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Judgment: approved by the Court for handing down | *Delivered:* **22/02/13**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN

LOWRY BROTHERS LTD
and
ALBERT GEORGE WILSON, TRADING AS A G WILSON

Plaintiffs

and

NORTHERN IRELAND WATER LTD

Defendant

Judgment No 2

McCLOSKEY J

Introduction

[1] These are separate actions, proceeding in tandem, in which the Plaintiffs challenge the outcome of an exercise conducted by the defendant concerning the procurement of contracts for what is known as the "*IF019 Capital Delivery Framework*" (hereinafter "*IF019 CDF*"). The overarching purpose of this scheme is described as the improvement of water and sewerage services, including customer services and the achievement of substantial operational and capital investment efficiencies, in Northern Ireland.

[2] The relevant statutory framework is provided by the Utilities Contracts Regulations 2006 ("*the 2006 Regulations*"). Both Plaintiffs were unsuccessful in their quest to be invited to negotiate for appointment as a contractor in the scheme known as "*Lot 2 CDF*" (in shorthand). I shall describe these as "the impugned decisions". Having been notified of the impugned decisions by separate letters dated 31 August

2012 and following some further exchange of letters subsequently, each Plaintiff issued separate writs on the same date, 4 October 2012, claiming the following relief:

(a) An order pursuant to Regulation 45I of the 2006 Regulations setting aside the impugned decisions.

(b) Further, or alternatively, a declaration that the impugned decisions were unlawful – specifically, in breach of the duties of equality of treatment, transparency and proportionality and in breach of implied contract.

(c) Further, or alternatively, an order restraining the Defendant from inviting any contractor to negotiate for appointment or appointing any contractor to Lot 2 CDF.

(d) Further, or alternatively, damages.

The Defendant's Applications

[3] In each action, the Defendant has applied to the court for the following relief:

(a) A determination that each of the Plaintiff's claims is statute barred, in whole or in part, having regard to the time limit of 30 days specified in Regulation 45D the 2006 Regulations, as amended.

(b) An order pursuant to Regulation 47H(1)(a) of the 2006 Regulations terminating the requirement imposed by Regulation 47G whereby the Defendant is precluded from entering into any contract or appointing any contractor.

This judgment determines these applications.

[4] Applying the practice which has developed in this sphere of litigation, the court's response was twofold. First, an early preliminary hearing was arranged, taking place on 19 December 2012. A preliminary ruling followed, on 31 December 2012. Second, an accelerated date for the hearing of the Defendant's applications was allocated. Furthermore, with the approval of the court, the parties agreed a timetable for the regulation of pleadings and other steps in the interim. Hearings ensued on 1st, 7th and 13th February 2013.

Brief Chronology

[5] The genesis of the litigation can be traced to the OJEU "Contract Notice – Utilities", published on 10th December 2011. The chronology continues:

(a) 16th December 2011: Registration of interest by the Plaintiffs.

(b) 29th February 2012: Submission of completed "Pre-Qualification Questionnaires" ("*PQQs*") by the Plaintiffs.

(c) Mid-April 2012: Projected date for the issue of invitations to tender.

(d) 31st August 2012: Letter of decision, informing the Plaintiffs that they had been unsuccessful as regards "Lot 2".

(e) September 2012: Exchange of electronic communications/letters between the Plaintiffs and the Defendant.

(f) 4th October 2012: Initial letter from the Plaintiffs' solicitors (each represented by the same firm) and issue of Writ of Summons.

(g) 16th October 2012: The Defendant's respective Appearances.

(h) 13th December 2012: The Defendant's Notices of Motion (*supra*).

At this juncture, the Defendant has not proceeded to the stage of issuing invitations to tender to the initial batch of successful bidders. The Defendant believes that it is legally precluded from doing so (*infra*).

The OJEU Notice

[6] The OJEU Notice identified Northern Ireland Water Limited as the contracting entity and signalled that this was a utilities procurement exercise. Under the rubric "Title Attributed to the Contract by the Contracting Entity", it announced:

> "*IF019-Capital Delivery Framework.*"

The Notice stated, *inter alia*:

> "*Information on framework agreement …….*
>
> *Framework agreement with a single operator*
>
> ***Duration of the framework agreement … … ….***
>
> *Duration in months: 48 ……*
>
> ***Estimated total value of purchases for the entire duration of the framework agreement … … … ….***

Range between £130 million and £485 million ……

Short description of the contract or purchase … … … … … …

Northern Ireland Water have a planned programme of work which includes but is not limited to water and wastewater infrastructure (including but not limited to sewage network systems, water main systems, sea outfalls and tunnels); water and wastewater non-infrastructure (including but not limited to service reservoirs, water towers, pumping stations, water treatment works, wastewater treatment works and sludge treatment works); and where appropriate base maintenance items of work will also be carried out."

Accordingly, the contracts being procured by the competition were of three basic types, namely water and wastewater infrastructure; water and wastewater non-infra structure; and maintenance. The Notice continues:

"*Northern Ireland Water will require a number of suppliers as envisaged and stated in the PQQ documentation to provide project management, optioneering and solution development, design and/or construct, commission and/or maintain capital works as part of the planned programme of work. The Framework Agreement will be awarded in five Lots. For further detail of each Lot see Annex B.*"

[7] The five separate "Lots" were detailed in Annex B as follows:

(a) **Lot number 1:** Water and wastewater non-infrastructure, major works generally, exceeding £500,000 per work package, the subject matter being "*water and wastewater treatment works*".

(b) **Lot number 2:** "[***Title***] *- Water and wastewater Non-infrastructure. Minor generally – under £500,000 per work package …. [****short description****]....process, mechanical and electrical engineering including but not limited to the design, installation, refurbishment, construction and commissioning of water and wastewater treatment works. The work content is as Lot 1, but of a lesser value and extent.*"

(c) **Lot number 3**: Water and wastewater infrastructure, major works generally, exceeding £500,000 per work package, the subject matter being sewers, pumping mains and stations, trunk water mains and new service reservoirs.

(d) **Lot number 4:** "*Small sewers contractors (in effect wastewater infrastructure) – minor works generally – under £500,000 per work package … [****short description****]... the refurbishment, construction and commissioning of gravity sewers, sewerage pumping mains and sewerage pumping stations*".

(e) **Lot number 5:** "*Small sewers (in effect wastewater infrastructure) detailed design and project manager*".

