Neutral Citation Number: [2020] EWHC 1803 (TCC)

Case No: F40BS112

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

Bristol Civil & Family Justice Centre
2 Redcliff Street
Bristol BS1 6GR

Date: 17/07/2020

Before :

HH JUDGE RUSSEN QC

(sitting as a Judge of the High Court)

- -

Between :

COMMUNITY R4C LTD	**Claimant**
- and -	
GLOUCESTERSHIRE COUNTY COUNCIL	**Defendant**

- -
- -

Duncan Sinclair (instructed by **Shakespeare Martineau LLP, Nottingham**) for the **Claimant**
Sarah Hannaford QC (instructed by **Eversheds Sutherland (International) LLP, Cardiff**) for the **Defendant**

Hearing dates: 2nd to 4th March and 24th June 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and its release to Bailii at 10:15am on 17 July 2020.

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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HH JUDGE RUSSEN QC

HH Judge Russen QC:

1. This is my judgment following the trial of the two preliminary issues identified in paragraph 24 below. It is broken down into the following sections (the paragraph numbers identify the start of each section):

    i) Introduction (paragraph 2)

    ii) The Witnesses (paragraph 27)

    iii) CR4C's Application dated 2 June 2020 (paragraph 41)

    iv) The First Issue: CR4C as an economic operator which could have pre-qualified

        a) Preliminary Observations (paragraph 57)

        b) The Benchmark for Pre-Qualification (paragraph 79)

        c) The Interpretation of Regulation 91 (paragraph 104)

        d) The Concept of an 'Economic Operator' (paragraph 144)

        e) The Pleaded Case (paragraph 168)

        f) CR4C as an Economic Operator (paragraph 184)

        g) CR4C's Prospects of Pre-Qualifying (paragraph 207)

    v) The Second Issue: Limitation

        a) The Test under Regulation 92(2) (paragraph 261)

        b) The Rival Contentions (paragraph 273)

        c) Analysis (paragraph 278)

    vi) Disposal (paragraph 347)

Introduction

2. By a Claim Form issued on 18 January 2019 the Claimant ("**C4RC**") seeks damages against the Defendant ("**the Council**") in respect of the Council's alleged "*breach of the Public Procurement Regulations 2015*" and/or "*directly applicable principles of EU law in relation to a waste disposal contract awarded to UBB Waste Gloucestershire Ltd in 2016*". CR4C's claim is therefore a procurement claim brought under Regulation 91 of the 2015 Regulations ("**the Regulations**").

3. The contract entered into between the Council and Urbaser Balfour Beatty Waste Gloucestershire Ltd ("**UBB**") on 21 January 2016 is described as an "Amended and Restated Contract"; this by reference to an earlier contract between the parties

concluded on 22 February 2013. As a reflection of their rival arguments about the status of the 2016 contract, when viewed from the perspective of the Regulations, C4RC has described it in its statement of case as "*the Second Contract*" whereas the Council refers to it as "*the Amended Contract*". I shall instead refer to it in this judgment as "**the 2016 Contract**" and to the earlier one as "**the 2013 Contract**". Taking them both together, the Council's witness, Mr Ian Mawdsley, referred to it "*as the largest contract the Council has ever let*". When the 2016 Contract was entered into it was given a value by the Council of around £613m measured over 25 years (it has the potential to run for 30).

4. The subject matter of the 2013 Contract and the 2016 Contract is an Energy from Waste Plant ("**the EfWP**") which recovers energy from the treatment of municipal waste generated in the county of Gloucestershire. The EfWP is sited at Javelin Park, Haresfield, close to junction 12 of the M5 in Gloucestershire. It operates by incinerating residual waste and recovering energy in the form of electricity generated by combustion and heat. Residual waste comprises the elements of commercial or household waste which remain after recyclable or compostable elements have been removed: the 'black bag' rubbish at the household level. The amount of anticipated waste to be managed by the EfWP is in the region of 130,000 to 160,000 tonnes per annum. The contract is to run for 25 years from commencement of operation of the EfWP, with an option for the Council to extend for another 5 years.

5. The Council's position is that the 2016 Contract provided for the amendment of the 2013 Contract for the EfWP and was made in accordance with a procedure set out in Schedule 26 of the 2013 Contract.

6. The 2016 Contract was entered into in circumstances where, after the entry into the 2013 Contract, there was a delay of over 2 years in securing planning permission for the EfWP at Javelin Park. UBB had applied for planning permission on 31 January 2012. After an initial refusal in March 2013, the project was then "called in" by the Secretary of State on 16 July 2013 and the result was a public inquiry held between November 2013 and January 2014. When planning permission was later granted in January 2015 it was challenged by Stroud District Council. Approval for the EfWP was only finally given in August 2015. The delay meant that the "*Planning Permission Longstop Date*" of 15 February 2015, specified in the 2013 Contract, had passed. That meant that the Council was required to request a Revised Project Plan from UBB in accordance with Schedule 26 of that Contract. The terms of that led to the entry into the 2016 Contract. Construction of the EfWP under the 2016 Contract began around November 2016.

7. CR4C makes no complaint about the procurement process adopted by the Council in relation to the 2013 Contract (which was conducted in 2009 in accordance with what were then the Public Contracts Regulations 2006). The Council advertised the procurement - for a contract for the provision of residual waste treatment capacity that would divert municipal solid waste from landfill with a duration of 20 to 25 years - in the Official Journal of the European Union on 30 January 2009. The OJEU Notice stated that the solution should include provision of treatment capacity, together with all associated infrastructure and additional services; and that this would include but not be limited to the management, storage, treatment, sale marketing, removal, recycling, transportation and/or disposal of all products (including any energy), by-products, process residues and rejects. It also stated that the Council had a "*neutral technology*

stance" and that the solution did not necessarily have to consist of any single technology or combination of technologies

8. CR4C, whose purpose and constitution I refer to further below, did not exist at the time of that initial procurement. CR4C says it set up as an informal association around July 2015. It was formally registered as a society in February 2016. I return below to the significance of the timing of the establishment of CR4C in addressing the first preliminary issue.

9. However, CR4C contends that the 2016 Contract was a new contract in procurement law terms. The total amount payable under it was well in excess of the threshold value under Regulation 5 of the Regulations and CR4C says its amendment of the 2013 Contract was material (for procurement law purposes) in that it changed the economic balance of the contract in favour of UBB in a manner not provided for by that earlier contact. CR4C challenges the Council's position by saying that the award of the 2016 Contract was not within any of the exceptions exhaustively set out in Regulation 72 of the Regulations and which identify the circumstances in which changes to a contract, post-award of the contract, will not require a new procurement exercise. The present claim is founded upon what CR4C says was an obligation upon the Council to ensure that such a public contract was only awarded in 2016 following compliance with the rules on procurement contained in Part 2 of the Regulations. Accordingly, CR4C claims to be entitled to the remedy of damages under Part 3 of them.

10. The challenge to the Council's procurement of the 2016 Contract by CR4C forms part of a wider concern about economic and environmental impacts of the EfWP which is held by those who support CR4C. Whether or not those concerns are justified is not material to my determination of either of the present preliminary issues but, if this case goes forward, they might well be relevant to CR4C's claim that its own tender either would or might well have been viewed by an avowedly technology-neutral Council as the 'most economically advantageous tender' (or "**MEAT**", the language of Regulation 67(1)) and the basis of being awarded its own waste treatment contract in place of UBB.

11. At an early stage of the hearing I asked Mr Sinclair, counsel for CR4C, about the basis of his client's claim to damages, identified in the Claim Form in the sum of £350,000. Mr Sinclair's skeleton argument mentioned that CR4C had been identified as sole claimant (to the exclusion of other members of the proposed consortium mentioned below) as the joinder of other claimants would only have increased the size of the damages claim. I therefore observed that the claim did not appear to be first and foremost one about money. Mr Sinclair confirmed as much by saying that his client was not interested in increasing the burden for ratepayers and that, instead, CR4C's interest in establishing that there had been a breach of procurement law was to establish the beginnings of a case that there had been unlawful State Aid.

12. His written closing submissions (in a section headed *"What This Case Is About"*) further clarified CR4C's position by saying that the £350,000 (or some fraction of that sum reflecting any lost chance) was nothing like the amount that might have been claimed and that:

> "*C4RC instead brings this case for non-commercial reasons in the public interest.*

These include:

(a) *Public (judicial) recognition that GCC breached the law, ultimately signing a revised contract unlawfully that cost it some £140-£160m more than the competitive result signed in 2013. As a public letter signed by Councillors and others in January 2019 and sent to GCC puts it, GCC consistently wrongly and publicly represented the contract cost was £500m right up until disclosure in December 2018.*

(b) *The issue of secrecy is particularly at issue at this stage of the case as your Lordship will have to decide (preliminary Issue I) whether, as we submit, C4RC did not and could not have known of the breach of law until GCC released material on 20 December 2018, nearly 6 years after the early 2013 contract and nearly 3 years after the February 2016 contract. The Court need only address what was known or could have been known by C4RC, but as the Judge will no doubt appreciate it is the Claimant's belief and stated position that there was deliberate concealment of important facts.*

(c) *It is a matter of important principle that GCC obtains the best value for money available on behalf of taxpayers and this is only possible by compliance with the procurement rules.*

(d) *Finally, and importantly, if ultimately a breach of procurement law is found at final trial, there will be a solid basis for the UK Government/GCC to find that the overpayment to UBB is unlawful State aid. Any overpayment to date will be recoverable from UBB (GCC may immediately have £10's of millions to spend on public services) and any future overpayment will not be payable."*

13. In his oral closing submissions, Mr Sinclair noted the irony in the position that his client's claim could produce such ultimate financial benefit for the Council.

14. The public letter referred to by Mr Sinclair was dated 7 January 2019, after the release of material in December 2018, and therefore just prior to the commencement of proceedings. It disclosed concern that the public may have been misled about the value of the 2016 Contract and other issues. It was initially signed by seven local councillors (either county or district) including the Leader of Gloucestershire Liberal Democrats, the Labour and Co-op MP for Stroud. Those signatories were later joined by an MEP, the leader of the Labour Group at the Council and more County, District and Parish Councils. The letter called upon the Chief Executive of the Council to immediately establish an independent inquiry into the award and structure of the contract for the EfWP.

15. On the final day of the hearing, Ms Hannaford QC, for the Council, objected to CR4C relying upon that letter. She said it had not been adduced in evidence and had only

been included within a supplementary bundle of documents lodged with the court on 16 March 2020 and therefore after the close of evidence. However, the letter was written as an open letter and in circumstances where it was arguably disclosable (my question about this revealed that neither side had disclosed it) it seems right that CR4C should be able to make me aware of its existence and content.

16. By way of further background to the preliminary issues, CR4C's criticisms of the EfWP are summarised in section 13 of its 2016 Share Offer which I mention further below: "*Comparison: Incinerator to R4C Recycling Plant*". That was a comparison which CR4C sought to make between the intended EfWP and what CR4C were proposing for waste treatment. At the time of the offer, CR4C were proposing a recycling plant that would exist alongside the EfWP. The matters listed in that section include a greater build cost (£150m or more compared to the £15m contemplated under CR4C's rival proposal); a less favourable carbon footprint (because of the amount of plastic to be burnt in the EfWP) and lower percentage of recycling; and poorer energy efficiency and renewable energy performance. The Share Offer highlighted *"The Immediate Problem"* as being one where:

> "[*t]he County Council's planned solution is to build a huge "mass-burn" incinerator into which everything in our black bags will be thrown with no sorting or pre-treatment, costing the taxpayer an estimated £600 million over 30 years, creating greenhouse gases and risk of widespread pollution, and destroying valuable materials forever. With regulations heading towards recycling, recovery and climate protection, this wasteful project may soon be heavily taxed and/or unusable*."

17. In relation to the anticipated costs of the EfWP, section 13 of the Share Offer involved a comparison of 'gate fees': the price per tonne charged at the weighbridge of a waste disposal centre. This involved comparing suggested prices per tonne for the R4C Recycling Plant (£20 per tonne for household waste and £50 per tonne for commercial and industrial waste) with the following for the EfWP: "*25 year contract thought to be £100+ pt, £500M contract (now estimated £595M)*". As I explain below, the Council relies upon this assertion by CR4C in 2016 as to the likely cost of the EfWP to argue, on the limitation issue, that CR4C had the requisite knowledge to commence a claim under the Regulation well before the date the proceedings were in fact commenced.

18. As CR4C's Claim was not issued until January 2019, CR4C is well outside the 6 month time limit (under Regulation 92(3)(b)) for seeking a declaration of ineffectiveness in respect of the 2016 Contract. Instead, CR4C seeks damages, saying that the Council's breach of the procurement rules was sufficiently serious to give rise to an entitlement to damages and that, at the minimum, it lost a significant chance of its tender qualifying as the MEAT and so being awarded an alternative waste disposal contract.

19. The essence of CR4C's case on this loss of a chance (at least) is that it would have formed a consortium to bid for such a contract with the Council. CR4C's alternative proposal would have involved waste disposal through a process known as mechanical biological heat treatment ("**MBHT**") rather than incineration. The MBHT process is designed to produce the by-product of a high grade pelletised fuel. The "R4" part of the claimant's name stands for a centre for 'Resource Recovery, Refining and Recycling'. A CPR Part 18 response from CR4C confirms that the consortium would, at least, have comprised itself, Biocentre Technology Ltd ("**BTL**", the owner of

patented technology based upon MBHT and of the trademark Biocentre™) and Revolution R4C Ltd ("**RR4C**", which was set up as an SPV to build the plant envisaged by the 2016 Share Offer). BTL had acquired its intellectual property from a company called Advanced Recycling Technology ("**ART**") which had gone into administration in November 2011.

20. The Council defends CR4C's claim on a number of grounds. In summary, the grounds of defence are that the above-mentioned Regulation 72 entitled the Council to enter into the 2016 Contract without undertaking a new procurement procedure; that CR4C has no standing to bring the claim; that any breach of the Regulations was not sufficiently serious to lead to an award of damages; that CR4C had not lost the prospect of, or a significant chance of being awarded an alternative contract; and that the claim was not brought within the timescale permitted by the Regulations.

21. So far as the first of those points is concerned, the Council denies that the 2016 is a new contract in procurement law terms but instead operated to effect amendments to the 2013 Contract which were permitted by Regulation 72. The Council says that the amendment was permissible under the Regulations on two alternative bases:

    i) firstly, it was made pursuant to a clear, precise and unequivocal amendment clause (in Schedule 26 of the 2013 Contract), which means that it was permissible under Regulation 72(1)(a); and

    ii) secondly, it was not a "substantial" amendment (as that is defined in Regulation 72(8)) and was permissible under Regulation 72(1)(e).

22. Those last two matters do not presently fall to be determined by the court.

23. The Council's Defence in fact relies upon three of its points – about Regulation 72, the lack of *locus standi* and limitation – to go so far as saying that the claim is misconceived and it flagged the reservation of the Council's right to apply to have it struck out on those grounds.

24. At the Case Management Conference held before me on 19 June 2019 the following were instead identified as issues for a preliminary trial (with any determination of the remaining issues being stayed in the meantime):

    i) Limitation; and

    ii) Whether CR4C is an economic operator which could have pre-qualified having regard to any selection criteria that could have been imposed upon it by the Council pursuant to Regulation 58 of the Regulations.

25. The trial of those two preliminary issues addressed in this judgment took place before me over 4 days, with opening submissions and evidence being heard on Monday 2 to Wednesday 4 March and oral closing submissions, following the filing of written ones, being made on 24 June 2020 (a date postponed from 19 March 2020 as a result of the impact of the Covid-19 outbreak).

26. I am grateful to Mr Sinclair and Ms Hannaford QC for the clarity of their submissions on all of the significant points surfacing in the context of those two issues.

The Witnesses

27. Evidence was given at the trial of the preliminary issues by three witnesses for CR4C and one for the Council.

28. The witnesses for CR4C were Mr Tom Jarman ("**Mr Jarman**"), Mr Mark Christensen ("**Mr Christensen**") and Ms Sarah Lunnon ("**Ms Lunnnon**").

29. Mr Jarman helped to found and is a director and a shareholder of CR4C. He is a chartered mechanical engineer with a particular interest in waste treatment, especially in Gloucestershire where he lives. He co-founded BTL in 2012 and RR4C in October 2015. BTL owns the patented technology, mentioned above, which is based upon MBHT but has the distinguishing features of (a) the use of infrared sorting to remove plastics and yield a 90% biomass fuel pellet and (b) a mechanism for blending different fuel streams to control the biomass content and the fuel's burning characteristics.

30. Mr Christensen has an academic background in environmental chemistry and considerable experience in promoting the use of 'clean technology' in the waste and renewable energy sectors. Such technology includes mechanical biological treatment of which MBHT (with its additional heat, or flash drying, stage incorporated) is a variant. Mr Christensen is the co-founding shareholder (but not director) of BTL with Mr Jarman. Prior to that he had been the development director at ART. Mr Christensen had provided an expert witness statement for Stroud District Council in response to UBB's appeal against the refusal of planning permission for the EfWP. He gave evidence that the Biocentre technology would have been made available through BTL for a consortium-based bid by CR4C.

31. Ms Lunnon is a Stroud Town Councillor. She was a district councillor at Stroud District Council between 2004 and 2013 and (as a member of the Green Party) a county councillor at the Council between 2009 and 2017. In her role as district councillor, Ms Lunnon became aware of a document produced in 2008 by the Council together with the District Councils through the voluntary and non-statutory structure known as the Gloucestershire Waste Partnership. The document was the '*Joint Municipal Waste Management Strategy 2007 - 2020*' and, at section 10.5, it addressed the need to find a residual waste treatment solution that would enable the partnership to meet landfill reduction targets, in accordance with the EU Landfill Directive of 1999, and avoid the need to trade in Landfill Allowances or the risk of fines.

32. As a county councillor, Ms Lunnon sat on the Council's Residual Working Waste Group ("**RWWG**") which was set up in 2013 after planning permission for the EfWP had been rejected. She explained that (with the EfWP being "Plan A") the RWWG came to consider a "Plan B" should the EfWP not go ahead. By November 2014, the RWWG was considering some variant of a mechanical biological treatment plant as an option. Mr Jarman had by that stage already made a presentation of MBHT technology to the RWWG on behalf of BTL.

33. The Council's witness was Mr Ian Mawdsley ("**Mr Mawdsley**") who is Head of Strategic Procurement at the Council. In that role he is responsible for setting and monitoring procurement policy and the procurement of large and complex contracts.

Mr Mawdsley was the Project Lead on the Council's Residual Waste Treatment Project between April 2009 and June 2016. Mr Mawdsley is a chartered accountant by profession. His evidence was directed to an explanation of the requirements set by the Council on its procurement of the 2013 Contract, and what would have been those under any fresh procurement exercise instigated in 2015-16, as well as highlighting events upon which the Council relied (for limitation purposes) in saying CR4C had knowledge of the significantly increased cost of the 2016 Contract at a much earlier point in time than it conceded.

34. I am satisfied that each of the witnesses was doing his or her best to assist me in obtaining a clear and reasonably straightforward view of matters from their perspective. The nature of each preliminary issue is such that it was inevitable that the focus of the evidence of all four witnesses, including Mr Mawdsley's, was upon CR4C's position in the period between 2015 and the commencement of proceedings in early 2019. The fact that each issue carries with it a heavy dose of legal principle, and one of them turns upon an analysis of CR4C's prospects under an entirely hypothetical procurement process, are further reasons why I am not in giving this judgment in the position of having to choose between conflicting factual accounts.

35. I mention particular aspects of the witness evidence, as appropriate, in addressing the two issues below. This includes, on the issue of limitation, the difference between Mr Mawdsley and Mr Jarman as to what CR4C might have discerned about the value of the 2016 Contract when certain redacted material about its terms came to light in June 2017 and then, with fewer redactions, later in August 2017.

36. One person who was not called to give evidence on behalf of CR4C was Mr Stephen Burnett ("**Mr Burnett**"). Mr Burnett is an environmental economist and project analyst. He is the author of a Report dated March 2017 upon which CR4C relied in making a complaint about the EfWP to the local auditor, Grant Thornton UK LLP ("**Grant Thornton**"), on 26 March 2017. I refer to this further below in connection with the limitation issue. I mention Mr Burnett because, by a letter dated 16 April 2020 and therefore after the main hearing, CR4C's solicitors, Shakespeare Martineau LLP sought the Council's consent to a witness statement from him being adduced as further evidence in the case.

37. By an earlier letter dated 25 March 2020, and therefore again after the evidence had closed, the Council's solicitors, Eversheds Sutherland (International) LLP, had objected to certain aspects of Mr Sinclair's written closing submissions which, they said, amounted to him giving evidence. It was no doubt that letter (identifying as an example Mr Sinclair's reference in paragraph 123 to an email from Mr Burnett confirming a particular understanding) which led to his witness statement being served. Mr Sinclair's submissions had referred to Mr Jarman's *"unfortunate misreading"* of Mr Burnett's Report being the circumstances in which CR4C had made an objection to the local auditor based upon a large increase in cost. It was in order to clarify what Mr Burnett had actually reported that CR4C wanted to put in evidence from him.

38. Mr Burnett's witness statement is dated 15 April 2020. It became the subject matter of CR4C's application to have it admitted in evidence.

39. By their letter dated 24 April 2020, Eversheds Sutherland objected to the statement being relied upon, saying amongst other things that it did not properly arise out of

anything Mr Mawdsley had said in his evidence and that, in any event, it was too late to seek to respond to what had been trailed in Mr Mawdsley's witness statement. What had been flagged by him in that witness statement, they said, was not a reference to Mr Burnett's Report of March 2017 but, instead, what CR4C's complaint to the local auditor had said about it; namely that "*[the Report] shows that at today's prices, 2017, the total contract cost will be £537.604m, £87m more than originally claimed*." The solicitors' letter said that the Council would oppose any application to have the statement admitted in evidence.

40. The disagreement between the parties over the admissibility of Mr Burnett's witness statement led CR4C to issue an application, dated 2 June 2020 and therefore during the interlude between the close of the oral evidence and the final day of the hearing. That period before the final day of the hearing was much longer than had been anticipated because of the impact of the reaction to the outbreak of the Covid-19 virus. Mr Burnett's witness statement was produced almost 6 weeks after the close of the oral evidence (on 4 March 2020) and just short of a month after the parties had filed detailed written closing submissions (on 17 March 2020).

CR4C's Application dated 2 June 2020

41. By this application CR4C sought my permission, to be granted without a hearing, to rely upon Mr Burnett's witness statement dated 15 April 2020.

