

Neutral Citation Number: [2017] EWHC 1867 (TCC)

Case No: HT-2016-000201

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**TECHNOLOGY AND CONSTRUCTION COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 21/07/2017

**Before :**

**MRS JUSTICE JEFFORD**

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**Between :**

**PERINATAL INSTITUTE**

**- and -**

**HEALTHCARE QUALITY IMPROVEMENT PARTNERSHIP**

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**Miss Rebecca Haynes** (instructed by **My Business Counsel**) for the **Claimant**

**Mr Jason Coppel QC and Mr Joseph Barrett** (instructed by **Gardner Leader**) for the **Defendant**

Hearing date: 8<sup>th</sup> June 2017

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**Judgment Approved**

**MRS JUSTICE JEFFORD:**

1.

On this occasion, there were before the Court two applications: by the Claimant, the Perinatal Institute (“PI”), to amend the Claim Form and Particulars of Claim to add a Fresh Claim (“the Fresh Claim”) and by the Defendant, the Healthcare Quality Improvement Partnership (“HQIP”), to strike out the existing pleaded claim (“the Original Claim”). Given the urgency of some of the matters raised, I gave short oral reasons for my decision at the conclusion of the hearing and directions for the immediate future conduct of the action. I undertook to provide full written reasons and these are those reasons. On 27 June 2017, these were provided to the parties in draft for comments. I indicated that, as a matter of convenience, judgment would be handed down at the hearing of the Case Management Conference. Neither party has asked for judgment to be handed down any earlier.

**Background**

2.

The background to this matter is set out in my judgment on HQIP’s successful application in October 2016 to lift the automatic suspension on contract award under Regulation 95(1) of the Public Contracts Regulations 2015. I repeat what I said there in summary form only:

(i)

HQIP is an independent organisation established in 2008 to promote quality in healthcare and in particular to increase the impact of clinical audit on healthcare quality improvement.

(ii)

PI is a national not for profit company whose primary mission is to enhance the quality and safety of maternity care.

(iii)

HQIP was given the task by the Department of Health and the devolved governments of Scotland and Wales of commissioning a project to implement standardised mortality reviews across the NHS principally through training and the use of software to enable local and national collection and analysis of data. The purpose of this project was to reduce the level of perinatal deaths (encompassing still births and early neonatal deaths).

(iv)

An invitation to tender (“ITT”) was sent out on 29 March 2016 seeking an appropriate software tool to achieve these aims. It provided that the timetable for the procurement was that the contract award decision would be notified on 17 June 2016; the contract would be awarded on 28 June 2016; and the contract would commence on 1 July 2016 for a national roll out in March 2017. I note that, on this timetable, contract award was to be shortly after the decision and roll out within 9 months thereof.

(v)

PI submitted a tender as did a consortium led by Oxford University’s National Perinatal Epidemiology Unit (“NPEU”). NPEU’s bid was the winning bid.

(vi)

By a Claim Form issued on 27 July 2016 PI challenged that decision as a result of which the contract award was stayed. Thereafter, Particulars of Claim were served on 3 August 2016; the Defence was served on 30 August 2016 followed by a Reply; the application to lift the stay was issued on 21 September 2016 and was followed by a hearing on 5 October 2016. I handed down judgment on 26 October lifting the stay.

(vii)

A contract with NPEU was subsequently entered into on 21 December 2016.

### **The Original Claim**

3.

The Original Claim alleged, amongst other things, that the evaluation or preference of NPEU’s bid was unlawful or irrational in a number of respects. Central to this case was the express requirement in the ITT that the tool was to be able “to prompt for when and how to seek parents input into the review and when to communicate with parents about outcomes.” NPEU’s bid was said by HQIP to provide them with greater assurance than PI’s bid about obtaining patient consent “because of their plans to use s.251 approval to address patient confidentiality.”

4.