Each of the Plaintiffs competed for Lot 2 (unsuccessfully) and Lot 4 (successfully). Thus, as regards Lot 4 only, they have progressed to Stage Two of the competition (*infra*) *viz* they qualify for an invitation to negotiate for contract award.

The PQQ

[8] I turn to consider the PQQ, which was a crucial element of the procurement exercise. This has a breakdown of an introduction section, a brief description of the project, guidance and instructions for applicants and questionnaires to be completed by those seeking to compete. It begins with the words:

> "*This Pre-qualification Questionnaire ("PQQ") is issued pursuant to OJEU Notice Reference (etc). Its purpose is to enable NI Water to select applicants to be invited to negotiate for inclusion as contractors and/or consultants in* ***NI Water Capital Delivery Framework***."

The text continues:

> "*The information contained in any part of the PQQ cannot be and is not intended to be comprehensive, nor a substitute for the underlying documentation (whether existing or to be concluded in the future) and is in all respects qualified in its entirety by reference to such documentation*."

The PQQ repeatedly uses the terminology "*the framework agreement*" and, in some places, speaks of *appointment to the Framework Contract*. It describes the overall programme as the implementation of improvements in the quality and efficiency in the delivery of water and sewerage services throughout the region of Northern Ireland. The purpose of the procurement exercise is described as:

> "*The appointment of contractors and consultants to work in partnership with NI Water to deliver defined portions of the PC 10 and PC 13 Programmes to achieve the following objectives ……*"

The "*framework contract*" is described as "*the NEC3 Framework Contract……..….required for delivery of assets across Northern Ireland in the categories listed in Appendix A*". The text continues:

> "***It is currently anticipated that a multi supplier framework agreement will be entered into for each Lot with a maximum of 4 contractors per Lot for Lots 1 and 3; 8 contractors per Lot for Lots 2 and 4; and 4 consultants for Lot 5 ……***

Generally work orders for Lots 1 – 3 will be issued on a design and build basis, Lot 4 on a build only basis and Lot 5 for the provision of professional consultancy services only…….

Each successful applicant appointed to the framework will contract with NI Water individually through a framework agreement."

[I have highlighted the above passage as it features prominently in the Plaintiffs' contention that the Defendant is procuring multiple contracts, rather than a single framework agreement.]

In the PQQ, the work to be procured in respect of each of the five Lots is then described in some detail. Here one finds the more detailed outworkings of the five categories of work described with less particularity in the OJEU Notice (*supra*).

[9] As noted above, the PQQ makes reference to the "*delivery of assets across Northern Ireland in the categories listed in Appendix A*." These categories do not equate with each of the five Lots. Rather, in Appendix A, there are two "asset categorisations". These are "*non-infrastructure assets*" and "*infrastructure assets*". According to the text, the former –

"*……. are typically above ground and include all assets not defined as Infra structure*".

In the non-exhaustive list which follows, there is a description of (*inter alia*) pumping stations, drawing untreated water storage, water treatment works, flow and pressure meters, monitoring equipment, computers, vehicles, mobile plant, site security, sewerage treatment works, land, buildings, laboratories and workshops. As regards the second category of "*Infrastructure assets*", Appendix A states:

"*Infrastructure assets are typically below ground and comprise the following which is not an exhaustive list …*

Dams and impounding reservoirs …… water distribution mains …… tunnels, conduits, valves, chambers …… foul sewers, combined sewers, manholes, overflows, sewerage pumping mains …… sea outfalls …."

It is convenient to record, at this juncture, the Defendant's contention that Lot 2 belongs to the non-infrastructure category, whereas Lot 4 is a member of the infrastructure category and the Plaintiffs' joinder of issue on this important point.

[10] The PQQ also describes the selection process. In brief compass:

(a) Stage 1 entailed a pass/fail evaluation, based on the completed questionnaire.

(b) Stage 2 would be a "*detailed assessment*" involving those who had successfully completed at stage 1.

(c) The "*maximum anticipated number of applicants to be invited*" to engage in stage 2 was 16 for each of Lots 2 and 4.

(d) The "*maximum anticipated number of applicants to be appointed to the Framework*", following both stages, was 8 in respect of each of Lots 2 and 4.

It is common case that, as regards their bid for Lot 2 contract awards, both plaintiffs overcame Stage 1. This brought them into the "*detailed assessment*" territory of Stage 2, which listed the following criteria and associated maximum marks:

- Resources: 25.
- Construction experience: 45.
- Management system evidence: 6.
- Quality assurance: 10.
- Environmental management systems: 5.
- Team working and partnering: 5.
- Training policies and staff competencies: 4.

The marking was, therefore, weighted heavily in favour of the criteria of resources and construction experience, grouped together under the banner "Resources and Experience", in contrast with the remaining five criteria, arranged under the label "Management Systems". The ***third stage*** of the exercise is described as "*shortlisting*":

> "*Based on the total scores from the evaluation team for Stage 2, applicants will be placed in order of merit. It is envisaged that NI Water will invite the numbers set out in the table of section 3.24 to participate in the next stage of the process ……..*
>
> *Successful applicants will be notified in writing and invited to participate in the ITN or tender stage. Unsuccessful applicants will be informed in writing and will be provided with written debriefing information.*"

This latter passage is clearly concerned with progression from both stage 1 to stage 2 and from stage 2 to stage 3.

The impugned decisions and ensuing challenges

[**11**] The two cases have much in common and have, appropriately, proceeded together in consequence. As noted above, each Plaintiff submitted a bid for Lot 2, unsuccessfully. Their respective bids for Lot 4 were successful. They challenge the former decision in these proceedings.

[**12**] Sections 3 and 4 of the PQQ contained a number of questions which an applicant was required to answer in relation to each Lot for which the applicant was competing. The first Plaintiff, Lowry Brothers Limited, complains of the scores allocated to it for its responses to Questions 33, 36, 37, 39 and 40 of the PQQ in respect of Lot 2. The comparative gross scores assessed for this Plaintiff in its responses to these questions were 42 [Lot 2] and 62 [Lot 4] respectively. This equated to weighted scores of 24.8% and 35.9% respectively. This Plaintiff complains that this entailed an unlawful disparity. The essence of the complaint is that there was no material distinction between the requirements for each Lot, with the result that its (admittedly) substantially similar answers to the questions concerned should have attracted substantially similar marks. In some of the formulations of this case, the contention is that the scores should have been identical. The primary ground of challenge is manifest error. While it is pleaded, in the alternative, that the Defendant unlawfully applied an undisclosed criterion, this ground was not developed in argument. The second substantive ground of challenge is that an undisclosed criterion was applied in determining that only 12, rather than 16, bidders would progress from stage 1 to stage 2, in respect of Lot 2.

