Neutral Citation Number: [2019] EWHC 1291 (TCC)

Case No: HT-2018-000078
HT-2018-000258

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/05/2019

Before :

THE HONOURABLE MR JUSTICE STUART-SMITH

- -

Between :

AMEY HIGHWAYS LTD	**Claimant**
- and -	
WEST SUSSEX COUNTY COUNCIL	**Defendant**

- -
- -

Mr Parishil Patel QC and Ms Kelly Stricklin-Coutinho (instructed by **Trowers & Hamlins LLP**) for the **Claimant**
Mr Jason Coppel QC and Mr Joseph Barrett (instructed by **Acuity Legal Ltd**) for the **Defendant**

Hearing dates: 30th April, 1st May and 2nd May 2019

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Approved Judgment

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

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THE HONOURABLE MR JUSTICE STUART-SMITH

Mr Justice Stuart-Smith :

Introduction

1. The Claimant ["Amey"] has brought two sets of proceedings against the Defendant ["the Council"] alleging failures in the Council's procurement of a contract known as "Highways Term Service Contract 2018-2028" ["the Procurement"]. The Procurement was governed by the Public Contract Regulations 2015 ["the PCR"]. The Council decided to award the contract to Ringway Infrastructure Services Ltd ["Ringway"]. Amey's overall score was assessed to be 85.48, which Ringway bettered by just 0.03. By action HT-2018-000078 ["the First Action"] Amey alleged that its score should have been higher than Ringway's and that it should have been awarded the contract.

2. The Council applied to strike out critical parts of Amey's pleaded case. Amey responded by applying for summary judgment on its claim. Those applications were the subject of a judgment which I handed down on 30 July 2018 ["the Interim Judgment"], dismissing each party's application for the reasons there set out: see [2018] EWHC 1976 (TCC). The Council then gave notice on 2 August 2018 that it was "terminating" the Procurement and would start again ["the Abandonment Decision"]. It was the Council's hope and intention that withdrawing the Procurement would defeat any claim that Amey might otherwise have. Amey promptly issued its second set of proceedings by action HT-2018-000258 ["the Second Action"] challenging the lawfulness and effect of the withdrawal.

3. At a case management hearing on 18 December 2018, the Court gave directions consolidating the two actions and directed that there should be a trial of the Second Action and of the effect on Amey's claim in the First Action of the Council's decision to withdraw the Procurement.

4. This is my judgment after the preliminary trial. The parties agreed a list of issues for determination, which are set out at [5] below. Put shortly, the critical issue is whether the Council was right in its hope and intention that withdrawing the Procurement as and when it did would bring Amey's claim (as articulated in the First Action) to an end.

The issues for determination

5. The agreed list of issues was as follows:

   1. Did the Defendant act manifestly erroneously, contrary to the PCR, by taking the Abandonment Decision:

   (1) On the premise that it would supersede the Claimant's claim in the First Action?

   (2) By taking into account the potential costs, uncertainty, delay and disruption to highways services that it considered would arise from continuing to contest the First Action?

> 2. Did the Defendant act manifestly erroneously, contrary to the PCR, by taking the Abandonment Decision in a deliberate attempt to deprive the Claimant of its cause of action in the First Claim?
>
> 3. Did the Defendant breach its obligation of equal treatment imposed by the PCR in taking the Abandonment Decision because the Claimant alone had an enforceable cause of action in respect of any errors in the conduct of the Procurement?
>
> 4. Did the Defendant breach its obligation of transparency imposed by the PCR in taking the Abandonment Decision because its stated reason or reasons for the decision was not that the decision was taken in a deliberate attempt to deprive the Claimant of its cause of action in the First Claim?
>
> 5. Did any breach established by the Claimant cause loss or damage to Claimant? In particular, would the Defendant have decided to abandon the Procurement on a lawful basis in any event?
>
> 6. What relief, if any, should be granted to the Claimant?
>
> 7. What was the effect of the Abandonment Decision on the First Claim?

6. For the reasons set out below, I answer the issues as follows:

    i) Issues 1-4: no.

    ii) Issue 5: the Council would not have abandoned the Procurement in any event and, if Amey establishes that its score should be revised to be greater than 85.51, the breach established by Amey caused it to suffer loss and damage.

    iii) Issue 6: Amey's claim for damages in the First Action may be pursued as indicated in this judgment. I do not grant any other relief, declaratory or otherwise.

    iv) Issue 7: the Abandonment Decision had no effect on the First Claim if and to the extent that Amey is able to prove that it had an accrued cause of action before the decision was taken on 2 August 2018.

The legal framework

7. The legal framework for a claim arising under the PCR is now well known and I do not propose to set out the relevant provisions in full.

8. Where the PCR apply, contracting authorities such as the Council are required to base the award of public contracts on the most economically advantageous tender assessed from the point of view of the contracting authority: Regulation 67(1). They must treat economic operators such as Amey and the other bidders in the Procurement equally

and without discrimination and shall act in a transparent and proportionate manner: Regulation 18(1). Regulation 89 provides that the contracting authority is under a duty to comply with the provisions of Parts 2 and 3 of the PCR (which include Regulations 18 and 67) and any enforceable EU obligations in the field of public procurement.

9. Regulation 91 provides that a breach of the duty owed in accordance with Regulation 89 is actionable by any economic operator which, in consequence, suffers, or risks suffering, loss or damage. The available remedies where 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 depends upon whether a contract has been entered into or not. Where (as here) a contract has not been entered into, Regulation 97(2) provides that the Court may (a) order the setting aside of the decision or action concerned; (b) order the contracting authority to amend any documents; (c) award damages to an economic operator which has suffered loss or damage as a result of the breach. Where a contract has been entered into, Regulation 98(2) provides that the Court may award damages to an economic operator which has suffered loss or damage as a consequence of the breach. In such a case it does not have the powers it would have under Regulation 97(2)(a) and (b) but has additional powers including, in suitable cases, making a declaration of ineffectiveness and imposing penalties.

10. The nature of the rights and remedies have been considered by high authority. In *Energy Solutions v Nuclear Decommissioning Authority* [2017] 1 WLR 1373 at [37]-[39] Lord Mance, with whom the other Justices of the Court agreed, rejected the Court of Appeal's assumption that any claim for damages under the 2006 Regulations that preceded the PCR "was no more than a private law claim for breach of a domestically-based statutory duty…". He endorsed the earlier approach of Sir Andrew Morritt V-C in *Phonographic Performance Ltd v DTI* [2004] 1 WLR 2893 at [11]-[12], namely that the liability was best regarded as a breach of statutory duty but subject to *Frankovich* conditions.

11. Throughout its submissions in the present case the Council emphasised the public law aspects of breaches of duty in the course of a public procurement pursuant to the PCR. In particular, it relied upon dicta in the Court of Appeal decision in *R (Chandler) v Secretary of State for Children, Schools and Families* [2009] PTSR 749, [2009] EWCA Civ 1011 at [76]-[78]. *Chandler* was a claim for Judicial Review and the relevant passage was in response to a submission that a complaint that the public procurement regime had not been complied with was a matter for private, not public, law. That submission was rejected as an oversimplification because a failure to comply with the PCR may give rise to situations where a public body may be subject to public law review and remedies. Nothing in the passage casts doubt on the essential nature of a claim for damages for breach of the duties owed to an economic operator, as explained by the Supreme Court in *Energy Solutions*. Whether or not there could be a concurrent public law remedy, a claim for damages such as Amey's in the present case is essentially a private law claim for damages upon completion of the cause of action, subject only to the superimposition of the *Frankovich* conditions.