42. The witness statement of Mr Alexander Ryan (of CR4C's solicitors Shakespeare Martineau) in support of the application said that it was only fair that Mr Burnett's statement should be admitted in evidence when the first mention of Mr Burnett's March 2017 Report was not in the Council's pleading of its limitation defence but instead in Mr Mawdsley's witness statement as then elaborated upon by him in testimony. Mr Ryan said that the Council's position involved asking the court to exclude from its consideration what would otherwise have been pleaded by CR4C in reply to a properly pleaded limitation defence by the Council and then addressed by CR4C in evidence before the hearing. He said that the unpleaded aspects of limitation subsequently raised by Mr Mawdsley should either be excluded from consideration or CR4C should be given a fair opportunity to address them through Mr Burnett's witness statement. The latter course was said to be proportionate and fair and better reconciled with the overriding objective. Mr Ryan said there had not been adequate time to adduce the evidence from Mr Burnett in the short period between receipt of Mr Mawdsley's witness statement and the start of the hearing.

43. Mr Ryan's witness statement exhibited and commented upon the content of Mr Burnett's witness statement of 15 April 2020. Mr Burnett's statement was therefore in evidence and I read it *de bene esse*, knowing that the Council's position was as stated in its solicitors' letter dated 24 April, and therefore for its worth as part of the exercise in deciding whether or not to grant CR4C's application for it to be admitted in evidence.

44. Shakespeare Martineau's letter to the court dated 2 June 2020, enclosing the application, recognised that the final day of the hearing (by video) had been fixed for 24 June 2020. In the first instance, the letter invited me to exercise my case management powers under CPR 3.10 and/or 3.3 (and possibly 3.1(m)) to permit

reliance upon Mr Burnett's statement without the need to determine the formal application. It was said I might do so either with or without the benefit of written submissions from the Council. Alternatively, it was suggested that I should determine the point following brief oral submissions at the start of the hearing on 24 June.

45. By a decision on paper communicated to the parties on 8 June 2020, I directed that brief submissions on the application of 2 June should be made at the outset of the hearing listed for 24 June. I did so in circumstances where three things were apparent. The first was Shakespeare Martineau's recognition that, rather than decide the application before the hearing, I might hear arguments on it at the outset of the hearing. The second was that there was no question in my mind that the final day of hearing should be otherwise disrupted by the application. The application was far too late in the day for that. In fairness to CR4C, there was no suggestion that, if the application was successful, Mr Burnett would then be called as a witness. Instead, Shakespeare Martineau's letter dated 2 June 2020 had put forward reliance upon his hearsay statement as a "*proportionate, cost effective and just solution*." The third significant point was that the Council's response on paper to the application did not suggest to me that, if the application was successful, it would then be appropriate that Mr Burnett should be cross-examined at that late stage of the proceedings. On the contrary, the Council's position in the solicitors' correspondence appeared to be that Mr Burnett's evidence did not really address the point trailed by Mr Mawdsley's witness statement about CR4C's understanding at the time. An email from Mr Sinclair the day before the hearing in fact confirmed that the parties were agreed that, if the witness statement was admitted in evidence, Mr Burnett would not be required to be called or cross-examined.

46. At the hearing on 24 June 2020, Ms Hannaford QC confirmed that to be the Council's position. She indicated that, if Mr Burnett's witness statement was admitted, the disclaimer of any intention to cross-examine was borne of expediency as much as anything else; it being unacceptable to contemplate that the conclusion of the hearing should be further delayed or disrupted. On that basis, her primary submission was that Mr Burnett's witness statement came far too late in the day. Ms Hannaford also said that the point made by Mr Mawdsley had been blown out of all proportion by the application to admit this further evidence. That was consistent with what Eversheds Sutherland had said in their letter of 24 April 2020 about Mr Burnett's statement not really being relevant to the point that (whether or not his Report had reported such an increase) CR4C believed there had been an increase of £87m to the contract value when making its objection to the local auditor. On that basis, Ms Hannaford said that, if seen earlier, the content of the statement would have been more likely to have prompted further cross-examination of Mr Jarman on the point rather than Mr Burnett.

47. During the course of argument on the application I made it clear that the timing of the application was such that, if Mr Burnett's statement was to be admitted, the Council should still therefore be able to remark that it was hearsay evidence and that there had been no satisfactory opportunity to cross-examine any witness about what Mr Burnett said.

48. Having heard counsel's succinct rival arguments on the application, I decided to admit the witness statement of Mr Burnett as hearsay evidence. I gave brief reasons for doing so at the hearing which, in the interests of saving time, I indicated I would elaborate upon in this judgment.

49. To my mind, the most important factors to be weighed up in determining the application were:

    i) the suggested justification for the lateness of Mr Burnett's statement;

    ii) the apparent significance of the point sought to be addressed in that statement to the determination of the limitation issue. There would obviously be less prejudice to CR4C in not permitting it to adduce belated evidence on a marginal point than a central one; and

    iii) the prejudice to the Council in admitting the statement (even as hearsay evidence) if the practical effect of doing so, at such a late stage, is that it unfairly leaves the Council in a position of being unable to address it adequately. Again, the apparent significance of the late evidence comes into the balancing exercise when viewed from the perspective of the respondent to the application. That said, I have already explained that the Council's position was that Mr Burnett's statement addressed a rather marginal point which did not compel the need for him to be cross-examined.

50. The essential point made by CR4C in seeking to justify reliance upon Mr Burnett's witness statement was that paragraph 17 of the Council's Defence raised four particular points in time and factual bases for its argument that the claim was barred by limitation. The present two preliminary issues were ordered at the CCMC on 20 June 2019 with the shape of the limitation defence being as set out in the Defence. CR4C's Amended Reply was served on 21 June 2019 engaging with paragraph 17. Witness statements, including Mr Mawdsley's, were exchanged on 10 February 2020, only 14 days before the hearing of the preliminary issues. This was later than envisaged by the Order made at the CCMC but exchange of statements had been delayed by an application by CR4C seeking further disclosure from the Council (and issuing the application for it on the date which, following earlier requests by CR4C to postpone the date specified in the Order, had been agreed to be the date for exchanging witness statements).

51. Mr Mawdsley's witness statement made a number of points in relation to the limitation issue which were not foreshadowed in the Defence. I say that recognising Ms Hannaford's point that the Defence did not purport to set out exhaustively all matters upon which the Council relied in attributing CR4C with earlier knowledge of the grounds for its suggested claim. Paragraph 14 of the statement referred to an undisclosed Annex 1 to a Financial Monitoring Report discussed at the Council's Cabinet meeting on 12 November 2015. His paragraph 18 involved the calculation of an approximate 2016 Contract value of £600m using figures that were revealed (as opposed to redacted) in a particular version of a November 2015 Report from Ernst & Young which was published in 2017. The version he mentioned in his witness statement was the one released in June 2017 (though in testimony he identified the version published on the Council's website in August 2017) whereas the Defence had sought to attribute CR4C with knowledge of what was revealed by a redacted version disclosed on 21 March 2017. As I explain below (in paragraph 323) Ms Hannaford QC clarified that the March date was an error and the Council's focus was on the June version. Mr Mawdsley also relied upon the terms of CR4C's objection to the local auditor in March 2017 which, as I have noted above, referenced Mr Burnett's Report. These points were expanded upon in his oral evidence and I refer to them below when addressing the limitation issue.

52. In his testimony, Mr Mawdsley made a number of references to Mr Burnett's Report and made observations that he, Mr Burnett, had concluded that the difference between the value of the 2013 Contract and the 2016 Contract was approximately £90m (he attributed the figure of £87m to Mr Burnett).

53. The purpose of Mr Burnett's witness statement was to explain Mr Burnett's position that Mr Mawdsley had been wrong, when giving his evidence, to say that Mr Burnett had concluded in his March 2017 Report that the difference in value between the 2013 and 2016 Contracts was approximately £87m. Mr Burnett said that he had instead calculated the difference as being approximately £20m. His witness statement clarified the approach he had taken in the report and identified the comparison at its page 4 as the basis for the figure of just under £20m. The essential point in the witness statement was that his estimate in March 2017 of the value of the 2016 Contract (which had not by then been disclosed) was £537.604m. However, that estimated value was not properly to be compared with the total estimated value of the 2013 Contract given by the Council (a figure of £450.507m as set out in Annex 4 to the Report) but instead to be compared with what Mr Burnett had calculated the total value of the 2013 Contract to be, namely £517.875m. Hence the smaller difference of around £20m.

54. These points sought to be made by Mr Burnett were apparent to me on a reading of his witness statement *de bene esse* for the purpose of deciding the proper outcome of CR4C's application. In deciding to admit Mr Burnett's witness statement, the key point in favour of doing so was, to my mind, that he was commenting upon what is already recorded in his March 2017 Report. I was also mindful of the point that, Mr Burnett not having been tested in cross-examination, the Council is able to make its own observations upon the report and what CR4C did or could have taken from it.

55. As with Mr Mawdsley's testimony which provoked it, I return to Mr Burnett's evidence when addressing the limitation issue.

56. I now turn to the detail of the Preliminary Issues. As the second of the preliminary issues requires consideration of the position around early 2016, whereas the first focuses instead upon actual or constructive knowledge of a claim arising as a result of a contract concluded at that earlier time, it is logical to address them in reverse order.

The First Issue: CR4C as an economic operator which could have pre-qualified

Preliminary Observations

57. The Regulations apply to 'contracting authorities' and to 'economic operators', both defined in Regulation 2 of the Regulations.

58. The definition of contracting authorities extends to local authorities. The Council is a local authority and, under section 51 of the Environmental Protection Act 1990, the waste disposal authority for Gloucestershire. There is no dispute that it is a contracting authority for the purpose of the Regulations. I note at this point that Gloucestershire is a 'two-tier' waste authority with district councils acting as waste collection authorities and the Council being the waste disposal authority. I mention that because the evidence indicates that Stroud District Council, as a waste collection authority, was certainly at

one stage supportive of CR4C's plan for a rival facility to the EfWP. I have already referred to that council's opposition to the grant of planning permission for the EfWP.

59. Under Regulation 89 the Council, as a contracting authority, owed economic operators a duty to comply with the Regulations.

60. Regulation 2 defines an 'economic operator' as:

> "*any person or public entity or group of such persons and entities, including any temporary association of undertakings, which offers the execution of works or a work, the supply of products or the provision of services on the market*".

61. Regulation 91 provides as follows:

> "*Enforcement of duties through the Court*
>
> *(1) A breach of the duty owed in accordance with regulation 89 or 90 is actionable by any economic operator which, in consequence, suffers, or risks suffering, loss or damage.*"

62. This first preliminary issue is expressed in terms which reflect these provisions in Regulations 2 and 91 of the Regulations. Those in turn reflect Article 1(3) of Directive 89/665/EC as amended ("the Remedies Directive") which, in addressing the need for national provision for effective and rapid view of decisions taken by contracting authorities, states:

> "*Member States shall ensure that the review procedures are available, under detailed rules which member states may establish, at least to a person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement."*

63. Mr Sinclair drew my attention to the *Pressetext Nachrichtenagentur* Case C-454/06 (13 March 2008), at [AG 143] where Advocate General Kokott highlighted that the two limbs of Article 1(3) of the Remedies Directive were the means by which "*public interest actions and actions brought by applicants with no prospect of success may be excluded*".

64. Although I am not addressing the application or non-application of Regulations 2 and 91 to CR4C in the context of a strike-out application of the kind contemplated by the Council's Defence, this preliminary issue is really all about CR4C's standing to sue the Council in a way that questions whether it has any reasonable grounds for bringing the claim. Paragraph 24(b) of the Particulars of Claim pleads that CR4C has "*at the minimum* lost a significant chance of being awarded a contract" as a result of the alleged breach of the Regulations (emphasis in the original). Paragraph 5 of the Defence sets out the matters on which the Council relies in denying that any such breach is actionable by CR4C and which are now encapsulated within the present preliminary issue.

65. In determining this preliminary issue the court must assume the scenario of a competitive tender taking place in about 2015/16. The parties agreed that this would have involved the Council in adopting a competitive dialogue procedure on the basis

that one or more of the criteria for doing so (as specified in Regulation 26(4) of the Regulations) was met. That is the basis on which the 2009 procurement was conducted.

66. It is CR4C's case that it would (for the purpose of a lawful procurement exercise conducted in relation to the needs of the Council which came to be served by the 2016 Contract) have formed a consortium to meet any lawful selection criteria, would at that time have met the definition of 'economic operator', and would have had a significant chance of success in the putative tender exercise. However, a question arises as to when more precisely during that approximate timeframe the Pre-Qualification Questionnaire ("**PQQ**") stage of the hypothetical procurement should be assumed to have occurred.

67. Mr Jarman gave evidence predicated upon the Council publishing a technology neutral advertisement for a replacement contract in the first or second quarter of 2016, it having become clear at the beginning of that year that an overpayment would have been required to continue with UBB. At another point in his witness statement he had indicated the relevant time was the end of November 2015 or beginning of 2016.

68. The Council said that any date well into 2016 was unrealistically late for the purposes of assessing CR4C's chances of pre-qualification. Mr Mawdsley's evidence assumed a PQQ exercise commencing around October or November 2015 with responses due by December 2015. Ms Hannaford QC made the following points:

    i) that Satisfactory Planning Permission for the EfWP (within the meaning of the 2013 Contract) was obtained in August 2015, UBB submitted their revised project plan on 24 June 2015 ("**the RPP**" which was the subject of the Ernst & Young Report mentioned below on the limitation issue) and the Council resolved to accept it at its Cabinet meeting on 11 November 2015. The Amended Contract was signed on 21 January 2016; and

    ii) on the hypothetical analysis that the Council would have decided that it needed to procure a new contract, the relevant time for commencing a "new" procurement was no later than November 2015. That is because the decision to reject the RPP would have been made after 24 June 2015 (when the RPP was submitted) and, at the latest, on 11 November 2015 when the Cabinet meeting took place. In any event, the relevant date should be no later than the actual date of the 2016 Contract, namely 21 January 2016.

69. The Council's fall-back position was to say that even the first or second quarter of 2016 would still have been too early for CR4C given its recent registration and the fact that it did not issue its Share Offer until late April 2016.

70. In my judgment the appropriate date for considering CR4C's prospects under the hypothetical PQQ is 15 January 2016. Taking that mid-January 2016 date results, in my judgment, in a reasonable period of time for the Council to have considered the RPP, taken a different decision than in fact taken at the Cabinet meeting on 11 November 2015 and then issued a fresh PQQ. I have noted that the 2009 procurement exercise allowed a 6 week period for completion of the PQQ.

71. CR4C's case is that it would have had a good prospect at that stage of winning the tender with its MBHT technology. Mr Sinclair for CR4C emphasised that it was, he said, sufficient for his client to establish loss of a significant (as opposed to fanciful)

chance of success as that reflected the language of Regulation 91 and its reference to *the risk* of the economic operator suffering loss. I return below to this important aspect of the present issue.

72. The present issue falls to be addressed primarily by reference to Regulation 58 of the Regulations. Regulation 58 provides that a contracting authority may, for the purposes of establishing which potential bidders "pre-qualify" for the purposes of being permitted to participate further in the procurement process, set out selection criteria aimed at establishing the candidate's capacity and ability to perform the contract to be awarded. The criteria which the contracting authority is permitted to impose in relation to two of the three matters identified in Regulation 58(1) – namely economic and financial standing and technical and professional ability – are respectively identified in sub-paragraphs (7) to (10) and (15) to (18).

73. The Council not only challenges the assertion that CR4C satisfied the definition of an economic operator in early 2016. It also says that the pre-qualification and selection criteria that it would have been entitled to stipulate (under Regulation 58) in relation to matters of economic and financial standing and technical and professional ability were such that CR4C could not have pre-qualified for any tender process, so that any breach of the Regulation 89 duty cannot be shown to be actionable by CR4C.

74. A further preliminary observation to be made in connection with this issue is one that emerges from a point made by Mr Sinclair in his written closing submissions. He referred to the provisions of Regulation 71 which provides that the contracting authority may in the procurement documents ask the tenderer to indicate in its tender any share of the contract that it may intend to subcontract out. Mr Sinclair said this was significant as, on the same day as signing the 2013 Contract, UBB signed 60 other contracts with subcontractors, banks and others. He referred to confirmation of this fact in the ruling of the First Tier Tribunal of 10 March 2017 addressing the Council's appeal from the decision of the Information Commissioner which is otherwise relevant to the chronology of events on the limitation issue. On the present issue, he submitted that this was relevant context as, unsurprisingly given that UBB was itself a special purpose vehicle like RR4C, the owners of the UBB relied heavily on others (and contracts were actually signed some 4 years after the PQQ).

75. However, I regard this as a distraction from the inquiry on the present preliminary issue. The question I had to decide is whether or not CR4C could have pre-qualified under the hypothetical PQQ in mid-January 2016 by reference to the selection criteria justified by Regulation 58. Whether or not the Council was right to award the 2013 Contract to UBB on the basis that its tender (including any identification of subcontractors) was the MEAT – compare Regulations 30(5) and 67 – forms no part of the issue before me and was not a matter explored in evidence.

76. The final preliminary observation which it is appropriate to make is that I am, of course, required to decide this preliminary issue, and the second one, in a way which will dispose of it finally within these proceedings (subject to any appeal). I make this point because Mr Sinclair made a submission which amounted to saying that CR4C had cut its evidential cloth to suit the nature of the hearing. He referred to his client not having hauled before the court witnesses on behalf of the companies which CR4C says were supportive of its alternative proposal and who may well have featured in a consortium bid. He reminded me that the trial of the two preliminary issues was estimated to last 3

days (in fact it ran to 4) and said that it did not lie in the Council's mouth to highlight the absence of evidence from such third parties given the confines of the hearing.

77. In noting CR4C's position on this point, I have well in mind Mr Sinclair's point, addressed below, that the question of whether or not his client is an economic operator (and was one in mid-January 2016) cannot sensibly be distinguished from the question of whether it was at risk of loss or damage. He is right to observe that evidence from such third parties would be highly relevant to any later assessment of the degree of that risk (determining the quantum of any damages) which forms no part of the present issue.

78. However, Ms Hannaford QC was in my view correct in her response when pointing out that this was the trial of the preliminary issue and not the contemplated strike-out application mentioned in the Defence. It was therefore incumbent upon CR4C to adduce sufficient evidence to persuade me of its case. Certainly in situations where the court is asked to reach a dispositive rather than interim decision, the time estimate for the hearing should not generally be permitted to govern its outcome. Again, I deal below both with what the pleaded case is and with an issue raised by Mr Sinclair over the relevant standard of proof for making good on it.

The Benchmark for Pre-Qualification

79. It will be readily apparent that a question begged within this preliminary issue is one over the nature of the selection criteria that might have been *lawfully* imposed in accordance with Regulation 58. What are "*the minimum financial or technical requirements*" which the Council might lawfully have proposed and which Ms Hannaford's skeleton argument said CR4C could not meet? She remarked in her opening submissions that Mr Sinclair had not fully engaged with my question to him as to what those requirements should be taken to have been if not those identified by the Council (in the Shadow PQQ mentioned below).

80. By the time of the CMC in June 2019 the Council's position in relation to the criteria that it could lawfully imposed as pre-qualification for tender stage of any 2015/16 procurement was set out in its Defence. I should make it clear that, for convenience, the parties have used the expression 'PQQ' (for 'Pre-Qualification Questionnaire') even though the language of pre-qualification had by that date fallen out of use in favour of the 'SQ' (for 'selection qualification') introduced by Regulation 58. Those criteria pleaded in the Defence were based upon the original PQQ adopted in the procurement of the 2013 Contract. They included pass/fail requirements, which required tenderers to have turnover greater than £100m and net assets greater than £80m.

81. However, CR4C's position at the CMC was that it wished to argue that those requirements were not permissible ones under the 2015 Regulations (as opposed to the 2006 Regulations which had applied to the procurement advertised in the January 2009 OJEU Notice) and the circumstances of a notional procurement exercise in 2015/16. Accordingly, my Order dated 19 June 2019 gave CR4C permission to amend its Reply to plead that the Council's selection criteria were unlawful and to state its case as to what lawful selection criteria could have been imposed.

82. CR4C served an Amended Reply on 21 June 2019. The amendments within it were quite extensive and (engaging with the Council's Defence) made a number of points against the putative selection criteria taken from the 2009 procurement exercise being a lawful reference point for a hypothetical procurement in 2015/16. The Amended Reply said those criteria ignored changes in procurement law since that earlier date and referred to the requirement in the 2015 Regulations (at Regulation 107) to have regard to Cabinet Office guidance summarised in the pleading. The Amended Reply addressed in some detail the Council's separate suggested requirements of £80m assets and a turnover of £100m, saying that neither could have been justified by a proper application of the provisions of Regulation 58. For example, focussing upon the "proportionality" requirement within Regulation 58(4), CR4C said that its proposed MBHT solution would "*require capital expenditure of c. £20m. This does not require net assets of £80m (rather it requires access to finance to cover capex and operating expenses until payments begin).*"

83. Although it offered this and many other reasons for saying the Council's pleaded PQQ would have been unlawful, the Amended Reply was less clear when taking up the opportunity, given by my Order of 19 June 2019, for CR4C to state positively what its case was as to the selection criteria that could lawfully have been imposed in 2015/16. Reading sub-paragraphs 17.1 to 17.20 of the Amended Reply, I distil the following positive averments from CR4C's general critique of what the Council had then pleaded:

    i) that the Cabinet Office guidance (to which Regulation 107 directs attention) required *"[t]he financial assessment of potential providers to be undertaken in a manner that is proportionate, flexible and not overly risk-averse while ensuring taxpayer value and safety is protected and the relevant EU procurement law is complied with*." CR4C also referred to the guidance pointing out that potential providers may have been recently formed and so unable to provide accounts and should not be purely disadvantaged on that basis, as there were a number of alternative means of providing sufficient evidence of financial and economic standing. The guidance relied upon was contained in *'Procurement Policy Note – Supplier Financial Risk Issues, February 2013*';

    ii) that Regulation 58(9) provides that the minimum yearly turnover required of an economic operator "*shall not exceed twice the estimated contract value, except in duly justified cases*" and that a purposive reading of the provision and EU Guidance means that the comparison is between a bidder's (including a consortium's) annual turnover and the estimated annual value of the contract. This provision for a cap upon the minimum required turnover would also be subject to the need for proportionality imposed by Regulation 58(4); and

    iii) in relation to technical resources and experience, that "*it is averred that what the [Council] could ask for would have to be proportionate and linked to the requirements of the contract to be let (Regulations 18 and 58)*" and "*would have been sufficiently flexible to accept a range of cogent evidence of technical experience/expertise*."

