Neutral Citation Number: [2019] EWHC 2050 (TCC)

Claim No: HT-2015-000219

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

Date: 26 July 2019

B e f o r e:

SIR ROBERT AKENHEAD

(1) AEW EUROPE LLP
(2) TRUSTEE 1 FB LIMITED
(3) TRUSTEE 2 FB LIMITED

Claimants

- and -

BASINGSTOKE AND DEANE BOROUGH COUNCIL

Defendant

- and –

NEWRIVER LEISURE LIMITED

Interested Party

Michael Bowsher QC and Ewan West (instructed by Bryan Cave Leighton Paisner LLP, Solicitors) for the Claimants
Jason Coppel QC and Patrick Halliday (instructed by Womble Bond Dickinson LLP, Solicitors) for the Defendant
Fergus Randolph QC (instructed by Addleshaw Goddard LLP) for the Interested Party

Hearing dates: 16-17 July 2019

Approved Judgment

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

Introduction

1. This is a public procurement case which brings into focus the remedy available in certain cases of statutory infringement of a declaration of ineffectiveness of a contract entered into by a public authority required to comply with the Public Contract Regulations. A Preliminary Issue has been ordered to be heard which raises issues as to the circumstances in which the remedy of the declaration of ineffectiveness can and should be granted.

2. Basingstoke and Deane Borough Council ("Basingstoke") owns Basingstoke Leisure Park ("the Leisure Park") which for a number of years to date has hosted a number of leisure facilities, including a multiscreen cinema, swimming pools and lagoon area with various features (sometimes called the "Aquadome"), gym facilities, an ice rink, restaurants, bowling alley, bowls, a skiing and skydiving facility, bingo and the Milestones Museum. The Leisure Park is away from the town centre. The Leisure Park was set up in the 1990s with most of the larger facilities let on 100-150 year ground leases. Basingstoke in Hampshire is well located in terms of road and rail.

3. There came a time by 2011-2012 when Basingstoke began to consider in detail the possibility of developing (or redeveloping) and the regeneration of the Leisure Park. In that respect it retained a number of professionals including a firm called Montagu Evans who were and are planning development specialists to assist it. Because this was going to involve a public procurement which was subject to the Public Contracts Regulations 2006 as amended, a notice had to be and was posted in the Official Journal of the European Union (the "OJEU Notice") on 21 June 2013. Although there were numerous expressions of interest for the initial stage of the tendering process (the Invitation to Submit Outline Proposals ("ISOP") stage), only 2 bids were submitted apparently in accordance with Basingstoke's published evaluation criteria. One of those bidders was the Interested Party in this case, Newriver Leisure Ltd ("NRL"). Although both bidders were invited to proceed to the second stage which involved the submission of detailed proposals, only NRL submitted a final, more detailed bid. Negotiations proceeded with NRL and as from 2 April 2015 NRL and Basingstoke proceeded on the basis of an "Exclusivity" agreement.

4. Later in 2015 NRL proposed that what was described as a "more bold scheme" could be developed which would effect "a complete regeneration and expansion of the leisure offer but this would include a greater level of retail on site" (Paragraph 6.5 of Basingstoke Cabinet papers for a meeting held on 12 April 2016). Proposals for this scheme began to be developed and were submitted by April 2016. A report was prepared (the Cabinet Report) to be laid before the Basingstoke Cabinet at its meeting on 12 April 2016 which set out NRL's latest proposals in relation to the proposed development which involved the complete redevelopment of the existing Leisure Park such that the leisure facilities would double in size (presumably over and above that which currently then existed) and be restructured into a series of leisure zones and, as Paragraph 1.6 of the Cabinet Report indicates, "up to 300,000 sq ft of retail space, provided as a designer outlet centre [would] be incorporated". The Cabinet Report indicated that legal advice from solicitors and Leading Counsel had been obtained in relation to, amongst other things, whether the proposal "remained within the procurement process" (Paragraph 15.1). As indicated in the witness statement of Mr Bovis, the Cabinet resolved to follow the recommendations of the Cabinet Report to the

effect that Basingstoke would enter into Heads of Terms with NRL and into a Development Agreement and Lease in respect of the Leisure Park redevelopment. The Cabinet decision became effective from 14 June 2016 upon the decision of Basingstoke's Overview and Scrutiny Committee.

5. Either by late 2015 or at some stage in 2016, the first named Claimant, AEW Europe LLP ("AEW"), acquired or set up various retail investment properties in Basingstoke (Festival Place) and, as it became aware of the later proposals either generally or in detail, its solicitors, Berwin Leighton Paisner LLP ("BLP") began to contact Basingstoke from early December 2016 onwards, as is evident from its letter dated 13 October 2017 to Basingstoke. As that letter makes clear, AEW had been having concerns as to the conduct of the procurement following a statement issued publicly by Basingstoke in April 2016 to the effect that the procurement up to that time had been conducted in a compliant manner.

6. The negotiations which culminated in the Development Agreement which was entered into on 19 March 2018 between Basingstoke and NRL had started after the Overview and Scrutiny Committee's decision such that, as Mr Bovis said, by January 2018 there was substantive agreement in relation to Development Agreement, albeit that there were some minor and non-material alterations before it was formally entered into. This Agreement will be considered in some detail later in this judgment.

7. AEW and the second and third named Claimants, said in their pleadings with others to be the owners and managers of the existing Festival Place retail facility in the centre of Basingstoke, issued proceedings against Basingstoke on 17 September 2018 in this Court seeking, amongst other things, a "declaration of ineffectiveness in respect of the March 2018 Contract" as well as damages.

