Neutral Citation Number: [2025] EWHC 108 (TCC)

Case No: **HT-2024-000136**

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

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

Date: **23 January 2025**

Before :

Sir Vivian Ramsey

- -

Between :

Airwave Solutions Limited	**Claimant**
- and -	
The Secretary of State for the Home Department & another	**Defendants**

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- -

Valentina Sloane KC, Rupert Paines, Henry Hoskins and Jen Coyne (instructed by **Quinn Emanuel Urquhart & Sullivan LLP**) for the **Claimant**
Jason Coppel KC, Stephen Kosmin and Benjamin Tankel (instructed by **TLT LLP**) for the **Defendants**

Hearing date: **18 December 2024**

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JUDGMENT

This judgment was handed down by the court remotely by circulation to the parties' representatives by email and released to The National Archives. The date and time for hand-down is deemed to be 23 January 2025 at 10:30am.

Sir Vivian Ramsey:

Introduction

1. This judgment deals with the Defendants' application for permission to re-amend the Amended Defence (the "Defence Amendment Application").

2. There are also other applications, being the Claimant's application to strike out parts of the Amended Defence (the "Strike Out Application") and the Claimant's application to re-amend the Amended Reply (the "Reply Amendment Application") and the Claimant's application for an Order requiring the Defendants to provide a full and proper answer to the Claimant's Request for Further Information dated 22 October 2024 under CPR Part 18 (the "RFI Application"), which are referred to but not dealt with.

3. These proceedings concern the dedicated UK emergency services mobile communications network (the "Current Emergency Network"), which is owned and operated by the Claimant. The Claimant, in these proceedings, challenges the conduct of the Defendants in purporting to extend the time for which the Claimant will be required to operate the Current Emergency Network under the so-called "Blue Light Contracts" by a further three years, from 31 December 2026 to 31 December 2029, by the issuance of a Deferred National Shut Down Notice dated 13 March 2024 (the "2024 DNSDN"). The Claimant's case is that the 2024 DNSDN was issued in breach of the Defendants' obligations under the Public Contracts Regulations 2015 (the "PCR"), and also in breach of contractual obligations owed by the Defendants to the Claimant.

4. The Defendants are currently developing the Emergency Services Network (the "ESN"), which they intend will replace the Current Emergency Network if and when it becomes operational and all users of the Current Emergency Network have transitioned to the ESN.

5. The First Defendant ran an initial procurement process for the ESN between April 2014 and September 2015. Three main contracts were awarded to provide the relevant services, which were referred to as Lot 1, Lot 2 and Lot 3. Motorola Solutions UK Ltd ("MSUK" or "Motorola") was awarded the Lot 2 contract, which was a contract for "User Services" and the First Defendant and MSUK entered into a contract in respect of Lot 2 on 18 December 2015, which they then agreed to vary by entering into an amended and restated contract on 14 May 2019 (as amended, the "Lot 2 Contract" or "Lot 2 ESN Contract").

6. Subsequently, a number of disputes arose between the First Defendant and MSUK regarding the Lot 2 Contract. Some were resolved at an earlier stage and the remaining disputes were resolved fully and finally by the First Defendant, MSUK

and Motorola Solutions Inc ("MSI") entering into a settlement agreement on 19 December 2022 (the "Settlement Agreement") under which the Lot 2 Contract was also terminated by consent.

7. In their Defence, served on 23 May 2024, the Defendants pleaded in paragraphs 2(9), 2(31), 27(4)(d), 36, 41A(2)(i), 82(4)(a) and 86(7) various allegations referring to the performance of "Motorola" under the Lot 2 Contract.

8. In its Reply, served on 24 June 2024, the Claimant pleaded as follows:

"15. The Defendants make various prejudicial and highly contentious allegations in relation to Motorola's conduct in performing and exiting the Lot 2 ESN Contract (paragraphs 2(3), 2(4), 2(9), 2(16), 2(18), 2(31), 20(8), 20(9), 27(4), 36). The allegations should be withdrawn. They are of no legal relevance to the Claim and they have been raised in breach of a settlement agreement relating to a dispute which is outside the scope of the Claim. For completeness and the avoidance of doubt, they are denied.

16. The Defence identifies no basis as to how or why these allegations in relation to the performance and termination of the Lot 2 ESN Contract are of any relevance to the issues in the Claim, which concern the Defendants' procurement law obligations.

17. The Defendants are in any event precluded by contract from making such allegations in the Claim. A number of disputes arose between Motorola and the First Defendant, relating to dissatisfaction on the part of each party regarding performance and delivery by the other under the Lot 2 ESN Contract ("the Lot 2 Dispute"). Those parties settled their differences about the Lot 2 Dispute and agreed terms for the full and final settlement of the Lot 2 Dispute, including the early termination of the Lot 2 ESN Contract and any payments due to Motorola as a result, and they recorded the terms of settlement, on a binding basis, in the Lot 2 Settlement Agreement and Release dated 19 December 2022 (the "Lot 2 Settlement Agreement"). The Lot 2 Settlement Agreement relevantly includes the following terms:
a. Clause 6.3 provides […]
b. Dispute is defined as: […]
c. Reserved Claims is defined as: […]

18. In accordance with the Lot 2 Settlement Agreement, the Claimant makes no allegations against the Defendants in the Claim in relation to issues covered by the Lot 2 Dispute (but reserves the right to do so, and to take any other measures it deems appropriate, if the Defendants pursue their equivalent allegations in breach of the Lot 2 Settlement Agreement).

