditor (here ARP) is released from the costs of unsuccessful enforcement. He also said at para.47:

> "…The contractor bears such financial risks as are involved in running the service. These arise for a number of reasons. The total remuneration is unknown in advance not only because the number of defaulters is unpredictable, which… would not of itself be sufficient to constitute a concession, but also because the number of those who will avoid payment altogether is unknown. Furthermore, because the costs are subordinated to the fines, the contractor takes the risk not only of being unable to recover anything from the defaulters, but also of recovering insufficient to cover both the fine and the costs of recovery. These risks include, but go beyond, those necessarily involved in any service contract of being unable to provide the service at the agreed price. Even if it can be said that the relevant risks are small—since statistics provide a good indication of the extent of those risks and they can be catered for in the price offered in the tender—they are precisely the same risks as those to which the MoJ would be subject if it were to perform the contract for itself."

The regime is slightly different under the Fees Regs 2014 in that Reg.13 gives priority to the £75 compliance stage fee before repayment of the debt if the funds recovered do not cover fees and debt. However, the enforcement agent still 'takes the risk not only of being unable to recover anything from the defaulters, but also of recovering insufficient to cover both the fine and **all** the costs of recovery'. Moreover, because the operator must account for all returned Liability Orders including visits to property it cannot 'cherry pick' debts, reinforcing that *effectively all* operating risk transfers.

88. Nevertheless, I have also considered whether the Fees Regs based on Mr Dehayen's calculations may point away from a 'concession' due to Recitals 17 and 19:

> "(17) Contracts not involving payments to the contractor and where the contractor is remunerated on the basis of the regulated tariffs, calculated so as to cover all costs and investments borne by the contractor for providing the service, should not be covered by this Directive….
>
> (19) Where sector-specific regulation eliminates the risk by providing for a guarantee to the concessionaire on breaking even on investments and costs incurred for operating the contract, [it] should not qualify as a concession…"

I am conscious the Dehayen Report bench-marked Non-High Court fees of £75 for Administration; (now) £235 and 7.5% with debts over £1,500 for Enforcement; and £110 and 7.5% with debts over £1,500 for sale to the least profitable fee output as:

> "…the single fee point would need to be selected so that even the least profitable of debt-types could be enforced sustainably."

Moreover, the Dehayen Report's profitability testing suggested a profit margin way above the 10% target for the two core debts in the present procurement: Council Tax (34.8%) and Non-Domestic Rates (64.3% adjusted that down to 10%). This is one reason I accept for present purposes Ms Naylor's evidence suggesting the Claimant's substantial incumbent profit margin. However, none of this is a 'guarantee' in the sense contemplated in either Recital for a very simple reason. It could only ever operate (over a decade ago, it is less clear now) as any sort of 'guarantee' of covering *the cost of enforcing debts where the fee is recovered*. In an industry where even a very efficient operator like the Claimant may only enforce a proportion of the total fees – and where they cannot 'cherry pick' debts but have to try to enforce them all, the 2014 Regs fees are neither a *guarantee* of breaking even nor covering *all* costs for providing the service, as only a minority of fees are paid. Indeed, as Mr Barrett stressed, Mr Dehayen himself said earlier in the report:

> "The Fee Structure should not be seen as a mechanism to protect all firms in the industry, beyond ensuring that a reasonable level of profit can be earned by an averagely efficient company within the industry."

89. Therefore, whilst strictly academic, it is clear that under normal operating conditions, there is 'no guarantee' under Reg.3(5) of recouping costs or investments, whether in the Adjusted Contract or Proposed Contract (which each specifically state through p.2.2 of the Specification there is 'no guarantee as to number or value of Liability Orders [to] be passed to the contractor in any given period'). There is not only recovery of only a proportion of fees, there is no guarantee about how many cases there will be, which with debt enforcement can fluctuate as it did for the Claimant as the incumbent for ARP as society came out of the 'Pandemic' and into the 'Cost of Living Crisis'. For the year from April 2021 to March 2022, there were 4885 Council Tax debts sent for enforcement and 361 Non-Domestic Rate debts. In only six months from April 2022 to the end of September 2022, there were respectively 3280 (2/3 in ½ the time) and 124 (1/3 in ½ the time). There is no evidence on how these fluctuations affected the Claimant's profitability.

Does Reg.3(4)(b) apply ?

90. This brings me on to the final part of the definition of a 'services concession': "*The part of the risk transferred to the concessionaire shall involve real exposure to the vagaries of the market, such that any potential estimated loss incurred by [it] shall not be merely nominal or negligible"*. Mr McGurk submitted in his Skeleton:

> "Ms Naylor explains why the paragraph 4 requirements could not be met for this award, noting (at para 5.1.1 of her first statement) that the Claimant "knew from experience…that our model would cover all of our costs and generate a profit on our provision of the services." Plainly Regulation 3(4) of the CCR would not be met in those circumstances. Ms Naylor amplifies this evidence at para 5.1.4: "Dukes always recovers [a redacted proportion] of the fees it charges to debtors and this is always more than enough to cover its operating costs. The risk (to the extent there is any) and amount of any potential loss is therefore nominal or negligible." In her second statement she makes clear that this figure "is the approximate rate of recovery in respect of all fees overall rather than the amount which [the Claimant] expects to recover from each individual debtor." Ms Naylor reinforces the point further by reference to the return generated by the Claimant as incumbent provider of these services to the Defendant over the past 4 years. She….estimate[d] the operating costs for the 2 year term… However, this is likely to overestimate the costs relating to this contract as many are overheads which would be incurred in any event regardless of the contract with the Council. Regardless, it is clear that there is no operating risk for the contractor." In those – factual – circumstances, the call-off the subject of this dispute could not have been a services concession contract within Regulation 3 of the CCR 16…. Ms Naylor is in the best position to explain to the Court how the Claimant undertakes financial modelling and what that has yielded in terms of risk and return, both historically and what that very likely means for the present contract."

Whilst I have not accepted these submissions on Reg.3(4)(a)/(5) CCR, I accept they are probably more forceful in relation to Reg.3(4)(b) CCR. After all, the Claimant is the incumbent and has run the same contract with a healthy profit margin way above the target margin of 10% in the Dehayen Report; and its fee recovery rate was better than the average in that report of 22.75%. I must (and do) assume that factual evidence is true and take it at its highest. Therefore, Ms Naylor contends legally for the purposes of Reg.3(4)(b) CCR 16, 'the risk and amount of any potential loss is...negligible'. I have considered all the evidence very carefully and I remind myself of the need to be 'certain' that I disagree on a strike-out application and similar stringency is required for reverse summary judgment. Nevertheless, I do disagree for five different but cumulative reasons.

91. Firstly, even on the Claimant's assumed facts, these submissions miss the legal point. As I have explained, 'operating risk' and 'potential estimated loss' both in the Directive and Reg.3(4) normally go hand in hand – or 'in parallel' as the ECJ put it in *Oymanns* at p.71 as Elias LJ noted in *JBW* at para.34. There are cases like *Oymanns*, where there is (limited) operating risk but no 'real exposure to the vagaries of the market' and as also explained in Recital 18, it is those sorts of cases which what has been implemented here as Reg.3(4)(b) CCR 16 is intended to catch. This case is not like that, for the reasons I have just explained under 'operating risk', on Ms Naylor's own evidence. This is because, as I explained above at paras.63-65, Art.5(1) CDir and Reg.3(4)(b) CCR 16 are not actually concerned with whether an incumbent contractor has been profitable or whether their successor is likely to be. They are concerned with whether the (part of) the operating risk transferred by the contract award involves 'Reg.3(4) exposure'. In economic terms, even high likelihood of profit does not mean there is no real exposure to risk of loss. In the circumstances of this case, Ms Naylor's factual evidence (as opposed to her legal assertions) demonstrate there is extensive operating risk, similar to that in *JBW* at p.47. Under either the Proposed or Adjusted Contracts, the number of debtors transferred is unpredictable and not guaranteed; the number who will refuse payment is unpredictable; there is a risk not only of recovering nothing, but also of the funds recovered not covering all costs; and none of this can be mitigated by cherry-picking. Indeed, only a proportion of fees are recovered, which *in itself* amounts to proof of 'Reg.3(4)(b) exposure' or indeed 'more than negligible potential estimated loss' on costs and itself 'real exposure to the vagaries of the market'. The Claimant's very healthy profit margin is due to its efficiency and *despite* such 'real exposure to the vagaries of the market'.