Section 251 of the National Health Service Act 2006 permits the Secretary of State to make regulations for processing patient information. Under the Health Service (Control of Patient Information) Regulations 2002 (which I understand were adopted under provisions subsequently consolidated in the 2006 Act) confidential patient information may be processed for specified types of

or aspects of medical research if that processing has been approved by the Health Research Authority (“HRA”). The HRA has established a Confidentiality Advisory Group (“CAG”) to advise it on applications for approval. In accordance with s. 251(4), regulations may not make provision requiring the processing of confidential patient information if it would be “reasonably practicable to achieve that purpose” in some other way. The HRA’s published policies reflect that in that the HRA and the CAG will consider whether it would be reasonably practicable to seek patient consent.

5.

As I summarised at paragraph 20 of my earlier judgment, PI’s key complaints were these:

(i)

that HQIP had misdirected itself as to the law relating to s.251 in that approval under the Regulations is not available where it is practicable to obtain patient consent;

(ii)

that HQIP had misdirected itself and/or erroneously or irrationally concluded that patient consent cannot be obtained in circumstances where its own specification and the duty of candour (in Regulation 20 of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014) necessarily renders patient consent a practicable option;

(iii)

that HQIP had, as a result, selected a bid which would not or was unlikely to gain approval under s. 251.

6.

That case was strongly disputed by HQIP both on the facts and on the law, HQIP arguing on the previous application that there was no serious issue to be tried. I rejected that particular submission. In doing so I said this:

“PI’s case cannot be said at this stage to be misconceived: the inference which it draws that the winning bid does not allow for patient input is tenable and the evidence to refute that inference is limited and does not give any detail as to NPEU’s bid. If the inference that PI draws is right, that would mean that a bid has been preferred that makes no provision for patient input and PI has at least an arguable case that to prefer such a bid is irrational.”

### **The Fresh Claim**

7.

There was plainly a delay in the progress of this project from what was contemplated in the ITT because of the stay and the proceedings in relation to it:

(i)

As I have said above, the contract was then entered into 2 months after my judgment was handed down.

(ii)

NPEU’s website states that the tool is currently being developed and will be piloted over the summer of 2017 with a roll out planned by the end of the year.

(iii)

No application for approval under s.251 has yet been made. In a statement from Mr Felton, of HQIP's solicitors, he says that the application will be submitted next month and that approval is expected in August/ early September.

8.

On this basis, PI infers that the contractual timetable has been varied to afford NPEU time to develop its tool and that the tool was never ready to implement in accordance with the ITT. As a result, PI also infers that the contract and/or specification has been amended in breach of Regulation 72 of the Public Contracts Regulations; indeed PI go further in inferring that it has been amended to reflect PI's tool. This is in essence what is relied upon as giving rise to the Fresh Claim.

9.

For the reasons I address below, PI says it did not and could not have become aware of anything of this nature until at earliest 13 March 2017.

10.

Since then PI has sought to amend the existing claim but has not issued fresh proceedings. PI argues that this is a convenient course to take because much of the background to the claim is already pleaded and amendment avoids significant duplication. One objection that might be taken to this course is that no cause of action in respect of the fresh claim could have arisen at the date of the issue of the Claim Form. In answer to that potential point, PI relies on the decision of Chief Master Marsh in *The Football Association Premier League Limited v O'Donovan and Barclays Bank* [2017] EWHC 152 (Ch). The claim related to alleged infringement of copyright in logos for the 2015/2016 football season. An application was made to amend to add claims relating to the following season which had not arisen at the time of issue. The Chief Master held that there was nothing in the CPR or general law that prevented the addition of such claims and that, as the CPR encourages parties to resolve all issues in one claim, the Court would lean in favour of adding claims rather than requiring the issue of a new claim where possible. One of the instances, however, where that was not possible was where there was a limitation defence.

11.

The principal ground then on which HQIP opposes this application is that the Fresh Claim is or is arguably time barred. HQIP says, therefore, that the Court should not allow the amendment but should leave the Claimant to decide whether to take its chances in issuing a fresh Claim Form in which proceedings HQIP would be able to raise its limitation defence. The Defendant's secondary ground of opposition is that the fresh claim is wholly without merit. It is convenient to take HQIP's arguments first.