19. Without prejudice to the general objections set out above, the Claimant denies that the Defendants' allegations, either overt or oblique, in relation to Motorola and the legality of its performance of and exit from the Lot 2 ESN Contract (paragraphs 2(3), 2(4), 2(9), 2(16), 2(18), 2(31), 20(8), 20(9), 27(4), 36) are justified."

9. At a Case Management Conference ("CMC") on 23 July 2024, I directed that there should be an expedited trial of these proceedings.

10. On 26 July 2024 the Claimant served an Amended Particulars of Claim, on 22 August 2024 the Defendants served an Amended Defence and on 10 September 2024 the Claimant served an Amended Reply.

11. On 30 September 2024 the Claimant issued an application (the "Lot 2 Application") in which it sought a preliminary issue, alternatively an order striking out or summary judgment in relation to the Defendants' allegations in paragraphs 2(9), 2(31), 27(4)(d), 36, 41A(2)(i), 82(4)(a) and 86(7) of the Amended Defence.

12. On 23 October 2024, the Defendants issued the Defence Amendment Application seeking to re-amend their Defence as set out in the draft Re-Amended Defence attached to that application.

13. On 6 November 2024 I held a CMC at which I heard oral submissions concerning the Lot 2 Application and the Defence Amendment Application.

14. On 7 November 2024 I notified the parties that the Lot 2 Application was dismissed and I gave directions for the hearing of the Defence Amendment Application. I gave my reasons for that decision in a judgment dated 28 November 2024 (the "Lot 2 Application Judgment").

15. On 15 November 2024 the Claimant filed a further strike out application supplementing the application of 30 September 2024 which forms the basis for the Strike Out Application.

16. On 19 November 2024 the Defendants filed a further draft Re-Amended Defence in substitution for the draft attached to the Defence Amendment Application.

17. Following the directions given on 7 November 2024, the parties served further documents and submissions and the Defence Amendment Application was heard on 18 December 2024. I made an order on that application on 19 December 2024 and I now give my reasons for that order.

The Defendants' Submissions

18. The Defendants submit that their currently pleaded allegations relating to Motorola's conduct, failures and breaches of the Lot 2 Contract are straightforward,

obvious and well understood by the Claimant. That is that Motorola was contractually committed to deliver services under Lot 2 by 2019, it made representations to the First Defendant about when a workable solution would be delivered which the CMA has revealed were contrary to its own internal analysis. They state that the security architecture of the technical solution that Motorola tendered and contractually committed to deliver ("Wave 7000") was wholly unfit for purpose and was jettisoned by Motorola, in circumstances where Motorola was taking steps to acquire a substitute replacement technical solution (namely "Kodiak") in advance of the National Cyber Security Centre confirming its conclusions as to the unsuitability of the Wave 7000 solution. By end of 2022, Motorola had exited the Lot 2 ESN Contract without delivering any workable solution. The Defendants allege that all of this occurred in the context of an obvious and overriding commercial conflict of interest, worth USD200million to the Motorola group in payment to the Claimant for each year that the Lot 2 ESN Contract was delayed.

19. The Defendants submit that the Claimant wishes to avoid dealing with these matters and to avoid providing disclosure in respect of them. It rejects any suggestion that the Claimant is unable to understand the allegations or fairly to respond to them based on the Amended Defence. The Defendants rely on my statement in the Lot 2 Application Judgment that an important element of a number of their justifications for the lawfulness of the 2024 DNSDN, as a matter of procurement law for the purposes of regs. 32 and/or 72 of the PCR, is that the extension of the Blue Light Contracts effected by the 2024 DNSDN was caused by MSUK's failures and/or delay in delivery of the Lot 2 Contract and/or breaches of contract in delivery of the Lot 2 Contract.

20. The Defendants contend that, to the extent that there is any force in the Claimant's contention that the current form of the Amended Defence is not sufficiently particularised on these matters because they do not refer to specific clauses of the Lot 2 ESN Contract that the Claimant breached, the correct way to remedy that issue is for the Defendants to be permitted to re-amend to refer to the relevant clause numbers. They state that the re-amendments set out their allegations on a more particularised footing, meeting the Claimant's criticism of the existing Amended Defence. The Defendants submit that the merits of the proposed re-amendments meet the threshold having "a real prospect of success".

21. The Defendants refer to the amendments in paragraph 27(4)(e) about Wave 7000 and in paragraph 27(4)(h) in relation to Kodiak. They say that the amendments to paragraphs 82(4) and 83(3) to (4) seek to clarify their case on reg.72(1) of the PCR 2015 which provides that modifications may be agreed "for additional works, services or supplies by the original contractor that have become necessary and were not included in the initial procurement …". They say that the amendments to paragraphs 83(3) and (4) relate to the first condition in reg.72(1)(c) of PCR 2015: "the need for modification has been brought about by circumstances which a diligent contracting authority could not have foreseen".