84. The absence of suggested alternative and clearly defined selection criteria within the Amended Reply emerges from that last quote (from paragraph 17.16 of it) and is also indicated by what CR4C said (at paragraph 17.10) about the criteria aimed at establishing economic and financial standing:

> "*The type of proportionate requirement that the [Council] may lawfully have chosen is open to conjecture, but would need to be directly linked to having sufficient access to finance* [sic] *to undertake the services (based on its own solution, not on the costs of an EfW plant – this is far more capital intensive) and (likely) indemnity insurance to cover any risk*."

85. In fact, it was the Council which subsequently, after the June 2019 Order, sought to identify alternative selection criteria to those postulated in its Defence. Without accepting the validity of CR4C's complaint about the original PQQ criteria, the Council identified in its Rejoinder (served after the date of the CMC) the financial PQQ requirements which it would have required if it had been obliged to carry out a procurement for a new contract in late 2015 or early 2016. Those requirements are set out in a document attached to the Rejoinder and described as "**the Shadow PQQ**" prepared by Ernst & Young LLP in July 2019.

86. The Council says that the Shadow PQQ criteria clearly comply with the 2015 Regulations. Ms Hannaford QC said that its requirements are entirely realistic and proportionate for the hypothetical procurement in 2015/16. The subject matter of the procurement was a very large and important project for the construction and operation of residual waste plant and associated infrastructure. The purpose behind the imposition of appropriate and proportionate requirements for selection was to *ensure* that the candidate had the capacity and ability to perform the contract under tender: see Regulation 58(3). Therefore, she said, the Council needed to assess the risk to its business and/or public money which would result if a potential provider bidding for a contract was shown to have inadequate experience or resources to perform it. The Council was entitled to eliminate from a procurement any potential provider whose limited capacity would pose an unacceptable risk to business and/or public money. She submitted that this approach is supported by the *Cabinet Office's Procurement Policy Note – Supplier Financial Risk Issues (PPN 02/13)*.

87. The Council's position was disputed by CR4C which argued the Shadow PQQ does not reflect lawful selection criteria. Mr Sinclair pointed out that the assumed annual contract value of £25m meant its value over 25 years (the anticipated duration of the 2016 Contract) was £625m. This was in excess of what is now known to be the value of the 2016 Contract and it was, he submitted, greatly in excess of what (following the Cabinet Office guidance) the Council should have been open to in terms of less financially onerous alternative waste disposal solutions such as that proposed by CR4C.

88. In his closing submissions, Mr Sinclair said CR4C:

> *"…does not (really cannot) counter with an alternative "shadow PQQ" but submits that under any putative tender process GCC would have undertaken market testing first and if approached with an open mind, and as is becoming increasingly accepted (in particular in the competitive dialogue procedure), have kept the selection criteria relatively light, and incorporate aspects of deliverability (which may entail aspects of financial viability) in the later stages of the process."*
>
> and
>
> *"Certainly GCC must be able to be comfortable as to financial and economic issues (and technical issues, though its case on this is vanishingly thin) but the selection*

criteria should be set at levels which permit a number of alternative solutions to proceed past the first threshold test and into the more detailed elaboration of a Competitive Dialogue procedure described [in the Regulations]"

89. However, Mr Sinclair said in opening that it was his client's case that it could have and would have formed a consortium able to meet whatever lawful criteria were required. Although he disputed the lawfulness of them, this extended to those in the Shadow PQQ.

90. The competing submission of Ms Hannaford QC was that CR4C "*could not have met the financial requirements for the original PQQ, for the Shadow PQQ or, indeed, any realistic financial requirements*" that the Council might lawfully have imposed.

91. Having raised with counsel during their opening submissions the question begged by the formulation of the preliminary issue, so far as the lawfulness of the requirements identified by the Shadow PQQ is concerned, I am satisfied that it is appropriate to determine this preliminary issue by reference to those requirements. No other rival and clearly defined requirements have been identified for that purpose and doing so is consistent with the parties' diametrically opposite positions about CR4C's ability to meet *any* lawfully imposed requirements under Regulation 58. If that is the position they come to, advancing from opposite sides, the Shadow PQQ may safely be taken as setting the relevant benchmark for my determination. The assumption that it contained lawful requirements, for the purpose of deciding this preliminary issue, does not prejudice CR4C which disputes their compliance with Regulation 58. As Mr Sinclair said in opening submissions, "*if you accept that we would have met the Shadow PQQ, …. it then becomes a moot point*."

92. I therefore turn to the terms of the Shadow PQQ.

93. In introducing the Shadow PQQ, Ernst & Young made it clear that it was not a complete PQQ and that it had been prepared retrospectively so that the Council could understand the types of requirement that would have been imposed under the Regulations. They explained that they had prepared it on the instructions of the Council "*solely for the purpose of understanding the recommendations which EY would propose for inclusion in a PQQ in respect of the financial standing of potential applicants had the waste project been retendered*".

94. The Shadow PQQ addressed only the aspect of economic and financial standing. The Council's position in relation to requirements in relation to technical and professional ability was that the Council would have sought the same or similar technical experience for any 2015-16 procurement exercise as those stipulated for the 2009 procurement. Regulation 58(16) entitles authorities to require potential tenderers to have a sufficient level of experience demonstrated by suitable references from contracts performed in the past. Regulation 60(9) permits them to require a list of the works carried out over the past 5 years. I note that the Shadow PQQ explained that the "fund raising capability" requirement of the 2009 procurement was not included as "*any organisation demonstrating the required technical capability will have by necessity been required to perform the appropriate fund raising to undertake projects.*"

95. The 2009 PQQ had sought details of up to 5 contracts which demonstrated bidders' capability and track record in undertaking contracts for the delivery and operation of

major capital infrastructure projects in the last 5 years. In order not to restrict competition unduly, the Council was prepared to accept experience of delivery and operation of major capital infrastructure projects whether or not in the waste management sector. Experience in the waste management sector was also tested. Bidders were required to score 50% of the available marks to pass the technical pre-qualification stage. The available marks for the relevant areas of project-based experience were identified in Tables 15 to 19 of the 2009 PQQ.

96. The Shadow PQQ also included a comparison with the part of the PQQ used by the Council for the 2013 Contract to test financial standing. As I have mentioned, the 2009 PQQ had included within a stage one test (to be assessed on a pass or fail basis) the requirements of a minimum turnover threshold of £100m and minimum net assets of £80m, and had also set requirements of available public liability insurance cover of £10m and available employers' liability insurance of £10m.

97. Under the Shadow PQQ the turnover threshold was reduced to £50m. That was based upon twice the assumed annual contract value of £25m.

98. Mr Mawdsley said in evidence that the £25m was "*based partly on what we know we got to with subsequent changes to UBB and also on the previous competition we'd run up to February 2013, where we knew from the bids we'd had from other suppliers what their value was*." He said that (without breaching commercial confidentiality) he had in mind that one of the four bids contained a mechanical treatment, rather than an energy from waste, solution. Mr Sinclair challenged Mr Mawdsley on his £25m figure, asking why in the Shadow PQQ (addressing the position in late 2015) the actual figures for the revised UBB contract then known to the Council had not been used. Mr Sinclair focused upon the actual value of £613m for the 2016 Contract. The exchanges between counsel and the witness proceeded on the assumption that, doing so, would have produced an annual contract value of £23m. Mr Mawdsley defended his position by saying that he was looking for a figure that was reasonable and would enable the industry to get a feel for the value of the contract. Ms Hannaford QC made the point that, in this hypothetical scenario of early 2016, there is no contract with UBB so the value of that contract was irrelevant. That observation must be right and it is consistent with my decision to proceed on the basis that the stipulation of a minimum turnover of £50m was a lawful one.

99. The turnover test under the Shadow PQQ was a pass/fail one and formed the first part of a two-stage financial standing test which it was necessary to pass in order to proceed to a second stage which formed part of the Council's due diligence process. This pass or fail turnover test was described in the Shadow PQQ as a test of 'the Minimum Standards'.

100. The test in relation to net tangible assets was included within the second stage identified in the Shadow PQQ, as part of a set of four further financial attributes (each with its own weighting for scoring purposes) for the purpose of assessing whether a further minimum threshold had been met. That threshold was set at a minimum of 50% of the overall available score in respect of those criteria.

101. Each of the two stages of the test aimed at establishing the applicant's economic and financial standing was stated to be conducted by reference to the applicant's last three published financial statements.

102. The Shadow PQQ recognised the potential for an application by a consortium. It did so by referring to a consortium member as a "*Party to an Applicant*". As I have explained, the term 'economic operator' includes a "*group of such persons and entities, including any temporary association of undertakings*". In relation to a consortium application, the Shadow PQQ contained the following statements:

> For the first-stage, turnover test:
>
> "*For consortium/group submissions where supported by an appropriate guarantee then the consolidated turnover across the entities will be assessed*."
>
> and
>
> "*GCC reserves the right to reject PQ Applications, and not assess the PQQ further (if any Applicant and, in the case of Consortia, if any Party fails to meet the Minimum Standards as identified in this PQP Section [x] and in the PQQ; otherwise, the assessment of the PQ Application continues*."
>
> For the second stage, due diligence test:
>
> "*Where the Applicant is a Consortium, each Party to an Applicant will be assessed against these criteria in order for GCC to obtain confidence in the ability of the Parties to fulfil their obligations under a Contract, on a joint and several basis, should it be successful*."
>
> "*The weighted score from each section are then added together to derive a combined score for each Applicant, shareholder or consortium member within a Group SPV or Contractual JV respectively. An Applicant must achieve combined score of no less than 5 out of a possible 10 to pass the 2nd stage of the financial assessment*."
>
> "*In order to establish an overall score for a Group SPV or Contractual JV the scores of each shareholder or consortia member will be averaged*."
>
> "*As part of its due diligence process, GCC will ask Applicants and Parties to a Consortium, to provide a statement detailing their financial position in full from the date of their latest submitted company accounts, or relevant financial information, to the PQ Application Deadline*."
>
> and
>
> "*The accounts of any Guarantor of a Party or a single Applicant will only be assessed if:*
>
> - *The Applicant, or Party to a Consortium, is relying on a Guarantor in order to prequalify;*
> - *Further investigations are triggered as described above during the due diligence process; and*

- *The Applicant or Party as applicable provides satisfactory confirmation from that parent company (or other Guarantor) that it will provide a Parent Company Guarantee*."

103. These statements about assessing the financial standing of each party to a consortium are to be considered in the light of Regulation 19(4) of the Regulations which provides:

> "*Where necessary, contracting authorities may clarify in the procurement documents how groups of economic operators are to meet the requirements as to economic financial standing or technical ability referred to in regulation 58 provided that this is justified by objective reasons and is proportionate."*

The Interpretation of Regulation 91

104. The terms of Regulation 91(1) are set out in paragraph 61 above. Another question arises as to how the present preliminary issue is to be decided in accordance with language which provides that non-compliance with the Regulations is actionable by an economic operator which "*suffers, or risks suffering, loss or damage*" as a consequence. I have already touched upon the prominence of Mr Sinclair's submission that the language of Regulation 91 is such that it confers standing to sue upon an economic operator who is at risk of suffering loss even if it cannot prove that it would have won the contract had the Regulations been observed.

105. I recognise that the hypothetical nature of the inquiry as to what might have happened had the Council not proceeded to award the 2016 Contract to UBB and the language of the present preliminary issue ("*could have pre-qualified*") are such as to inevitably raise a question over what, for convenience only, I would describe as this requirement of a 'material interest' on the part of a claimant economic operator. The language of Regulation 91(1) really encapsulates the concept of a material interest. The court needs to identify correctly, as a matter of principle, the point at and beyond which the uncertainty over CR4C's prospects of pre-qualifying becomes sufficiently great that it must be outside the scope of Regulation 91, because it can therefore be said to have lacked any material interest in the procurement.

106. The risk of semantic confusion on this issue is illustrated by Mr Sinclair's proleptic submission, addressed further below, about an error which would be apparent in any subsequent finding by me that CR4C "*would not have met lawful selection criteria*" (to quote from his skeleton argument but with my emphasis) which was expressed in terms of the balance of probabilities. The language of the preliminary issue instead requires me to decide whether CR4C *could have* met them.

107. In deciding the actual question before me, I think it is important to have in mind the separate inquiries (as a common lawyer would identify them free from the language of Regulation 91) which arise in a claim based upon loss of a chance. They involve, firstly, establishing that the claimant has lost a real chance and, if so, then, secondly, the quantification of that established chance. The immediate point on the present preliminary issue is about the impact of Regulation 91 upon the question of whether

CR4C could have pre-qualified. The language of that question instinctively strikes me as equivalent to the first level of inquiry in a loss of a chance claim rather than the second (where the court goes on to assess how much of a chance has been lost by considering whether the claimant would or might have successfully exploited it). Can CR4C establish that it has lost a real chance, entitling it to go forward and establish the percentage prospects of it successfully tendering for the 2016 Contract, by first showing that it could have pre-qualified?

108. On CR4C's case it is only an economic operator who cannot establish it was at *any* risk of loss (beyond the level of fanciful) who will then lack a material interest in the alleged non-compliance. In relation to the prospect of CR4C meeting the selection criteria, and as I have just mentioned, Mr Sinclair therefore submitted that it was sufficient for his client to establish a more than fanciful prospect that it would have done so. He said that the court would fall into error in requiring a claimant to prove more than a risk of loss for Regulation 91 purposes, and the error would be apparent in any finding (that CR4C would not have met lawful selection criteria) expressed in terms of the balance of probabilities.

109. At paragraph 34 of his closing submissions Mr Sinclair said this in seeking to highlight the impermissible consequence of what he said would be such a wayward and erroneous approach:

> "*A Contracting Authority could raise the "preliminary issue" of selection criteria against any Claimant in a direct award case (where by definition there was no PQQ) and the case would be entirely disposed of on the basis of an inability to prove that a (necessarily hypothetical) bid would not have met a (hypothetical) PQQ*."

110. Mr Sinclair said that result would be quite wrong when it is only if the facts show that a claimant (which is an economic operator) had no prospect of success or only a fanciful one, so as not even to have been at risk of losing out in the tender process, that it will follow that it has no *standing* under the Regulations.

111. At first sight, that last submission might be said to be in keeping with the established approach to assessing any claim based upon the loss of a chance. However, Mr Sinclair's admonition against deciding the preliminary issue on the balance of probabilities (and his use within it of "*would*" rather than "*could*" language) appears to me to potentially involve eliding the two conventional points of inquiry mentioned above. Establishing the loss of a real or significant chance does generally fall to be determined by a finding on the balance of probabilities. That is so even if the subsequent evaluation of the extent of it, and the quantification of its value, reveals that the prospect of the claimant successfully exploiting it, but for the defendant's actions, was materially less than 51%. When I put that proposition to him during his oral closing submissions, Mr Sinclair appeared to accept that a claimant seeking damages for loss of a chance first has to establish the loss of a real chance on the balance of probabilities.

112. However, the general thrust of his submissions - eg. referring to "*the presumptive existence of a risk of harm unless there is a 'manifest' absence of loss or standing*" (per para. 25 of his written closing) and "*it is only if on the facts that a Claimant had no prospect of success that it has no standing*" (per para. 13 of his skeleton argument) – involve a less onerous initial burden upon the claimant than would ordinarily apply in

a loss of a chance claim. His argument on behalf of CR4C was that asking whether *on balance* it would have met selection criteria would cut across the principle which he said emerged from the English and European authorities mentioned below. He also said in his oral closing submissions that it would be wrong for me to approach the question of whether CR4C was an economic operator by applying the usual civil burden of proof.

113. In other words, for CR4C to succeed on this preliminary issue it merely needs to show that its case for saying that it is an economic operator which could have pre-qualified is better than fanciful even if not persuasive enough to discharge the civil burden of proof.

114. The question for me is whether Regulation 91 supports that approach.

115. Mr Sinclair developed his argument by relying upon the decision of Ramsay J in *Mears v Leeds City Council* [2011] EWHC 1031 (TCC). Mr Sinclair presents the decision as one in relation to the claimant's standing to sue. In *Mears* the judge was considering the equivalent provision to Regulation 91(1) contained in the earlier Public Contracts Regulations 2006. He introduced the issue of causation of loss as follows:

> "*Issue3: Causation of loss*
>
> *205. In order for a breach of the Regulations to be actionable Regulation 46(6) provides:*
>
> *"A breach of the duty owed in accordance with paragraph (1) and (2) is actionable by any economic operator which, in consequence, suffers, or risks suffering, loss or damage and those proceedings shall be brought in the High Court."*
>
> *206. What then is the test to be applied in relation to this issue where a breach of the Regulations has been established? I accept Mr Patel's submission that the correct test, in the context of this case where I am not considering the detail of the loss, is whether there is a real or significant as opposed to a fanciful chance that Mears would have been selected for the ITCD stage of the Procurement had LCC given advance disclosure of the weightings in the Scoring Table. I consider that this follows from the following decisions."*
>
> [The Judge then went on to refer to *Letting International v Newham* [2007] EWCA Civ 1522 (Court of Appeal); [2008] LGR 908 (Silber J) and *Lion Apparel Systems Limited v Firebuy Limited* [2008] EuLR 191 (Morgan J).]

116. In my judgment it is important to note that this passage was directed to the issue of "*causation of loss*". The relevant preliminary issue for the court, which the judge was addressing, was: "*Whether in any event Mears suffered a risk of loss of being selected for the ICTD stage of the Procurement.*" This raises a question as to whether or not the court was truly concerned with the claimant's standing to bring a claim as opposed to one of the "*certain issues of liability*" (as the judge described them in introducing his judgment) in the claim as brought. The judge was certainly not approaching that issue from the viewpoint of a threshold test fixed at the reference point of pre-qualification. Mears had in fact pre-qualified and been invited to participate in the competitive dialogue state of the procurement by the City Council. Their tender failed following the evaluation of their submitted outline solutions and, as is apparent from the above

quote from paragraph 106 of the judgment, the judge was considering the prospects that they would have been invited to continue that dialogue but for the breach of the regulations.

117. The decision in *Mears* therefore reveals a potential distinction between an assessment (even a preliminary one) of the merits of a claim for substantial damages under what is now Regulation 91(1), for the loss of a chance, and the decision for me as to whether or not CR4C has demonstrated what I have summarised to be a material interest in the hypothetical procurement. The judge's citation of the Court of Appeal's decision in *Letting International v Newham* [2007] EWCA Civ 1522, at [20], where Moore-Bick LJ said the regulation was "*concerned with providing a cause of action, not with establishing a pre-condition to the commencement of proceedings*" highlights the point.

118. As appears from the above quote from the judgment of Ramsay J and the wording of the preliminary issue before him, the judge was considering the prospects of Mears being selected for the next stage of the procurement process (the invitation to continued dialogue) for the purposes of evaluating their case on a risk of loss. His conclusion on that preliminary issue (at [214]) was that Mears had established a more than fanciful chance that they would have been successful in their tender (but for the breach of the regulations) and that was "*sufficient for me to decide that, in principle, Mears is entitled to relief under the Regulations*". He did therefore use language suited to the first stage of any evaluation of a loss of a chance claim for the purpose of deciding that the claim (including the actual assessment of the chance of success and any resulting damages) should proceed further. The judge expressed himself in terms of Mears being entitled (in principle) to relief under the 2006 Regulations and the language of the preliminary issue before him (see paragraph 116 above) tracked the language of what is now Regulation 91(1).

119. As I have said, that language is aimed at establishing a material interest in the procurement on the part of the claimant. I therefore accept Mr Sinclair's submission that *Mears* is properly analysed as a decision about standing to bring a claim under the Regulations. Nevertheless, the real question is whether *Mears* supports his argument that CR4C is not required to demonstrate such standing, or its material interest, to the standard of the balance of probabilities.

120. As I have explained, Mr Sinclair challenges the notion that what his client has to "*show*" for these purposes (to use the language of Ramsay J in *Mears* at [208]) is something to be demonstrated on the balance of probabilities. The terms in which Ramsay J went on to refer to the other authority, on the question of whether the claimant "*complied with*" or "*satisfied*" the regulation, might be said to lend some support to the proposition that (assuming it can establish it was an economic operator) CR4C is entitled to take its damages claim to trial provided that it can show that its prospects of pre-qualifying were more than fanciful even though they perhaps fell short of being more likely than not.

121. The question I have to decide is whether or not CR4C was an economic operator which *could* have pre-qualified. Mr Sinclair correctly pointed out that it is not a question framed in terms of whether or not CR4C can show *on the balance of probabilities* that it had a real or substantial chance of establishing loss or damage covered by Regulation 91. Nevertheless, it is an issue aimed at establishing whether or not CR4C can demonstrate a material interest by first establishing it was in with a real chance under

the hypothetical tender. Both limbs of the present preliminary issue track the language of the regulation which encapsulates what, for convenience, I have described as the concept of a material interest.

122. In my judgment, Mr Sinclair is wrong to interpret *Mears* as supporting the proposition that, to come within Regulation 91, an economic operator may establish the existence of a risk of loss (which later falls to be evaluated) to a lower threshold test than the balance of probability. On closer analysis, the decision, as I read it, does not support the conclusion (if I may paraphrase his submission) that Regulation 91 only operates to weed out claims by economic operators whose case for saying they have lost a real chance through non-observance of the Regulations is one that is not only less likely than not but really no more than fanciful. That conclusion would involve eliding the two separate inquiries in a loss of chance claim. It confuses what has to be shown (a more than fanciful prospect of success) with the standard to which that must be shown. Although the decision in *Mears* did not expressly refer to that threshold burden of proof, the only concept which was addressed in the decision (at paragraphs [205] to [214]) was the latter one of causation of loss (i.e. some loss). On my reading of it, the decision does in *Mears* does not support a further watering down of the test of actionability under the Regulations, so that a claimant is not even subject to the civil burden of proof in doing so.

123. In my judgment, it should not be sufficient for a claimant under Regulation 91 to say that it has established (only) a more than fanciful case that it has, through non-compliance with the Regulations, lost a more than fanciful opportunity.

124. Regulation 91 makes it clear that an award of damages is not precluded simply because the inevitable uncertainty which is the result of the hypothetical nature of the inquiry means that the claimant is to prove on the balance of probabilities that *it would have won the contract* which the contracting authority in fact awarded elsewhere. The "risks suffering" phraseology in Regulation 91(1) probably provides clearer guidance upon the viability of a loss of a chance claim than that ordinarily available to a 'damnified' claimant seeking to establish the existence of a private damages claim for statutory duty applying common law principles. But this must be subject to the claimant first establishing on the balance of probabilities that it lost a real chance of doing so.

