Neutral Citation Number: [2022] EWHC 2451 (TCC)

Case No: HT-2022-000281

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

Royal Courts of Justice
7 Rolls Building, Fetter Lane,
London, EC4A 1NL

Date: 14th October 2022

Before:

MR JUSTICE EYRE

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Between:

SIEMENS MOBILITY LIMITED	**Claimant**
- and –	
HIGH SPEED TWO (HS2) LIMITED	**Defendant**
- and –	
(1) BOMBARDIER TRANSPORTATION UK LIMITED	**Interested Parties**
(2) HITACHI RAIL LIMITED	

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Fionnuala McCredie KC, Ewan West, Fiona Banks and John Steel (instructed by **Osborne Clarke LLP**) for the **Claimant**
Sarah Hannaford KC, Simon Taylor and Ben Graff (instructed by **Herbert Smith Freehills LLP**) for the **Defendant**

Hearing date: 21st September 2022

Approved Judgment

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MR JUSTICE EYRE

Mr Justice Eyre:

Introduction.

1. The Claimant is engaged, inter alia, in the manufacture and maintenance of railway rolling stock. The Defendant is a non-departmental public body responsible for developing, building, and operating the HS2 railway. From April 2017 the Defendant conducted a procurement exercise leading to the award of a contract for the supply and maintenance of very high speed railway rolling stock for that project. The Claimant was an unsuccessful tenderer in that exercise which resulted in the contract being awarded to a joint venture formed by the Interested Parties.

2. It is common ground that the procurement exercise was governed by the Utilities Contracts Regulations 2016 ("the Regulations") and that the Claimant was an economic operator and the Defendant a utility for the purposes of the Regulations. When it was issued this claim was the latest in a series of claims in which the Claimant alleges breaches of the Regulations by the Defendant in the conduct of the procurement exercise. The first claim was issued on 18th June 2021 and five further claims were issued before the current claim. Associated judicial review claims were issued alongside each of those claims. Those earlier claims have been consolidated and are set down for a sixteen-day trial beginning on 14th November 2022.

3. The current claim was issued on 15th August 2022. It will be necessary to analyse in some detail the nature of the claim being made but it suffices at this stage to say that the claim relates to alleged conflicts of interest arising from the involvement of Tim Sterry, Tom Williamson, and Bernard Rowell in the procurement process and to an alleged breach of the Tender Opening Evaluation Procedure ("the TOEP") drawn up to govern assessment of the rolling stock tenders. The claim in relation to Mr Rowell has been abandoned and I will not refer to it save to the extent that it forms part of the Defendant's argument about the nature of the claim which was originally made.

4. Messrs Sterry and Williamson were formerly employed by the First Interested Party ("Bombardier"). They are members of and hold defined benefits under the Bombardier Transportation UK Pension Plan ("the Scheme"). There is dispute as to the proper analysis of how the claim was originally advanced but the Claimant's contention now is that membership of the Scheme gave rise to a conflict of interest which was not properly addressed.

5. A judicial review claim associated with this claim was issued on 16th August 2022. However, at the time of the hearing before me that claim had not been transferred to the Technology and Construction Court and, for the reasons I explained briefly at the hearing, I accepted that it was not appropriate for me to consider the grant or refusal of permission in respect of that claim.

6. On 16th September 2022 the Claimant issued a further claim also alleging a breach based on failure to address a conflict of interest. That is not before me though I note that the Defendant says that a finding that the current claim is out of time will inevitably mean that the further claim is also out of time.

7. The Defendant says that the Claimant knew or ought to have known that it had grounds for starting the current claim at the latest by the end of October 2021 or shortly

thereafter and in any event more than 30 days before 16th August 2022 with the consequence that the claim was not commenced within the 30 day period provided for in regulation 107. Accordingly, it applies for the claim to be struck out and/or for summary judgment.

8. The Claimant says that in relation to the conflict of interest element of the claim the knowledge which is relevant is the knowledge of Mr Sterry and Mr Williamson's membership of the Scheme and that it had neither actual nor constructive knowledge of that membership until receipt of the Defendant's solicitors' letter of 2nd August 2022. In addition it says that the Defendant's actions in October 2021 gave rise to an estoppel by representation which precludes the current application. The arguments before me focused on the role of Mr Sterry and the provision of information about him. The parties proceeded on the footing that in terms of limitation the claim relating to Mr Williamson's involvement stood or fell with that in relation to Mr Sterry.

9. The outcome of the application in relation to that part of the claim will in very large part depend on my analysis of the nature of the breach being alleged in these proceedings. That will govern the matters of which the Claimant needed to have actual or constructive knowledge to start the 30 day time period running and those matters being identified it will then be necessary to consider when the Claimant first had knowledge of them.

10. The Claimant also contends that there was a failure to comply with the procedure laid down in the TOEP. That breach is said to have involved a failure to record the concerns which Mr Sterry had expressed in a WhatsApp exchange. Those concerns were as to whether the joint venture's tender met a mandatory requirement laid down by the Defendant. The Claimant says that those concerns should have been recorded in the Evaluation System and that the failure to do so was a breach of the TOEP. The claim in respect of that alleged breach is also said to be out of time with the Defendant contending that the Claimant had the requisite knowledge in April 2022.

11. In respect of the alleged breach of the TOEP there is no dispute as to the nature of the claim and it is not suggested that the alleged estoppel can assist the Claimant there. The issue will, accordingly, be when the Claimant had actual or constructive knowledge of the relevant matters.

12. If the Claimant is found to have had knowledge such as to start time running in respect of either claim more than 30 days before the issue of the claim a further question will arise. It will then be necessary to consider whether the claims amount to allegations of breaches of different obligations or to allegations of different breaches of the same duty. If the latter then both claims will be out of time if either of them is (or more precisely the 30 day period for both will start at the date the Claimant had knowledge of either) but if the former then they can survive separately from each other.

The Parties' Cases in Outline.

13. The Defendant says that the claim as originally advanced was based on a conflict of interest which was alleged to flow from the past employment of Messrs Sterry and Williamson with Bombardier. Although the Claimant has sought to change tack that was, the Defendant says, the breach alleged in the Particulars of Claim. The Claimant was aware of that previous employment and so of the relevant conflict of interest before

October 2021 and in any event very substantially more than 30 days before the commencement of the proceedings. Even if the relevant conflict is that alleged to have derived from Messrs Sterry and Williamson's membership of the Scheme the Claimant was aware of that in October 2021 and even if the Claimant did not have actual knowledge of that membership it had constructive knowledge because it could and should have made in October 2021 the enquiries which it did make in July 2022. Those enquiries would have been answered then as they were in July 2022 and would have revealed such membership.