[**13**] The Statement of Claim of the second Plaintiff, Wilson, is materially indistinguishable from that of the other Plaintiff. This Plaintiff, invoking the same grounds of challenge, complains of the differing scores allocated to his bids for Lot 2 and Lot 4 in respect of Questions 33, 34, 35a, 36, 37 and 41. The comparative gross marks awarded for the six questions under scrutiny were 65 [Lot 2] and 106 [Lot 4]. The weighted scores were 46.4% and 78.4% respectively. Thus, while the disparity in scoring of which this Plaintiff complains is markedly greater than that relating to the other Plaintiff, the Plaintiff Wilson secured substantially higher scores. Each of the Plaintiff's pleadings contains the following passage:

> *There is no material distinction between –*
>
> *(a) The plant and equipment,*
>
> *(b) The management systems,*
>
> *(c) The quality management systems,*
>
> *(d) The ability to comply with environmental legislation, or*
>
> *(e) The ability to work in a team*

required to carry out the works comprised in Lot 2 and the works comprised in Lot 4 ……

*In the circumstances, the Plaintiff provided substantially similar responses to [*the relevant Questions*] in respect of both Lot 2 and Lot 4.*

Within this pleading the gravamen of the Plaintiffs' respective cases is captured.

[14] Each Plaintiff's Statement of Claim contains the following further passage:

> "*Furthermore, the lowest total score of those applicants invited to negotiate was 73.1%. If the Plaintiff's responses to the* [relevant Questions] *had been scored as the Plaintiff's responses to the said questions in respect of Lot 4, the Plaintiff's total scores would have been* [71.9% and 87.1% respectively]."

At this point, there is a divergence between the two cases. Given that the first Plaintiff's [Lowry's] case, at its zenith, contends for a score (71.9%) lower than that of the lowest of the 12 successful Stage 1 bidders (73.1%), this Plaintiff is driven to rely on the second of the aforementioned grounds of challenge, in addition to the first. In contrast, in the case of the second Plaintiff [Wilson], the comparative scores are 87.1% [zenith] and 73.1% [lowest successful Stage 1 bidder], giving rise to the pleading that this Plaintiff –

> "…… *would have been invited to negotiate notwithstanding the effect of the undisclosed criterion applied by the Defendant to reduce the number of applicants in respect of Lot 2 invited to negotiate ……..* [from 16 to 12]".

To summarise:

(a) In order to succeed, the first Plaintiff, Lowry, must make good both grounds of challenge.

(b) In contrast, the second Plaintiff, Wilson, could, in principle, succeed in the event of making good only one of the grounds.

[15] The submissions of Mr Humphries QC and Mr Coghlin (of counsel) on behalf of the Plaintiffs, faithful to the case made in their client's respective Statements of Claim, acknowledged that, in respect of both Lot 2 and Lot 4, each Plaintiff provided materially similar responses to the questions under scrutiny. The arguments of counsel compared and contrasted the differing scores assessed in the Lot 2 and Lot 4 scoring exercises. The centrepiece of each Plaintiff's case is that the works being procured in respect of Lots 2 and 4 are essentially the same, separated by no material distinction. As a result, it is contended, the scores allocated by the Defendant's evaluation panel to the questions under scrutiny, which embraced both Lots, should

have been the same. The divergent scores, it is contended, are on their face contaminated by manifest error.

[16] In both oral and written advocacy, the Plaintiffs' submissions were developed in the following way:

(i) There is no material difference between the criteria for the award of Lot 2, being the composite of the definition of the works comprised in Lot 2 provided in [the PQQ] and the criteria for the award of Lot 4 that justified the difference in scoring between the Plaintiff's responses to [re the Plaintiff Lowry] Question 33 of section 3 and Questions 36, 37, 39 and 40 of section 4 [and re the Plaintiff Wilson] Questions 33, 34, 35a, 36, 37 and 41, in respect of Lot 2 and the similar responses provided to the same questions, by each Plaintiff in respect of Lot 4. In the absence of such material differences, the Plaintiffs contend that the proper inference to be drawn from the difference in the scores is the intrusion of a material error in the Lot 2 assessment panel's marking.

(ii) In the case of the Plaintiff Lowry, as the skeleton argument makes clear, it is further contended that the criterion applied to select the applicants invited to negotiate from the number who passed the first stage of the assessment process was undisclosed and conferred an unrestricted choice of to whom the contract should be awarded, in breach of the duty of transparency owed by the Defendant.

(iii) It was acknowledged (realistically) that there are some clear differences between Lot 2 and Lot 4. However, it was submitted that the material similarities between them were such that the differing scores allocated can be explained only on the basis of manifest error, outwith the accepted margin of appreciation enjoyed by every contracting authority.

(iv) As regards the Plaintiff Wilson, it was recognised that one of the Questions under scrutiny – Question 34 – falls to be treated slightly differently because there is a material difference between Lots 2 and 4 in the context of this Question. This acknowledgment recognises that, as regards Lot 2, the panel was assessing the resources of both the contractor and the consultant, to reflect the "design and build" dimension, while contrasting that as regards Lot 4 only the contractor's resources were to be assessed. This Plaintiff's scores for Question 34 in respect of Lots 2 and 4 were 7/15 and 15/15 respectively. This gave rise to the contention that this Plaintiff should have received at least 7.5 out of 15 for Lot 2, a disparity explicable only by manifest error.

(v) As regards the **second** ground of challenge, it was argued that by stating only that it **anticipated** inviting 16 applicants to negotiate after the PQQ, rather than identifying in the contract documents the criterion that it would use to

determine how many of the applicants who passed the first stage of the PQQ assessment would be invited to negotiate, the Defendant adopted an undisclosed criterion which conferred an unrestricted choice of to whom the contract should be awarded: it had complete freedom to invite any number of applicants to negotiate, in breach of the duty of transparency.