125. As I have noted above, that is the burden of proof which initially applies to a claimant seeking to recover damages for loss of a chance which is properly evaluated as "real" or "substantial", as opposed to "fanciful" or speculative". So far as the first aspect of the present preliminary issue is concerned, I consider it to be the only one that can sensibly be applied to the question of whether or not CR4C was an economic operator at the relevant time. I see no proper place for the conclusion that CR4C's claim should go forward on the basis that it has made out a more than fanciful case that it might well have been an economic operator, but nothing stronger than that. Likewise, it should not be sufficient to say that its prospects of pre-qualifying were more than fanciful. That only becomes the test when considering any later assessment of damages by reference to CR4C thereafter being selected as the MEAT.

126. So far as the present preliminary issue is concerned (both aspects of it tracking Regulation 91(1) and what I have described as the claimant's material interest) my conclusion is that *Mears* does not support it, or any aspect of it, being decided otherwise than by reference to the balance of probabilities.

127. However, Mr Sinclair's argument on this aspect of the case does not stop there as he submitted that I must direct my mind to any EU legislation or case law when seeking to resolve any disputed points of legal principle or ambiguity under the Regulations. He made the following points:

i) Regulation 2(1) of the Regulations defines the "Public Contracts Directive" as Directive 2014/24/EU. Regulation 2(2) provides that unless the context requires any expression used in the operative part 2 of the PCRs shall have the same meaning as in the Directive. Mr Sinclair said that this is the effect of EU law in any event under the well-established *Marleasing* principle of consistent interpretation (and disapplication of conflicting national rules) when a Directive is implemented. He referred to the decision of the CJEU in *Uniplex (UK) Ltd v NHS Business Services Authority*, Case C-406/08, [2010] P.T.S.R. 1377, [45]-[49], for the specific application of this principle as regards UK procurement Regulations and the EU Directives;

ii) Such consistent interpretation also extended to the provisions of the Remedies Directive which was also implemented by the Regulations. The right to a remedy under Regulation 91(1) if a party '*suffers or risks suffering loss or damage*' is in line with the wording of Article 1(2) of the Remedies Directive. Article 1(3) of the Remedies Directive provides that "*Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and <u>who has been or risks being harmed</u> by an alleged infringement*." (my emphasis);

iii) In *Pressetext Nachrichtenagentur,* Case C-454/06 (19 June 2008), the national court had referred to the CJEU (by its question 6) the question as to what was involved in the concept of 'harm' in Article 1(3) of the Remedies Directive and whether it extended to the situation where a party has been deprived of the opportunity to participate in a procurement procedure because the contracting authority did not, prior to making the award, publish a contract notice. The CJEU did not address that question as it followed the proposal of Advocate General Kokott, delivered on 13 March 2008, that it should decide only the first three questions referred to it. However, AG Kokott delivered her Opinion on question 6 in terms which emphasised the need for the Directive to be practically effective (see further below). Mr Sinclair pointed out that AG Kokott had also relied on the effectiveness of the objectives of damages actions in procurement cases (namely that of providing legal protection for candidates and tenderers as well as having a disciplinary effect upon contracting authorities) in her Opinion in *Uniplex* at [AG55] – [AG56].

128. Mr Sinclair relied upon what he said was the compelling Opinion of the Advocate General in *Pressetext* (as well as her warning in *Uniplex* against an unduly restrictive approach to the conditions for obtaining secondary legal protection) to say that it was consistent with his interpretation of the test in *Mears* and showed that a claimant economic operator had standing under Regulation 91(1) unless the risk of loss to it could be shown to be fanciful.

129. More generally, Mr Sinclair also relied upon the same Advocate-General's Opinion in *Medeval,* Case C-166/14, delivered on 21 May 2015 and addressing the situation of a

'direct award' (i.e. the award of a contract without a competitive tender) where she referred to ECJ case law to the effect that such awards are to be regarded as the most serious breach of public procurement law. In *Medeval*, the CJEU followed her Opinion by its judgment of 26 November 2015. The court's conclusions, at [39]-[44], contained an analysis of the principle of effectiveness and recognition of the difficulties faced by parties seeking a remedy inherent to situations of direct award with no prior indication of a contract notice. Mr Sinclair said that requiring a party to demonstrate that it would have met selection criteria would not only ignore such difficulties but also deprive parties who "risk" suffering harm (or loss) of an effective remedy.

130. It is therefore appropriate that I set out what AG Kokott said in her Opinion in *Pressetext* in relation to the national court's question 6 and the principle of effectiveness (with Mr Sinclair's emphasis underlined and the Advocate General's own in their original italics):

> "143. Article 1(3) of Directive 89/665 permits the Member States to restrict the right to bring an application in relation to a review procedure for the award of public contracts in two respects: on the one hand, through the requirement that the applicant should have an interest in the relevant public contract and, on the other, through the requirement of existing or imminent harm to the applicant. In this way public interest actions and actions brought by applicants with no prospect of success may be excluded."
>
> 144. However, that must not affect the practical effectiveness of the directive. The restrictions on the entitlement to bring an action must therefore be construed in the light of the twofold aim of the directive: on the one hand, the individual must be *afforded an effective legal remedy* in connection with the award of public contracts and, on the other, the requisite *review of the lawfulness* of the decisions by contracting authorities must be facilitated.
>
> 145. For, as is apparent from the first and second recitals in its preamble, Directive 89/665 seeks to strengthen the means available at national and Community levels <u>in order to secure the actual application of the Community directives in the sphere of public procurement. To that end the Member States are obliged under Article 1(1) of the directive to ensure that unlawful decisions by contracting authorities can be reviewed effectively and as swiftly as possible</u>.
>
> […]
>
> 148. <u>The possibility of harm to the person concerned must be presumed where it is not manifestly excluded that the applicant would have received the award</u> if the legal infringement alleged had not occurred. Where, as in the present case, the public contract is awarded directly without prior contract notice, it follows from the fact that the person concerned is – allegedly unlawfully – precluded from participating in the award procedure that he may have lost a contract and thus suffered loss.
>
> […]
>
> 149. Nor may actual proof of standing be required of the person concerned at the stage of an application for review; in the same way, he cannot be required to

> provide evidence that he would have received the award if the alleged infringement had not taken place. Otherwise access to the review procedure would be rendered impossible in practice or at any rate excessively difficult. In particular in cases of direct awards such as the present case, it would be barely possible for the person concerned to provide actual proof of standing, since he would have no accurate information about the requirements laid down by the contracting authority because of the lack of a prior contract notice.
>
> [….]
>
> 151. On the sixth question I therefore conclude that an application for review under Article 1(3) of Directive 89/665 is admissible if the applicant persuasively asserts an interest in the public contract, the existence of a legal error and the possible harm suffered or about to be suffered. If the contract was awarded without prior publication of a contract notice, it follows from the fact that the person concerned was precluded from participating in the award procedure that he may have suffered harm unless there is a manifest lack of standing on its part."

131. I asked counsel what their respective positions were in relation to an Opinion of the Advocate-General on a point which had not then been addressed by the CJEU. Mr Sinclair said it should be treated as persuasive. He said the opinions of Advocates-General are often cited either to assist in the understanding and reasoning behind issues then addressed by the Court or (as here) on issues which the Court did not in the event have to decide. As an example of the former, he referred to the judgment of Elias LJ in *Sita UK Ltd v Greater Manchester Waste Disposal Authority* [2011] EWCA Civ 156, [21] to which I refer further below on the limitation issue. Mr Sinclair added that the Advocate-General's Opinion in *Pressetext* had been generally endorsed by the Court in *Medeval* so far as the reasoning based upon the principle of effectiveness is concerned.

132. Ms Hannaford QC submitted that the Advocate-General's Opinion should be treated as advisory rather than persuasive in such circumstances. She referred to the European Parliament Briefing *'Role of Advocates General at the* CJEU', explaining their advisory, non-binding nature within the operation of the CJEU, and to *Digings and Bennett on EU Public Procurement: Law and Practice* which (at Vol.1, Appendix 1.16) which refers to the objective, reasoned submissions within it being "*of persuasive authority rather than binding on the judges*." The authors of the textbook say that where the Advocate-General's submission is not followed (as opposed to not addressed) by the CJEU "*that submission is deemed to have a similar legal status to a dissenting judgment before an English court*".

133. I therefore proceed on the basis that what AG Kokott said in her Opinion in *Pressetext* about those who are within the range of "harm" (or "loss") is clearly to be taken by me as influential. If the Opinion had the potential to persuade the CJEU (or a majority of its judges) with its objective reasoning and advice on a point of EU law then I think it is appropriate that I should take proper account of her observations and the reasoning behind them when weighing up my own decision on that point. Although the judicially unendorsed submission is not binding upon me, nor suggested to be, I would have thought that countervailing reasons (at least) ought to be identified by me if it is to be disregarded.

134. Were it not for the final sentence in [AG 151] quoted above, I would have read these passages from the Advocate-General's Opinion as simply recognising that the fact that "*the person concerned*" might not be able to prove harm (or, for Regulation 91(1) damages purposes, causation of loss) should not mean he is to be deprived of legal protection unless his case on harm (or loss) is manifestly lacking. At paragraph 142 of her Opinion, the Advocate General posed the question as to whether an application for a review could be based on a missed opportunity or whether "*the applicant must in addition prove its own standing to perform the relevant public contract*" (or, as I would reinterpret that for English law purposes, establish causation of undiscounted loss). It would not follow from such a reading that the person concerned (or the "*person having an interest*" within the meaning of Article 1(3) of the Remedies Directive) should not first have to establish the materiality of that interest in the procurement to the standard of proof recognised by the national court.

135. Nevertheless, I recognise that the language of that final sentence appears to contemplate that an applicant might "*persuasively assert an interest in the public contract*" and establish *standing to sue* for damages by asserting a material interest which cannot be dismissed on the ground that it is manifestly absent. In other words, that an applicant can indeed establish a material interest in the procurement by asserting a missed opportunity which (being better than absent but less than real) would not pass the first test in English law for a conventional claim for damages based upon the loss of a chance.

136. However, in my judgment, the Advocate-General's observations, and the question she identified at paragraph 142, generally reinforce the distinction I have drawn between the need for a claimant to establish a material interest (i.e. that it should be treated with having been in with a chance) before the language of Article 1(3) and Regulation 91(1) comes into play on the question of risk of harm/loss (i.e. the question as to how much of a chance). The first of the quoted paragraphs above (paragraph 143 of the Opinion) recognises the two-stage nature of the inquiry. The person is first required to establish an interest in the procurement before establishing it is protected by the extended concept of harm.

137. I see nothing in the Opinion of AG Kokott which suggests that the English court would be undermining the principle of effectiveness in deciding the first matter by reference to the civil burden of proof.

138. Article 2(1(c) of the Remedies Directive requires Member States to include within their review procedures powers to "*award damages to persons harmed by an infringement*." Regulation 99(1) does that by extending an effective legal remedy to an economic operator which establishes harm by proving loss of a real chance in the conventional way. In my judgment, there is no conflict between the principle of effectiveness under the Remedies Directive and a cause of action under English law – a private law claim for damages for breach of statutory duty – which falls to be decided on the balance of probabilities. Nor do I consider that the application of that conventional standard of proof, as an element of the English court's procedural autonomy, offends the aspiration under the Directive's complementary principle of equivalence. As noted by the CJEU in *Medeval*, at [32], the principle of equivalence (encapsulated within Article 1(2) of the Remedies Directive) requires that the remedies and procedures under the Regulations shall be at least as favourable as those governing similar situations under domestic law.

139. The English civil standard of proof would apply if, for example, the contracting authority took a point against the economic operator about a break in the chain of causation precluding any claim for damages. Allowing for the point that the authority would probably bear the initial evidential burden of proof, the claimant ought not to be able to succeed in its claim merely by saying its argument against the existence of a *novus actus* cannot be dismissed as fanciful.

140. It therefore follows that, notwithstanding these further considerations of EU law, I remain of the view that I should decide the question of whether or not CR4C could have pre-qualified (having regard to any lawfully imposed selection criteria) on the balance of probabilities. The nature and origin (in the Defence) of this preliminary issue are such that CR4C is required to establish that it is more likely than not that it could have pre-qualified. The same burden of proof should apply to the other limb of the preliminary issue, which is whether or not CR4C was an economic operator at the relevant time. That observation is, however, subject to Mr Sinclair's submission (addressed next) that there are not really two limbs to the issue.

141. An evaluation of CR4C's chances of (notionally) thereafter securing a Council contract, on the basis that its bid would have been viewed by the Council as the MEAT, falls outside the scope of that preliminary issue. Any such evaluation would be for a later stage of the proceedings and decided by reference to the threshold of establishing the loss of a significant chance recognised in *Mears*.

142. Mr Sinclair had a further point about the interpretation of Regulation 91(1) which was essentially to the effect, as he put it politely in his oral closing submissions, that there is a risk of being "*very black letter/English law about this in distinguishing economic operator from economic operator which suffers or risks suffering loss. I think the reality is that it is one single test rather than two when you look at it closely.*"

143. This contention is best addressed by analysing the concept of an economic operator.

The Concept of an Economic Operator

144. I have set out in paragraph 60 above the definition of an economic operator within Regulation 2.

145. CR4C made the following points about the width of the concept of 'economic operator' with particular reference to the ability of consortia to submit a tender:

i) The clarification in recital (14) to the Public Contracts Directive (2014/24/EU) that the notion of 'economic operators' should be "*interpreted in a broad manner so as to include any persons or entities which offer the execution of works irrespective of the legal form under which they have chosen to operate*".

ii) That recital, informing the interpretation of the substantive provisions of the Directive, was consistent with the express inclusion of universities within the list then set out in the recital and with the decision of the CJEU in December 2009 in *Consorzio Nazionale Interuniversitario per le Scienze del Mare* (*CoNISMa*), Case C-305/08. That decision, under the earlier Directive

2004/18/EC, confirmed that one of the primary objectives of the EC rules on public procurement was the attainment of the widest possible opening up of competition; that a person's classification as an economic operator did not depend upon establishing capability for direct performance of the contract using its own resources but that *"[t]he person in question need only be able to arrange for execution of the works in question and to furnish necessary guarantees in that connection"*; and that eligibility to put itself forward as a candidate was regardless of "*whether it is active as a matter of course on the market or only on an occasional basis.*" The Court said that "*any person or entity which, in the light of the conditions laid down in a contract notice, believes that it is capable of carrying out the contract, either directly or by using subcontractors is eligible to put itself forward as a candidate.*"

iii) Regulation 19(3) of the Regulations provides that "*Groups of economic operators, including temporary associations, may participate in procurement procedures and shall not be required by contracting authorities to have a specific legal form in order to submit a tender or a request to participate.*"

146. Mr Sinclair relied upon the above legislation and case law to say that the definition of 'economic operator' does not therefore really present a question of standing, to be scrutinised and tested separately from CR4C's prospects of pre-qualifying. He said that CR4C's belief that it had the ability to satisfy the Council's contractual requirements, and the evidence of Mr Jarman and Mr Christensen that they would have bid, was sufficient to bring it within the concept. He again referred to Article 1(3) of the Remedies Directive to point out that the term 'economic operator' was not used in that Directive which instead refers to the availability of review procedures for "*any person having or having had an interest in obtaining a particular contract*." In his oral closing submissions, Mr Sinclair said that the concept of economic operator had no independent meaning where there was a consortium bid: "*an economic operator can be essentially anyone who is able to, with others, form a consortium and put in a bid*".

147. Ms Hannaford QC responded by saying that the question of whether CR4C was an economic operator (as alleged in paragraph 3 of the Particulars of Claim) existed independently of any question over its ability to enter into a consortium with others. She submitted that CR4C could not bring itself within the definition in Regulation 2 (or that it could have formed a consortium which would have pre-qualified). She also made the forensic observation that CR4C's assertion that the claim is not about money, but instead is one intended to lead to a State Aid claim, reinforced the point that it was not an economic operator.

148. I cannot accept Mr Sinclair's submission that the concept of being an 'economic operator' really adds nothing to the inquiry into the viability of a claim under Regulation 91(1). It takes insufficient note of the point that the regulation clearly confines any claim that may exist to one made by an economic operator. By this means it seeks to identify those who are to be treated as having "*an interest in the relevant public contract*" (as the Advocate-General expressed it in *Pressetext* at [AG 143]). The true requirements of Article 1(3) and of the regulation are properly reflected in the distinct limbs of the present preliminary issue.

149. It is economic operators in the UK or another EEA state to whom the duty to comply with the Regulations is owed under Regulation 89, not also persons or entities who seek

to identify the *entirety* of their economic operation upon the hoped-for contract which later becomes the subject matter of the procurement claim. If the duty were to be extended to those whose "operations" were merely putative, rather than real, then that would open the class of potential claimants to include pretty much anyone, no matter how slim the prospects might be of the claimant then establishing in the litigation a lost chance in accordance with the test addressed in the previous section of this judgment. The requirement that the applicant should have an interest in the relevant public contract would become nebulous and unworkable.

150. Indeed, if the suggested interest in the procurement claim was sufficient in and of itself to establish the claimant's status as an economic operator then the Regulations would in my judgment become potentially oppressive to contracting authorities. It would produce the polar opposite of the concern at common law that, without a private law action being available to someone when a statutory duty is breached, the absence of any other sanction means that the duty is but a "pious aspiration". Yet the true principle underlying Regulation 91(1) is one as to the availability of an effective remedy, rather than something edging towards a universal one. The draftsman of the Regulation clearly had the distinction well in mind.

151. Whether or not a claimant can go on to establish a material interest in the procurement, or what should have been the procurement, which is sufficient to support a claim under Regulation 91 (for at least the loss of a chance) is therefore quite separate from the anterior question of whether or not it can establish it was an economic operator at the relevant time. Even that first question involves some analysis of the "track record" of the claimant person entity or group, at least to the extent of testing its existing status in the market at the relevant time, and ensures that a breach of the Regulations is not potentially actionable by too wide a class of claimants. I have already indicated that both are matters to be decided on the balance of probabilities.

152. The reference point for any decision about the claimant's status as an economic operator must be the definition of that term in Regulation 2. That definition addresses two matters. The first is the form or structure which the economic operator may take. It may either be a single person or public entity or a group of such persons and entities. Any such grouping may be through a temporary association, a point which is reinforced by Article 19(3) stating that the group shall not be required to have any specific legal form for the purpose of being able to submit a tender or a request to participate in the procurement. The second matter addressed by the Regulation 2 definition is what it is that the person or public entity (or group) actually does. It must be able to show that it "*offers the execution of works or a work, the supply of product or the provision of services on the market.*" The decision in *CoNISMa* shows that the market presence must at least be occasional.

153. In *CoNISMa* the CJEU addressed the concept of 'economic operator' under Article 1(8) of the earlier 2004 Directive. That provision stated that the term 'economic operator' was used merely in the interests of simplification to cover equally the concepts of 'contractor', 'supplier' or 'service provider'. Those more specific terms were used to describe any person (natural or legal) or public entity, or group of such persons, "*which offers on the market, respectively, the execution of works and/or a work, products or services*". The national law which was under consideration by the Court (Article 3(19) and 3(22) of the Italian Public Contracts Code) reflected this by also defining an 'economic operator' (whether a single contractor, supplier or service provider or a

group or consortium of them) by reference to such services which it "*offers on the market*". The similarity with the second part of the definition in Regulation 2 is obvious.

154. In *CoNISMa*, the Court observed (at [19]) that the reference to an economic operator which offers services on the market was consistent with an earlier decision confirming that it should be *active on the market*. However, the Court found that a non-profit-making consortium of 24 universities and public authorities (3 ministries), which "*did not have the organisational structure of an undertaking or a regular presence on the market*", was within the concept of an economic operator which should be permitted to participate in a public tendering process.

155. The decision in *CoNISMa* reinforces the point already made above that the Regulations offer a potential remedy to those who actually offer work, products or services in the relevant market as opposed to those who are only able to say they would like to be given the opportunity to do so. I also note that in *CoNISMa* there was no doubt about the identity and composition of the consortium (what would be the "group" for the purposes of the definition in Regulation 2) whose status as an economic operator was under analysis by the CJEU. I make that observation having regard to the way CR4C has pleaded its case on the point, as mentioned below.

156. Mr Sinclair mentioned in passing, during Ms Hannaford's oral opening, the decision of the Supreme Court in *EnergySolutions EU Ltd v Nuclear Decommissioning Authority* [2017] UKSC 34. He did so in support of his observation that an economic operator may comprise an individual company or entity within a grouping of other entities which itself may also qualify as such. Mr Sinclair said that the single claimant in that case was an economic operator but so was the consortium of which it was part.

157. In *EnergySolutions* the claimant was part of a two-member consortium which had been asked to tender for the defendant's contract for the decommissioning of power stations. The other corporate member of the consortium had not joined in the claim for damages under the Public Contract Regulations 2006. I note that in his judgment on liability, given in July 2016, Fraser J observed that the absence of the other member from the proceedings was *"not relevant to the claims as Energy Solutions, as a member of a consortium, is entitled to bring proceedings individually. This is because pursuant to Regulation 28(4), Energy Solutions is itself, as a member of a consortium, an "economic operator" within the meaning of Regulation 4 [of the 2006 Regulations]"*: [2016] EWHC 1988 (TCC)' [2016] BLR 625, [9]. The judge also referred, at [265], to European case law to the effect that, where a consortium was an economic operator, it would be incompatible with the Remedies Directive to preclude a claim for damages brought just by one member of it. Whereas all the members of the consortium would be required to act together in a direct challenge to the procurement for a declaration of ineffectiveness, each one of them might have suffered its own separate loss for the purposes of a damages claim: see *Club Hotel Loutraki AE v Ethniko Simvoulio Radiotileorassis (Case C-145/08)* [2010] 3 CMLR 33.

158. In circumstances where there can have been no issue in the *EnergySolutions* case over the consortium's status as an economic operator, given its position as tenderer, there can have been no question over the claimant's standing to sue under the 2006 Regulations. That is because, as Fraser J observed, Regulation 28 of the 2006 Regulations (addressing the concept of 'consortia') expressly provided that at least one member of any consortium seeking the award of a public contract should be an

economic operator and (at Regulation 28(4) stated that "*references to an economic operator where the economic operator is a consortium includes a reference to each person who is a member of that consortium.*" Regulation 4(1) defined 'economic operator' as "*a contractor, a supplier or a services provider*."

159. The definition of 'economic operator' in Regulation 2 of the 2015 Regulations strikes me as being a little more ambiguous on the point which had previously been made explicit by Regulation 28(4) of the 2006 Regulations: the derivative status of a member of a consortium, where the consortium qualifies as an economic operator but that member standing alone would not or might not do so. On one reading, the language of Regulation 2 ("*such persons and entities*") and Regulation 19(3)-(6) (referring to "*groups of economic operators*" – my emphasis) might suggest that each consortium member should be able to show that it offers works, products or services on the market so as to meet the second defining characteristic of an economic operator in its own right.

