A

Court of Appeal

SITA UK Ltd *v* Greater Manchester Waste Disposal Authority

[2011] EWCA Civ 156

2010 Dec 14, 15, 16; Arden, Rimer, Elias LJJ
B 2011 Feb 24

European Union — Public procurement — Contract review procedure — National limitation period for bringing proceedings for breach of procurement rules — When "grounds" for bringing proceedings first arose — When time beginning to run — Nature and degree of knowledge required to start time running — Whether knowledge of real likelihood of success necessary — Relevance of statutory letter
C *before action — Whether defendant's lack of disclosure stopping time running — Whether time beginning to run afresh where further breaches of same duty — Public Services Contracts Regulations 1993 (SI 1993/3228), reg 32(4) — Council Directive 89/665/EEC (as amended by Council Directive 92/50/EEC), art 1(1)*

The defendant, the statutory waste disposal authority for Greater Manchester, invited tenders for a contract for the disposal of the city's waste. The claimant,
D whose tender application was unsuccessful, issued two statutory letters before action asserting that the defendant had breached its legal obligations to the claimant under public procurement law. Over three months later, the claimant issued a claim against the defendant seeking, inter alia, a declaration that the public procurement rules had been breached and damages. The defendant applied for the claim to be struck out as time-barred under regulation 32(4)(b) of the Public Services Contracts Regulations 1993[1], which provided that proceedings were to be "brought promptly
E and in any event within three months from the date when grounds for the bringing of the proceedings first arose unless the court considers that there is good reason for extending the period". Having regard to Council Directive 89/665/EEC[2], to which the 1993 Regulations were designed to give effect, and to recent European Union authority, the judge held that the promptness requirement of regulation 32(4)(b) was to be disapplied but that the three-month time limit did not start to run until the claimant knew or had constructive knowledge of facts which apparently clearly
F indicated, but did not absolutely prove, an infringement. He found, on the facts, that information later obtained by the claimant did not constitute separate grounds for bringing a claim, so as to bring those matters within the relevant time limit, and that an alleged lack of disclosure by the defendant had not caused the claimant delay in bringing the claim. The judge therefore struck out the claim on the basis that the claimant had sufficient knowledge of the infringement more than three months before the claim was brought and there was no reason for extending time.

G On the claimant's appeal—

Held, dismissing the appeal (Arden LJ dissenting in part), (1) that the judge had acted consistently with EU law principles in disapplying the promptness requirement and exercising the discretion conferred by regulation 32(4) of the 1993 Regulations to secure that time would run from the date of the claimant's actual or constructive knowledge; that knowledge had to relate to and be sufficient to identify the "grounds" for bringing proceedings, as it was expressed in regulation 32(4)(b); that
H the concept of "grounds" in the 1993 Regulations had to be read consistently with the concept of infringement of EU public procurement requirements in article 1 of Directive 89/665; that time started to run under regulation 32(4) once a prospective

[1] Public Services Contracts Regulations 1993, reg 32(4): see post, para 9.
[2] Council Directive 89/665/EEC (as amended), art 1(1): see post, para 4.

claimant had sufficient knowledge to take an informed view as to whether there had been an infringement in the way the public procurement process had been conducted and had concluded that there had been such an infringement; and that, adopting the judge's test, the standard of knowledge was a knowledge of the facts which apparently clearly indicated, though they need not absolutely prove, an infringement (post, paras 18, 19, 22, 26, 31, 91, 94, 95).

Uniplex (UK) Ltd v NHS Business Services Authority (Case C-406/08) [2010] PTSR 1377, ECJ considered.

(2) That time did not begin to run merely because a claimant mistakenly thought that it did, but a claimant who issued a statutory letter intending it to be a genuine statement of his belief that there had been a breach of the relevant regulations and that he was proposing to commence proceedings would find it difficult to deny that he had sufficient knowledge to start time running, as least as regards the breach or breaches so identified (post, paras 33, 91, 94, 95).

(3) That a public authority's failure to respond to requests for information, where the claimant had sufficient information to commence proceedings, did not freeze time for limitation purposes (post, paras 36–38, 91, 94, 95).

(4) That on the evidence, in particular the statutory letters, the claimant was aware more than three months before it issued proceedings that it had a prospective claim and was right to say that there was a clear indication that the defendant was in breach of its procurement obligations; that a further breach of the same duty did not start time running afresh, whether the further breach occurred before or after the breaches already known; that the matters relied on by the claimant as constituting the fresh breaches were simply further particulars of the infringement which could already be pursued and did not constitute separate causes of action in their own right; and that, accordingly the judge's analysis was correct and his refusal to exercise his discretion to extend time was neither plainly wrong nor perverse (post, paras 78, 81, 83, 85, 89, 90, 91, 94, 95, 107, 108).

Per Elias LJ. (i) The formulation that time should not run until the claimant knows that he has a real likelihood of success puts the test too high, and there is no authority supporting it. This analysis confuses the detailed facts which might be deployed in support of the claim with the essential facts sufficient to constitute a cause of action and undermines the principle of rapidity at the core of the provisions (post, para 30).

(ii) Adopting the judge's approach, a claim should not be struck out unless it can be demonstrated sufficiently clearly that it is bound to fail as a matter of law and/or fact on limitation grounds and that a trial would not change that situation. Any doubts as to what was known to the claimant should be resolved in its favour (post, paras 40, 41).

Decision of Mann J [2010] EWHC 680 (Ch); [2010] 2 CMLR 1283 affirmed.

The following cases are referred to in the judgments:

Alcatel Austria AG v Bundesministerium für Wissenschaft und Verkehr (Case C-81/98) [1999] ECR I-7671, ECJ

Haward v Fawcetts [2006] UKHL 9; [2006] 1 WLR 682; [2006] 3 All ER 497, HL(E)

Lämmerzahl GmbH v Freie Hansestadt Bremen (Case C-241/06) [2007] ECR I-8415, ECJ

R (Risk Management Partners Ltd) v Brent London Borough Council [2009] EWCA Civ 490; [2010] PTSR 349; [2010] LGR 99, CA

Swain v Hillman [2001] 1 All ER 91, CA

Three Rivers District Council v Governor and Company of the Bank of England (No 3) [2003] 2 AC 1; [2000] 2 WLR 1220; [2000] 3 All ER 1; [2001] UKHL 16; [2003] 2 AC 1; [2001] 2 All ER 513, HL(E)

Uniplex (UK) Ltd v NHS Business Services Authority (Case C-406/08) [2010] PTSR 1377, ECJ

A The following additional cases were cited in argument:

Assicurazioni Generali SpA v Arab Insurance Group (Practice Note) [2002] EWCA Civ 1642; [2003] 1 WLR 577; [2003] 1 All ER (Comm) 140, CA
Jobsin Co UK plc (trading as Internet Recruitment Solutions) v Department of Health [2001] EWCA Civ 1241; [2001] Eu LR 685, CA
Keymed (Medical and Industrial Equipment) Ltd v Forest Healthcare NHS Trust [1998] Eu LR 71
B *Marleasing SA v La Comercial Internacional de Alimentacion SA* (Case C-106/89) [1990] ECR I-4135, ECJ
Matra Communications SAS v Home Office [1999] 1 WLR 1646; [1999] 3 All ER 562, CA
Nomura International plc v Granada Group Ltd [2007] EWHC 642 (Comm); [2008] Bus LR 1; [2007] 2 All ER (Comm) 878
C *Paragon Finance plc v DB Thakerar & Co (a firm)* [1999] 1 All ER 400, CA
Pfeiffer v Deutsches Rotes Kreuz, Kreisverband Waldshut eV (Joined Cases C-397/01–C-403/01) [2005] ICR 1307; [2004] ECR I-8835, ECJ
R (IDT Card Services Ireland Ltd) v Customs and Excise Comrs [2006] EWCA Civ 29; [2006] STC 1252, CA
R v Secretary of State for Health, Ex p Furneaux [1994] 2 All ER 652, CA
Roache v Newspaper Group [1998] EMLR 161
D *Vodaphone 2 v Revenue and Custom Comrs* [2009] EWCA Civ 446; [2010] Ch 77; [2010] 2 WLR 288; [2010] Bus LR 96; [2009] STC 1480, CA