92. Secondly, even if that analysis of Art.5(1) CDir and Reg.3(4) CCR 16 is wrong, I return to my separate point at para.63.3 above. For the reasons explained there, Reg.3(4)(b) is *a requirement of the contract*. As Mr Barrett submits, it is *the contract* (as opposed to economic conditions, market competition or contractor performance etc) that must transfer (at least part) of the operating risk which 'shall involve' 'Reg.3(4)(b) exposure'. As this is a question of considering the relevant contract, it is eminently suitable for summary judgment / strike-out. As explained, both Proposed and Adjusted Contracts plainly transfer effectively all operating risk of debt recovery and by virtue of the contract terms involve real exposure to the vagaries of the market. They explicitly do not guarantee any level of debt enforcement (which has fluctuated) but also require attempted enforcement (including visits to the debtor's home) prior to returning unenforced orders – there is no 'cherry picking'. Moreover, what is telling is what is <u>not</u> in the contract. There is no direct payment (and the potential scope is plainly ancillary). There is no effective or actual guarantee as in *Oymanns* or the situations discussed in Recitals 17 or 19. On the contrary, recovering sums from recalcitrant debtors is far closer (as Elias LJ observed in *JBW* para.54) to the rescued climbers chased for their fees who may be uninsured in *Stadler*. The contract *requires cost to be incurred* (e.g. home visits to debtors with Liability Orders) but *does not cover it* – only effective contractor performance does. The award of *the contract* therefore involves 'Reg.3(4)(b) exposure' indeed an approximate fee recovery rate of only a proportion of fees demonstrates more than negligible *potential* estimated loss.

93. Thirdly, even if both those analyses of Art.5(1) CDir and Reg.3(4) CCR 16 is wrong the result is the same. They clearly 'codified' the law under the 2004 Directive (as is clear from *Promoimpresa* and explained by Professor Arrowsmith) all fully considered and applied in *JBW* (rather than the 2006 Regs). So, as Mr Barrett submits, *JBW* remains 'highly persuasive' even if it does not formally bind me as it was on the earlier directive as Mr McGurk rightly says. I respectfully agree with *JBW* and follow it (strengthened by that also being Coulson J's view in *Newlyn*, factually closer still to the Proposed and Adjusted Contracts). Whilst the concept of 'potential estimated loss' was not so clearly developed by the ECJ at that time, in para.47 of *JBW* Elias LJ specifically considered how the transfer of operating risk and in particular the risk of non or partial-payment exposed Bailiffs to potential losses. Certainly, all four elements of his analysis why there was on balance a concession at para.53 of *JBW* are present: all risks (or effectively all) of those were risks transferred to the contractor; no direct payment from the Defendant (even if theoretically there could have been); which benefits by the recovery of (some) debt; and if not 'beneficiaries', debtors are targets of the service. Elias LJ's two factors weighing against concession at para.54 of *JBW* are also present: preservation of control and limited scope to expand the source of income, but in fact much of the 'control' over fees recovery is now through the 'regulated tariffs' of the Fees Regs 2014, rather than the Defendant. As Elias LJ noted in *JBW* para.30, in *Eurawasser* (see paras.72-7) it was noted this feature is common in the public sector where 'regulated tariffs' and other rules of public law limit the degree of risk (as now made clear in Recital 19 CDir).

94. Fourthly, speaking of the Fees Regs 2014, even if Reg.3(4)(b) CCR depends on the factual issue of profitability of a particular contract, there is still no realistic prospect of success due to those Regs, the Dehayen report and Ms Naylor's evidence which together show the contract (in whatever form) involved 'Reg.3(4)(b) 'exposure'. That would sometimes depend on factual evidence at trial, especially if the price and costs are unique (e.g. the particular car park in *Parking Brixen*). However, in some cases (like *Eurawasser*), the payment arrangements are set by legislation and the fee structure itself can prove whether Reg.3(4)(b) applies. The Dehayen Report set the fees (slightly increased in the Fees Regs 2014) with a target profit margin of 10%, but testing suggested higher for Council Tax and Non-Domestic Rates. It stated:

> "It may be that even after an amendment to the Fee Structure some inefficient EACs continue to perform badly in terms of profitability, <u>or even make a loss</u>. When there is such a wide range of profitability this is <u>inevitable</u>, except in the case where a Fee Structure allows even the least efficient EAC to be profitable… <u>[I]t may be the case that the least efficient firms cannot operate profitably with that Fee Structure</u>. [It] should not be seen as a mechanism to protect all firms in the industry, <u>beyond ensuring that a reasonable level of profit can be earned by an averagely efficient company within the industry.</u>" (my underline)

As Mr Barrett said, this involves what I am calling 'Reg.3(4)(b) exposure'. Whilst a fee *if recovered* would cover costs of enforcing *that debt* (and possibly a profit), as fee recovery averaged less than 25% from debtors overall, fees were not so high to reduce risk to negligible potential estimated loss: some inefficient firms would make a loss.

95. This ‘Reg.3(4)(b) exposure’ inherent in Fees Regs 2014 was caried forward into the Proposed and Adjusted Contracts. True, the Claimant was a very profitable incumbent contractor as it was very efficient (with a higher fees recovery rate than the average of 22.75% in the Dehayen Report). However, even assuming the Claimant if it had been successful would have continued to be so profitable (see below), as the 2014 Fees were intrinsic to that contract, so too was their ‘Reg.3(4)(b) exposure’, even with a better than average fee recovery rate. In short, because the Fees Regs 2014 capped the fees and only a proportion of fees were recovered overall, there was ‘Reg.3(4)(b) exposure’ (in simple terms, exposure to a more than negligible potential loss), even if the Claimant through efficient management made it work and turned a profit. This may have been different if the contract had involved substantial direct payment to the contractor by the Defendant (although it would have needed more than the ancillary matters on the pricing schedule), but it did not. If a highly efficient operator like the Claimant only recovered only a proportion of its fees, then the average contractor would be even more exposed to the risk of making a loss. Indeed, contrary to Dehayen Report’s recommendations, fees have not been increased in almost a decade.

96. Finally, I assume I am wrong about all of that and ‘Reg.3(4)(b) exposure’ purely turns on the evidence of the particular profitability of the Proposed or Adjusted contracts, irrespective of their terms or the Fees Regs 2014. Indeed, I assume it just turns on the profitability evidence of Ms Naylor taken at its highest given this is summary judgment / strike-out stage not trial. Even then, in my judgment there is still no realistic prospect of success for the Claimant on ‘Reg.3(4)(b) exposure’. It is true the Claimant was a very profitable incumbent contractor with a healthy profit margin and a higher than average fee recovery rate, with the advantages of four years of incumbency, I accept Ms Naylor would have estimated continuing profits (or at worst, negligible loss). However, that is not the Reg.3(4)(b) question: it is the *potential estimated loss* for the concessionaire, not the actual estimate by the incumbent. Here the concessionaire (i.e. Bristow) is taking over the contract during a ‘Cost of Living Crisis’. I have no evidence from either party about what impact this may have on debt levels (although Specification p.2.12 suggests from April to September 2022, Council Tax debts were 2/3 of the previous year but Non-Domestic Rates were only 1/3 of the previous year) and I have no evidence from the Claimant on the effects of this on profits this year. I accept more evidence on this would be available at trial. However, as Mr Barrett submitted, whether the contract ‘shall involve’ (what I am calling) ‘Reg.3(4)(b) exposure’ is assessed prospectively, not retrospectively. The relevant ‘potential estimated loss’ to which the concessionaire is exposed is from April 2023. In times of economic turmoil as now, the past does not prove the future (as my mooted bankrupt office coffee stand concessionaire would also confirm). The evidence relevant to that prospective assessment is before me and indeed I am assuming Ms Naylor’s factual evidence to be true. At trial, the Claimant’s case will be challenged on the facts too.

