Neutral Citation Number: [2012] EWHC 2639 (TCC)

Case No: HT-12-147

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/9/2012

Before :

MR JUSTICE COULSON

- -

Between:

AG QUIDNET HOUNSLOW LLP	**Claimant**
- and -	
MAYOR AND BURGESSES OF THE LONDON BOROUGH OF HOUNSLOW	**Defendant**

- -
- -

Mr Nigel Giffin QC (instructed by **Berwin Leighton Paisner LLP**) for the **Claimant**
Mr Michael Bowsher QC & Ms Anneliese Blackwood (instructed by **Osborne Clarke**) for the **Defendant**

Hearing dates: 25th & 26th July 2012

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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 COULSON

Mr Justice Coulson:

1. INTRODUCTION

1. On 17 January 2012, the defendant ("the Council") agreed in principle to enter into what was described as a Development Agreement with Legal and General Assurance Society Limited ("L&G") for the redevelopment of a site in Hounslow Town Centre known as Key Site 1, Phase 2. The Council also agreed to enter into a "Lock Out" Agreement to enable them to negotiate the terms of the proposed agreement exclusively with L&G.

2. The claimant ("Quidnet") owns an existing shopping centre in Hounslow Town Centre. It objects to the manner in which the Council has decided to reach the proposed agreement with L&G and, to that end, commenced these proceedings on 4 May 2012. The claim against the Council is put in two ways. First, it is said that the proposed agreement comprises a public works contract to which the public procurement rules (set out in the **Public Contracts Regulations 2006** ("the 2006 Regulations"), as amended) apply. Quidnet say that the Council are in breach of the 2006 Regulations. Secondly, it is said that, even if the proposed agreement with L&G does not constitute a public works contract, nonetheless the proposed agreements are in breach of Article 56 of the Treaty on the Functioning of the European Union ("TFEU").

3. At a hearing on 27 June 2012, Akenhead J stayed the primary claim pursuant to the 2006 Regulations, and ordered an expedited trial of the alternative claim pursuant to Article 56. The issues of fact between the parties became negligible, so that at the trial on 25 and 26 July 2012, leading counsel were able to concentrate on the issues of law. I am very grateful to both of them for their considerable assistance.

4. It is first necessary to set out the factual background (**Section 2** below) and then summarise the relevant principles of law (**Section 3** below). Thereafter I deal with the six issues agreed by the parties in this way. In **Section 4**, I address Issues 2, 3 and 4, which are all concerned, in one way or another, with the true nature of L&G's obligations under the proposed agreement. In **Section 5,** I deal with Issue 1, which is a stand-alone issue as to whether or not this dispute relates to matters and parties restricted to the UK only, such that Article 56 would not be engaged at all. Thereafter, at **Section 6** I deal with Issue 5, which assumes that Article 56 applies to the proposed agreement and addresses the question of whether or not proper steps have been taken by the Council in consequence. In **Section 7,** I deal with Issue 6, which is concerned with the exercise of the court's discretion and Quidnet's claim for a declaration that the Council may not enter into the proposed agreement.

2. THE FACTUAL BACKGROUND

5. At present, there are two shopping centres in Hounslow Town Centre. One is the Treaty Centre, which is owned by a subsidiary of Quidnet. Quidnet became the owner in about December of 2011. The other shopping centre is known as the Blenheim Centre and is owned by L&G. Key Site 1, Phase 2 is adjacent to the Blenheim Centre.

6. The precise footprint of Key Site 1, Phase 2 remains unclear, although it appears broadly that the Council owns the freehold of around 60% of the relevant land. L&G themselves own about 20%, with the remaining 20% owned by third parties. All these percentages are rough estimates. The parties are agreed that, for present purposes, the fact that L&G own a part of Key Site 1, Phase 2, is irrelevant to the issues that I have to decide. It is, however important to note that the 20% of the site owned by third parties is likely to be the subject of the exercise of the Council's Compulsory Purchase Order ("CPO") powers.

7. It is no accident that the Council own the majority of Key Site 1, Phase 2: the evidence is that the Council acquired their proprietary interests about 20 years ago with a view to the potential development of this site. Indeed, prior to 2007, the Council had entered into a development agreement with a company called Apollo Real Estate, who then owned the Blenheim Centre and part of Key Site 1, Phase 2. However, it became apparent that Apollo's development proposal was not financially viable, and the development agreement was terminated. Subsequently, Apollo sold their freehold interests to L&G.