### **The limitation period**

12.

Regulation 92 is headed "General time limits for starting proceedings". It provides as follows:

(1) This regulation limits the time within which proceedings may be started where the proceedings do not seek a declaration of ineffectiveness.

(2) Subject to paragraphs (3) and (5), such proceedings must be started within 30 days beginning with the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen.

.....

(4) Subject to paragraph (5), the Court may extend the time limits imposed by the regulation .... where the Court considers that there is a good reason for doing so.

(5) The court must not exercise its power under paragraph (4) so as to permit proceedings to be started more than 3 months after the date when the economic operator first knew or ought to have known that grounds for starting proceedings had arisen.

13.

In summary, therefore, and there was no issue about this, proceedings must be started within 30 days of the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen. That time limit is subject to extension at the discretion of the Court up to a maximum extension of 3 months.

**PI's case as to the date when it knew or ought to have known that grounds for starting proceedings had arisen**

14.

PI's case is that the earliest relevant date is 13 March 2017.

15.

As I have said, one of the issues that PI raised in relation to the successful bid was its reliance on s. 251 approval. Obtaining this approval involves an application to the HRA and consideration by the CAG. There was evidence that approval can be expected to take 3 months. PI says that it would have expected NPEU to make such an application in sufficient time: if no such application had been made by the end of January, then the pilot could not commence in March 2017, which was the intention stated by HQIP in its evidence on the earlier hearing.

16.

The CAG publishes the minutes of its meetings on its website. There was evidence before me that it does not do so until 6 weeks to 2 months after a meeting has taken place. PI's position, therefore, is that it did not and could not have known that it had grounds for starting further proceedings until it had seen the minutes up to the end of January (which I was told were the minutes from a meeting on 26 January 2017) and was able to see that no application for s.251 approval had been made. There is no evidence from PI as to how frequently they visit the website nor was any witness from PI able to say exactly when they were first aware of the relevant minutes.

17.

The reliance that PI placed on the minutes was evident on the face of the draft Amended Particulars of Claim. Paragraphs 59 and 60 are in the following terms:

"59. The Claimant has examined the minutes of the CAG meetings held since the date of the Defendant's application to lift the stay. The most recently published minutes are those of 26 January 2017. As of that date, no application has been made by NPEU for approval under s. 251 of the NHS Act 2006 and the Health Service (Control of Patient Information) Regulations 2002. Furthermore, as far as the Claimant is aware, there has been no published statement on the part of either the Defendant or NPEU that NPEU's tool is being or has been tested, implemented or rolled out.

60.

The Claimant has since by a letter dated 13 March 2017 sought information on the progress of the implementation of the contract. The Defendant has not provided a response. ...."

18.

There was evidence from Mr Gillespie, solicitor for PI, in a statement dated 19 May 2017, as follows:

(i)

based on the evidence at the previous hearing, PI expected the pilot phase of the project to start in March 2017.

(ii)

PI was not in a position to know that there was any delay in progress until it knew that no application for s.251 approval had been made by the end of January – an application would have had to have been made by this time for the pilot to commence in March.

(iii)

It was only when it became apparent that that had not happened that the Claimant was in a position to commence a fresh claim.

(iv)

That followed a letter from Mr Gillespie to HQIP's solicitors on 13 March 2017. That letter stated that, as far as PI and its solicitors were aware, no application had been submitted and it asked a number of questions about the application (such as whether it had been submitted and when it would be) requiring an answer by 15 March 2017.

19.

In a witness statement served the day before the hearing, Mr Gardosi of PI explained that the reason for the letter on 13 March 2017 was that “we would have expected the NPEU consortium to have obtained, or at the very least applied for, s.251 exemption by January 2017 if they were to be able to stick to the required project timetable.” He said that he did not believe that the minutes of the 26 January 2017 meeting were published until after 13 March 2017 but could not be certain of the date. He could not recall the exact date when he was able to access them on the CAG website but said “I believe it was some time between 13 March and 20 March 2017, after which preparations began to make the Amended Claim.” Those dates are broadly consistent with the fact that the minutes are not published online until 6 weeks to 2 months after the meeting.