22. In relation to the amendments to paragraph 86(7), the Defendants say that these amendments serve to clarify their plea in relation to reg.32 of the PCR. Regulations 32(2)(c) and 32(4) PCR 2015 provide:

> "(2) The negotiated procedure without prior publication may be used for public works contracts, public supply contracts and public service contracts in any of the following cases:
> … (c) insofar as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for the open or restricted procedures or competitive procedures with negotiation cannot be complied with. …
> (4) For the purposes of paragraph (2)(c), the circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting authority."

23. The Defendants state that paragraph 86(7) avers that the circumstances invoked to justify extreme urgency were, for the purposes of reg.32, attributable to the Claimant and/or Motorola and not to the Defendants. First, the Defendants say that they clarify their case on reg.32(2)(c) of PCR 2015 that the nature, extent and gravity of the Claimant and/or Motorola's conduct, failures and/or breaches of contract related to the Lot 2 ESN Contract were not foreseeable within the meaning of reg.32. Secondly, in relation to reg.32(4) of the PCR, the Defendants plead that the circumstances giving rise to extreme urgency were, and are, not attributable to the Defendants within the meaning of reg.32, and rather are attributable to the Claimant and/or Motorola.

24. The Defendants say that they are not advancing a new case by their proposed re-amendments but supplementing their original and existing defence, which has long been well-understood by the Claimant. They refer to the Reply Amendment Application in which the Claimant now seeks to plead a detailed response to the Defendants' pleas concerning the Lot 2 ESN Contract and Motorola's defective performance.

25. The Defendants summarise their case as follows. Motorola bid for, and committed to providing, a service under the Lot 2 ESN Contract. During the course of that Lot 2 ESN Contract, Motorola made representations to the Defendants as to timelines for delivery, upon which the Defendants based decisions as to lengths of extensions to the Blue Lights Contracts. But Motorola did not deliver under the Lot 2 ESN Contract and its performance fell woefully short. Its first solution was not fit for purpose and Motorola elected to substitute it mid-contract. The replacement solution also did not result in a solution being delivered at all. The termination of the Lot 2 ESN Contract was (i) not foreseeable to the Defendants in a way that would have enabled it to conduct a competition and (ii) not attributable to the Defendants in that its determinative cause was Motorola's conduct under the Lot 2 ESN Contract.

26. The Defendants say that the re-amendments clarify and provide sufficient certainty for trial of the parties' competing cases on regs.32 and 72 PCR. They state that the Claimant contends, on the one hand, that if permission to re-amend is granted, it will be surprised by a new case that will trigger an avalanche of consequential directions that will jeopardise the trial date; on the other hand the Claimant contends that, if the amendments are not permitted, then the existing parts of the pleadings going to the Lot 2 ESN Contract fall to be struck out.

27. The Defendants submit that they seek permission for, at most, "late", and not "very late" re-amendments. They submit that a central consideration when considering the "lateness" of the Defendants' re-amendments is their nature, including the extent to which they introduce a novel case, of which the Claimant has not had prior notice. Here, they submit that the re-amendments cannot properly be regarded as a "new case".

28. They state that the Claimant has greatly overstated the risk to the trial window. The re-amendments are not a wholly novel case, in respect of which the Claimant will have to undertake lengthy and onerous steps. The Defendants state that the trial window can be retained. They say, first, that the Claimant's Re-Amended Reply can be pleaded reasonably soon and they point to the fact that in Ms Vernon's sixth witness statement, the Claimant sets out its proposed response to the re-amendments in 12 detailed and closely-argued pages. Secondly, in response to the Claimant's contention that disclosure will then take 2 or 3 months to complete, they say that this appears to be greatly overstated. The Defendants say that the current disclosure exercise will have materially concluded by the date that further disclosure will fall to be undertaken. They also dispute the Claimant's assertion that the Defendants' disclosure will be deficient and require specific disclosure applications or that time will be needed to liaise on disclosure parameters, given the previous consideration given to disclosure Issue 9. They contend that proportionate disclosure will relate to the extent to which Motorola's defective contractual performance in relation to both Wave 7000 and Kodiak bears upon the regulatory tests imposed under regs 32 and 72 PCR.

29. Thirdly, they say that the Claimant's assertion that witness statements could only be produced 1 to 2 months after disclosure is untenable. The preparation of witness statements does not have to wait the conclusion of the disclosure exercise and the Claimant states that the evidence would be given by three witnesses. That evidence would be directed at the foreseeability of, and attribution for, the circumstances relied upon by the Defendants to justify extreme urgency (reg.32(4)) and the manner in which the 2024 DNSDN "became necessary" (reg.72(1)(c)) which are confined issues. Fourthly, whilst the Claimant asserts that there is a need for expert evidence, the Defendants say that it is unnecessary and the relevant issues have been dealt with in contemporaneous expert accounts. Fifthly, the Defendants say that no extension to the eight day trial window is warranted.

30. In relation to the Claimant's criticisms of the re-amendments, the Defendants submit that the Claimant has been able to set out its response in Ms Vernon's sixth witness statement without any difficulty and that they are as particularised as the Claimant's allegations in the Re-Amended Reply.

The Claimant's submissions

31. The Claimant says that the Defendants' Defence and Amended Defence contained various unparticularised assertions that MSUK breached its obligations as Lot 2 contractor under the Lot 2 ESN Contract. The Claimant states that, from the outset, it has made clear that these allegations are both unparticularised and legally irrelevant, as well as being advanced in breach of the Lot 2 Settlement Agreement. The Claimant was unable to respond to those allegations in any detail given their

lack of particularity but, in broad terms, denied any wrongdoing by MSUK in relation to the Lot 2 ESN Contract.