The following additional cases, although not cited, were referred to in the skeleton arguments:

AIC Ltd v ITS Testing Services (UK) Ltd (The Kriti Palm) [2006] EWCA Civ 1601; [2007] 1 All ER (Comm) 667; [2007] Lloyd's Rep 555, CA
E *Allied Maples Group Ltd v Simmons & Simmons (a firm)* [1995] 1 WLR 1602; [1995] 4 All ER 907, CA
Amministrazione delle Finanze dello Stato v Simmenthal SpA (Case 106/77) [1978] ECR 629, ECJ
Barker v Corus UK Ltd [2006] UKHL 20; [2006] 2 AC 572; [2006] 2 WLR 1027; [2006] 3 All ER 785, HL(E)
F *Barrett v Enfield London Borough Council* [2001] 2 AC 550; [1999] 3 WLR 79; [1999] 3 All ER 193, HL(E)
Bridgeman v McAlpine-Brown (unreported) 19 January 2000; [2000] CA Transcript No 39, CA
Broadley v Guy Clapham & Co [1994] 4 All ER 439, CA
Commission of the European Communities v Republic of Austria (Case C-212/02) (unreported) 24 June 2004, ECJ
G *Darley Main Colliery Co v Mitchell* (1886) 11 App Cas 127, HL(E)
European Commission v Kingdom of Spain (Case C-423/07) [2010] ECR I-3429, ECJ
Evropaïki Dynamiki—Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v Court of Justice of the European Communities (Case T-272/06) [2008] ECR II-169, CFI
Fleming (trading as Bodycraft) v Customs and Excise Comrs [2008] UKHL 2; [2008] 1 WLR 195; [2008] 1 All ER 1061; [2008] STC 324, HL(E)
H *Henderson v Henderson* (1843) 3 Hare 100
Hughes v Richards (trading as Colin Richards & Co) [2004] EWCA Civ 266; [2004] PNLR 706, CA
Independents' Advantage Insurance Co Ltd v Cook (Personal Representatives of) [2003] EWCA Civ 1103; [2004] PNLR 44, CA

Intel Corpn v VIA Technologies Inc [2002] EWCA Civ 1905, CA
Letang v Cooper [1965] 1 QB 232; [1964] 3 WLR 573; [1964] 2 All ER 929; [1964] Lloyd's Rep 339, CA
Letting International Ltd v Newham London Borough Council [2008] EWHC 1583 (QB); [2008] LGR 908
Marks & Spencer plc v Customs and Excise Comrs (Case C-62/00) [2003] QB 866; [2003] 2 WLR 665; [2002] STC 1036; [2002] ECR I-6325, ECJ
Michaniki AE v Ethniko Symvoulio Radiotileorasis Impourgos Epikrateias Elliniki Technodomiki (TEVAE) formerly Pantechniki AE Sindesmos Epikhiriseou Periodikon Tipou (Case C-213/07) [2008] ECR I-9999, ECJ
Pressetext Nachrichtenagentur GmbH v Republik Österreich (Bund) (Case C-454/06) [2008] Bus LR D118; [2008] ECR I-4401, ECJ
SIAC Construction Ltd v Mayo County Council (Case C-19/00) [2001] ECR I-7725, ECJ
von Colson v Land Nordrhein-Westfalen (Case 14/83) [1984] ECR 1891, ECJ
Wall AG v Stadt Frankfurt am Main (Case C-91/08) [2010] ECR I-2815, ECJ
Williams v Lishman, Sidwell, Campbell & Price Ltd [2010] EWCA Civ 418; [2010] PNLR 487, CA

APPEAL from Mann J

By a claim form dated 27 August 2009 the claimant, SITA UK Ltd, issued proceedings against the defendant, the Greater Manchester Waste Disposal Authority, alleging that, in relation to the contract for the disposal of waste for which the defendant had invited tenders, public procurement rules had been breached. The defendant applied for the claim to be struck out on the ground that it had been commenced outside the limitation period in regulation 32(4)(b) of the Public Services Contracts Regulations 1993 and on 29 March 2010 Mann J struck out the claim.

By an appellant's notice filed on 19 April 2010, and with the permission of the judge, the claimant appealed on the grounds, inter alia, that the judge had erred: (1) in holding that time could begin to run when the claimant knew of facts which appeared to indicate that a breach of the public procurement rules might have occurred but which did not in themselves constitute an actionable claim; (2) in his assessment of the standard of knowledge required for time to begin to run against the claimant; (3) in holding that the claimant had sufficient knowledge for time to begin to run in circumstances where the defendant continued to assert that no breach of its obligations under the 1993 Regulations had occurred; (4) in holding that time could begin to run before the claimant knew or ought to have known that any harm had been suffered; and (5) in appearing to hold that a claim based on one breach of the 1993 Regulations could be struck out on the basis that the claimant ought to have known of a different breach of the 1993 Regulations more than three months before the issue of proceedings.

The facts are stated in the judgment of Elias LJ.

Michael Bowsher QC, *Jennifer Skilbeck* and *Philip Woolfe* (instructed by *Legal Business Support, SITA UK Ltd, Maidenhead*) for the claimant.

Dinah Rose QC, *Brian Kennelly* and *Tom Richards* (instructed by *S J Berwin LLP*) for the defendant.

The court took time for consideration.

24 February 2011. The following judgments were handed down.

ELIAS LJ

1 SITA UK Ltd ("SITA"), the claimant, tendered for a contract with the Greater Manchester Waste Disposal Authority ("GMWDA"). It was an extremely large contract, worth around £4 billion and running for 25 years. SITA was not awarded the contract. On 27 August 2009 it issued proceedings against the GMWDA for breach of various infringements of public procurement law. GMWDA applied for the case to be struck out on the grounds that it had been commenced outside the relevant limitation period. The case came before Mann J who upheld the application and made an order striking out the claim. SITA now appeals against that decision.

The relevant law

2 Before considering the facts, I will set out the relevant legal context.

3 Various directives have been passed which are designed to harmonise the procedures for awarding public contracts across Europe to ensure open and transparent competition without discrimination, and to secure effective remedies.

4 The directive directly in issue in this case is Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L359, p 33). The object of this Directive is to guarantee the existence of effective remedies for infringement of European Union ("EU") law in the public procurement field. Article 1(1) of the Directive (as substituted by article 41 of Council Directive 92/50/EEC of 18 June 1992 (OJ 1992 L209, p 1)) states in terms that member states must take measures to ensure that procurement decisions may be reviewed effectively "and, in particular, as rapidly as possible . . . on the grounds that such decisions have infringed Community law in the field of public procurement or the national rules implementing that law".

5 The Public Services Contracts Regulations 1993 are designed, inter alia, to give effect to Directive 89/665/EEC. They have since been replaced by the Public Contracts Regulations 2006 (SI 2006/5) but both parties have been willing to assume that, because of the time when the tender process began, the former were the applicable Regulations. In any event the 2006 Regulations are not materially different with respect to the matters in issue in this case.

6 The 1993 Regulations lay down various ways in which contracts may be awarded. In this case GMWDA followed what is termed a "negotiated procedure". This permits a preference to be expressed for one or more bidders, and for negotiations to take place with the preferred bidder or bidders after that choice has been made. Regulation 13(5) appears to envisage that provided a sufficient number of suitable bidders exist, at least three should be selected and negotiations should be carried on with them all. In fact in this case only one bidder, Viridor Laing (Greater Manchester) Ltd ("VL") was selected as the preferred bidder and SITA was told that it was the reserve bidder. We were told that the procedure adopted here is common practice, and in any event SITA does not complain about the choice of only one preferred bidder. The status of reserved bidder confers no special legal

status but it means that, if for one reason or another something goes wrong with the chosen bidder, negotiations can be carried on with the reserve.

7 There are different ways in which the preferred bidder may be selected, but in this case it was by choosing the most economically advantageous bid. This is not just the lowest bid; it involves identifying a range of factors and evaluating the value of the bid by reference to the criteria chosen. The criteria must be made public.

