Neutral Citation Number: [2021] EWHC 3498 (TCC)

Case No: HT-2020-000092

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

Royal Courts of Justice, Rolls Building

Fetter Lane, London, EC4A 1NL

Date: 23/12/2021

Before :

MRS JUSTICE JEFFORD DBE

- -

Between :

ACCESS FOR LIVING **Cla**

- and –

LONDON BOROUGH OF LEWISHAM **Defe**

- -

- -

Jamie Burton QC (instructed by **Morison Spowart Ltd.**) for the **Claimant**

Rupert Paines (instructed by **Sharpe Pritchard LLP**) for the **Defendant**

Hearing dates: 16 July 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Covid 19 Protocol: This judgment is to be handed down by the judge remotely by circulation to the parties' representatives by e-mail and release to BAILLI. The date and time for handdown is deemed to be **10.30 on Thursday 23rd December 2021.**

MRS JUSTICE JEFFORD DBE :

Background

1.
This matter involves two applications. The defendant council ("the Council") seeks to strike out the claim on the basis that it is time barred and in the alternative seeks summary judgment. The claimant

makes a corresponding application, so far as necessary, for an extension of time to issue proceedings. The claimant accepts that the claim is out of time so far as paragraphs 15(6) and 15(8) of the Particulars of Claim are concerned but the claimant's primary position is that no extension of time is necessary in respect of the claim advanced in paragraph 15(7).

2.
The claimant is a charity. Mr Harris, its CEO, sets out the background to its existence in his witness statement. In its current form, Access for Living provides services to people with varying degrees of learning disabilities. It does so on behalf of the Council which is its only client. It has been supporting some individuals for decades let alone years and it is quite clear that Mr Harris feels strongly about the importance of continuity for clients.

3.
In September 2019, the Council put into place a Framework Agreement covering adult learning disability services and the claimant was one of 21 providers appointed to the "supported living" Lot 1.

4.
On 21 October 2019, the Council commenced a mini-competition for the award of 4 year contracts for the provision of 12 adult learning supported living services. The claimant was the existing provider for 5 of these services. The contracts were due to come to an end on dates in March and April 2020.

5.
The competition was conducted through a portal and the Invitation to Tender was published through the portal on 21 October 2019. The claimant tendered for the 5 lots where it was the existing provider but was unsuccessful in all bids.

6.
In very short summary, the tenderers were required to complete a series of Method Statements which would form the basis for evaluation. MS5 was headed Support Hours and was in the following terms:

"MS5 Support Hours

Please clearly describe how you would evidence how the individually allocated support hours (either as 1:1 or 2:1) are being used? How would you monitor delivery to identify where hours could be reduced? (maximum 500 words)"

Tenderers were required to achieve a score of at least 7 against MS5. The claimant's score was 6 and so the claimant's bid did not progress past this stage of evaluation.

7.
The claimant's response to MS5 included the following:

(i)
"Access for Living (AfL) is given CAAs by the social work team. These identifies (sic) key areas where 1:1 or 2:1 support is required, which could include personal care, activities, maintaining health, skills teaching etc. The manager of the service ensures that the hours identified are allocated."

(ii)
The claimant then set out "The evidence that shows the allocation of hours". The following paragraphs made reference to Rotas, which record service users' activities and who is allocated to support them, and to Weekly Plans showing weekly activities for each service user both inside and outside the house.

(iii)
The next section said that the manager of the service monitors 1:1 hours and outcomes using various tools. The tools were set out with a fuller explanation of what they encompassed: service user's diaries/ house diary; monitoring forms; PCP meetings/keyworker meetings; team meetings, supervisions and observations.

(iv)
The final section or paragraphs (which appeared to address the second question) said:

"Whilst hours are allocated weekly, not all of the areas that people need support with are weekly and there needs to be some flexibility in the allocation of hours. For example, support with medical appointments, this would not be a weekly need, but the hours identified may be used in a block. This could be the same for family contact, visits. etc.

When there is an identified reduction in a person's 1:1 support, AfL will alert the Social Work Team, so support time can be reduced, reviewed, or reallocated.

AfL is committed to supporting service users to become as independent as possible in all aspects of their daily lives, and by going so, this will lead to less reliance on 1:1 or 2:1 support. To date, AfL has successfully supported 9 people from living in 24 hour supported houses to live independently in their own homes with outreach support."

8.
The claimant was informed, on 7 February 2020, that it had been unsuccessful. Against MS5, the reasons given for the lower score were:

(i)
The response "conveys a view of service users as passive recipients of support and does not evidence their involvement in planning their own support."

(ii)
"The response also does not address the process for how reduction in support will be managed and monitored."

9.
Proceedings against the Council were issued on 11 March 2020. In the Particulars of Claim, the claimant relies on Part 2, Chapter 3, Section 7 of the Public Contracts Regs 2015 and the defendant's obligation to use procedures that were sufficient to ensure compliance with the principles of transparency and equal treatment of economic operators (Regulation 76(2)). It is not in issue that that was the relevant regime.

10.
The claimant then makes the following complaints:

"15.6 In breach of the transparency principle the Defendant did not evaluate the Claimant's tenders in accordance with the published criteria: reason (a) relies on the absence of an indication that the Claimant would involve service users in the planning of their support and reason (b) relies on the absence of an identified process by which the Claimant would implement a reduction in support hours. The information identified as being absent in the Claimant's response was not requested by MS5.