[**17**] As regards the Plaintiff Lowry, the following are the main comments of the Lot 2 evaluation panel in its assessment of this Plaintiff's responses to the questions under scrutiny:

> "[**Question 33]** *Mark would have improved by quoting a wider range and number of items of plant and equipment required to deliver a works programme …..*
>
> [**Question 36]** *Submission demonstrates generic evidence provided on the management systems used to help deliver the client brief. Mark would be improved by providing more evidence of risk management and change control …….*
>
> [**Question 37]** *Submission demonstrated how QMS embedded throughout the organisation. Would have scored better with further detail on PR …..*
>
> [**Question 39]** *The submission demonstrated a general approach to aspects of environmental management. The marks would improve with more details on measures to mitigate disturbance to flora and fauna and carbon footprint management ……..*
>
> [**Question 40]** *Response demonstrates that the applicant has adequate team working and partnering experience. Would benefit with more reference to team development.*"

In brief, this Plaintiff received approximately half of the marks available for four of the impugned assessments by the panel to the five questions under scrutiny and 80% of the mark available in respect of the fifth question.

[**18**] The scores assessed by the Defendant's evaluation panel in relation to **Lot 2** for the Plaintiff Wilson were accompanied by the following material comments:

> "[**Question 33]** *Demonstrates that they have restricted access to a limited range of the major types and numbers of items of plant and equipment that is* [sic] *required to deliver a capital works*

programme. Could be improved by quoting a wider range and number of items of plant and equipment ……..

"**[Question 34]** *The submission present restricted access to a limited range of experienced and competent people resources required. The response could be improved by quoting a greater range of experienced and competent people to undertake multiple projects/commissions …….*

[Question 35a] *[**As regards all 3 projects, each allocated a score of 7 out of 15]**. The submission cited relevant experience, however the response would have scored higher with details of the Applicant's experience **in non-infra structure** with evidence of partnering ……..*

[Question 36] *Submission demonstrates generic evidence provided on the management systems used to help deliver the client brief. Mark would be improved by quoting a more comprehensive management system alignment to example projects and assets …….*

[Question 37] *Submission demonstrated how QMS is embedded throughout the organisation, would have scored better with further detail on induction and compliant management …..*

[Question 41] *The submission demonstrates the applicant has adequate staff training. Mark would improve by more clearly evidencing that the applicant has comprehensive staff training programme development policies and delivery arrangements ……..*

[My emphasis]

The brief analysis is that, with reference to the impugned assessments by the panel of the answers provided to the six questions under scrutiny, four of the scores represented approximately 50% of the marks available, while the remaining two scores amounted to about 80% of the marks available.

[19] The evidence considered by the Court includes the different, better scores achieved by both Plaintiffs for their responses to the questions under scrutiny in respect of **Lot 4** and the [differently composed] assessment panel's comments. All of the equivalent "Lot 4" scores were higher. The higher scores belonged to a spectrum: some were around double their lower counterpart, while others were less than double. One of the comparisons advanced by the Plaintiff Lowry entails juxtaposing a score of 12/15 for the responses to question 37 [Lot 2] and 13/15 [Lot 4]. In other instances, the margins are greater. The detail of these comparative

scores is set out in a table annexed to this judgment. The Plaintiffs' challenge is not confined to comparing and contrasting the scores allocated to them for their responses to the same questions in relation to their Lot 2 and Lot 4 submissions. In argument, there was also some limited comparing and contrasting of the marks awarded as between the Plaintiffs and the corresponding comments of the assessment panels.

[20] At this juncture, it is appropriate to rehearse some of the salient averments in the Defendant's affidavit evidence:

> "*While it is entirely correct to observe that the expenditure which is anticipated under each of the multiple projects is similar, the nature of the work which is to be undertaken is very different indeed ……..*
>
> *The framework was divided into separate Lots because of the different services required by the Defendant and considerable resources were committed to ensure that there were separate evaluation panels to evaluate the responses for each Lot ……..*
>
> *There is only a very small element of M&E in Lot 4, whereas Lot 2 includes a significant level together with treatment process design, contraction, installation and commissioning along with the design installation and commissioning of instrumentation, control and automation systems. These elements are not required for Lot 4 but are a significant element to Lot 2 together with normal M&E engineering ……*
>
> *It is my view that any reasonably well informed tenderer would have immediately appreciated that there are important distinctions between Lot 2 and Lot 4. It does not appear that the Plaintiff properly assessed the specific needs of each Lot when seeking to prepare its PQQ response ……..*
>
> [As regards the works comprised in Lot 2 and Lot 4] *the non-infra structure assets types are totally different to infrastructure asset types and consequently the work associated with the provision or refurbishment of these assets is totally different and requires different capability and experience*."

Focusing on Lot 2, the Defendant's deponent makes the following specific averments:

> "*Typically for the M&E element of Lot 2 the Defendant would have expected to see M&E items such as transformers, M&E hand tools, instrumentation and electrical test equipment, PLC programming equipment, lifting equipment, gas monitors, pressure testing equipment and water quality sampling equipment. In addition, the Defendant would have expected to see a significantly wider range of civil engineering plant and equipment for Lot 2 than that required for Lot 4. The Lot 2 scope describes large scale, more complex civil engineering construction which requires a scale up on the size*

and working capacity of plant and equipment in comparative terms to that of Lot 4 which engages works of a less complex nature."

There is no material distinction between the Defendant's affidavit evidence in the two cases.

Legal framework

[21] The legal rules and principles in play in the context of the Plaintiff's challenge belong to well travelled territory and can be outlined in very brief compass. They repose in the relevant EU legislation, the transposing domestic legislation and the associated European and domestic jurisprudence. The legal rules and principles in play in the present litigation context have been considered by this Court in the following decisions, which featured in the parties' arguments:

- ***Resource (NI) – v – Northern Ireland Courts and Tribunal Service*** [2011] NIQB 21, paragraphs [62] – [72] especially.

- ***Easy Coach – v – Department for Regional Development*** [2010] NIQB 10.

- ***First for Skills – v – Department for Employment and Learning*** [2011] NIQB 59.

- ***Rutledge Recruitment – v – Department for Employment and Learning*** [2011] NIQB 61.

- ***Clinton – v – Department for Employment and Learning*** [2012] NIQB 2.

In short, bearing in mind the present litigation context, the most important principles are the following:

(a) A manifest error in the marking of a tenderer's bid equates with a clearly demonstrated defect in assessment/evaluation.

(b) The error must be material: defects belonging to a vacuum, with no material consequence, are not actionable.

(c) By virtue of the principle of transparency, selection criteria must be disclosed in the published structure and rules of the contract procurement exercise and must not confer unrestricted choice on the contracting authority.