The Proceedings

8. The Re-Re-Amended Particulars of Claim, so far as is material, makes it clear that the Claimants did not seek to participate in the Procurement in the 2013/2014 period (Paragraph 16). It sets out some of the history referred to above, as well as extensive assertions relating to the disclosure or non-disclosure of certain documents. They assert that, as a consequence of the Public Contract Regulations, Basingstoke was "only entitled to entertain bids that fulfilled the requirements identified in the OJEU Notice and further is prohibited from entertaining any bid or contracting on the basis of any bid that involves any material change from the scope of works and/or services as identified in the OJEU Notice" (Paragraph 56). They assert (Paragraph 58) that they are to be considered as "economic operators" within the statutory definition to whom the statutory public procurement obligations were owed.

9. Although there are other complaints (such as what are said to be unlawful failures to provide information and/or documents (Paragraph 68 (a)) and the unlawful grant of state aid (Paragraphs 77-80), which are not material to the Preliminary Issue, the allegations of breach are contained in Paragraphs 74-75 relating to the "Unlawful procurement process and/or award of the March 2018 Contract". It is these breaches which are said to give rise to the entitlement to the declaration of ineffectiveness under the 2006 or 2015 Public Contract Regulations.

10. In essence, and as confirmed and developed by Mr Bowsher QC on behalf of the Claimants at the hearing, the case is predicated upon the pleas that (a) the original OJEU Notice would only permit retail development at the Leisure Park which was "minor and ancillary to the construction and operation of a leisure facility" (Paragraph 74 b of the Claimants' pleading) such that retail tenants would be "anticipated to sell goods related to meeting customers' leisure needs" and that "any retail development (if included) must support the main use, which was leisure…", (b) the OJEU Notice "did not commence procurement for the construction and/or operation of the retail facility at the Leisure Park" (Paragraph 74 c), and (c) "...the provision of 300,000 sq ft of retail space provided for in the March 2018 Contract would be a very substantial change from the terms of the procurement process initiated by the OJEU Notice".

11. The original Particulars of Claim pleading was served on 24 September 2018 with the amendments coming on 28 November 2018, 9 May and 5 July 2019 and the Defence of Basingstoke was served on 21 December 2018, amended on 12 July 2019. In summary in relation to the Preliminary Issue matters, Basingstoke argued that the claim for a declaration of ineffectiveness was misconceived because the "Contract was advertised and a tender process ensued, so the first ground for ineffectiveness is inapplicable even if (which is denied) the Contract in its final form differed from what was advertised" (Paragraph 4(5)). At Paragraph 69 and following, Basingstoke effectively asserted that the contents of the OJEU Notice were sufficiently broad to cover the development envisaged by the Development Agreement.

12. By Order dated 17 December 2018 NRL was added as an "Interested Party", submitting its Statement of Case on 24 January 2019, broadly endorsing the contents of Basingstoke's Defence but referring in some detail to the Development Agreement. It asserted that from as early as November 2016 the first named Claimant had stated that it would oppose the redevelopment of the Leisure Park "through the planning process" (Paragraph 10).

13. It is clear that the redevelopment of the Leisure Park is on hold due to these proceedings, as confirmed by Mr Bovis (Paragraph 29). Notwithstanding this, the proceedings have now been extant for some 10 months. Unsurprisingly, perhaps, Basingstoke, supported by NRL, applied for there to be a preliminary issue, with Mr Justice Fraser ordering on 16 April 2019 so far as is material that there should be a preliminary issue: "whether, assuming the breach of procurement law alleged by the Claimants, the facts of the claim are capable of giving rise to grounds for a declaration of ineffectiveness (in the light of the arguments pleaded in summary at paragraph 4 (5) of the Defence)". He accepted, as recorded at Paragraph 2 of the transcript, that the issue would have to be "slightly tweaked". However, this led to further extensive discussions before the Court at a later date before Mr Justice Waksman on 16 May 2019 whereby the following was ordered:

> "The same Preliminary Issues Trial shall proceed on the basis of an assumption that the contract entered into by the Defendant and Interested Party that is the subject of these proceedings departs from the contract sought by the tender process to such an extent that it is a materially varied contract which was not actually the subject of the previous tender process and would have required a fresh process in accordance with the applicable regulations".

14. During the hearing of the Preliminary Issue and at the urging of the Court, the parties with the Court's approval produced an "Agreed Formulation of the Preliminary Issue"

which sought to combine the formulations in the orders made by Fraser J and Waksman J as follows:

> "Whether, assuming the breach of procurement law alleged by the Claimants (namely that the Development Agreement departs from the contract sought by the tender process to such an extent that it is a materially varied contract which was not actually the subject of the previous tender process and would have required a fresh process in accordance with the applicable regulations), the facts of the claim are capable of giving rise to grounds for a declaration of ineffectiveness (in the light of the arguments pleaded in summary at paragraph 4(5) of the Defence)."

15. Mr Justice Fraser's order of 16 April 2019 called upon the parties to "exchange… signed statements of all witnesses of fact on whom they intend to rely on the Preliminary Issues Trial". The only witness statement was that of Mr Bovis, the contents of which were initially challenged but at the trial there was broad agreement about small elements which should be considered as excluded together with some matters which were described as "contentious".

16. Before Mr Justice Waksman on 16 May 2019, there was extensive discussion (over 2 hours or more) about the basis on which the preliminary issue trial should proceed with a fundamental issue being apparently accepted as whether or not the decision of Mr Justice Mann in **Alstom Transport v Eurostar International Limited** [2011] EWHC 1828 (Ch) was applicable. Whilst none of the parties suggested that the decision was wrong, AEW argued that the current case did not fall within Mann J's decision whilst the other two parties argued that it did. There was a relatively detailed consideration of Mann J's judgment and, indeed, the assumptions made in the order which he made about the preliminary issue are based on assumptions made in that judgment.