15.7 Alternatively, MS5 breached the transparency principle because it was not capable of being understood in the same way by all reasonably informed tenderers acting with due care and diligence.

15.8 The Defendant did not treat all tenderers equally because it did not apply a consistent approach to MS5. This is demonstrated by its reasons for selecting the successful tenderer in each of the five mini-competitions…"

The limitation issue

11.
Regulation 92 provides:

92.—(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) to (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 this regulation (but not any of the limits imposed by regulation 93) 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 the proceedings had arisen.

(Emphasis added)

12.
The defendant's position is that, so far as the allegation at paragraph 15(7) of the Particulars of Claim is concerned, this is an allegation that the ITT was unlawfully vague. Since the complaint relates to the wording of the ITT, the time for issuing of proceedings started to run at the date of the ITT. The claim is, therefore, not only out of time but the court has no power to extend time because more than 3 months has passed. The claimant disputes this and, indeed, argues that time did not start to run until 3 March 2020 when the defendant replied to a pre-action letter.

13.
So far as the allegations at paragraphs 15(6) and 15(8) are concerned, it is common ground that the time limit for issue of proceedings was 9 March 2020 which I understand to turn on the timing of the upload to the portal on a non-working day.

Events leading up to the issue of proceedings

14.
Before I turn to the arguments, I turn to the events and correspondence that preceded the issue of proceedings.

15.
Firstly, there was, in accordance with Regulation 86, an automatic standstill period from 10 days from 7 February (or 9 February) during which the Council could not enter into new contracts. As Mr Paines

rightly points out that is unconnected with the limitation period in Regulation 92. During the standstill period, the Council could not award a new contract. Thereafter, if proceedings were issued in time and before a new contract was entered into there would be an automatic suspension of contract award (Regulation 95) and the remedies in Regulation 97 would be available to the claimant.

16.
In her statement, Miss Spowart, the claimant's solicitor, explains that she agreed to act for the claimant pro bono and obtained advice from counsel, at a significant discount, on 12 February 2020.

17.
The claimant's solicitors then wrote to the Council on 14 February 2020. In doing so, the intention was to follow the guidance in Appendix H to the TCC Users' Guide in respect of procurement claims.

18.
The letter made the point that MS5 unambiguously asked for 2 pieces of information but that the Council had then misapplied the tender criteria. This section of the letter concluded:

"As a result of the Council's breach of duty AfL intends to start proceedings in the High Court pursuant to regulation 91 of the Public Contracts Regulations 2015. It will seek an order setting aside the decisions to award the contracts to the successful bidder in relation to all five competitions and substantial damages.

Unless an extension is otherwise agreed we are instructed to issue and serve a claim in the High Court before Friday 21 February. This will have the effect of prohibiting the Council from entering into contracts in relation to any of the competitions."

The letter went on to ask the Council to agree to extend the standstill period for 28 days to enable to the parties to engage in ADR and to give 10 days' notice of any intention to award a contract in any of the five competitions.

19.
The letter, therefore, indicated a proper understanding of the effect of the standstill. It made no reference to the limitation period or to extending the limitation period, although, not least with the benefit of hindsight, it can been seen that the underlying assumption appeared to be that proceedings would not be issued until after the end of any standstill period.

20.
By letter dated 17 February 2020, the Council agreed to extend the standstill period "so that no contract will be awarded on the lots until at least after Friday 28 February".

21.
Ms Spowart responded by e-mail the same day and asked for any substantive response and documents by 21 February "as we will have to file our claim by 28 February". It can be seen that again that appeared to draw a link between the time for commencing a claim and the duration or expiration of the standstill period.

22.
By a letter also dated 17 February, but sent under cover of an e-mail on 20 February, the Council said:

"It is apparent that more time will be needed to investigate the substantive points you have raised and respond to the same on the 5 contracts under dispute.

Accordingly we are instructed in accordance with your second suggestion at the end of your letter of 14 February 2020, that the standstill period on the 5 contracts will be extended, so that our clients will give you 10 days advance notice in writing of any intention to proceed to award these contracts."

23.
The substantive response from the Council came on 3 March. The Council responded at length. Having set out the two main allegations in the claimant's letter, the Council said this:

"36. In relation to the first point, we do not agree that the Council has applied "a different set of criteria" to those published. We would contend that the approach of the challenge takes a very narrow approach to what MS5 was requesting and a narrow interpretation of the word "evidenced" and of the other requirements of the question.

37. This approach concentrates on a mechanistic interpretation of the question on MS5 and of "evidenced" in terms purely of recording/documentary processes. It applies an analogous approach as to how a lawyer might document an evidential point, rather than considering the bid in the context of providers of social care for individuals demonstrating how they would show they were using support hours and how they would go about identifying potential reductions.

38. We contend our clients were entitled to consider the broader interpretation of the definition implicit in the published criteria. The winning providers in each case also understood the wider interpretation of the published terms, which suggests this is not a manifest error, it is a permissible interpretation.

39. Your client's answer to MS5 is very much process related, rather than client/service user related. It refers to use of rotas, use of the weekly plan, use of diaries, use of monitoring forms, PCP meetings, team meetings and supervision and observations. On the reduction point, your clients stress alerting the social work team and make a general statement re supporting service users.

40. We would consider that it is not irrational or perverse for our clients to consider that the interpretation of the question involved a wider context than the mere methodology of recording/ documentary systems and in fact related to how one would demonstrate/ evidence that service is actually working .....