97. On this basis, the combination of the evidence before me and economic circumstances of which I can take judicial notice drives me to the conclusion that in April 2023 when the contract was actually awarded to Bristow, it involved 'Reg.3(4)(b) exposure' even assuming as true Ms Naylor's evidence. Even a successful and efficient incumbent had only been able to recover a proportion of its fees, albeit it had made a healthy profit. However, Bristow takes over during economic turmoil where costs have been rising dramatically but fees are fixed (themselves not uprated for inflation in almost a decade). It may very well be that Bristow will prove (almost) as efficient as the Claimant and make a healthy profit, but in current economic circumstances and assuming the same fee recovery rate as the Claimant, that hardly means it is not 'Reg.3(4)(b) exposed', or in practical terms, not running the risk of making even a nominal loss. With respect to Ms Naylor, if I may be blunt, with the Claimant only recovering a proportion of ifs fees from debtors in economically easier times, during a Cost of Living Crisis, this conclusion would simply fly in the face of current economic reality. I am afraid I do not need a trial to tell me that.

98. For all those reasons, applying the principles in summary judgment cases and the necessary caution and even assuming the truth of the Claimant's evidence, I am driven to the conclusion the Defendant has shown that the Claimant does not have a realistic prospect of success at trial. This is not least as I have taken the Claimant's evidence at its highest whereas at trial the burden of proof will be on it. Whilst there may be further evidence at trial, even assuming there is evidence of the Claimant's ever higher profitability in 2022-23 actually *increased* by the mushrooming debts to enforce during the 'Cost of Living Crisis' which may undermine this last point at paras.96-97, it would not affect my other four reasons for finding Reg.3(4)(b) satisfied, nor any of my other conclusions for the reasons I have explained. Therefore, even applying all the guidance in the authorities on CPR 24.2 as in *Easyair*, I am driven to the conclusion the Claimant has no real prospect of success on the PCR 15 claim and I should grasp the nettle and grant summary judgment now. Nor is there any compelling reason to allow that issue to proceed to trial within CPR 24.2. Whilst it is true there will be a trial anyway on the contract claim and so costs incurred anyway, as I shall briefly explain in a moment, the Claimant can effectively re-argue many of the same points in that claim, even if the remedies are limited to damages. Moreover, the law can be taken as settled in this field as despite my doubtless excessively long reasoning (in fairness, reflecting the high quality of Counsels' submissions), in simple terms, I have reached the same conclusion as in *Newlyn* and in *JBW* and in my judgment it is clear the substance (as opposed to the form) of the law has not changed. As and when the Procurement Bill is passed, it may have a different definition of 'concession' in clause 8 that will need its own consideration.

99. For the same reasons, as a cross-check, I am 'certain' the Claimant's claim under the PCR 15 itself discloses no reasonable grounds of claim. No amendment would cure it – I have already rejected many arguments based on Ms Naylor's evidence not pleaded in the APOC itself. Indeed, its claim the PCR 15 applies is principally based on the DPS Contract, which I have found the weakest part of the Claimant's argument. However, it is central to the contract claim I now describe.

The Contract Claim

100. Fortunately, I can deal with the rest of the issues very much more briefly, especially the Claimant's contract claim ('The Contract Claim') proceeding to trial which I briefly note as it is relevant what I have said on 'other compelling reason' and especially to the JR Claim I consider next. As I have explained, the Claimant's evidence taken at its highest would be that (i) the DPS Contract clearly stated the PCR 15 applied and would apply to the call-off, (ii) the call-off competition was run under DPS 953 and did not suggest the PCR 15 did not apply; (iii) there was no mention of the CCR 16 during the procurement process; (iv) the Claimant assumed the PCR 15 applied and it is plainly arguable the Defendant assumed the same; (v) the CCR 16 was not mentioned until after the TCC Claim and references in the Bristow Contract are arguably an 'afterthought, if not a deliberate tactic'.

101. The key principles in the Contract Claim were again discussed by Elias LJ in *JBW*:

> "60….A tendering authority is not obliged to comply with the Regulations where a service concession is in play, but there is in principle no reason why it could not choose to do so and I do not see how it could be illegal for it to do so. The parties could expressly agree to contractual terms mirroring the Directive and the Regulations if they so wished, and therefore there is no reason in principle why implied terms could not cover that same ground…..
>
> 61 When considering the implied contract question, two issues arise for consideration: first, is there any implied contract? Secondly, if so, what is its scope ? As to the first issue, I would be prepared to accept, in line with the well-known judgment of Bingham L.J., as he then was, in *Blackpool and Fylde Aero Club v Blackpool BC* [1990] 1 W.L.R. 1195 that the MoJ would in principle be under an obligation to consider the tender. Also…I would have no difficulty in implying that any such consideration should be in good faith. [The MoJ] contended that this was an obligation under public rather than private law, but I do not see why this should preclude the obligation arising in private law also. Indeed, if a tender is not considered in good faith, I do not think that it can sensibly be said to have been considered at all.
>
> 62 However, [JBW] does not contend that there has been a breach of this limited duty. The question is whether the implied obligations can extend beyond that limited requirement to embrace the much fuller set of duties relied upon by [JBW]. I see no conceivable basis for concluding that it can. There is simply no basis on which it can be contended that these terms necessarily have to be implied to give efficacy to the contract; and nor can there be a common intention that they should given that the MoJ has always been denying that the Regulations apply."

A similar result was reached by HHJ Keyser QC in *Adferiad* at p.139; and likewise, by O'Farrell J in *Excession v Police Digital Service [2022] PTSR 859* at ps.152-164. Both HHJ Keyser QC and O'Farrell J held on the facts in those cases there was no basis for implying contract terms beyond consideration of the Claimant's tender in good faith as explained in *JBW* e.g. to score without manifest error: indeed the ITTs in each case had expressly negatived such implied terms.

102. This case is rather different. At ps.61A-D APOC it is pleaded that the DPS Contract was either breached by failure to apply the PCR 15 to the tender (which is not the strongest way of putting the argument now I have found the PCR 15 did not apply – see *McAdam* quoted below); or that against the background of the DPS Contact and DPS 953, the ITT and Specification which referred to them amounted to an express or implied contract between the Defendant and tenderers such as the Claimant, not simply to consider their tenders in good faith as in *Blackpool*, but to conduct the call-off competition either (i) 'as if' the PCR 15 applied; or (ii) by awarding to the most economically advantageous tenderer on the ITT criteria; or (iii) in accordance with the criteria in the ITT and providing adequate feedback.

103. The contended term to conduct the tender 'as if the PCR 15 applied' is central to the Contract Claim as it potentially opens the same obligations (if not the same remedies, as a contract claim would be limited to damages) as under the PCR 15 which I am striking out. This argument is what Elias LJ in *JBW* called agreeing to 'mirror' the Regulations and I repeat the explanation of Gloster LJ in *McAdam* at p.54:

> "Whilst the cases (and indeed the article by Mr Robert Megarry) to which we have referred above, do not rule out the possibility that parties can, by appropriate wording in their contract, agree that particular provisions of, for example, the Rent Acts may be incorporated into their contracts, with the result that one party will be treated *as if* he enjoyed particular rights conferred by the relevant Act, parties cannot, as it were on a wholesale basis, validly contract that the agreement *is* regulated by the 1974 Act and that the provisions apply. As Mr Megarry said in the article: "The difference is between saying, 'The Acts shall apply' and saying, 'I agree to your having by contract the same rights as if the Acts applied'."

Such a claim – which I will call here the 'As If Claim' is never straightforward – versions of it were rejected in *JBW*, *Adferiad* and *Excelsior*. If the Court has closed the front door by holding the PCR 15 does not apply, getting into it by the back door is not easy and takes unusual facts, as HHJ Keyser QC said in *Adferiad*. Nevertheless, this is an unusual case. Many arguments based on the DPS Contract to contend the PCR 15 applied which I have rejected as the wrong approach to the PCR actually applying, are directly relevant to the claim the parties agreeing to proceed 'as if' the PCR 15 applied. There was no summary judgment or strike-out application in respect of the 'As If Claim', or the other contractual arguments. Nor could there have been – they are plainly arguable. However, whether the Claimant can prove them and if so, what the remedies may be, are clearly matters for trial.