12. There was a substantial measure of agreement between the parties about relevant established principles. As articulated in Amey's opening skeleton (and agreed by the Council during the hearing), the following general principles may be relevant:

a. A contracting authority has a broad discretion in assessing the factors to be taken into account for the purpose of deciding to award a contract following an invitation to tender and therefore in respect of any decision not to award a contract and abandon a procurement (see *Embassy Limousines & Services v. European Parliament* T-203/96 [1999] 1 C.M.L.R. 667 at [56]);

b. The exercise of that discretion is not limited to exceptional cases or has necessarily to be based on serious grounds (see *Metalmeccanica Fracasso SpA v. Amt de Salzburger Landesregierung* [1999] ECR I-5697, [2000] 2 CMLR 1150 at [23]);

c. There is no implied obligation under the Public Contracts Directive or the Regulations to carry the award procedure to its conclusion (see *Metalmeccanica* supra. at [24] and [33]);

d. Neither the Public Contracts Directive nor the Regulations contain any specific provision concerning "the substantive or formal conditions" for the decision not to award a contract/to abandon a procurement. But, the decision is "subject to the fundamental rules of Community law, and in particular to the principles laid down by the EC Treaty on the right of establishment and the freedom to provide services" (see *Hospital Ingenieure ("HI") v. Stadt Wien* [2004] 3 CMLR 16 at [42] and [47]);

e. The duty to notify reasons in the Public Contracts Directive and the Regulations is "dictated precisely by concern to ensure a minimum level of transparency in the contract-awarding procedures … and hence compliance with the principle of equal treatment" (see *HI* supra. at [46]);

f. The courts of member states must be able to determine the lawfulness of a decision to abandon a procurement, and it is contrary to the provision of Directive 89/665 ("the Remedies Directive") to limit the review of the legality of the decision to "mere examination of whether it was arbitrary" (see *HI* supra. at [61]-[64]);

g. A contracting authority has power to abandon a procurement without contract award "when it discovers after examining and comparing the tenders that, because of the errors committed in its preliminary assessment, the content of the invitation to tender makes it impossible for it to accept the most economically advantageous tender, provided that, when it adopts such a decision, it complies with the fundamental rules of Community law on public procurement such as the principle

of equal treatment" (see *Kauppatalo Hansel v. Imatran Kaupunck* [2003] ECR I-12139 at [36]);

h. EU law permits member states to provide in their legislation for "the possibility to withdraw an invitation to tender on grounds which may be based on reasons which reflect inter alia the assessment as to whether it is expedient, from the point of view of the public interest, to carry an award procedure to its conclusion, having regard, amongst other things, to any change that may arise in the economic context or factual circumstances, or indeed the needs of the contracting authority concerned. The grounds for such a decision may also relate to there being an insufficient degree of competition, due to the fact that, at the conclusion of the award procedure in question, only one tenderer was qualified to perform the contract" (see *Croce Amica One Italia SrL v. AREU* [2015] PTSR 600 at [35]).

I shall return to the relevant principles when addressing the issues later in this judgment.

The evidence

13. In addition to reviewing contemporaneous documents, live evidence was given by Mr Tony Kershaw and Mr Bob Lanzer. Mr Kershaw is employed by the Council as its Director of Law and Assurance. He is the Council's chief legal officer and its statutory monitoring officer. As such he is responsible for the operation of the Council's decision-making processes and for ensuring that its actions and procedures are lawful. He held this position throughout the relevant period. Mr Lanzer is an elected councillor and, until 15 August 2018, was the Council's Cabinet Member for Highways and Infrastructure. He was therefore the Cabinet Officer most closely and directly involved with the Procurement and how it should be progressed. Both witnesses gave written and oral evidence. Mr Kershaw was conspicuously careful in the answers he gave in cross-examination, as befits an experienced solicitor. Mr Lanzer was equally careful, albeit that he has a rather different professional background. I have no hesitation in accepting that each witness was doing his best to give accurate evidence as he remembered it. Amey did not suggest otherwise.

14. One wrinkle that was identified in cross-examination is that there are passages in the written statements of the two witnesses that are either identical or nearly identical. I accept Mr Kershaw's evidence that he drafted his own statement. When he had done so, someone else compiled a draft for Mr Lanzer which drew on the terms of Mr Kershaw's statement. That draft was then presented to Mr Lanzer who was told that that the statement needed his approval as a true and factual record of his recollection, which he gave. I accept that Mr Kershaw took no part in the preparation of Mr Lanzer's statement. I also accept that Mr Lanzer approved the draft statement because he was satisfied at the time that it accurately reflected his recollection and that he did so without knowing that it had been compiled by drawing on the terms of Mr Kershaw's statement. There was no collusion or other inappropriate behaviour.

15. One category of contemporaneous document was not before the Court. It is obvious and accepted in its evidence that the Council received legal advice both from Mr Kershaw and from external solicitors and counsel. At an earlier hearing, I ruled that legal advice that was subject to a claim for privilege should not be disclosed. My reasons were given in a separate judgment which has not been challenged. Consistently with that ruling, the parties were not permitted to investigate with the witnesses the terms of any legal advice that was given to the Council.

The factual background

16. The factual background to the First Action is set out in the Interim Judgment and does not need to be repeated in full here. Amey alleged that:

    i) The Council acted contrary to the principle of transparency in instructing Amey to amend its Cost Model, thereby making its submission less economically advantageous; and

    ii) The Council failed to assess the tenders rationally because it had made manifest errors in its assessment of Amey's tender by underscoring; and

    iii) Had the Council not failed as alleged, Amey would have obtained higher scores and would have been awarded the contract. Alternatively it was alleged to be reasonably possible that it would have been awarded the contract. The primary relief claimed by Amey was that the Council's decision to award the contract to Ringway should be set aside. The loss and damage alleged by Amey was alleged to be that (a) it was not awarded the contract (which gave rise to loss of profits under it); alternatively (b) it was deprived of a significant chance of winning the contract; further or alternatively (c) it incurred the wasted costs of preparing its tender.

17. The headline sums claimed by Amey were loss of profits over the projected life of the contract, in the sum of just under £28 million; and/or just under £1 million as the wasted costs of preparing its tender.

18. For present purposes it is sufficient to note that the Procurement envisaged entering into the resulting contract on 1 July 2018. The margin between the scores allocated to Ringway and Amey respectively was wafer-thin so that virtually any upward revision of Amey's score would mean that it would have ended up higher than Ringway's. Although reference has been made during the hearing of the theoretical possibility of a challenge from Ringway, it is no part of the Council's pleaded case in either action that Ringway's score should or would also be revised upwards. The present trial and judgment do not determine the First Action and therefore I am not in a position to find what the outcome of that action would be. However, the determination of the present issues takes place on the working assumption that Amey's claim in the First Action would be successful in causing Amey's score to be revised upwards so that it should have been Amey and not Ringway which was the highest scoring tenderer.

19. I accept the evidence of Mr Kershaw and Mr Lanzer that the option of abandoning the Procurement was a matter that was kept under review from April 2018 onwards, the First Action having been served on the Council on 22 March 2018. Mr Lanzer was provided with regular verbal briefings, mainly from the Council's Director of

Highways and Transport, but also from Mr Kershaw in respect of the ongoing progress of the First Action. In addition, both Mr Lanzer and the Council's cabinet, meeting as a Cabinet Board, received verbal briefings about the outcome of the Procurement process, the legal challenge and the Council's options. I also accept that the Council decided initially to see if it could knock out the First Action so as to eliminate the risks associated with it in a relatively swift and economical way. The other options considered by the Council were (a) seeking to lift the automatic suspension and signing the contract with Ringway, which would involve continuing the litigation with Amey (unless it could be settled) and would limit the remedies available to the court to the awarding of damages; (b) abandoning the Procurement; (c) attempting to "re-wind" the Procurement to an earlier stage, such as the call for final tenders, and then re-running it from that point; or (d) withdrawing its decision to award the contract to Ringway and awarding it to Amey instead, which should satisfy Amey but ran the risk of an adverse reaction and challenge from Ringway, whether justified or not.

20. I accept the evidence of the Council's witnesses about the Council's thinking in the light of the First Action. The Council has never publicly accepted that it made mistakes in the course of the Procurement; but it was entirely realistic in accepting from the outset that the First Action raised real legal risk. This is reflected in entries in the Council's Risk Register in April 2018 which are consistent with an assessment that the First Action gave rise to real risks on a number of fronts; and I accept the evidence of Mr Kershaw that he spoke to Cabinet Members in private session about the relative risks of a court finding that the Council had made errors. It is clear also on the evidence and I accept that the Council's preferred option was to contract with Ringway, at least until receipt of the Interim Judgment. To that end it secured Amey's consent to the lifting of the automatic suspension in late May 2018. If the Interim Judgment had gone in favour of the Council, the way would have been open for the Council to contract with Ringway promptly, which was desirable as the existing contractor – Balfour Beatty – was holding over and providing highway maintenance services but, not unreasonably, wanted to clarify and formalise its position going forward. One of the matters taken into account by the Council was that a failure to put a new long-term contract in place could be seen as a failure of one of the Council's core functions and duties. Second, the Council was also conscious that it needed to make provision for the annual winter maintenance service, which would commence on 1 October 2018. Third, the new contract was expected to deliver significant savings of about £3.4 million over its projected 7-year term. Fourth, it was anticipated that the new contract would lead to improvements in the quality of services delivered.