(d) The professed knowledge and understanding of the Plaintiffs are to be viewed through the prism of the hypothetical reasonably well informed tenderer.

I further remind myself that the fundamental criteria to be applied in the determination of the first element of this application are those of good arguable case and the balance of convenience. The latter criterion encompass the considerations of the adequacy of the remedy of damages and the availability and efficacy of any cross undertaking in damages. I shall deal separately with the freestanding issue of limitation, *infra*.

Consideration and Conclusions

[22] To begin with, I shall address the question of what was being procured by the Defendant. This requires juxtaposing the relevant statutory provisions with the OJEU Notice and the PQQ. I have already rehearsed the material passages in each of the latter in paragraphs [6] – [10] above. The first of the relevant provisions in the 2006 Regulations is Regulation 18, which provides in material part:

> "*(1) A utility may regard a framework agreement as a contract within the meaning of these Regulations and award it in accordance with these Regulations and in such a case reference in these Regulations to a contract includes a framework agreement, except where the context otherwise requires.*
>
> *(2) A utility which has entered into a framework agreement awarded in accordance with these Regulations may rely on Regulation 17(1)(i)* ***when awarding a contract under a framework agreement.***"
>
> [My emphasis.]

The subject matter of Regulation 17 is "Award without a call for competition". Regulation 17(1)(i) provides:

> "*A utility may seek offers in relation to* ***a proposed contract*** *without a call for competition in the following circumstances …….*
>
> *(i)* ***When the contract to be awarded is to be awarded under a framework agreement which has been concluded in accordance with these Regulations and to which the provisions of Regulation 18 apply.***"

[My emphasis]

Within Regulation 2 there are two salient definitions:

> "***Contract*** *means any services contract, supply contract or works contract* ***and includes a framework agreement where required by Regulation 18(1)****.*"

The words in bold were inserted by Regulation 4(a)(ii) of the Utilities Contracts (Amendment) Regulations 2009, operative from 20th December 2009. The second important definition is the following:

> "***Framework agreement*** *means an agreement or other arrangement,* ***which is not in itself a supply contract, a works contract or a services contract,*** *between one or more utilities and one or more economic operators which establishes the terms (in particular the terms as to price and, where appropriate, quantity) under which the economic operator will enter into one or more contracts with a utility in the period during which the framework agreement applies.*"
>
> [My emphasis.]

[23] The construction of the OJEU Notice and the PQQ is a question of law for the Court to determine. Accordingly, I disregard any averments in the Defendant's affidavit evidence purporting to sound on this issue. Furthermore, I attribute no weight to the unexecuted contractual documents added to the Defendant's evidence – admittedly stimulated by an enquiry from the Court – as the hearing progressed. These, in my view, do not properly bear on the detached, uncontaminated exercise of construing the OJEU Notice and the PQQ in a disinfected and sealed vacuum, within which the Court is imprisoned for this discrete purpose.

[24] I consider it appropriate to commence by identifying the essential nature and purpose of a "framework agreement". These I consider to be clear from the provisions of the 2006 Regulations rehearsed above. A framework agreement is clearly designed to operate as a broad, overarching contractual structure giving rise *per se* to legal rights and obligations on part of the contracting authority and the other parties thereto. However, crucially, it does not constitute a supply contract, a works contract or a services contract. Rather, it represents the first step – itself contractual in nature – in entering into individual contracts of this kind with the economic operators concerned. Another feature of the framework agreement is that it establishes the terms, in particular those concerning price and, where appropriate, quantity under which the parties will execute subsequent contracts. As Regulations 17 and 18 make clear, the execution of these subsequent contracts does not require a further competitive exercise. Stated succinctly, the Regulations specifically empower a public utility to procure a framework agreement and, having done so, to enter into individual supply, works and services contracts thereunder on subsequent dates. In principle, this mechanism appears ideally suited for major, rolling projects with variable and, perhaps, not readily predictable needs - such as that with which this litigation is concerned. Moreover, it gives effect to a discernible policy whereby multiple economic operators, rather than only one, can benefit financially from large scale projects of this kind. This analysis equates broadly with that espoused by Professor Arrowsmith:

> "*Framework arrangements are arrangements whereby a procuring entity and provider establish the terms on which purchases may or will be made over a period of*

time. The procuring entity makes an initial solicitation of offers against proposed terms and conditions, chooses one or more providers – referred to as the 'framework provider(s)' – on the basis of their offers and then places periodic orders with chosen framework providers as particular requirements arise."

[The Law of Public and Utilities Procurement, paragraph 11.1]

As the author notes, frameworks are of particular utility when the contracting authority is unable to measure with precision the quantities, nature and/or timing of future requirements. Much time, resources and delay are saved. Furthermore, this mechanism can be of economic benefit to so-called SME's [small to medium sized enterprises].

[25] In my opinion, the clear thrust and effect of the OJEU Notice and the ensuing PQQ are that the Defendant was procuring a framework agreement within the meaning of the 2006 Regulations. This, in my view, represents the correct construction of the words and passages under scrutiny which must, of course, be read and considered together and in their full context. The wording of paragraph 2.2.2 of the PQQ, on which the Plaintiff's arguments relied strongly, is not entirely felicitous. It contains a degree of ambiguity. However, the PQQ is to be read and construed *subject to* the OJEU and paragraph 2.2.2 is not to be detached from its full surrounding context. Furthermore, I am satisfied that the passage in question, while containing an element of ambiguity, bears a meaning consistent with my analysis and conclusion.

[26] The significance of the Court's determination of this discrete issue is that the moratorium automatically imposed by Regulation 45 G relates to the award of the framework agreement in its entirety. This, self evidently, will have a bearing on the Court's evaluation of the balance of convenience. The submission of Mr Humphries QC was that the Defendant [a] could, at this stage, proceed with the invitations to negotiate vis-à-vis those who have been successful thus far, [b] then enter into the framework agreement with the successful bidders and [c] thereafter, execute individual contracts relating to four out of the five Lots, excluding the controversial Lot 2. For the reasons explained, I consider that this fragmented approach is not lawfully open to the Defendant. Thus I reject this submission. In the language of Regulation 45G, the Defendant is at present "*required to refrain from entering into the contract* [i.e. the framework agreement]": the prohibition is absolute.