104. Moreover, as I put to Mr McGurk in argument on 'apparent bias' by Ms H in the JR Claim, if the Claimant could prove Ms H was *actually* biased in favour of Mr J and Bristow, that would seem to be a clear breach of the implied term of good faith which is now well-established by cases like *JBW* (unlike the wider 'As If Claim'). Whilst I accept that 'good faith' term would probably not cover any 'apparent bias' of Ms H, that is to an extent governed by Reg.24 PCR, which requires contracting authorities to take appropriate measures to prevent 'conflicts of interest' which could cover the same ground. I return to it in considering 'apparent bias' in the JR Claim.

The JR Claim

Permission for Judicial Review

105. Judicial Review is described by CPR 54.1(2), as 'a claim to review the lawfulness of….(ii) a decision, action or failure to act in relation to the exercise of a public function'. JR is often said to be a 'remedy of last resort' and can be refused if there is an alternative remedy (see e.g. *Archer v HMRC [2019] 1 WLR 6355 (CA)*). However, Mr McGurk fairly submits that if I strike out the Claimant's claim under the PCR 15 (as I have), its Contract Claim is not a proper alternative remedy because its only remedy can be damages, not setting the Bristow Contract aside. This is the main reason the Claimant brings the JR Claim in the alternative. However, as noted above, remedies in Judicial Review are also discretionary generally and there is another potential barrier to Judicial Review in s.31 Senior Courts Act 1981 (SCA):

> "(3C) When considering whether to grant leave…the High Court— (a) may of its own motion consider whether the outcome for the applicant would have been substantially different if the conduct complained of had not occurred….
> (3D) If…it appears to the High Court to be highly likely that the outcome for the applicant would not have been substantially different, [it]….must refuse…leave.."

106. This reference to 'leave' for Judicial Review is usually described as 'permission', required under CPR 54.4. However, as Mr McGurk says in his Skeleton, the permission stage is, in essence a 'filter'. In *Maharaj v PCTT* [2019] UKPC 21, Lord Sales said 'The threshold for the grant of [permission] to apply for judicial review is low..' What is required is an arguable ground which has a realistic prospect of success'. In that sense, it can be seen as the obverse of the summary judgment application I have dealt with, where the Defendant had to (and I have held, did) show the Claimant only had 'fanciful' rather than 'realistic' prospects of success. In the JR Claim at this stage on the merits of the particular grounds of challenge, the Claimant only has to show 'realistic' (in the sense of more than fanciful) prospects. Nevertheless, at permission stage in Judicial Review, sometimes cases can be 'filtered out' not because they are not 'arguable' on their merits, but other grounds, such as out of time, or the 'no substantial difference' basis in s.31 SCA. The question is not whether those bases are 'arguable', but whether they are established. If so, permission can be refused irrespective of the 'arguabilty' of the grounds.

107. One such 'permission filter' is whether a decision by a public body is 'amenable to Judicial Review' under CPR 54.2. A 'decision' (such as the Defendant's decision on the procurement in this case) is only 'amenable to Judicial Review' if, in the words of CPR 54.1(2)(ii), it is 'in relation to the exercise of a public function'. So, in *R v East Berkshire AHA exp Walsh* [1984] 3 WLR 818 (CA), the claim for judicial review by a nurse dismissed from employment by an NHS authority was refused because even though the authority was a public body, in dismissing the nurse it was not exercising 'public functions' but private law contractual functions – it was case about a contract of employment, it just happened to involve a public body. The modern approach to 'amenabilty' was summarised by Lord Dyson (as he later became) in *R(Beer) v Hampshire Farmer's Market* [2004] 1 WLR 233 (CA) para.16:

> "…[U]nless the source of power clearly provides the answer, the question whether the decision of a body is amenable to judicial review requires a careful consideration of the nature of the power and function that has been exercised to see whether the decision has a sufficient public element, flavour or character to bring it within the purview of public law."

108. In the context of procurement, what is a 'sufficient public element' is coloured by the context that it concerns award of a contract (to which I have held neither the PCR 15 or the CCR 16 applied). As illustrated by *Walsh*, contracts characteristically fall within private law, not public law. Indeed, in this case, a private law contractual claim is proceeding to trial. Unlike the inter-relationship of the CCR 16 and PCR 15, the amenability to Judicial Review of public authority contract decisions is well-travelled ground and I was taken to several authorities. In chronological order they were: *R v LCD exp Hibbit* [1993] COD 326, *Mercury v ECNZ* [1994] 1 WLR 521 (PC), *Cookson, R(Menai) v Swift Credit Services* [2006] EWHC 724, *R(Gamesa Energy) v National Assembly for Wales* [2006] EWHC 2167, *R(Chandler) v SoSSF* [2010] PTSR 749 (CA), *R(Gottlieb) v Winchester CC* [2015] EWHC 231, *Newlyn, SoST v Arriva* [2019] EWHC 2047 (TCC), *Amey, R(Good Law), Excelsior* and *R(Shashikanth) v NHS Litigation* [2022] EWHC 2526. In what is already an over-long judgment, I will simply summarise their effect as is relevant in this case:

108.1 The conduct of a procurement process by a public authority can involve both public and private law and causes of action can co-exist: *Amey, Arriva*.

108.2 If the PCR 15 / CCR 16 apply, whilst disappointed bidders can claim for breach of statutory duty, directly-affected members of the public can have standing to claim Judicial Review: *Chandler*, *Gottlieb, Good Law Project.*

108.3 However, outside the PCR 15 or CCR 16, a public authority's award of *a contract* to one bidder is *typically* a private not public law act, not amenable to Judicial Review by another: *Hibbit*, *Menai*, *Gamesa*, *Newlyn*, *Excelsior*.

108.4 Nevertheless, this depends on the bidder's ground of challenge. There is a distinction between challenging a breach of statute or an '*ultra vires*' / illegal decision on one hand; and challenging 'normal commercial decisions' on the other: *Cookson.* As Lord Templeman said in *Mercury*:

> "It does not seem likely that a decision by a state enterprise to enter into or determine a commercial contract….will ever be the subject of judicial review in the absence of fraud, corruption or bad faith."

The latter types of legitimate challenge have been expanded since to encompass also bribery and implementation of an unlawful policy: *Cookson, Menai*. However, amenability of a decision to challenge for public law 'irrationality' would be 'rare': *Gamesa*. Challenges for 'breach of legitimate expectation' were not in *Gamesa* and *Newlyn*. Judicial Review should not be used simply to improve the position in contract: *Shashikanth*.

108.5 If a decision lacks a sufficient public law element, it is not 'amenable' to Judicial Review even if it is otherwise arguably unlawful or unfair: *Hibbit*.

109. Since the question of 'amenability' varies with the particular ground of challenge and there may be overlap between 'amenability', 'arguability' and 'no substantial difference' on the individual grounds of challenge, I will consider all under each of the grounds not those under those headings. The JR Claim issued on 10th March 2023 raised two grounds overlapping with the TCC Claim under the PCR which I am striking out: apparent bias and inadequate reasons. As I said, both can in principle be ventilated in the 'As If Claim' in contract. However, again this is not a true 'alternative remedy' because it is limited to damages whereas the JR Claim is not. Nevertheless, the overlap between the JR Claim and the 'As If Claim' is relevant to 'amenability'. The same is true of the overlap between the additional grounds of challenge added in the Reply on 20th April 2023 (which I accept is in response to the TCC Defence on 30th March, so in time): Legitimate Expectation and the '*Ermakov*' challenge. Indeed, I proceed in this order: (i) Legitimate Expectation; (ii) '*Ermakov*'; (iii) Inadequate Reasons; and (iv) Apparent Bias.