...

56. As we do not consider there is any valid basis for the claims, we also give you 10 days' advance written notice that the standstill period will come to an end at the end of Friday 13 March 2020 and thereafter our clients will proceed to award the contracts."

24.
On 5 March, Ms Spowart asked for a further extension of the standstill period. The Council refused.

25.
Ms Spowart's evidence is that she thereafter tried urgently to arrange a conference with counsel. The first day on which counsel was available was 9 March 2020 and the trustees took the decision to issue proceedings on 10 March 2020. Proceedings were issued the following day. Both Mr Harris and Ms Moorey, chair of the board of trustees, explain that the claimant had never been involved in litigation before and that, as a charity, the decision to commence proceedings was a serious one.

26.

In the event, the proceedings themselves were subject to a stay and no new contracts were placed, as the Council recognised the merits of continuity in provision during the pandemic. The stay was without prejudice to any limitation point the Council might take.

The law: submissions

27.
The 30 day limit is a short one but the courts have repeatedly emphasised that it should be observed. Subject to the 3 month long-stop, the court has a discretion to extend the 30 day limit if the court considers that there is a good reason for doing so.

28.
The origin of that approach to the limitation period, and the approach to extensions of time, can be seen in the decision in Jobsin v Department of Health [2001] EWCA Civ 1241. At the time, the relevant limitation period came from regulation 32(4)(b) which provided that the proceedings had to be commenced promptly and, in any event, within 3 months from the date when the grounds for bringing proceedings first arose. In that case, the decision was made on 17 November 2000 but the Court of Appeal held that the cause of action had arisen earlier on 14 August 2000. Proceedings were not commenced until 5 March 2001. However, no point was taken on the failure to commence proceedings after 12 December so that the period of extension in issue was from 14 November to 12 December.

29.
At first instance, the judge held that Jobsin had a “reasonable objective excuse” for commencing proceedings late, which was that, until they consulted solicitors, they did not know that they had a claim. Further, the short extension did not cause any damage or prejudice to any third party or to good administration by the defendant. Those matters were repeated in submissions to the Court of Appeal and rejected by Dyson LJ.

30.
At [33] Dyson LJ said that it was not unreasonable to expect Jobsin to start proceedings before they were excluded from the tender process. On or about 14th August they were aware of all the facts that they needed to know in order to start proceedings. Ignorance of the legal significance of those facts was not a good reason to extend time. The short limitation period was there for a reason and to extend time because of ignorance of the law would not reflect that reason which he put as follows:

“That is no doubt for the good policy reason that it is in the public interest that challenges to the tender process of a public service contract should be made promptly so as to cause as little disruption and delay as possible. It is not merely because the interests of all those who have participated in the tender process have to be taken into account. It is also because there is a wider public interest in ensuring that tenders which public authorities have invited for a public project should be processed as quickly as possible. A balance has to be struck between two competing interests: the need to allow challenges to be made to an unlawful tender process, and the need to ensure that any such challenges are made expeditiously. Regulation 32(4)(b) is the result of that balancing exercise.”

31.
So far as prejudice was concerned, at [40], Dyson LJ said this:

“It is not necessary to adduce particular evidence of prejudice to third parties. It is inherent in the process itself that delay may well cause prejudice to third parties as well as detriment to good

administration. One of the concerns of the DOH is that delay may lead to the successful bidders dropping out of the process. One has already done so."

What can be seen from that is that absence of evidence of prejudice to third parties or to the authority is not in itself a good reason to extend time.

32.
Starting from that authority, in his submissions before me, Mr Paines drew together the principles he submitted were to be derived from the authorities as follows:

(i)
In his skeleton argument, Mr Paines submitted that "a good reason" must be a reason why the claimant was not able to issue proceedings. In argument, Mr Paines accepted that that submission was overstated. But, he submitted a good reason should ordinarily relate to some factor that had an effect on the ability of the claimant to issue proceedings (SRCL Ltd. v National Health Commissioning Board[2018] EWHC 1985 (TCC) and/or will usually be something which was beyond the control of the claimant (Turning Point Ltd. v Norfolk County Council [2012] EWHC 2121 (TCC) and Mermec UK Ltd. v Network Rail Infrastructure Ltd.[2011] EWHC 1847 (TCC)).

(ii)
It is no basis to extend time that the period required is a short one (relying on Mermec and Turning Point).

(iii)
It is important to take into account when the basic facts relied on were known (relying on Mermec, Jobsin and Riverside Truck Rental v Lancashire County Council[2020] EWHC 1018 (TCC)).

(iv)
None of ignorance of the law, commercial considerations, culpable carelessness by lawyers, and lack of urgency by the lay client were good reasons to extend time (relying on Jobsin, Mermec and Riverside Truck).

(v)
Engagement in pre-action investigations or correspondence was not a good reason to extend time (relying on SRCL, Riverside Truck and Mediterranean Hospital of Cyprus (MHOC) Ltd. v Secretary of State for Defence [2018] EWHC 3289 (TCC)).

(vi)
Prejudice is not particularly relevant to the inquiry and certainly not determinative (SRCL, Jobsin, Riverside Truck).

33.
Putting the submissions of Mr Burton QC, for the claimant, in very short summary, they were that such firm principles could not be derived from the authorities. As Akenhead J had said in Mermec and Fraser J had said in SRCL, a broad range of factors may be taken into account by the court in the exercise of its discretion. The proposition that a good reason would ordinarily relate to some matter that meant that the claimant could not issue proceedings in time was an additional gloss on the concept of a good reason to extend time and it was a word that had crept into the authorities but added little.