20.

This is the basis on which PI argue that the earliest relevant date is 13 March 2017.

### **Starting proceedings**

21.

On that basis, PI ought to have started proceedings in respect of the Fresh Claim within 30 days of 13 March 2017. What they in fact did was make this application for permission to amend on 21 March 2017 and served it on 23 March 2017 .

22.

On behalf of PI, Ms Haynes argued that the making of the application to amend amounted to starting proceedings. I do not accept that.

(i)

Regulation 92(6) itself provides that proceedings are to be regarded as started when the Claim Form is issued.

(ii)

A Claim Form can, in normal circumstances, be issued as of right but an application for permission to amend is what it says it is – an application that may or may not be granted by the Court.

(iii)

I cannot see that any relevant proceedings are started unless and until the amendment is allowed.

23.

It follows that, for the purposes of the application for permission to amend, the date on which the proceedings would be commenced would be the date of the hearing. That is outside the 30 days on PI's case (although within the maximum 3 month extended period).

**Does the Court have the power to allow the amendment?**

24.

Against that background, Mr Coppel QC, for HQIP, submitted that it was simply not open to me to allow the amendment, relying on CPR Part 17.4(1)(b) (which itself reflects s.35(5) of the Limitation Act 1980). Part 17.4 is a permissive provision. It permits the Court to allow an amendment to bring a fresh claim in circumstances where that claim would be time-barred if commenced in new proceedings. It provides as follows:

“(1) This rule applies where –

(a) a party applies to amend his statement of case in one of the ways mentioned in this rule; and

(b) a period of limitation has expired under –

(i) the Limitation Act 1980; or

(ii) the Foreign Limitation Periods Act 1984; or

(iii) any other enactment which allows such an amendment or under which such an amendment is allowed.

(2) The court may allow an amendment whose effect will be to add or substitute a new claim, but only if the new claim arises out of the same facts or substantially the same facts as a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings.”

25.

The argument before me proceeded on the basis that a period of limitation under the Limitation Act 1980 had expired. It was no part of PI's case that the fresh claim arose out of the same facts and matters as the original claim – indeed PI's case was completely the opposite. Accordingly, Mr Coppel QC submitted that there was simply no power in the court to allow the amendment.

26.

Although it seemed to be common ground that the issue was whether a period of limitation had expired under the Limitation Act, having considered the matter following the hearing, I have to express doubt as to whether that was the proper analysis. Without reciting the entirety of the Act, each section of it is expressly concerned with the limitation period for the cause or causes of action specified. None of these is applicable to a claim under the Public Contract Regulations 2015 or, indeed more generally, to claims under statutory instruments. On the contrary, section 39 of the Act provides:

“This Act shall not apply to any action or arbitration for which a period of limitation is prescribed by or under any other enactment (whether passed before or after the passing of this Act) or to any action

or arbitration to which the Crown is a party and for which, if it were between subjects, a period of limitation would be prescribed by or under any such other enactment.”

27.

For the present, I proceed on the basis that, if the period for starting proceedings under Regulation 92 had expired, the only power I would have to allow the amendment would be under Part 17.4 and it would have the effect for which HQIP contends. In my view, however, the argument must assume that no extension of time is given under Regulation 92. If such an extension is given, then either the “period of limitation” has not expired or, a period having expired, it has been extended, such that there is a further period in which to bring the claim.

28.

It follows, in my judgment, that the right approach is for me to consider whether the period for starting proceedings has expired taking into account any extension of time under Regulation 92 that might be granted.

29.

If there is no power to allow the amendment under Part 17.4 (because there is no period of limitation expired under the Limitation Act 1980), there would be power in the Court to extend time to commence proceedings under Regulation 92(4) so the same considerations would arise.

#### **Is there an arguable case that the fresh claim is time-barred?**

30.

