Neutral Citation Number: [2026] EWHC 2239 (TCC)

Case No: HT-2025-000267

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

Royal Courts of Justice
Rolls Building
London, EC4A 1NL

Date: 28/08/2026

Before:

MR ROGER TER HAAR KC

Sitting as a Deputy High Court Judge

Between:

APASEN LIMITED
Claimant

- and –

LONDON BOROUGH OF TOWER HAMLETS
Defendant

Rhodri Williams KC and Tom Walker (instructed by **Russell-Cooke LLP**) for the **Claimant**
Parishil Patel KC and Gethin Thomas (instructed by **Trowers & Hamlins LLP**) for the **Defendant**

Hearing date: 31 July 2026

- -

APPROVED JUDGMENT

Mr Roger ter Haar KC:

The Application before the Court

1. The application before the Court is the Defendant's application as follows:

> For the reasons set out in the enclosed First Witness Statement of Daniel John Butler dated 18 May 2026, the Defendant seeks an order that the claim, insofar as it contends that the Claimant is entitled to the remedy of set aside of the interim contracts which the Council entered into with the four service providers, being paragraphs 22(e), 24 and recital (2) of the prayer for relief of the Particulars of Claim, is struck out pursuant to CPR 3.4(2)(a) and the Court's inherent jurisdiction on the basis that it is not arguable the conditions for set aside in section 105(1) of the Procurement Act 2023 are met.

The Facts

2. The facts which I set out in this section of this judgment are substantially taken from paragraphs 7 to 29 of the Claimant's counsel's skeleton argument.

The Parties

3. The Claimant is a UK Registered Charity (Registration 04688707) and is a provider of a wide range of social care and community support services to vulnerable people in the East of London. It is a United Kingdom supplier for the purposes of section 100(2) of the Procurement Act 2023 Act ("the 2023 Act").

4. The Defendant is a London public authority responsible, *inter alia*, for the provision of domiciliary care services to service users in its area. It is a contracting authority for the purposes of sections 2(1) and 100(1) of the 2023 Act.

The Original Procurement

5. By an initial contract notice published on or about 19 July 2023 (reference number DN604265), the Defendant advertised on the Find a Tender service a procurement for contracts for the provision of domiciliary care services ("the Original Procurement").

6. The Original Procurement was split into four lots by area: Area 1 (Northwest); Area 2 (Southwest); Area 3 (Northeast); and Area 4 (Southeast).

7. The Claimant submitted a tender in respect of Area 2 and Area 3.

8. In September 2023 and October 2023, anonymous whistleblowing allegations of, *inter alia*, corruption and financial impropriety on the part of the Claimant were received by the Claimant. These allegations were sent to the Defendant on 1 November 2023.

9. In January 2024, representatives of the Defendant contacted PricewaterhouseCoopers LLP ("PwC") for advice in respect of these allegations.

10. On 15 January 2024, a report of an internal investigation commissioned by the Claimant as a result of the whistleblowing allegations was provided to the Defendant. None of the allegations were upheld.

11. On 18 March 2024, the Defendant informed the Claimant that PwC had been commissioned to carry out an investigative audit of its contracts with the Claimant ("the Defendant's Audit").

12. PwC subsequently produced a report on its investigation into the whistleblowing allegations dated 12 June 2024 and an addendum to that report dated 15 July 2024 ("the Project Winter Reports").

13. As part of the Defendant's Audit, on 15 August 2024 the Defendant instructed PwC to perform a forensic contract review in connection with the Defendant's contracts with the Claimant. This related, *inter alia*, to an alleged overpayment to the Claimant.

14. On 7 October 2024, the Defendant issued contract award decision notices in respect of the Original Procurement. The Claimant was unsuccessful in respect of Area 2, but successful in respect of Area 3. However, the award of the Area 3 contract to the Claimant was made conditional upon the outcome of the Defendant's Audit.

15. The Claimant challenged the award of the contract for Area 2 and the fact that the award to it of a contract for Area 3 had been made conditional.

16. On 5 November 2024, following the exchange of pre-action correspondence, the Claimant issued proceedings pursuant to Regulation 91 of the Public Contracts Regulations 2015 ("the PCR 2015") for breach of those Regulations (Claim No. HT-2024-000372).

17. Following challenges to the Original Procurement by the Claimant and other tenderers, the Defendant informed all tenderers on 6 November 2024 that it had decided to abandon the Original Procurement.

18. On 12 March 2025, PwC submitted its report in respect of the forensic contract review that the Defendant had instructed it to carry out. PwC submitted an addendum to this report on 2 May 2025 ("the Project Autumn Reports"), referred to collectively with the Project Winter Reports as "the PwC Reports").