8 The basis of SITA's case is that, as a result of the further negotiations with VL following its selection as the preferred bidder, there was a fundamental change in the nature of VL's bid and this should have caused GMWDA to reopen negotiations with SITA. It is submitted that the principles of transparency and equality underlying the procedure required this at least once there was real doubt whether VL's bid remained the most economically advantageous. The failure to reopen the process and to allow SITA back into the frame meant that SITA lost the chance of obtaining this very important contract. Indeed, the pleading goes further and claims that had a proper re-evaluation taken place, SITA would have been awarded the contract. It has to be said that it is far from clear when the obligation arises to reopen the selection as a result of negotiations with the preferred bidder, but for the purposes of a striking out application it is at least arguable that there was a legal obligation on GMWDA, arising from the principles of transparency and equality, to reopen negotiations with SITA once there was real doubt whether VL's bid was the most economically advantageous.

The limitation period

9 The central regulation in issue in this appeal is regulation 32(4) of the Public Services Contracts Regulations 1993. This lays down certain conditions for commencing proceedings:

> "Proceedings under this regulation may not be brought unless— (a) the services provider bringing the proceedings has informed the contracting authority of the breach or apprehended breach of the duty owed to him pursuant to paragraph (1) . . . by the contracting authority and of his intention to bring proceedings under this regulation in respect of it; and (b) they are brought promptly and in any event within three months from the date when grounds for the bringing of the proceedings first arose unless the court considers that there is good reason for extending the period within which proceedings may be brought."

10 There are three features to note. First, a statutory letter before action needs to be sent before proceedings can be commenced. Article 1(3) of Directive 89/665 confers a discretion on member states to impose such a requirement and the United Kingdom has chosen to do so. Second, proceedings may be initiated even before a contract has been awarded and even where no breach has yet been committed, provided it is anticipated that it will be. Finally, there is a broad discretion to extend time where the primary limitation period is not satisfied if there is good reason to do so.

11 In *Uniplex (UK) Ltd v NHS Business Services Authority* (Case C-406/08) [2010] PTSR 1377, the Court of Justice of the European Union ("the Court of Justice") had to consider whether regulation 32(4)(b) complied with EU law. The court held that it did not, for two reasons. First, the rule infringed the EU doctrine of legal certainty which requires the rule to

A be sufficiently clear, precise and foreseeable. The regulation infringed this principle because by stipulating that proceedings had to be taken "promptly", the limitation period was placed at the discretion of the national court, and its effect was not predictable.

12 Second, regulation 32(4)(b) also contravened the principle of effectiveness because if time runs from the date when the cause of action arises, the three months may have run their course before the claimant even B knows of the facts which would enable him to pursue a claim. So he could be deprived of a right which he never knew existed. The question posed to the court asked in terms whether time should run from the date of the infringement or when the claimant knew or ought to have known of it. The court held that it was the latter, at para 35:

C "The answer to the first question accordingly is that article 1(1) of Directive 89/665 requires that the period for bringing proceedings seeking to have an infringement of the public procurement rules established or to obtain damages for the infringement of those rules should start to run from the date on which the claimant knew, or ought to have known, of that infringement."

D **13** The court considered that in the context of regulation 32(4)(b), the principle of effectiveness could be achieved by requiring a court in the exercise of its discretion to extend time so that it would not be deemed to run until the claimant knew or ought to have known that he had a claim that could be pursued, at para 48:

E "If the national provisions at issue do not lend themselves to such an interpretation, that court is bound, in exercise of the discretion conferred on it, to extend the period for bringing proceedings in such a manner as to ensure that the claimant has a period equivalent to that which it would have had if the period provided for by the applicable national legislation had run from the date on which the claimant knew, or ought to have known, of the infringement of the public procurement rules."

F **14** In effect this approach converts the discretion conferred by regulation 32(4)(b) into a duty where the reason for delay is lack of actual or constructive knowledge. There still remains the genuine discretion to extend time further if the court thinks there is good reason to do so.

15 The court then summarised the obligation on the national court in the following terms, at para 50:

G "50. . . . Directive 89/665 requires the national court, by virtue of the discretion conferred on it, to extend the limitation period in such a manner as to ensure that the claimant has a period equivalent to that which it would have had if the period provided for by the applicable national legislation had run from the date on which the claimant knew, or ought to have known, of the infringement of the public procurement rules. If the national provisions do not lend themselves to an H interpretation which accords with Directive 89/665, the national court must refrain from applying them, in order to apply [EU] law fully and to protect the rights conferred thereby on individuals."

16 It is pertinent to note that there was no adverse comment in the *Uniplex* case on the fact that the period is limited to three months.

Indeed the court emphasised the importance in cases of this kind of proceedings being initiated rapidly. The court's judgment therefore strikes a balance between the principle of rapidity and the well-established EU principles of certainty and effective remedy.

17 Mann J [2010] 2 CMLR 1283 sought to give effect to this analysis by the Court of Justice by disapplying the promptness requirement and exercising the discretion conferred by the regulation to secure that time would run from the date of actual or constructive knowledge, as the court had suggested. Mr Bowsher submitted before us, as he did below, that this was not a legitimate way to give effect to EU law; he claimed that it contravened the principle of certainty. The court should simply have disapplied the whole regulation and applied a different limitation period, namely that applicable to claims for breach of statutory duty.

18 I do not accept that argument. The judge's analysis was in my view wholly in line with EU law principles: it applies the three-month period adopted in the national rules and fixes the point from which time runs as the date of actual or constructive knowledge. It does not contravene the principle of certainty because there is a duty, and not merely a discretion, to apply that principle in all cases. Furthermore, this approach preserves the principle of rapidity which is a central feature of the Directive and would be seriously undermined if the claimant's argument was correct.

What degree of knowledge is required?

19 At the heart of this case lies the question: what degree of knowledge or constructive knowledge is required before time begins to run? The knowledge must relate to, and be sufficient to identify, the "grounds" for bringing proceedings, as it is expressed in regulation 32(4)(b) of the 1993 Regulations. Directive 89/665 does not use that word but instead article 1 speaks of taking proceedings rapidly against a decision involving an "infringement" of EU law. The concept of "grounds" in the 1993 Regulations must be read consistently with that concept of "infringement", as the judge below recognised, at para 127. So the question becomes: when is the information known or constructively known to the claimant sufficient to justify taking proceedings for an infringement of the public procurement requirements?

20 Some assistance in answering this question can be gleaned from the *Uniplex* decision itself. The Court of Justice said [2010] PTSR 1377, paras 30–31:

> "30. However, the fact that a candidate or tenderer learns that its application or tender has been rejected does not place it in a position effectively to bring proceedings. Such information is insufficient to enable the candidate or tenderer to establish whether there has been any illegality which might form the subject matter of proceedings.
>
> "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."

21 This reflects the approach of the Advocate General in that case who observed that time should run from the date when an unsuccessful bidder

had been told the "essential reasons" why their bid had failed: opinion, para 43. The Advocate General observed that this would normally be from the date when the tenderer was sent a summary of the relevant reasons—a requirement which Directive 89/665, following an amendment in 2007 (by Parliament and Council Directive 2007/66/EC of 11 December 2007 (OJ 2007 L335, p 31)), now requires.

22 Plainly, the Court of Justice is drawing a clear distinction between the reasons for a decision and the evidence necessary to sustain those reasons. It does not envisage that the prospective claimant should be able to wait until the underlying evidential basis for the reasons is made available. To put it in the language of the 1993 Regulations, there is a difference between the grounds of the complaint and the particulars of breach which are relied on to make good those grounds. Once the prospective claimant has sufficient knowledge to put him in a position to take an informed view as to whether there has been an infringement in the way the process has been conducted, and concludes that there has, time starts to run.

23 But what degree of knowledge is sufficient to provide that informed view that a legal claim lies? That depends upon how certain a case should be before a party is expected to take proceedings. Is a claimant expected to initiate proceedings once there is an arguable case, a reasonably arguable case, a strongly arguable case, or even a certain case? He may have knowledge sufficient to enable him to conclude that he has an arguable case but it may not be sufficient to enable him to take an informed view as to whether it is a strong case. So if the latter test is the right one, time will not begin to run until he acquires further knowledge which enables him to take an informed view about that. In my judgment the *Uniplex* case does not assist in determining that question. It is true that in answer to the first question it says that time runs from when the claimant "claimant knew, or ought to have known" of the infringement. But I do not believe it was thereby intending to state that the claimant is entitled to be certain that there is an infringement before taking proceedings. The issue the Court of Justice was considering was simply whether time ran from the date of the (alleged) infringement or the date of actual or constructive knowledge about it. The court was not addressing an argument about how strong the evidence of infringement has to be before time starts to run, and I do not think it engaged with that question.