HQIP then argues that even if the maximum extension of time of 3 months were granted, it would still have an arguable case that the fresh claim was time-barred. Accordingly, the right approach would be to refuse the application to amend and let PI take their chances in issuing a fresh Claim Form. For this proposition, Mr Coppel QC relied on the Court of Appeal decisions in **Welsh Development Agency v Redpath Dorman Long** [1994] 1 WLR 1409 and more recently in **Chandra v Brooke North** [2013] EWCA Civ 1559. In **Chandra**, Jackson LJ said this:

“66. If a claimant seeks to raise a new claim by amendment and the defendant objects that it is barred by limitation, the court must decide how to proceed. There are two options. First the court could deal with the matter as a conventional amendment application. Alternatively, the court could direct that the question of limitation be determined as a preliminary issue.

67. If, as is usually the case, the court adopts the first option, it will not descend into factual issues which are seriously in dispute. The court will limit itself to considering whether the defendant has a “reasonably arguable case on limitation” ..... if so, the court will refuse the claimant’s application. If not, the court will have a discretion to allow the amendments if it sees fit in all the circumstances.

68. If the court refuses permission to amend, the claimant’s remedy will be to issue separate proceedings in respect of the new claim. The defendant can plead its limitation defence. The limitation issue will then be determined at trial and the defendant will not be prejudiced by the operation of relation back under section 35(1) of the 1980 Act.”

31.

It is apparent that underlying Mr Coppel QC’s submissions and the reasoning of the Court of Appeal is the understanding that to allow the amendment would be to debar the defendant from relying on its limitation defence because the claim would relate back to the commencement of the original proceedings and be deemed to have been commenced at that date. That is the effect of s.35(1) of the



Limitation Act 1980. Again that presupposes that the Limitation Act is engaged (which I have doubted above).

32.

If time starts to run from 13 March 2017, and if the maximum 3 month extended period is granted, then there could be no arguable limitation defence in any event.

33.

HQIP, however, argues that there is either (i) insufficient evidence before me as to when PI first knew or ought to have known that grounds for starting proceedings had arisen or (ii) evidence that suggests that PI possessed the relevant knowledge earlier than 13 March 2017.

34.

As to the argument that there is insufficient evidence, there is clear evidence from Mr Gardosi, which is consistent with the evidence of the timing of the publication of the CAG minutes on its website, as to when he first became aware that NPEU had not, by the end of January 2017, sought s.251 approval. Although not objecting to that statement, HQIP complained that they had not had an opportunity to respond because the statement was served the day before the hearing. But it must, in my view, have been clear from the draft Amended Particulars of Claim that the minutes of the meeting on 26 January 2017 were central to PI's case (and thus the date on which they became aware of them) and clear from Mr Gillespie's statement that PI had not seen those minutes as at 13 March 2017 (when he wrote his letter) and that PI's case as to the relevant date was that it could not be earlier than 13 March 2017. HQIP had ample opportunity to respond to that case if there was relevant material in the public domain at an earlier date or any other evidence that PI had been aware of the position earlier.

35.

The high point of the argument that there was evidence that PI possessed the relevant knowledge sooner than 13 March 2017 was the content of an e-mail from HQIP's solicitors to PI's solicitors on 13 March 2017 which itself referred to a conversation on 10 March 2017 in which Mr Gillespie had said that PI had or might have further causes of action against HQIP. That comment might suggest some relevant knowledge but could, as Ms Haynes put it, refer to anything.

36.

Against the evidence of PI, and in support of its own limitation defence, HQIP advanced no relevant evidence at all. They did not adduce any evidence as to CAG's practice in posting minutes of meetings or as to when the minutes of the meeting in January were posted on its website or as to any other matters that might have alerted PI to the fact that the s.251 approval application had not been made in January.

37.