32. The Claimant refers to extensive consideration of this issue in the context of the disclosure CMCs in September and October 2024. The Claimant says that it had repeatedly explained to the Defendants that the proper course, if they wished to advance such allegations, was to seek permission to amend their Amended Defence but they chose not to do so. Instead, they initially sought to dismiss suggestions that they should amend their case as being entirely without merit and then sought to cure their position on a unilateral basis by providing purported voluntary particulars in submissions, which raised new unpleaded matters, yet remained inadequately particularised and were later sought to be further amended.

33. Following the disclosure rulings and consents, in particular relating to disclosure Issue 9, the Claimant wrote to the Defendants on 18 October 2024, explaining that their case was properly to be understood as limited to the timing and terms of MSUK's withdrawal, as pleaded in paragraph 83(3) of the Amended Defence. The Claimant says that this did not appear to allege breaches of contract and so it invited the Defendants to confirm that they would advance no allegation of breach of the Lot 2 ESN Contract at trial. In response, on 23 October 2024, the Defendants issued the Defence Amendment Application, supplying a draft Re-Amended Defence. The Claimant says that after it had noted its continuing lack of particularisation, the Defendants withdrew that draft on 6 November 2024 and on 19 November 2024 filed a new draft Re-Amended Defence.

34. The Claimant refers to new factual allegations which are primarily in paragraph 27(4) of the draft Re-Amended Defence. First, in paragraph 27(4)(e) the Defendants allege that the initially-procured 'push to talk' application which was intended to be used for the Lot 2 ESN Contract (Wave 7000) was unfit for purpose "due to (i) its failure to meet the security requirements of the project, and (ii) unacceptably high failure rates". This relates to matters that arose between about 2016 and 2017. Secondly, the Defendants allege that MSUK proposed the use of a replacement technology, Kodiak, in May 2018, and that a contract variation was agreed in September 2018 but not executed until May 2019 "due to Motorola electing to prioritise other customers". This relates to matters in 2018 and the first half of 2019. Thirdly, they allege that the replacement technology (Kodiak) was unfit for purpose "due to (i) failure to meet the security requirements of the project, and (ii) inadequate technical quality, unreliability and unacceptable levels of defects". The Defendants refer to various papers and other matters running from 2019 to June 2022 and the Claimant submits that this form of pleading is deeply unsatisfactory. The Defendants use two sets of non-exhaustive lists to provide purported particularity of a very broad overarching allegation, requiring the Court and the Claimant to guess at the possible interaction between that allegation, various documents and assertions, and contractual provisions.

35. The Defendants' Defence Amendment Application has been and will be heard some eight months after issue of the claim; seven months after Defendants' Defence was filed; after disclosure has been given; and only four months before trial. The Claimant says that the Defendants have refused to engage with justified criticisms of their pleading and only sought to amend when compelled to do so by the Court's

rulings on disclosure. Even after they sought to amend, the Claimant says that the Defendants withdrew their draft pleading and took weeks further to produce another draft which is still hopelessly inadequate. There can be no serious dispute that the amendments are late and they concern matters said to have taken place several years ago or more and all of which were known to the Defendants when they served their original Defence. If these allegations were to be pursued at all, the Claimant says that they could and should have been brought at that time. Instead, the Defendants have delayed almost six months (until 19 November 2024) to serve the present draft Re-Amended Defence, just five months before trial.

36. Given that the amendments are late or very late, the Claimant says that there must be a good reason for the delay, and it is impossible to see how the present trial could go ahead if the Defendants' amendments were allowed. The Claimant says that the amendments are not merely late but 'very late' because "permission to amend threatens the trial date" and where amendments are very late, there is no good reason for the delay, and granting permission would result in real prejudice or disruption, permission to amend should not be granted. The Claimant submits that the Defendants wrongly seek to give the impression that all the matters they now seek to advance have always been well-understood to be in issue, and that the amendments are a 'tidying-up' exercise required only because of a change of position by the Claimant.

37. Insofar as the allegations raise criticisms of MSUK, the Claimant says that they are not legally relevant and that the Defendants do not explain how these allegations concerning MSUK could be relevant either to the Defendants' reliance on reg.72 or to reg.32.

Relevant Authorities

38. The principles relevant to dealing with amendments and ones which are late have been set out in a number of authorities.