34.

In Mr Burton's submission, each of the cases relied on by Mr Paines turned on its own facts which were very different from the facts of the present case. Put another way, each of them presented a factual scenario in which the court had, understandably, concluded that there was no good reason to extend time; none of them established any principles as to what was not a good reason; and the authorities supported an exercise of broad discretion as to what was a good reason. In this case, in his submission, the test of "good reason" was met – although the standstill agreement did not operate to extend time to commence proceedings, so long as the standstill period persisted, the Council could not award any contracts, so the issue of proceedings outside the limitation period had no material impact. Looked at in the context of the limitation period coming to an end on 9 March 2020, any extension sought was very short indeed, the delay in issuing proceedings was of no practical effect, and there was thus a good reason to extend time.

The law: discussion

35.
To address these submissions, it seems to me both helpful and necessary to review many, if not all, of the authorities I was referred to, starting with the decision of Akenhead J in Mermec.

36.
The claim in Mermec arose under the Utilities Contracts Regulations 2006 and the court was concerned with a three month limitation period. Network Rail's decision letter was dated 23 September 2010. On 1 October 2010, Mermec wrote asking for further information and a meeting. A meeting was held on 14 October 2010. On 26 October 2010, Mermec's solicitors wrote asking for detailed scores. Network Rail replied on 28 October 2010 saying that it was not appropriate to provide further information. The claim was issued on 22 October and served on 30 December 2010. The regulations expressly provided that commencement of proceedings required service and not merely issue.

37.
On the facts, the judge concluded that time started to run on 23 September 2010 or within a day or two thereafter, so that the claim was time barred. At [23], Akenhead J then addressed the issue of whether there was a good reason why there should be an extension of time, in effect, to bring service within time. In concluding that there was not he took account of the fact that there was no explanation why the claim could not have been drafted let alone served weeks before it was served. He continued:

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

(c) It is said that the delay was only some six or seven days and that there should be an extension for such an insignificant period because it is a relatively short delay. However, there is no point in having a three-month period if what that means if three months plus a further relatively random short period."

(Emphasis added)

38.
So far as the present case is concerned:

(i)
There is an explanation for the delay but that explanation is an error, namely a misunderstanding of the effect of the standstill agreement and the claimant properly accepts that that is not, in itself, a good reason to extend time.

(ii)
What the decision in Mermec did not decide in terms was that a good reason to grant an extension of time could only be one which had the effect of preventing the claimant from issuing proceedings. Although that was given as an example of a good reason, it was not expressed in exclusionary terms and Akenhead J was clear that it was unhelpful to try to give an exhaustive list of good reasons.

(iii)
So far as the length of any extension sought was concerned there is a strong steer in this decision that the argument that the stay is very short is not one that provides a good reason to grant an extension of time for the reasons Akenhead J gave.

39.
In the Turning Point case, Akenhead J then reviewed his own decision in Mermec. In that case the decision letter was dated 12 March 2012 and proceedings were issued on 28 March 2012. The judge found that Turning Point knew of the relevant facts and breach of the Regulations by no later than 9 February when it submitted its tender so that proceedings were commenced outside the 30 day limitation period. The judge, therefore, considered whether there was a good reason to grant an extension of time. Having dismissed arguments that are not material to the present case, he addressed what I shall call the short extension argument as follows (at [37]):

“The final argument for an extension of time is that only a short extension (put at 14 days) is sought and that it would be reasonable and proportionate for it to be allowed. That cannot in itself be a good reason because the 30 day period is clearly defined and, if statutorily what was intended was 30 days plus a reasonable proportionate and short period, that is what the legislators would have written. A good reason will usually be something which was beyond the control of the Claimant; it could includes significant illness or detention of relevant members of the tendering team. …”

40.
Akenhead J still did not go so far as to say that something beyond the control of the claimant was the only reason to grant an extension of time but he went perhaps a little further than he had done in Mermec in stating that that would usually be the case. The short extension argument got the same short shrift that it had done in Mermec.

41.
Continuing chronologically, Mr Burton QC placed some reliance on my decision in Perinatal Institute v Healthcare Quality Improvement Partnership [2017] EWHC 1867 (TCC) in which an extension of time was granted. The reason for granting an extension of time in that case turned on an unusual and highly case specific procedural history. In summary, the claimant had sought permission to amend to add a fresh claim which was, on its case, well within the 30 day period and anticipated that that application would be determined at a hearing fixed for a few days later. Because of correspondence between the parties about the hearing length, the advantages of taking a number of applications together, and listing issues, the hearing, in the event, took place over 2 months later. The claimant only found itself in the position of asking for an extension because of that procedural history.

42.

At [42] I set out the defendant's argument that Mermec set a high threshold to overcome before an extension of time would be granted. I made the point that the regulations did not impose a particularly onerous test and are framed in terms of "good reason" and not exceptional circumstances or a similar test. Mr Burton relies on that observation and my emphasis on the "good reason" test and not some higher threshold. In the decision in SRCL which I shall come to, Fraser J also suggested that this observation had introduced some concept of onerousness, or lack of it, to the relevant test.