In my judgement, therefore, and if a maximum extension of time were to be granted under Regulation 92, there would be no arguable case that HQIP had a limitation defence available to it, as at the date of hearing. It seems to me that that is in line with **Chandra** which contemplates that the court may conclude on an interlocutory basis that there is no arguable limitation defence HQIP's limitation defence amounts to no more than a bare assertion that it might have such a defence based on pure speculation and no evidence. Mr Coppel QC argued, however, that such a decision should not be reached on an interlocutory basis and could only be reached following a full hearing of the limitation defence with, in particular, cross-examination of witnesses. That would plainly be a forceful submission if there was some evidence that the date of possession of relevant knowledge was earlier

than the date relied upon by PI but there is no such evidence and any challenge to Mr Gardosi's evidence would be a challenge made without an evidential foundation.

### **The extension of time**

38.

It follows that the next question I have to consider is whether I should grant an extension of time, and if so, of what length. If I were not to grant such an extension, the Fresh Claim would be time-barred.

39.

Plainly, at the time that PI sought permission to amend (well within 30 days of 13 March 2017), they could equally have commenced new proceedings and that might well have been a wise course of action. However, there was at the time no application to strike out the Original Claim and I can equally well see why it appeared more sensible and cost-effective to amend an existing pleading which set out the background in some degree of detail. There was some suggestion that that approach might have been taken to avoid the payment of an issue fee but I do not consider that that is borne out.

40.

At the time the application was made, a Case Management Conference had been listed on 24 March 2017. Although PI had sought to change that date, they had subsequently said that they were prepared to go ahead on that date. By letter dated 31 March 2017, PI asked the Court to determine its application to amend on paper. By letter dated 3 April, HQIP's solicitors set out its objections to the amendments and said that the matter required an oral hearing. A further letter from HQIP's solicitors dated 11 April referred to a CMC now listed for 5 May 2017 for 1 hour but said that it did not think that adequate for the CMC and both parties' applications, that is PI's application for permission to amend and HQIP's application to strike out which had been issued on 5 April 2017. The letter said: "There is a clear advantage in dealing with the above matters at one hearing, hence our suggestion that it be listed for half a day". Following some further exchanges the matter was listed for half a day's hearing on 8 June 2017.

41.

The net effect was that PI had drafted its Fresh Claim and provided that draft to HQIP well within the 30 day period. PI was also in a position where it could have reasonably expected its application to amend to have been dealt with within the 30 day period but, as a consequence of correspondence about listing and hearing lengths, it was not. From the outset, HQIP's argument was that the claim was time-barred yet at the same time HQIP wanted all the applications dealt with at once. Once the 30 day period had expired there was little to be gained from issuing a further Claim Form because an extension of time would still have been required. The only criticism that could be made of PI was that, as the expiry of the 30 day period approached, it did not, out of caution, issue a Claim Form. In the context of the procedural history, there seems to me to be a good reason to allow the extension, reflecting the fact that there was, in reality, no delay on PI's part in advancing its claim, and that time passed simply in bringing the matter before the Court for an adequate hearing.

42.

HQIP argues that I should not do so because there is a high threshold to overcome before an extension will be granted, relying on **Mermec UK Limited v Network Rail Infrastructure Limited** [\[2011\] EWHC 1847 \(TCC\)](#). In that case, Akenhead J concluded that Mermec had the relevant knowledge by 23 September 2010 when they were notified of the outcome of the bid process. They did not issue proceedings until 22 December 2010 or serve them until 30 December 2010. The Judge held that there was no good reason for the delay and that none was advanced by the Claimant:

23. The main remaining issue is whether or not there is some good or arguable reason why there should be an extension of time in effect to bring the service of the Claim on 30 December 2010 within time. I do not consider there is any such reason:

(a) There is no explanation from Mermec as to why the Claim should not have been drafted let alone served weeks before it was served.

(b) It is perhaps unhelpful to try to give some exhaustive list of the grounds upon which extension should be granted but such grounds would include factors which prevent the served of the Claim within time which are beyond the control of the Claimant; these could include illness or detention of the relevant personnel. There must however be a good reason and none is advanced by the Claimant in this case.

.....”

43.