39. In *CNM Estates (Tolworth Tower) Ltd v Carvill-Biggs* [2023] 1 WLR 4335 ("*CNM*") at [66-77] the court considered the legal principles governing amendments to statements of case which are brought late, but not very late (in the sense that the amendment would cause loss of the trial date). In particular:

a. A party seeking a late amendment must demonstrate that they have "a real as opposed to fanciful prospect of success which is one that is more than merely arguable and carries some degree of conviction" (see *Elite Property Holdings Ltd v Barclays Bank plc* [2019] EWCA Civ 204 ("*Elite*") at [41]. The approach to be taken to a late amendment is therefore that adopted in relation to summary judgment: see *CNM* at [74]. Provided that a case would survive a summary judgment application, its apparent weakness cannot be taken into account on an application for a late amendment.

b. A claim does not have a real prospect of success where (i) it is possible to say with confidence that the factual basis for the amendment is fanciful because it is entirely without substance; (ii) the party seeking the amendment does not have material to support at least a prima facie case that the allegations are

correct; and/or (iii) the amended statement of case has insufficient facts to entitle the court to draw the necessary inferences: see *Elite* at [41].

c. Where there are significant differences between the parties so far as factual issues are concerned, the Court is in no position to conduct a mini-trial: see *ED&F Man Liquid Products Ltd v Patel* [2003] CP Rep 51 at [10]. In *CNM* at §76, the Court of Appeal held: "… it may be necessary to consider, as Carr J [in *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 (Comm)] suggested: "a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done." But even if it is necessary to adopt that approach when the amendment is on the cusp of being "late" and "very late", it will never be appropriate to attempt to conduct a mini-trial."

d. Permission to amend should be refused if it is apparent that a proposed claim would have no real prospect of success (*CNM* at [69]-[70]).

40. In *Sayn-Wittgenstein-Sayn v HM Juan Carlos Alfonso Victor Maria de Borbon y Borbon* (Rev1) [2022] EWCA Civ 1595; [2023] 1 WLR 1162 at [63]:
"Unless the particular circumstances make it obviously unnecessary, a formal application to amend is ordinarily required, with a written document setting out the proposed amendments; and, again in general, there is a merits test to overcome in obtaining permission to amend. The pleading must not only be coherent and properly particularised, it must plead allegations which if true would establish a claim that has a real prospect of success. This means that the claim must carry a degree of conviction; and the pleading must be supported by evidence which establishes a factual basis which meets the merits test."

41. In *CIP Properties v Galliford Try Infrastructure* [2015] EWHC 1345 (TCC) at [19] Coulson J said:
"(a) The lateness by which an amendment is produced is a relative concept (*Hague Plant*). An amendment is late if it could have been advanced earlier, or involves the duplication of cost and effort, or if it requires the resisting party to revisit any of the significant steps in the litigation (such as disclosure or the provision of witness statements and expert's reports) which have been completed by the time of the amendment.
(b) An amendment can be regarded as 'very late' if permission to amend threatens the trial date (*Swain-Mason*), even if the application is made some months before the trial is due to start. Parties have a legitimate expectation that trial dates will be met and not adjourned without good reason (*Brown*).
(c) The history of the amendment, together with an explanation for its lateness, is a matter for the amending party and is an important factor in the necessary balancing exercise (*Brown; Wani*). In essence, there must be a good reason for the delay (*Brown*).
(d) The particularity and/or clarity of the proposed amendment then has to be considered, because different considerations may well apply to amendments which are not tightly-drawn or focused (*Swain Mason; Hague Plant; Wani*).
(e) The prejudice to the resisting parties if the amendments are allowed will incorporate, at one end of the spectrum, the simple fact of being 'mucked around'

(*Worldwide*), to the disruption of and additional pressure on their lawyers in the run-up to trial (*Bourke*), and the duplication of cost and effort (*Hague Plant*) at the other. If allowing the amendments would necessitate the adjournment of the trial, that may be an overwhelming reason to refuse the amendments (*Swain Mason*).
(f) Prejudice to the amending party if the amendments are not allowed will, obviously, include its inability to advance its amended case, but that is just one factor to be considered (*Swain Mason*). Moreover, if that prejudice has come about by the amending party's own conduct, then it is a much less important element of the balancing exercise (*Archlane*)."

42. In *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 (Comm) Carr J stated:

a. At [38]:
"a) whether to allow an amendment is a matter for the discretion of the court. In exercising that discretion, the overriding objective is of the greatest importance. Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted;
b) where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. Rather, a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission;
c) a very late amendment is one made when the trial date has been fixed and where permitting the amendments would cause the trial date to be lost. Parties and the court have a legitimate expectation that trial fixtures will be kept;
d) lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done;
e) gone are the days when it was sufficient for the amending party to argue that no prejudice had been suffered, save as to costs. In the modern era it is more readily recognised that the payment of costs may not be adequate compensation;
f) it is incumbent on a party seeking the indulgence of the court to be allowed to raise a late claim to provide a good explanation for the delay;
g) a much stricter view is taken nowadays of non-compliance with the CPR and directions of the Court. The achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations because those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds but also the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the courts enable them to do so.""

b. And at [96]:

> "Very late applications for permission to amend in circumstances where a) there is no good reason for the delay and b) amendment would result in real disruption or prejudice to the parties and/or the Court are unlikely to be allowed, irrespective of the merits of the proposed amendment."

43. In *Pantelli Associates Ltd v Corporate City Developments Number Two Ltd* [2011] PNLR 12 at [11], Coulson J dealt with the level of particularity required for pleas alleging breach of contract:

> "CPR 16.4(1)(a) requires that a particulars of claim must include "a concise statement of the facts on which the claimant relies". Thus, where the particulars of claim contain an allegation of breach of contract and/or negligence, it must be pleaded in such a way as to allow the defendant to know the case that it has to meet. The pleading needs to set out clearly what it is that the defendant failed to do that it should have done, and/or what the defendant did that it should not have done, what would have happened but for those acts or omissions, and the loss that eventuated. Those are 'the facts' relied on in support of the allegation, and are required in order that proper witness statements (and if necessary an expert's report) can be obtained by both sides which address the specific allegations made."