8. In March 2008, the defendant commissioned the production of what was known as the Vision Report which was approved by the Council in January 2009. The recommendations of the Vision Report dealt in general terms with the proposals to develop Hounslow Town Centre, of which Key Site 1, Phase 2 was just one possible development site. The document emphasised the potential of the area (and Key Site 1, Phase 2 in particular), but it was on any view a 'high level' strategy document which highlighted a three stage development process. The first was described as "a strategic master plan for the town centre" which would identify potential developments; the second involved area-based design proposals and detail guidance; and the third stage was for site-specific proposals.

9. In 2010, architects and planning consultants, Building Design Partnership ("BDP"), were commissioned to produce a Masterplan which would set out a detailed framework for the future development of Hounslow Town Centre. The Masterplan was not finalised and formally approved until February 2012. It divided the town centre into three areas: the Western Gateway, the Central Heart, and the Eastern Gateway. One of many development opportunities it described was the creation, on Key Site 1, Phase 2 (there described as 'Blenheim Centre Phase 2') of "a high quality and vibrant shopping, leisure and living area to connect the Blenheim Centre to the High Street". The key challenges in relation to this proposal were said to include "multiple land ownerships", which of course highlighted the need for CPOs. Indeed, that was emphasised in section 11 of the Masterplan, under the heading 'Context', which stated:

> "In many cases however, the delivery of regeneration schemes is a complex and longer term process. Successful schemes often require a combination of CPO, land assembly, highway changes, tenant relocations and statutory permissions before they can move to a construction phase. Thus many of the enabling actions can be taken early in order that when the property market returns to more normal levels of activity, schemes can be delivered in a timely fashion."

10. In relation to Key Site 1 Phase 1, the suggested delivery approach was as follows:

> "Significant development opportunity requiring comprehensive planning approach. A considerable number of interests are present, although there are several key ownerships identified, including the Council. Development expected to pay for new bus route and enhanced public realm within the wider area.
>
> Expected that the Council will take a significant lead in delivering the scheme by engaging with the developer, to secure the delivery through an appropriate selection process. Expectation that a scheme will be worked up in conjunction with the Council to meet the masterplan principles, before moving to submit a planning application. The use of CPO (or potential threat of) will almost certainly be needed to assemble all the land in a timely manner."

11. Before the final publication of the Masterplan, both L&G and Quidnet had been involved in discussions, of one sort or another, with the Council. It appears that, whilst the preparation of the Masterplan was still in its early stages, L&G approached the Council in June 2010 with a view to opening discussions about the development of Key Site 1, Phase 2. On 16 May 2011, L&G gave a formal presentation of their proposals for the development of the site. The Council viewed these proposals positively, principally because of L&G's access to the finance necessary to fund the development.

12. Quidnet's involvement began later and originally stemmed from the enquiries that they were making before they purchased the Treaty Centre at the end of 2011. It appears that on 16 August 2011, representatives from BDP met with representatives from Quidnet, when they were informed that the Council was already involved in discussions with L&G in relation to Key Site 1, Phase 2. The exclusive nature of those discussions was confirmed by Mr Dawson, the Council's Assistant Director of Environment, when he met the Quidnet representatives on 24 August 2011. Mr Dawson informed Quidnet that, subject to Council approval, the Council wanted to enter into a formal agreement with L&G in the early part of 2012.

13. It appears that, at this stage, Quidnet were more concerned with ensuring that proposed tenants for the Treaty Centre were not lost as a result of the possible development of Key Site 1, Phase 2. That concern formed the background to a further meeting between the parties on 6 December 2011, at which the intention to enter into an exclusive agreement with L&G was restated. It does not appear that at any stage in 2011 Quidnet suggested that they wished to be considered as a potential alternative to L&G in respect of the development of Key Site 1, Phase 2.

14. On 17 January 2012, the Council's Cabinet agreed to accept the recommendation to enter into a Lock-Out Agreement with L&G for the purpose of negotiating what was called a Development Agreement between the parties. Such lock-out agreements are common in this situation, where each party is keen to convey to the other the seriousness of their future intent.

15. The Lock-Out Agreement has reached final draft form, but has not yet been entered into. In the Lock-Out Agreement the Council are described as the Seller, and L&G are described as the Buyer. It records the parties' agreement, subject to contract, to enter into an agreement pursuant to which the Council will grant L&G a long lease of Key Site 1, Phase 2, in accordance with certain heads of terms. The Council agreed that, during the Exclusivity Period provided for in the Lock-Out Agreement, it would not enter into negotiations with any other party and would use its reasonable endeavours to agree detailed heads of terms. In exchange, L&G would also use reasonable endeavours to agree detailed heads of terms and to perform various conveyancing obligations.