14. The Claimant says that the basis of the conflict of interest claim has throughout been that of a conflict derived from Messrs Sterry and Williamson's membership of the Scheme. The Claimant had no actual knowledge of that membership until it received the Defendant's solicitors' letter of 2nd August 2022. It had no constructive knowledge at any earlier stage. That was because it was entitled to take the response it received in October 2021 at face value and to assume that further enquiries would not reveal any further conflict of interest. Alternatively, the Claimant asserts an estoppel. It says the Defendant's actions in October 2021 amounted to a representation that the documentation provided then was the only relevant conflict of interest documentation in respect of Mr Sterry and that Mr Sterry had no financial or other conflict of interest. The Claimant relied on that representation to its detriment by making no further enquiries and by not making any challenge to the procurement exercise based on such a conflict of interest. As a consequence it would be unconscionable for the Defendant now to assert that the Claimant had the relevant knowledge (either actual or constructive) at an earlier stage and the Defendant is estopped from making such a contention.

15. The Defendant says that by April 2022 at the latest the Claimant knew of the failure to record the concerns which Mr Sterry had expressed in the WhatsApp exchange. The Claimant had such knowledge because the WhatsApp messages were included in the Defendant's disclosure given on 1st April 2022 in the proceedings then underway. The Claimant accepts that the messages were disclosed at that time but says that it was only after it had received and been able to consider Mr Sterry's witness statement in July 2022 that it learnt that the concerns had been expressed in the context of him acting as a Technical Assessor during the Stage 2.1 Compliance Checks. It says that it is those matters which gave grounds for believing there had been a breach of the TOEP and that it was only then that the 30 day period began.

The Current Proceedings and the Background to them in Further Detail.

16. For the Defendant to perform its role effectively it had to engage staff who had relevant industry experience. Unsurprisingly this led to the employment of staff who had previously worked for companies which would in due course seek to supply rolling stock to the Defendant. The staff recruited included the former Bombardier employees, Mr Sterry, who became the Defendant's Head of Rolling Stock Engineering, and Mr Williamson, who became the Defendant's Director of Rail Systems.

17. The Defendant took steps to identify and to manage the potential conflicts of interest arising as a consequence of its employment of such persons. Thus on their engagement Messrs Sterry and Williamson had signed "Register of Interest" forms. In May 2017 the Defendant's Rolling Stock Procurement Officer, Amy Parker, sent them, and others, copies of these forms. They were asked to review the forms and to let Miss Parker know

if there had been any changes. In asking for this information Miss Parker explained that:

> "This is to assure there are no conflicts of interest for the Rolling Stock Procurement and to make sure all of our compliance is up to date on the Rolling Stock team".

18. Mr Sterry replied by email saying that he, Mr Williamson, and Oliver Lynch-Bell (another former Bombardier employee who had been engaged by the Defendant) had filled out the forms and confirmed that they believe that they had no conflict of interest. He added:

> "All three of us have final-salary pensions in one of the Bombardier UK pension schemes. These schemes are independent of Bombardier and not invested in Bombardier. However, the pension schemes do receive contributions from Bombardier and so we have some interest in Bombardier remaining a going concern in the UK, but not specifically in whether Bombardier is involved in the HS2 project. Therefore, we do not think this is a conflict of interest".

19. Miss Parker referred these comments to the Defendant's compliance team who responded by saying:

> "Due to the nature of the industry we often have staff who have pensions with previous employers who are part of the HS2 supply chain – this is not viewed as a material conflict that requires action but it is worth the individuals recording the pension on the Register of Interest Form for transparency and the form being held on their staff record (HR Shared Services)".

20. The Defendant had drawn up the TOEP and this was intended to address, inter alia, potential conflicts of interest. The TOEP required each member of the Procurement Project Team to complete an Availability, Competency, Conflicts of Interest and Confidentiality Declaration ("a COID"). In an appendix each COID listed the tenderers in the rolling stock procurement exercise including Bombardier. The declarant was required to confirm that he or she "had no personal, financial or other interest" in any of the tenderers listed in the appendix. The form gave a non-exhaustive list of such interests which included "having any other interests that a member of the public, knowing the facts, might reasonably think are significant". Mr Sterry signed the form and stated that he had previously worked for Bombardier but made no other addition or alteration to the form. Mr Williamson signed the form similarly mentioning his Bombardier employment but in his case adding:

> "Having worked for Bombardier Transportation from 1999 to 2012, I do have a Bombardier pension scheme. I have no other ongoing interests with Bombardier Transportation".

21. Mr Sterry was involved in the evaluation of the tenders acting both as a Technical Assessor and as Lead Technical Assessor in that exercise. Mr Williamson was a member of the Review Panel responsible for ensuring that the evaluation was conducted in accordance with the tender processes.

22. On 29th October 2021 the Defendant informed the Claimant of its decision to award the tender to the joint venture formed by the Interested Parties. However, by then the Claimant had already started proceedings challenging the procurement process having commenced on 18th June 2021 the first of the six claims currently awaiting trial.

23. On 20th October 2021 the Claimant's solicitors had written to the Defendant's solicitors referring to Mr Sterry's past employment with Bombardier and to the requirement under the TOEP for members of the Procurement Project Team to complete a COID. They then said:

> "Given the significance of Mr Sterry's opinion in the context of this Procurement and the prima facie appearance of a conflict of interest in this situation, please therefore provide Mr Sterry's Conflict of Interest Declaration Form and all other conflict of interest documentation relating to him".

24. The Claimant's solicitors followed that letter with one of 22nd October 2021. In this they referred to various alleged failings in the procurement exercise and to an alleged failure to treat the Claimant and the Interested Parties' joint venture equally. The letter referred to the alleged reliance of the Defendant's Shortfall Tender Report on an opinion from the Lead Technical Adviser and said, at 3.3(a):

> "The Lead Technical Assessor who provided this opinion was Tim Sterry, HS2's Head of Rolling Stock Engineering, who had spent 15 years working at Bombardier and was until 2016 employed as its Lead Design Assurance Engineer. None of the disclosure that has been provided to Siemens to date gives any indication that any consideration was given to the apparent conflict of interest in these circumstances, despite the fact that because of the content of the JV's testing plan (referring inter alia to its partners' previous projects and identity of testing locations) it would have been impossible to anonymise their submission to someone who has Mr Sterry's inevitable knowledge of his long term employer or detailed knowledge of the industry".

25. On 29th October 2021 the Defendant's solicitors replied to a number of letters from the Claimant's solicitors including that of 20th October 2021. At Annex 1 the Defendant's solicitors set out the Defendant's response to the Claimant's early disclosure request. Annex 1 took the form of a table setting out the Claimant's requests and the Defendant's response. The request in relation to Mr Sterry which I have set out above was quoted and the response was stated as "Mr Sterry's Conflict of Interest Declaration Form is enclosed" and the enclosures to the letter included that form.