160. However, the competing interpretation of the 2015 Regulations is one that produces the result expressly achieved by the former Regulation 28(4). Provided the group itself has the requisite presence in the market, it is sufficient that each member of it is either a *'person or public entity'* (under English law a member inevitably would be a natural or legal *person* in some shape or form, if not a public entity, but Regulation 19(1) makes it clear that there may be economic operators in other member States who otherwise would not qualify as such). A strict textual analysis of the definition of 'economic operator' sustains this interpretation, as it is the group (singular) "*which offers*" the relevant works, products or services.

161. I am persuaded that the points made in paragraph 145 above and the principle of consistent interpretation mean that CR4C should as a matter of principle be able to claim derivative economic operator status if it is able to establish that it was a member of a consortium which was one. Under the *Marleasing* principle the recitals to an EU Directive may also inform the proper interpretation of UK law. On this basis, the Remedies Directive and the decision of the CJEU in *Club Hotel Loutraki* would also mean that the individual consortium member could bring its own claim for damages if the consortium itself did not sue. The language of Regulation 91(1) ("*any economic operator*") supports that potential right whereas Regulation 94 ("*the economic operator*") would require the consortium to sue for a declaration of ineffectiveness.

162. On this interpretation of the definition in Regulation 2, Regulation 19(3)-(6) would be read as relating to the grouping within any consortium of those members who derive (if they do not have it already) economic operator status from the consortium's own. Those provisions would also recognise the ability of the consortium itself to form a group (however temporary or legally informal prior to any contract award) with one or more other economic operators outside its direct membership.

163. I analyse CR4C's pleaded case on 'economic operator' status in the next section of this judgment. I have already noted that CR4C had not been formally registered as a society until after the date of mid-January 2016 at which CR4C's prospects under the hypothetical PQQ should be assessed. It is right to point out, as Mr Sinclair did, that paragraph 27(2) of the Council's Defence said both that CR4C was not an economic operator and would not have pre-qualified but I do not read that as supporting Mr Sinclair's essential point that there is no real place for an inquiry into economic operator status which is separate from one into the prospects of a successful bid. As the analysis

of the parties' pleaded cases shows, the Council had put CR4C's status as an economic operator distinctly in issue.

164. Mr Sinclair sought to bolster his submission about the qualifying status of CR4C prior to registration by highlighting that the Regulation 19(3) expressly contemplates temporary associations and saying "*CR4C could have bid as part of an unincorporated association or indeed initially through Mr Jarman before he became a director of an incorporated body*." He said the provision showed how an intended consortium between (at least) CR4C, BTL and R4C for the construction of an MBHT facility was entirely consistent with CR4C being categorised as an economic operator, in its own right, for the purposes of its claim under Regulation 91 about the absence of a procurement process for the 2016 Contract.

165. However, in my judgment it is important to note that the "*temporary*" nature of the association which is expressly recognised by that provision (and also in the definition of 'economic operator' in Regulation 2) is one that may exist between a number of economic operators. CR4C, the claimant, cannot in my judgment rely upon this nod to the impermanence of any group association to support an argument that its own legal personality might somehow be inchoate. On the contrary, it is clear both from the definition and Article 19(1) that, whether acting alone or as a member of a group, an economic operator must either be a natural or legal person under English law, or the equivalent as established under the law of another member state, or a public entity.

166. I have already mentioned how Regulation 19(4) recognises that a contracting authority may clarify how such groups are to meet selection criteria provided that the authority's position is objectively justified and proportionate. The same qualification goes for any conditions for the performance of a contract by a group which are different from those imposed on individual participants: see Regulation 19(5). In relation to the position after the tender process, Regulation 19(6) enables the contracting authority to require groups of economic operators to assume a specific legal form once they have been awarded the contract, if the change is necessary for the satisfactory performance of the contract.

167. In my judgment, the provisions of Regulation 19 highlighted by Mr Sinclair should not deflect attention from the need for me to decide whether or not CR4C was an economic operator at the relevant time. That is the preliminary issue for my determination. I now turn to how the pleadings have led to the formulation of that issue.

The Pleaded Case

168. I have dwelt upon the presumed ability of a consortium member to derive economic operator status from the consortium's own status as such in order to contrast the way CR4C has pleaded its case. Paragraph 3 of the Particulars of Claim alleges:

> "*The Claimant is an economic entity (as defined in Regulation 2 of the PCR 2015), the legal form being a registered Community Benefit Society. The Claimant had previously (in 2015-15) taken steps to form a consortium to win a contract for waste disposal from the Defendant (this was ultimately abandoned only once it became clear the UBB contract left no realistic scope for any other provision of*

services) and it would have used that consortium to bid had a procurement exercise taken place."

169. The reference to CR4C as an 'economic entity' was obviously meant to be a reference to it being an 'economic operator". In my judgment, that paragraph can only be read as an allegation that CR4C (as a legal person in the form of a community benefit society) is an economic entity in its own right. Further, although expressed in the present tense, it must be implicit in this claim under Regulation 91(1) (premised upon loss having been suffered) that CR4C claims to have been such at the time of the hypothetical tender exercise. As such, it *would have* formed and used the consortium for any bid. Paragraph 27 of the Particulars of Claim is to the same effect. In other words, it is not alleged that a consortium with economic operator status had already been formed, from which CR4C derives its standing to sue under Regulation 91.

170. This reading of the Particulars of Claim is consistent with Mr Sinclair highlighting the provisions of Regulation 63 which permits an economic operator to rely upon the capacity of other entities in meeting selection criteria. However, reliance upon that provision is relevant to whether CR4C could have pre-qualified, not the anterior point as to whether it was an economic operator.

171. The Council has clearly read the Particulars of Claim the same way as I do. Paragraph 5 of the Council's Defence denies that CR4C either was or is an economic operator for the purposes of Regulation 91, saying that it neither existed (as a registered society) nor had the requisite presence on the market at the relevant time.

172. Paragraph 16 of CR4C's Reply responded to the Defence by saying that the Regulations do not require any specific legal status and that the definition of 'economic operator' was a broad one. Paragraph 18 of the Reply said that "*CR4C and its partners would have established a consortium with any necessary incorporation and contracts in place in good time if only the Defendant had put out a contract to tender*."

173. CR4C has therefore not pleaded any wider case that its status as an economic operator (for the purpose of standing to sue under Regulation 91) derives from its membership of a consortium which satisfied the definition of 'economic operator'. Had it done so, it would have been necessary to identify the consortium and its membership with some precision in order to see whether or not it, the consortium, qualified.

174. Instead, when in August 2019 the Council made a CPR Part 18 Request for clarification of CR4C's position in relation to the consortium (the trial of the preliminary issues had been directed two months earlier and the Council had in July served its Rejoinder with the Shadow PQQ) CR4C responded on 11 September 2019 with answers to the effect that it would have comprised at least CR4C, BTL and RR4C. It said RR4C was merely the SPV for the consortium bid. In response to the Council's request pressing for each member of the alleged consortium to be named and which member(s) would have been relied upon to meet the financial and technical requirements, CR4C responded:

"*As regards these issues, it is respectfully suggested that the Defendant wait until disclosure has taken place and the Claimant's witness evidence has been provided as the (hypothetical but realistic) members/composition of the consortium will be set out and made clear by way of evidence (by witnesses and contemporary*

documents) as will their financial standing and technical ability and how this would meet any lawful requirements."

175. Ms Hannaford QC made the observation that CR4C's evidence had failed to subsequently make clear the membership of the consortium. However, for present purposes I simply note that there is nothing in CR4C's pleaded case to indicate expressly that the economic operator was anyone other than CR4C itself.

176. The Council's RFI was made by reference to paragraph 17.20 of CR4C's Amended Reply which had said the "*real question is whether the Claimant's consortium had a real prospect of winning a lawful procurement exercise.*" Again, therefore, these further statements of case were really about the prospects of pre-qualifying, not CR4C's claim that it was an economic operator.

177. Mr Sinclair drew my attention to some solicitors' correspondence surrounding the RFI and CR4C's response to it. He pointed out that Shakespeare Martineau had, at the time of the response, only recently been instructed (the RFI had in fact been sent to their predecessors the day before they gave notice of acting). The new solicitors had later picked up what had been said about the information provided (which included a subsequent invitation by Eversheds Sutherland for CR4C to discontinue the proceedings) in a letter dated 21 November 2019. That letter referred to the key issue of whether CR4C's hypothetical consortium bid would have satisfied, or had a realistic prospect of satisfying the Council's requirements under the hypothetical procurement. It pointed out that the Council's Rejoinder had introduced the Shadow PQQ and that CR4C had not had the opportunity to address the legitimacy of the new requirements which differed from those identified in the Defence. The letter said that the RFI had been served at a questionable time, given that disclosure and witness statements had yet to be completed, and correctly noted that the response had made it clear that CR4C would address the Council's requirements regarding financial and technical standing through disclosure and witness evidence.

178. Mr Sinclair referred to the letter of 21 November 2019 for its proposal that, as CR4C had "*not had the opportunity to address the points made in the Rejoinder in formal pleadings pertaining to the selection criterial and the nature of the consortium*" the sensible way forward would be for it to file a Re-Amended Reply "*to address the newly pleaded case put forward by your clients in the Rejoinder, and to clarify our client's position*." It also proposed that, to accommodate this, the date for exchanging witness statements should be extended from 5 December 2019 to 16 January 2020. Mr Sinclair pointed out that the Council's response in Eversheds Sutherland's letter dated 4 December 2019 resisted the proposed amendment and stated "*[w]e consider that any challenge your client may have to our client's position, as set out in its Rejoinder, can be properly dealt with at the hearing in March.*" Mr Sinclair said the point was indeed dealt with at trial. He also highlighted that witness statements were served closer to the trial than originally anticipated because it had been necessary for his clients to seek and obtain specific disclosure from the Council.

179. Allowing for Ms Hannaford's riposte that the specific disclosure application was not made until the postponed date which (following CR4C's suggestion) had been agreed for the exchange of witness statements, 9 January 2020, I note the accuracy of Mr Sinclair's observations. Nevertheless, the remains that (as with the response to the RFI quoted in paragraph 174 above) CR4C's focus was as much if not more upon the

legitimacy of the Shadow PQQ, and a consortium's ability to meet its requirements, rather than identification of the consortium membership. I recognise that the two are interrelated, of course, but logic requires that to make good a case that a consortium would have met the PQQ requirements one must first identify that consortium. This is especially so when the thrust of CR4C's Amended Reply (addressing requirements then identified in the Defence rather than by the Rejoinder) was that CR4C would have "*self-certified*" its own compliance with proportionate and lawful requirements of the Council by reference to the financial resources and technical expertise available within (or to) the consortium.

180. The observation made in the letter of 21 November 2019 about CR4C not having had an opportunity to address the nature of the consortium therefore does not seem to me be justified. Instead, the following observation in the 4 December letter in response more accurately reflects the position:

> *"Our client's Part 18 request dated 21 August 2019 was made in order to identify your client's consortium bid on the basis that this had not been confirmed in your client's pleadings, despite references to a consortium having been formed previously which would have been used in this procurement exercise. Our client wanted to ensure that details of your client's consortium was within the scope of both disclosure and witness evidence so that it would have the opportunity to consider and respond in advance of the hearing in March."*

181. Even if CR4C had felt wrong-footed by the Council's shift to the Shadow PQQ in the Rejoinder (as the letter of 21 November suggested) then it could have volunteered details of further members of the consortium, either in correspondence or a substitute Part 18 response. However, I accept that instead (and in the face of opposition to "*amendment*") CR4C decided to leave it to the witness evidence. I have already noted the Council's position that CR4C's evidence fell short of the mark in identifying the membership of the consortium. That contention is best addressed in the context of my assessment of CR4C's prospects of pre-qualifying.

182. As things stand, the only constant in CR4C's pleaded case is, therefore, that it is and was the economic operator. To quote from paragraph 17.1 of the Amended Reply (engaging with the denial in the Defence that it was one): *"[f]or the avoidance of doubt it is averred that the Claimant is an economic operator ……*".

183. The way CR4C has pleaded its case on it qualifying as an economic operator flows through to the language of the present preliminary issue. Even though that language potentially covers the concept of derivative economic operator status of the kind addressed in *EnergySolutions* (as now considered in the context of 2015 Regulations) it is for CR4C to establish that it was an economic operator, in its own right, at the relevant time.

CR4C as an Economic Operator

184. CR4C is a Community Benefit Society, which was registered as such (under the Co-operative and Community Benefit Societies Act 2014) with the Financial Conduct Authority on 8 February 2016. Its Rules identify its objects as being:

"*to carry on any business for the benefit of the community by the protection and the preservation of the environment for the public benefit by:*

The promotion of waste reduction, resource re-use reclamation, recycling, use of recycled products, and the use of surplus.

Advancing the education of the public about all aspects of waste generation, waste management, waste recycling and the circular economy.

The promotion of such other activities and initiatives that contribute to and stimulate the development of a local circular resource economy."

185. In his oral closing submissions in reply, Mr Sinclair said:

> *"As regards the question of economic operator, C4RC, our position, just to be clear, C4RC was offering services on the market. We do not need to, but we could, if necessary, rely on forming a consortium to do so. C4RC was offering services to Stroud District Council. Therefore, within, if you like, an English black and white letter interpretation of economic operator."*

The reference to offering services to Stroud District Council was to what by the time of CR4C's 2016 Share Offer was known as the R4C Recycling Plant.

186. The Council took the following points against CR4C's case that it was at the relevant time an economic operator within the meaning of Regulation 2:

i) at the date of the 2016 Contract, 21 January 2016, CR4C had not even been registered as a Community Benefit Society; and

ii) CR4C was not by that date, and for the purposes of applying the definition of 'economic operator' in Regulation 2, carrying out or offering on the market the relevant works or services (i.e. construction, waste incineration or waste plant operation). The Council referred to CR4C's objects quoted above and to the terms of its Share Offer which was published in 2016 (and self-evidently after CR4C had been registered on 8 February 2016 with the ability to raise share capital) and referred to that initial offer being open from 29 April 2016 to 27 May 2016.

187. The 2016 Share Offer was circulated in April 2016. It described CR4C as being:

"*a community-owned sustainable enterprise with a commitment to delivering long term economic, social and environmental benefits through working with local businesses and communities that will prevent, reduce, reuse and recycle material which would otherwise be thrown away and wasted – thus destroying our valuable resources and doing great harm to the environment through global warming gasses and toxic emissions*."

188. The Council emphasised that the Share Offer did not represent that CR4C would be building the waste recycling plant which would produce such benefits. On the contrary, it referred to its first project being to work with RR4C in providing the SPV with non-cash support – such as through education and promotion, identification of partners and the encouragement of businesses to recycle locally and to convert to the biomass fuel

to be produced by the plant – in connection with a proposed recycling plant identified as the 'R4C Recycling Plant'.

189. As Mr Jarman explained in evidence, the idea of such plant had been under discussion from around 2012 with the support of an informal alliance of parish councils, organisations and individuals within the Severn Vale known as 'Glosvain'. Glosvain was opposed to waste incineration and in favour of greener methods of waste disposal. From around that time, 2012, Mr Jarman had known that UBB was likely to be awarded the Council's contract to build and operate an incinerator plant at Javelin Park. The R4C Recycling Plant envisaged by Glosvain would have used the technology licensed from BTL and potentially been based alongside UBB's facility at Javelin Park. The proposal was that it would operate as a "merchant plant", processing the waste of commercial operators, as well as Stroud District Council and other supportive local councils. The income would be generated by the commercial waste and low tonnage fees would be charged to the councils on the basis that they would be entitled to recycling credits (which the Council would be obliged to give in respect of recycled collected waste). The concept of the R4C Recycling Plant had earlier been known as the 'Stroud R4C Peoples Project' and it was by that name that the project was launched at a public meeting on 7 July 2015. Very soon after that meeting Glosvain learned that UBB's appeal against the refusal of planning permission for the EfWP had been successful. Plans therefore continued for the building of a recycling plant in competition with the EfWP.

190. The 2016 Share Offer was quite clear in stating that CR4C would not be providing support for capital projects, such as plant and equipment, as opposed to assistance with professional communications, administration and publicity. It would be R4C, as a commercial operation, which would own and operate the plant and be responsible for raising the capital for it to be built and operated. R4C was described as CR4C's "*customer*" and the Share Offer stated that in return for CR4C's input and support "*a generous share of profits from the first line of the plant's operations – up to 25% - will be paid to [CR4C]*."

191. It is also significant that (as appears from sections 4 and 5 of the Share Offer) the timescale for R4C Recycling Plant envisaged funding being secured by September 2016 and that, after a 15 month period for the construction and commissioning phases, the plant would become operational in the third quarter of 2018.

192. These plans, summarised in the Share Offer, were consistent with the pleading of the initial commercial aim of the contemplated consortium as pleaded in paragraph 3 of the Particulars of Claim.

193. On behalf of CR4C, Mr Sinclair submitted that the fact that his client was not formally registered as a society before February 2016 was an irrelevance as it had been "*operating*" as an unincorporated association since July 2015. That earlier date marked what Mr Jarman described as the launch of CR4C "*as a concept*", which was marked by its website going live. Mr Jarman explained how the Stroud R4C Peoples Project evolved into the two-entity structure of RR4C (incorporated in October 2015 as the SPV intended to contract with others for the long-term funding, building and, ownership and operation of the intended plant) and CR4C (as the organiser and co-ordinator of plans for the plant and short-term funder of the project).

194. In response to a question from me, Mr Jarman confirmed that CR4C had no rules or constitution in place prior to its incorporation as a mutual society. However, during his cross-examination, he emphasised that the registration had been a fairly lengthy process and one preceded by the establishment of a 'Steering Group' known as "Community R4C". Mr Jarman was describing a "*communication forum*" between the membership of that group which resulted in the establishment of a website, a press release and production of a video in July 2015. This was soon after the launch of the 'Stroud R4C Peoples Project' (as it was then known) at the public meeting on 7 July 2015. Mr Jarman said a significant part of the group's discussion related to the type of vehicle to take the project forward. This included the need for a separate commercial vehicle, RR4C, and the nature of the relationship between CR4C and that special purpose vehicle as it came to be explained in the 2016 Share Offer. He explained how in October 2015 the group "*took steps to work out budgets for the plant and securing partners. We also worked to find funding and other partners including Smiths (Waste co) Tennens (Logistics) and Capital on Site (Site Funding)*" (per para. 124 of his witness statement).

195. Mr Sinclair said that if the Council had invited tenders in 2015/16 then his client would have formed a consortium with others. Again, this is what paragraph 3 of the Particulars of Claim alleges, saying it would be the same consortium ("*that consortium*") as contemplated for the recycling plant mentioned in the 2016 Share Offer. Paragraph 17.20 of CR4C's Amended Reply identified "*the real question [as] whether the Claimant's consortium had a real prospect of winning a lawful procurement exercise*." Paragraph 18 talked of a consortium between "*CR4C and its partners (including technology providers. Revolution R4C and others).*"

196. I have already explained how paragraph 17.20 of the Amended Reply led to the RFI and the subsequent correspondence about that.

197. In his testimony Mr Jarman said that it was clear that CR4C and RR4C were going to work together. RR4C would be the SPV for any consortium bid. I have already expressed my view that the idea of a consortium bid should not distract the court from deciding the first point in the preliminary issue as to whether or not CR4C was an economic operator in its own right. However, CR4C's contemplated reliance upon the skills and resources of other parties is said to be relevant to the prospects of pre-qualification.

198. Mr Jarman said:

> *"It is also very clear that they were going to work with other parties, whether it was in a bid for a Gloucestershire City Council contract, which didn't exist"* - by which he meant the contemplated consortium had not been given an opportunity to tender for the 2016 Contract – *"or for any other party, they would work with other parties. And as such a consortium would consist of Community R4C and Revolution R4C and other parties."*

199. Mr Sinclair's submission that his client has standing under Regulation 91 must be considered in the light of my decision (paragraph 70 above) that CR4C's status as an economic operator is to be tested as at 15 January 2016 and also Mr Jarman's evidence about the position at the time of the 2016 Share Offer. In answers of equal significance to the prospects of CR4C pre-qualifying, Mr Jarman confirmed that the plan was to

build a new recycling plant in Gloucestershire to be operational by the third quarter of 2018. He accepted Ms Hannaford's suggestion that neither CR4C nor RR4C was set up to bid for a contract with the Council, whilst emphasising that they had not of course been given the opportunity to do so.

200. When the denial of any such opportunity is the basis of the claim, CR4C has to be able to show that it was a person offering the works or services to fulfil it at the relevant time. That is what the definition of 'economic operator' requires: at least one "*person*" (or "*public entity*") "*which offers*" such works, products or services "*on the market*".

201. In my judgment, CR4C has not established this. It did not have any legal personality as at mid-January 2016. Nor, for that matter did Stroud R4C Peoples Project (or Community R4C) which was an informal association of like-minded persons. To illustrate the point, CR4C could not have sued or been sued as if it was a legal person at that point in time. The evidence does not support the conclusion that any person or entity (whether public, natural, corporate or unincorporated) standing behind the collective nomenclature could then have pointed to the existence of a separate unincorporated association and an interest representative of other identical "membership" interests: compare CPR 19.6.

202. It is also clear in my judgment that neither was CR4C then offering the works or services to meet the requirements of the hypothetical tender. So much is obvious from the terms of the 2016 Share Offer which show that CR4C was both looking to raise capital in the Spring of 2016 and hoping to commence construction on the R4C Recycling Plant from September 2016 onwards. I have sought to emphasise that the definition of 'economic operator' requires some market presence. I do not accept that CR4C met this requirement even by reference to its proposal in relation to the R4C Recycling Plant. The 2016 Share Offer (aimed at raising funds in the period 29 April 2016 to 27 May 2017 to "*galvanise the whole process*") showed that CR4C's business was a nascent one and it had first to be established before RR4C could then set about raising the capital to build the R4C Recyling Plant at an estimated build cost of £15m. What CR4C's subscription offer identified as "*[o]ur first priority for our activity*" was dependent upon the share offer being successful. Even a couple of months after the date of the hypothetical PQQ exercise, it had yet to enter the market.

203. It is not enough in my judgment to say that some of the individuals or companies who were behind the Stroud R4C Peoples Project, before CR4C was formally established, had expertise in the MBHT process in a way which would have enabled *any one or more those persons* to have embarked upon meeting the Council's selection criteria, with the prospect of working capital then being raised for the newly formed CR4C if the relevant requirements of the PQQ were met. Again, such a scenario would simply confirm the fact that CR4C was not itself offering any works or services at the time. It also reinforces the point that, before the registration of CR4C in February 2016, those persons were not bound together by membership of any unincorporated association as opposed to a common interest (or what Mr Jarman described as the communication forum) between them.