Legitimate Expectation

110. The basis of the Claimant's legitimate expectation challenge is summarised by Mr McGurk in the Reply in the JR Claim in the following way:

> "The representations made in the DPS Agreement which the Claimant signed, gave rise to clear and unequivocal representations that any call-off contract for the provision of Enforcement Agency Services would be made under the PCR 15. Those representations gave rise to a legitimate expectation the Defendant would conduct a procurement for the award of a contract for Enforcement Agency Services under the PCR 15….While not necessary to establish a legitimate expectation, the Claimant relied on those representations and assurances…in submitting its bid….There is no basis on which the Defendant can seek to resile from those representations and assurances; the only basis upon which it has sought to resile is in an attempt to generate a legal means of preventing the Claimant's claims from proceeding. That cannot constitute the sort of 'overriding reason in the public interest' required to justify a public authority resiling from a legitimate expectation."

The Reply went on to contend that the Defendant had unlawfully resiled from this legitimate expectation by failing to follow the PCR 15, seeking after the event to contend that the contract was a concession contract excluded from the PCR 15 and in breach of the standstill under the PCR 15 once the TCC Claim was issued.

111. The principle of legitimate expectation (whether expressed as procedural or substantive) was summarised by Lord Kerr in *Re Finucane* [2019] UKSC 7 para.62:

> "…[W]here a clear and unambiguous undertaking has been made, the authority giving the undertaking will not be allowed to depart from it unless it is shown that it is fair to do so. The court is the arbiter of fairness in this context….[A] matter sounding on the question of fairness is whether the alteration in policy frustrates any reliance which the person or group has placed on it. This is quite different…from saying…it is a prerequisite of a substantive legitimate expectation claim the person relying on it must show [it]…suffered a detriment."

112. Here, *for the same reasons as in the Contract Claim*, I accept that on the assumed facts (not a usual approach in Judicial Review: *R(Good Law*) para.86, quoted above), the ITT's references to DPS 953 against the context of the DPS Contract *arguably* amounted to a 'clear and unambiguous' undertaking that the PCR 15 would apply to the procurement. I say 'arguably' because Mr Barrett argues forcefully to the contrary the relevant 'representations' in the DPS Contract were from YPO, not the Defendant. I also cannot see how the Defendant pleading in the Defence the PCR 15 did not apply was unlawful when I have found that was correct, nor indeed awarding the Bristow contract under a 'standstill' it follows did not apply (see *Newlyn*). Nevertheless, the Defendant clearly represented the 'call-off competition' was being run under DPS 953 to which the PCR 15 had been clearly stated (by YPO) to apply and it has now resiled from that. So, this ground is arguable subject to amenability.

113. Nevertheless, as I stressed, the legitimate expectation claim, relying on the DPS Contract and the 'representation' that the PCR 15 applied, is in substance rather than form the same claim as the Contract Claim (in particular, the 'As If Claim'). Whilst that is not a true alternative remedy because it is limited to damages and the PCR 15 claim itself is struck out (cf. *Cookson* p.20), this is directly relevant to amenability. It shows the 'public law element' to this challenge, even if it co-exists with the 'private law element' as in *Amey* and *Arriva,* is unlike those cases effectively subsumed within the latter. *Chandler* and *Gottlieb* also do not assist as they relate to standing of third parties to bring challenges under the PCR 15 / CCR 16. This challenge is the same as in *Newlyn*: by a losing bidder that a representation was made that the PCR 15 would apply. Whilst the representations in *Newlyn* were not as strong as in this case, what matters is that Coulson J held that applying *Hibbit, Menai* and *Gamesa*, the claim for a legitimate expectation the PCR 15 applied was not amenable to Judicial Review, effectively as it sought to challenge a commercial decision. *Newlyn* on this point is indistinguishable from the present case and whilst not binding on me, is consistent with all the authorities I have considered and summarised above. So, the decision impugned here is not amenable to challenge on the legitimate expectation ground.

114. In any event, even aside from pure 'amenability', I would have refused permission for judicial review on this ground on the basis that (unlike *Newlyn*), there is an extant contract claim covering the same ground and the only difference is remedy. As Bourne J said in *Shashikanth* at p.136, *'parties to a contract cannot rely on public law remedies to improve their contractual position, no matter how 'public' the context to the dispute'*. This is effectively what this claim seeks to do here. Whilst *Shashikanth* was strictly a case about 'amenability to judicial review', this same point can be articulated in a slightly different way, which was also considered by Coulson J in *Newlyn* separately from the 'amenability' point (albeit in response to attempt to *convert* a private law claim to Judicial Review, not bring a separate one). It is an abuse of process in the obverse of *O'Reilly v Mackman* [1983] 2 AC 237 (HL) in seeking to turn a private law claim into a public law one for improved remedies. Even if the decision to award the contract here not to the Claimant but to Bristow was strictly 'amenable to Judicial Review', it is a basically Private Law claim impermissibly masquerading as Public Law in order to bolster the remedies available.

'Ermakov'

115. The '*Ermokov* principle', explained in the judgment of Hutchinson LJ in the housing Judicial Review case of *R v Westminster CC exp Ermakov* [1996] 2 All ER 302 (CA), at least as I have always understood it, relates to the extent to which a public authority in Judicial Review can amplify its reasons in respect of a decision being challenged as being inadequately reasoned. Mr McGurk summarises it well in the JR Claim Reply:

> "It is axiomatic that a public decision maker can only seek to defend the legality of a decision on the basis of the reasons which it in fact relied upon in taking the decision. While it is permissible to elaborate on those reasons after the decision (and in the course of seeking to defend them), the *Ermakov* principle provides that the decision-maker cannot seek to defend a decision from public law challenge on the basis of reasons that it had not relied upon and/or not thought of or considered at the time of taking the decision."

I also note in *Ermakov* at pages 315g-6g Hutchinson LJ was concerned with new reasons *once proceedings have started* (which he limited to statements 'to elucidate or exceptionally correct or add to' the original reasons, albeit cautiously and to a minor degree). He distinguished elaboration of reasons for a decision *before proceedings*:

> "Nothing I have said is intended to call in question the propriety of the kind of exchanges, sometimes leading to further exposition of the authority's reasons or even to an agreement on their part to reconsider the application, which frequently follow the initial notification of rejection. These are in no way to be discouraged, occurring, as they do, before, not after, the commencement of proceedings…"

116. Consistently with all this, in his Skeleton Argument, Mr McGurk suggests his points on *Ermakov* should be considered together with the original reasons challenge. This would be entirely orthodox if the Defendant in its SGR had sought to rely on reasons which were *different to* (as opposed to *elucidating*) reasons it gave at the time. But this begs the questions: reasons for what ? The answer must be 'reasons for its decision to choose Bristow not the Claimant in the procurement'. As Mr McGurk put it at p.32 of the SFG under the original reasons challenge I consider next: '…to provide reasons as to why it scored as it did relative to the applicable award criteria, and to explain why it was not awarded the contract'. A theoretical example of how *Ermakov* could apply here is if the Defendant had claimed the Claimant lost crucial marks because of a flaw in its bid the Defendant never previously mentioned.

117. However, Mr McGurk's *Ermakov* argument in the Reply is rather different:

> "There is not a single reference in any document issued in the Procurement to suggest this call-off was not being conducted under the PCR 15 or to positively suggest that the contract to be awarded was a concession contract for the purposes of the CCR 16. The clear inference to be drawn from the DPS Agreement, the tender documents issued in the Procurement and all communications in relation thereto, is that the Defendant in fact undertook the Procurement on the basis that the PCR 15 applied. The Defendant has not produced a single document to the contrary or made any contention that seeks to gainsay this in fact.

> The new argument that the contract was a concession, including for the purposes of the CCR 16, and thus must have been excluded from the PCR 15, not only is at odds with the clear and unequivocal representations made to the contrary, but has all the hallmarks of an argument confected by lawyers after the event and in response to the issue of the current proceedings. In the premises, the Defendant cannot seek to defend these claims by contending that the decisions the subject of challenge (being the decision to award the contract to a third party) were taken on the basis of reasons that simply didn't exist at the time the award decision was taken. The principle in *Ermakov* precludes a public authority from doing what the Defendant is seeking to do, namely reverse-engineer a justification after the decision in question has been taken."