Determining this Application: Governing principles

[27] None of the parties dissented from the approach outlined in ***Rutledge Recruitment – v – Department for Employment and Learning*** [2011] NIQB 61, paragraph [16]. In determining this application, I apply the following legal framework. The Court must decide at this stage whether either Plaintiff has a good arguable case or, in the language employed in some of the reported cases, has raised

a serious issue to be tried. This is the first of the main criteria to be applied. The second concerns the balance of convenience. In applying this latter criterion, the Court is empowered to take into account the adequacy of damages as a remedy; the availability, terms and apparent efficacy of any cross undertaking in damages offered by the Plaintiff; the possibility of irremediable prejudice to third parties; and the demands of the public interest. The Court also falls within the embrace of the general obligation enshrined in Article 10 TEU to secure that all appropriate measures are taken to ensure the fulfilment of Community law obligations. Thus the ruling of the Court at this stage must give full effect to the relevant principles and provisions of Community law.

Manifest error: Good arguable case?

[28] The assertion of manifest error forms the centrepiece of each Plaintiff's challenge. As regards the correct approach in principle, Courts throughout the United Kingdom have consistently given effect to the following passage in ***Lyon Apparel Systems – v – Firebuy Limited*** [2007] EWHC 2179 (CH):

> "[37] *In relation to matters of judgment, or assessment, the Authority does have a margin of appreciation so that the Court should only disturb the Authority's decision where it has committed a manifest error.*
>
> [38] *When referring to manifest error, the word manifest does not require any exaggerated description of obviousness. A case of manifest error is a case where an error has clearly been made.*"

In ***Rutledge*** *(supra)*, this Court stated:

> "[30] *While the reviewing Court will always be alert to ensure that the procurement exercise under scrutiny has been compliant with the overarching rules and principles of Community law, I consider it uncontroversial that in matters of qualitative or evaluative judgment the contract award authority/Evaluation Panel must be accorded a certain margin of appreciation.*"

The rationale for this approach is explained in the next succeeding sentence:

> "*The reviewing Court cannot lay claim to the qualifications or expertise of those performing the evaluation.*"

[29] The detailed arguments developed on behalf of both Plaintiffs involved a micro-analysis of the scores accorded by two separate evaluation panels to the Plaintiffs' answers to six questions [Wilson] and five questions [Lowry] which were common to their bids for Lot 2 and Lot 4. The cornerstone of each Plaintiff's case is that there was no material distinction between the requirements for each Lot. Building on this foundation, it is argued that the Lot 2 assessment panel should have

allocated to the Plaintiffs essentially the same scores as were allocated by the Lot 4 assessment panel in relation to the questions under scrutiny. The Plaintiffs complain of a disparity in scoring which, they contend, can be attributable only to manifest error on the part of the Lot 2 panel.

[30] I have rehearsed in paragraphs [6] – [9] above the salient elements of what, per the OJEU Notice and the PQQ, the Defendant was seeking to procure. I have considered carefully the language used, bearing in mind that labels and headings are essentially a form of shorthand and do not, therefore, operate as a substitute for the wording which follows. They do, however, have some value as a guide or indicator and they serve to inform and illuminate one's understanding of the more detailed wording which follows. I have considered the "non-infrastructure" and "infrastructure" dichotomy in this way. In doing so, as already observed, the construction of these key documents is a question of law for the Court. This is not a matter of construing a contract award criterion, with the result that, strictly, the principle of the reasonably well informed and normally diligent bidder, articulated by the Court of Justice in ***Siac Construction – v – Mayo County Council*** [Case C – 19/00], paragraph 42, does not apply. However, I am content to take this principle into account. Furthermore, in performing an exercise of this kind, I consider that the Court should be circumspect as regards the subjective claims and assertions contained in the affidavit evidence of the contracting authority. This school of thought is reinforced by two particular considerations in the present context. The first is that the Defendant's sole deponent was not a member of either of the evaluation panels concerned. The second is that the adversarial trappings of cross examination and full discovery of documents are not part of the litigation jigsaw at this juncture. In the present case, I have determined to take no account of the Defendant's affidavit evidence in this context. Rather, the focus of the Court is squarely on the relevant contents of the OJEU Notice and the PQQ, together with the comments and scores of the two evaluation panels.

[31] Applying this approach, I consider that the cornerstone of the Plaintiffs' case is weak. There is demonstrably greater force in the Defendant's contentions that the Plaintiffs are not comparing like with like. It may be that there is no absolute, bright luminous line between water and waste water non-infrastructure projects (on the one hand) and water and waste water infrastructure projects (on the other). However, I consider that the dichotomy formed by these two categories emerges clearly from the documents under scrutiny, on dispassionate and objective examination. While the OJEU Notice required only a "*short description*" of what the Defendant was procuring in respect of each of the five Lots, this distinction is clearly identifiable in the language and descriptions provided. It is, predictably, even stronger in the PQQ, which contains the detailed outworkings of the more economically formulated OJEU Notice. It is especially clear in the detailed lists of "*non-infrastructure assets*" and "*infrastructure assets*" contained in Appendix A of the PQQ. The distinction is further highlighted in the "*design and build*" characteristic of Lot 2, in contrast with the "*build* [only] *feature of Lot 4*". This is undeniably a distinction of substance. To the same effect is the specific inclusion of the design,

installation and commissioning of mechanical and electrical works (including instrumentation, controls and telemetry) in Lot 2 and the substantial exclusion of this item from Lot 4. I consider that this particular distinction is not confounded by the inclusion in Lot 4 of the installation and commissioning of **mechanical and electrical refurbishment** of small sewage pumping stations. True it may be that the two categories are not hermetically sealed: indeed this is reflected in the degree of flexibility and elasticity in the language employed by the Defendant in the Lot 2 and Lot 4 descriptions. Notwithstanding, the basic distinction between infrastructure and non-infrastructure in this context seems to me unmistakable. This manifest division clearly required differently tailored responses by bidders to questions which were common to Lot 2 and Lot 4. This, in my view, is what the Defendant was expecting of bidders and I find this expectation harmonious with the procurement documents, properly construed. The Plaintiffs' cases are founded on an acknowledged failure to respond differently to the Questions under scrutiny.