17. Mr Justice Waksman gave an oral judgment, but due to a mechanical recording breakdown, the judgment was not recorded. The legal teams for Basingstoke and NRL produced a note of the oral judgment, which was not agreed by AEW's legal team, albeit it was not positively or even specifically challenged as to its wording. The note went to Mr Justice Waksman who produced his slightly amended but approved draft. I will treat this as a proper note of the judgement which he gave on 16 May 2019. He specifically referred to relevant paragraphs in the **Alstom** judgment. He referred to Paragraph 27 which referred to there being assumptions that "there was a materially varied Contract which required a new tender process if that Contract was to be proper within the Regulations". He recognised that the **Alstom** case involved a "qualification scheme", which the current case does not. He recognised that the central question in **Alstom** was "as to whether it is right (or sufficiently arguably right to prevent striking out) that the alteration of the Contract makes that Notice [of the qualification scheme] irrelevant, with the effect that the relevant Notice was in fact not given". He said that the position was "the same in this case" and that even "if one can show that any Notice was given, was that good enough?". To some extent at the very least, Mr Justice Waksman considered and analysed in some detail Mann J's judgment, referring to the use by Mann J of the expression that the test was "mechanistic" and relying on the fact that the Notice had "sparked the competition" in that case. He said that he did not read the current case (presumably on the preliminary issue) as different to that decided by Mann J and that he had to "give effect to the decision made in that case which is assumed to be correct unless it is clearly wrong". He said that it did not seem to him that the procedure or current case was different as had been argued by Mr Bowsher QC.

He said that at "the end of the day, there is considerable force in putting this as a comparison only between the original Notice in the Contract to see if it is a Notice objectively capable of being the prior Notice for the contract in this case" going on that even "if the Claimant here may be on stronger ground that there has been material alteration here, that is an ancillary point, the issue being whether the Notice sparked the competition in this case". He continued: "it may be that Alstom was different because the qualification notice was more generic. But that is the heart of the issue – the comparison between the Notice and the contract". He rejected the application of the Claimants for very substantial additional disclosure.

18. I have to say that I would not treat Mr Justice Waksman's judgment or ruling as finally deciding any part of the Preliminary Issue under consideration, although I can give some due weight to the views which he expressed. I do not consider that he was deciding that notices relating to the qualification system are or can be equated to the OJEU Notice in the current case.

19. Mr Bowsher QC argued that the reference in the finally formulated Preliminary Issue to "the facts of the claim" meant the facts of the claim as pleaded by the Claimant. In my judgment, that is wrong. That expression meant the facts of the case, obviously as relevant to the Preliminary Issue. That is clear from the formulation of the issue itself, the absence of any wording which qualifies the expression and the order that the parties exchange witness statements.

The Law

20. Although the public procurement in this case was initiated at a time when the Public Contracts Regulations 2006 as relevantly amended in 2009 were in effect, it is common ground (and rightly so) that for all practical purposes the Public Contracts Regulations ("PCR") 2015 are in substance the same. Counsel all referred to paragraphs in the 2015 PCR and I will do the same.

21. It is common ground that (a) Basingstoke was a "contracting authority" in this case which was obliged to comply with the relevant PCR, (b) it owed duties to "economic operators", albeit that there is a very real issue as to whether any of the Claimants have any locus in the current proceedings as economic operators, (c) none of the Claimants became involved purportedly or otherwise as actual or potential economic operators at the time that this procurement started or indeed much before 2016 and (d) the relevant type of procurement procedure adopted by Basingstoke here was the "negotiated" type.

22. The more relevant regulations are as follows:

"18 (1) Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

26 (1) When awarding public contracts, contracting authorities shall apply procedures that conform to this Part.

(2) Such contracts may be awarded only if a call for competition has been published in accordance with this Part and the Public Contracts Directive…

(4) Contracting authorities may apply a competitive procedure with negotiation or a competitive dialogue in the following situations…

(8) Subject to paragraph (9) the call for competition shall be made by means of a contract notice in accordance with regulation 49…

29 (1) In competitive procedures with negotiation, any economic operator may submit a request to participate in response to a call for competition by providing the information for qualitative selection that is requested by the contracting authority.

(2) In the procurement documents, contracting authorities shall-

(a) identify the subject-matter of the procurement by providing a description of their needs and the characteristics required of the supplies, works or services to be procured…

(11) Only those economic operators invited by the contracting authority following its assessment of the information provided may submit an initial tender which shall be the basis for the subsequent negotiations…

(14) The minimum requirements and the award criteria shall not be subject to negotiation…

(16) During the negotiations, contracting authorities shall ensure equal treatment of all tenderers and, to that end –

…(b) they shall inform all tenderers, whose tenders have not been eliminated under paragraph (19), in writing, of any changes to the technical specifications or other procurement documents, other than those setting out the minimum requirements; and

(c) following any such changes, they shall provide sufficient time for tenderers to modify and re-submit amended tenders, as appropriate…

(19) Competitive procedures with negotiation may take place in successive stages in order to reduce the number of tenders to be negotiated by applying the award criteria specified in the contract notice, in the invitation to confirm interest or in another procurement document.

49. Contract notices shall contain the information set out in Part C of Annex 5 to the Public Contracts Directive and shall be sent for publication in accordance with regulation 51.