The March Decision

19. On 13 March 2025, the Defendant published its intended transparency notice (reference 2025/S 000-009158) under the provisions of the 2023 Act ("the Transparency Notice"). This stated the Defendant's intention to award seven interim contracts by way of direct awards in reliance on the direct award justification of *"Urgency"* ("the March Decision"). Two of the interim contracts were awarded to the Claimant.

20. On the same day, the Defendant also published what it intended to be a contract award notice under the 2023 Act (reference 009237/S 000-2025) ("the Contract Award Notice"). The Contract Award Notice made no mention of the direct award justification relied upon by the Defendant.

The June Decision

21. By a decision taken on 18 June 2025, the Defendant performed a *volte face* from the March Decision and decided that it would not in fact make a direct award of any contract to the Claimant. The other direct awards proceeded ("the June Decision").

22. The Defendant says that the June Decision was taken on the basis of the outcome of the Defendant's Audit.

23. The Claimant sought disclosure of the documents relevant to the Defendant's Audit from 8 July 2024. The Defendant initially withheld the relevant documents on the basis that they were allegedly subject to legal professional privilege. The Defendant eventually abandoned this position and disclosed several relevant documents (including the PwC Reports) on 13 October 2025. The Defendant's change of position occurred after the Claimant had commenced judicial review proceedings challenging the March and June Decisions.

24. The Claimant maintains that the PwC Reports provide no (or no proper) basis for the June Decision.

The Statement of Claim

25. Paragraph 22 of the Particulars of Claim pleads as follows:

> 22. The Defendant, having decided to abandon the Original Procurement process, has acted in breach of the aforementioned duties, as

particularised below:

a. The Defendant determined to award contracts for the provision of domiciliary care services by way of direct awards in circumstances where the provisions of section 41(1)(6) and Schedule 5 did not apply and otherwise than in accordance with the requirements of those provisions, in that

i. The purported justification that such awards were necessitated by "*extreme and unavoidable urgency*" was manifestly erroneous and incorrect;

ii. The requirements of Schedule 5, paragraphs 13(a)(b) were not met, since the services to be provided under the contracts were not strictly necessary for reasons of extreme and unavoidable urgency and, as a result, the public contracts could have been awarded on the basis of a competitive tendering procedure;

iii. Whilst it is accepted that the Defendant was under a statutory duty to ensure the ongoing delivery of what it referred to as Home Care Services and that the Defendant wanted to ensure a seamless continuation of the services at the expiry of the existing contractual arrangements which were due to expire on 31st March 2025, the delivery of such services on a long term basis could have been achieved by applying the time limits for a competitive tendering process set out in section 54 of the 2023 Act and notably those in section 54(3)(4) (amounting to a total of twenty days) in circumstances where the Defendant genuinely considered there to be a state of urgency that meant that any other minimum participation or tender periods were impractical;

iv. These abbreviated minimum periods could easily have been accommodated by 31st March 2025, following the decision of the Defendant notified on 6th November 2024 to abandon the original procurement, notwithstanding the purported desire of the Defendant to carry out a detailed review of its delivery strategy for the services;

v. On no account was a period of up to two years justifiable, in that a period of nine months for such a review was manifestly excessive, the period of three months for procurement preparation was equally unnecessary, (given that the Defendant was effectively re-running the original procurement exercise which had just been abandoned), the further period of nine months for the procurement exercise was clearly not required in the light of the provisions section 54(3)(4) and the period of three months for mobilisation was excessive (given that the contracts were likely to be awarded to incumbent service providers, as in fact turned out to be the case);

b. Furthermore, the requirements of Schedule 5 paragraph 14(a)(b) were not met in that:

i. The alleged urgency was attributable to the acts or omissions of the Defendant, as contracting authority, in that the situation arose because of the breaches of the 2015 Regulations which had been committed by the Defendant during the original procurement exercise further to the justified challenges which had been raised by the tenderers which had participated in that tender exercise, the legal claim which had been issued by the Claimant and the consequent failure of the Defendant to act in a timely way to comply with its duties under the procurement regime;

ii. That the situation, in which a claim was made by the Claimant which had led to the Defendant being obliged to, or voluntarily deciding to, abandon the original procurement exercise because of the legitimate risks that were posed, was clearly something which could and should have been foreseen by the Defendant as contracting authority;

iii. That in alleging that the situation amounted to "*unforeseen circumstances*" or that there was "*new legislation and new technical solutions*", the Defendant had applied the wrong test under Schedule 5 paragraph 14 and/or had acted manifestly erroneously;

c. In those circumstances, the transparency notice of 13th March 2025 relied on by the Defendant, in which it wrongly attempts to argue to the contrary that the requirements of Schedule 5 Paragraphs 13 – 14 were satisfied, is manifestly erroneous and invalid, of no effect and the Defendant failed to comply with the requirements of section 44(1)(2) and regulation 26 of the Procurement Regulations 2024;