21. As a result of these considerations, it is plain and I find that the Council decided to await the Court's decision on the strike-out application before taking any final decision to enter into the contract with Ringway. The hearing was on 12 July 2018. An embargoed draft judgment was circulated on 19 July 2018 from which it was apparent that the Council had failed to strike out Amey's claim in the First Action. What happened next led to the most significant factual disputes on the evidence.

22. On 24 July 2018 Mr Kershaw met Mr Lanzer and Ms Goldsmith, the Leader of the Council, to discuss the Council's options in the light of the anticipated judgment. No documents were tabled or produced for the meeting. Having regard to the stated

value of the First Action, Mr Lanzer and Ms Goldsmith formed the clear view and took the position that it would be too great a risk for the Council to enter into the contract with Ringway and to litigate the resulting damages claim with Amey. I accept that their thinking was informed by the view that adopting such a course would involve real and substantial litigation risk, would commit the Council to lengthy, expensive and labour intensive litigation, and would inevitably require very significant commitments from responsible officers which would distract from and undermine their ability to carry out their primary responsibilities in ensuring service delivery. While I think that this last consideration can be overstated, there can be no doubt that litigating the First Action to a conclusion would impose a heavy burden on the Council's limited resources, both human and financial.

23. Mr Lanzer quickly formed the view that the Interim Judgment left as the Council's best options either (a) to rewind the Procurement to a point from which it could be run again or (b) to abandon the Procurement and commence a new procedure. After discussion with Ms Goldsmith, Mr Lanzer came to the position that abandoning the Procurement was the best option. His stated reasoning, which was evidenced both by Mr Lanzer and Mr Kershaw in their witness statements[1] was that:

> "[Mr Lanzer] reached the view (supported by Ms Goldsmith) that deciding to rewind the Procurement would create greater uncertainty and risk (e.g. because of the risk of provoking challenges from both Amey and [Ringway]). Consequently it was felt[2] that abandoning the Procurement was the best option available to the Council, being most likely to bring litigation to an end and to enable the Council to put in place a new service as quickly as possible. That view was reached on the basis that abandonment would be likely to extinguish any claim by Amey or Ringway against the Council in respect of the conduct of the Procurement, but recognising that the bidders could dispute this."

24. As a result of adopting this position, Mr Lanzer and Ms Goldsmith asked Mr Kershaw to take the necessary steps for the Council to take a decision to abandon the Procurement adopting the Council's procedures for taking urgent action in relation to key decisions. Mr Kershaw also accompanied them to the Cabinet Board meeting that was scheduled for the morning of 24 July 2018, at which he updated the members of the Cabinet Board on developments including the effect of the Interim Judgment and the Cabinet Board members discussed the options and the route that Mr Lanzer was minded to take. The members of the Cabinet Board endorsed the position being taken by Mr Lanzer. The Council's note of the meeting recorded on this subject:

> "[Mr Kershaw] confirmed that the result of the summary judgment had been received and that Amey's claims had not been struck out. There were therefore a set of options for consideration. Abandonment of the current procurement was the recommended way forward to remove the litigation claim

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[1] See Mr Kershaw's at [41] and Mr Lanzer's at [15].
[2] Mr Lanzer's statement says at this point "Consequently my ultimate decision was that abandoning….". The difference is not material.

> which had huge financial and resource implications. It would also enable the new procurement to be redesigned on lessons learnt from existing process. The roll back of the procurement was an alternative option; however it would be complex to ensure the process remained equal and fair to all bidders and had a risk of future challenge from other bidders.
>
> The summary judgment would be made public on Thursday and a notice would need to be given to Balfour Beatty imminently to agree the extension of the interim contract beyond October. A note would go out to all members once the next steps had been confirmed.
>
> Conclusion/Action Points
>
> Cabinet Members noted the update and recognised the huge financial risk associated with the litigation."

25. It was suggested in cross-examination that the words "Abandonment of the current procurement was the recommended way forward to remove the litigation claim…" meant that Mr Kershaw and Mr Lanzer thought and conveyed to the Cabinet Board that abandonment was certain to remove the litigation claim. I do not accept that is an unambiguous meaning to be attributed to the words of the note and, as Mr Kershaw pointed out, the note does not purport to be a verbatim account of what was said. I am confident that neither Mr Kershaw nor Mr Lanzer believed or would have said to the Cabinet Board that abandonment of the Procurement was bound to remove the litigation claim. Mr Kershaw is too experienced and careful a solicitor to have thought that the desired outcome would be either uncontroversial or certain of achievement, however bullish the external advice he received.

26. No formal decision was taken on 24 July 2018 but the Council's preferred course was set. For a formal decision to be taken under the council's urgent action procedure, a decision report with a set of recommendations from the Director of Highways and Transport had to be prepared and submitted to the responsible Cabinet Board member for him to agree to an officer authorising the recommendation. Those steps were taken on 2 August 2018 when Mr Kershaw wrote to Mr Lanzer enclosing a copy of the decision report and asked him to agree with an officer authorising its recommendation. Mr Lanzer duly did so and the formal decision of the council to abandon the Procurement was taken.

27. The decision report was full and thorough and should be read in full for a complete understanding of its terms and recommendations. It included the following:

    i) The initial summary said:

    > "**Summary**
    >
    > A decision that the recent procurement process for a highways maintenance service provider should be abandoned with no contract award and authorisation be given for the making of interim service arrangements.

West Sussex Plan: Policy Impact and Context

The service is statutory as it ensures the safe standard of roads across the country.

Financial Impact

The decision will mean that the planned service efficiency savings from a re-procured service cannot be realised in the current financial year. The service cost will be higher than has been planned for the year to April 2019.

Recommendations

(1) To approve a decision to authorise the abandonment of the procurement process for a new highways maintenance term contract and for there to be no award of a contract in connection with that process.

(2) To delegate authority to the Director of Highways and Transport to make such arrangements as may be needed to secure the continued provision of a highways maintenance service whilst requirements and proposals for the future of the service are settled, that is up to April 2019 but with such provision for extension as may be advised."

ii) After referring to the background history and the effect of the Interim Judgment, [2.1] set out the recommendation to abandon the procurement as follows:

"**2. Proposals Detail**

2.1 In relation to the procurement process it is proposed that the procurement be abandoned – that no contract be awarded to any bidder and that all of the final stage bidders be notified of this decision with immediate effect. The County Council has the power to do so under procurement law, provided there is proper and rational reason."

iii) The financial and resource implications were summarised at [4.1] ff as follows:

"4.1 Core annual expenditure through the current Term Maintenance Contract is in the region of £10 million revenue and £20 million capital. Further expenditure has also come through exceptional or one-off funding streams, for example the Better Roads Programme.