26. Witness statements in the existing proceedings were exchanged on 26th July 2022. The statements served on behalf of the Defendant included a statement from Mr Sterry. The Claimant says that this caused it to appreciate the extent of Mr Sterry's role and to consider that further investigation was needed of the potential for conflict of interest. The Defendant says that the extent of Mr Sterry's role had been known at the outset of the proceedings and that the witness statement contained nothing new in that regard. The Defendant says that the statement might have caused the Claimant to reflect further but that such reflection had not been prompted by any new information.

27. In any event it was following the receipt of Mr Sterry's statement that the Claimant's solicitors wrote again to those acting for the Defendant. In their letter of 28th July 2022 the Claimant's solicitors said that Mr Sterry's COID "did not particularise the actual extent of Mr Sterry's ongoing interests in and/or connections to his previous employer". It then asked, at 2.3:

> "Please therefore now provide details of any interests Mr Sterry continues to hold (directly or indirectly) in Bombardier Transportation, Bombardier Inc or any related company (including Alstom SA following Alstom's acquisition of Bombardier Transportation in January 2021). This should include details of:

(a) Interests in any shares, share options, or other securities;

(b) Interests in any company pension scheme or pension scheme linked to the performance of any such company;

(c) Any other financial interests connected to any such company."

28. The letter noted that Mr Williamson's COID had not yet been disclosed and asked for a copy of that together with the same information as had been requested in respect of Mr Sterry.

29. The Defendant's solicitors replied on 2nd August 2022. They provided a copy of Mr Williamson's COID. In respect of Mr Sterry they said, at 7(a):

> "Mr Sterry is a member of the Bombardier Transportation UK Pension Plan from his prior employment. He has no stock/shares or other financial interests in either member of the JV;"

30. It was after the receipt of that letter that the Claimant commenced the further proceedings with the Part 7 claim being issued on 15th August 2022 and the judicial review claim on 16th August 2022.

31. The Claim Form referred to the parties and the relevant duties and then alleged breach in these terms at [5]:

> "The Defendant has breached those principles, obligations, duties and requirements by failing to take any steps to prevent, identify and/or manage the risk of conflict in respect of three key individuals in its Procurement team and acting in breach of its own evaluation procedures. The three individuals concerned had all worked previously for parties to the JV and two still had Bombardier pensions, but all three (both individually and jointly) had extensive influence over the outcome of the Procurement. As such, the Procurement was tainted by conflicts of interest pervading the assessment, evaluation and decision-making process, to the detriment of the Claimant and to the advantage of the JV. The Shortfall Tender Decision, the Lead Tenderer Decision, the Award Recommendation Decision, and the Award Decision were therefore unlawful".

32. In the Particulars of Claim the Claimant set out details of the parties and the background to the procurement process. It referred to various requirements of the TOEP. Then, under the heading "decision makers and Evaluators/Assessors with a Conflict of Interest", the pleading said, at [13], "a number of the Defendant's key decision-makers and evaluators/assessors during the procurement had previously been employed by one or other of the JV partners". Reference was then made to Messrs Sterry, Williamson, and Rowell and averments made as to their actions in the procurement process. At [18] reference was made to the completed COIDs and at [18(a) and (b)] the Claimant pleaded:

> "(a) Mr Sterry signed this declaration, failing to declare that he remained a member of the Bombardier Transportation UK Pension Plan from his prior employment (which information was only disclosed to the Claimant by way of letter on 2 August 2022"
>
> "(b) Mr Williamson also has a Bombardier pension, but (unlike Mr Sterry) did declare this on his COID".

33. At [19] the Particulars of Claim assert that the Defendant took no specific or proper steps to manage the conflicts of interest arising from the roles of Messrs Sterry, Williamson, and Rowell.

34. At [20] – [27] averments were made as to the history of the conduct of the procurement exercise with a failure to identify the most economically advantageous tender being alleged at [28].

35. The Defendant's obligations were asserted at [29] with reference being made, inter alia, to the regulation 42 duty in respect of conflicts of interest. Breach of those obligations was pleaded thus at [30] and [31]:

> "In breach of its obligations, including its duties of equal treatment, transparency, proportionality and those arising under Regulation 42 of the UCR and its duty to take appropriate measures to prevent conflicts of interest, the Defendant failed to take any steps to identify and/or manage the risk of conflict in respect of Mr Sterry and also (pending further disclosure) Mr Williamson and Mr Rowell and acted in breach of the anonymisation requirements of the TOEP."

> "Consequently, while the Claimant will seek also further information and disclosure in this regard, it is apparent that the Procurement was tainted by conflicts of interest pervading the assessment, evaluation and decision-making process, to the detriment of the Claimant and to the advantage of the JV. As such, the Shortfall Tender Decision, the Lead Tenderer Decision, the Award Recommendation Decision, and the Award Decision were unlawful."

36. The strike out application was issued on 18th August 2022. The Defendant sought a stay pending determination of the strike out application. However, by his order of 12th September 2022 Pepperall J dismissed that application as being totally without merit explaining in his reasons the inappropriateness of the proposed course.

37. The Defence was filed on 14th September 2022. Although it took issue with some aspects of the Claimant's account of the history the real dispute was as to the Claimant's entitlement to bring the claim and as to the merits of the claim.

38. First, it was said that the claim had not been issued within the period provided for in regulation 107. It was said that the Claimant had been aware of the prior Bombardier employment of Messrs Sterry and Williamson and, at [24(2)(f)], that:

> "The Claimant knew or ought to have known that any employee of long service in a major rail company such as Bombardier would be in receipt of a company pension as also appears to be the case in relation to the Claimant's employees. The Claimant could and should have asked the Defendant relevant questions in October 2021 (when it learned of Mr Sterry's prior employment at Bombardier) but failed to do so until 28 July 2022".

39. At [24(3)] the Defence asserted the Claimant's knowledge of the WhatsApp exchange thus:

> "…the Claimant knew about the contents of the 4 July WhatsApp Exchange on 1 April 2022 (when these messages were disclosed) and referred to the same in its amended pleadings of 13 May 2022. Also on 1 April 2022, the Claimant was provided with further information on the extent of Mr Sterry's role in the Stage 2.1 Compliance Checks (from the minutes of RP1 meetings containing detailed action logs which were disclosed on that date…"

40. The Defendant denied that there had been any breaches of the regulation 42 duty. In that regard it averred, at [27(1)], that the previous Bombardier employment of Messrs Sterry and Williamson did not create a conflict of interest saying:

> "The previous employment of any of the 3 employees by one of the bidders did not give rise to a conflict as appears to have been admitted by the Claimant in paragraph 15 of CM8.