43.
It did not seem to me that Akenhead J in Mermec had set the bar any higher than "good reason" and nothing that I said in the judgment in Perinatal could or should be taken to indicate a departure from the approach in Mermec and indeed Turning Point to what would usually be regarded as a good reason or to the short extension argument. As I have said, the facts of Perinatal were highly unusual. The observation as to onerousness, read in context, simply introduced the statement that the test was one of good reason and not, for example, exceptional circumstances. It follows that I do not accept Mr Burton's submission, if indeed he went that far, that this decision or that observation added anything to or involved any departure from the approach in Mermec and Turning Point.

44.
In Amey Highways Ltd. v West Sussex County Council [2018] EWHC 1976 (TCC), Stuart-Smith J also found a good reason to grant an extension of time. The reasons were case specific and fact sensitive but, in the course of his judgment, Stuart-Smith J drew attention to the fact that the test was whether there was a good reason to grant an extension of time and not whether the claimant had a good reason for not having commenced proceedings in time.

45.
In Amey, there were two categories of claim which the judge dubbed the instruction claims and the manifest error claims. There were two elements to the instruction claims, namely a first instruction on 19 January 2018 and a second instruction on 2 February 2018, which concerned the allocation of staff and costs within Amey's tender pricing. Compliance with each of these instructions increased Amey's tender price. Amey was informed that its bid was unsuccessful on 14 February 2018. Amey's case was that its tender would have been the most competitive in the absence of the adjustments it had made in compliance with the instructions.

46.
There followed pre-action correspondence which including discussion of a standstill agreement, that is, a standstill on the time for bringing any claim. On 5 March 2018, the council agreed that it would not take any limitation point for the period starting that day and ending the third working day after the issue of its substantive response. That response was issued on 12 March 2018 and proceedings were commenced on 15 March 2018.

47.
At [35], Stuart-Smith J referred to the authorities that had considered what may be a good reason for extending time limits and said this:

"Many have said that it would be unwise to try to provide a definitive list of what the court will or will not take into account in assessing what may be a good reason for extending time limits. I agree, for the simple reason that the regulation does not impose any fetter or limitation upon what may be brought into account. For that reason I would not accept that the claimant must show good reason for not issuing in time as a necessary prerequisite to the exercise of the court's discretion under

regulation 92(4), although the absence of good reason for not issuing in time is always likely to be an important consideration."

48.
It was common ground that time started to run in relation to the first instruction on 19 January 2018 and the judge found that time started to run in relation to the second instruction on 2 February 2018. So far as the second instruction was concerned, the claimant, therefore, required an extension of time from 2 March 2018 to 15 March 2018. At [41], the judge considered the standstill agreement to be a good reason to extend time "even allowing for the strictness of the approach to which the authorities refer".

49.
The position in relation to the first instruction was different because time had expired on 19 February 2018 well before the standstill agreement came into effect. Stuart-Smith J accepted that after 2 March there was a good reason for delay provided by the standstill agreement. As to the earlier period, he considered that there was no prejudice to the council or to the wider public interest because even if proceedings had been commenced in time, it was overwhelmingly probable that they would not have progressed until the further claim in relation to the second instruction and the manifest error claims had commenced and "Accordingly, this is a case where not merely can it be said that there is no prejudice, but the delay in relation to paragraph 33.1 [the first instruction] has been of no practical consequence at all." (at [43]).

50.
I will return to this below but Mr Burton places some reliance on this decision as one where an absence of prejudice was regarded as a good reason to grant an extension and, more specifically, because the delay in commencing proceedings was of no practical consequence.

51.
Also in 2018, Fraser J decided SRCL v NHS Commissioning. In that case, on the judge's findings as to when time started to run, the proceedings were commenced after more than 3 months so that no extension of time was available in any event. But he also considered the position if he was wrong about that and the proceedings were commenced outside the 30 day time limit but within 3 months.

52.
At [149] and with reference to the facts of the case, Fraser J said this:

"A potential defendant will rarely invite the issuing of proceedings against itself. informing a potential claimant that there are no grounds for issuing proceedings, and urging that party not to do so, does not in my judgment constitute a good reason for extending time under regulation 92(4). "Good reason" should, ordinarily, relate to some factor that has a effect upon the ability of a claimant to issue. This is the approach adopted by Akenhead J in Mermec …."

(Emphasis added)

53.
Mr Burton submitted that this decision introduced the idea of what was ordinarily a good reason. In effect his submission was that this was a gloss on the meaning of "good reason". If it introduced a further requirement or pre-condition for the court to find a good reason, there was no justification for that. If it did not, it added little to the words of the regulation. It seems to me that in using the word "ordinarily", Fraser J was doing no more than Akenhead J had done in Turning Point in setting out

what would usually be a good reason. If the use of the word “ordinarily” went any further, it was only in the sense that it reflected the dearth of authority in which any other good reason had been identified. At [150] Fraser J himself emphasised that the test was one of good reason.

54.
Further, at [154], Fraser J summarised the principles that apply where an extension is sought under regulation 92(4) as follows:

“(1) There must be a good reason for extending time.

(2) One of the matters that the court will consider is whether there was a good reason for the claimant not issuing within the time required, such as an illness or something out of the claimant’s control which prevented the claimant from doing so.

(3) It would be unwise to list or seek to limit in advance what factors should be considered to have relative weight to one another in that exercise.

(4) The court will take a broad approach in all the circumstances of the particular case.

(5) The categories are not closed or exhaustively listed in the cases. Lack of prejudice to the defendant is not a determinative factor.”