4.2 The proposals will bring two consequences for the budget for the current year. The planned procurement has been designed to deliver service efficiencies and bring some

> reduction in overall spend. Whilst these are not now likely to be realised from this contract it is difficult to confirm the precise effect of the proposals on those savings plans. Whilst the legal process remains outstanding and, including an uncertain timescale, the costs of that process are also unpredictable, the adverse impacts on the service budget are likely to be more significant if other options available were pursued.
>
> 4.3 The element which is known is the likely additional cost over the projected budget as a result of the terms on which a new contract for the interim period can be secured and other incidental unplanned costs. The total additional cost will be in the region of … for the current year."

iv) [5.1] stated that external legal advice had been secured on the legal implications of the proposed decision and that it was set out in a separate note. That note has not been disclosed, being subject to a claim to privilege;

v) Risk assessment implications and mitigations were summarised as follows:

> "6.1 Corporate and service risks have been evaluated as part of the preparation of these proposals and action has been taken to mitigate their impact. Certain of those risks are addressed in the legal advice which has been provided to the decision maker. Essentially the risks are those associated with the continuation of the current litigation which is very likely to be costly, lengthy and distracting of the County Council's expertise in certain critical service areas, and of uncertain outcome. Even if the County Council were entirely successful in the litigation, it would inevitably lead to not insignificant delay and the County Council being required to incur significant legal costs (not all of which would be recoverable from the claimant). Pursuing this course would also prevent certainty being achieved in respect of the services. The County Council is advised to pursue a route which gives greater certainty in terms of service provision and the best use of its resources."

vi) Other options, namely awarding the contract to Ringway or rolling the Procurement back to an earlier point were considered in Section 7. That section included the following:

> "7.2 The County Council would be likely to face significant service pressure due to the continuation of the litigation and the need for senior officers to focus time and costly external and internal advice on the legal process. If the decision is taken to let the contract to one of the bidders it is likely that this disruption and diversion of resources will continue for many months.
>
> 7.3 The procurement process did not lead to any significant service innovation or plans to develop the services

> in beneficial ways such that key service or financial benefits would accrue. Significant savings were looked for but it was not likely that these could be realised without reductions in services delivered. The abandonment of the procurement will bring a fresh opportunity to design service requirements more fully so that greater opportunities for innovation and flexibility as well as efficiency or cost savings initiatives may be secured."

28. The decision report did not comment expressly on the likelihood or otherwise that the decision to abandon would extinguish Amey's claim in the First Action. No doubt that would have been the subject of the external legal advice which has not been disclosed. However, the absence of any mention of the legal consequences of abandonment leaves a significant hole in the reasoning set out in the decision report, though it can be inferred that the continuation of the Amey litigation was considered to be undesirable because it would lead to disruption and diversion of resources for many months.

29. On 27 July 2018, before the formal decision was taken, two documents were issued. The first was an email from Mr Lanzer to all council members telling them in general terms what was happening and why. The second was an email to members of the Council's highways staff from Mr Davey, the Council's Director of Highways and Transport, to similar effect.

30. The email from Mr Lanzer included the following passage:

> "All litigation brings risk and cost for the County Council and so we have looked at alternatives that will allow us to move on, continue to deliver the service and consider our options for the best model of service delivery in the future. As we never awarded a contract at the end of this procurement we have the option to abandon it – not to award to any bidder and to start the process again. This would enable us to bring the litigation to an end quickly as there will be no basis for it to continue."

The email from Mr Davey was in broadly similar terms and included the same passage.

31. On 1 August 2018 a trade journal, Highways Magazine, published an article which quoted a spokesperson from the Council as referring to the First Action and saying:

> "Our priority in this case has always been to make sure we have the right contract in place to ensure our highways are maintained properly and to limit any unnecessary spending of tax payers' money. As a result we have taken the decision to abandon the procurement process and start again, meaning that the legal challenge can be brought to an end."

Although there could be no doubt that things were moving in the direction of taking a formal decision to abandon, that had not yet been done and was not done until the decision report was duly signed by all relevant personnel on 2 August 2018.

32. The formal decision to abandon the Procurement was conveyed to all bidders by letter dated 2 August 2018, which said:

> "… The Council has taken the decision to terminate the procurement, without proceeding to enter into a contract with the preferred bidder.
>
> The procurement has been subject to a legal challenge, which raises a number of issues and risks. The Council is aware that litigation of this sort is expensive, protracted and inherently uncertain in terms of outcome. The Council has carefully considered the overall position. With regret, it has come to the view that, in the circumstances the termination of the procurement is the most appropriate action. The Council will consider carefully how best to meet its future needs for highways services.
>
> Thank you for your interest and participation in this procurement."

33. The Council is now pursuing a fresh procurement which, in its view, will provide a better outcome than the contract envisaged in the Procurement: instead of a single supplier, it is now proposed that there will be a "multi-agency approach" which is intended to provide "a more flexible streamlined service."

34. Mr Lanzer, who was the decision-maker, and Mr Kershaw were clear on a number of points, each of which I accept. First, the driver for the decision to abandon the Procurement was Amey's legal challenge and the terms of the Interim Judgment. Second, there was no other rationale that was driving the decision to abandon the Procurement. Third, in the absence of Amey's challenge, the Council would in all probability have awarded the contract to Ringway. Fourth, if Amey had scored higher than Ringway, and assuming the absence of a challenge from Ringway or anyone else, in all probability, the Council would have awarded the contract to Amey. Fifth, as a consequence of taking the decision to abandon, the Council lost the benefit of planned efficiency savings from the new contractual service, which were estimated at £1.1 million for 2018/19 and service costs arising from the interim arrangements with Balfour Beatty would be higher than had been budgeted.

35. Amey submits that the Council took the decision to abandon on the basis and in the belief that it would certainly bring the litigation to an end quickly. The high point in the evidence to support this submission is the statement in the emails sent out on 27 July 2018 by Mr Davey and Mr Lanzer respectively in which they said that the decision to abandon "would enable [the Council] to bring the litigation to an end quickly as there will be no basis for it to continue." That statement (which was approved by Mr Kershaw for Mr Lanzer's email) is to be contrasted with the more nuanced evidence from Mr Kershaw and Mr Lanzer that they thought that abandonment was most likely to bring the litigation to an end on the basis that abandonment would be likely to extinguish any claim by Amey but recognising that bidders could dispute this.

36. Mr Kershaw's response to the terms of the 27 July emails was that they were not purporting to set out the full rationale for the decision. I accept that evidence as accurate, but it does not assist in deciding whether the decision maker was acting in the belief that abandonment would certainly bring the action to an end quickly as a constituent part of his reasons for making the decision when he later did so. Mr Kershaw was clear in his evidence that he did not regard the defence as "copper-bottomed".

37. Mr Lanzer's evidence was more informative. He said in cross-examination:

> "A. This is a statement of what I believed would happen and would be most likely. Clearly, as referenced elsewhere in the documents, it was also appreciated that such a viewpoint, as we see today, could be open to challenge.
>
> Q. Well, it is not a statement as to what would be most likely to happen because you do not use the words "most likely", do you?
>
> A. No.
>
> Q. This is a statement, is it not, an accurate statement, given at the time, as to what you considered the basis of the decision was; correct?
>
> A. Yes, and the outcome."

38. I accept that evidence, bearing in mind always that the actual formal decision was not taken until 2 August 2018 when it was taken with the benefit of the decision report, to which I have referred above.

39. The Regulation 84 Report, which was dated 17 August 2018, shed further light on the reasoning that led to the Council's decision. At [6.3]-[6.5] the report recorded:

> "6.3 The consequence for the Council was that it must decide what action it should take. This included consideration of how the continuity and delivery of critical statutory highways service might be best secured and the impacts and risks that would arise from defending the legal claim to a trial.
>
> 6.4 The Council considered the available courses of action with the benefit of internal and external advisors. Corporate and service risks have been evaluated as part of that exercise and action has been taken to mitigate their impact. Certain of those risks are addressed in the legal advice which has been provided by the decision maker. Essentially the risks are those associated with the continuation of the current litigation which is very likely to be costly, lengthy and distracting of the Council's expertise in certain critical service areas, and of uncertain outcome. Even if the Council were entirely successful in the litigation, it would inevitably lead to not

> insignificant delay and the Council being required to incur significant legal costs (not all of which might be recoverable) from the claimant.) Pursuing this course would also prevent certainty being achieved in respect of the services. The Council was advised to pursue a route which gives greater certainty in terms of service provision and the best use of its resources.[3]
>
> 6.5 In relation to the procurement process it was decided that the procurement be abandoned – that no contract be awarded to any bidder and that all of the final stage bidders be notified of this decision with immediate effect. The Council has the power to do so under procurement law, provided there is a proper and rational reason."

In the light of the other evidence in the case I accept this as a reasonable summary of matters that informed the Council's thinking. It supports the view that the Council thought that abandoning the Procurement would provide *greater* rather than *absolute* certainty about Amey's claim in the First Action.

40. Mr Kershaw was cross-examined about the passage at [7.2] of the decision report that referred to significant pressure upon the Council if the litigation continued. In my judgment the meaning of that passage (which is also reflected in the passage from the Regulation 84 Report that I have set out above) is clear; it is also based upon the view of the Council that contracting with Ringway and continuing the litigation with Amey was unpalatable because of the potential costs, uncertainty of outcome and diversion of resources that would be required to deal with the First Action if it was to be defended properly.