> It is unclear whether (contrary to the above admission) the Claimant alleges in the Particulars of Claim that their previous employment did create a conflict of interest…"

41. At [27(2)] the following was said in respect of Mr Sterry and Mr Williamson's membership of the Scheme:

> "It is denied (if it is alleged) that the company pension held by Mr Sterry and Mr Williamson is a relevant financial interest within the meaning of Regulation 42 on the grounds (a) such pension is held in a separate trust which is by law managed independently of Bombardier and is not permitted to invest in Bombardier, (b) is thus unaffected by any market successes (such as securing a new major contract) enjoyed by Bombardier and (c) is too indirect or remote a financial interest to be perceived as compromising the impartiality or independence of Mr Sterry or Mr Williamson for the purposes of Regulation 42".

42. The Defence then proceeded to state that the Defendant had taken proper measures to address any conflict of interest and to deny that there had been any breach addressing, at [29], the details of [30] of the Particulars of Claim.

43. In the Reply, at [15(b)], the proceedings were said to be:

> "…the claim as brought and pleaded by the Claimant, namely that the Defendant breached its obligations to the Claimant by failing: (i) adequately to identify and remedy the financial conflict of interest arising as a result of Mr Sterry's and Mr Williamson's membership of the Bombardier Pension scheme; and (ii) to comply with the terms of the TOEP."

44. The Claimant said that it could not have known of the claim particularised at [15(b)(i)] until it had known that Messrs Sterry and Williamson were members of the Scheme.

45. At [15(d)] the Claimant said:

> "It is no part of the Claimant's case that the mere fact that Mr Sterry and Mr Williamson previously worked for Bombardier is of itself sufficient to amount to a conflict of interest…"

46. The Claimant denied that it had constructive knowledge of Messrs Sterry and Williamson's membership of the Scheme.

47. At [15(f)] the Claimant admitted that the WhatsApp exchange had been disclosed and had been referred to in its pleading but said that it had not had the relevant knowledge until after 26th July 2022 when it received Mr Sterry's statement because:

> "…the Claimant was unaware on 1 April 2022 as to the context in which that exchange occurred. In particular, the Claimant did not know until 26 July 2022 that the Whatsapp exchange took place in the context of Mr Sterry's conduct of his role as a Technical Assessor during the Stage 2.1 compliance checks. It was only with that knowledge that the Claimant became aware that the Defendant had thereby breached its obligations to the Claimant by failing to follow the TOEP procedure by not making any note of the concern communicated to Mr Williamson in the Evaluation System…"

48. At [16] the Claimant averred that the Defendant was estopped from seeking to strike out the claim on the basis that it was time-barred. The estoppel was pleaded thus:

> (a) by its letter dated 29 October 2021 (particularised above) and the disclosure provided therewith, the Defendant clearly represented to the Claimant that the disclosure they

provided pursuant to the Sterry COI Conflict of Interest Request comprised the only relevant conflict of interest documentation held by the Defendant relating to Mr Sterry and/or that the document disclosed on 29 October 2021 was an accurate representation of Mr Sterry's true position in respect of conflicts of interest. That document expressly asserted that Mr Sterry had no conflict of interest, whether financial or otherwise (the Claimant refers to the representations made by the letter and associated disclosure as the "October Sterry Conflict Representation");

(b) the October Sterry Conflict Representation was therefore knowingly communicated to the Claimant by the Defendant and was made on the basis that the Claimant would rely upon it, being made in response to a specific information request raised;

(c) the October Sterry Conflict Representation was false and misleading in that, as the Defendant knew, by his email dated 5 June 2017 at 12:37, Mr Sterry had previously disclosed to the Defendant his membership of the Bombardier pension scheme in June 2017 and in doing so had expressly referred to his "*interest in Bombardier remaining a going concern in the UK".* At the date of settling this pleading, the Claimant has not been given disclosure of the Register of Interest form submitted by Mr Sterry. At a minimum, Mr Sterry's Register of Interest Form should have been disclosed with Mr Sterry's Conflict of Interest Declaration;

(d) the case that the Defendant now seeks to advance that the Claimant could and should have asked the Defendant questions in October 2021 is inconsistent with the October Sterry Conflict Representation;

(e) in reliance upon the October Sterry Conflict Statement, the Claimant acted to its detriment. It did not pursue its enquiries as to Mr Sterry's potential conflict of interest in October 2021 and decided not to further challenge the Contract Award Decision.

49. At [17] the Claimant denied any lack of clarity in the Particulars of Claim but clarified its case as being that the Defendant had acted in breach of its obligations by failing:

(a) to take adequate steps to identify and manage the financial conflict of interest in respect of Mr Sterry and Mr Williamson arising as a result of their membership of the Bombardier UK Pension Scheme (see further paragraph 18(d) below). That conflict of interest was not considered to be a conflict by the Defendant and therefore it follows that no steps were taken to address it and therefore the Defendant necessarily breached its obligations owing to the Claimant, critically undermining the fairness of the stages in the Procurement in which Mr Sterry and/or Mr Williamson were involved; and

(b) to follow the process established in the TOEP, including as a result of Mr Sterry's failure to record his concerns in respect of the Stage 2.1 Compliance Checks in the Evaluation System and by Mr Sterry being provided with access to all technical aspects of the bids on a non-anonymised basis.

50. It is to be noted that by that stage the Claimant was asserting that its claim involved two breaches of the Defendant's obligations: a breach of the regulation 42 duty in respect of conflicts of interest and a breach by way of a failure to follow the process set out in the TOEP.

The Legal Framework.

51. Regulation 42 addresses conflicts of interest and provides that:

1. Utilities that are contracting authorities shall take appropriate measures to effectively prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures so as to avoid any distortion of competition and to ensure equal treatment of all economic operators.

> 2. For the purposes of paragraph (1), the concept of conflicts of interest shall at least cover any situation where relevant staff members have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure...

52. There is no dispute that Messrs Sterry and Williamson were relevant staff members for this purpose.

53. By regulation 107(2) proceedings which do not seek a declaration of ineffectiveness

> "…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."

54. Regulation 107(4) makes provision for an extension of time but no extension has been sought here and so the relevant period for the commencement of proceedings is that of 30 days from the date of actual or constructive knowledge.

55. The relevant wording of regulation 107(2) is in materially the same terms as the equivalent provision in the Public Contracts Regulations 2015 and there is no dispute that the same approach is to be taken to the interpretation and application of both. The relevant principles can be summarised shortly and were not contentious. I had summarised my understanding of some of the relevant principles in *Bromcom United Computers PLC v United Learning Trust & another* [2021] EWHC 18 (TCC). Neither side sought to dissuade me from that understanding and I will not repeat at length here the analysis that led to that understanding.