72 (1) Contracts…may be modified without a new procurement procedure in accordance with this Part in any of the following cases…

(9) A new procurement procedure in accordance with this Part shall be required for modifications of the provisions of a public contract…during its term other than those provided for in this regulation.

98 (1) Paragraph (2) applies if -

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

(b) the contract has already been entered into.

(2) in those circumstances, the Court –

(a) must, if it is satisfied that any of the grounds for ineffectiveness applies, make a declaration of ineffectiveness in respect of the contract unless regulation 100 requires the Court not to do so;

(b) must, where required by regulation 102, impose penalties in accordance with that regulation …

99 (1) There are three grounds for ineffectiveness.

(2) The first ground

Subject to paragraph (3), the first ground applies where the contract has been awarded without prior publication of the contract notice in any case in which Part 2 required the prior publication of a contract notice…

100 (1) Where the Court is satisfied that any of the grounds for ineffectiveness applies, the Court must not make a declaration of ineffectiveness if –

(a) the contracting authority or another party to the proceedings raises an issue under this regulation; and

(b) the Court is satisfied that overriding reasons relating to a general interest require that the effects of the contract should be maintained.

(2) For that purpose, economic interests in the effectiveness of the contract may be considered as overriding reasons only if in exceptional circumstances ineffectiveness would lead to disproportionate consequences…

101 (1) Where a declaration of ineffectiveness is made, the contract is to be considered to be prospectively but not retrospectively, ineffective as from the time when the declaration is made and, accordingly, those obligations under the contract which at that time have yet to be performed are not to be performed.

102 (1) Where the Court makes a declaration of ineffectiveness, it must also order that the contracting authority pay a civil financial penalty of the amount specified in the order."

23. The single most important case referred to by all parties and relied upon by Basingstoke and NRL was the first instance decision of Mr Justice Mann in **Alstom**. The case related to a public procurement exercise under the Utilities Contracts Regulations 2006 (as amended in 2009), these being comparable to the PCR, relating to the provision of railway stock for the Channel Tunnel. This was procured under a tendering system known as the "qualification system" permitted by Regulation 16 which materially stated:

"(1) Subject to regulation 17, for the purposes of seeking offers in relation to a proposed contract a utility shall make a call for competition.

(2) The requirement under paragraph (1) to make a call for competition is satisfied –

(a) in the case of a contract to be awarded using the restricted procedure or the negotiated procedure-

…(ii) if a notice indicating the existence of a qualification system for economic operators has been sent to the Official Journal in accordance with regulation 25(17) and the requirement referred to in paragraph (5) is satisfied…"

24. Mann J described this qualification procedure as follows at Paragraph 25 of his judgment:

"In this case the proposal was for the negotiated procedure (defined elsewhere) and there was a qualification system. Under such a system the notice referred to reg. 16(2) (a) (ii) tells potential tenderers that within a given timeframe the utility in question may be proposing contracts of certain kinds, that there is a scheme of qualification for those who might wish to tender, and potential tenderers are thereby invited to demonstrate that they qualify to be in a pool of tenderers for that sort of work. The utility then selects tenderers and deals with them in accordance with the requirements of the Regulations. That is what happened in this case. Pursuant to a notice both Alstom and Siemens qualified and thereafter were selected and embarked on the tendering process. There is no dispute thus far. I shall call this form of notice a "qualification notice".

25. The case was concerned with proceedings commenced by Alstom seeking a declaration of ineffectiveness in relation to tenders for a new generation of trains to run in the Channel Tunnel. Eurostar, a "utility" under the relevant regulations, having lodged an OJEU Notice (or its equivalent) and run a competition on the basis of securing tenderers for a qualification system of procurement, had invited both Siemens and Alstom (who had succeeded in qualifying) to tender and Eurostar had entered into contract with Siemens. Initially, Alstom's injunction application to restrain Eurostar from entering into such a contract had been dismissed by Mr Justice Vos in a reasoned judgement. Eurostar applied to strike part of Alstom's claim, namely the claim for a declaration of ineffectiveness. The basis of that application (Paragraph 4) was that "the necessary grounds do not exist for the application of the remedy of a declaration of ineffectiveness". The Court proceeded (Paragraph 5) on the basis of an assumption that the contract between Eurostar and Siemens departed from the contract sought by the tender process to such an extent that it is a "materially varied contract which was not actually the subject of the previous tender process and would have required a fresh process in order to fall within the regulations in question." In effect the same assumptions have been adopted for the purposes of the Preliminary Issue with which this Court is concerned.

26. Mann J summarised Alstom's case (Paragraph 27) that no relevant notice was or could have been served in respect of the contract entered into and based on the assumptions adopted on the striking out application, the tender process would have required a fresh notice under Regulation 16 of the Utilities Contracts Regulations. Having reviewed the

various arguments by Eurostar and Siemens about the different notices required, Mann J said at Paragraph 34:

> "Because of the assumptions on which this application proceeds, I have to consider this matter on the footing that the differences between the final form of contract and the tender conditions were such as to make the contract sufficiently materially different as to require a new tender process. The defendants accept the factual assumption within that, and Eurostar accepts the underlying legal principle in its defence. It is clear to me that a notice of the qualification scheme is capable of being a notice required to be given for the purposes of the first ground [meaning the first ground for making a declaration of ineffectiveness] and no one disputes that such a notice was given in this case. So the central question in this case is whether it is right (or sufficiently arguably right to prevent striking out) that the alteration of the contract makes that notice irrelevant, with the effect that the relevant notice was in fact not given."