55.
In setting out those principles, it can be seen that Fraser J was treating a matter which prevented the claimant from issuing proceedings as a matter the court would consider and not elevating its status within a broader discretionary approach. The judge’s observation that prejudice to the defendant is not a determinative factor is consistent with that discretionary approach – it may be a factor but it is not a determinative factor. On the facts of the case, the extension of time was refused because SCRL had given no adequate explanation for why they were unable to issue proceedings and they had rather chosen not to issue proceedings.

56.
Lastly, I come to the decision of HHJ Eyre QC, as he then was, in the Riverside Truck Rental case. In that case the decision was made on 29 November 2019. Proceedings in respect of breach of the regulations and for judicial review. The claimant’s position was that both were in time. On 13 January 2020, the claimant’s solicitors sent to the defendant a draft application for an extension of time to commence proceedings for judicial review. They said that they considered the time for commencing proceedings for breach of the regulations to run from the end of the standstill period so that time did not expire until 13 January 2020. In its reply the council said that it had no objection to the extension of time to commence proceedings for judicial review but doubted that this was the appropriate procedure to follow. The council also correctly stated that the time for commencing proceedings for breach ran from the date of the decision and not from the end of the standstill period. Two sets of proceedings were then issued on 24 January 2020.

57.
The judge held that part of the claim was time-barred in any event but then considered whether, in respect of the larger part of the breach claim where time ran from 29 November 2019, an extension of time should be granted. Amongst the matters relied upon by the claimant were the holiday period; the time spent seeking to avoid litigation; the contention that the claimant could not formulate its claim until it knew how much the successful tender was; that the claimant had then acted promptly; and

that the claimant had a legitimate expectation of an extension of time from the content of the council's letter referred to above.

58.
None of those arguments found favour and amounted to a good reason to extend time. At [93], the judge continued:

"I have also considered them as a combination of factors taking a broad approach to see whether in the circumstances seen as a whole there is a good reason for extending time. In that exercise it is relevant that the Claimant was not pointing to matters outside its control as having prevented it from commencing proceedings in time. The reality is that the Claimant failed to start the Procurement Claim in time because it adopted a mistaken view of the appropriate line of challenge and of the applicable time limits and because it was not minded to commence proceedings until it knew whether or not it would have been the successful tenderer if it had not been excluded because until then there was a prospect that the proceedings would not be worthwhile commercially. None of that amounts to a good reason for an extension and I have concluded that even when the matter is viewed in the round there is no good reason for an extension and so the application for an extension must fail."

(Emphasis added)

59.
At [91], HHJ Eyre QC expressly considered the relevance of prejudice or lack of prejudice. He took the view that absence of prejudice would not be a good reason for extending time and noted that in SRCL, Fraser J had referred to it as a factor relevant to the extending of time to commence judicial review proceedings but not in his list of principles applicable to an extension of time under regulation 92(4). On the other hand prejudice would be a factor against granting an extension of time:

"However, it does not follow from the proposition that the existence of prejudice can be a factor against the grant of an extension that the absence of prejudice amounts to a good reason for granting an extension. The position is akin to that which I have described above in relation to the promptness of the application. Just as delay would operate as a factor against granting an extension so would the presence of prejudice and just as promptness in applying does not amount to a good reason for granting an extension similarly the absence of prejudice is also not a good reason."

60.
I agree that lack of prejudice is not in itself a good reason to grant an extension of time but I am not persuaded that it can never be a relevant positive factor. It seems to me that Fraser J's characterisation of lack of prejudice as not determinative is more accurate or, as Mr Paines put it in his submissions, that it is not particularly relevant to the inquiry. But there may be circumstances in which it is a positive factor as, for example, in Amey where the failure to issue in time was of no practical consequence. As ever, it is a question of facts and degree and the exercise of the court's discretion.

61.
The end result of these authorities is, to my mind, that there is no exhaustive list of factors that may (or may not) be a good reason to extend time. The list is open-ended. The authorities, as Mr Burton QC submitted, largely illustrate factual scenarios that do not amount to a good reason. To that extent they establish that a number of matters are at the very least unlikely to be considered by the court to be a good reason and these include ignorance of the law, commercial considerations, carelessness including by lawyers, lack of urgency and engagement in pre-action investigations or correspondence.

62.
One matter that is clearly not in itself a good reason to extend time is that the extension sought is a short one. As Akenhead J said, it would mean that the limitation period was 30 days plus some other short random period. Where there is some other good reason to extend time, the shortness of the extension may be a relevant factor but it is not sufficient in itself.

63.
Similarly lack of prejudice to the defendant is not in itself a good reason to extend time although it may be a relevant factor. I do not consider that Stuart-Smith J's decision in Amey goes any further than providing an example of circumstances in which the absence of prejudice was a factor and I repeat what I said at paragraph 60 above.

64.
The authorities are of limited assistance as to what might be a good reason. However, a matter that is beyond the control of the applicant may well provide a good reason. It seems to me that the words "usually" and "ordinarily" have crept in not because of some gloss to the test but because this is the only commonplace situation that the courts have identified as one where there would be a good reason to extend time. That does not preclude there being other factual situations in which there is a good reason to extend time. The particular facts of my decision in Perinatal and the particular facts in Amey provide examples of such scenarios.