24 In the domestic context this was a matter that was considered by the House of Lords in *Haward v Fawcetts* [2006] 1 WLR 682, which involved a claim for damages in a latent damage case where section 14A of the Limitation Act 1980 (as inserted by section 1 of the Latent Damage Act 1986) applied. Lord Nicholls of Birkenhead, in a characteristically succinct formulation, described the degree of knowledge required to bring a claim in the following way, at para 9:

> "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, such as submitting a claim to the proposed defendant, taking advice, and collecting evidence: 'Suspicion, particularly if it is vague and unsupported, will indeed not be enough, but reasonable belief will normally suffice' [see *Halford v Brookes* [1991] 1 WLR 428, 443]."

25 He added, at para 10: "it is not necessary for the claimant to have knowledge sufficient to enable his legal advisers to draft a fully and comprehensively particularised statement of claim". Lord Nicholls added that one should ask in broad terms whether the claimant had knowledge of the facts on which his complaint is based.

26 In these proceedings Mann J adopted a test which was arguably more favourable to the claimant. He formulated it thus, at para 130: "the standard ought to be a knowledge of the facts which apparently clearly indicate, though they need not absolutely prove, an infringement."

27 This would appear to be a little stricter than that which would suffice for embarking on the preliminaries, to use Lord Nicholls's words. Ms Rose formulated the test in terms of a claimant having "enough information to have reasonable grounds for belief in the essential facts constituting the alleged infringement". That is closer to Lord Nicholls's test, but as I understood it she did not cavil with the judge's formulation. Indeed, she recognised that given the short time limit for bringing this claim, a slightly more generous test could properly be adopted in the claimant's favour than that formulated by Lord Nicholls.

28 Mr Bowsher submitted that the test should be whether the claimant knew "facts which, if pleaded and proved at trial, would amount to a breach of the 1993 Regulations". I do not consider that this is materially different to the test adopted by the judge below, although Mr Bowsher appeared to suggest that it was. He was contending that a prospective claimant must have a greater degree of particularity than was suggested by Mann J. Indeed, in oral submissions, he went so far as to suggest that the test should be whether there was a "real likelihood of success".

29 In support of that analysis he pointed to the Court of Justice's judgment in the *Uniplex* case, para 31, set out at para 20 above, where the court observed that the claimant must have information on which he could reach an informed view as to whether there was an infringement but added: "and as to the appropriateness of bringing proceedings". He suggested that this was a distinct and separate requirement which would be satisfied only where there was a real likelihood of success. I do not agree: it is plain from the Court of Justice's answer in para 35 (reproduced at para 12 above) to the question posed to it that this was not intended to be a distinct element in the test. Deciding what steps are appropriate is simply part and parcel of taking an informed view of the case.

30 I have no doubt that this formulation that time should not run until the claimant knows that he has a real likelihood of success puts the test too high, and there is no authority supporting it. It appears to be a complaint that knowledge of facts which, to use the judge's words, clearly indicate an infringement will not be enough to set time running. I agree with Ms Rose that this analysis confuses the detailed facts which might be deployed in support of the claim with the essential facts sufficient to constitute a cause of action. Mr Bowsher's approach would undermine the principle of rapidity which lies at the core of these provisions.

31 In the circumstances I propose to adopt the test applied by the judge below which is not in my view unfair to the claimant and is consistent with the *Uniplex* case approach.

Knowledge and the statutory letter

32 Ms Rose asserted that the test would necessarily be satisfied if the proposed claimant had enough material to issue a statutory letter before action, such as is required by regulation 32(4)(a) of the 1993 Regulations. Mr Bowsher disputed that this was necessarily so. I accept that it may not be if the letter which informs the public authority of the breach and threatens proceedings is not stating the writer's genuine belief but is deliberately exaggerating his perception of the facts, alleging breach where it has no proper grounds for suspecting that there may not be one. Mr Bowsher came close to making the submission that this was the position here, but the case was not put before the judge in that way. Indeed, the judge stated in terms that it had not been suggested that the letters were not genuine.

33 Even where the letter is genuine, it is logically possible for the claimant to have adopted the wrong test for determining whether there was enough material to justify alleging that there was a breach and accordingly mistakenly to have asserted that there was in the statutory letter. Time does not run because a claimant mistakenly thinks that it does. Again, however, that has not been asserted here. On any view, a claimant who issues a statutory letter intending it to be a genuine statement of his belief that there has been a breach of the Regulations and that he is proposing to commence proceedings, will find it difficult to deny that he had sufficient knowledge to start time running, at least as regards the breach or breaches identified in the letter.

Further refinements of the knowledge test

34 Mr Bowsher suggested three further refinements of the knowledge requirement.

35 First, he submitted that time would not begin to run until the claimant had knowledge not merely of an infringement of the rules but also that he has suffered damage. Ms Rose submitted that this was contrary to the views of the Advocate General in para 50 of her opinion in the *Uniplex* case [2010] PTSR 1377, but Mr Bowsher suggested that her original draft may have been mistranslated. Mr Bowsher accepted, however, that it is not necessary to resolve this question because it does not arise in this case. The reason is that the focus of his claim is that SITA should have been allowed back into the bidding process because there was a realistic chance that its tender may be the most economically advantageous one. It therefore suffered damage at that point, namely the loss of the chance to secure the contract. So on the pleaded case infringement and damage are inextricably linked. In view of the fact that it is not a live issue, I do not intend to try to resolve it.

36 Second, he submitted that time will not run if the public authority is in breach of its duty of transparency and conceals information from the tenderer. Reliance is placed on the decision of the Court of Justice in *Lämmerzahl GmbH v Freie Hansestadt Bremen* (Case C-241/06) [2007] ECR I-8415. In that case one of the difficulties facing the contractor was the lack of knowledge of the value of the contract and the failure by the public authority to respond to repeated requests for relevant information. The court concluded, at para 55:

"A contract notice lacking any information as to the estimated value of the contract, followed by evasive conduct by the contracting authority in response to the questions of a potential tenderer such as that at issue in the main proceedings, must be considered, in view of the existence of a limitation period, as rendering excessively difficult the exercise by the tenderer concerned of the rights conferred on him by Community law . . ."

Likewise, it is submitted that here time did not begin to run because of evasive conduct by the GMWDA.

37 Ms Rose submits that this is a misreading of the decision. The case is concerned only with the principle of effectiveness, as the reference to "making excessively difficult the exercise of the rights" makes clear. If by withholding information the tenderer is prevented from acquiring knowledge of information that would otherwise have enabled a claim to be advanced, time should not be allowed to run against him until that information is available. But Ms Rose submits that the principle has no application where the tenderer has sufficient information to commence proceedings.

38 I agree with that analysis. Further, it would be inconsistent with the principle of rapidity to punish a public authority which is in breach of its transparency obligations by freezing time for limitation purposes until the authority is in full compliance. Accordingly, I reject this submission.

39 The third qualification relates to the question whether, even if SITA had sufficient information to bring proceedings for breach of the duty, it could rely on further alleged breaches of the same duty to allow time to start running again from the date of knowledge of each breach. It will be easier to understand the implications of this question with reference to the material facts of the case, so I shall defer consideration of this issue until later in this judgment.

The test for striking out

40 The limitation defence was raised by GMWDA in a striking out action. Mann J considered that the test to be applied, in the light of authorities such as *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1 and *Swain v Hillman* [2001] 1 All ER 91, was [2010] 2 CMLR 1283, para 16:

"a claim should not be struck out unless it can be demonstrated sufficiently clearly that it is bound to fail as a matter of law and/or fact, and that I should not determine the serious live issue of fact which requires oral evidence, or which requires a full scrutiny that a trial will bring to bear."