d. As a consequence, the interim contracts were awarded in breach of the provisions of sections 19 – 20 of the 2023 Act;

e. Furthermore, as a consequence, the standstill period alleged to have been applied by the Defendant was not in accordance with section 51 of the 2023 Act and any contracts which the Defendant has entered into with any of other four service providers were in breach of section 51(1) and give rise to one or more of the set aside conditions, pursuant to section 105(1);

f. Further or alternatively, for the same reasons as set out in paragraph 22(a) & (b) above, the contact award notice purportedly published a little more than three hours later on the same day as the transparency notice on 13th March 2025, was manifestly erroneous and invalid, of no effect and the Defendant failed to comply with the requirements of section 50(1)(2) and regulation 27 of the Procurement Regulations 2024;

g. Further or alternatively, the Defendant has failed to publish a contract details notice in accordance with its duty under section 53(1)(b)(2) of the 2023 Act and regulation 35 of the Procurement Regulations 2024;

h. Further or alternatively, by its decision taken on 18th June 2025, to enter into the interim contracts with the other four tenderers but not to do so with the Claimant, the Defendant acted in breach of section 12(1)(2)(3) and/or principles of Retained/Assimilated EU law, in that it failed to treat all five incumbent suppliers the same, failed to take all reasonable steps to ensure that it did not put a supplier at an unfair advantage or disadvantage, treated the Claimant unfairly and/or discriminated against the Claimant and failed to act with integrity and/or comply with its duty of transparency;

i. Further or alternatively, in excluding the Claimant from the process of entering into the interim contracts, whereas the Claimant had been among the five tenderers which were to be awarded a contract or contracts as a result of the original procurement process, and by failing to explain adequately or at all the reasons for that exclusion or to give the Claimant a reasonably opportunity to make representations and provide evidence as to whether grounds for exclusion applied or were likely to occur again, the Defendant failed to comply with its duties under sections 26 – 30 and/or sections 57 – 60 of the 2023 Act.

26. Paragraphs 23 to 25 of the Particulars of Claim then plead:

H. RELIEF CLAIMED

23. By reason of the above breaches of statutory duty, breach of Retained EU law/Assimilated EU law obligations, whether individually or together, the Claimant has suffered and/or is at risk of suffering loss and damage, including, the loss of the opportunity to be awarded one or more of the interim contracts in a fair and transparent procedure in accordance with the 2023 Act.

24. Insofar as any of the interim contracts awarded to the four other suppliers have been entered into as at the issue of the current proceedings, a set aside condition exists in that the Claimant was denied a proper opportunity to seek a pre-contractual remedy under section 103 of the 2023 Act because either (i) the required contract award notice was not published (pursuant to section 105(1)(a)); (ii) the contract was entered into before the end of the applicable standstill period; (pursuant to section 105(1)(b)); (iii) the breach only became apparent on publication of the contract award notice (pursuant to section 105(1)(d)); and/or (iv) the breach only became apparent after the contract was entered into. In those circumstances, the Claimant claims the remedy of set aside in respect of that contract or contracts.

25. Insofar as any of the interim contracts awarded to the four other suppliers have not been entered into as at the issue of the current proceedings, the provisions of section 101(1) apply and the Defendant may not enter into that contract or contracts.

27. The relief claimed by the Claimant in the Particulars of Claim is as follows:

(1) A declaration that the Defendant acted in breach of the 2023 Act and/or in breach of any obligation under Retained/Assimilated EU law and/or acted in manifest error;

(2) An order setting aside any interim contract or contracts which the Defendant has entered into and a declaration that it was lawful for the Defendant to enter into that contract or contracts;

(3) An order, in respect of any contracts which have not been entered into, that the Defendant's decision to make a direct award of that contract or contracts should be set aside;

(4) An order that the Defendant should re-procure the contracts, whether on an interim or on a more permanent basis, in a lawful manner, by means of a competitive tendering process and in accordance with the provisions of the 2023 Act;

(5) Any other order or relief which the Court may consider appropriate.

28. As set out at the beginning of this judgment, the Defendant's application seeks to strike out those elements of the Particulars of Claim seeking the remedy of setting aside contracts entered into with other tenderers for which the Claimant also tendered.

The Statutory Context

29. In order to set that application in context it is necessary to set out the relevant statutory context, which is the 2023 Act and the Procurement Regulations 2024 ("the Regulations") 2024 made thereunder.

30. The 2023 Act and the 2024 Regulations in broad terms replicate under different nomenclature provisions contained in earlier legislation.

31. The general intent of the Act and the Regulations is that public contracts should be issued following a tendering process. The general intent is qualified by certain provisions in the Act. Section 11 provides:

(1) A contracting authority may not carry out a covered procurement except in accordance with this Act.