118. Aware of the irony that I seem to be criticising a reasons challenge for being unclearly reasoned and that this may well simply be my misunderstanding of it, this could be read in two ways. The first and more orthodox way (and in fairness what I believe Mr McGurk means) is that the Defendant cannot say that it deliberately made its decision to award the contract without following the PCR 15 because it did not apply. If the Defendant had said that, *Ermakov* may assist the Claimant. However, that is not how I read Mr Barrett's argument for the Defendant. Instead, it is simply (although in fact his argument is one I have accepted but found it a very complex issue, as the length of the judgment shows) the PCR 15 did not apply to the procurement; but if it did apply, it was not breached (which point now only lives on in response to the As If Claim). So, there is no '*Ermakov* issue' in that sense (but I return to it briefly below).

119. However, the second way of reading this '*Ermakov*' ground is not a reasons challenge at all and nothing to do with *Ermakov* in its orthodox application: Mr McGurk's point in the Reply that 'The new argument that the contract was a concession….not only is at odds with the clear and unequivocal representations made to the contrary, but has all the hallmarks of an argument confected by lawyers after the event and in response to the issue of the current proceedings'. As I said earlier, this is the only way in which what might have been argued as an attempt to evade the PCR 15 or stymie the TCC Claim has been phrased. In Judicial Review terms, this would not be an *Ermakov* challenge relevant to the original reasons for choosing Bristow not the Claimant. It would either be (and to an extent is) a re-articulation of the 'legitimate expectation' ground which I have already dismissed; or an entirely new ground that the new CCR 16 argument (and as Mr McGurk added in argument, the 'labelling' of the Bristow Contract as a concession) 'was an argument confected by lawyers and in response to the TCC claim'. Whilst a criticism of a legal argument is par for the course in litigation, the contention that the Bristow Contract was 'labelled' *so as to defeat the PCR 15* claim is a new and very different point: potentially one of 'bad faith' which may be amenable to Judicial Review, as Lord Templeman recognised in *Mercury*. However, that is *not* the challenge which the Claimant has made, through the Reply or elsewhere. In any event, whatever may be the reach of 'bad faith' with the alleged deliberate application of labels to contracts to avoid legislation in other cases, in this case, I have found that the 'label' was in fact correct and lawful. To the extent it resiled from an arguable legitimate expectation, that claim is not amenable, as I said.

Inadequate Reasons

120. I turn, albeit with *Ermakov* in mind, to the orthodox reasons challenge to the decision to award the contract to Bristow rather than the Claimant – in other words the reasons for the scoring. This repeats the challenge in the TCC Claim and the SFG then says:

> "The Claimant repeats the matters pleaded…in the TCC Claim. Further…to the Defendant's duty to give reasons arising under Regulation 86 [PCR 15] and/or the duty under Regulation 18 to act transparently and/or the general principles of procurement law, the Defendant owed the Claimant a common law, public law duty to provide reasons as to why it scored as it did relative to the applicable award criteria, and to explain why it was not awarded the contract."

I have found that the PCR 15 did not apply and it follows that the duty to give reasons did not arise under Regs.18, 86 or otherwise under the PCR. However, those arguments live on in the Claimant's 'As If Claim' in contract.

121. However, as Mr McGurk pleaded, the JR Claim also alleges breach of a public law duty to give reasons. In the SGR, Mr Barrett argued no such duty arose here as: there was no general duty to give reasons and no 'exceptional or unusual factors' to create such a duty here: *R(Save Britain's Heritage) v SoSCLG* [2018] EWCA Civ 2137 in the terms explained by Coulson LJ at paras 25-28; that this was generally true in the a procurement exercise with no duty of fairness; and in any event as Arden LJ (as she then was) said in *Monro v HM Revenue & Customs* [2008] EWCA Civ 306 at para 22:

> "….[I]f Parliament creates a right which is inconsistent with a right given by the common law, the latter is displaced. By 'inconsistent', I mean that the statutory remedy has some restriction in it which reflects some policy rule of the statute which is a cardinal feature of the statute. In those circumstances, the likely implication of the statute, in the absence of contrary provision, is that the statutory remedy is an exclusive one."

Whilst I can see how Arden LJ's point in *Monro* would shut down a separate common law reasons challenge where there is a statutory duty to give reasons as in the PCR 15 and CCR 16 (still more if there was no such duty for a DPS award: Reg.86(5) PCR 15). But here I do not agree with Mr Barrett that in a tender exercise to which they do not apply, the common law duty to give reasons does not arise. The *Monro* problem would not arise and as Mr McGurk submits, the general existence of a statutory duty to give reasons in a plainly analogous context of a tender exercise (especially one where all the parties were assuming the PCR 15 applied) would in my judgment be an unusual if not exceptional factor so as to give rise to the duty in this sort of case.

122. However, this is a 'Pyrrhic victory' on the reasons point for three other reasons.

122.1 Firstly (as I discuss below) I accept some reasons challenges to a tender decision will be amenable to Judicial Review if they closely relate to other permissible challenges (e.g. 'inadequate reasons' *relevant to bad faith* etc). However, this is a simple reasons challenge to the scoring - close to an irrationality point, which is 'rarely' amenable (*Gamesa*). In my view, this is not amenable as it relates to reasons for commercial judgement on scores.

122.2 Secondly, this reasons challenge is simply not arguable. As Hutchinson LJ explained in *Ermakov*, a decision-maker can and should if asked elaborate on its reasons at the time prior to proceedings. As I discussed at paras 31-32 above, this is exactly what Mrs Butcher did. Any uncertainty there may have been about the reasons in her decision letter of 27th January 2023 were cleared up in the correspondence between her and Mrs Naylor over the following fortnight. As I noted, by her letter of 10th February 2023, Ms Naylor had moved on from criticising the clarity of the reasons to attacking them: in particular the reason about the free telephone line. As Ms Naylor says, that reason was plainly central, if not determinative, to the Defendant's tender decision. Whether it was a *good* reason (and whether it considered the Claimant's bid in good faith etc) will have to be adjudicated as part of the Contract Claim, but it was *clear* as a *reason*.

122.3 Thirdly, even if the reasons had been more clearly expressed initially and subsequently, it would have made no difference whatsoever to the actual decision that had already been taken. I can and should consider this issue of my own motion even though the Defendant did not raise it and in itself, it is a reason to refuse permission on this ground (s.31(3C)/3D) SCA).

Apparent Bias

123. Finally, I turn to the apparent bias challenge relating to the scorer, Ms H. In the APOC on the TCC claim, it is pleaded that Ms H has a close relationship with Mr J, a current employee of Bristow and former employee of the Claimant (who left in difficult circumstances), who is said to have accompanied Ms H to conferences and award ceremonies; taken her to lunches paid for by the Claimant but not recorded properly as expenses; and arranged for train travel together paid for by the Defendant. Ms H is said to have returned from extended leave to participate as one of the four bid evaluators where, as evaluator 4, she gave the Claimant the lowest score (84% overall, the next highest being 88%). Ms H gave the Claimant the same score as the other evaluators - 4/5 - on the decisive criterion: 'communication'. However, she also gave the lowest individual criterion score '3/5' for any of the evaluators - on 'innovation' albeit it was moderated up to a '5/5' so did not affect the result. Ms H denies this. Given this, the JR Claim pleads (I will sub-number and underline it, for convenience):

> "(1) In permitting Ms H to be an evaluator of the final bidders' bids, including that of Bristow, and in permitting her to take part in the moderation meeting at which, it is understood, final scores were awarded to each aspect of each bidder's bid, the Defendant's evaluation of the bids gives rise to an appearance of bias contrary to ordinary principles of public law, given the aforesaid relationship between Ms H and Mr J. In this regard, the Defendant was performing an adjudicative function in presiding over a competitive procurement and was therefore (i) acting in a quasi-judicial capacity and (ii) obliged to conduct the Procurement fairly, including by taking such steps as to ensure that no one with a personal relationship with any bidder was permitted to have an active role in the evaluation of the final bids. The Defendant failed…to take any such steps in permitting Ms H to evaluate the Claimant and Bristow's bids.