And a little later he said, at para 18:

"The real question for me is whether it is clear enough, at this stage, that the claim is bound to fail on limitation grounds, and that a trial (or a fuller hearing of a preliminary issue) would not change that situation. Any doubt about it would have to be resolved in favour of the claimant. When I make any determination in this matter whether of fact law or discretion, I should be taken to be doing so on the footing that the point

A has been clearly established, and that the same result would clearly be reached at trial."

41 Mr Bowsher does not criticise this formulation of the test, although he does submit that the judge wrongly applied it. It is the approach I will adopt in this appeal; any doubts as to what was known to the claimant should be resolved in its favour.

B

The material facts

42 The facts are very fully dealt with by the judge below. I am going to sketch in outline only the material facts sufficient to understand the appeal.

43 GMWDA invited expressions of interest in a contract to design, build, finance and operate waste facilities on 5 February 2005. Their C criterion for selection was, as I have indicated, to select as the preferred bidder the most economically advantageous tender, as opposed to adopting the lowest price criterion. Both SITA and the successful bidder, VL, were invited to put in their best and final offers. Bids could be put on two bases, depending on whether or not they undertook to dispose of refuse-derived fuel. In addition, they could each put in varied bids.

44 On 26 January 2007 GMWDA announced in a press release that D VL was the preferred bidder. It stated that the bid was worth about £3 billion and involved over £300m investment in the infrastructure. SITA then obtained certain feedback from GMWDA. First, a letter was sent on 26 January 2007 giving certain details of the bids. A table was provided showing the prescribed criteria adopted by GMWDA and the marks allocated to each of the criteria. It demonstrated that SITA's best bid was 63 E out of 100 whereas VL's equivalent was 70.

45 At a subsequent debriefing meeting SITA was told that the VL bid was in fact in excess of £3 billion and that the reason that SITA scored lower than VL was a combination of issues on technical and service quality, and funding and commercial criteria. GMWDA then pursued its negotiations with VL. One particular change was that in the initial proposal it had been anticipated that refuse-derived fuel would be disposed of at a site at F Bredbury. However, the bid also contained an uncosted alternative proposal to dispose of it at a site at Runcorn run by a chemical company called Ineos Chlor.

46 In June 2007 GMWDA resolved to pursue this alternative proposal and they released a press statement confirming that this was what they intended to do. That stated that a £320m investment in the infrastructure G would be necessary and that VL, as preferred bidder, was part way through consultations on the provision of these new facilities. On 2 July GMWDA wrote to SITA enclosing this press release and stating that it was continuing to produce and pursue an integrated solution with VL.

47 The following day SITA indicated that it could provide a reduced bid and would revisit its original offer if GMWDA wished.

48 In December 2007 Ernst & Young carried out a re-evaluation of the H financial and commercial aspects of VL's bid as it stood at that time following the further negotiations, and they compared those aspects with the corresponding aspects of the original SITA bid. This re-evaluation was not known to or seen by SITA at the time, and indeed it was not disclosed until July 2009. SITA put considerable weight on this document in its

submissions. The report demonstrated that with respect to VL's bid there had been a significant increase in costs and adjustments in the financial and commercial scoring, and an indication that SITA would now on the marks alone be the preferred bidder. However, it was noted that the comparison between the two companies was not truly equivalent because the SITA bid had not been updated and there were various cost increases which, in the writer's view, would have compelled its bid to be higher too. The conclusion of Ernst & Young was that it was appropriate for GMWDA to continue negotiations with VL and not to reopen negotiations with SITA so that is what GMWDA resolved to do. SITA say that that was a legal error.

49 Negotiations therefore continued with VL and it was agreed that a contract would be signed in April 2008. A short press release to that effect was released on 11 April; at that stage it was envisaged that the contract would be signed on 29 April, but in fact there were further delays caused in part at least by the credit crisis and the tender was not finally awarded, and the contract signed, until April 2009.

50 Having resolved to enter into the contract in April 2008, the GMWDA was obliged to issue what is known as an "*Alcatel* notice", which is a requirement imposed on public authorities pursuant to a Court of Justice decision of that name: *Alcatel Austria AG v Bundesministerium für Wissenschaft und Verkehr* (Case C-81/98) [1999] ECR I-7671. There has to be an opportunity for a review of a contracting authority's decision to contract before the actual contract is entered into, and notice of an intention to contract must be sent to any relevant unsuccessful bidders. SITA fell into that category in this case. On receipt of the letter any unsuccessful bidder then has an opportunity to challenge the proposal before the contract is entered into.

51 That notice was sent on 18 April 2008. It provided information confirming the original scores of 70 for VL as opposed to SITA's 63 and did not mention the updated re-evaluation carried out by Ernst & Young. On the same day SITA sent what they described as a "formal notice" requesting reasons why SITA's bid was unsuccessful and asking for information about VL's bid "as it *now* stands" (emphasis in the original). They set out a series of questions, including a request that GMWDA provide information about changes in the project documentation which might have an impact on price, of the allocation of risks, and the risk profile of the project generally. They also specifically asked for VL's score at the time when the decision to award the contract had been taken.

52 GMWDA gave its response by a letter dated 9 May 2008. It enclosed the previous letter of 26 January 2007 (referred to in para 44 above) and reiterated in substance what that letter said and also what SITA been told in the original debrief meeting. It then provided some further information which it said it was providing on a purely voluntary basis. The information which it did provide included the following:

> "Both [VL] and [SITA] submitted in their BaFOs [Best and Final Offers] alternative facilities as back-up for the EfW [Energy Recovery from Waste] element of the project. [VL] offered a combined heat and power facility located at the Ineos Chlor site at Runcorn. At the request of the GMWDA, [VL] were invited to develop this solution further in the course of the negotiations following their appointment as preferred bidder.

A To satisfy itself that [VL] should remain the preferred bidder based upon the Runcorn facility being the EfW facility for the project, the GMWDA re-evaluated the [VL] bid once the solution had been developed. The same evaluation criteria, weightings and methodology were applied as had been applied at ITT [Invitation to Tender] and BaFO. On the basis of this the preferred bidder decision was not undermined on the basis of this, B the GMWDA resolved at its meeting on 29 June 2007 to proceed with the Runcorn facility as its EfW facility."

53 GMWDA also indicated that there was certain information, such as changes to the project documentation, which it was not prepared to disclose at that stage at least because it would prejudice legitimate commercial interests.

C **54** On 19 November 2008—so still before the contract was entered into in April 2009—SITA wrote a letter to GMWDA reiterating its commitment and indicated a willingness to formulate "robust and deliverable proposals in a very short time scale" should GMWDA be interested.

55 The next material document was the press release following the signing of the contract on 8 April 2009. This made patently clear that the bid finally accepted departed in a significant number of ways from the D contract originally envisaged and on which the evaluation of the competing tenders had been made. The press release indicated that the contract with VL would trigger a £640m construction programme, that it would increase VL's work force by 116 staff, and that the contract was worth £3·8 billion to VL. This was some £500m more expensive than SITA's bid, involved more staff than SITA were proposing to employ, and the £640m construction E programme was much higher than the sum which SITA had committed in its contract.

56 GMWDA then wrote to SITA on 16 April confirming that it would place the agreement, with appropriate redactions, on its website in due course. There were then three letters between April and early June from SITA to GMWDA, which lie at the heart of this appeal.

F **57** On 21 April 2009 SITA wrote to GMWDA asking for a copy of the contract. It stated in terms that bearing in mind a number of features, there was a "prima facie" case to answer by GMWDA with respect to its compliance with its legal obligations under the procurement regulations. The features included the over two years of negotiations, the additional capital expenditure, the additional £500m cost to the taxpayer, the G additional 85 employees, and market reports and rumours indicating the transfer of risk factor to GMWDA during the negotiations. It sought an explanation of the change in the project documentation and indicated that it was reserving its right to claim damages for loss and opportunity on future profits and wasted bid costs. I will call this letter the "prima facie case" letter.

58 GMWDA responded on 18 May, denying that it had acted unfairly. H It declined to participate in what it termed a "fishing expedition" and assured SITA that the appropriate processes had been strictly complied with. It told SITA that the tenders had been objectively assessed and that the relative scoring had been monitored to ensure fairness as the matters were evolving. It added that the credit crisis had caused the delays.