27. The judge addressed arguments made by Counsel for Alstom to the effect that "a contract which has stepped beyond the bounds of the tendering process is one which should be treated like an illegal direct award" and that any "argument which seeks to look purely at the initial notice of the qualification scheme fails to give effect to a necessary connection between the notice and the contract, which connection is absent on the assumed facts of this case." The judge rejected this argument at Paragraph 38 and following:

> "38. It seems to me that this argument does not give sufficient weight to the mechanism that Parliament has adopted in the Regulations, and also Directive 2007/66/EC, which also spoke in terms of the giving of a notice. Reg 45K does not speak in terms of a failure of the competitive process generally. It specifically ties itself down to the failure to give a prior notice. In the present case a contract notice was not required. It was open to Eurostar to adopt the qualification procedure instead. It did so. The first step in that (for present purposes) is the publishing of the notice required by Reg 16(2)(a)(ii). Such a notice was published. It preceded the competition between Alstom and Siemens. It is not said that no such notice was given; indeed it is implicit in the Particulars of Claim that such a notice was given, because paragraphs 4 and 5 of the Particulars in the first action, adopted in this action, plead that Eurostar used a qualification system. Nor is it said that the notice was in terms incapable of applying to the final contract. Qualification notices are in such general terms that that would be a difficult thing to say in this case. No complaint is made about the notice. The pleading goes on to refer to an invitation to negotiate, and the essence of the complaint about the final contract is that it is said to demonstrate that Eurostar's requirements had materially changed. But that does not affect the force and effect of the notice, or its applicability. So the complaint is not, and in my view cannot be, that a required notice was not given. It was given. The Regulations required a notice. It could have been in one of the three forms referred to in Reg 16. Eurostar gave a qualification system notice (and then, if it is relevant, selected the potential tenderers from the pool of the qualified, for the purposes of Reg 16(5)). No other notice was required. Any divergence from the proper path which led to an aberrant contract as is assumed

in this case is a breach of subsequent procedure, not consequential upon a failure to give the notice. There is therefore no failure under ground 1.

39. Miss Hannaford sought to rely on what she said was the absurdity of approaching this question without requiring a link between the required notice and the final contract (which link, she said, was broken by the material alterations in the final contract). She said that if the situation were as the defendants would say it was, one could have a qualification notice, and then have the utility taking tenderers from outside the pool and escaping ineffectiveness because of what would, on those facts, be a wholly irrelevant notice, albeit a notice which ostensibly covered the contract in question (because of the generality of the description of the activities that is contained in an qualification notice).

40. In my view Miss Hannaford is right about a link, but only to a limited extent. Any notice which is relied on by the utility as being part of its compliance with its duty to economic operators must be a notice which is objectively capable of being a relevant notice. Mr Howell sought to say that any qualification notice would suffice in the present case provided that it was given before the contract was concluded, and referred to an intention to contract within the period of the notice. Thus he relied (so far as he had to) on a qualification system notice which was placed in the *Official Journal* in May 2010, which was well into the negotiation and tender process. He said he could also, as a matter of analysis, have relied on a notice given one day before the actual contract. The purpose of the notice, he said, was to give notice of the competition, and to that end it did not matter when it was given provided it was adequate in form.

41. Those are unattractive submissions. It cannot realistically have been intended that a utility could rely on a notice which was given at a time when, on the facts, it had nothing whatsoever to do with what had been going on in relation to the contract in question. While the test of the existence or absence of a notice is a mechanistic test, it cannot be taken to be so mechanistic as to produce a test which is pure form and no substance at all. Such a test would be pointless. Mr Howell suggested it would have some point because it would give notice that there is a competition, but that would be a largely pointless indication if the notice were given (as Mr Howell said it could be given) very shortly before the contract.

42. Be that as it may, Mr Howell does not have to go that far. There has, in my view, to be a notice which is capable of being related to the procedure and the contract. Even so, Alstom cannot satisfy this ground because of the earlier qualification notice which is not only objectively capable of being the prior notice for the competition in this case, it was *actually* the notice which sparked the competition in this case. Even if Miss Hannaford's material alteration case is right, there was still a prior notice. She submitted that in such a case there would be an illegal direct award, and that that should attract the sanction. The trouble with that argument is that that is not how the Regulation operates. It operates by looking to the existence or absence of a notice. That is, as I have observed, a mechanistic test. The benefit of such a test is that it will often be easier to apply, and since the availability or not of the ineffectiveness remedy is

something which calls for clarity if the remedy is to operate sensibly in a commercial context, ease of application is important. The detriment is that it is indeed mechanical, and may not catch some instances where, on the merits, it might be thought the remedy should operate. The mechanics of this test rule out the first ground in this case.

43. I therefore find that ground 1 is not available to Alstom."

28. I will review this case in the Discussion section of this judgment. There are a number of other cases, both European and English, which I will also consider in that section

The OJEU Notice and the Development Agreement

29. All three Leading Counsel invited me to consider and review the content of the OJEU Notice and compare it with the relevant parts of the Development Agreement.

30. The OJEU Notice in itself is in relatively broad terms. Relevant parts of the OJEU Notice are as follows:

(a) Under Section II, which identifies the "Object of the Contract", the "Short description of the contract or purchase" is said to be:

"The Council is seeking a development partner to work with the Council and then to implement a long-term strategy plan for the development of Basingstoke Leisure Park. The Council is looking to establish a partnership which will provide the foundations and commercial/financial basis for securing investment to revitalise existing leisure facilities and also provide new 'destination' facilities"

Under "Total quantity or scope", the following is said:

"The Council is seeking to enter into a long-term regeneration partnership and it is envisaged that the partnership will last up to 15 years, with long leasehold (s) granted to the developer as development phases are delivered. The value of the contract will be ultimately dependent on the scope of the regeneration.