56. In *Sita UK Ltd v Greater Manchester Waste Disposal Authority* [2011] EWCA Civ 156, [2011] 2 CMLR 32 the majority of the Court of Appeal approved the formulation of the degree of knowledge required which had been enunciated by Mann J at first instance namely:

> "the standard ought to be knowledge of the facts which apparently clearly indicate, though they need not absolutely prove, an infringement".

57. I summarised my understanding of the effect of the *Sita* approach to determining the necessary degree of knowledge thus, at [16] of *Bromcom*:

> "It follows that what is needed is knowledge of material which does more than give rise to suspicion of a breach of the Regulations but that there can be the requisite knowledge even if the potential claimant is far from certain of success. Answering the question whether the facts of which a potential claimant was aware were such as to "apparently clearly indicate" a breach of duty by the contracting authority will require consideration of the nature of the procurement exercise; of the nature of the particular breach alleged; and of the nature and extent of the particular factual material".

58. The court is to focus on what the potential claimant knew at the relevant time and "not on what it did not know" (see per Elias LJ in *Sita* at [75]). The withholding of information by the potential defendant will not prevent the running of time if the potential claimant otherwise has the requisite knowledge but it will be relevant if such withholding means that the potential claimant does not in fact have such knowledge (see *Bromcom* at [17]).

59. What is required is knowledge of the breach of the particular duty but not of all the particulars of that breach. Thus in *Sita* Elias LJ said, at [22]:

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

60. At [30] Elias LJ adopted counsel's distinction between "the detailed facts which might be deployed in support of the claim" and "the essential facts sufficient to constitute a cause of action" indicating that it was knowledge of the latter and not the former which was required.

61. In *Bromcom* at [18] I explained my understanding of Elias LJ's analysis at [88] – [89] of *Sita* thus:

> "If the allegations are on proper analysis different breaches of the same duty then a potential claimant has the requisite knowledge when it knows or ought to have known of facts clearly indicating a breach of that duty. The time period is not extended simply by the potential claimant learning at a later stage of further separate breaches of the same duty even if they occurred "before or after the breaches already known". If, however, the potential claimant learns of facts indicating a breach of a different duty then it may be the position that time begins to run anew in respect of a claim alleging a breach of that duty".

62. Formal correspondence by or on behalf of a potential claimant is likely to be seen as demonstrating that party's state of knowledge at least to the extent of precluding a contention that it lacked such knowledge as appears to be demonstrated by that correspondence (see *Sita* at [33] and *Bromcom* at [55(v)]).

63. In both *Sita* and *Bromcom* the question was one of actual knowledge and there was no issue as to the existence of constructive knowledge. Nonetheless, the approach set out there as to the matters of which it is necessary for the potential claimant to have knowledge to start time running applies to both actual and constructive knowledge.

64. In *Matrix-SCM Ltd v London Borough of Newham* [2011] EWHC 2414 (Ch) Susan Prevezer QC sitting as a deputy High Court Judge summarised the position thus at [13]:

> "*Sita* was not a case about constructive knowledge, and where it can not be said that a claimant knew of facts that apparently clearly indicated an infringement, the question will become whether the claimant should have known of such facts. A claimant will have constructive knowledge if, upon reasonable enquiries, it should have discovered the alleged infringement. However, I accept Mr Randolph QC's submission on Matrix's behalf that in light of the rationale for the decision in *Uniplex,* the Court should be cautious not to impose too onerous a standard on tenderers who do not have actual knowledge of an infringement, and equally, should not require a claimant tenderer to take steps that would be regarded as *unreasonable* to discover the infringement".

65. I respectfully agree with the test formulated there but in applying that test it is necessary to consider the standard by which the reasonableness or unreasonableness of particular enquiries or steps is to be judged. In *ROL Testing Ltd v Northern Ireland Water* [2015] NIQB 10 Horner J derived assistance in determining that standard from the conclusion

of the Supreme Court in *Healthcare at Home Ltd v The Common Services Agency (Scotland)* [2014] UKSC 49, [2014] PTSR 1081. In that case the Supreme Court had said that a test of reasonableness was the application of a legal standard by the court. It held that in the procurement context the standard to be applied when interpreting tender documents and considering their clarity or lack of clarity was that of the notional reasonably well-informed and normally diligent tenderer. Horner J concluded that similarly constructive knowledge for the purpose of challenges to procurement decisions was to be determined by reference to the knowledge which the RWIND tenderer would have possessed in the particular circumstances (see at [12]). I agree. As Lord Reed explained in *Healthcare at Home*, at [12], "the yardstick of the RWIND tenderer is an objective standard applied by the court". It is right that the same standard be used when considering the knowledge which a potential claimant had or should have had as when considering how a tenderer would interpret tender documents.

66. It follows that in considering the enquiries which reasonably should have been made and the inferences which reasonably should have been drawn regard is to be had to the approach of the RWIND tenderer. The answer will inevitably be fact-specific. Much will depend on the circumstances of the particular procurement exercise. It will be necessary amongst other matters to have regard to the subject-matter of the exercise; to the sums at stake; to the nature of the utility or other public body engaged in the exercise; to the nature of the potential causes of concern potentially triggering the proposed enquiries; and to the ease or difficulty with which answers can be expected to be obtained.

67. It was common ground before me that, as was noted in *Bromcom* at [31], where a procurement claim is said to have been commenced out of time there is no distinction in approach between striking out and summary judgment. The test to be applied is that adopted by Mann J at first instance in *Sita* and approved by Elias LJ at [40] - [41] namely whether it is clear that the claim is bound to fail on limitation grounds.

68. An estoppel by representation can arise if a party makes an unequivocal representation intending to induce another party to act in reliance on the representation. If the representee then acts to its detriment in such reliance the representor can be estopped from relying on facts which are or asserting a case which is contrary to the representation.

The Issues.

69. In respect of the conflict of interest element of the claim the first issue is the proper analysis of the nature of the claim when it was first advanced. Was it an assertion of a breach flowing from a conflict of interest derived simply from the past employment of Messrs Sterry and Williamson by Bombardier, as the Defendant says, or was it then an assertion of a breach based on a conflict of interest derived from those gentlemen's membership of the Scheme, as the Claimant says?

70. The second issue is closely related to the first and will depend on the conclusion reached on that. The question will be that of identifying the matter or matters of which the Claimant had to have knowledge in order to know facts which apparently clearly indicated an infringement of the Regulations.

71. Next, it will be necessary to consider when the Claimant first had actual knowledge of such matters.

72. If the Claimant did not have actual knowledge until less than 30 days before the commencement of these proceedings it will be necessary to consider whether it had constructive knowledge at an earlier date.

73. If the date of the Claimant's knowledge is such that the claim is or would otherwise be seen as having been brought out of time the question will then arise of whether the Defendant is estopped from taking this point.