(2) Accordingly, a contracting authority may not enter into a public contract unless it is awarded in accordance with –

(a) section 19 (competitive award);

(b) section 41 (direct award in special cases);

(c) section 43 (direct award after switching procedures);

(d) section 45 (award under frameworks).

32. Section 12(1) sets out the objectives to which contracting authorities must have regard:

In carrying out a covered procurement, a contracting authority must have regard to the importance of –

(a) delivering value for money;

(b) maximising public benefit;

(c) sharing information for the purpose of allowing suppliers and other to understand the authority's procurement policies and decisions;

(d) acting, and been seen to act, with integrity.

33. For present purposes, of the four exceptions in Section 11(2), Section 41 is the relevant exception:

Direct award in special cases

(1) If a direct award justification applies, a contracting authority may award a public

contract directly—

(a) to a supplier that is not an excluded supplier, or

(b) in accordance with subsection (2).

(2) A contracting authority may award a contract to a supplier that is an excluded supplier if the contracting authority considers that there is an overriding public interest in awarding the contract to that supplier.

(3) A contracting authority may carry out a selection process or take such other preliminary steps as it considers appropriate for the purpose of awarding a contract under this section.

> (4) Before awarding a contract to a supplier under this section, a contracting authority must consider whether the supplier is an excludable supplier.
>
> (5) There is an overriding public interest in awarding a public contract to an excluded supplier if—
>
> (a) it is necessary in order to construct, maintain or operate critical national infrastructure,
>
> (b) it is necessary in order to ensure the proper functioning of a sector on which the defence, security or economic stability of the United Kingdom relies,
>
> (c) failure to do so would prejudice the conduct of military or security operations, or the effective operation of the armed forces or intelligence services, or
>
> (d) the contract is being awarded by reference to paragraph 13 of Schedule 5 (extreme and unavoidable urgency) and cannot be awarded to, or performed by, a supplier that is not an excluded supplier within the necessary time frame.
>
> (6) The direct award justifications are set out in Schedule 5.
>
> (7) In this section, "intelligence services" means the Security Service, the Secret Intelligence Service and the Government Communications Headquarters.

34. Section 41(5)(d) refers to paragraph 13 of Schedule 5 of the 2023 Act. Paragraph 13 needs to be read together with paragraph 14 of Schedule 5:

> 13. Where –
>
> (a) the goods, services or works to be supplied under the public contract are strictly necessary for reasons of extreme and unavoidable urgency, and
>
> (b) as a result the public contract cannot be awarded on the basis of a competitive tendering procedure.
>
> 14. For the purpose of paragraph 13, urgency is unavoidable if it –
>
> (a) is not attributable to any act or omission of the contracting authority, and
>
> (b) could not have been foreseen by the contracting authority.

35. Section 44 requires that before a contract is awarded pursuant to Section 41, a contracting authority must publish a Transparency Notice:

> **Transparency notices**
>
> (1) Before awarding a contract under section 41 or 43 a contracting authority must publish a transparency notice.
>
> (2) A "transparency notice" means a notice setting out—
>
> (a) that a contracting authority intends to award a contract directly, and
>
> (b) any other information specified in regulations under section 95.
>
> (3) This section does not apply in relation to the award of a contract under section 41 by virtue of paragraph 15 of Schedule 5 (direct award: user choice contracts).

36. The Procurement Regulations 2024 ("the 2024 Regulations") set out at Regulation 26 the information which must be included in a transparency notice (emphasis added):

> **26.**—(1) This regulation sets out other information which must be included in a transparency notice published under section 44(1) of the PA 2023.
>
> (2) The information is—
>
> (a) the contracting authority information,
>
> (b) the title of the procurement,
>
> (c) the unique identifier for the procurement,
>
> (d) in the case of a procurement where there has been a switch to a direct award in accordance with section 43 of the PA 2023, the unique identifier allocated to the procurement before the switch to direct award,
>
> (e) the unique identifier for the contract, if this is known when the transparency notice is published,
>
> (f) the contract subject-matter,
>
> (g) whether the contract is a special regime contract and, if so, whether it is—
>
> (i) a concession contract,

(ii) a defence and security contract,

(iii) a light touch contract, or

(iv) a utilities contract,

(h) whether the contract is being awarded directly to a supplier that is not an excluded supplier because a direct award justification applies in accordance with section 41(1)(a) of the PA 2023,

(i) if sub-paragraph (h) applies, the direct award justification in Schedule 5 to the PA 2023 which applies and an explanation of why the contracting authority considers that it applies,

(j) whether the contract is being awarded directly to a supplier that is an excluded supplier because the contracting authority considers that there is an overriding public interest in awarding the contract to that supplier in accordance with section 41(2) to (5) of the PA 2023,