[32] I remind myself that it is not the function of the Court to determine the issues in the litigation at this stage. Rather, the Court's concern is whether the Plaintiffs' challenges overcome the good arguable case threshold. I take into account that the Court's determination at this stage of the proceedings is made in the absence of the elements of full blown adversarial litigation – in particular discovery of documents, interrogatories and responses thereto and the cross examination of deponents. However, having regard to the formulation of the Plaintiffs' challenge and avoiding impermissible speculation, it seems likely that the essence of the critical documentary evidence is available – in particular, the OJEU Notice, the PQQ and the marks and comments of the two assessment panels. Furthermore, I take into account that in the presentation of the Plaintiffs' cases, no issue of substance has been raised about the meaning of the words used in the commentaries. Issues of ambiguity, obscurity and equivocation do not feature in the Plaintiffs' challenge. *Au contraire* – I consider that, properly analysed, the Plaintiffs boldly make the case that the content and meaning of the comments are so clear that the governing threshold is overcome. With reference to each of the differing scores, Mr Humphries QC submitted unequivocally that the disparities are explicable **only** on the ground of manifest error. I reject this submission at this stage. It seems to me a good deal more likely that these differences in scoring are explained by reference to the distinctions between the projects being procured in Lot 2 and Lot 4 and the respective assessment panel's appreciation of these differences. Furthermore, duly analysed, the main thrust of the comments accompanying the impugned scores is that both Plaintiffs' responses suffered from a deficiency of supporting evidence, detail and particularity. This is consistent with three factors in particular: the distinction which I have identified, the panel's appreciation thereof and the related lack of appreciation on the part of both Plaintiffs. In essence, the Court is urged to the view that the Lot 2 scores vis-à-vis the relevant questions are undermined by some serious misunderstanding or other lapse on the part of the different assessment panel concerned. For the reasons explained, I consider that this contention confronts significant hurdles. I conclude that, at this juncture, its frailty is such that it fails to raise a serious triable issue.

[33] I now turn my focus to the second of the grounds of challenge. The essence of this ground is that the impugned decision is contaminated by the prohibition against unrestricted freedom of choice. This relates to the Defendant's decision that only 12, rather than 16, of the bidders would be permitted to proceed to Stage 2. There are two passages in the PQQ having a bearing on this discrete issue: both are reproduced in paragraph [10] above. The principle invoked by the Plaintiffs in support of this ground of challenge is the well established one that a selection criterion which confers unrestricted freedom of choice on the contracting authority is unlawful. Assuming, without deciding, that this is a selection criterion (which is not obvious), in my view the obvious infirmity in this ground is that this mechanism, by its express terms, conferred on the Defendant a restricted measure of choice. It amounted to a qualified projection and did not confer an unqualified discretion. Thus it is harmonious with the principle in play. This is my primary conclusion.

[34] Furthermore, this mechanism does not have the hallmarks of a typical selection criterion. It is markedly different in its nature and terms from the Stage 1 selection questions. It was not a means of allocating scores and marks, with a view to identifying the strong contenders and the weak contenders. The two passages in the PQQ on which the Plaintiffs focus had nothing to do with scoring. Rather, they enshrine a mechanism which came into operation following assessment of every bidder's submission and the application of scores. This mechanism, moreover, applied uniformly to all bidders. While it undoubtedly reserved a degree of discretion to the Defendant regarding the number of bidders to be admitted to the second stage, this did not, in my estimation, infringe the legal principle invoked. EU procurement law has not, yet, outlawed this species of numerical discretion. This is my secondary conclusion.

[35] I conclude that this ground of challenge has no merit accordingly. This conclusion is open to the Court since the evidence bearing on this discrete issue is almost certainly complete. In the unlikely event that something material were to emerge at a later stage of the proceedings, the Court would, of course, revisit the issue. I would add, finally, that this ground is manifestly statute barred [*infra*] in any event as it consists of a challenge to the structure of the competition and not its outcome.

The balance of convenience

[36] I take into account that the Plaintiffs are prepared to offer an undertaking in damages. Furthermore, there is no suggestion that this is of limited, or no, value. I must balance this against, firstly, the question of whether, if ultimately vindicated, the Plaintiffs would be adequately compensated by an award of damages. In the event of ultimate success, the loss to each Plaintiff to be compensated by damages would be the loss of their opportunity to compete in Stage 2 for inclusion in the Framework Agreement. The proposition that those who compete successfully, to the

extent of becoming parties to the Framework Agreement, will gain financially is incontestable. In contrast, there is no financial loss involved in failing at Stage 1 of the exercise. Rather, what is lost is the opportunity to secure a contractual award which, in turn, would lead to the award of an indeterminate number of individual contracts.

[37] At this juncture, I consider what is said on the Plaintiffs' behalf in their respective affidavits. Both make essentially the same averment:

> "*If there has been a breach of the Regulations, it is unlikely that damages will provide the Plaintiff with an adequate remedy as it has been excluded from the process at such an early stage that it will encounter very significant problems of proof if it has to try and show that it lost a valuable chance by reason of the Defendant's default.*"

This is, in reality, the full extent of the evidence concerning this discrete issue. I also take into account what was said by Aikenhead J in ***Exel Europe – v – University Hospitals Trust*** [2010] EWHC 3332 (TCC), paragraph [48] :

> "*….. the Court will have to determine the percentage chance which* [the Plaintiff] *would have had in securing the contract. That may be anything between, say, 10% and 90%. One then applies the percentage to whatever would have been earned by way of profit over either the five or ten year period which this agreement would or may have run for. There may have to be some credits to be given, for instance, to reflect the additional work Excel has taken on or is likely to take on because it has not succeeded in securing this particular contract and a financing credit to reflect the receipt of damages for loss of profit earlier than the profit would have been earned. However, this is all readily assessable by forensic accounting experts.*"

A similar analysis is contained in the same Judge's decision in ***European Dynamics – v – HM Treasury*** [2009] EWHC 3419 (TCC), paragraph [23]. His Lordship further eschewed the notion that injunctive relief is the primary remedy in this field: paragraph [24].

[38] In commercial cases generally, expert forensic accountants, duly aided by discovered documents, rarely display any inhibitions in constructing and advocating a claim for financial loss. I accept that, from the Court's perspective, there would be several shades of grey in the exercise. However, Courts are well used to grappling with all kinds of claims for damages. Moreover, the standard of proof to be applied is that of the balance of probabilities. I find much common sense and wisdom in the approach of Aikenhead J (*supra*), with which I concur. While damages may not be easily assessed, this does not give rise to the proposition that damages would be inadequate. There is a logical gulf between the two. Equally unsustainable is any suggestion that the Plaintiffs' displeasure at any award of damages condemns the remedy as inadequate. Finally, the prospect of sharp differences of calculation and opinion on the part of competing forensic accountants has no bearing on the

adequacy of damages as a remedy. On balance, I conclude that an award of damages would be an adequate remedy for the Plaintiffs.