Discussion

44. In the Amended Defence the following matters were pleaded;
    a. Paragraph 2(9): "Subsequently, Motorola failed to discharge its obligations to deliver the Lot 2 ESN Contract, whether timeously or at all…".
    b. Paragraph 2(16): "On 3 November 2022…, Motorola announced that it would seek to withdraw from the Lot 2 ESN Contract. … Motorola was subject to strong commercial incentives to seek to delay transition to the ESN for as long as possible…".
    c. Paragraph 2(31): "The need to re-procure the public contract for the delivery of Lot 2 of the ESN, arising from Motorola's failure to meet its contractual obligations in respect of the Lot 2 ESN Contract and the subsequent termination of the Lot 2 ESN Contract, is a significant source of uncertainty in respect of the date on which transition to the ESN will complete."
    d. Paragraphs 27(4)(d), (e) and (g): "there were (inter alia) significant on-going delays to the Lot 2 ESN Contract…

       (d) The on-going failure to successfully progress the delivery and implementation of the ESN in line with the contract and delivery plan continued throughout 2017.

       (e) On or around 28 August 2017, Motorola acquired Kodiak Networks ("Kodiak"), a company that had developed its own form of PTT communications technology as a potential alternative, and competitor, to the technological solution that Motorola had tendered, and undertaken to deliver, pursuant to the Lot 2 ESN Contract (CMA, §2.93).

       (g) Following negotiations from May to August 2018, on 21 September 2018 the First Defendant agreed a contract variation (executed on 14 May 2019) that would permit Motorola to:

i. substitute the Kodiak technology for the technical solution that it had tendered and contractually committed to provide,…".

e. Paragraph 36: "…The re-procurement in respect of Lot 2 of the ESN, and the issue of the 2024 DNSDN, were necessary due to the fact that Motorola did not timeously or effectively achieve the outputs required under the Lot 2 ESN Contract, and the termination of the Lot 2 ESN Contract.".

f. Paragraph 41A(2)(i): "…In any event, it is averred that the position as at early 2022 concerned: (i) Motorola, and the then current position related to its failure to perform its contractual obligations in respect of the Lot 2 ESN Contract…".

g. Paragraph 82(4)(a): "The previous arrangements and extensions in respect of the relevant Blue Light Contracts which demonstrate that Defendants' conduct was reasonable, that there was no relevant "failure" on the part of the Defendants and that the cause (and/or principal and/or material cause) of the need for the previous arrangements and extensions following the original procurement of the ESN was (and is) the conduct, failures and defaults of the Claimant and/or Motorola (and the other appointed ESN providers).".

h. Paragraph 83(3): "It is denied that the relevant conduct of the Claimant and/or Motorola (namely the timing of their withdrawal and terms on which that withdrawal was effected) was reasonably foreseeable.".

i. Paragraph 86(7): "The 2024 DNSDN is necessary for reasons of extreme urgency…brought about by events unforeseeable by the contracting authority, namely the Claimant and/or Motorola's relevant conduct, failures and/or breaches of contract related to the Lot 2 ESN Contract, and….".

45. From those paragraphs it is evident that the Defendants were relying on the fact that Motorola did not timeously or effectively achieve the outputs required under the Lot 2 Contract; that Motorola failed to perform its contractual obligations in respect of the Lot 2 ESN Contract; that the cause of the need for the previous arrangements and extensions was the conduct, failures and defaults of Motorola; and that the 2024 DNSDN was brought about by Motorola's relevant conduct, failures and/or breaches of contract related to the Lot 2 ESN Contract. In other words, the Defendants pleaded general allegations of conduct, failures and breaches of contract by Motorola of the Lot 2 Contract.

46. It was accepted by the Claimant that this was the position. First, in paragraph 15 of the Amended Reply it pleads that: "The Defendants make various prejudicial and highly contentious allegations in relation to Motorola's conduct in performing and exiting the Lot 2 ESN Contract (paragraphs 2(3), 2(4), 2(9), 2(16), 2(18), 2(31), 20(8), 20(9), 27(4), 36)." Secondly, the Claimant pleads at paragraph 17 of the Amended Reply that those allegations are in breach of the Lot 2 Settlement Agreement and then brought the Lot 2 Application by which it sought a preliminary issue as to whether the Defendants' allegations in paragraphs 2(9), 2(31), 27(4)(d), 36, 41A(2)(i), 82(4)(a) and 86(7) of the Amended Defence were in breach of the Lot 2 Settlement Agreement and should therefore be dismissed.

47. Those allegations have been pleaded since the Defence was pleaded on 23 May 2024. When I dealt with contested disclosure issues on 18 September 2024, I considered disclosure Issue 9 which was originally in these terms in the List of Issues for Disclosure ("LoIFD"):
    a. On the Claimant's formulation: "Whether the asserted need for extensions to the Blue Light Contracts is attributable to any failure by the Claimant rather than the Defendants. [The Defendants] rely upon the timing of MSUK's withdrawal from Lot 2 and the terms on which that withdrawal was effected.".
    b. On the Defendants' formulation: "Whether the asserted need for extensions to the Blue Light Contracts is attributable to any conduct of the Claimant.".