204. My conclusion that CR4C lacked economic operator status can be tested by considering how it might have completed, in January 2016, the equivalent of the preliminary questions contained in Section 2 of the Council's 2009 PQQ. That section sought information about "*organisation details*". As at mid-January 2016, Community R4C

and/or CR4C would not have been able to complete the information sought as to registered number, date of registration, registered office address or VAT number. It would not have been able to "*specific the type of organisation (e.g. private limited company, partnership, sole trader)*". I am also unclear what would have been said in response to the request to "*provide details of your organisation's main areas of business*". What I envisage would have been a series of blanks in any equivalent PQQ submitted in January 2016 would have immediately led the Council to question whether it was in fact looking at a PQQ from a legal person already operating in the market.

205. In the interests of clarity, given my preliminary observations upon the appropriate standard of proof, I have found that CR4C has not established on the balance of probabilities that it was an economic operator in mid-January 2016. Even if I had considered it appropriate to decide that point (as part of the wider preliminary issue) by reference to a lower standard of proof, I would have concluded that CR4C's claim to economic operator status, as at 15 January 2016, was fanciful.

206. My decision that CR4C lacked eligibility as an economic operator at the relevant time is sufficient to dispose of the Claim against the Council as a core requirement for a valid claim under Regulation 91 is missing. Nevertheless, it is obviously sensible that I address the other matters raised for my determination which have been addressed so comprehensively in evidence and argument.

CR4C's Prospects of Pre-Qualifying

207. The second limb of this first preliminary issue requires the court to determine whether or not CR4C could have pre-qualified having regard to any lawfully imposed selection criteria under Regulation 58.

208. In my preliminary observations upon this issue I have determined that this question is to be addressed as at mid-January 2016. I have also explained why I have taken the Shadow PQQ as the benchmark.

209. In my analysis of CR4C's pleaded case I have indicated how an assessment of CR4C's prospects of pre-qualifying through reliance upon the capacity of other members of a consortium is closely connected to the question of whether CR4C was an economic operator at that time. Despite my finding to the contrary, for the purpose of analysing this second limb of the preliminary issue I will proceed as if CR4C qualified as an economic operator, either in its own right or deriving that status from its proposed consortium.

210. I have already explained that the Shadow PQQ recognised the ability of tenders to submit a consortium bid. I shall assume that the then soon-to-be-registered CR4C would have given the same details about the consortium in its PQQ of January 2016 as those given in its response to the Council's RFI in September 2019.

211. The Council argued that CR4C would not have been able to pre-qualify for any new contract in early 2016 as it did not have the necessary financial capacity and lacked the requisite technical ability and experience.

212. In relation to the Shadow PQQ's requirements for proving economic and financial standing, the Council highlighted that CR4C did not have any financial statements at the beginning of 2016, as it did not then exist as a registered society. It also pointed out that CR4C's unaudited accounts for subsequent periods show that it had virtually no turnover, no assets (other than a small amount of cash in the bank) and that it was making a loss.

213. CR4C's unaudited accounts for the period from its date of incorporation (8 February 2016) until 30 June 2017 showed turnover of £2,825 (in the form of donations), an absence of fixed assets, current assets in the form of cash at bank of £43,601, an operating deficit of £55,991, and the existence of only one employee who was paid £12,098.

214. For the accounting year ended 30 June 2018, its accounts showed turnover (in the form of grants) of £4,165, no fixed assets, current assets (cash at bank) of £43,465, a loss after taxation of £722 and still only one employee (who was paid £4,165).

215. On the Council's case, this clearly could not have met the financial requirements of the original PQQ, or the Shadow PQQ or, indeed, any realistic financial requirements. Indeed, by the terms of the Shadow PQQ, Ernst & Young explained how, even by considering the financial statements for periods after the date of the hypothetical tender, CR4C failed the turnover test. Whereas that test required a turnover threshold of £50m p.a., the weighted scoring system applied to the 2017 and 2018 accounts (and to the nil turnover for 2016) produced a figure of £3,346. On that basis, the accountants stated: "*No further tests would be performed under the PQQ as the organisation has failed the turnover threshold test*."

216. I have assumed that CR4C's PQQ would also have identified RR4C and BTL as consortium members.

217. RR4C was incorporated on 6 October 2015. As the intended SPV, it was dormant in mid-January 2016. Indeed, it remained dormant in the years that followed. Mr Christensen said he provided consultancy services to RR4C but these were paid for by CR4C. RR4C's accounts for 2016, 2017 and 2018 were filed at Companies House under the relevant exemption for dormant companies and show that its only asset was the £10 share capital raised by the issue of 1000 shares of £0.01 each.

218. BTL was incorporated on 3 February 2012. The company's unaudited accounts for each of the years ended 31 July 2013, 2014 and 2015 recorded the following:

    i) 2013: net current assets of £53,967 and an operating loss of £217,505;

    ii) 2014: no turnover (and indicating the same for 2013 which had been in abbreviated form and not included a P&L account), net current assets of £98 and an operating loss of £95,040; and

    iii) 2015: net current assets of £4,653 and (although these accounts were in abbreviated form and did not include a P&L account) an operating loss of £25,516.

219. BTL's accounts for the years after the date of the hypothetical PQQ show that the company continued to be unprofitable and that its assets remained modest. In the financial year ended 31 July 2016, it made a further loss of around £3,500 and its net current assets reduced to £1,113. In 2017, its net current assets benefited through a modest increase in the cash at bank but the deficit on the profit and loss account increased by just under £4,000. In 2018, its net current assets stood at £2,145 and a further loss of around £1,500 was made.

220. I should note for completeness that BTL's accounts noted the existence of a contingent liability "*relating to payments to third parties if certain funding targets are met*" (quantified at £138,250 in the 2013 accounts and at £212,600 in the 2018 accounts).

221. Mr Jarman was a director of BTL. He confirmed in cross-examination that BTL had no paid employees. Mr Christensen said that he had done some consultancy work for BTL which, because of budgetary constraints, was done on a project-by-project basis.

222. In my judgment, this evidence about the financial standing of the 3 identified members of the consortium (as identified by CR4C's Part 18 response) show that CR4C would have failed 'the Minimum Standards' turnover threshold test. The conclusion which Ernst & Young reached in relation to CR4C alone would have held good for the consolidated turnover of all three entities taken together. Indeed, although the turnover threshold was set at £50m p.a. it is obvious that they could not have met any but the most minimal turnover requirement set by reference to the terms of Regulation 58(8)-(9). If, for example, the procurement had been for the R4C Recycling Plant envisaged by CR4C's Share Offer (at an estimated capital cost of £15m) then CR4C, RR4C and BTL could not have demonstrated consolidated turnover to the level that might lawfully have been stipulated under Regulation 58(9).

223. I would add that the financial statements of CR4C, RR4C and BTL, to the extent they were then available, show that whether considered separately (as the Shadow PQQ required, at least prior to an averaging exercise) or together, there was no prospect of them obtaining 50% of the marks under the second due diligence process for assessing financial standing under the PQQ even if they had got to that stage.

224. I now turn to the Council's requirements in relation to technical and professional ability. For the purposes of the hypothetical tender in January 2016 these are to be taken as similar to those stipulated for the 2009 procurement. I have summarised in paragraphs 94 and 95 above the requirements under the 2009 procurement in relation to technical and professional ability. It follows that CR4C is able to point to the Council's "*neutral technology stance*" announced in the OJEU Notice. I also bear in mind Ms Lunnon's evidence about the RWWG having by late 2014 recognised that an MBHT facility was being considered as an option under "Plan B".

225. However, these observations simply show that CR4C considered itself to be in a position to meet the Council's residual waste needs. The form of the 2009 PQQ illustrates the requirement that capability and track record should be demonstrated by identifying any contracts undertaken for major capital infrastructure projects in the previous 5 years. I have already noted that the Shadow PQQ proceeded on the basis that such a track record would be indicative of fund-raising capacity. The earlier PQQ had also required identification of the key persons within the applicant organisation with the experience in the provision of services similar to those required. Under

Regulations 58(16) and 60(9) the Council would have been entitled to ask for such details.

226. In his testimony, Mr Jarman relied upon the track record in the waste treatment sector which would have been available to a consortium between CR4C, RR4C and BTL. In response to Ms Hannaford QC suggesting that none of those entities had a track record of operating plants within the previous 5 years, he said:

> "*You're applying a valuation process which is not the evaluation process that a PQQ process goes through or a full tender process goes through. They look at the proposal that I put on the table to them and the proposal that I put on the table to them, or we, the consortium, put on the table to them would include aspects that prove that we have a track record of delivering the equipment, delivering it, installing it, running it. We have personnel and skill levels that meet all the requirements in terms of health and safety throughput, guarantees and all the rest. You would deliver that and you would use it, you'd do it using people with the skill set of Paul Winter, who was the CEO of Biocentre at the time, extensive experience delivering £100 million type contracts in the energy waste field. So of course, we had the experience to do this. In terms of technical experience, as the track record shows in terms of the technology in the process, it's been installed in a number of plants. KMH, who was an active technical partner of ours, were installing plants as we were talking and still do.*"

227. In addition to Mr Winter, Mr Jarman also pointed to the experience of Mr Tony Manser who he said was the chief engineer or general manager of 6 waste treatment plants (including an MBHT plant at Castle Bromwich, Birmingham which had operated between 1989 and 1998) identified in a written presentation which Mr Jarman had prepared for RR4C in around November 2015. Mr Manser had been a founding member of ART from which BTL had acquired its patented technology based upon MBHT and the trademark Biocentre™ after ART went into administration. Although 4 of the plants identified in RR4C's presentation pre-dated the establishment of ART, Mr Jarman said Mr Manser's experience in the sector was still relevant to the prospects of CR4C and its consortium pre-qualifying for a replacement for the 2013 Contract.

228. Mr Jarman said:

> "*But the point is that clearly a track record is not something that a company owns, it's soft intellectual property, it's something that people and processes and documentation and, you know, process diagrams and certification and data from modelling, the metrics, the model that you run all of this complicated mechanical equipment and ensure that flow rates are correct and all the rest. All of that is deep engineering modelling with experience. It's built on empirical data - you test what your outputs are and you build that into your future models. All of that is, therefore… All of these plants built into Tony Manser's models, which were then transferred into ART and then later to BTL. So, these engineering models, which NBHT is based around, come from this track record."*

229. Ms Hannaford QC cross-examined Mr Jarman by reference to the terms of a Report prepared by Eunomia Research & Consulting Ltd ("**Eunomia**") in March 2016 at the request of Stroud District Council. In December 2015 the District Council had commissioned a review by Eunomia of RR4's proposal summarised in the November

2015 presentation. Mr Jarman correctly observed that the Eunomia Report was therefore upon the proposal which was also identified in CR4C's 2016 Share Offer (the recycling plant potentially to be sited alongside UBB's facility at Javelin Park) and not the consortium's ability to meet the Council's needs which were the subject matter of the 2013 Contract between the Council and UBB. He said that the contract envisaged by that proposal was significantly more difficult because it would have been in the shadow of the EfWP.

230. Eunomia's Report expressed their thanks to Mr Jarman for his support in providing the supporting documentation which enabled them to prepare it. In responding to the point that Eunomia's conclusion that RR4C's proposals were not sufficiently robust in presenting a business case to which the council could respond positively, and that the council was unlikely to commit until the outstanding aspect of the business case identified in the Report were resolved, Mr Jarman said, amongst other things:

> "*This is a financial model for a very different plant to what would have been proposed to the County Council. It operates at much lower margins and operates with a very low price, £20 a tonne for treating waste - the incinerator's headline price is £190 a tonne. You can understand that that makes it very demanding in terms of how you operate the plant.*"

231. Nevertheless, in the context of questions put to him about the Eunomia Report, Mr Jarman did accept the correctness of the following observations within it:

i) that RR4C was a newly incorporated company which did not have direct company experience of waste plant, development construction and operation;

ii) that CR4C was also newly established as a community benefits society and had no direct experience of community fundraising under the CR4C name; and

iii) that BTL had obtained its intellectual property from ART in circumstances where ART had established a consortium to commercialise the MBHT process but the venture did not proceed because (as Mr Jarman had explained at an earlier point in his testimony) one of the consortium members – Cargill Incorporation – had wanted to step out of the waste market.

232. Mr Christensen explained how, after joining ART in 2007, the company had secured support for the building of a "*Biocentre merchant plants*" in Birmingham, Bristol and London. However, he confirmed that ART had only carried out design work and not constructed or operated any waste disposal plants. He said that Cargill's withdrawal reflected a decision to restructure in the light of the global credit crunch. As with the point to emerge from RR4C's presentation in November 2015, it is significant that paragraph 33 of Mr Christensen's witness statement was worded so as to identify plants that had been built "*during [ART's] lifetime and the careers of its members and associates*."

233. As with ART before them, each of CR4C, RR4C and BTL were pointing to the experience of others in seeking to establish a track record of undertaking projects. This lack of direct experience had been noted by Eunomia in their Report. Mr Jarman said that Tony Manser (whose experience both Mr Jarman and Mr Christensen relied upon as flowing through to BTL) had retired in 2012 though he also said he continued to do

a bit of consultancy. It was also apparent that much of Mr Manser's experience had been gained when he was employed by East Sussex Council rather than at ART.

234. As submitted by Ms Hannaford QC, the true position was that:

i) none of the projects relied upon by them had been in the last 5 years;

ii) none of them had been carried out by CR4C, RR4C or BTL; and

iii) they had not built or operated any waste disposal plants.

235. In my judgment, therefore, a consortium bid by CR4C, RR4C and BTL would not have demonstrated a track record in delivering major capital infrastructure projects in the last 5 years. Looking at the different tests of particular project based experiences identified in Tables 15 to 19 of the 2009 PQQ (as adopted by the Shadow PQQ) they could not have achieved 50% of the marks required under the Shadow PQQ in order to pass the technical pre-qualification stage.

236. The conclusions I have reached therefore mean that CR4C could not have pre-qualified on a hypothetical tender in January 2016 based upon a consortium of itself, RR4C and BTL.

237. However, although the form of the 2009 PQQ and, more relevantly, the terms of Regulation 63 clearly indicate that CR4C would have been required in January 2016 to identify any other entities relied upon, I should also consider the prospect that CR4C could have pre-qualified by relying upon those who by its Part 18 response in this case it said would be later identified in evidence. I have already analysed CR4C's pleaded case partly in order to clarify the reliance upon others in relation to the prospects of pre-qualifying. Mr Sinclair's written closing submissions emphasised the fundamental nature of the point. He pointed out that Mr Mawdsley's own evidence (about the "Industry Day" held on 17 February 2009 in the context of the procurement exercise in 2009) highlighted the Council's encouragement of consortium bids.

238. In his witness statement Mr Jarman identified (alongside Stroud District Council) 5 other potential "*funding, engineering and other partners*" with whom CR4C had been in discussion and from some of whom, he said, "*offers in principle*" had been forthcoming. At paragraphs 19 to 23 of his statement, Mr Jarman referred to Capital on Site (a property investor with an interest in waste and biomass projects); Smiths of Gloucester Ltd (a local waste disposal business with a site near Javelin Park); Howard Tenens Associates Limited (described as a £100m logistics company with headquarters in Stroud); PBS Engineering Group (the UK subsidiary of a large Czech engineering enterprise with an interest in biomass boilers); and Green Investment Bank (which had been in discussions with BTL since 2012). Mr Jarman also mentioned that BTL had an established relationship with Damar-Finning (a substantial subsidiary of Caterpillar Inc) as a potential engineering procurement and construction "*which would have provided the financial security and engineering back up required to bid for a contract with GCC*."

239. Mr Christensen's witness statement also talked about consortium members (beyond CR4C, RR4C and BTL) in the following terms:

> "*I am also aware of other members of a possible consortium bid that could have been brought together for a bid in 2015/16. For example, PBS (funding and offtake, biomass boiler), Smiths (operations and CIW waste supply), Veolia (waste supply), Damar/Finning (EPC provider), KMH (mechanical design and installation).*"

240. Mr Jarman was cross-examined about some of these potential partners.

241. The conclusions which Mr Sinclair and Ms Hannaford QC each invited me to draw from the evidence given about them could not have been wider apart.

242. Mr Sinclair said that Mr Jarman's evidence on these potential consortium members was clear and either not directly challenged or not challenged effectively. He referred to contemporaneous letters and emails indicating interest on the part of Capital on Site (in November 2015), Smiths (in April 2016), and PBS (in June 2016). The expressions of interest by PBS, Smiths and Capital on Site were, Mr Sinclair submitted, obtained in the context of the much less attractive context of the R4C Recycling Project. He pointed out that the correspondence between CR4C and Green Investment Bank (and the local MP) in February and March 2016 indicated that, whilst the R4C Recycling Project did not fit its investment criteria, the bank would be happy to re-engage in discussions with CR4C if there had been significant material changes in its proposal and if the Council's decision not to proceed with the EfWP removed a conflict of interest faced by the bank as lender to the Council.

243. Mr Sinclair relied upon a letter dated 29 September 2014 from the Damar Group to BTL which referred to recent meetings and ongoing discussions and said they "*are progressing through the advance general technical information with the intention of negotiating a position of the EPC deliverer of the Biocentre scheme/s.*" The letter referred to the fact that Damar-Finning routinely offered bonds, 'wraps' and guarantees in the EPC context.

244. Mr Sinclair submitted that "*with parties <u>such as</u> PBS and/or Damar-Finning and/or Veolia parties to a consortium, the issues of meeting financial and economic criteria at the PQQ stage are addressed*."

245. In relation to technical and professional ability, Mr Sinclair highlighted Mr Jarman's unchallenged evidence that the MBHT process produces a fuel which took the resulting product out of the legal categorisation of 'waste' (though I should not that there was no need for the Council to challenge it in the context of the preliminary issues).

246. Against this, Ms Hannaford QC said there was no evidence or certainly no satisfactory evidence that any of the other entities identified in the evidence would have been prepared to form a consortium with CR4C. By way of example, she referred to the limited contemporaneous exchanges between Mr Jarman (on behalf of RR4C) and Howard Tenens in November 2015 and pointed out that he had indicated that the R4C Recycling Plant had "*significant support*" from Stroud District Council when the Council soon after commissioned the Eunomia Report which led to a change of position. Even then, the response from the Chairman of Howard Tenens was to say they looked forward to a meaningful discussion about the proposal. Looking at the interest on the part of PBS, Ms Hannaford pointed out that by August 2016 this seemed to have moved from making an investment to instead acquiring the technology of BTL.

247. Further, Ms Hannaford QC said that there was no evidence that any such members of the consortium could have complied with the technical requirements of the PQQ.

248. She correctly pointed out that, just as Regulation 60(6)-(9) contained detailed provisions in relation to an economic operator's proof of both its own economic and financial standing and technical and professional ability, in meeting Regulation 58 selection criteria, so too Regulation 60(3) provides (with her emphasis):

> "*Where an economic operator wants to rely on the capacities of other entities, it shall prove to the contracting authority that it will have at its disposal the resources necessary, for example by producing a commitment by those other entities to that effect."*

249. Ms Hannaford made the point that the need for such proof is obviously designed to protect the contracting authority from non-performance and the contract later falling apart. The need for certainty over the identity of any other entities being relied upon to meet selection criteria is exemplified by Regulation 60(5) which provides that, in such circumstances, the contracting authority may require that the economic operator and those entities be jointly liable for the execution of the contract. The form of the 2009 PQQ (obviously prepared by reference to the 2006 Regulations) clearly illustrates the need for the economic operator to identify the names, addresses and roles of any consortium members and subcontractors who will play a significant role in the delivery of services or works under the contract.

250. I accept the Council's argument that none of the evidence relied upon by CR4C about the potential support serves to materially enhance the strength of its case on the prospects of pre-qualifying.

251. What I regard as the weakness of CR4C's case on this aspect of the case is revealed by the way Mr Sinclair came to summarise his client's position. The way he did so was dictated by the fluidity of CR4C's case as to the composition of the contemplated consortium. I refer back to my comments on CR4C's pleaded case. So far as the evidence was concerned, paragraph 63 of Mr Sinclair's written closing submissions said:

> "*It is submitted that, whilst C4RC faces the inherent difficulty of any party dealing with a failure to tender (see AG Kokott in Pressetext) it is likely that a consortium consisting of all or some of the parties described by Mr Jarman and/or Mr Christensen would have bid for the GCC contract in 2015/16 (the degree of likelihood of this need not be separated from the overall question of a substantial as opposed to fanciful chance of meeting lawful selection criteria).*"

252. I have already expressed my conclusion that such an approach involves the wrong test. CR4C needs to establish on the balance of probabilities that it could have pre-qualified.

253. In my judgment, it has not done so even by reference to these other potential consortium partners beyond the identified three.

254. That is because the nebulous scope of CR4C's consortium, and its reference to potential consortium members rather than actual ones, inevitably carries through to a lack of commitment on the part of those others, and vice versa. One would not expect a party such as PBS to make a commitment (of relevant capacity for Regulation 63 purposes) without first knowing who the other members of the consortium (with their own financial or technical capacities) were to be.

255. That PBS, for example, had not committed its capacity is clear from the 'Letter of Interest' it wrote to BTL on 12 June 2016 (and therefore some 4 months after the hypothetical date). The letter confirmed PBS's interest in two things. The first was making a financial investment in BTL. The amount of any such investment would be decided after PBS had conducted due diligence into BTL and its IP, with a particular focus on the technical and operational aspects of its technology and know-how. The second matter was making a financial investment in the R4C Recycling Plant. The amount of the investment was to be decided upon revision of the business plan and other relevant information relating to the plant. To the extent they needed to, PBS reserved the right to withdraw or amend their letter of interest. As the Council pointed out, their later 'Letter of Interest' dated 8 August 2016 confirmed interest in acquiring BTL's technology, subject to conducting due diligence.

256. For reasons I have explained at some length in my preliminary observations upon the approach to this issue, I have decided the issue against CR4C by testing its case against the civil burden of proof in accordance with what I believe to be the conventional (and EU law compatible) approach. CR4C has not in my judgment established on the balance of probabilities that it could have pre-qualified.

257. It is because matters appeared too amorphous, even at trial, in relation to the composition of the consortium that CR4C is forced to argue for a lower level of scrutiny fixed at deciding whether or not its prospects of pre-qualifying were sufficiently substantial as not to be dismissed as fanciful. And it is because the application of that threshold test strikes me as both inappropriate when considering the purpose behind setting pre-qualification requirements, when viewed from the perspective of the contracting authority, and inadequate for the purpose of properly identifying a material interest in the procurement on the trial of a preliminary issue rather than a strike-out application (see the observations in paragraph 78 above) that I do not believe it is the correct one.