16. Confidentiality has been claimed for a number of the heads of terms referred to in the proposed Lock-Out Agreement. It is therefore difficult, in a public judgment, to convey with complete accuracy, the precise nature of L&G's obligations. That is unfortunate where, as here, those obligations lie at the heart of the debate between the parties, and I know that I am not alone in believing that confidentiality is too often asserted in procurement disputes without proper justification. However, the essence of what is envisaged is an agreement for a long lease, with the Council as the landlord and L&G as the tenant. There are express references to third party land and CPOs.

17. Importantly, there is no reference anywhere in the heads of terms to any express obligation on the part of L&G to carry out any development of Key Site 1, Phase 2. Accordingly, despite the wording of the original recommendation, and the minutes of the meeting on 17 January 2012, there is no document which could accurately be described as a development agreement. Mr Giffin maintained that, instead of imposing express development obligations on L&G (which could bring the 2006 Regulations into play), the Council seemed to be relying on the commercial imperatives that L&G would doubtless face as the long-term tenant of Key Site 1, Phase 2 if it was *not* developed. Whether that is right or not, the absence of any express obligation on the part of L&G to develop Key Site 1, Phase 2 is potentially significant as a matter of law, as we shall see in paragraphs 22-26 below.

18. The decision in principle to enter into the Lock-Out Agreement was noted on the Council's website on 18 January 2012. At the same time, they issued a press release which said that the Council had "approved plans to enter negotiations with L&G which will agree how the site between the Blenheim Centre and Hounslow High Street can be redeveloped". L&G themselves issued their own press release on 27 January 2012 which referred to the proposal as offering "an excellent opportunity to deliver new shops, leisure facilities and public spaces that will help revitalise Hounslow Town Centre and create hundreds of new jobs for local people." The scale of the development was picked up in a number of the subsequent press articles, which referred to the initial proposals including a cinema, 15-20 shops, 6 or 7 restaurants and a 500 space car park.

19. As noted above, the Masterplan was formally approved by the Council's cabinet on 7 February 2012. Between then and 11 May 2012, there were further negotiations between the Council and L&G over the terms of the Lock-Out Agreement, which have now been finalised, although it has not yet been signed. In addition, although the agreement to grant a head lease has not yet been negotiated, the heads of terms have also been agreed in principle.

20. Although Quidnet had met with some of the Council's planning team on 24 January 2012, it does not appear that any specific objection was taken on that occasion to the Lock-Out Agreement or the decision in principle that had been taken by the Council. The evidence suggests that it was not until February 2012 that Quidnet's planning consultants first raised the possibility that there may be a procurement challenge to the decision relating to Key Site 1, Phase 2.

21. On 5 March 2012, Quidnet sought further information in respect of the proposals for Key Site 1, Phase 2 by way of a request under the Freedom of Information Act 2000. As is sadly too often the case, the Council were slow to answer the request, and when they did, on 4 April 2012, their answer was inaccurate in a number of important respects. In consequence, Quidnet sent a further letter dated 24 April 2012 and the Council responded on 9 May 2012. At least some of the information originally sought had still not been provided. In parallel, Quidnet wrote to the Council on 25 April 2012 seeking confirmation that the Council would comply with its obligations under public procurement law. The Council responded on 4 May 2012 but, by then, Quidnet had decided to commence these proceedings.

3. THE RELEVANT PRINCIPLES OF LAW

3.1 Public Procurement and the 2006 Regulations

22. Although Quidnet's primary claim (that the proposed agreement was a public works contract) has been stayed, it is important briefly to analyse the law relating to public procurement and how it interacts with development agreements generally. This is because, at the hearing before me, leading counsel agreed that Quidnet's alternative case (that, even if the proposed agreement was not a public works contract, Article 56 still applied to it) had never before been argued in connection with a development agreement. Accordingly, before going on to look at what the Council's obligations might be for the purposes of Article 56, it is instructive to see just why the argument arises in the first place.

23. The **2006 Regulations** contain an exhaustive list of the mandatory rules relating to the procurement of public works contracts. There have been a number of cases, both in the UK and in Europe, which have considered the question of whether development agreements were public works contracts, and therefore caught by the 2006 Regulations or the relevant EU Directive.