I note first that the Regulations do not in terms impose a particularly onerous test. It is framed in terms of “good reason” not exceptional circumstances or some other such test and it does not seem to me that Akenhead J in Mermec set the bar any higher. Further he expressly did not set out any exhaustive list of relevant factors: the factors that he indicated I would regard as strong and obvious ones militating in favour of an extension but not as characterising the only sorts of factors that might be taken into account. The procedural history of this case is, in any case, wholly different from that in Mermec and I am not persuaded by reference to this authority to depart from my view that the extension should be granted.

44.

I would add the following. If I am concerned only with the time limit in Regulation 92 and not the Limitation Act, then the only issue before me is whether I can and should grant an extension to commence proceedings by way of amendment. The Regulation contemplates that the Court may grant an extension to commence proceedings. Whilst it does not specify when that extension may be granted, it must at the least envisage that the extension is granted before the proceedings are commenced or retrospectively in proceedings that have been commenced without permission. Mr Coppel QC’s submissions were to the effect that, where the defendant has an arguable time-bar defence based on the “start date” for calculating time, the Court should not deal with the issue of extension on an interlocutory basis: the claimant must take its chances in issuing a claim and await, on a final basis, the court’s decision on the start date and any following decision on an extension of time. By analogy to the position where a Limitation Act defence is relied upon, that may be an appropriate way to proceed where there is an arguable defence but it seems to me to follow that the court must, therefore, first consider whether there is such an arguable case as to the start date and time bar. That is what the Court did in Mermec , deciding on an interlocutory basis (in that case in the defendant’s favour) what the start date was and then considering whether to grant the extension of time sought by the claimant.

### **Conclusion on amendment**

45.

My conclusions are therefore as follows: (i) there is no arguable case that PI knew or ought to have known that the grounds for starting proceedings had arisen earlier than 13 March 2017; (ii) although proceedings in respect of the fresh claim were not commenced within 30 days of that date, there is good reason to extend time to do so and to extend time by the maximum permitted period of 3 months

from knowledge; (iii) the application to amend is, therefore, not made in respect of a claim that is time-barred and is one in respect of which I should exercise my discretion in the usual way; (iv) doing so, I allow the amendment – at this stage, I cannot conclude that the Claimant’s case is wholly without merit.

46.

Although in the light of the Defendant’s application it will be necessary to further amend the Particulars of Claim, it is still convenient, and in accordance with the overriding objective, to incorporate this claim within the existing pleading with its background narrative and there is no prejudice to the Defendant in doing so.

### **The Defendant’s application to strike out the Original Claim**

47.

The Original Claim included no claim for damages and no application to amend to add such a claim has been made. In summary, PI is a not for profit organisation. On the application in October 2016 to lift the automatic suspension, PI argued that there would no monetary losses for which it could be compensated, albeit I found the contrary.

48.

The basis for the HQIP’s application to strike out is simple. A contract was entered into in December so that Regulation 98 is now relevant. The regulation provides as follows:

“(1) Paragraph (2) applies if –

(a)

the court is satisfied that a decision or action taken by a contracting authority was in breach of the duty owed in accordance with regulation 89 or 90; and

(b)

the contract has already been entered into.

(2) In those circumstances the Court,

.....

(c)

may award damages to an economic operator which has suffered loss or damage as a consequence of the breach, regardless of whether the Court also acts as described in subparagraphs (a) and (b);

(d)

must not order any other remedies.”

(3) Paragraph (2)(d) is subject to regulation 103(3) and (9) (additional relied in respect of specific contract where a framework agreement is ineffective) and does not prejudice any power of the Court under regulation 101(3) or 102(12) (orders which supplement a declaration of ineffectiveness or a contract-shortening order.”

49.

In the event that the Court were to find the breaches alleged by the Claimant in the Original Claim, paragraphs (a) and (b) would not be applicable; there is no claim for damages; and so, HQIP submits no remedy which the Court can grant including the remaining pleaded claim for a declaration that the Defendant’s tender process was in breach of the Regulations.