74. In respect of the claim alleging a breach of the TOEP by failing to record the WhatsApp exchanges the issue will be whether the Claimant had actual or constructive knowledge of facts apparently clearly indicating a breach before reading Mr Sterry's witness statement.

75. Finally, if either claim is out of time it will be necessary to consider the impact of the conclusion on the other claim.

The Nature of the Breach being alleged in the Conflict of Interest Claim and the related Issue of the Facts of which the Claimant had to have Knowledge for Time to start running.

76. For the Claimant Miss McCredie KC said that because interests can differ there can be different conflicts of interest and potential conflicts. Different interests can influence a decision-maker in different ways and to different degrees. That means that the nature of the relevant interest and the nature of the potential conflict will govern the action needed to address it so as to "avoid distortion of competition and to ensure equal treatment" for the purposes of regulation 42. Those matters will, accordingly, govern the question of whether appropriate measures have been taken for the purposes of regulation 42. The knowledge which is necessary to start time running is, Miss McCredie submitted, knowledge of the particular interest because it is that which gives rise to the potential conflict and which determines the action which ought to have been taken to address it and so demonstrates whether there was a breach or not.

77. There is force in that analysis and one can readily envisage circumstances in which the conflict flowing from a particular interest can adequately be addressed in a way different from that which would be necessary to address the conflict resulting from a different interest. However, the question must be considered in the context of the procurement in question and it is necessary to avoid any watering down of the protection which regulation 42 seeks to provide against the distortion of competition through conflicts of interest. Subject to that qualification the analysis is helpful in directing attention to the points that a potential conflict of interest may on particular facts turn out not to be relevant or not in fact to give rise to a conflict and that the nature of the interest will be relevant to the way in which it should be addressed.

78. In the context of this case it is necessary to consider the claim being made and having done so to assess the matters which would be facts apparently clearly indicating a breach and of which knowledge is needed to start time running. The Claimant's knowledge of facts which might give rise to a different claim would not advance matters. Similarly, knowledge of facts which the Claimant concluded did not give rise to a claim and on which the claim now being made is not based would not be relevant

unless knowledge of such facts should have caused the Claimant to believe that it had grounds for alleging a breach of the regulation 42 duty in respect of a particular conflict of interest. In such circumstances the Claimant would have the requisite knowledge even if it later learnt of a separate breach of the same duty.

79. I turn to the concrete contentions here. The Defendant says that the claim as set out in the Particulars of Claim alleged a conflict of interest arising from Messrs Sterry and Williamson's prior employment with Bombardier and asserted a breach in respect of that. It says that the Claimant has moved away from that position and is asserting that the interest which gave rise to the conflict was membership of the Scheme. The Claimant is doing that, the Defendant says, because it is clear that it knew of the past employment considerably more than 30 days before the issue of the claim and it is seeking to recharacterize the claim to avoid the effect of regulation 107. The Claimant accepts that the past employment of Messrs Sterry and Williamson did not of itself give rise to a relevant conflict of interest and it says that was never the basis of the claim. Rather the claim is and has throughout been based on the conflict of interest arising from those gentlemen's membership of the Scheme knowledge of which the Claimant did not have until August 2022.

80. As I have already noted it now becomes necessary to analyse the Claim Form and the Particulars of Claim to see the claim which was being made.

81. The Claim Form at [5] provides support for each analysis. It refers to the past employment of three individuals but also says that two of them retained Bombardier pensions.

82. The Defendant says that [30] of the Particulars of Claim sets out a series of particulars of breaches and that the reference at [30(a)] to past employment with the Interested Parties shows the Claimant alleging that the past employment of itself gave rise to a conflict of interest. Miss Hannaford KC supported that interpretation by referring to the correspondence from the Claimant's solicitors in October 2021. She said that the assertions there that Mr Sterry's past Bombardier employment gave "the prima facie appearance of a conflict of interest" and that there was an "apparent conflict of interest" showed the Claimant asserting a conflict flowing solely from the past employment and that this is an indication of the basis on which the claim was subsequently made.

83. I do not agree with that reading of the Particulars of Claim at [30]. The Claimant is not in that paragraph setting out a series of breaches nor even giving traditional particulars of breach. Rather, in the opening section of that paragraph the pleading is asserting a breach or breaches and then the following sub-paragraphs set out the circumstances in which it is or they are said to have arisen. I find sub-paragraphs (b) and (c) particularly significant in this context. In (b) the Claimant says expressly and clearly that it was because of their membership of the Scheme that Messrs Sterry and Williamson had "an ongoing financial interest in [Bombardier]'s success". In (c) it is the failure to declare that interest to which reference is made. It is also of note that at [18] the Particulars of Claim had placed emphasis on Messrs Sterry and Williamson's membership of the Scheme.

84. It is relevant that at [27(1)] of the Defence it is said that it is unclear whether the Particulars of Claim was asserting that previous employment of itself created a conflict of interest. I attach little weight to this as the Defence came later than the strike out

application. Nonetheless, it does provide some support for the view that the Particulars of Claim was not clearly asserting the case on which the Defendant alleges it was based.

85. There is some force in the Defendant's point that the Particulars of Claim alleged a breach of the Defendant's regulation 42 obligations in respect of Mr Rowell. There is no suggestion that he was a member of the Scheme or had any relevant pension rights. The conflict in Mr Rowell's case is said to have come from his past employment with the Second Interested Party (as it turns out he was never employed by that company but had been seconded to it by a previous employer for some months). The Defendant says that this is an indication of the nature of the case actually being advanced in the Particulars of Claim and shows that the Claimant was asserting that past employment without more gave rise to a conflict of interest. Although this point has some force it cannot change the conclusions which, in my judgement, follow from considering the wording of the Particulars of Claim as a whole.

86. It follows that properly read the claim as advanced in the Particulars of Claim in respect of Messrs Sterry and Williamson alleges a failure to address the conflict of interest flowing from those gentlemen's membership of the Scheme and not one resulting just from their past Bombardier employment.

87. The conclusion in respect of the second issue follows from that assessment of the nature of the claim being advanced. The fact of which the Claimant had to have knowledge in order to know facts which apparently clearly indicated an infringement of the Regulations is the fact of Mr Sterry and/or Mr Williamson having an interest deriving from holding a pension the value of which could be affected by Bombardier's financial fortunes. Knowledge that those gentlemen had been employed by Bombardier would not without more indicate a breach of the Regulations.