65.
I would add that it is unfortunate that every case that comes before this court on this issue seems to provoke a further thorough trawl through the authorities to articulate the relevant principles and consider arguments on refinements of or glosses on those principles. It is a trawl I have felt it necessary to undertake again. Having done so, it seems to me that the principles are adequately set out in Mermec and, if one needs to go further, one need go no further than paragraph 154 in SRCL.

The application

66.
I start with the two matters where it is common ground that the 30 day limit expired on 9 March 2020, that is the claims in paragraphs 15(6) and (8).

67.
There is no reason why the claimant could not have commenced proceedings by that date. There was nothing to prevent the claimant from doing so and nothing that was outside the claimant's control. The claimant accepts this. In reality, the reason the claim was not commenced sooner was that Ms Spowart equated the standstill for the purposes of contract award with a standstill for the purposes of limitation. She apologises whole-heartedly for the error.

68.
As I have observed, with the benefit of hindsight, one might be able to see some indication of the error in the correspondence but, it is not suggested, and it could not be, that the defendant was aware of this and sought to take advantage of it.

69.
I recognise that the claimant is a charity and that the strictures applying to it in terms of decision making are significant and important but there was nothing to stop it preparing to issue proceedings,

if so advised, within the time limit. The unavailability of counsel is not and could not be relied upon other than in exceptional circumstances.

70.
Mr Burton QC's submissions addressed the merits of the claimant's claim and Mr Harris' evidence speaks to the devastating impact that losing these contracts will have on the claimant's ability to provide services or even to survive. But I do not see that the merits of the claim are a relevant factor – if they were, in every case of this nature, the court would have to embark on a preliminary assessment of the merits which cannot have been the intention of the regulation. There may be exceptionally strong or weak cases where the merits would be a factor respectively for or against the grant of an extension of time but this is not such a case.

71.
The fact that the delay was short is similarly not, in my view, a sufficient reason to extend time. Mr Burton makes the point that in none of the authorities cited where an extension was refused was the delay only a couple of days. But if there is a time limit, it has to be observed unless there is some good reason otherwise. In Mermec, Akenhead J referred to a short extension as some "random" period and Mr Burton submitted that the present case was distinguishable because the period was not random but reflected the standstill agreement. That is not, to my mind, the point Akenhead J was making. Rather it was that if a short delay of a day or two would be a reason to grant an extension of time, then why not 3 days, and then why not 4 days and so on. That is the point that Akenhead J made in Mermec and Turning Point and I agree.

72.
Mr Burton sought to persuade me otherwise by reference to the decision of the Court of Appeal of Northern Ireland in of Henry Brothers (Magherafelt) Ltd. v Department of Education for Northern Ireland [2011] NICA 59. His reliance on that decision was related to the remaining and particular argument that arises in this case which is the relevance of the extension of the standstill period and I shall address that submission first.

73.
It is accepted that an error was made in conflating the extension of a stay on the letting of the contract with a stay of proceedings and corresponding extension of the limitation, and that was not in itself a good reason to extend time. But Mr Burton submitted that since the purpose of the short time scale for issuing proceedings is to prevent or mitigate delay to the letting of any contract, it made no difference to the Council whether the proceedings were issued within the limitation period or before the end of the stay on entering into any contract. There was therefore a good reason to grant the extension of time as it made no practical difference to the position of the Council and caused no prejudice to the Council. That submission reflected the reasons given by Stuart-Smith J for granting an extension of time in the Amey case.

74.
Attractive though that submission may seem, I am unable to accept it. The claimant's argument is in reality one as to why there is no good reason not to extend time rather than why there is a good reason to do so. If I were to accept that approach, I would, in effect, treat lack of prejudice to the defendant as the determinative factor and that would be wrong in principle and not accord with the decided cases.

75.

In any event, it seems to me that there is a real prejudice to the Council and the administration of its business in the grant of an extension of time. Normally the standstill period expires before the limitation period. That provides an incentive to the claimant to issue proceedings if it wishes to effect a suspension of the authority's ability to enter into a contract and have the decision set aside. The extension of the standstill period, therefore, gave the claimant a significant benefit, firstly, in that there was no risk of a contract being entered into during the period between the end of the statutory standstill period and the expiry of the limitation period and, secondly, providing a longer period or potentially longer period in which the claimant's provision of services was unaffected by the letting of new contracts. But the corresponding benefit for the defendant was the knowledge that as soon as the standstill period expired, which was after the expiry of the limitation period, it would be able to let the new contracts free of any risk that the claimant would issue proceedings and cause that process to be suspended and the Council could plan accordingly. The grant of an extension of time would have disrupted that process. The fact that there is no direct evidence of that effect is immaterial because the concern is with the wider public interest and the purpose of the time limits. Further it is not relevant that, because of the Covid-19 pandemic, what actually happened was entirely different and it was agreed that the stay on proceedings was without prejudice to the Council's case on limitation.

76.
That brings me back to the Henry Brothers case in which the Court of Appeal of Northern Ireland took what may be thought to be a different approach to an extension of the standstill period. The case concerned the 2006 Regulations under which the proceedings were to be brought promptly and in any event within 3 months but following the decision in Sita UK Ltd. v Greater Manchester Waste Disposal Authority [2011] EWCA Civ 156, the court was concerned only with the 3 month limit. The ITT documents were sent out on 19 June 2007 and clarifications were issued between that date and 7 August 2007. The final date for receipt of tenders was 7 August 2007. The decision was notified on 17 October 2007. The standstill period was extended to 12 November 2007 and proceedings were issued on that date, notification of an intention to do so having been given on 2 and 9 November.