41. On the basis of all the evidence before the Court, the most salient points of which I have attempted to summarise above, I make the following findings of fact:

i) The Council recognised that Amey's legal challenge gave rise to significant risk. It kept the position under review after Amey's challenge was received and adopted the initial strategy of trying to knock out Amey's claim in the First Action by its application for summary judgment. Had it succeeded in that application it would have gone ahead and contracted with Ringway.

ii) The Council recognised that the Interim Judgment meant there was no quick, clear-cut and certain route that would enable it to dispose of Amey's challenge in the First Action. Because of the wafer-thin margin by which Ringway had achieved the highest score and my conclusion in the Interim Judgment that Amey's challenge could not be dismissed on a summary basis, the Council correctly foresaw the risk of protracted contested litigation with no certainty of success and a potentially very serious worst-case outcome. After taking into consideration the planned savings and benefits of the proposed Ringway contract, the Council decided that contracting with Ringway and pursuing the Amey litigation to a conclusion was an unpalatable risk;

[3] This paragraph substantially replicates [6.1] of the Decision Report: see above.

iii) The Council evidently acted on the basis of external and internal legal advice. The terms of that advice are not in evidence. What is in evidence is the position and thinking of Mr Kershaw, as the Council's officer responsible for the operation of the Council's decision making process, and Mr Lanzer, as the Council's responsible cabinet officer and the relevant decision maker. Each of them hoped and intended that abandoning the Procurement would have the effect of terminating Amey's claim in the first proceedings. However, I find that neither of them believed that abandoning the Procurement was bound to have that effect. There are a number of strands that lead me to this conclusion. The first is my assessment of Mr Kershaw as an experienced, cautious and careful solicitor. He undoubtedly appreciated that Amey is a determined protagonist and that it would be unlikely to take the abandonment with its intended consequence lying down: events have shown how right he was in that appreciation. He would also have known that litigation is inherently uncertain and, in my judgment, would not have made the elementary mistake of thinking that a controversial step in litigation (i.e. the abandonment) would be truly "copper-bottomed". Second, I would have expected Mr Kershaw to have conveyed the lack of certainty to Mr Lanzer. Third, I am not persuaded that the terms of the emails on 27 July 2018 or the quoted statement to the trade journal compel a contrary conclusion. To my mind, it is not surprising that such statements were in absolute terms since the Council would have no wish to broadcast any doubts about the potential effectiveness of the course it was pursuing. To my mind, this is all of a piece with the fact that the Council has never publicly acknowledged that it made mistakes in the Procurement, whatever its actual internal assessment: the furthest it has gone publicly is to acknowledge litigation risk arising from Amey's challenge in the First Action;

iv) I find that, in this state of uncertainty, both Mr Kershaw and Mr Lanzer believed that terminating the Procurement was most likely to bring Amey's claim in the First Action to an end. In truth, there was no real Plan B for dealing with Amey's claim other than litigating it: there is no evidence before the Court that serious consideration was given to settling the claim or how and at what level it might be settled. It follows that I accept the evidence of Mr Kershaw and Mr Lanzer as set out in the extract from their witness statements set out above;

v) The driver for the decision to abandon the Procurement was Amey's legal challenge and the terms of the Interim Judgment; and there was no other rationale that was driving the decision to abandon the Procurement. The decision report and other evidence makes clear, and I accept, that the Council attempted to balance the risks inherent in the litigation, the prospect of terminating the Amey's claim in the First Action, the hope and intention that withdrawing the Procurement would open the way for an untroubled second procurement that could take into account lessons learned from the Procurement, the need to secure critical services over the coming winter period, and the loss of the savings and benefits that had been anticipated if the contract with Ringway had gone through smoothly;

vi) If Amey had not challenged the outcome, the Council would have contracted with Ringway on or about 1 July 2018;

vii) Adopting the language of the issues for determination, the Council made its decision with the hope and intention that it would supersede Amey's claim in the First Action but, as I have found and explained, without being certain that it would do so. Had it been certain of its ground, there would have been no reason for it not to enter into the contract with Ringway. The fact that it did not do so indicates that its decision was more subtly based than certainty would imply. In particular, in reaching its decision, it took into account the potential costs, uncertainty, delay and disruption to highways services that it considered would arise from continuing to contest Amey's claim in the first action.

42. At one point in its closing submissions, Amey characterised what the Council did as "exercising its broad power to terminate a procurement with the sole purpose of removing a claim brought by an economic operator against it arising out of its conduct of the procurement." This, in my judgment is not a full or fair characterisation. The Council found itself in a very difficult (if not uncommon) position after it had failed to strike out Amey's claim. A fuller description would be that the Council's main purpose was to avoid contracting with Ringway and contesting the Amey litigation to a conclusion. Of itself, that was a rational purpose for the Council to seek to achieve. Any attempt to achieve that purpose was likely to involve expenditure. For example, it would have been open to the Council to attempt to settle Amey's claim on terms that might have been good, bad or indifferent, but which would without doubt have involved payment to Amey if settlement could be achieved at all. In fact, the chosen route was to withdraw the Procurement with the hope and intention that it would eliminate Amey's claim. I consider later in this judgment whether that route was effective or not; but the fact remains that the chosen route, involving as it did not contracting with its preferred tenderer and not achieving the savings that had been anticipated from that contract, was a means to an end rather than the end itself. Nor was it the only consideration: as I have indicated already, there were a number of other factors, including the pressing need to achieve certainty in relation to its provision of services over the coming winter.

43. Amey issued proceedings in the Second Action on 30 August 2018. The Particulars of Claim were originally served in September 2018 and then in the current Amended form dated 30 January 2019. In briefest outline, Amey claims (by [2] of the Amended Particulars of Claim) that:

> "The [Council] has acted erroneously and unlawfully in taking the Abandonment Decision in that it has been taken on the premise that the Claimant's claim in [the First Action] has thereby been superseded, taking into account the potential costs, uncertainty, delay and disruption to highway services and in a deliberate attempt to deprive [Amey] of its cause of action in [the First Action]; none of which were proper and rational reasons for the decision. The Abandonment Decision was also contrary to the principles of equal treatment and transparency."

The Issues: analysis and determination

44. I consider it to be more convenient to change the order of the issues, so as to consider the impact of the Abandonment Decision before considering whether it was lawful. When discussing the impact of the Abandonment Decision, I shall do so on the assumption that it was lawfully taken, that being the assumption most favourable to the Council.

Did any breach established by Amey cause it to suffer loss or damage? In particular, would the Defendant have decided to abandon the Procurement on a lawful basis in any event? [Issue 5]

45. At this stage I have not tried and am not in a position to make findings of fact about whether Amey's criticisms of the conduct of the Procurement in the First Action are well founded. However, the evidence in the present trial has established that, if Amey had scored higher than the score allocated to Ringway, it would have been awarded the contract. As I have said, the Council has advanced no case in the First Action to the effect that the score allocated to Ringway score should have been higher. Questions of causation, loss and damage therefore arise in the First Action if Amey proves that its score should have been greater than 85.51.

46. Subject to the question whether the Council would have decided to abandon the Procurement on a lawful basis in any event, there is no evidence before the Court to cast doubt on the proposition that Amey would have been awarded the contract from on or about 1 July 2018 if it had scored more than 85.51. If that is correct, then all the constituent elements of an accrued cause of action would be in place on and from 1 July 2018 because Amey lost what is taken to be a profitable contract on and from that date: the loss of a profitable contract is capable of being loss and damage for the purposes of completing a cause of action for breach of the statutory duties owed under the PCR. Amey has pleaded in the alternative that it was deprived of a significant chance of winning the contract. The loss of a significant chance of winning the contract is also capable of constituting loss and damage for the purposes of completing the cause of action asserted by Amey, the loss being suffered, at the latest, when the contract would have been concluded if Amey's chance had come to fruition. For present purposes that would be 1 July 2018.

47. Therefore, subject to the question whether the Council would have abandoned the Procurement lawfully in any event and on the assumption that Amey makes good the factual basis of its claim in the First Action such that its score should be revised to be greater than 85.51, the asserted breaches of duty by the Council caused it to suffer loss and damage.