Estimated value excluding VAT:

Range: between 50,000,000 and 150,000,000 GBP".

The duration of the contract or time limit for completion was said to be 180 months from the award the contract."

(b) Section IV identified that the type of tendering procedure was to be "negotiated", that 3-5 tenderers were envisaged and that the award criterion was to be the "most economically advantageous tender in terms of the criteria stated in the specifications, in the invitation to tender or to negotiate or in the descriptive documents".

(c) Section VI, entitled "Complementary Information", contained the following at VI.3:

"Basingstoke Leisure Park is a prime leisure led development opportunity, with the 45 acre site offering significant scope for change. The site is occupied by 12 tenants who provide a range of existing leisure facilities but some are now dated and have suffered from enhanced competition from other leisure facilities. To the south there is a further 8 acres (3.2 Ha) of undeveloped land, although it is subject to environmental constraints.

The Council is seeking a long term development partner who it can work with to create a regional leisure destination and encourage reinvestment within the existing Park, and will also explore the means by which the development opportunity is best pursued, including whether by co-investment or other joint venture arrangement.

This notice is the start of a structured marketing competition to appoint a development partner who will bring forward development and commercial property expertise to help transform the Leisure Park and put it at the forefront of leisure and recreational provision in the region. The project is key to the continued prosperity of Basingstoke and therefore a high priority for the Council.

The development partner will be required to carry out the following key roles:

-Leading in the repositioning of the profile of the Park.

-Pre development activities, to include; securing occupiers, master plan/design evolution, planning, etc.

-Undertake a core development role and apply its expertise and resources to support this.

-Being proactive in creating development and investment opportunities.

-Bringing forward proposals that are deliverable on a phased basis, set against a realistic delivery programme.

The Council recognises that the partnership will need to be based on flexible delivery arrangements, founded on sound commercial principles, which encourages and motivates the development partner to apply its expertise and resources, and to actively promote the Park and pe existing and future opportunities which are capable of delivering the Council's aspirations for the Park.

The development partner will have an exclusivity period to work up a scheme for phase 1. Phase 1 is not defined in terms of land take. Land uses will focus primarily on the preferred uses, namely, leisure, restaurants/cafes/bars, retail (A1), hotel and conference facilities uses. Once Phase 1 is delivered, the development partner will have the ability to draw down other land on the site.

Project documents can be viewed in the data room via the following link…"

31. Although it seems likely that there were other documents the only document in the "data room" which was put forward by any party as having any relevance to this Preliminary Issue was the Invitation to Submit Outline Proposals ("ISOP"). Relevant parts of this document are as follows:

"Executive Summary

- Basingstoke Leisure Park is a prime leisure led development opportunity, with the 62 acre site offering significant scope for change…
- Opportunity to enhance leisure offer to create a facility of significant regional importance.
- Already an established and successful leisure offer present, providing a strong platform for improvement…"

"Introduction

Basingstoke Leisure Park offers a prime development opportunity. Basingstoke…wish to create a regional leisure destination of significance and encourage reinvestment within the existing leisure park facilities. [Basingstoke] is seeking a long-term development partner to realise this vision."

"Leisure Park Strategy & Its Objectives

The objective of the strategy is to encourage regeneration and reinvestment into the Park, and the developer is expected to deliver this. Principles of the strategy are:

1. To seek innovative proposals from parties to create a regional leisure destination within the Council's landholding at the Leisure Park and encourage reinvestment within existing facilities.

2. To enable the whole of the Leisure Park...to be part of any regeneration proposal.

3. To secure a development partner to bring forward holistic development on the Park and offer that party a long term partnership to incentivise them to deliver.

4. To control and steer the nature of development through retention of the Park's ownership and through a governance structure to manage the partnership."

"The Developer's Role

The Council is seeking to enter into a long-term regeneration partnership and it is envisaged that the partnership will last 15 years, with long leasehold(s) granted to the developer as development phases are delivered. The Council expects the etc developer to have financial standing, experience, capacity and vision to:

- Lead in the repositioning of the profile of the Leisure Park.

- Carry out pre development activities: securing occupiers, master plan/design evolution, planning,.

- Undertake a core development role and apply its expertise and resources to support this.

- Be proactive in creating development and investment opportunities.

- Bring forward proposals that are deliverable on a phased basis, set against a realistic delivery programme."

32. Under a heading "Potential Development Uses", it was stated that "The Basingstoke Leisure Park offers scope for a range of new development uses" under which the following table appeared:

USE	COMMENT
Leisure	Required to be the key development component of any proposal. Deliverable and ideally innovative leisure uses are sought. The Council recognises that

	trends in leisure uses change quickly and therefore has no preconceived ideas of what will constitute a modern, strong and attractive leisure offer for the Park.
Restaurants/Cafes/Bars	Anticipated to form an integral part of the modern leisure development mix for the Park
Retail (A1 uses)	If included, must be supporting the main leisure use and be ancillary. Anticipated that retail tenants will sell goods targeted at meeting customers' leisure needs.

Thereunder the following appeared:

> "It is also recognised by the Council that in supporting the financial viability of proposals for the park, schemes could include ancillary supporting and compl[e]mentary uses. The scale of development should reflect the size of the opportunity available, and the Council's ambition to secure a leisure offer of regional significance."