(k) if sub-paragraph (j) applies—

(i) the offence or other event mentioned in Schedule 6 to the PA 2023 by virtue of which the supplier is an excluded supplier, and

(ii) which ground in section 41(5) of the PA 2023 applies and an explanation of why the contracting authority considers that it applies,

(l) whether the contract is being awarded directly to a supplier pursuant to regulations made under section 42 of the PA 2023 (direct award to protect life, etc),

(m) if sub-paragraph (l) applies, the title and registration number of the statutory instrument containing those regulations,

(n) whether the contract is being awarded directly to a supplier that is not an excluded supplier by virtue of section 43 of the PA 2023 (switching to direct award),

(o) if sub-paragraph (n) applies, the reason the contracting authority considers there were no suitable tenders or requests to participate by reference to section 43(2) of the PA 2023

and why it considers that an award under section 19 of that Act is not possible in the circumstances,

(p) whether the contract is being awarded by reference to lots and, if so—

(i) the title of each lot, and

(ii) the distinct number given to each lot by the contracting authority,

(q) the estimated value of the contract,

(r) whether the contracting authority considers that the contract or any lot forming part of the contract may be particularly suitable to be awarded—

(i) to a small and medium-sized enterprise, or

(ii) to a non-governmental organisation that is value-driven and which principally

reinvests its surpluses to further social, environmental or cultural objectives,

(s) a description identifying any risk that—

(i) the contracting authority considers—

(aa) could jeopardise the satisfactory performance of the contract, but

(bb) because of its nature, may not be addressed in the contract as awarded, and

(ii) may require a subsequent modification to the contract under paragraph 5 of Schedule 8 to the PA 2023 (modification of contract following materialisation of a known risk),

(t) whether suppliers have been selected for the award of the contract,

(u) if suppliers have been selected for the award of the contract, for each supplier selected—

(i) the supplier's name,

(ii) the—

(aa) unique identifier for the supplier, or

(bb) in the case of a direct award of a public contract pursuant to paragraphs 13 and 14 of Schedule 5 to the PA 2023 (urgency) where the supplier has not been allocated a unique identifier when the transparency notice is published but can instead provide unique information (for example a company registration number given under the CA 2006) which can be recognised by the central digital platform as the basis for a unique identifier allocated by that platform, that unique information, and

(iii) the supplier's contact postal address and email address,

(v) the estimated date when the contract will be entered into, and

(w) where the contract is a framework—

(i) the term of the framework,

(ii) whether the framework provides for fees to be charged to a supplier in accordance with the framework and, if so, details of the fixed percentage by which they will be charged in accordance with section 45(7) of the PA 2023, and

(iii) the contracting authorities entitled to award contracts in accordance with the framework (whether by listing the names of those authorities or by describing categories of authorities).

(3) Nothing in this regulation prevents a contracting authority from publishing other information that relates to the same procurement in the notice.

37. Section 50 provides:

Contract award notices and assessment summaries

(1) Before entering into a public contract, a contracting authority must publish a contract award notice.

(2) A "contract award notice" means a notice setting out—

(a) that the contracting authority intends to enter into a contract, and

(b) any other information specified in regulations under section 95.

38. The relevant information to be provided is set out in Regulation 27:

27.—(1) This regulation sets out other information which must be included in a contract award notice published by a contracting authority under section 50(1) of the PA 2023.

(2) The information is—

….

(s) the end date of any standstill period under section 51 of the PA 2023 or, if no standstill period applies, any date before which the contracting authority has determined not to enter into the contract,

(t) the estimated date when the contract will be entered into,

(u) where the public contract is being awarded directly under section 41 or 43 of the PA 2023, the same information referred to in 26(2)(h) to (o) ….

39. An important part of the legislation is that there should be a window within which a tenderer can challenge a contract award with which it is dissatisfied. In the 2023 Act an important part of the relevant machinery is Section 51:

Standstill periods on the award of contracts

(1) A contracting authority may not enter into a public contract before –

(a) the end of the mandatory standstill period, or

(b) if later, the end of another standstill period provided for in the contract award notice.

(2) The "mandatory standstill period is the period of eight working days beginning with the day on which a contract award notice is published in respect of the contract.

(3) Subsection (1) does not apply in relation to a contract that is –

(a) awarded under section 41 by reference to paragraph 13 of Schedule 5 (direct award: extreme and unavoidable urgency);

….

(4) If a contract is of a kind described in subsection (3), a contracting authority may not enter into the contract before the end of any standstill period (a "voluntary standstill period") provided for in the contract award notice.

(5) A voluntary standstill period may not be less than a period of eight working days beginning with the day on which the contract award notice is published.

40. Thus a contracting authority is not compelled to provide a standstill period in respect of a direct award contract to which the "extreme and unavoidable urgency" criterion applies. However, it may do so – a voluntary standstill period.