258. Nevertheless, had I been persuaded by Mr Sinclair's submission that the proper test to be applied was instead one of asking whether or not CR4C's case on pre-qualification (and not just any later issue over its tender qualifying as the MEAT) was better than fanciful, I would still have decided the point against CR4C. In circumstances where I believe the prospects of CR4C, RR4C and BTL (combined) meeting the requirements of the Shadow PQQ were fanciful, I cannot accept that they should be treated as being significantly better simply because the resources and capacity of other *potential* consortium members *might* have been made available.

259. Simply pointing to the presence of one or more *potential* consortium partners is completely at odds with proving their commitment in the manner envisaged by Regulation 60(3). Even if the entities identified in the witness evidence had been named (with their respective capacities for performance) in the hypothetical PQQ of January 2016, the evidence before the court in 2020 does not indicate that CR4C could then

have complied with Regulation 60(3). Simply naming them (or some of them) in the PQQ as if they were actual members of the consortium, as opposed to potential ones, would not overcome the evident uncertainty over their actual commitment to the project.

260. I now turn to the second preliminary issue.

The Second Issue: Limitation

The Test under Regulation 92(2)

261. Article 1(1) of the Remedies Directive requires Member States to ensure that decisions taken by contracting authorities may be reviewed "*effectively and, in particular, as rapidly as possible*."

262. Accordingly, Regulation 92(2) of the Regulations provides as follows in relation to the commencement of procurement claim:

> *"(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."*

263. The decision of the Court of Appeal in *Sita UK Ltd v Greater Manchester Waste Disposal Authority* [2011] EWCA Civ 156; [2012] P.T.S.R. 645, [12] and [15], applying *Uniplex,* provides a direct reference to the Remedies Directive as the source of the jurisprudential test of '*knew or ought to have known*'.

264. Regulations 92(4)-(5) contain provision for the Court to extend this period to a maximum of 3 months but CR4C did not suggest that to be of any relevance on the facts of the present case.

265. The 2016 Contract was signed on 21 January 2016. The Claim was issued almost 3 years later, on 18 January 2019.

266. The parties were agreed that the level of knowledge (actual or constructive) required by Regulation 92(2) – referring to knowledge that "*grounds for starting proceedings had arisen*" – is that identified by the decision of the Court of Appeal in *Sita*. That decision concerned the impact of regulation 32(4)(b) of the Public Services Contracts Regulations 1993. That earlier provision referred to the requirement that proceedings should be brought "*promptly and in any event within three months from the date when the grounds for the bringing of proceedings first arose unless the court considers there is good reason for extending the period within which proceedings may be brought*".

267. In *Sita* the Court of Appeal was considering that predecessor regulation in the light of the decision of the CJEU in *Uniplex*. The decision in *Uniplex* was to the effect that the principle of effectiveness meant that regulation 32(4)(b) did not comply with EU law

and the national court was obliged to exercise its discretion to extend time so that the relevant period did not begin before the claimant had knowledge of the grounds for bringing proceedings. In language which foreshadowed that now contained in Regulation 92(2), the Court in *Uniplex*, at [47]-[50], identified the start date for limitation purposes as "*the date on which the claimant knew, or ought to have known of, the infringement of the public procurement rules*."

268. In considering that test, the Court of Appeal in *Sita*, at [26]-29], adopted the test of knowledge applied by Mann J at first instance which was that the level required was "*a knowledge of the facts which apparently clearly indicate, though they need not absolutely prove, an infringement*." As Elias LJ observed (by reference to the decision of the House of Lords in *Haward v Fawcetts* [2006] 1 WLR 682 and the speech of Lord Nicholls) this test is stricter than the test of knowledge in a latent damage case said to be within section 14A of the Limitation Act 1980. However, as I remarked at the hearing, it seems to me that the *Sita* test is clearly less exacting than the 'statement of claim' test which applies to a case of alleged deliberate concealment for the purposes of section 32(1)(b) of the 1980 Act: compare *AIC Ltd v ITS Testing Services (UK) Ltd (The "Kriti Palm")* [2006] EWCA Civ 1601 and *Arcadia Group Brands Ltd v Visa Inc* [2015] EWCA Civ 883. The reference in *Sita* to facts which "*apparently clearly indicate*" the existence of a claim fixes a lower benchmark of knowledge than a test which relates to a claimant's knowledge of facts which ought to be pleaded in particulars of claim and without subsequent proof of which the cause of action is incomplete.

269. In *Amey Highways Ltd. v. West Sussex County Council* [2018] EWHC 1976 (TCC), [33], Stuart-Smith J confirmed that the *Sita* test - a knowledge of the facts which apparently clearly indicate, though they need not absolutely prove, an infringement – was now the established test which applied to a procurement claim the timely commencement of which is governed by Regulation 92.

270. At one point in his argument Mr Sinclair made the observation that imputing *Sita* knowledge too readily to a claimant could jeopardise the enforcement of procurement rules and undermine the principle of effectiveness. When I pointed out that the Remedies Directive highlighted the need for rapidity as a particular aspect of an effective remedy, he noted that the time limit for primary remedies (such as a declaration of ineffectiveness governed by Regulation 93) were much stricter and "knowledge-free". I mention this only because it is, however, clear that the language of Regulation 92(2), as clarified by the formulation of the test in *Sita*, has already factored in such wider considerations. The test is the *Sita* test and it is to be applied objectively to the facts of the case.

271. The language of Regulation 92(2) focuses only upon the economic operator's knowledge and notions of "concealment" by the contracting authority do not feature within the Regulations. Ms Hannaford QC emphasised this fact by referring to how Elias LJ in *Sita* had, at [37]-[38], applied "*the principle of rapidity*" in saying that, where the proposed claimant had the requisite knowledge, there was no room for punishment of the defendant authority (by freezing time further for limitation purposes) until it was in full compliance with its obligations of transparency. I have already noted that the *Sita* test is less forgiving for a claimant than the one applied under the Limitation Act 1980 to a case of alleged concealment. I also note that the policy reasons underlying the need for speed on the part of a claimant armed with such knowledge

signposting an infringement of the Regulations, being reasons based on the need for expedition and certainty of outcome in the tender process, were noted by Stuart-Smith J in *Amey Highways* at [33]-[34]. However, as the Court of Appeal recognised in *Sita*, there may obviously be cases where the withholding of information by the authority prevents the claimant from acquiring such knowledge.

272. This being a preliminary issue directed to limitation, the burden of establishing that the claim is barred must be upon the Council.

The Rival Contentions

273. The Council's Defence says that the claim is time barred as CR4C knew or ought to have known of the alleged breaches more than 30 days before it commenced proceedings. In support of that contention, the Council relied upon a number of points (I have already noted in the context of CR4C's Application of 2 June 2020 that paragraph 17 of the Defence did not purport to be exhaustive on this aspect). The points included CR4C's awareness that the 2016 Contract was worth around £600m when making a share offer in April/May 2016; what CR4C had been able to say in its objection to the local auditor made in March 2017 (and what CR4C and Mr Sinclair, who was providing legal advice at the time, then said about the response from Grant Thornton the following Spring); and CR4C's actual or imputed knowledge of what was revealed about the contract in a redacted report from Ernst & Young disclosed to it in June 2017 (before being published, with fewer redactions, on the Council's website in late August 2017).

274. CR4C's position on limitation (as anticipated in the Particulars of Claim in a section headed *'Timing issues and extend of material damage*') is that it did not know of the breach of the Regulations alleged by it until the release of information on 20 December 2018. To quote from paragraph 13 of the Particulars of Claim:

> *"By disclosure on 20 December 2018 of previously redacted material, including disclosure for the first time of the changes that had taken place between the First Contract and the Second Contract it became apparent that there were material changes (including to 'gate fees' or payment levels and an increase in up-front payment by the [Council]) such that the total value of the contracts were assessed by the Claimant as being in the order of a change from c. £455m (First contract/contract signed in February 2013) to c. £600m (Second Contract/contract as materially amended and signed in February (sic) 2016). In contrast, the Council had publicly consistently cited a revised value/cost of £500m."*

275. In his closing submissions, Mr Sinclair made the bold submission that the Council's limitation defence, based upon CR4C having acquired *Sita* knowledge a significant time before disclosure of the unredacted EY Report on 20 December 2018, had blown up in a puff of smoke. He referred to "*a deliberate and ongoing four or five year tussle over freedom of information [and] failing to disclose*". I have just observed that a putative claimant may acquire knowledge to trigger Regulation 92(2) despite the best efforts of the contracting authority. However, referring to the open letter of 7 January 2019 mentioned in the Introduction above, Mr Sinclair asked rhetorically why CR4C

should not be permitted the same reaction as the signatories to that letter (some of them councillors on the Council) once the full information was revealed.

276. It is therefore necessary to test this position against the Council's case that CR4C either knew or ought to have known of the value of the 2016 Contract at a significantly earlier point in time.

277. Mr Sinclair impressed upon me the point that there was more to the test of *Sita* knowledge than just the increased value of the 2016 Contract. The core ingredients of an indicative claim identified by him were:

i) that there had been a modification of the 2013 Contract which was '*substantial*' within the meaning of Regulation 72(8). That provision identifies five conditions, any one or more of which will, if met, lead to the modification being considered to be substantial. They require a comparison between the 2013 Contract and the 2016 Contract. He pointed out that the terms of the 2013 Contract were only disclosed (almost entirely unredacted) in March 2017 after the Council's appeal to the First Tier Tribunal against the Information Commissioner's ruling in favour of its disclosure had failed. The 2016 Contract was not seen by CR4C (with trigger dates redacted) until 20 December 2018, after the Council had abandoned its appeal against a further ruling by the ICO and also relented on making available an unredacted version of the EY Report.

ii) once the extent of changes between the two contracts were known, whether or not the 2016 Contract had been made pursuant to a '*clear, precise and unequivocal review clause'* for the purposes of Regulation 72(1)(a). One example of such a clause identified in the regulation are '*price revision clauses or options*' which meet certain specified criteria); and

iii) after those first two matters had been considered, establishing that the Council was not paying UBB more for additional works or services of the kind contemplated in Regulation 72(1)(b). The regulation says a modification of contract, without undertaking a new procurement exercise, may be justified not only by reference to a regulatorily compliant review clause but also in certain prescribed circumstances militating against the case for a change of contractor despite the need for further work, services or supplies.

Analysis

278. In my judgment, however, the issue of the requisite knowledge to trigger Regulation 92(2) really turns on a comparison of the values of the 2013 and 2016 Contracts as the quote from paragraph 13 of the Particulars of Claim tends to confirm. I say that because CR4C's essential allegation in the Claim, as brought, is about the relative cost of the 2016 Contract. Of the five conditions for testing whether or not its modification of the 2013 Contract was '*substantial*' within the meaning of Regulation 72(8) the one identified (with emphasis) in paragraph 8 of the Particulars of Claim is that "*the modification changes the economic balance of the contract in favour of the contractor in a manner which was not provided for in the terms of the initial contract*."

279. In reaching that conclusion I recognise that the Particulars of Claim also anticipate (at paragraph 11) the potential for argument as to whether the Council might have entered into the 2016 Contract without embarking upon a new procedure by relying upon some other provision of Regulation 72. However, I do not consider that the Council's reliance upon any such relieving provision – including its reliance upon Regulation 72(1)(a) which is an exception that applies regardless of the monetary value of the modification – undermines the conclusion that there came a time when CR4C otherwise knew enough to conclude that there was a sufficiently *clear and apparent factual indication* that the Regulations had been breached. The point is illustrated by the fact that the Council's reliance upon Schedule 26 to the 2013 Contract, as a clear, precise and unequivocal review clause within the meaning of Regulation 72(1)(a), is an issue which, but for my conclusions on the first preliminary issue, would have remained to be determined in these proceedings.

280. It follows that the test of knowledge has to be assessed by reference to what was already known by CR4C about the value of the 2013 Contract and what it came to know about the value of the 2016 Contract.

281. As a matter of evidential analysis, it must in my judgment be right to undertake a cross-check of what it is suggested CR4C should have known by a certain date by looking at later contemporaneous material to see whether or not that is consistent or at odds with CR4C having actually acquired such knowledge. Paragraph 17 of the Council's Defence relies upon specific developments to attribute CR4C with knowledge over the period between April 2016 and May 2018. Although evidence indicating CR4C's actual ignorance of the 2016 Contract value at the end of that period may not provide a complete answer to the attribution of constructive knowledge, for the purposes of Regulation 92(2), documents indicating such ignorance at a certain point in time will inform any decision about the acquisition of actual *Sita* knowledge at an earlier stage. I have already noted that the Court of Appeal recognised that any withholding of information by the contracting authority may form part of the decision-making process.

282. CR4C's apparent knowledge of the value of the 2013 Contract is revealed by the 2016 Share Offer circulated soon after its registration. This referred to the contract with UBB being a *"£500M contract (now estimated at £595M)*". The approximate starting figure of £500m for the 2013 Contract would have been reinforced by what was said about that being its value in the decision of the First Tier Tribunal in March 2017.

283. In relation to the revised value of the 2016 Contract, the Council's starting point was to say that CR4C either had or should be taken to have had knowledge of a clear indication of a regulatory infringement from the time the Council approved the entry into the 2016 Contract at a Cabinet meeting on 11 November 2015. Of course, this was before CR4C was incorporated – the point upon which the Council relied heavily to say it could not be regarded as an economic operator at the time of the hypothetical tender – and it is difficult to see how this claimant can be attributed with a state of knowledge before it was established.

284. Nevertheless, in relation to the knowledge of those individuals who might be said to be the directing mind and will of CR4C, from the point in time of its registration, the Council relied upon what could have been discovered from the minutes and decision of the Cabinet meeting on 12 November 2015 which were published at the time. Mr Jarman said that he could have looked at the minutes of the meeting but it was not his

practice to follow closely what was going on at the Council. As for the Financial Monitoring Report which was discussed at the meeting, Mr Jarman said he would not have looked at it at the time but that he had read it subsequently "*and have no problem in accepting that I could have looked at it at the time*" (by which I understood him to accept he was able to have read it).

285. Although Annex 1 to that Financial Monitoring Report was exempt from that publication, Ms Hannaford QC submitted that the following significant matters were nevertheless clear from the documents that were published. As put to Mr Jarman in cross-examination, these were:

(1) the 2013 Contract had been varied and the change had increased the price. However, Mr Jarman noted that the minutes referred to the authority to sign the variation being delegated to a Council office and offered his view that this signified that there had not been a material change to the contract as "*you do not give delegated authority on a material change*";

(2) the delay to the planning permission had resulted in increased project cost, price indexation of the capital equipment and additional financing costs. Mr Jarman observed that the net increase (after mitigation through the increased capital contribution) was not clear;

(3) the Council was having to make a further capital contribution of £17m. Mr Jarman described this as a payment to mitigate the costs of delay; and

(4) the amendment had reduced the savings by around £37m (to £153m) when compared against the landfill alternative.

286. Ms Hannaford QC further submitted that as a matter of simple maths (and without taking into account changes from nominal values to NPV), it was therefore clear that the overall cost increase was some £54m (17m + 37m) as the reduction in savings was after taking account of the additional £17m contribution from the Defendant.

287. The exempt (from publication) Annex 1 to the Financial Monitoring Report did state that with that additional capital contribution the contract cost was approximately £602m. The Annex disclosed the figures for nominal all-in capital cost identified in a report prepared earlier that month by Ernst & Young (addressed below). Although that figure had not been made publicly available, the Council made the point that Ms Sue Oppenheimer had attended the meeting. Ms Oppenheimer was then the Chair of Glosvain and later became a director of CR4C. The Council pointed out that she had not given evidence at the trial of the preliminary issues so could not be asked about her understanding of the cost of the 2016 Contract.

288. As a local councillor, Ms Lunnon would also have had access to Annex 1. However, when asked in cross-examination whether she had attended the Cabinet meeting, Ms Lunnon said she had been trying to remember whether she had but could not say that she had. As to whether or not she read the accompanying papers, she felt unable to assert that she had but said she would be surprised if she had not read them. As for Annex 1, she said "*I think I would have looked at that*."

289. I have already mentioned the terms of the 2016 Share Offer and the statement in it that a £500m contract was, by April 2016, estimated to cost £595m. The document made two further references to the cost of the mass incineration over the next 30 years being an estimated £600m. One of these was made in the introduction to which Ms Oppenheimer put her signature. The Council argued that the document demonstrated explicitly CR4C's knowledge of a substantial modification of the 2013 Contract.

290. Ms Hannaford QC criticised CR4C's explanations for these references in the 2016 Share Offer which were:

    i) in Mr Sinclair's opening submissions, that the £600m was a calculation based on 30 years, not 25 years. This was a correct observation upon two of the references in the offer but the Council said the point was the document noted an increase in costs rather than any change in the number of years which CR4C was using in its calculation;

    ii) according to what Mr Jarman said in his witness statement, the £600m figure was just an estimate. The Council said that this explanation did not lie happily with the importance of the Share Offer to CR4C in obtaining funds for its proposed new plant. CR4C would have taken care to ensure that the price comparison between the UBB solution and its own solution was accurate and the difference in cost from the UBB contract was one of its key selling points; and

    iii) according to what Mr Jarman said in cross-examination, use of the £595m figure was a mistake and it should have been pulled into line with the other references to the round £600m based upon 30 years. In addition to its other observations, the Council said that this answer was aimed simply at avoiding the obvious conclusion that CR4C had been able to reach a calculation of the increased costs (including from the information provided to the meeting of the Cabinet on 12 November 2015) for the purposes of inclusion in such a significant fund-raising document.

291. In reflecting upon the evidence and the parties' rival contentions on the limitation issue, I have found this aspect of the case to be the most problematical from the perspective of reaching a decision. The Council made a powerful point when observing that it had not been able to explore in evidence what understanding Ms Oppenheimer had taken away from the Cabinet meeting and what personal knowledge of hers might then properly be attributable to CR4C. In his testimony, Mr Jarman had said Ms Oppenheimer had paid more attention to such things. For the purposes of Regulation 92(2), the confidential nature of Annex 1 makes it difficult for the Council to suggest that CR4C ought to be treated as having come to learn of its contents.

292. It was certainly not suggested either in cross-examination or submissions that knowledge of the terms of the confidential Annex 1 had actually filtered through to CR4C from Ms Lunnon (who, I recognise, did not become an officer of CR4C). As for Ms Oppenheimer, Mr Jarman said he did not know whether or not she had attended the Cabinet meeting.

293. Having reflected on the evidence which was available, I feel unable to conclude that the terms of the 2016 Share Offer reveal that CR4C had acquired *Sita* knowledge to

justify the commencement of proceedings against the Council. I accept Mr Jarman's evidence that it was an estimate. I note that the particular estimated figure of £595m mentioned in that offer was not the figure of £602m identified in the confidential Annex 1.

294. As for the figures made publicly available, the figure identified as the cost of the amendment was the £37m (reflected in a reduction in saving relative to the cost of landfill). In my judgment, Mr Sinclair was correct in his final observation at the hearing when he said that an increase of £37 million over several years of delay might well be anticipated within a normal contract. He noted that, in relation to a contract which was understood to have a cost of £500m, the figure of £37m represented around a 7% increase measured over 3 years and "*that is an entirely different proposition in terms of the application of the procurement rules, the exceptions available, and so on, to assessing an increase, or a difference in value of the nature of which came first to be known about on 20 December 2018*."

295. I have also undertaken a cross-check of the soundness of this particular decision upon CR4C's lack of knowledge by reference to what (in conclusions upon the evidence which follow) I have found to be CR4C's actual state of knowledge at subsequent points in time. As will be seen, it is consistent with those findings.

296. I therefore find that CR4C had not by February 2016 acquired the level of knowledge to trigger the 30 day period under Regulation 92(2).

297. In addition to relying upon the 2016 Share Offer as an indication of CR4C's knowledge of the true cost of the EfWP well before the end of 2018, the Council's Defence also relied upon what CR4C had been able to say in an objection it made in March 2017 to the local auditor, Grant Thornton, under sections 27 and/or 28 of the Local Audit and Accountability Act 2014. In fact, paragraph 17(4) of the Defence highlighted a development (in the context of that objection) a year or so later and made reference to Mr Sinclair's *'Note on Interim Issues'* of 30 May 2018 addressed below.

298. Nevertheless, in addressing CR4C's Application on 2 June 2020, I have already explained how paragraph 17 of the Defence did not purport to exhaustively identify the particular matters upon which the Council relies in support of its limitation defence and how it was that, in its initial objection of March 2017, CR4C had made reference to and annexed Mr Burnett's Report of March 2017.

299. In his witness statement which I decided to admit in evidence, Mr Burnett said his Report of March 2017 had been misconstrued and that he had identified an increase in contract value of around £20m.

300. I recognise that there was no opportunity for the Council to challenge Mr Burnett's evidence in a way that it might have done had his witness statement been served earlier. Nevertheless, I accept what Mr Burnett says about his report and what it revealed in terms of an increase in the cost of the EfWP contract. I have already observed that his witness statement really summarises what his report said. He is right to challenge the observation that it revealed an increase in cost of around £87m. In the initial section of the report ('*Overview*') Mr Burnett referred to the delay in the EfWP getting the go-ahead in 2015, after the delay in the planning process, and he noted that *"[t]he commercial terms then had to be re-negotiated to be account for the delay and these*

updates are not publicly known". To quote from a later section dealing with the probably present-day cost of the contract (which involved a recalculation of figures provided in 2013 so as to reflect then current market conditions) "[*T]he impact of the delay appears to increase the total nominal cost of £20m*".

301. However, Ms Hannaford QC is right to say that the inquiry does not end there if CR4C took from Mr Burnett's report a different conclusion which ought to have prompted a claim under the Regulations. If it did, that could be an indication that CR4C had acquired knowledge the *Sita* standard.

302. As I have already explained in addressing its application to rely upon Mr Burnett's witness statement, it is accepted by CR4C that a different conclusion was drawn from the report. In the objection to the local auditor dated 26 March 2017 (to which the report was appended) CR4C replicated one of Mr Burnett's tables showing the 2013 figures recalculated to reflect the position in 2017 and then stated: "*He further shows that, at today's prices, 2017, the total contract cost will be £537.604m, £87m more than originally claimed*." That figure of £87m was therefore based upon what Mr Burnett had taken to be the total nominal costs of the 2013 Contract in 2013: £450.507m. CR4C had failed to heed what Mr Burnett had said in his report, which was that his figure of £537.604m – which was his *estimate* of the updated contract price (as since identified by the 2016 Contract) – should be compared with his recalculated 2013 figures.