59 On 27 May 2009 SITA wrote a further letter, which later correspondence had shown was intended to be the statutory letter before action. I will call this the "first statutory letter". The letter has been set out in detail in the judgment of Mann J below [2010] 2 CMLR 1283, para 99 because it is the most important document in this case. I will not reiterate all the detail here. Suffice it to say that it begins by asserting that GMWDA had "breached its legal obligations to SITA under procurement law". It observed the changes in the overall cost, the cost of capital works, the head count; and said that "these raise obvious questions as to why the SITA bid was not reconsidered". It focused on the phrase used by GMWDA in its letter, namely that the negotiations had "evolved and progressed" and to the fact that as a result GMWDA had stated that "financing issues then arose" and submitted that this amounted to "a strong inference of renegotiation of the contract terms . . . in clear breach of GMWDA's breach of duties (including fairness to unsuccessful bidders)". It asserted that SITA should have been offered the contract if VL were unable to confirm their funding arrangements, or at least further negotiations should be commenced to establish which bid was now the most economically advantageous. It criticised GMWDA for assuming that in the changed economic circumstances SITA could not provide a tender that offered better value for money than VL. It asserted that its own bid was more robust than VL's and could better withstand worsening economic conditions. It also alleged that any readjustment of risk would amount to a material change in the specifications, constituting a further breach of the regulations.

60 The letter then continues:

> "In the present case, the [private finance initiative] contract that has been entered into is clearly *not* the contract in respect of which SITA was debriefed in January 2007. We were aware of certain changes relating to the construction works to be provided by [VL] which prompted our letter of 16 April 2008. This letter is not concerned with those changes, but the changes we now learn of through the press release of 8 April 2009, which we believe required the authority to carry out a further debrief. Accordingly, by way of a further breach, GMWDA has unlawfully entered into a 'new' contract with VL without providing SITA with the necessary debrief and opportunity for challenge under the 2006 Regulations."

61 The letter then stated that since SITA had been assured that there was no change in the ranking of the bids, it assumed it had suffered no loss and no risk of loss, and emphasised that GMWDA had not provided the relevant information to enable SITA to determine whether this was accurate or not.

62 Then the letter says:

> "In the circumstances, if GMWDA continues to refuse further information, SITA will have no choice but to bring proceedings on the basis of the information so far available; to seek from the court an order that further information be supplied, to apply for an order that the contract be set aside, alternatively that no further steps be taken to implement the contract, pending further resolution of the matters."

A **63** SITA concludes the letter with a section entitled "Summary of breaches", in which it identifies what it considers to be breaches of the procurement provisions. This includes wrongly allowing VL to improve its terms, and failing to reject VL's bid when it was unable to adhere to its original offer, and refusing to offer the contract to SITA or give it an opportunity to rebid, and failing to open renegotiations with both parties. It insisted upon the letter being provided within five working days "as SITA does not want to prejudice the undoubted grounds it has for legal challenge".

B

64 GMWDA replied in a long letter on 3 June 2009. It noted that the proposals in relation to the Runcorn site had been known to SITA since at least 9 May 2008. It stated that there had been no change to the technical specifications, and it asserted that it had properly carried out its obligations. It did not, however, add any further information to that which SITA already had.

C

65 SITA's response was another lengthy letter on 12 June, the "second statutory letter". It concluded by asserting that GMWDA was:

> "in breach of its obligations under the applicable procurement regulations . . . and in particular, the underlying obligations of equal treatment and transparency, in proposing to contract with VL on a basis which was the subject of the procurement stage when the award was made in April 2007. This letter is to be treated as a further formal written notice of SITA's intention to bring proceedings under both of these sets of regulations in respect of those breaches."

D

66 It went on to ask for further information so that legal proceedings would: "go forward only on a focused basis".

E

67 There were further letters from GMWDA, the most material ones being on 3 July and 17 July. The 3 July letter contained a lot more information than SITA had previously been given, and on 17 July SITA were told in terms for the first time of the existence of Ernst & Young's report.

68 The claim was then finally lodged on 27 August 2009 and particulars followed on 11 September.

F

The pleadings

69 It is agreed that it is necessary to focus on the original particulars of claim, although they have now been amended in various ways. They set out in some detail the relevant background and identify three distinct breaches.

G

70 The first is that GMWDA failed to provide the debrief information required and/or failed to act with necessary transparency. It is accepted that some of these breaches were known, in particular that the relevant "*Alcatel*" letter had not been provided when it ought. As for the other matters, they identified information which it was alleged ought to have been provided but was not. Mr Bowsher accepted that no loss flowed from these failings on their own. Their significance is to highlight what he says is the nature of the information which was required before SITA could take an informed decision about whether to take legal proceedings.

H

71 The second ground is that GMWDA failed to take the necessary steps to identify the most economically advantageous tender. This breach is

identified in two paragraphs of the pleadings, paras 73 and 74, which lie at the heart of this case and therefore I shall set them out: A

> "73. It is unknown on what precise basis, whether relative scores, or a qualitative review, GMWDA made its decision to proceed with VL at the various stages of the post-BaFO negotiations, including at the point at which a contract was entered into in April 2009. The information available to SITA regarding these matters is as follows: (a) The press release of 8 April 2009 showed very substantial increases in VL's costs. (b) In December 2007 Ernst & Young concluded that SITA's original BaFO bid had a similar score to VL's updated bid. The assumptions on which that conclusion were based have not been disclosed. (c) The January 2007 assessment showed that SITA's best bid was VB1 [Variant Bid 1] and that VL's best bid was MSB1 [Mandatory Standard Bid 1]. That assessment, on which SITA was six percentage points behind, has formed the basis of subsequent reassessments. Subsequent comparisons have been based on fundamentally different assumptions, namely a comparison between SITA's MSB1 (and not its best bid) and VL's MSB1, although based on a different site with different costs than the contract entered into. (d) Assumptions have been made as to the likely increase in SITA's bid, had it been asked to resubmit a bid. Those assumptions are without foundation: (i) they take no account of the differences between VL and SITA's position in the market, for example as regards access to finance, parent company support, and relative experience of waste contracts; (ii) they take no account of the fundamental purpose of the Regulations which is to enable competition—SITA would not necessarily have expected GMWDA to assume all/any of the increases in any costs that would have been incurred; (iii) they take no account of the greater margins identified by GMWDA in SITA's bid, and the consequent scope for absorbing additional costs; (iv) they take no account of the unreliability of the VL bid as evidenced by its material under-costing of its capital costs in its BaFO bid; (v) they take no account of SITA's offers to re-enter the competition. Those offers were made by SITA without knowledge of the material increases in VL's costs at the time the offers were made. GMWDA should have realised that SITA would only make such an offer, involving further expense, if they believed they could supply an offer that might be competitive with VL, even without knowledge of the increases in price.
>
> "74. Accordingly, on the information available, GMWDA wrongly failed to offer the contract to SITA when the VL costs increased and/or wrongly failed to invite SITA to offer a further bid. Further, GMWDA has no basis upon which to determine or proceed on the basis that VL offered 'the most economically advantageous tender' either at the times when GMWDA directed their minds to the matter during the procurement process and/or when they entered into a contract with VL and/or if SITA had been able to supply a further bid."

B C D E F G H

72 The third breach is that GMWDA failed to treat SITA and VL equally. Again, Mr Bowsher accepts that this is in substance an alternative way of putting the second breach; it relies upon the same facts. If GMWDA did not reopen negotiations with SITA when it should have done, this would also constitute a failure to treat them equally.

A *The hearing before Mann J*

73 The case advanced by Mr Bowsher before Mann J was essentially the same as that now being advanced. The principal submission was that SITA did not have enough knowledge to pursue its claim until at the earliest 3 July 2009. Although it had some information which put it on notice that there may have been a breach, it was far from conclusive and SITA, it is said, B was justified in seeking further explanations before committing itself to taking legal proceedings. GMWDA argued that whatever information appeared in July 2009, SITA had sufficient information by April of that year demonstrating that it had a cause of action, as the three letters—the "prima facie" and the two statutory letters—amply confirmed.