50.

In those circumstances, HQIP's case is that to allow the claim to proceed would be an abuse of process - that is not because there was any abuse in the proceedings as originally commenced but because the effect of allowing the proceedings to continue would be a substantial use of court resources on a claim which could never result in any remedy in the Claimant's favour.

51.

The first issue on this application is, therefore, whether it is right that there is no remedy available to the Claimant other than the damages claim which it has not brought or whether the Court's inherent jurisdiction to grant declaratory relief is not ousted by Regulation 98(2)(d).

52.

Mr Coppel QC drew my attention to a number of passages in Woolf on "The Declaratory Judgment" which summarises the position as follows [at para. 3-73]:

"When an express procedure is provided by legislation to determine an issue, it is a question of construction whether that procedure is an exclusive procedure which wholly or partly ousts the courts' jurisdiction to grant declarations or whether the courts retain a jurisdiction to grant relief. Even when the existence of a statutory procedure does not implicitly exclude the courts' jurisdiction, its existence is a factor which the court will take into account in exercising its discretion whether or not to grant relief."

53.

My attention was also, however, drawn to the decision of the House of Lords in **Pyx Granite Co Ltd. v Ministry of Housing** [1960] AC 260. That case concerned s.17(1) of the Town and Country Planning Act 1947. Under that section, it was provided that a person wishing to have an application for permission to carry out operations on land "may apply to the local planning authority to determine that question" . It was decided that that did not provide an exclusive method of determining questions of this kind and did not exclude the Court's jurisdiction. In contrast the Regulations both provide remedies and expressly exclude any other remedy.

54.

Ms Haynes argued that in each of the instances referred to the exclusion was by primary not secondary legislation. She is right about that but I cannot see, without more, how that is relevant. This is not a case where, for example, secondary legislation is unlawful.

55.

One potential argument is that Regulation 98(2)(d) is only concerned with the "other remedies" contemplated by the Regulations and not remedies within the court's inherent jurisdiction. As Mr Coppel QC submitted, the answer to that argument lies in the contrast between the wording of Regulation 97 and this sub-paragraph. Regulation 97 sets out remedies available where the contract has not been entered into. Regulation 97(3) expressly provides that "This regulation does not prejudice any other powers of the Court" , whereas Regulation 98(2)(d) explicitly says that the Court must not grant any other remedy (subject to specific reservations not relevant to this case).

56.

Surprising though it may be that the Court's jurisdiction to grant declaratory relief should be excluded, I am drawn to conclude that the Regulation does indeed restrict the remedies available such that PI has no available remedy in respect of the Original Claim.

57.

It follows, argues HQIP, that there is no purpose in continuing with the Original Claim because it cannot result in any remedy in the Claimant's favour and that the statement of case should therefore be struck out under Part 3.4(2)(b). This was the course taken in **Jameel v Dow Jones & Co. Inc.** [2005] EWCA Civ 75 and **Evans v Secretary of State for the Environment** [2006] EWHC 322.

58.

Where there is no remedy that can be obtained by the Claimant, it cannot be right that an action should simply proceed to no end using court time and resources and placing the court in the curious position of making findings which do not go anywhere. Ms Haynes argued that it would be premature to strike out the Original Claim before disclosure but disclosure cannot change the position that no remedy is available.

59.

In my judgment, therefore, the Original Claim should be struck out but, in the circumstances of this case, I do not strike out the entirety of the Particulars of Claim but only those parts that are not material to the amended claim.

### **Conclusion**

60.

At the hearing, I dealt with this application second because of the order in which the applications were issued. Since this application was issued after the Claimant's, it seemed to me that it would be unfair to consider the amendment application as if the strike out application had already been determined potentially in the Defendant's favour. My decision does, however, produce the somewhat unsatisfactory position that the amendments are made to a pleading that would then, in part at least, be struck out. In these reasons, I record simply that, to deal with this conundrum practically, I gave directions to bring the Particulars of Claim into line with this decision and to allow this matter to proceed to a productive CMC.