48. The explanation given in the LoIFD was:
    a. By the Claimant: "The Claimant maintains its position on this issue, as set out in its 7 August 2024 letter. We suggest the matter be revisited in light of any amendments to the relevant sections of the Defendants' pleaded case (as set out in its Amended Defence).".
    b. By the Defendants: "The Claimant's position has been to revert to its first proposals for the formulation of Issue 9 back on 17 July 2024, with some further wording added on 25 July 2024 which it has since insisted upon. The Defendants have amended the description of this issue to properly reflect the Defendants' pleaded case, and suggest that the following paragraph references of the Amended Defence are added to the LoIFD: [2(18)], [2(25)], and [36]. We also see no need for the second sentence in the description of this issue.".

49. That issue was said to arise out of paragraphs 82(4) and 83(3) of the Amended Defence. Paragraph 82(4) of the Amended Defence was pleaded as follows:

> "(4) At trial, the Defendants will refer to the CMA's Report, and facts and matters referred to therein, addressing (inter alia):
> a. The previous arrangements and extensions in respect of the relevant Blue Light Contracts which demonstrate that Defendants' conduct was reasonable, that there was no relevant "failure" on the part of the Defendants and that the cause (and/or principal and/or material cause) of the need for the previous arrangements and extensions following the original procurement of the ESN was (and is) the conduct, failures and defaults of the Claimant and/or Motorola (and the other appointed ESN providers).
> b. The economic and technical reasons why a change of contractor would, inter alia, result in incompatibility and/or disproportionate technical difficulties.
> c. The reasons why a change of contractor would cause significant inconvenience and duplication of costs."

50. At the hearing on 18 September 2024 I expressed concern about how the terms of Issue 9 were derived from the pleading in paragraph 82(4). I therefore adjourned the

question of whether to order Issue 9 for further consideration with directions for the Defendants to serve submissions by 23 September 2024 and the Claimant to respond by 25 September 2024.

51. In their submissions on 23 September 2024, the Defendants re-phrased Issue 9 as follows:

> "Whether the asserted need for extensions to the Blue Light Contracts is attributable to any conduct of [the Claimant] rather than [the Defendants], including (i) the change of the technology to deliver the ESN Lot 2 Contract; (ii) representations by the Claimant to the Defendants as to the timeline of its delivery of the ESN Lot 2 Contract; and (iii) the limited utility of the technology used to deliver the ESN Lot 2 Contract following the Lot 2 Termination Agreement."

52. In its response submissions on 25 September 2024, the Claimant raised the fact that the Lot 2 Application was to be made and proposed that, in those circumstances, the dispute on Issue 9 should be deferred for consideration following the resolution of the Lot 2 Application. The Claimant said that this "will give the Defendants a period to seek permission to amend, if they wish to advance the unpleaded contentions now put forward".

53. The Claimant issued the Lot 2 Application on 30 September 2024.

54. At a hearing on 16 October 2024, I ruled against Issue 9 being an issue under paragraph 82(4) as those were not matters clearly pleaded in that paragraph and disclosure needed to be given by reference to the pleaded issues. I therefore limited the disclosure under Issue 9 to paragraph 83(3) which pleaded conduct in relation to the timing of MSUK's withdrawal from the Lot 2 ESN Contract and the terms on which that withdrawal was effected.

55. On 23 October 2024 the Defendants issued the Defence Amendment Application with a draft Re-Amended Defence which did not include the amendments now sought in paragraph 27(4). I then heard the Lot 2 Application on 6 November 2024 and on 7 November 2024 made an order dismissing the Lot 2 Application for a preliminary issue and gave directions for the Defence Amendment Application. In their submissions for the Lot 2 Application the Defendants indicated that they wished to submit a further draft Re-Amended Defence and the directions included a provision for them to do so. They then provided the current version of the Re-Amended Defence on 19 November 2024.

56. I have set out the history because, although this is a late application as, in particular, it comes after pleadings have been closed, the need to amend the Defence has been tied up with the other matters, including the Lot 2 Application. In those circumstances, the comparative lateness of the application is explicable because it

developed from disclosure CMCs in September and October 2024, particularly on 16 October 2024. The application was then made on 23 October 2024 and, absent the Lot 2 Application, would otherwise have been dealt with in November 2024. I accept the Defendants' submission that this is not in reality a "new case" but one of which the Claimant has been aware since the original Defence.

57. I do not consider that this is a "very late" application. I have read and carefully considered the sixth witness statement of Ms Vernon and, in fairness, she says at paragraph 141 of that witness statement that the draft amendments are not particularised to a sufficient degree to have a full view of the impact on the trial listing, but she raises concerns that there will not be sufficient time within the current eight day listing for these issues to be dealt with. In my judgment, the trial of the new allegations if narrowed and concisely particularised can be dealt with in the existing trial window. It is evident from Ms Vernon's sixth witness statement that the Claimant knows the points it wants to plead by way of an Re-Amended Reply. I consider that disclosure can be narrowed and that there will be limited witness evidence. My current view is that the issues are likely to be dealt with as matters of fact and without expert evidence. On that basis, with appropriate case management, I consider that the currently pleaded allegations, concisely particularised, can be dealt with in the existing trial window.