74 In the alternative, Mr Bowsher submitted that even if SITA did know C enough to be able to bring proceedings for breach earlier than it did, it should in any event be permitted to take action with respect to the particular breaches it only discovered in July 2009 which are identified in para 73(b) and (c) of its pleading, namely the information about the Ernst & Young re-evaluation which on any view demonstrated how close the bids had become following the negotiations, and the fact that the site for the refuse-driven waste changed from Bredbury to Runcorn, thereby altering the D specification of the contract. Finally, SITA argued that, even if it was out of time, it was reasonable to extend time under the discretion conferred by regulation 32(4) of the 1993 Regulations.

75 The judge rejected all of these submissions. He rightly held that the focus has to be on what SITA knew in April 2009 and not on what it did not know, although the latter was potentially relevant to the question whether to E extend time in his discretion. The judge rejected the contention that SITA knew "pitifully little" at that stage. He held that, even accepting that it did not know the facts identified in para 73(b) and (c), the three letters, and the facts they disclosed which were plainly known to SITA, established both that SITA knew enough to initiate proceedings at that stage (or very shortly thereafter when it could consider the information in the April press release about the creation of the contract), and that it was making unambiguous F assertions to that effect.

76 As to the alternative ground, the judge held that once SITA knew enough to pursue proceedings, it was irrelevant that it was ignorant of other breaches of the same duty, even where these demonstrated that the duty had been infringed earlier than SITA had appreciated. The judge held that it would be anomalous and inconsistent with the principle of rapidity, at G para 160:

> "to allow [a claimant] an extended limitation period because he discovers later that his cause of action arose earlier than he had originally thought when he had enough to sue as a result of his original discovery".

77 Finally, he reviewed various factors which SITA suggested ought to H cause him to exercise his discretion to extend time in its favour, including the allegation that GMWDA had failed to comply with its duty of transparency and had concealed information from SITA, but concluded that any extension should be in exceptional circumstances only, and that the factors relied upon did not bring the case within that category.

The grounds of appeal

78 SITA appeals that judgment. It seeks to challenge not only the judge's conclusions that the claims were out of time, but also the judge's refusal to exercise his discretion in its favour to extend time. No submissions were pursued orally with respect to the discretion ground. A short passage in the skeleton argument contended that the judge had failed properly to exercise his discretion and had not given proper weight to the fact that GMWDA had failed to comply with its duties of disclosure and transparency. However, the judge fully addressed and considered that specific allegation, along with others; the weight to be given to it is a matter for him, subject to the decision not being perverse or plainly against the weight of evidence. No other misdirection has been suggested, and the decision could not in my judgment be said to be plainly wrong or perverse. I would therefore reject this aspect of the appeal.

Did SITA know enough?

79 The case advanced by Mr Bowsher before Mann J was essentially the same as that now being advanced, although greater focus was given to the Ernst & Young report. The principal submission was that SITA did not have enough knowledge to pursue their claim until at the earliest 3 July 2009. Although they had some information which put them on notice that there may have been a breach, it was far from conclusive and SITA, it is alleged, was justified in seeking further explanations before committing itself to taking legal proceedings.

80 Mr Bowsher also repeated the submission that even if SITA did know enough to be able to bring proceedings for breach earlier than it did, it should in any event be permitted to take action with respect to the particular breaches it only discovered in July 2009. This included in particular the information about the Ernst & Young re-evaluation which on any view demonstrated how close the bids had become following the negotiations, and the fact that the site for the refuse-driven waste changed from Bredbury to Runcorn thereby altering the specification of the contract.

81 I have no doubt that SITA's primary case fails, essentially for the reasons given by the judge. SITA was aware that the price of the contract had increased very significantly; that the capital costs had also risen; that the number of employees had risen; and that in all these respects its own tender came in lower than VL's. It also knew, because the letter of 9 May 2008 made it abundantly clear (see para 53 above), that the facility being developed at Runcorn with Ineos Chlor involved a significant change in its original primary proposal for dealing with refuse derived fuel, resulting in a far greater capital expenditure than had been envisaged in its original proposal.

82 Mr Bowsher's principal submission was that as significant as these factors were, of themselves they were insufficient to provide the necessary evidence of breach of the transparency and equality duties. Both the change in price and indeed the increase in the capital expenditure would not have necessarily caused the evaluation of VL's bid to alter to any significant extent. VL's bid might still have been more economically advantageous than SITA's tender. Without some knowledge of how the original criteria were affected by these changes, no clear evidence of breach emerged. The most

important information which decisively demonstrated the existence of a cause of action was the Ernst & Young report. Information about this was not made available until July 17. That proved that the bids were on any view much closer following the further negotiations with VL than they had been, and justified proceedings being taken.

83 The principal difficulty with this submission is that it does not sit happily with the three letters to which I have referred. The very act of sending two statutory letters, once it is accepted that they were genuinely expressing SITA's views, demonstrates an intention to bring proceedings for what was in terms alleged to be a breach of a legal duty. And the first "prima facie" breach letter was to similar effect. The tone of these letters is wholly inconsistent with the assertion that SITA was unsure of the situation and was simply asserting that more information should be given. That was indeed part of its complaint, but that does not fairly or accurately summarise the thrust of this correspondence. I agree with Mann J who said with respect to the 27 May letter, at para 138: "The thrust [of the letter] is an assertion of breach by a party who has a keen understanding of the position and who is offering the other side the chance to head off proceedings which would otherwise ensue."

84 That is the thrust of the other two letters also. It is, moreover, pertinent to note that in a later letter of 24 June, SITA in terms stated that unless further material was immediately forthcoming, it would instigate proceedings by 30 June to obtain that information and would thereafter take action to recover damages should the information reveal a breach of the 1993 Regulations: "as seems to be the case".

85 I have no doubt that SITA was aware that it had a prospective claim; it was right to say that on the material it had there was a "clear indication", to use the judge's language, that GMWDA was in breach of its procurement obligations. I do not accept that the further information referred to in para 73(b) and (c) of the pleading materially altered the situation. These matters constituted further evidence of the same breach which could be deployed in making good the claim, but in my judgment these were merely particulars of an existing claim which reinforced the view that a cause of action existed. They were not necessary building blocks in establishing that cause of action.

86 In fact, I have doubts whether it is accurate to say that the matters referred to in para 73(b) and (c) were unknown until July. That was plainly true of the Ernst & Young report, but I am far from satisfied that it was true of the information referred to in para 73(c). Mr Bowsher stated that the understanding of SITA was that the VL bid had always been evaluated on the basis of an integrated fuel use solution at Runcorn whereas in fact it only discovered in July 2009 that VL's original bid had been based on a solution at Bredbury. Given the letter of 9 May 2008 which had identified the Ineos Chlor solution as an alternative to the original proposal, it is difficult to see on what basis it was assumed that Runcorn was the location of the original site. But even assuming in SITA's favour—as I am willing to do for the purposes of these proceedings—that this was its understanding, it is difficult to see why the key feature should be the change in the geography of the site rather than the extra cost that the new proposal was generating. The judge was not willing to conclude without further evidence that the change in the capital cost should of itself have caused SITA to take the view that it should

be let back in to the tender exercise, but on any view it is part of the evidence, together with the other changes known to SITA, which would necessarily inform its assessment.

87 In addition, as Ms Rose points out, SITA has pleaded in para 73(d) of the pleadings that GMWDA had taken into account assumptions about its bid which were wrong and unjustified, with very little positive evidence to demonstrate that these assumptions had in fact been made. In that context SITA had no difficulty in pleading a case based on limited information.

88 I turn to the alternative basis, namely that even if SITA had enough knowledge to bring its claim sooner, it should have been allowed to pursue a case based on those breaches which did not emerge until July 2009. Ms Rose submits, relying on the decision of this court in *R (Risk Management Partners Ltd) v Brent London Borough Council* [2010] PTSR 349 that there is but one duty under these procurement regulations, namely to comply with the required procedure. Once a prospective claimant had sufficient evidence to establish a clear indication of breach, time began to run and no further information could ever be relevant, save with respect to the discretionary extension. (Ms Rose accepted that the position with anticipated breaches was different and constituted a separate cause of action. But that issue does not arise here.) Mr Bowsher submitted that this was a misreading of the *Brent* decision, and that time should run afresh from each breach. So SITA could still rely on the matters pleaded in para 73(b) and (c) even if it was too late to take proceedings with respect to the other breaches.