24. In ***R v Brent London Borough Council ex parte O'Malley*** [1997] 30 HLR 328, the Court of Appeal concluded that development agreements were not public works contracts, so that the 2006 Regulations and Directive did not apply to them. However, the court in ***Case C-220/05 Auroux*** [2007] ECR 1-385 (a decision of the First Chamber) ruled that, in certain circumstances, development agreements could be public works contracts. The law has now been comprehensively restated in ***Case C-451/08 Helmut Müller*** [2010] 3 CMLR 18. In that case, the Third Chamber set out the principle that a development agreement is a public works contract if (but only if) the developer was under a legal obligation to carry out the works and if the works were of direct economic benefit to the public authority. At paragraph 63, the court said:

> "…the concept of 'public works contracts', within the meaning of [the Directive], requires that the contractor assume a direct or indirect obligation to carry out the works which are the subject of the contract and that that obligation is legally enforceable in accordance with the procedural rules laid down by national law."

25. In ***R (on the application of Midlands Cooperative Society Limited) v Birmingham City Council and Another*** [2012] EWHC 620 (Admin), Hickinbottom J ruled that the development agreement with which he was concerned did not contain any legally enforceable obligation on the part of Tesco to perform relevant construction works. Applying the decision in ***Helmut Müller***, he therefore concluded that the development agreement in that case was not a public works contract, so that the 2006 Regulations did not apply.

26. As I have noted, the claim that the proposed agreement was a public works contract has been stayed. Since the alternative case under Article 56 only arises at all if the proposed development agreement between the Council and L&G was *not* a public works contract, the remaining question is whether, if the 2006 Regulations do not apply to this contract, Article 56 still does. Leading Counsel agree that this is a novel claim; it was not argued in ***Midlands Cooperative Society***, nor in any of the European cases concerned with development agreements.

3.2 Article 56

27. Article 56 of the TFEU provides as follows:

> "Within the framework of the provisions set out below, restrictions and freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.
>
> The European Parliament and the Council acting in accordance with the ordinary legislative procedure, may extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Union."

28. Services are defined in Article 57:

> "Services shall be considered to be 'services' within the meaning of the Treaties where they are normally provided for remuneration so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.
>
> 'Services' shall in particular include:
>
> a) activities of an industrial character;
>
> b) activities of a commercial character;

> c) activities of craftsmen;
>
> d) activities of the professions.
>
> Without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the Member State where the service is provided, under the same conditions as are imposed by that State on its own nationals."

29. The only other article of the TFEU said to be relevant to this dispute is Article 345, which provided that "the Treaties shall in no way prejudice the rules in Member States governing the system of property ownership".

3.3 Situations Where Article 56 Has Been Engaged

30. Although the TFEU does not limit the application of Article 56 to particular situations, it is right to note that, in broad terms, Article 56 has been held to apply where the contract could be said in one way or another to be analogous to a public works contract. There are essentially three such situations identified in the case law.

31. The first is where the Directive on Public Works Contracts (Directive 2004/18/EC)("the Directive") does not apply because of the operation of a particular exclusion or prohibition, the most common being that the value of the contract in question falls below the €6 million threshold identified in the Directive. An example of such a case is ***Case C-59-00 Vestergaard*** [2001] ECR I-9505.

32. The second type of situation where Article 56 has been applied is where the Member State controls access to a particular service market by imposing a general prohibition, and then grants a single licence to a third party to provide those services. A number of these cases relate to gaming and betting services: see for example ***Case C-203/08 Sporting Exchange Limited*** [2010] 3 CMLR 41. Plainly, in such situations, there is a clear and obvious requirement for transparency and competition, because the State directly controls access to all the opportunities to provide the restricted services within its territory by the grant of the single licence.

33. The third type of situation is the granting of a concession. I was referred to a number of cases in this area of law, because it was Mr Giffin's central submission on behalf of Quidnet that the proposed agreement in this case was akin to the grant of a concession. In particular, Mr Giffin relied on three particular cases in this connection.

34. The first was ***Case C-324/98 Telaustria*** [2000] ECR 1-10745. That was a case in which the contracting authority had an obligation to make a directory available to their customers. They granted the concession for the making of the directory to a third party contractor. The principal argument, that this was a public works contract, failed. Thus the detailed provisions of the Directive were not relevant. However, the court went on to say that:

> "60…[Although] such contracts are excluded from the scope of Directive 93/38, the contracting entities concluding them are, none the less, bound to comply with the fundamental rules of

> the Treaty, in general, and the principle of non-discrimination on the ground of nationality, in particular…
>
> 62. That obligation of transparency which is imposed on the contracting authority consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed."