(2) Further or alternatively, the fair-minded and informed observer, having considered the facts, would conclude there was a real possibility that the decision-maker [i.e. Ms H] was biased, whether or not she was in fact biased, given her connection with Mr J of Bristow. The Defendant failed to take steps to prevent an apprehension of bias arising. That apprehension of bias will be accentuated insofar as it transpires that the lowest, outlier evaluation scores were those of Ms H. The Claimant reserves the right to plead further on this point.

(3) But for the failure to prevent the appearance of bias arising by permitting Ms H to be an evaluator, the Defendant would have appointed a different evaluator and the Claimant would have scored higher than or at least..the same as Bristow."

Whilst there is some overlap between paragraphs (1) and (2), there is a distinction between the Claimant's criticism in (1) *of the Defendant permitting* Ms H to be an evaluator at all given the 'apparent bias' said to stem from her alleged connection between her and Mr J on one hand; and the criticism in (2) *of Ms H herself* given the combination of the connection to Mr J and being the lowest scoring evaluator. There is only a partial overlap with the Claimant's Contract Claim, depending on the 'scope' (as Elias LJ put it in *JBW*) of any express or implied bid contract.

123.1 As to (1), *if* such a 'bid contract' is established and *if* it is specifically found to incorporate a 'mirroring' term (as Elias LJ again put it in *JBW*) that the Defendant was under a duty to conduct the tender process 'as *if*' the PCR 15 applied (i.e. the 'As If Claim'), then the Claimant could present a similar argument to (1). This would be that the Defendant had a duty to prevent conflicts of interest under Reg.24 PCR. However, there are no fewer than three 'if's to get over first and in any event, this would not be the same test as common law 'apparent bias', as Mr McGurk pointed out in his Skeleton. Not least, I consider it would require the Defendant knew or ought to have known about the alleged connections between Ms H and Mr J.

123.2 As to (2), if the Claimant proves a *Blackpool* implied contract term to consider all tenders in good faith (as Elias LJ described it in *JBW*), these points could be made as an allegation of *actual bias* but not *apparent* bias.

124. Therefore, neither of these contractual arguments would enable a complaint of common law 'apparent bias'. As Mr McGurk says, this arises in a quasi-judicial adjudicative context, but the context is important. I respectfully accept the two-stage process described in *Bubbles & Wine Ltd v Lusha* [2018] EWCA Civ 468 at para 17 by Leggatt LJ (as he then was), but that was a case about judicial apparent bias in unusual circumstances. So, I prefer to focus on the more recent analysis of the common law of apparent bias from a Judicial Review case in the procurement context in *R(Good Law)*. It involved emergency contracting-out without competition under Reg.32 PCR 15 of communications consulting at the start of the Pandemic by the Cabinet Office to a firm linked to the then Chief Adviser to the Prime Minister, Dominic Cummings. Dismissing the challenge (and allowing the appeal), the judgment of the Court of the current Lord and incoming Lady Chief Justices with Coulson LJ, said this on common law apparent bias (my underline, citations omitted):

"63 The common law rules against bias date back to the 1860s…[They] established judges cannot determine an issue in which they have any pecuniary interest. The rules are rooted in the context of judicial and quasi-judicial decision-making. Procedural fairness requires that the decision-maker should not be biased or prejudiced in a way that precludes fair and genuine consideration being given to the evidence and arguments being advanced by the parties. It aims at preventing a hearing or decision-making process from being a sham or a ritual because the decision-maker is not open to persuasion.

64 Actual bias has been described as rare and difficult to prove…; the courts are therefore more commonly asked to look at the circumstances of a case to see if there is an appearance of bias, an allegation which should only be made on a proper basis. The rules against bias are an aspect of the principles of natural justice. The relevant test is now well-established: the court must first ascertain all the circumstances which have a bearing on the suggestions that the decision maker was possibly biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the decision maker was biased…

65 The fair-minded and informed observer is someone who reserves judgment until both sides of any argument are apparent, is not unduly sensitive or suspicious, and is not to be confused with the person raising the complaint. This observer considers the evidence carefully, having particular regard to the specific factual circumstances, taking a balanced approach and appreciating that context forms an important part of the material to be considered…

66 These principles have been extended to apply to wider extra-judicial decision making, but always and only in an adjudicative context, such as local authority and planning committee decision-making… or a process to determine which of a number of hospitals should conduct specific treatments…

67 In support of its submission that the common law principles of bias applied to the instant facts, Good Law referred to *R (ex p Kirkstall Valley Campaign Ltd) v Secretary of State for the Environment)* [1996] 3 All ER 304. The relevant question in that case was whether a decision to grant outline planning permission was tainted by bias on the basis that the chairman of the local planning authority committee making the planning decision had a vested interest in the land under consideration. At page 324g Sedley J (as he then was) stated:

> "….. public law has returned to the broad highway of due process across the full range of justiciable decision-making. One effect is that the maxim *audi alteram partem* is not to be regarded as a free-standing principle covering only proceedings in which there can be said to be sides or parties, but is one application of the wider principle that all relevant matters must be taken into account."

Sedley J held that the principle that a person is disqualified from participation in a decision if there is a real danger that he or she will be influenced by a pecuniary or personal interest in the outcome is of general application in public law and is not limited to judicial or quasi-judicial bodies or proceedings.

68 That common law principles of fairness applied on the facts of *Kirkstall* is unsurprising. The planning committee was considering a formal planning application in the context of an adjudicative process, determining whether or not to grant the planning permission sought.

69 Turning to the present case, however, there was very specifically and… justifiably…no competitive procurement process or, for example, an application by Public First as part of an adjudicative procedure of any sort. Rather, the Minister was entering directly into a private law services contract with Public First. It is difficult to see how any analogy can be drawn between the award of such a contract and the adjudicative context in which the rules against bias have hitherto been engaged. Unlike in a competitive procurement process, even one conducted outside the Regulations, the Minister was not assessing one or more applications and then making a determination. The Minister was thus not carrying out any adjudicative (and obviously not a quasi-judicial or judicial) function.

70 The lack of appropriate analogy can be demonstrated by a consideration of waiver: it has long been held that a party may waive his objections to a decision-maker who would otherwise be disqualified on the ground of bias….Here there was no relevant third party for the purpose of considering whether or not to waive any alleged bias. Instead, Good Law assert the process was biased against other potential providers of the service and, in particular, the two identified in the pleading….Yet the evidence was that neither was a suitable candidate….

82 Decision-makers cannot refute an allegation of bias simply by asserting that they had an open mind and were not prejudiced. But where, as here, the judge was imputing to the informed observer a view that there should have been consideration of other providers, it obviously would be important to know why the decision to contract with Public First and not others was taken. In so far as the fair-minded and informed observer could not find any publicly documented reasons for the decision at the time, then they would ask for an explanation before reaching any firm conclusions. As Good Law itself points out, the hypothetical observer is 'informed' and aware of all the circumstances, including facts ascertained on investigation by the court…. Those facts are not limited to the facts available to the hypothetical observer at the time of the decision, or to 'publicly available information'….

86 The general rule is that the evidence of a witness is accepted unless given the opportunity to rebut the allegation made against them, or there is undisputed objective evidence inconsistent with that of the witness that cannot sensibly be explained away so that the witness's testimony is manifestly wrong. A court hearing a judicial review will generally accept the evidence of the public authority: and will not normally decide contested issues of fact…"

From this review and the principles I have summarised above, three issues arise in relation to giving permission for this ground relating to Ms H's alleged apparent bias:

(i) Was the contract award decision amenable to Judicial Review for apparent bias ?
(ii) If so, is it arguable on the merits ?
(iii) In any event, would there a substantially different outcome without Ms H ?

125. Amenability's role in procurement cases was stated by Gibbs J in *Gamesa* at para 79:

> "On a broader policy level, there may be sound reasons why matters of this sort should not generally be open to challenge on the ground of irrationality. To hold otherwise would enable challenges to be mounted on the basis of an attack on particular aspects of tendering processes by one potential bidder..on the basis that a particular aspect or aspects of such processes as they affect that bidder are unreasonable. Such challenges would be permissible even if the body were acting in good faith and as between the bidders there was a level playing field. The extension of public law into matters of that kind could be regarded as creating an unreasonable impediment to impose upon a public body..."