89 I do not think it necessary to resolve the question whether Ms Rose's submission was correct or not. This is because I am satisfied, as was the judge below, that time does not start afresh where what is being relied upon to start time running again is a further breach of the same duty, whether it in fact occurred before or after the breaches already known. The position may be different if a number of distinct duties can be spelt out of the procurement obligations; it may be said that time runs separately with respect to each duty. But Mr Bowsher properly did not contend that these further breaches could be said to relate to a different duty. They all went to the failure to reopen the bidding process. As I have said, in my judgment the matters being relied on as constituting the fresh breaches are simply further particulars of the infringement which could already be pursued. They do not constitute separate causes of action in their own right.

Disposal

90 It follows that, in my judgment, Mann J was correct in his analysis, and I would dismiss this appeal.

RIMER LJ

91 I have had the advantage of reading in draft the judgments of Elias and Arden LJJ. I too would dismiss the appeal and would do so for the reasoning of Elias LJ, with which I agree. In particular, I agree with Elias LJ's adoption of Mann J's test as to the degree of knowledge sufficient to provide an informed view as to whether there has been an infringement of the public procurement rules.

92 Arden LJ takes a different view as to the applicable test. She refers to the Court of Justice of the European Union's judgment in *Uniplex (UK) Ltd v NHS Business Services Authority* (Case C-406/08) [2010] PTSR 1377,

paras 30 and 31 as showing that the court's view was that time for limitation purposes runs from when the claimant has: "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".

93 I agree that it is from then that time begins to run. That is what the court said. Where I have more difficulty is in deriving from its language precisely what it meant. The court did not explain itself further, no doubt because the reference to it did not require it to do so. It left unexplained how well informed the informed view has to be. Arden LJ does not attempt to explain that either, favouring the view that paras 30 and 31 tell the national court all it needs to know in order to resolve a limitation issue that arises under the regulations.

94 In my view Elias LJ is correct in saying, at para 23, that the Court of Justice was not engaging with the question of how strong the evidence of an infringement has to be before time starts to run. It seems to me that, in those circumstances, it is legitimate for the national court to consider its own prior guidance on like questions of knowledge arising in a limitation context and to apply that guidance in arriving at a workable, practical, objective test that is consistent with the general guidance provided in the *Uniplex* case. To that end, Elias LJ has adopted Mann J's test, which sets the bar at a level which he regards as consistent with the *Uniplex* approach and as also not unfair to SITA. I agree with that approach.

ARDEN LJ

95 I am most grateful to Elias LJ for his illuminating judgment and agree with him that this appeal should be dismissed for the reasons he gives, save on one point, and that concerns the correct formulation of the test for knowledge following the judgment of the Court of Justice of the European Union in *Uniplex (UK) Ltd v NHS Business Services Authority* (Case C-406/08) [2010] PTSR 1377.

96 To recapitulate, in April 2009 (following the issue of a press release when GMWDA made its contract with VL), SITA became aware that the cost of VL's bid was considerably greater than that contained in its original tender. SITA's case is that it needed to know the relative scores in the light of the change of circumstances before it could know that its bid had in fact become the most economically advantageous bid and that it had a cause of action against GMWDA.

97 It is clear that the damages remedy given to the unsuccessful tenderer by Council Directive 89/665/EEC, implemented in the United Kingdom by the Public Services Contracts Regulations 1993 and subsequently the Public Contracts Regulations 2006, is given for the purpose of providing an incentive to public authorities to act in accordance with the obligations imposed pursuant to the Directive. The European Union legislature had to draw a balance between the public authority and the tenderer since the remedy could lead to unacceptable business uncertainty. No doubt for this reason, the period for bringing a claim is extremely short: it is only three months. In these circumstances the Court of Justice held that the tenderer is required to exercise his right at an earlier opportunity than he might have to do under domestic law for other purposes.

98 Constructive knowledge was not alleged in this case. What is said is that SITA knew enough to bring its claim.

99 In my judgment, the principles in the *Uniplex* case are highly condensed. They need to be considered not simply for what they say in terms but also for what is necessarily implied in them. In my judgment, it would be better so far as possible to use the words of the Court of Justice and not to substitute some other formula. Prior domestic case law is useful as showing the issues that have arisen in the field of latent damage and how they should be resolved, but we must be mindful that EU law is not necessarily the same.

100 In the *Uniplex* case, the Court of Justice decided to adopt a test of discoverability, not a test which would result in time running from the happening of an event of which the victim might not know.

101 The paragraphs of the judgment in the *Uniplex* case which I wish to emphasise are paras 30 and 31:

> "30. However, the fact that a candidate or tenderer learns that its application or tender has been rejected does not place it in a position effectively to bring proceedings. Such information is insufficient to enable the candidate or tenderer to establish whether there has been any illegality which might form the subject matter of proceedings.
>
> "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."

102 I accept that the question under reply by the Court of Justice only required the court to decide whether the three-month period began with the date of the date of the infringement or on the date when the claimant knew or ought to have known of the infringement, but it is clear that in paras 30 and 31, the Court of Justice moved to consider the degree of knowledge necessary to constitute knowledge for the purpose of starting the three-month period.

103 The conclusion that time only starts to run once the unsuccessful tenderer can, at para 31, "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" reflects a number of decisions that the Court of Justice must have taken with respect to the test of discoverability. The most obvious question that arises for consideration, given that the unsuccessful tenderer has such a small window of time in which to start proceedings and given that the factual basis of a claim may be complex, is what happens if the information which the unsuccessful tenderer has is incomplete? It seems to me that in effect the Court of Justice resolves the problem of gaps in knowledge by treating the existence of an informed view as sufficient to bridge this gap. Once that is reached, there is no further threshold test in terms of prospects of success or indeed any other reason to escape the consequence of knowledge, such as lack of resources or failure to realise the true position in law, that can be taken into account. From this analysis it must follow that it is irrelevant that the unsuccessful tenderer's evidence is incomplete. The unsuccessful tenderer has the requisite knowledge once he has sufficient information to enable him to reach an informed view as to the matters stated in para 31 of the judgment of the Court of Justice. Finally, the formulation provided by the Court of Justice,

involving an informed view as to the appropriateness of bringing proceedings, may well mean that knowledge of some trivial breach not justifying the start of proceedings would not be enough.

104 It follows from para 31 of the judgment of the Court of Justice that the unsuccessful tenderer need not know that it has suffered loss. It is sufficient that it knew enough with respect to harm or the risk of harm to justify the issue of proceedings. The Court of Justice does not use terms such as arguable case because it is laying down a rule for member states with different systems of procedure. It is to be noted that, under CPR r 22, a statement of case must bear a statement of truth, namely a statement that the party putting forward the claim *believes* the facts stated to be true.

105 A possible difficulty with the judge's formulation as it seems to me is that it is addressed to the situation where the evidence is not complete but this is only one of the reasons why it may be contended in any case that the unsuccessful tenderer's knowledge was insufficient. Miss Rose's test deals with gaps in knowledge as well as lack of evidence but it does not deal with the circumstances in which the commencement of proceedings may be inappropriate. I would anticipate that cases may arise in the future which are not covered by any of the three formulations considered by Elias LJ.

106 For these reasons I would not apply any of the tests put forward but would prefer so far as possible to adhere to the language of the Court of Justice. It follows that I am not putting forward any test of my own.

107 When in this case did SITA know enough to justify the issue of proceedings? SITA threatened to issue proceedings in its letter of 21 April 2009. That letter referred to there being a prima facie case for GMWDA to answer and in the final paragraph referred to loss which it was at risk of suffering. SITA cannot now resile from what it said then, or contend now that it was prevented from reaching an appropriate view to start time running while information to which it was entitled was being withheld by GMWDA.

108 Accordingly, I too would dismiss this appeal.

Appeal dismissed.

JEANETTE BURN, Barrister