41. Section 100 provides:

Duties under this Act enforceable in civil proceedings

> (1) A contracting authority's duty to comply with Parts 1 to 5, 7 and 8 is enforceable in civil proceedings under this Part.
>
> (2) For the purposes of this Part, the duty is owed to any supplier that is —
>
> > (a) a United Kingdom supplier, or
> >
> > (b) a treaty state supplier.
>
> (3) Proceedings under this Part may be brought in the court by a supplier that—
>
> > (a) is a United Kingdom or treaty state supplier, and
> >
> > (b) has suffered, or is at risk of suffering, loss or damage in consequence of a breach of the duty….

42. Section 101 provides:

> **Automatic suspension of the entry into or modification of contracts**
>
> (1) A contracting authority may not enter into a public contract, or modify a public contract or a convertible contract, if during any applicable standstill period—
>
> > (a) proceedings under this Part are commenced in relation to the contract, and
> >
> > (b) the contracting authority is notified of that fact.
>
> (2) The court may lift or modify the restriction in subsection (1) by order under section 102….

43. In this case the Claimant did not start proceedings during the standstill period so that the automatic suspension did not apply.

44. Section 103 provides for pre-contractual remedies: those do not apply in this case.

45. Section 104 provides for post-contractual remedies. It is upon those remedies that the Claimant relies. The remedies are as follows (emphasis added):

> **Post-contractual remedies**
>
> (1) This section applies if the court is satisfied that a decision made, or action taken, by a contracting authority breached the duty referred to in

section 100(1) and—

(a) the contract in relation to which the breach occurred has already been entered into, or

(b) where the breach occurred in relation to a modification of a contract, the modification has already been made.

(2) The court—

(a) **must, if a set aside condition in section 105 is met, make an order setting aside the contract** or modification, and

(b) may, in any case, make an order for the award of damages.

(3) The duty in subsection (2)(a) does not apply if the court is satisfied that there is an overriding public interest in not setting aside the contract or modification (for example, in respect of defence or security interests or the continuing provision of public services)…..

46. Section 105 provides:

Post-contractual remedies: set aside conditions

(1) A set aside condition is met if the court is satisfied that the claimant was denied a proper opportunity to seek a remedy under section 103 (pre-contractual remedies) because—

(a) a required contract award notice was not published;

(b) the contract was entered into or modified before the end of any applicable standstill period (see sections 51 and 76);

(c) the contract was entered into or modified during a period of automatic suspension under section 101 or in breach of a court order;

(d) in the case of a contract of a kind described in section 51(3) (exceptions to mandatory standstill), the breach became apparent only on publication of a contract award notice;

(e) in the case of a modification under section 74, the breach became apparent only on publication of a contract change notice;

(f) the breach became apparent only after the contract was entered into or modified.

(2) Subsection (1)(d) does not apply if—

(a) the contract award notice provided for a standstill period, and

> (b) the contract was not entered into before the end of that standstill period.
>
> (3) Subsection (1)(e) does not apply if—
>
> (a) the contract change notice provided for a standstill period, and
>
> (b) the modification was not made before the end of that standstill period.
>
> (4) References in this section to a notice not being published include references to a notice that, though published, did not provide accurate information in respect of the contract as entered into.

The Claimant's Submissions as to the validity of the Contract Award Notice and the Transparency Notice

47. The Claimant's submission as to the effect of the above legislative provisions is set out at paragraphs 73 to 80 of its counsel's skeleton argument:

> 73. The CAN is invalid and therefore of no effect because, contrary to the requirements of Regulation 27(2)(u) of the 2024 Regulations **…**: (1) it does not state that the Interim Contracts were being awarded directly because a direct award justification allegedly applied; and (2) it does not identify the direct award justification of *"Urgency"* and explain why the Defendant considered that it applied. Indeed, it makes <u>no reference whatsoever</u> to the justification of *"Urgency"* **…** .
>
> 74. That really ought to be the end of the matter. The fact that the Defendant (erroneously) relies on the justification of *"Urgency"* in the TN is neither here nor there. Regulation 27(2)(u) is clear that this justification must be identified and explained in the CAN ….
>
> 75. However, both the CAN and TN are in any event invalid because the direct award justification of *"Urgency"* relied upon by the Defendant does not apply in the present case ….. The Claimant has five submissions in this regard.
>
> 76. First, even though it bears the burden of proving that the justification of *"Urgency"* applies, the Defendant has provided virtually no evidence of this … There is therefore no (or no proper) evidential basis for the court to find that the justification of *"Urgency"* applies in the present case; the Defendant has failed to show that there are *"exceptional circumstances"* making the direct award of the Interim Contracts *"strictly necessary"* … .
>
> 77. Secondly, contrary to paragraph 13(a) of Schedule 5 of the 2023 Act … , there was no extreme and unavoidable urgency as alleged by the Defendant:

> ….
>
> 78. Thirdly, insofar as there was any urgency (which is denied), it was not such that the Interim Contracts could not have been awarded on the basis of a competitive tendering procedure (contrary to paragraph 13(b) of Schedule 5 of the 2023 Act **…**):
>
> ….
>
> 79. Fourthly, insofar as there was any urgency (which is denied), it was not unavoidable (contrary to paragraph 14 of Schedule 5 of the 2023 Act **…**):
>
> ….
>
> 80. Finally, contrary to paragraph 14 of Schedule 5 of the 2023 Act **…** , any such urgency was plainly foreseeable. A challenge to a procurement for breaches of a contracting authority's obligations is a foreseeable risk of any procurement. Likewise, a contracting authority cannot sensibly describe its own decision to voluntarily abandon a procurement as unforeseeable.

The Defendant's Submissions in support of its Strike Out Application

48. In its Counsel's Skeleton Argument, the Defendant submits:

> 25. For the reasons set out below, there is no reasonable basis upon which the claim for an order to set aside the interim contracts can be established. The availability of the remedy of set aside is prescribed by s.104 and s.105 of the 2023 Act. The availability of that remedy relies upon the C establishing that one or more of the set-aside conditions in s.105 of the 2023 Act applies in that if one or more of the conditions is met, the court is satisfied that the C "was denied a proper opportunity to seek a remedy under s.103 [of the 2023 Act] (pre-contractual remedies)".
>
> 26. Particulars of Claim disclose no reasonable grounds for establishing a set-aside condition in s.105 of the 2023 Act. It is an unattainable remedy on the facts. The statutory conditions are simply incapable of being met. Therefore, the D submits that the claim for an order setting aside the interim contract should be struck out either on the basis that "it raises an unwinnable case where continuance of that part of the claim is without any possible benefit to C and would waste resources on both sides" or on the basis that it is not a "valid claim as a matter of law" (per *Wragg* above).
>
> 27. In relation to the set-aside conditions in s.105 of the 2023 Act, the D makes the following submissions:

a. First, the condition prescribed by section 105(1)(a) cannot be met. D published a Contract Award Notice on 13 March 2025, which irrefutably met the requirements of sections 50(1) and (2) of the 2023 Act and regulation 27 of the 2024 Regulations. Indeed, C does not allege that the Contract Award Notice breached those statutory provisions.

b. Secondly, the condition prescribed by section 105(1)(b) cannot be met. The interim contracts were not entered into until after expiry of the applicable standstill period. As the interim contracts were directly awarded, due to extreme and unavoidable urgency (under section 41 by reference to paragraph 13 of schedule 5 to the Procurement Act 2023), there was no mandatory standstill period, pursuant to section 51(3)(a) of the 2023 Act. But, the D observed a voluntary standstill period of eight working days (i.e. a standstill period of the same duration of the mandatory period) and did not enter into any interim contracts before the expiry of that voluntary standstill period;

c. Thirdly, the condition prescribed by section 105(1)(d) cannot be met. That condition is not applicable because the requirements of section 105(2) are met, namely that: (a) the contract award notice provided for a (voluntary) standstill period, and (b) the contract was not entered into before the end of that standstill period.

d. Fourthly, the conditions in section 105(c) and (e) are not applicable;

e. Fifthly, the condition in section 105(1)(f) cannot be met. The alleged breaches (namely that there was no basis to rely upon the justification in paragraph 13 of Schedule 5 of the 2023 Act for direct award) was apparent upon publication of the Transparency Notice and Contract Award Notice on 13 March 2025 (sometime prior to entry by the D into the interim contracts). The contents of the Transparency Notice and Contract Award Notice disclosed clearly and unequivocally the reasons the D relied upon to make the direct award of the interim contracts.

….

29. The only potential reference to the D's application is a suggestion (in paragraph 48 [**13/86**]) that the court cannot determine whether the set aside conditions are met without reaching a conclusion on the lawfulness of the D's reliance on paragraph 13 of Schedule 5 (urgency) for the direct award of the interim contracts, which is "*a dispute of fact and law*" that must be determined following "*evidence and disclosure"*.

30. That contention is misconceived. The lawfulness of the D's reliance on the justification in paragraph 13 of Schedule 5 has no material bearing on whether the C can establish an entitlement to the remedy of set aside. That entitlement depends upon a set aside condition being

> established, which are general application irrespective of the nature of the alleged breaches of duty.

Discussion

49. An important issue dividing the Parties is the correct approach to Sub-Section 105(4) which renders a contract award notice which does not provide "accurate" information equivalent to a contract award notice which has not been published.