303. Looking in hindsight at what CR4C said in their objection to Grant Thornton a number of relevant observations can be made. The first is that Mr Burnett's figures beyond the nominal reported cost of £450m in 2013 reflected estimated costs. In estimating the renegotiated contract cost he said "*[t]he rates re-negotiated between GCC and UBB are not known; the only financial update that was made public was that the Authority was going to increase the amount of the capital contribution from £13m to £37m*". The second is that the estimated figure identified by him as the cost of the re-negotiated contract was the £537.604m. This is to be contrasted with the £602m identified for the Cabinet meeting in November 2015 in the confidential Annex to the Financial Monitoring Report as the revised cost (including the additional £17m capital contribution). The third is the point that Mr Burnett's differential of £20m, rather than one of £87m, identified his *assessment* of the increased cost of the re-negotiation.

304. Mr Sinclair identified that third matter in submitting that his client's misunderstanding of Mr Burnett's estimate of the additional cost of the 2016 Contract undermine the Council's reliance upon the objection to Grant Thornton based upon an increase of £87m. He posited the scenario of CR4C going to see solicitors at the time, in the belief that it had a case against the Council for breach of the procurement rules, only to have its misunderstanding of the Burnett Report highlighted on closer analysis. He said it is no part of any sensible test of knowledge that a client has made a misunderstanding of fact as to a change in value.

305. I am persuaded by that submission. Regulation 92(2) refers to actual or constructive knowledge that *grounds* for bringing proceedings have arisen. The test in *Sita* refines that further to such knowledge of *facts* indicative of a valid claim. It follows that there has to be some solidity to the basis of such knowledge, particularly when constructive knowledge rests upon objective criteria, and a misplaced belief or suspicion that there has been a regulatory breach is not in my judgment sufficient. The 30 day period is not triggered when a degree of analysis – to the *Sita* level of what is apparent rather than

what might ultimately be proved – shows that the suspected grounds are in fact illusory and that, when properly understood, the facts do not indicate a breach of the Regulations.

306. In any event, I would add that the very nature of the exercise undertaken by Mr Burnett indicated an absence of knowledge of the actual cost of the 2016 Contract. Allowing for the fact that the objection did include his estimated figure of £537.604m, I must also bear in mind that CR4C were calling upon the local auditor to undertake an independent re-examination of the EfWP proposal in circumstances where it involved "*expenditure of over £500m*". Earlier that month, March 2017, the First Tier Tribunal had issued its decision (in favour of substantial disclosure of the 2013 Contract) referring to a contract cost of around £500m. The evidence indicates that CR4C did not know how much more than that sum the 2016 Contract would cost and in my judgment it should not be attributed with such knowledge on the basis of the information then publicly available.

307. I therefore find that CR4C had not by late March 2017 acquired the level of knowledge to trigger the 30 day period under Regulation 92(2).

308. The witness statement of Mr Burnett was not the only additional evidence to surface between the hearing in March 2020 and the final day of closing submissions on 24 June 2020. By their letter dated 17 June 2020 Eversheds Sutherland sent to the court 19 further documents disclosed by CR4C on 31 March 2020. I have been required to consider this material for the purpose of considering whether or not CR4C had acquired *Sita* knowledge by the time it and those advising it came to respond to Grant Thornton's provisional views upon the objection, in May 2018.

309. This further disclosure by CR4C was the result of Eversheds Sutherland writing to Shakespeare Martineau on 24 March 2020 in connection with what had been a deliberate waiver of legal professional privilege by CR4C. During her cross-examination of Mr Jarman, Ms Hannaford had asked him about a *'Note on Interim Issues*' prepared by Mr Sinclair on 30 May 2018. Mr Sinclair's Note was in the trial bundle. Its subject matter was the consideration by the local auditor of CR4C's objection to the local auditor the previous year. By their letter dated 29 March 2018 Grant Thornton had set out, over 22 pages, their preliminary views on the objection. It is clear from reading that letter that Grant Thornton understood CR4C's objection to be about value for money and that ("*VFM*") was the clear focus of their preliminary views. CR4C's objection a year earlier had called for an analysis of the Council's behaviour "*by specific reference to value for money, alternatives and fair competition implications*."

310. When Mr Jarman was being asked about Mr Sinclair's Note in cross-examination, Mr Sinclair advised him to waive the legal privilege relating to the advice within it. Eversheds Sutherland's letter of 24 March 2020 recited the relevant exchanges that day, including my own reminder that case law indicated that a waiver of legal privilege might in some cases extend further than the waiving party had perhaps initially contemplated: what I described as "*the can opening effect*". Mr Sinclair responded by saying that there were no other relevant documents and that Mr Jarman could feel comfortable that there was no opening of the can.

311. The letter of 24 March 2020 went on to refer to a passage in Mr Sinclair's written closing submissions which referred to him having seen a redacted form of the EY

Report by the time he prepared his Note on Interim Issues (as the Note itself also did) and to request copies of all instructions upon which the Note was prepared, or relating to any issues raised by the Note and any advice in relation to matters raised within it or such instructions. Shakespeare Martineau responded by their letter dated 31 March 2020, explaining that CR4C had at the time directly instructed and received advice from Mr Sinclair and enclosing an email chain between Mr Jarman and Mr Sinclair (with Ms Oppenheimer copied in and sometimes contributing) with the subject *"FW: Gloucestershire Incinerator – Request for some more of your time"*.

312. Shakespeare Martineau's position was that this email chain was not relevant to the preliminary issues and would not have fallen to be disclosed even if they had not previously been privileged. They made that point again in a further letter dated 20 May 2020 which they asked Eversheds Sutherland to put before me with any submission of the email chain. That letter took issue with what had been said on behalf of the Council, which was that the email chain set out Mr Sinclair's initial views and revealed discussion of a potential claim against the Council. CR4C's position was that the documents instead related to Mr Sinclair's initial views that Grant Thornton had not conducted a proper analysis of the procurement law principles (as they were required to do as local auditor). To quote from the letter dated 20 May 2020: *"This is not the same thing at all as suggesting there was any basis to bring an action against your client for breach of procurement law."* Shakespeare Martineau asked that the full chain of emails up to 30 May 2018 (10:18) be provided to the court if any were to be relied upon. Their quote from the last email of that date and time was relied upon to demonstrate that Mr Sinclair's Note was directed to securing from Grant Thornton both further disclosure and a proper analysis of issue of compliance with the 2015 Regulations, with a mention of judicial review as a last resort.

313. During closing submissions, Ms Hannaford QC highlighted only one email in the chain: an email from Mr Sinclair to Mr Jarman of 24 May 2018 (at 13:54). That email began with Mr Sinclair stating that he had spent several hours trying to pick holes in Grant Thornton's analysis (i.e. in their letter dated 29 March 2018). In that email Mr Sinclair said "*I kept returning to one area where there is some 'hard edged' law: procurement law, the change/variation in contract post award*." Later (under a section headed *'THE LAW'*) he went on to refer to the Council's potential exposure under the procurement rules. He referred to Regulation 72 and when a variation to a contract would be permitted without a new procurement exercise and identified one of the "*several potential legal issues*" by saying *"[t]he single clearest/most important breach would be if the price change is over 50%*". His initial summary was "*I think the only area where they may be exposed is on compliance with the procurement rules*."

314. For the sake of clarity, to the extent that it has any bearing upon the present issue, I should say that I have read the email on the basis that Mr Sinclair sometimes uses "they" to mean Grant Thornton (in relation to potential flaws in their analysis) and sometimes to mean the Council (whose actions had been analysed by the auditor). The one thing that is clear from the email is that Mr Sinclair was uncertain about the increase in value of the EfWP contract. It is noteworthy that the email expressly noted Mr Sinclair's uncertainty over a reference by Grant Thornton to "*EY's November 2015 VFM assessment*" a reduction of £5m in the net present value of the project compared with that shown in the model supporting the RPP. Mr Sinclair wondered ("*this is really my question*") whether that was based upon factoring in significant termination fees under

the 2013 Contract. His email ended with him saying he would like to be sure he had understood the VFM analysis.

315. I have highlighted that point because the only money figure identified in the email was one about which Mr Sinclair wanted to understand more. I regard the email as being entirely consistent with the state of CR4C's knowledge about the value of the 2016 Contract revealed by Mr Sinclair's *'Note on Interim Issues'* written 6 days later. It is true, as Ms Hannaford QC highlighted, that the Note contained 4 paragraphs (under the heading "*Breach of procurement law*") raising concern about the local auditor's awareness that there had been significant changes to the 2013 Contract. However, the conclusion under that section was that the application of the procurement rules was directly in issue and either not understood or not properly addressed or explained. It is in my judgment significant that (under the heading "*Disclosure*") the Note said:

> "*It is abundantly clear that the starting point for any analysis of the process and its results, and specifically of compliance with the procurement rules, must be consideration of the original contract (first) and the nature of the changes to it (including payments made by way of 'capital contribution'), in this case therefore including the RPP and the E&Y Report and any material information (e.g. models used) to arrive at the conclusions GT has (provisionally) formed."*

316. The Note concluded by saying that Grant Thornton should consider the points raised in it, provide the disclosure sought and then set out "*a properly substantiated, reasoned decision on the issue of compliance with the Public Contract Regulations.*"

317. In circumstances where CR4C was clearly seeking information about the 2016 Contract, it cannot in my judgment be said that it had knowledge of facts that were both apparent and clearly indicated a breach of the Regulations.

318. I therefore find that CR4C had not by late May 2018 acquired the level of knowledge to trigger the 30 day period under Regulation 92(2).

319. The Council also relied heavily upon the terms of a Report dated 5 November 2015 by Ernst & Young ("**the EY Report**") to say that, even with certain parts redacted, it clearly put CR4C on notice of the value of the 2016 Contract, certainly by no later than August 2017 if it did not know it before.

320. CR4C said that it was only when the unredacted version of the EY Report was disclosed, together with a further Report ("**the 2018 Report**") on 20 December 2018 that the start of the 30 day period under Regulation 92(2) was triggered.

321. Different redacted versions of the EY Report were published or disclosed at earlier points in time. The first redacted version was disclosed to CR4C on 9 June 2017 and the second was published on the Council's website on 30 August 2017 (or so it was thought). CR4C's position was that it obtained August version from the Council's website on 6 September 2017.

322. Or at least the release of the variously redacted forms of the EY Report on those dates was the basis upon which the hearing of the evidence in March 2020 proceeded. After that hearing, CR4C's solicitors produced two further redacted versions of the EY Report. One appears also to have been published on the Council's website in late

August 2017 (and my understanding is that it was published on 30 August and the existing one a day later) and the other was "disclosed" by Grant Thornton in October 2017 (but it is certainly the Council's position that this was just a repeat of what had been disclosed in June). The further August version had one further figure redacted (in error) than the August version referred to at the earlier hearing. These therefore came too late for any of the witnesses to be asked about them and, although there appears still to be a measure of disagreement between the parties as to their potential significance, I cannot safely draw any conclusions from them.

323. Paragraph 17 of the Defence sought to impute CR4C with *Sita* knowledge by referring to two of the redacted versions of the EY Report. Although paragraph 17(2) referred to a version of it disclosed on 21 March that was explained by Ms Hannaford QC to be a mistake (as it related to the date of a request rather than the response to it) and that the Council had instead intended to refer to the June 2017 version. In the event, the focus at trial was upon the August 2017 version mentioned in paragraph 17(4) of the Defence.

324. The purpose of the EY Report was to consider the "*Value for Money (using the quantitative aspects of the Treasury Green Book methodology and the approach taken in the September 2012 Cabinet Report) and Affordability*" of the offer made by UBB for a revised project plan in the light of the delay in obtaining planning permission for the EfWP.

325. In his witness statement, Mr Mawdsley indicated that the redacted form of the EY Report which was released in June 2017 enabled the reader of it to see an increase of £86m in the value of the contract. However, he clarified in brief supplementary evidence-in-chief that in paragraph 17 of his witness statement (although the difference of £86m remained the same) he was referring to a table in the version of the EY Report published on the Council's website on 30 August 2017. The relevant table (Table 8) in the June 2017 version contained no figures for costs or values, and those for "*Nominal All in Cost*" (to which Mr Mawdsley drew attention in his testimony) were all redacted in that earlier version.

326. However, the redactions were less extensive in the August version. The Council argued that what was revealed by that version was sufficient to arm CR4C with a level of knowledge sufficient to satisfy the *Sita* test. Paragraph 17(4) of the Council's Defence states: "*The Claimant was or should have been aware that the proposed revised value of the Contract was £598.862m from the version of the EY Report which was published on the Defendant's website on 30 August 2017*".

327. In looking at that August 2017 version of the EY Report (at Table 5.1.1), Mr Mawdsley explained in his witness statement and in testimony how applying an identified differential of 15.8% to the revealed cost of approximately £713m for the landfill alternative would have shown that the relative cost of the UBB proposal was approximately £600m. That disclosed percentage was the amount by which the cost of continuing with UBB under the 2013 Contract, as revised, was said to fall below the cost of terminating the contract and reverting to landfill and represented the Value for Money position (rising to 19.8% on the assumption that the Council injected further capital of £17m from reserves in addition to the £21m already committed). The comparison was with a disclosed figure of £713m in the EY Report for the landfill alternative and estimated "*force majeure termination costs*" of approximately £60m

(and detailed in Appendix A) in respect of any termination of the 2013 Contract. Obviously, such costs would not feature in any assessment of the cost of continuing with the 2013 Contract, as revised, but that does not detract from Mr Mawdsley's point that the costs of doing so were discernible from what was disclosed in the August version.

328. The unredacted version of the EY Report later disclosed in December 2018 showed the relevant figures (the "*Base Case – Nominal All in cost*") were in fact approximately £633.5m or £602m, depending upon whether or not the further £17m was injected. Mr Mawdsley confirmed that the 2016 Contract, as signed, had a revised contract value of £613m. He explained that the actual sum reflected the £602m in the EY Report as adjusted for movements in interest rates and the passing of a couple of months or so between the date of the report and the date of the contract.

329. Mr Mawdsley also said that a reader of the '*Value for Money'* section of the August 2017 version of the EY Report could have worked with the relevant Value for Money percentage figure (15.8%) in Table 1 applied to the disclosed net present value of the landfill alternative (£315,531) which again included an element of termination costs in relation to the 2013 Contract. This would produce a figure of approximately £265m – *'Base Case – NPV'* - later shown in the unredacted EY Report disclosed in December 2018 (the NPV is £252m odd when the higher Value for Money percentage of 19.8% is applied).

330. Mr Mawdsley went on to say that when combined with what he described as the "*multiply times two trick*", applied to that calculation of the NPV for the 2013 Contract, as revised, the cost of continuing with UBB could be established by reading the redacted version disclosed in August 2017. Multiplying by 2 was, he said, a good rule of thumb for establishing the cost of continuing with UBB (on the revised terms proposed) under a contract involving year-on-year payments over a 25 year term. He claimed that multiplying by 2 produced "*a reasonable approximation and that's all I claim it to be*". He resisted Mr Sinclair's suggestion that the calculation might produce inaccuracy ("*by a factor of two*") by saying that the gate fee payments under the contract, year on year over the 25 year term, would be reasonably constant on the basis that the volume of waste, certainly in the first 15 years, was "*reasonably flat*". He pointed to Table 2 in the EY Report to reinforce this point in relation to the first 5 years.

331. Working with the (duly calculated) NPV figure of £252m, Mr Mawdsley said the exercise produced a cost – the *'Nominal All In Cost'* in Table 1 - of approximately £504m. This compares with the actual figure in the unredacted report of £602m odd (and its own comparable figure of £633.5m odd mentioned in paragraph 328 above).

332. Mr Mawdsley said that his analysis, applied to what was revealed by the August 2017 version of the EY Report, gave "*a range of costs, indicating that the project value is between £500m and £600m, which is a significant increase, either way you do it, from the figure of £469m*". The figure of approximately £469.7m was revealed in that version of the report to be that considered in the Council's Cabinet Report of September 2012. In challenging Mr Mawdsley's observation about an apparently substantial increase, Mr Sinclair pointed out that the suggested figure of £504m (said to be capable of being derived from the August 2017 version of the EY Report) aligned with the general understanding that the initial value of the contract was £500 million. I have mentioned the terms of the 2016 Share Offer recording that assumption. The decision

of the First Tier Tribunal in March 2017 (leading to disclosure of most of the terms of the 2013 Contract) also referred to it being worth about £500m.

333. On one view, I have dwelt too long upon Mr Mawdsley's evidence about the ability to make a calculation of the nominal all in cost of the 2016 Contract from what was either known or could be discerned about its net present value. I say that because Ms Hannaford QC, in her closing submissions, made it clear that her client was not pressing the point that CR4C should have undertaken the exercise and thereby be fixed with relevant knowledge for limitation purposes. However, I consider it relevant to mention that aspect of Mr Mawdsley's evidence because it revealed his preparedness to make light of the redactions to the EY Report which his employer had deliberately made. Pointing to the resulting figure of £504m, which he said aligned with his client's understanding of the contract value, Mr Sinclair described it as "*the NPV fiasco*". In the light of the Council's position, I need simply say that I place no reliance on this particular part of Mr Mawdsley's evidence.

334. However, Mr Mawdsley also said that, although his witness statement had mistakenly identified the wrong set of figures in the table - indicating the overall project cost rather than the contract value - the August version of the EY Report, at Table 8, also indicated that a two year delay in implementing the 2013 Contract increased the "*Nominal All In Cost*" of the contract by approximately £86m; from the value of £469,743 approved by the Council in September 2012 to £555,514 as at November 2014.

335. As with the other aspect of Mr Mawdsley's evidence (from which he derived the £504m figure when looking at the redacted August version) Mr Sinclair pointed out that Mr Mawdsley's settling upon £555.5m odd was at variance with the figure pleaded against CR4C at paragraph 17(3) of the Defence. I note that the pleaded figure of almost £599m was the one reflecting the overall project cost from which Mr Mawdsley moved by his switch of column within Table 8. The lower figure was also significantly less than the figure of £600m odd which Mr Mawdsley said could be derived from Table 5.1.1 of the EY Report (paragraphs 327 and 328 above).

336. It was at this point in his evidence, identifying the increase of around £86m that Mr Mawdsley said that the amount of the increase corresponded to the conclusion which Mr Burnett had reached in his Report, which CR4C had submitted in support of their complaint to Grant Thornton, the local auditor, in March 2017. In that Report (prepared before CR4C had seen any version of the EY Report) Mr Burnett had identified an increased contract cost of £537.604m: some £87m above what had been approved in September 2012.

337. I have already explained, in the context of my determination of CR4C's application dated 2 June 2020, how this part of Mr Mawdsley's evidence prompted CR4C to respond with Mr Burnett's witness statement dated 15 April 2020. I have already expressed my conclusions upon that evidence and its significance (or rather lack of significance) on the question of CR4C's knowledge for Regulation 92(2) purposes.

338. Although she did not press the point about multiplying by 2, Ms Hannaford QC said that the version of the EY Report posted on the Council's website on 30 August 2017 revealed the following matters:

i) that the (redacted) figure for "*Base Case with capital cont(ribution)*" would have reflected "*an additional Council capital contribution of £17m funded from reserves*";

ii) the £86m increase in nominal all-in cost identified by Mr Mawdsley;

iii) an increase in operating costs of £23m.

339. Despite what the Council now says can be gleaned from the information disclosed within it, it is important to note that the August version of the EY Report had the following information redacted:

i) the approximate updated Engineering and Procurement Contractor ("*EPC*") price (or "*Updated Capex Price*") which UBB had indicated in May 2015;

ii) the revised EPC price identified in a Revised Project Plan submitted by UBB on 24 June 2015;

iii) the EPC price as negotiated down by the Council between June 2015 and the date of the Report; and

iv) the increase in Capex (redacted in Table 15).

340. As I remarked to Mr Mawdsley during his cross-examination, and he accepted, those within the Council responsible for these redactions presumably thought they would be effective in withholding information. Mr Mawdsley said it had been done on an internal review, following a Freedom of Information Request, and his view was that that they probably did not quite understand that the nominal increase in cost could be worked out. However, the redactions in section 5.5 of the Report – addressing the key changes in the UBB proposal compared with the position on financial close (on 22 February 2013) – were clearly aimed at *not* revealing the increase in capital expenditure resulting from the project extending beyond the Planning Permission Longstop Date.

341. In its Decision dated 7 June 2018 (the appeal against which the Council abandoned in December 2018) the Information Commissioner's Office had directed that, amongst other matters, the Updated Capex Price and the Capex figures in Table 15 of the EY Report should be disclosed. Mr Jarman explained that this decision was made on the complaint of an independent campaigner, Mr Tim Davies.

342. It is in my judgment significant that the ICO had noted the Council's position that disclosure of that information might breach its own and UBB's contractual agreements with third parties but concluded (at paragraph 66) "*[t]he Commissioner considers however that as a central aspect of the construction of the facility there is a very strong public interest in the public being able to take such issues into account with its consideration of the EfW project as a whole*." Paragraphs 68 to 78 of the Decision contained further rulings in support of disclosure, including "*[w]ithout a disclosure of this information the public will be largely left unable to establish in clear terms the revised agreement which the council has entered into with UBB and whether the contract (as revised) provides the public with value for money*."

343. Although the ICO was not considering the issue of CR4C's knowledge for the purposes of Regulation 92(2), those observations are entirely consistent with the conclusion that such knowledge was absent. In circumstances where CR4C understood the cost of the 2013 Contract to be around £500m, I am unable to conclude that it should have seen through the various redactions in the EY Report so as to have then been able to make the allegation later made in paragraph 13 of the Particulars of Claim.

344. I find that CR4C had not by late August or early September 2018 acquired the level of knowledge to trigger the 30 day period under Regulation 92(2).

345. The Council challenged that ICO ruling. It was only after the abandonment of the Council's appeal that the unredacted version of the EY Report was then disclosed and most of the terms of the 2016 Contract were made publicly available. Only then was CR4C able to see what had previously been masked in relation to the increased costs resulting from the RPP process: specifically the information within Table 9 of the EY Report and the identification of "*Nominal All-in Cost*" figure of £602m odd (based upon the additional capital contribution of £17m).

346. In my judgment, CR4C did not acquire *Sita* knowledge for the purposes of a claim in respect of the procurement of the 2016 Contract until 20 December 2018. It follows that the Claim commenced on 18 January 2019 was not barred by the provisions of Regulation 92(2).

Disposal

347. I now turn to my answers to the two preliminary issues.

348. For the reasons set out above, the answers to the two preliminary issues are:

    i) CR4C is not an economic operator which could have pre-qualified having regard to any selection criteria that could have been lawfully imposed upon it by the Council pursuant to Regulation 58; and

    ii) the Claim is not barred on limitation grounds under the provisions of Regulation 92(2),

349. I will hear the parties further on the consequential orders to be made in the Claim after the handing down of this judgment.