77.
At first instance, the judge found a manifest error in the application of a criterion on fee percentage in the assessment process, and, since the assessment necessarily commenced after the receipt of tenders, the Court of Appeal held that the earliest date on which there could have been an infringement, was 7 August and said that, if that were correct, time expired on 7 November 2007. At [35], Morgan LCJ continued:

"We note, however, that the claim was lodged on the last day of the extension of the standstill period on 12 November 2007. The original standstill period would have expired within the three month limitation period and was extended because of ongoing correspondence and exchange of information between the appellant and the respondent. If the respondents had the requisite knowledge on 7 August so that time runs from that date we consider that in view of the fact that the respondent is only 5 days outside the limitation period and that this is contributed to by the ongoing correspondence and extension of the standstill period the limitation period would inevitably be extended in those circumstances."

On the claimant/respondent's case the infringement did not take place until 17 October or they did not have the requisite knowledge until after 12 August and, on that basis, the claim was not, in any event, time-barred.

78.

Mr Burton submitted that this decision was the closest to the current case and that I should take a similar approach. The proceedings here were commenced within the standstill period and, he submitted, if an extension of time was issued in the Henry Brothers case, where the proceedings were commenced 5 days after the expiry of the limitation period so should it be here where the delay was even shorter. Whilst there is plainly a similarity in the factual scenarios in these cases, in my judgment however, I am not constrained to reach the same result as did the Court of Appeal of the Northern Ireland.

79.
Firstly, this decision precedes any of the English decisions on the principles to be applied and there was, with respect, little analysis of why this short delay was a good reason for granting an extension of time. To the extent that the shortness of the delay was itself regarded as a good reason why an extension of time would have been granted, that is inconsistent with the English cases. In any event, what the Court of Appeal relied on as a factor militating in favour of the grant of an extension of time was the fact that the delay was contributed to by the ongoing correspondence and the extension of the standstill period. It is unclear on the facts how these matters had contributed to delay but there is no evidence in the present case that the extension of the standstill period contributed to the delay in issuing proceedings. The only sense in which it did was the mistaken belief that the time for issuing proceedings had also been extended and that is accepted not to be a good reason to extend time.

80.
Accordingly, and subject to addressing the last argument advanced, I do not consider that there is a good reason to extend time.

81.
The last matter that Mr Burton relies on is the argument that the claim in paragraph 15(7) is not, in any event, time-barred and will proceed in any event, so that the other elements of the claim should be permitted to proceed with it. The contention that the claim is not time-barred turns on the assertion that it was not until receipt of the pre-action protocol response dated 3 March 2020 that the claimant became aware of the meaning the defendant gives to MS5.

82.
That brings me to the issue on paragraph 15(7). The complaint made in this paragraph, as set out above, is that the terms of MS5 breached the transparency principle. That is on its face a complaint about the tender documents and Mr Paines submits, relying on Jobsin and the decision of Coulson J in Joseph Gleave & Son Ltd. v Secretary of State for Defence[2017] EWHC 238 (TCC) at [13], that the date when the cause of action accrued in relation to a challenge to tender documents was the date of the tender documents. The invitation to tender was published on 21 October 2019, so the defendant therefore contends that the 30 day period expired on 19 November 2019. The proceedings were, therefore, commenced not merely outside the 30 day period but also outside the 3 month period which is the maximum extension of time permitted.

83.
Whilst that statement would be right in the vast majority of cases, the position here is different. The claimant’s primary case was, and is, that MS5 was unambiguous in what it asked for. When the defendant provided its reasons for not marking the claimant above a score of 6, it was apparent, on the claimant’s case, that the defendant had applied different criteria. That is the basis of the claimant’s case. But the claimant says in the alternative that, if MS5 could bear the meaning that the

defendant gives to it, then it was unclear and could be interpreted by different tenderers in different ways. That is the basis of the alternative case in paragraph 15(7).

84.
The issue on limitation is when the claimant knew or ought to have known that of the grounds for making a claim. At least for the purposes of these applications, it seems to me arguable that grounds for starting the proceedings had not arisen at the time of the invitation to tender. At the time of tender, the claimant did not know that MS5 could have a different meaning from the one the claimant attributed to it, nor did the claimant have actual knowledge of how the defendant would construe it, the claimant's case being that MS5 unambiguously said something else. As to whether the claimant ought to have known that MS5 was not capable of being read the same way by all tenderers, that raises the very issues raised by the other aspects of the claimant's claim and is not an issue which, in my view, would be capable of resolution on an interlocutory basis.

85.
However, the claimant must, in my view, have had the requisite actual or constructive knowledge by 7 February when the reasons for rejecting the claimant's bid were given. If those were proper reasons, then the defendant's interpretation of what was sought in MS5 must have been different from the claimant's understanding. By 7 February, the claimant could sensibly discern from the reasons given, that the defendant's position was that MS5 required something more than the "process driven" response the claimant had provided. It followed that the claimant ought to have known of the facts that found the alternative case in paragraph 15(7). It was unnecessary for the defendant to further set out its position, as it did on 3 March 2020.

86.
In my judgment, therefore, this claim is caught by the same time period for the commencement of proceedings and the argument Mr Burton advances is not sustainable.

Conclusion

87.
I decline to grant the extension of time sought which, in my judgement, would be required to bring each of the claims in paragraphs 15(6), (7) and (8) and it follows that the claim will be struck out.