50. If a contract award notice has not been published, then a set aside condition in Section 105 has not been met with the consequence under Section 104(2)(a) that the relevant contract must be set aside.

51. The issue is, what is meant by "accurate" information?

52. Whilst this is a novel issue under the 2023 Act, there is authority under previous legislation to which both Parties drew my attention.

53. In *R (Faraday Development Ltd) v West Berks Council* [2018] EWCA Civ 2532; [2019] PTSR 1346, the Court considered a "transparency notice" under previous legislation. It was a different type of "transparency notice" from that under current legislation. However, in this case the Court of Appeal gave guidance as to the information required to be given under a notice provision under procurement legislation. At paragraph 87 of his judgment, Lindblom LJ said:

> The nature of the requirement transposed into domestic law in paragraph (4)(a)(iii) was elucidated in the court's decision in *Fastweb*. More than a mere formal justification is required. The justification must be complete. This does not mean that it must be elaborated at great length. But, as the court stressed in *Fastweb*, at para 48, what is required is a clear and unequivocal explanation of the reasons that led the contracting authority to the view that the contract could be awarded without following the procedure for public procurement. Essential to this is that interested third parties, which in this case would clearly include Faraday, are able to decide "with full knowledge of the relevant facts whether they consider it appropriate to bring an action". This is the standard of

> justification required – that it should provide enough by way of objective detail about the contract to decide, in the short period allowed to him, whether to launch proceedings challenging the authority's decision to go ahead with a regulated procurement. Necessarily, such a decision must always be a properly informed decision.

54. Mr Patel, for the Defendant, submitted that, *mutatis mutandis*, this sets the standard of what information should be contained in a transparency notice or a contract award notice.

55. I am willing to accept that this passage from *Faraday* sets out a guide as to the approach to be adopted when deciding how much detail should be included in one or other of those notices.

56. It seems to me that the problem for the Defendant is the requirement that the contract award notice should contain "accurate" information.

57. In their Skeleton Argument at paragraph 60, the Claimant's counsel contend:

> It is submitted that the following propositions can be derived from the decision in *Faraday*:
>
> 60.1 When considering whether a notice precludes a claim for a declaration of ineffectiveness (i.e. set aside), the court will consider whether it is valid.
>
> 60.2 When considering whether a notice is valid, the court will go behind it and consider: (1) whether it said all that it should have said; (2) whether what is said was correct; and (3) whether the justification given for the contracting authority's decision was adequate.
>
> 60.3 Where a notice is found to be invalid, it is of no effect and will therefore not preclude a claim for a declaration of ineffectiveness (i.e. set aside).

58. Mr Patel accepts the propositions at paragraphs 60.1 and 60.3, but not that at paragraph 60.2.

59. In the course of argument, I raised the question of what would be the position if a contract award notice stated that the relevant contract was for one sort of project (perhaps for the construction of a bridge) but was in fact for a project of a very different nature (perhaps for the construction of a sewage works). Obviously that would be an inaccurate notice, and probably inaccurate in a fundamental way.

60. I do not see how such inaccuracy could usually be identified from the face of a notice. In order to identify whether the notice was accurate it would be necessary to consider evidence going behind the notice as to what was the nature of the project being tendered: this would be an example of a situation contemplated by paragraph 60.2(2) of the passage from the Skeleton Argument set out above.

61. It also seems to me that the situation referred to at paragraph 60.2(3) falls squarely within the reasoning in *Faraday*: in order to decide whether the justification given was adequate, in many cases it will be necessary to go behind the notice to see what facts have been omitted. There may well be cases where facts omitted may be so extensive and misleading as to render a notice inaccurate.

62. This judgment should not be taken as stating what approach a court should take in deciding whether a contract award notice was accurate or not. That will depend upon fact specific considerations in a wide range of circumstances.

63. What I do decide is that the question of what circumstances would justify holding that a contract award notice is not accurate is highly arguable and not decided as yet by authority. In particular in the circumstances of this case as pleaded by the Claimant, if in truth a justification of "urgency" was not factually well-founded, then it is at the least arguable that a notice asserting that the urgency criterion was satisfied would not be "accurate".

64. In this case, there is a further complication in that it was the transparency notice, not the contract award notice, which set out the "urgency" justification.

65. I accept that the point raised in paragraphs 73 and 74 of the Claimant's Counsel's Skeleton Argument, that the urgency justification had to be contained in the contract award notice, not just in the transparency notice, is arguable. Whilst this is not clearly pleaded in the Particulars of Claim, that deficiency can be cured by amendment, and it is well established that a pleading should not be struck out where it can, without injustice to the party seeking a strike out, be cured by amendment.

66. On those grounds I reject the Defendant's application to strike out the parts of the Particulars of Claim seeking to set aside certain contracts.