88. The references in the October 2021 correspondence to a prima facie or an apparent conflict of interest deriving from Mr Sterry's past Bombardier employment does not alter that assessment. It is now common ground that such past employment did not, of itself, give rise to a relevant conflict of interest. The fact that the Claimant had alleged a breach derived from circumstances which it now accepts did not of themselves create a conflict of interest does not mean it had knowledge of facts apparently clearly indicating an infringement. The incorrect assertion that a breach had arisen because of particular facts cannot prevent a finding that knowledge of the facts actually indicating a breach came later. The position would be very different if the Defendant's analysis were correct and the claim advanced in the Particulars of Claim had been based on a conflict of interest derived from past employment. In those circumstances it would be knowledge of that past employment which would be the relevant knowledge and the October 2021 correspondence would be an indication of that knowledge. That, however, is not the position in light of my conclusion as to the proper analysis of the Particulars of Claim.

When did the Claimant have the necessary actual Knowledge?

89. The Defendant says that the Claimant had actual knowledge of the interest deriving from Mr Sterry having a Bombardier pension by October 2021. This is because the Claimant knew that Mr Sterry had been employed by Bombardier for a number of years and "knew or ought to have known that any employee of long service in a major rail

company such as Bombardier would be in receipt of a company pension" (see the Defence at [24(2)(f)]).

90. I do not accept that contention. As Miss McCredie said there are many possible ways in which pensions can be held and, more significantly, many ways in which a pension entitlement held in a previous employment can be transferred or cashed in. At most the Claimant's actual knowledge was to the effect that Mr Sterry would have had a pension entitlement while working for Bombardier and that it was possible that this was continuing. However, that knowledge of that possibility would not give knowledge of facts apparently clearly indicating a breach of the regulation 42 duty. Putting the Defendant's case at its highest it is arguable that the Claimant knew of the nature of Mr Sterry's pension position by virtue of knowing of his past Bombardier employment. The point is debateable at best and it cannot be said at this stage that there would be bound to be a finding that the Claimant had the necessary actual knowledge more than 30 days before commencing the proceedings with the consequence that the claim would be bound to fail on the limitation ground.

When did the Claimant have the necessary Constructive Knowledge?

91. The question of constructive knowledge is much more finely balanced.

92. The Defendant's position is that a RWIND tenderer in the Claimant's position in October 2021 would have been alert to the possibility and arguably the probability that Mr Sterry had a continuing Bombardier pension entitlement and that the circumstances were such that the financial fortunes of Bombardier would impact on the value of that pension. Such a tenderer would have sought and would have received further information about Mr Sterry's pension position. The Claimant says that the best indication of what should and would have happened in October 2021 is what in fact happened in July and August 2022. On receiving Mr Sterry's witness statement the Claimant gave his position the thought which should have been given in October 2021 and sought further information about his financial interests including his pension. When that information was sought it was provided promptly and indicated the existence of the pension.

93. Miss McCredie sought to say that I should not accept that the information about Mr Sterry's pension would have been provided if expressly sought in October 2021 or shortly thereafter. She contended that the exchanges should be read as showing the Defendant being reluctant to provide information. I do not accept that. In that regard Miss Hannaford is right to say that the best indication as to the response which would have been given is that which was given. I will proceed on the basis that if an enquiry along the lines of that made in July 2022 had been made in the Autumn of 2021 it would have received a prompt response substantially in the terms of the response given on 2nd August 2022.

94. It is right to say that although Mr Sterry's witness statement made the extent of his involvement clearer that involvement and its general nature had been apparent at an earlier stage. It was because it was aware of the importance of Mr Sterry's role that the Claimant had made enquiries of his interest in October 2021. The statement did not materially alter the relevance of any conflict of interest in Mr Sterry's case. The statement was the trigger for further consideration of the position by the Claimant but it did not alter the essential position. It follows that the question remains whether the

Claimant should have made at an earlier stage the enquiries which it in fact made in July 2022. The making of such enquiries is a limited indication of the action which a RWIND tenderer could be expected to take but the weight to be attached to that fact is modest. Instead attention is to be focused on the position before July 2022; on the circumstances then appertaining; and on the steps which a RWIND tenderer acting reasonably would take. That is because the test of the enquiries which should have been made and of the knowledge which should have been acquired is one of reasonableness judged by the standard of the RWIND tenderer in the particular circumstances.

95. Here a RWIND tenderer would have been aware of the likelihood of any longstanding employee of Bombardier having a pension entitlement flowing from that employment but would also be aware that the pension arrangements could take many forms and that arrangements for the retention of the pension entitlement on the cessation of employment could also take many forms. The question then becomes one of the extent to which matters in that regard should have been investigated further.

96. In my judgement the Claimant is right to emphasise the facts of the enquiry it made in October 2021 as to the potential conflict of interest in relation to Mr Sterry and the response it received. The Claimant asked for Mr Sterry's COID "and all other conflict of interest information relating to him". In response it received the COID and no other documents. The Defendant's response at Annex 1 to the 29th October 2021 letter did not say in relation to that enquiry that obtaining further documents would require further steps which were not necessary or appropriate at that stage (an answer which was given in the annex in relation to other enquiries). The response simply said that Mr Sterry's COID was enclosed. Miss Hannaford pointed out that the response was being given in the context of early disclosure in a procurement dispute. She went on to say that a particular document had been sought and that document had been provided. However, that mischaracterises the enquiry which was made. The Claimant did, indeed, seek a particular document but it expressly sought all other conflict of interest documentation relating to Mr Sterry and in doing so expressly raised the prospect that the COID might not be the only document relevant to the question of conflict of interest.

97. Faced with that exchange would a RWIND tenderer acting reasonably have taken the matter further? Should further enquiries have been made and more precisely should the provision of Mr Sterry's COID have been met with detailed further enquiries along the line of those made in July 2022? The Claimant has said that the Defendant's response was a representation giving rise to an estoppel. In my judgement seeing matters in that light is not particularly helpful. Rather the response from the Defendant is an important part of the context in which the court must consider the enquiries which a RWIND tenderer acting reasonably would have made. The Claimant could have made further enquiries: it could have pointed out that the Defendant had not said whether or not there was further documentation and could have said, as it did in July 2022, that details of the actual extent of Mr Sterry's interests were needed. However, although that could have been done I am satisfied that in the context of the position at October 2021 those are not enquiries which it was necessary for a RWIND tenderer acting reasonably to make. The court has to have regard to the context of the procurement challenge with the emphasis on rapidity but also with the parties being required to have regard to the need to focus on key issues and to avoid descending into excessive detail. In the absence of any particular material to indicate that such was not the case the RWIND tenderer, and so the Claimant, was entitled to assume that there was no other relevant conflict of

interest documentation in relation to Mr Sterry and also that the declaration that he had no relevant financial interest was correct. In my judgement Miss McCredie was right to say that the Defendant's argument amounted to the Defendant now contending that in order to act reasonably the Claimant should not have accepted at face value the answer and the document which the Defendant itself had provided in answer to an enquiry from the Claimant. Acting reasonably did not require the Claimant to take that step and so the Claimant is not to be taken to have the knowledge which it would have obtained if the enquiry had been made.