48. There is no evidence to support a finding that the Council would have abandoned the procurement on a lawful basis in any event. In particular, although the promotion of Amey's score would have left Ringway as a disappointed underbidder, there is no evidence to support a finding that Ringway would have identified errors or potential errors in the scoring of its bid that would have caused Ringway to challenge the decision to award the contract to Amey. There is no reasonable basis for assuming that Ringway would have done so and, even if it had, there is no basis for speculation that Ringway's challenge would have been serious (as opposed to fanciful) in the

absence of any case being advanced by the Council that Ringway's score was wrong and should have been subject to upwards revision.

49. Therefore, since the driver for the actual Abandonment Decision was Amey's challenge and no other reason for withdrawing the Procurement has been identified (including on the assumption that Amey had been top scorer), I conclude that the Council would not have abandoned the Procurement lawfully in any event. For the avoidance of doubt, there is also no basis for a finding that the Council would have abandoned the Procurement unlawfully in any event.

50. I therefore answer issue 5 by saying that the Council would not have abandoned the Procurement in any event and, if Amey establishes that its score should be revised to be greater than 85.51, the breach established by Amey caused it to suffer loss and damage.

What was the effect of the Abandonment Decision on the First Claim? [Issue 7]

51. The Council's submission, in outline, is that bidders in PCR procurements have no right or legitimate expectation to be awarded a public contract or to be compensated for tender costs if a procurement does not lead to a public contract award being concluded. To the contrary, the Council submits that bidders take part in such procedures in the express knowledge of the authority's wide discretion to abandon a procurement procedure at any stage prior to entering into a public contract. Bidders are prepared to take the risk of abandonment because of the prospect of making substantial profits if the risk of abandonment does not eventuate and they are awarded a contract or contracts at the end of the procurement process.

52. The Council goes on to submit that the legal effect (or consequences) of a lawful abandonment decision is a matter of statutory interpretation of the PCR, having appropriate regard to relevant public law principles. Where a contracting authority decides that a procurement should be abandoned and an invitation to tender withdrawn, no public contract will ever be awarded pursuant to the withdrawn process and the tender rules that the withdrawn process entailed are no longer of any legal status or effect. So, submits the Council, it is not open to bidders in the lawfully abandoned procurement to pursue what it calls "PCR legal proceedings" against the authority "relating to the award of a non-existent public contract and/or alleged breaches of no longer subsisting or extant tender rules." To hold otherwise, submits the Council, would be to undermine substantially the broad discretion of an authority to withdraw a procurement and commence a fresh procedure. The utility of the broad discretion would be seriously compromised, which would be contrary to public policy.

53. The Council supports this approach by submitting that "decisions taken by contracting authorities pursuant to the PCR, and other similar decisions in relation to public contracts, are public law decisions which are, in principle, challengable by judicial review and which should be regarded as having the same attributes as other public law decisions. The PCR provide a remedy in damages which must necessarily be a private law remedy … . But that remedy is not to be regarded as equivalent to a "standard" tort claim for breach of statutory duty."

54. The Council goes on to submit that it is a necessary pre-condition to a claim for beach of EU procurement law, whether pursued as a judicial review or under the PCR, that there is (or remains) an extant procurement to challenge, and a public contract to be awarded. It follows from the same line of reasoning that "it is a critical element of the cause of action created by the PCR that the public law decision or action challenged by the claimant retains its legal status and effect and is capable of being set aside." This leads to the conclusion that what is being considered in the present case is not "cancellation" of an accrued cause of action but "the necessary components of the cause of action no longer being present." The Council asserts that "this is orthodox public law analysis"; and it submits that its analysis is supported by authority both domestic and from the CJEU.

55. I am unable to accept the Council's analysis and submissions for two broad reasons. First, they are based upon a false view of the nature of a claim for damages pursuant to the PCR and wrongly equate a private law claim for damages under the PCR with a claim for a public law remedy such as judicial review. Second, they fail to draw any distinction between claims that are inchoate or unenforceable before the abandonment of a procurement and claims that have crystallised into an accrued cause of action.

56. It is correct in principle that decisions taken by a contracting authority in the course of a subsisting procurement may in an appropriate case engage public law principles so as to give rise to public law review and remedies: see *Chandler*. Equally, I accept as a general principle that an entitlement to public law review of a decision may fall away if the decision is withdrawn, so that typically no public law remedy may be available after its withdrawal. However, to assert that decisions taken in the course of a procurement *only* engage public law principles and remedies is as wrong as it was wrong in *Chandler* to assert that *only* private law principles and remedies were engaged. To the contrary, *Energy Solutions* establishes that the liability to pay damages for breach of duties owed under the PCR is best regarded as a breach of statutory duty but subject to *Frankovich* conditions. The same act may simultaneously have the characteristics of a public law act that is susceptible to public law remedies and also be a breach of a private law duty that gives rise to what is acknowledged to be a private law remedy.

57. The fallacy in the Council's approach emerges clearly on consideration of its submission that "it is a critical element of the cause of action created by the PCR that the public law decision or action challenged by the claimant retains its legal status and effect *and is capable of being set aside*." PCR Regulation 98(2) provides for an award of damages for breach of statutory duty even where a challenged decision to enter into a contract may no longer be set aside. In other words, the private law remedy of an award of damages may subsist whether or not public law remedies are still available.

58. There is, in my judgment, nothing in the terms of the PCR which either expressly or by necessary implication requires the imposition of a limitation upon the availability of an award of damages where the Court is satisfied that the statutory criteria for an award are met. Those statutory criteria, both under Regulation 97 and 98 are (a) that a decision or action taken by a contracting authority was in breach of the duty owed in accordance with regulation 89 or 90; (b) that the breach of duty is actionable in

accordance with Regulation 91; and (c) that the claimant is an economic operator that has suffered loss or damage as a consequence of the breach.

59. Turning to the significance of an accrued cause of action, I accept that lawfully withdrawing a procurement may prevent private law claims from coming into existence thereafter. The broad discretion may therefore be useful in a wide range of circumstances, which (without limitation) may include those where the contracting authority recognises that (a) pursuing the procurement to the award of a contract would mean awarding a contract that was not the most economically advantageous or (b) taking the procurement to the award of a contract would not be expedient from the point of view of the public interest. To these established examples I would add that the discretion should allow a contracting authority to withdraw a procurement if it becomes apparent that continuing with the process means that the authority will act in breach of duty in such a way as enables an economic operator to bring a private law claim or a suitably interested party to bring a public law claim against it. All of these examples may be said to fall within the risk that tenderers accept because they know of the broad discretion and the absence of any implied obligation to carry the award procedure to its conclusion.

60. The question at issue is whether a lawful abandonment, in addition to the useful consequences outlined above, has the effect of depriving an economic operator of an accrued cause of action where, before the procurement is abandoned, a breach of duty by the authority can be proved to have caused the economic operator loss or damage.

61. An accrued cause of action is fundamentally different from an inchoate claim that might become enforceable at some future date. It is axiomatic that an accrued cause of action may be regarded as property, as an asset, as capable of having present value, and as being capable of being auctioned, assigned (for value or otherwise) and in some cases inherited or barred by limitation: see, for example, *LF2 Ltd v Supperstone* [2018] EWHC 1776 (Ch). These characteristics mean that it is correct to characterise what is being considered in the present case as "cancellation" of an existing accrued cause of action. Putting matters another way, there is a fundamental difference between the effect of Abandonment Decision being (a) to prevent further causes of action accruing in the future (which is uncontroversial) or (b) to deprive an economic operator of a cause of action which already exists and which he is entitled to enforce before the decision is taken. There are no terms of the PCR which expressly or by necessary implication mandate this second, more radical, effect. Furthermore, I see no basis in public law principles, public policy more generally or the purposes underlying and embodied in the PCR that mandates the result for which the Council contends. In particular, the principle of equal treatment, which underlies the directives on procedures for the award of public contracts, does not require the cancellation of an existing accrued cause of action as a consequence of withdrawing a procurement before a contract is concluded. Although tenderers are taken to accept the risk that a contracting authority may in some circumstances lawfully decide not to award a contract, there is no obvious basis for asserting that they also accept the additional risk that, if that happens, they will be deprived of accrued causes of action that are in existence at the time of the decision not to take the procurement to a contractual end-point.