33. There is little else of great relevance in the ISOP other than there being an identification of the tender process and the different Stages including how Outline Submissions (in Stage IB) were to be evaluated. It was then assumed that in later stages there would be Detailed Submissions during which there could be negotiation (Stage 2), followed by a period of "Developer Exclusivity" (Stage 3) followed by the Development Agreement (Stage 4).

34. As seems to be clear, this staged process was followed.

35. The Development Agreement is a substantial and complex document. Counsel primarily referred to Part 1 of Schedule 2 which identified the "Key Development Objectives" as being: "1. To create a high quality regional leisure destination at the Site which is market leading for the south of England. 2. To ensure that the design and architectural of a high standard to ensure that the New Leisure Park and the supporting DOC [Designer Outlet Centre] is a leading destination in the south of England…".Paragraph (3) of Part 2 of the Schedule states that the ratio of floor space of the "leisure uses" to floor space of the DOC "must not be less than 2:1".

Discussion

36. It is noteworthy that the PCR do not specifically legislate for what is to happen when there is a perfectly valid OJEU Notice but the Contract which is let nominally pursuant to the procurement process in question goes beyond what is set out in that Notice. It was unequivocally (and rightly) accepted by Mr Bowsher QC that the OJEU Notice, in itself, was valid and, indeed, there is no complaint about it.

37. There are several previous cases in which there was no call and no OJEU Notice at all in relation to contracts and projects which were the subject matter of the PCR. An example is **Faraday Development Limited v West Berkshire Council and another** [2018] EWCA Civ 2532 where the issue was the consequences of a local authority entering into a development agreement with a developer to carry out development on its own industrial land, this being a public service contract which was the subject matter of the PCR (2015).

38. In **Case C-340/02 Commission v France** [2004] ECR – I-09845, something comparable had occurred where the French Government had drawn up a scheme of works where the first phase related to the provision of a feasibility study, the second phase involved assisting the "Maître d'ouvrage" in various ways and the third phase was for the planning of the works and their execution. The Government issued two notices in the OJEU, one for tenders in respect of a design contest for the feasibility study required in the first phase and the second in relation to the third phase. There was no notice for the second phase and, as the Court said at Paragraph 44, the second phase "was not the subject of a contract notice published in accordance with the rules of that directive", namely the directive which required the provision of OJEU notices. It was not concerned with a declaration of ineffectiveness.

39. Thus, the most relevant authority is the **Alstom** case. It is, rightly, accepted by Mr Bowsher QC for AEW that this case can be considered to have been rightly decided but he argues that it is distinguishable, primarily because the case relates to a procurement on the basis of a "qualification system" rather than that which happened in the current case. The "qualification system" is one where potential suppliers or contractors are qualified by a way of a qualification system and, once having qualified, they can be invited to tender during the lifetime of the qualification system for whatever goods, equipment or services are covered. He says that the difference is highly relevant because what was under consideration there was the operation of the qualification system as opposed to whether what happened under the qualification system was contrary to the original OJEU notice. He produced a helpful chart which showed that in relation to a qualification system there would first be a Qualification OJEU notice announcing the establishment of the tendering process for the qualification system and the selection of suppliers; thereafter once the qualification system had then been established tender documentation will be sent to all suppliers who had qualified without any further notice required in the OJEU with qualified suppliers responding to the tender and, if there was a material variation between what was tendered and the tender documentation provided, a new tender process would be required to be started again but with no new qualification notice required if the contract was capable of being related to the existing system before the contract award.

40. Mr Coppel QC and Mr Randolph QC disagreed and said, whilst recognising that the current case did not involve a qualification system, that in reality and in substance the same principles and practice adumbrated by Mr Justice Mann in **Alstom** were applicable in the current case in terms of deciding whether or not a declaration of ineffectiveness should be made. They point, for instance, to the fact that exactly the same assumptions that are made in the Preliminary Issue in this case were made by the judge in that case and it all comes down to the same thing. They argue that what this Preliminary Issue is primarily about is whether or not the declaratory remedy of ineffectiveness is available even if the assumption in the preliminary issue (that the

Development Agreement departs from the contract sought by the tender process to such an extent that it is a materially varied contract which was not actually the subject of the previous tender process and would have required a fresh process in accordance with the applicable regulations) was right. They say that it is all about the remedy not the breach which is the subject matter of the assumptions. Mr Bowsher QC says that the distinction between remedy and breaches is immaterial but he needs to get over any hurdle created by the **Alstom** decision.

41. I have formed the clear view that Mr Coppel QC and Mr Randolph QC are right and that, even allowing for the assumption within the Preliminary Issue, the declaration of ineffectiveness is unavailable in this case. The **Alstom** case, albeit relating to the Utilities Regulations 2006 and to a qualification system, is based on the same principles and practice as would be applicable in relation to a tender process and, ultimately, contract entered into as is present in this case, namely a negotiated tender. It is clear from Mr Justice Mann's judgment that in substance the same considerations apply. In substance, he said, correctly in my view (primarily in Paragraph 42), that:

(a) There has to be an effective notice "which is capable of being related to the procedure and the contract" awarded.

(b) Regard can be and indeed should be had to the fact that the OJEU notice sparked the competition.

(c) The Regulation (dealing with ineffectiveness) operates by looking to the existence or absence of an OJEU notice which involves the application of a "mechanistic test" the benefit of which is that it will be easier to apply for clarity reasons "if the remedy is to operate sensibly in a commercial context"

42. This becomes clear when one looks at the (relevant) first ground for granting a declaration of ineffectiveness which applies "where the contract has been awarded without prior publication of a contract notice in any case in which Part 2 required the prior publication of the contract notice". Here, as in **Alstom**, a wholly valid OJEU notice was published. There is nothing in Part 2 of the PCR which on analysis requires the giving a further requisite Notice (the "call for competition" in Regulation 26 (2)) in circumstances such as the present where there has been a wholly valid OJEU Notice issued and the contract ultimately let substantially relates to the advertised project.