98. It follows that the Defendant has not established that in October 2021 or thereabouts the Claimant had constructive knowledge of Mr Sterry's interest in the Scheme and so of matters apparently clearly indicating a breach of the regulation 42 obligation.

99. It is not suggested that there was any particular event before July 2022 which should have caused the Claimant to make the enquiries which it made then (the Defendant says that they should have been made in October 2021). The consequence is the Defendant has not established that the Claimant had the relevant knowledge at any time before it received the response of 2nd August 2022 which was less than 30 days before the commencement of this claim.

100. After this judgment had been provided in draft to the parties and suggestions as to typographical corrections invited the Defendant proposed modification of the language in which my conclusions as to constructive knowledge had been expressed. It said that the language used could be interpreted as purporting to make a definitive finding as to the absence of constructive knowledge rather than determining whether grounds for striking out or summary judgment had been shown. The Claimant objected to that course saying that it amounted to the making of further submissions after the hearing and it also pointed out that the documentary material which was said to demonstrate that the Claimant had constructive knowledge will not change at trial. I am satisfied that the Defendant's submissions properly addressed the question of the language used rather than my substantive conclusions. I am also satisfied that the Defendant's point was a sound one. I am determining a particular application for striking out or summary judgment and not making a definitive determination as to matters of fact or as to the consequences of the facts. That was tolerably clear from the context of the passages which triggered the Defendant's concerns but I have made modest changes to the language in which I have expressed my conclusions on constructive knowledge to avoid the risk of misinterpretation.

The Asserted Estoppel by Representation.

101. In the light of the conclusion I have reached on the date of constructive knowledge the question of whether the Defendant is estopped from taking the point that the Claimant had knowledge in October 2021 is academic. As I have already indicated I do not regard it as helpful to view the October 2021 exchanges through the lens of representation and reliance. The Defendant's response to the Claimant's enquiries is best seen as an important part of the context in which the reasonableness of the Claimant's actions and the matters which it ought to have known are to be assessed. In the event that it had been necessary to do so I would not have held that the Defendant's letter of 29th October 2021 operated as a representation in the terms asserted by the Claimant and was capable of being relied upon such as to give rise to an estoppel.

The Alleged Failure to comply with the TOEP

102. The Claimant contends that the Defendant failed to conduct the procurement in accordance with the provisions of the TOEP by reason of a failure to record the concerns raised by Mr Sterry in respect of the Stage 2.1 Compliance Checks and by reason of the provision of non-anonymised information to Mr Sterry. The Claimant accepts that the WhatsApp exchange in which Mr Sterry expressed his concerns was disclosed on 1st April 2022. It says, however, that it only knew of facts apparently clearly indicating a breach of the Defendant's obligations in July 2022 after receipt of Mr Sterry's statement. The Claimant says that it was only at that stage that it knew the extent of Mr Sterry's role and the context of the exchange because it was only then that it knew that as well as being Lead Technical Assessor Mr Sterry had been a Technical Assessor in respect of the Stage 2.1 checks and that the exchange had arisen from that role. The Defendant's primary position in respect of this allegation is that it is a further breach of the duty which is said to have been breached by the failure to address Mr Sterry's conflict of interest of which the Claimant had knowledge in October 2021. Alternatively, the Claimant had the requisite knowledge in April 2022 because by then the Claimant knew of the exchange and of Mr Sterry's role as Lead Technical Assessor and that was sufficient indication of his role.

103. I am satisfied that by shortly after 1st April 2022 the Claimant had the requisite knowledge in relation to this alleged breach. It knew that Mr Sterry had a significant role in the procurement exercise (indeed it had known of that from an early stage and had expressed concerns about his involvement in October 2021) and had become aware of the exchange in which he referred to concerns about the compliance of the joint venture's tender with the Defendant's requirements. The precise capacity in which Mr Sterry expressed those concerns and the stage at which he did so are less important than the general nature of his role and the fact of the expression of the concerns. If, however, that view is wrong and knowledge of the precise role being undertaken by Mr Sterry and the precise context in which the concerns were expressed was necessary for the Claimant to have knowledge of facts apparently clearly indicating an infringement then I am satisfied that the Claimant had constructive knowledge of those facts shortly after 1st April 2022. That is because I am satisfied that the matters of which the Claimant had knowledge then would at least have caused a RWIND tenderer acting reasonably to seek clarification of the context in which the concerns were raised and the capacity in which Mr Sterry had been acting.

104. It follows that the Claimant had the requisite knowledge of the facts apparently clearly indicating an infringement in respect of the failure to record these concerns more than 30 days before the commencement of this claim and to that extent the claim was not commenced within the period provided by regulation 107. Even if, contrary to the analysis I have set out above, the Defendant's letter of 29th October 2021 operated as a representation giving rise to an estoppel it would not assist the Claimant here. That letter cannot on any basis be seen as having been a representation that there had been no breach of the kind now alleged in this regard or in some way as precluding the Defendant taking the point that the Claimant had knowledge of this element of the claim at a date in April 2022 some five months after the letter.

The Effect of the Conclusion in regard to the alleged Failure to comply with the TOEP on the Claim alleging a Breach of Regulation 42.

105. In the light of my conclusion that the claim alleging a failure properly to comply with the requirements of the TOEP is out of time it becomes necessary to consider the effect of that conclusion on the claim alleging a breach of the regulation 42 obligation. Are the claim alleging a breach in respect of Mr Sterry's conflict of interest and the claim alleging a failure to comply with the TOEP in truth allegations of breaches of the same duty with the conflict of interest claim amounting to further particulars of the infringement which had already been identified or are they separate claims alleging breaches of different duties?

106. The alleged failure to comply with the requirements of the TOEP and the alleged breach of the regulation 42 obligation are properly seen as allegations of breaches of different duties. The Particulars of Claim are not as clear on this point as would have been desirable and it would have been better for distinction between the two elements to have been more marked in the pleading. However, once it is understood that the relevant duties are different then it is apparent that two claims are being advanced based on alleged breaches of different duties and that the opening wording of [30] of the Particulars of Claim is referring to separate breaches. Accordingly, the fact the claim alleging a failure to comply with the requirements of the TOEP is out of time does not affect that alleging a breach of the regulation 42 obligation so as to cause that claim also to be held to have been made out of time.

Conclusion.

107. In those circumstances the claim is to be struck out to the extent that it alleges a failure to follow the procedure laid down in the TOEP. However, the claim alleging a breach of the Defendant's regulation 42 obligation has not been shown to be out of time. Therefore, that claim is not to be struck out nor can it be subject to summary judgment in favour of the Defendant. The Claimant has already accepted that the claim in respect of Mr Rowell's involvement in the procurement exercise is untenable and that also falls to be struck out.