62. In summary, I see no reason in principle why the Abandonment Decision should have any impact upon an accrued cause of action. The Council, however, supports its submissions by reference to authority, to which I now turn.

63. In *Embassy Limousines & Services v European Parliament* [1999] 1 CMLR 667 the applicant submitted a tender to the European Parliament to provide taxi services and was told it had been successful, which did not of itself give rise to any contractual or other obligation upon the Parliament to conclude the procurement process by entering into a contract. The applicant was encouraged by the European Parliament to incur start-up expenses such as purchasing cars and mobile phones and recruiting drivers. After a period of delay, the Parliament annulled the original invitation to tender and did not enter into the anticipated contract with the applicant, which brought a claim for compensation.

64. At [54] the Court affirmed the general principle that the contracting authority was not obliged to carry through to its end the procedure for an award of a contract. No liability flowed from the failure to award the contract to the applicant as no contractual liability (to enter into the contract) had been incurred and, since the annulment was lawful, it did not give rise to non-contractual liability either: see [56], [61], [96]. In particular, there was no liability to the disappointed tenderer for the expenses of preparing his tender: see [97]. However, and outside the scope of the procurement process itself, the contracting authority had encouraged the applicant to incur preparatory expenses in terms and manner that gave rise to a non-contractual liability. That liability did not flow from the procurement process as such; and no cause of action had accrued from the Parliament's conduct of the procurement as such. The case is therefore not direct authority on the possibility of a cause of action that accrues from the conduct of a procurement as such surviving the subsequent abandonment of the procurement.

65. In *Kauppatalo Hansel Oy v Imatran Kaupunki* [2003] ECR 1-12139 the procurement was for the award of an electricity supply contract for parts of the city of Imatra. The contracting authority did not enter into a contract on the basis of the invitation to tender. Instead, it decided after examining and comparing the tenders it had received that, because of errors committed by itself in its preliminary assessment, the content of the invitation to tender made it impossible for it to accept the most economically advantageous tender. The Court determined that, in such circumstances, the contracting authority was entitled to discontinue the procurement provided it did so without breaching the fundamental rules of Community law on public procurement such as the principle of equal treatment. Once again, this is not an authority upon the point at issue in the present case since no cause of action had accrued to the applicant before the contracting authority withdrew the procurement process.

66. The Council placed heavy reliance upon *Croce Amica One Italia Srl v Azienda Regionale Emergenza Urgenza* [2015] PTSR 600. The contracting authority withdrew the procurement having provisionally awarded the contract to the applicant but before entering into any binding commitment to do so. It withdrew the procurement on two grounds: first, that the applicant's bid was anomalous and, second, because preliminary criminal investigations were brought against the legal representative of the tenderer in respect of, inter alia, fraud: see [14] and [15]. The general statements of principle at [32]-[37] support the power of a contracting

authority to withdraw an invitation to tender on the basis that it is expedient, from the point of view of the public interest, to do so having regard to, among other things, any change that may arise in the economic context or factual circumstances the needs of the contracting authority itself. However, the facts in *Croce Amica* did not give rise to any binding obligation upon the contracting authority to the applicant, whether in the form of an obligation to enter into a contract or in any form of accrued cause of action. The question posed by the present action therefore did not arise and was not considered in *Croce Amica*.

67. The Council submits that *Croce Amica* confirms that there is a broad power to terminate a procurement. It goes on to submit that "it would be inconsistent with that broad power if termination did not as a matter of law bring the procurement to an end, in that authorities must remain liable for any and all of their conduct during the procurement." I am not sure I understand this submission. I accept that the termination brings the Procurement to an end. I also accept termination may have the desirable effect for the contracting party of preventing liabilities arising that would have arisen if the Procurement had been continued. However, for the reasons I have already outlined, there is no reason in principle why terminating a procurement (so that no further liabilities may accrue in future) should be regarded as inconsistent with a contracting authority being held responsible for liabilities that have already accrued.

68. *Apcoa Parking (UK) Ltd v City of Westminster* [2010] EWHC 943 (QB) was about procuring a contract or contracts for parking enforcement or street management services. The Defendant contracting authority came to recognise that a procurement process, in which the Claimant was a tenderer, was impermissibly being assessed by reference to criteria that were unpublished and unannounced, without reference to which it would not be possible to arrive at a proper decision as to whether any particular outcome would be the most economically advantageous: see [11]. It therefore withdrew the first procurement and commenced a second. The Claimant did not qualify to participate in the second procurement. The application before the Court was an application by the Claimant for an interim injunction to restrain the Defendant from entering into any contract with any bidders in the second procurement process.

69. As the judgment makes clear, there was a degree of confusion about the nature of the Claimant's case. It complained that the Defendant had acted unfairly to the Claimant in the course of the first procurement process and that it compounded the unfairness by arranging matters so that it was precluded from participating in the second: see [4]-[5]. The Judge recorded that it was unclear what "status quo" the Claimant was attempting to maintain. More fundamentally, he recorded that it was not clear what was the nature of the claim said to arise from the admitted illegalities in the course of the first procurement or what remedies were to be sought at trial, it being the Claimant's case that damages were not an adequate remedy: see [7]. What is clear is the limited nature of the issue being considered by the Court, namely whether an interim injunction should be granted on normal *American Cyanamid* principles in the prevailing circumstances. The final relief being claimed by the Claimant did not include a claim that the Defendant should be compelled by the court to enter into a contract with the Claimant; but it included the setting aside of the decision to abandon the first procurement, which led the Court to observe that:

> "This would involve *inter alia* an argument at trial that the decision to abandon the procurement process was itself a breach of the duty owed to the Claimant. Yet, however it is formulated, the Claimant's purpose would presumably be to compel [the Defendant] to backtrack and to pick up the first procurement process at some (unidentified) stage and thereafter to conduct it lawfully. … This reasoning is all based, obviously, on the assumption that Westminster was not entitled, in its discretion, to abandon the first process or, it would follow, to launch the second process now being conducted….": see [8].

70. The Court recorded the Claimant's contention that, if the published criteria had been properly applied, this would inexorably have led to its being awarded the contracts. The Court's response, at [12], was that:

> "… if the position is that [the Defendant] was entitled to abandon the first procurement process and to launch a second, as has now occurred, then it becomes unnecessary to rehearse at any length what did happen and what should have happened during the course of the first process."

71. The core of the Court's reasoning in refusing an interim injunction appears at [27]-[28] where, after referring to the broad discretion giving a contracting party the right to abandon a procurement procedure, the Court said:

> "27. I have come to the conclusion, therefore, that the essential foundation of the Claimant's argument is unsound in law. There is no legal basis to overturn or quash Westminster's decision to terminate the first procurement process and thus no prospect of obtaining the only form of injunctive relief currently pleaded. Accordingly, there is no need to "hold the ring" or maintain the status quo. The claim for interim relief thus falls at the first of the American Cyanamid hurdles.
>
> 28. Secondly, it is argued that the Claimant has failed to demonstrate why, if an actionable wrong has been committed and loss has been incurred in consequence, damages would not be an adequate remedy. It is plainly not an answer that a monetary award would be difficult to quantify, although I have little doubt that it would be. The primary argument appears to be that the Claimant was deprived of a flagship contract and the reputational kudos that would have been attached. That is not something that could be reflected in an award of damages, but it is also difficult to envisage a form of injunctive relief that could do any better."

72. Three points may be immediately noted. First, the decision was limited to a refusal to award an interim injunction. That decision was based upon acceptance of the broad discretion to terminate a procurement, so that the public law remedy of setting aside

the decision to terminate the first procurement was not available. That, of itself, says nothing about the survival of any accrued cause of action. Second, although there is mention in the judgment of the Claimant's submission that, but for the matters of which it complained, it would have been awarded the contract, it does not appear that there was any claim for damages; and, as already noted, it was the Claimant's case that damages would not be an adequate remedy. Third, even though the Court was accepting that there would be no power to overturn the termination of the first procurement, the possibility of a claim for damages surviving the termination was at least contemplated as a surviving remedy at [28]. What does not appear with any clarity is what was being considered to be the possible basis of such a claim for damages.