43. There may well be a remedy available to relevant economic operators in any case where there has been a breach of the relevant regulations, not least a claim for damages. The remedies sections of the regulations are extensive.

44. Mr Justice Mann referred to a "mechanistic test" in effect for determining whether the grounds existed for the granting of a declaration of ineffectiveness. The primary reason for this approach is pragmatism, which takes into account the fact that the declaration of ineffectiveness remedy is a Draconian one which brings to an end an otherwise lawful contractual relationship. This case is a good example: proceedings issued 10 months ago, another year of proceedings probably required to determine the factual background and merit, if any, of the Claimant's claim, the incurring of hundreds of thousands of pounds in terms of costs of the legal proceedings and the consequential economic uncertainty of whether the Leisure Park will start to be redeveloped much before 2022 (four years on from when the contract in question was let). This would be

avoided by the application of mechanistic test. It is legitimate in interpreting statutory regulations such as this to have regard to a realistic approach.

45. The mechanistic test should involve a broad-brush approach. If Basingstoke, having published the OJEU Notice which it did (for a regenerated Leisure Park), then let a contract for 1,000 dwellings on the site, one can readily see that such a contract went so far beyond what was covered by the original Notice that it bore no relation to it at all. I would therefore not go so far as Mr Randolph QC went (Paragraph 51 (ii) of his Skeleton Argument) where he said that the Declaration of Ineffectiveness remedy is only relevant where a contracting authority fails to make a call for competition at all. The Claimants had sought extremely extensive disclosure of documentation for this Preliminary Issue but its application for that was refused and this would not be necessary, as Mr Justice Waksman in the result resolved because the sort of detailed factual and historical investigation envisaged by such disclosure would not be required to be done for a mechanistic test approach.

46. Mr Bowsher QC attached much importance to the principles of transparency and equal treatment called for by the PCR. There is no (and no legitimate) complaint that the original tender process was anything other than transparent. There is now transparency to enable the parties and the Court to do the comparison exercise between the Development Agreement and the OJEU Notice. So far as equal treatment is concerned, the Claimants were not tenderers at the time, and it is not established that all or any of would even wish now to tender on a new competition. The principle of equal treatment here would only be applicable in practice in relation to the Claimants, if they succeeded on this Preliminary Issue and a new tender process was instituted in which the Claimants participated.

47. There clearly is a sufficient and indeed close connection between the OJEU Notice issued in this case and the Development Agreement. Not only did the OJEU Notice "spark" the Development Agreement, they are closely related. It is unnecessary to analyse the Development Agreement in any detail. There is much within the Development Agreement which has been identified as confidential but nothing is given away by saying that Schedule 2 identifies "Key Development Objectives" which bear a close relationship to the ISOP referred to in the OJEU Notice. The same Schedule contains "Key Elements" which reflect publicly available information to the effect that there will be a new leisure park of 500,000 square feet or more as well as new build retail units of between some 166,000 ft.² and 333,000 ft.². It is unnecessary to make a finding that this proposed retail use is within the or outside the purview of the generally worded OJEU notice or of the general wording in the ISOP. One can have a relatively semantic debate as to whether, on their own, the words in the table set out above relating to retail go far enough to cover what the Development Agreement requires NRL to provide or as to whether, taking the OJEU Notice as a whole and the ISOP as a whole, the Development Agreement requirements in relation to retail are within the commercial purview the reasonable tenderer would have thought that the wording meant. What is unchallengeable is the fact that undoubtedly there is a reasonably close relationship between the Development Agreement requirements and the OJEU Notice and the ISOP (incorporated by reference). For instance, it is undoubtedly clear that a substantial majority of the proposed square footage for the new Leisure Park development is leisure.

48. Mr Bowsher QC sought at one stage to argue that essentially what was called for by the OJEU Notice and the ISOP was effectively a refurbishment of what was there. Apart from the (possibly small) fact that this was not pleaded, there is nothing in either document which identifies that the regeneration called for requires simply a refurbishment. Indeed, it is highly arguable that the whole tone of the two documents called for development and regeneration as well as the provision of new "destination" facilities. Innovative proposals were sought and a "holistic" development was called for. There is no doubt that the development and regeneration were to be "leisure led". The only argument, on analysis, available to support Mr Bowsher's other (and pleaded) argument relating to the amount and quality of the retail use, is to be found in the table of Potential Development Uses in the ISOP referred to above in the words that it "must be supporting the main leisure use and be ancillary". It is, at the very least, highly arguable that the retail use referred to in the Development Agreement will support the main leisure use in possibly two ways: the first is to enable the main leisure use to be provided on a financial basis and the second is that customers who come to the Leisure Park will have one more thing to do which is shopping while friends or family use the purely leisure facilities. The use of the word "ancillary" could well be thought to go beyond retail shops which provide products which are entirely leisure based (e.g. swimming costumes for use in the pool, bowls for the bowling alley and bowling green, pens and pencils for use in the Bingo hall (if it is not electronically operated), skates for the ice rink, gym kit, skiwear and the like), not least because it is relatively difficult to differentiate dividing lines between many different types of retail provision.

49. It follows from the above that even making the assumptions required by the Preliminary Issue the declaration of ineffectiveness is not available to the Claimants. The Preliminary Issue is decided in favour of the Defendant and the Interested Party.