[39] In my estimation, the public interest factor is, by some measure, the most important of the ingredients in the balance of convenience equation. The Defendant's case, in brief, is that there is a compelling public interest in completing this procurement exercise to enable badly needed water and waste water projects to be executed. This need is reinforced by financial considerations. The Defendant's case, in this respect, is rehearsed in its affidavit evidence. Unsurprisingly, the Plaintiffs mount no challenge of substance to these claims. Their riposte is essentially twofold. Its first element consists of the argument which I have already rejected regarding what is being procured: see my conclusion in paragraph [25] above. Its second element is that an early substantive trial of these actions is feasible. In my view, with each passing month, the damage to the public interest will become increasingly visible and tangible. Even with the most strenuous of efforts, it is unlikely that these cases would be ready for trial until the commencement of the Michaelmas Term viz some six months hence. The Court's experience is that cases of this kind are organic in nature. Predictions of trial length invariably prove to be underestimates, oral evidence can be protracted and the discovery process may continue as the trial advances. The Court will then require time to prepare a complex judgment, following which there may be an appeal to the Court of Appeal which, as is well known, has overburdened schedules. In summary, the Plaintiffs' arguments on this discrete issue do not convince.

[40] For the reasons elaborated, I conclude that the balance of convenience inclines decisively against the maintenance of the injunctive prohibition.

Limitation

[41] Both Plaintiffs' claims are, on paper, out of time. At the trial, the argument on this discrete issue was presented by Mr Humphries QC with admirable economy. It reduced to two limbs. These are to be considered against the framework of Regulation 45D of the 2006 Regulations, as amended (operative from 1st October 2011 – and, hence, engaged in this context), which provides:

> "*(2) Subject to paragraphs (3) – (5), such proceedings must be started within 30 days beginning with the date when the utility* ***first*** *knew or ought to have known that grounds for starting the proceedings had arisen.*"
>
> [The emphasis is mine.]

Paragraph (3) has no application to the present context. Paragraph (4) provides:

"*Subject to paragraph (5), the Court may extend the time limit imposed by paragraph (2) ……. where the Court considers that there is a good reason for doing so.*"

Paragraph (5) makes provision for a "backstop" limit of three months. The first element of the Plaintiffs' argument was, in essence, that a very short period of grace, of some few days duration, should be permitted in the Court's calculation to facilitate absorption of the impugned decision by the affected economic operator. This would embrace – and permit – the initial weekend delay which occurred in the present case. The second element of the argument was that given the first post-decision communication from the Defendant, which foreshadowed the provision of some further information, duly materialising four days later, the operative date was postponed. If successful, these arguments would extend the "baseline date" by a period of seven days, measured from receipt of the impugned decisions and would defeat the limitation defence.

[42] In ***Uniplex – v – NHS Business Services Authority*** [2010] 2 CMLR 47, the European Court of Justice contrasted the candidate's receipt of a bare decision with receiving a reasoned decision:

"*(31) It is only once a concerned candidate or tenderer has been informed of the reasons for its elimination from the public procurement procedure that it may come to an informed view as to whether there has been an infringement of the applicable provisions and as to the appropriateness of bringing proceedings.*"

As Elias LJ recognised in ***Sita – v – Greater Manchester WDA*** [2011] EWCA Civ 156, paragraph [21]:

"*…….. This would normally be from the date when the tenderer was sent a summary of the relevant reasons – a requirement which the Directive, following an amendment in 2007, now requires. Plainly, the ECJ is drawing a clear distinction between the reasons for a decision and the evidence necessary to sustain those reasons ……..*

'Knowledge' does not mean knowing for certain and beyond possibility of contradiction. It means knowing with sufficient confidence to justify embarking on the preliminaries to the issue of a Writ …….."

Giving effect to this approach, with which I concur, I observe that the Plaintiffs' argument invites the Court to exclude from its calculation the first seven days following receipt of the notification letter. I consider this unsustainable, for the fundamental reason that the notification letter included the assessment panel's scores and its corresponding comments and, in this way, conveyed to both Plaintiffs the essence of the reasons for the impugned decisions. As already highlighted above, the Plaintiffs make no complaint of ambiguity or lack of intelligibility or inadequacy in the language used. The Plaintiffs were informed that they had been unsuccessful as regards Lot 2 and why. Furthermore, it is common case that the

further notification received from the Defendant seven days later added nothing to the Plaintiffs' respective funds of knowledge or understanding. The challenge which they bring is founded on alleged manifest error. The supporting grounds, in my view, crystallised fully on the date of receipt of the notification letters, without addition or metamorphosis of any kind in the subsequent communication. This fixes the Plaintiffs with both actual and constructive knowledge on the first of the dates under scrutiny, 31st August 2012. The Writs did not issue until 4th October 2012. It follows inexorably that both claims are out of time. Insofar as it was contended that time should be extended in the exercise of the Court's power under Regulation 45 D(4), the relevant factual matrix and accompanying arguments are duplicated. The sequence of events, in my view, is typical of the kind which must have been contemplated in the decision to establish a basic time limit of 30 days and cannot, therefore, justify extension thereof. Good reason is manifestly absent.

[43] Thus the Plaintiffs' manifest error challenge, the centrepiece of their respective cases, is out of time. It is common case, however, that this does not apply to the secondary ground of challenge, since the Writs were issued within 30 days of disclosure of the relevant additional facts to the Plaintiffs.

Conclusion

[44] For the reasons elaborated above, the Defendant's application for an interim order under Regulation 45H(1) terminating the automatic contract award prohibition enshrined in Regulation 45J(1) succeeds. I make clear that my evaluation of the balance of convenience would have been determinative of the application even if I had resolved the good arguable case issue in the Plaintiffs' favour. The Defendant's independent challenge to the Plaintiffs' claims on the ground of limitation succeeds to the extent specified above. It being common case that the evidential matrix relating to the limitation issue is complete, the Court's conclusions thereon are unqualified.

[45] The Order of the Court will be drawn up immediately. The issue of costs will be determined one week hence, to enable both parties to absorb this judgment. Brief E-mail submissions on this issue will suffice, with a view to avoiding the cost of a further mini-hearing. Finally, the parties will lodge agreed case management directions (or, as the case may be, competing drafts) within 21 days hereof.