73. Because of the nature of the application being considered in *Apcoa* and the consequential lack of detailed analysis, I think it would be unwise to draw any inference from the terms of [28]. However, in my judgment, *Apcoa* provides no support for a submission that any accrued cause of action would have ceased to exist or to be enforceable by reason of the termination of the first procurement in that case.

74. Lastly, the Council referred to dicta of Coulson J (as he then was) in *Woods Building Services v Milton Keynes Council* (No 2) [2015] EWHC 2172 (TCC). One clear difference between the facts of *Woods* and the present case is that the Council in *Woods* had not at any stage purported to terminate the procurement process. The present issue therefore did not arise for decision. In a prior judgment, Coulson J had concluded that the Council's tender evaluation process was fundamentally flawed and had made adjustments which meant that the underbidding Claimant's tender was the best. He formally declared that the Claimant's tender was the most economically advantageous tender provided to the Council. In the second judgment he declined to order the Council to award the contract to the Claimant for five reasons, which included that the Claimant had not claimed such relief in its pleaded case, the absence of such an order as one of the remedies provided under the then current procurement regulations, and common law considerations arising on a request for a mandatory injunction requiring people to work together.

75. The judgment went on to consider the Claimant's alternative submission that it was entitled to an order for damages. The passage relied upon is at [15]-[17]:

> "15. I turn to consider the alternative claim for damages to be assessed. The Council maintained that I should not make such an order, and submitted that the appropriate analogy was with a tender process which the contracting authority had terminated. Ms Osepciu argued that contracting authorities enjoyed a broad discretion to abandon or terminate procurements without making any financial award: see case C-27/98 Metalmeccanica Fracasso ECLI:EU:C:1999.420 at paragraph 23.
>
> 16. I do not accept that this situation is at all analogous to a voluntary termination of the procurement by the Council. On the contrary, the Council maintained throughout the trial that its tender evaluation process was in accordance with the Public Contracts Regulations. I have found that, for numerous reasons,

> they were in breach of the Regulations. Woods were right to challenge the procurement and, all other things being equal, they would have been awarded the contract. In those circumstances, it would be absurd if, having lost so badly, the Council could then avoid the natural consequence of those breaches, namely an award of damages in favour of Woods."

76. I respectfully agree with these dicta, but they take the present issue no further. Coulson J lent no support to a submission that *if* the procurement process had been terminated it would have had the effect of cancelling an accrued cause of action: he said nothing about it either expressly or by necessary implication. He correctly concluded that there was no analogy to be drawn and that there was no basis for depriving the Claimant of an award of damages in the circumstances prevailing before him.

77. In my judgment none of the authorities mentioned in the summary of principles at [12] above or considered in more detail at [63]-[76] above support the proposition for which the Council contends.

78. Drawing these strands together, I consider that the acknowledged broad discretion has considerable value even without the cancellation of accrued causes of action for which the Council contends. In principle, the inherent nature of an accrued cause of action means that the power to cancel an accrued cause of action by the termination of a procurement requires either clear statutory sanction or cogent policy justification or binding prior authority, each of which is lacking.

79. I therefore answer Issue 7 by saying that the Abandonment Decision had no effect on the First Claim if and to the extent that Amey is able to prove that it had an accrued cause of action before the decision was taken on 2 August 2018.

Issues 1-4:

1. Did the Defendant act manifestly erroneously, contrary to the PCR, by taking the Abandonment Decision:

(1) On the premise that it would supersede the Claimant's claim in the First Action?

(2) By taking into account the potential costs, uncertainty, delay and disruption to highways services that it considered would arise from continuing to contest the First Action?

2. Did the Defendant act manifestly erroneously, contrary to the PCR, by taking the Abandonment Decision in a deliberate attempt to deprive the Claimant of its cause of action in the First Action?

3. Did the Defendant breach its obligation of equal treatment imposed by the PCR in taking the Abandonment Decision because the Claimant alone had an enforceable cause of action in respect of any errors in the conduct of the Procurement?

4. Did the Defendant breach its obligation of transparency imposed by the PCR in taking the Abandonment Decision because its stated reason or reasons for the decision was not that the decision was taken in a deliberate attempt to deprive the Claimant of its cause of action in the First Claim?

80. In the light of my conclusions on Issues 5 and 7 I propose to answer issues 1 to 4 relatively shortly and on the basis of my conclusion that the Abandonment Decision has no effect on an accrued cause of action that Amey may prove.

Issues 1 and 2: Manifest Error/Irrationality

81. I adopt the observations of Morgan J in *Lion Apparel Systems v Firebuy Ltd* [2007] EWHC 2179 (Ch) at [37]-[38]:

> "37. In relation to matters of judgment, or assessment, the Authority does have a margin of appreciation so that the court should only disturb the Authority's decision where it has committed a "manifest error".
>
> 38. When referring to "manifest" error, the word "manifest" does not require any exaggerated description of obviousness. A case of "manifest error" is a case where an error has clearly been made."

I also respectfully accept and endorse the observation of Coulson J in *Woods Building Services v Milton Keynes Council (No 1)* [2015] EWHC 2011 (TCC) that there is a broad equivalence between the concepts of manifest error and Wednesbury unreasonableness.

82. The first point to note is that I do not accept that issues 1 and 2 fully or accurately characterise the nature and reasons for the Abandonment Decision: see [41]-[42] above. The difference between Amey's characterisation of what happened and my assessment is that, in my view, the hope and intention that withdrawing the Procurement would cancel Amey's cause of action was only one element of the approach the Council took to the broad problem of how to avoid contracting with Ringway and contesting the Amey litigation to a conclusion.

83. I reject Amey's primary case which is advanced on the basis that the premise for the Council's decision was that it *would* extinguish Amey's claim in the First Action. In the event, the hope and belief (which was evidently founded on advice) has proved to be misplaced. However, viewed overall, I am not persuaded that the decision to abandon the Procurement was irrational. On the contrary, it was a rational attempt to preserve public funds taking into account a number of factors including (a) avoiding the double bind of contracting with Ringway and litigating the Amey claim to a conclusion, (b) taking into account the potential costs that would be saved if the First Action could be disposed of, (c) taking into account the additional costs that would be incurred by not entering into the contract with Ringway, (d) taking into account the need to secure the provision of critical services over the coming winter and (e) taking into account the possibility of developing a more advantageous solution on a re-procurement, as has been done. Even allowing for the inability to terminate Amey's claim in the First Action, Amey has not shown that there was any better approach for the Council to take than abandoning the Procurement and starting again while securing the provision of interim services from Balfour Beatty. Put another way, Amey has not shown that the decision was not expedient in the public interest.

Equal Treatment

84. Amey relied upon the dictum in *Fabricom v Belgium* [2005] ECR I-01559 that:

> "… the equal treatment principle requires that comparable situations must not be treated differently and that different situations must not be treated in the same way, unless the treatment is objectively justified."

85. The touchstone of the PCR is the intention to ensure that any procurement gives all bidders an equal opportunity. The Abandonment Decision does not infringe that principle since all bidders were equally placed, being bidders to whom no binding commitment had been made and who accepted the risk of a rational decision to withdraw the Procurement.

Transparency

86. I do not accept the premise on which Issue 4 is based. As I have indicated, the reason for the Abandonment Decision was more subtle than Amey characterises. I accept that it would have been possible for the Council to explain its reason more fully or in different terms. Viewed overall, however, I do not accept that there was a lack of transparency in the reasons given which renders the Council's decision unlawful.

87. For these reasons, I answer issues 1-4 in the negative.

What relief, if any, should be granted to the Claimant? [Issue 6]

88. As I am not satisfied that the Abandonment Decision was unlawful, no question of setting it aside arises. Had I found the decision to be unlawful, Amey has realistically adopted the position that it does not pursue the remedy of setting the decision aside. In substance, this judgment clears the way for Amey and the Council to address the real issues raised by the First Action, namely whether Amey can substantiate a claim for damages. In the submissions for the present hearing, the Council took the point that Amey has not argued that the alleged breach of the PCR was sufficiently serious to justify an award of damages. If that point remains live, it can and should be addressed by a one-line amendment to Amey's pleadings or other suitable form of clarification.

89. I therefore answer Issue 6 by saying that Amey's claim for damages in the First Action may be pursued as indicated in this judgment; and that I do not give any declaratory or other relief.