By contrast, in 'amenable' challenges for bad faith or corruption etc, that rationale is absent, as McCombe J (as he then was) said in *Menai*. Like *JBW*, it concerned Court tendering of fine enforcement, where McCombe J likewise had found a commercial scoring decision was not amenable to irrationality challenge, as he explained at para.47:

> "It is not every wandering from the precise paths of best practice that lends fuel to a claim for judicial review. It is…for this reason that the examples given of cases where commercial processes such as these are likely to be subject to review are such as they are in the reported cases, namely bribery, corruption, implementation of unlawful policy and the like. In such cases, there is a true public law element. Here, as in *Hibbit*, the fact the decision sought to be reviewed is [simply] the placing of a contract with one bidder as opposed to another adds force to the contention that there is no relevant public law obligation…" (my underline).

I have very respectfully added the word 'simply' to make even clearer the point I consider McCombe J was making in *Menai* and its linkage to Gibbs J's later point in *Gamesa*. If the bidder's challenge is 'simply' to the authority's exercise of commercial judgment in scoring bids, whether dressed up as a challenge based on 'irrationality', 'reasons', 'legitimate expectation' etc, it will not be amenable to Judicial Review. By contrast, where there are allegations of fraud, bad faith, corruption, bribery, unlawful policy *or the like* (as the categories are not closed – e.g. possibly breach of the Public Sector Equality Duty in s.149 Equality Act 2010), such decisions should (subject to other 'filters') be scrutinised by the Court. This is not just because there is a 'true public law element', as McCombe J put it, but also in terms of 'policy' as Gibbs J put it - as such conduct is the antithesis of 'commercial judgement'. In my own legal judgement, a challenge of 'apparent bias' falls on the permissible side of this line: there is nothing legitimately 'commercial' about apparent bias, which shades into nepotism which in turn shades into corruption and bad faith. I am fortified in that view by the fact that in *R(Good Law Project)*, whilst the issue of the third-party campaign group's *standing* was queried by the Court citing *Chandler* (but not contested – see para 6), there was no doubt raised about *amenability* with apparent bias (even though the challenge failed). Indeed, as underlined at para 69 the Court distinguished that case of an emergency appointment without competition, from a case like this of competitive procurement which was 'adjudicative' that could be challenged for apparent bias. Indeed, this is even more important given the 'gap' in regulation of below-threshold concession contracts. For those reasons, the decision here *was* amenable to review for apparent bias.

126. However, this is another Pyrrhic victory for the Claimant on the JR Claim because even on the assumed facts, the apparent bias challenge in this case is not arguable. As stated at para. 64 of *R(Good Law)*, the Court must first ascertain all the circumstances which have a bearing on the suggestions that the decision maker was possibly biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the decision maker was biased. As the Court also clarified at para 82 of *R(Good Law)*, at the first stage, 'all the circumstances' include those not apparent at the time but emerging on investigation by the Court. In this case, those circumstances not only include the connections between Mr J and Ms H I am assuming to be true for present purposes and her lower scoring relative to the other evaluators, but also that she scored the same as the other evaluators on the crucial criterion of communication. In my judgement, the fair-minded and informed observer with the characteristics described by the Court at para. 65 of *R(Good Law)* would plainly conclude as follows. Firstly, the alleged 'connections' between Ms H and Mr J were relatively anodyne, consistent with a professional friendship, including when Mr J was an employee of the Claimant, so hardly consistent with antipathy to the Claimant. Secondly, Ms H's scoring was not very far out of kilter with other (by definition, not apparently-biased) evaluators, except on innovation when she agreed with the others a higher score. Thirdly, the observer may think that Ms H's scores overall, whilst lower on that one point, were hardly consistent with bias towards Bristow or against the Claimant, otherwise the disparity in her scoring from the others would have been much more pronounced. Given all that, at the second stage in my judgement the observer would almost certainly conclude there was no real possibility that Ms H was biased and I therefore consider this claim unarguable. I accept Mr McGurk's concern in argument that there has not been disclosure and he flagged in the SFG that he may amend the pleading in the light of it. However, I am examining a claim of *apparent* bias. If disclosure reveals evidence of actual bias or prejudice, that can be adjudicated as part of the *Blackpool* 'good faith consideration' implied contract argument. Moreover, I have also reached that conclusion assuming for permission the Claimant's pleaded facts are true, whereas the rule in Judicial Review is very different, as explained in para 86 of *R(Good Law)*. For that additional reason too, this claim is not arguable.

127. Finally, even if I am wrong and the apparent bias challenge is arguable on the merits, in my judgement, even if Ms H had not been an evaluator, the outcome would not have been substantially different and so s.31(3C)/(3D) SCA 1981 means I should refuse permission. This is for three separate but cumulative reasons. Firstly, as noted, the key criterion on which the Claimant lost out to Bristow was communication where Ms H gave the same score as the other evaluators, namely 4/5, as I infer would a different evaluator. Secondly, the one score where Ms H was markedly lower was on innovation where the evaluators moderated to give the highest score: 5/5. Thirdly, whilst 2.5% appears to be a very slight difference between the Claimant and Bristow, due to the weighted scores, the only criteria where the difference between 4/5 and 5/5 would have made up that 2.5% deficit were the first three categories, where only 2 out of the 4 evaluators scored any of those three 5/5 and even then on different criteria. So it was highly likely a different evaluator than Ms H would have made no difference.

Conclusion

128. Therefore, I refuse permission for the JR Claim as well as striking out of the TCC Claim the claim under the PCR 15 and grant summary judgment on that point. Even as conscious as I have been that this is not a trial and I have not heard any evidence – indeed that there has been no exchange of statements or disclosure – I do appreciate that is a slightly ironic term for a judgment of this length. However, that reflects the importance of this issue, which I am acutely aware affects not just the Claimant, nor even other EA agencies bidding to local and other public authorities for contracts, but other contractors not paid solely by such authorities in a range of fields. Whilst I have assumed the facts the Claimant pleaded, I did not want to assume the law remained as it was in *JBW* and *Newlyn* even though I have come to the conclusion that it does remain the same. However, it may change through EUWA (or any more radical replacement to it) as the PCR 15 and CCR 16 are amended as has already begun with other provisions of them irrelevant to this case. It will change as and when the Procurement Bill currently going through Parliament is passed. To the extent that the definition of 'concession' in clause 8 of that Bill may narrow the scope of 'concessions', so broaden the scope of 'public contracts' bringing more procurement of lower-value contracts within regulation, the Claimant and others may welcome it.

129. In any event, my decisions do not affect the Contract Claim which will proceed to trial, but do mean the Claimant's remedy is now limited to damages. However, in reality, unlike the remedies in the PCR 15, with remedies in the JR Claim discretionary, even if it had proceeded, the Bristow contract would have been unlikely to have been quashed, concerning as it does important services, important to income of public authorities at a time of a 'Cost of Living Crisis'. In reality, damages would always have been the primary remedy and that is still available to the Claimant with its Contract Claim. To that extent, the Claimant's claim remains alive and kicking.

130. However, in my view, it would be better for both parties if that Contract Claim were re-pleaded, promoted as it is from an alternative claim to the only claim. As I explained in the section on the Contract Claim, there is a substantial difference in scope between an implied bid contract limited to a '*Blackpool*' good faith duty to consider tenders in Good Faith and a full-blown 'As If Claim' as discussed in *JBW*. It is only fair to the Claimant to have the opportunity of tidying and focussing the pleadings; and only fair to the Defendant to understand clearly the case it has to meet. Therefore, I will invite the parties to agree directions for the onward conduct of the Contract Claim in the TCC. I will consider those directions and costs at a remote hearing in the next couple of weeks, organised for the convenience of all parties. However, I cannot leave this case without paying tribute to Counsel whose submissions were of the highest quality and indeed patience with my questions.