58. I now turn to the amendments which are essentially to be found in paragraph 27(4) of the draft Re-Amended Defence. The other amendments essentially rely on and are dependent on the new amendments in paragraph 27(4): see paragraphs 2(37)(ba), 29, 30(1), 63, 66(3A), 68(1), 72(1), 72(2), 74(1), 75, 76(1), 79(4), 82(4)a, 83(3), 85, 86(1), 86(7) and 91(a)(iii). In addition, the amendments also expand the reliance on paragraph 36 which already pleads that "the issue of the 2024 DNSDN, [was] necessary due to the fact that Motorola did not timeously or effectively achieve the outputs required under the Lot 2 ESN Contract, and the termination of the Lot 2 ESN Contract."

59. In the course of argument I raised concerns about the Defendants' amendments at paragraph 27(4)(e) relating the Wave 7000. Any issues with Wave 7000 were prior to the agreed variation in 2018/2019 to substitute Kodiak for Wave 7000. Their impact on matters relating to the 2024 DNSDN seemed to me to be largely historic issues, given the agreed variation to substitute Kodiak and of no direct relevance to the Defendants' case on the PCR. After taking instructions, Leading Counsel for the Defendants sensibly agreed that they would not pursue the allegations for breach of contract in relation to Wave 7000. On that basis I do not give permission for the amendments to paragraph 27(4)(e).

60. In relation to the proposed amendments in paragraphs 27(4)(h)(i) and 27(4)(h)(ii), there is an issue between the parties as to the relevance of the matters pleaded to the Defendants' case under regs.32 and 72 of the PCR. I do not intend to pre-judge the

merits of the amendments except to say that, at this stage, I consider that they have a real as opposed to a fanciful prospect of success, which is sufficient for present purposes, as explained in *Elite*.

61. I do, however, have concerns about the particularisation of certain allegations in paragraphs 27(4)(h)(i) and 27(4)(h)(ii). In these paragraphs the Defendants plead, first, broad allegations of breach but then say: "At trial, the Defendants will refer, amongst other things, to:" and then list a number of particulars of the alleged breach before setting out the terms allegedly breached. In my view, particularly for an amendment at this stage, it is necessary for the Defendants to set out concise particulars of the breach alleged and those matters should be treated as particulars, not as a non-exclusive list of documents.

62. In paragraph 27(4)(h)(i) one of the matters relied on at sub-paragraph (iv) is "Motorola's 'Delivery Improvement' proposals related to security in June-July 2021". Similarly, in paragraph 27(4)(h)(ii), sub-paragraphs (i) to (iii) rely on (i) the Remedial Advisor 'Engagement Observations & Recommendations' report produced by Thought Works dated April 2021, (ii) the IBM Report dated 26 May 2021, (iii) Motorola's 'Delivery Improvement' proposals related to infrastructure, defect management and test automation in June-July 2021.

63. I do not consider that these broad references to documents are an appropriate way to give concise particulars for the proposed amendment. Not without some hesitation, I have decided that, on balance, I should give the Defendants a final chance to provide the necessary concise particulars rather than disallow those proposed amendments. I will therefore give the Defendants a final limited period until 3 January 2025 to set out a concise summary of the allegations to be derived from those documents. I do not give permission for those amendments and will disallow those proposed amendments unless that is done.

64. As discussed at the hearing on 18 December 2024, this matter will then come back for a CMC in very early January 2025 and therefore the Defence Amendment Application is adjourned and I will then give the necessary directions to case manage these amendments until trial. I will also consider the other applications, to the extent still material, at that hearing.

Conclusion

65. Accordingly, for the reasons set out above, I give permission to re-amend the Amended Defence as set out in the draft filed on 19 November 2024, except that:
    (1) permission is refused for the re-amendment to paragraph 27(4)(e)(i), (ii) and (iii);
    (2) permission is granted for the re-amendment to paragraph 27(4)(h)(i) on the basis that the words "At trial, the Defendants will refer, amongst other things, to:" are deleted and that sub-paragraphs (i) to (vi) are re-phrased as "Particulars" and that sub-paragraph (iv) is drafted to include a concise summary of the particular

allegation derived from "Motorola's 'Delivery Improvement' proposals related to security in June-July 2021";

(3) permission is granted for the re-amendment to paragraph 27(4)(h)(ii) on the basis that the words "At trial, the Defendants will refer, amongst other things, to:" are deleted, that sub-paragraphs (i) to (iv) are re-phrased as "Particulars" and that sub-paragraphs (i) to (iii) are drafted to include a concise summary of the particular allegations derived from (i) the Remedial Advisor 'Engagement Observations & Recommendations' report produced by Thought Works dated April 2021, (ii) the IBM Report dated 26 May 2021, (iii) Motorola's 'Delivery Improvement' proposals related to infrastructure, defect management and test automation in June-July 2021.

66. The Defendants are to provide a further draft Re-Amended Defence in accordance with the permission given by 3 January 2025 and the Defence Amendment Application is adjourned to the further CMC, when further directions will be given in relation to and arising from the amendments.

67. The Strike Out Application, the Reply Amendment Application and the RFI Application are adjourned to the further CMC.

68. I give liberty to apply and reserve the costs in relation to the Defence Amendment Application.