35. In ***Case C-231/03 CoNaMe*** [2006] 1 CMLR 2, a decision of the Grand Chamber, the court confirmed that concession contracts were excluded from the Directive but restated the approach in ***Telaustria***:

> "18. In the absence of any transparency, the latter undertaking has no real opportunity of expressing its interest in obtaining that concession.
>
> 19. Unless it is justified by objective circumstances, such a difference in treatment, which, by excluding all undertakings located in another Member State, operates mainly to the detriment of the latter undertakings, [and] amounts to indirect discrimination on the basis of nationality…
>
> 20. With regard to the case in the main proceedings, it is not apparent from the file that, because of special circumstances, such as a very modest economic interest at stake, it could reasonably be maintained that an undertaking located in a Member State other than that of the Commune in question would have no interest in the concession at issue and that the effect on the fundamental freedoms concerned should therefore be regarded as too uncertain and indirect to warrant the conclusion that they may have been infringed…
>
> 21. In those circumstances, it is for the referring court to satisfy itself that the award of the concession by the Commune complies with transparency requirements which, without necessarily implying an obligation to hold an invitation to tender, are, in particular, such as to ensure that an undertaking located in the territory of a Member State other than that of the Italian Republic can have access to appropriate information regarding that concession before it is awarded, so that, if that undertaking had so wished, it would have been in a position to express its interests in obtaining that concession…
>
> 28. In those circumstances, the answer to the question referred must be that Articles 43 EC and 49 EC [the predecessor of Article 56] preclude, in circumstances such as those at issue in the main proceedings, the direct award by a municipality of a concession for the management of the public gas-distribution service to a company in which there is a majority public holding and which the municipality in question has a 0.97%

> holding, if that award does not comply with transparency requirements which, without necessarily implying an obligation to hold an invitation to tender, are, in particular such as to enable an undertaking located in the territory of a Member State other than that of the municipality in question to have access to appropriate information regarding that concession, so that, if that undertaking had so wished, it would have been in a position to express its interest in obtaining that concession."

36. The final concession case on which particular emphasis was placed was ***Case C-458/03 Parking Brixen GmbH*** [2006] 1 CMLR 3. There, the principal argument was whether the Treaty applied or whether, because all aspects of the case were restricted to Italy, it did not. That argument failed: see paragraphs 54 and 55 of the judgment. The court restated the principle that equal treatment of tenderers was to be applied to public service concessions even in the absence of discrimination of grounds of nationality. They stressed the importance of opening up contracts to competition. In addition, they said that a complete lack of any call for competition in the case of the award of a public service concession did not comply with Articles 43 and 49 (the predecessors to Articles 49 and 56).

37. One case to which I was referred that did not fit easily into the three broad categories noted above was ***Case C-145/08 Club Hotel Loutraki*** [2010] 3 CMLR 33. That case involved a contract which was intended to lead to the setting up of a single purpose limited company by the successful tenderer, which company would then take over the management of a casino, and implement a development plan. The issue was again whether the services aspect of the contract constituted a public service concession which was therefore not caught by the Directive. The court concluded that it did not matter whether the services aspect was a concession or not, because the main object of the contract fell outside the Directive in any event, but also made comments about the application of the Treaty:

> "62. Having regard to the foregoing considerations, the conclusion must be that a mixed contract of which the main object is the acquisition by an undertaking of 49% of the capital of a public undertaking and the ancillary object, indivisibly linked with that main object, is the supply of services and the performance of works does not, as a whole, fall within the scope of the directives on public contracts.
>
> 63. That conclusion does not preclude the fact that such a contract must observe the basic rules and general principles of the Treaty, in particular those on the freedom of establishment and the free movement of capital. However, there is no reason in the present case to consider the question of observance of those rules and principles, given that the result of such an examination could in no way lead to a finding that Directive 89/665 applies."

For the reasons noted below, I consider that there are at least some similarities between the proposed agreement in this case and the contract in ***Club Hotel Loutraki***.

3.4 What Is Required By Article 56?

38. If Article 56 applies, as opposed to the 2006 Regulations or Directive, what is required? The authorities suggest that no particular procurement procedure has to be followed. A formal tender process is not necessarily required: see ***Sporting Exchange***. What is definitely required is what is referred to as "a degree of advertising" sufficient to enable the service market to be opened up to competition: see ***Telaustria***. But this general obligation has itself been the subject of controversy in Europe: see the discussion in **Section 6**, dealing with Issue 5.

4. ISSUES 2, 3 AND 4: THE TRUE NATURE OF L&G'S OBLIGATIONS AND THE LEGAL CONSEQUENCES THEREOF

4.1 Issue 2: 'Does entry into the proposed agreement with the Defendant supply the party entering into that agreement with an opportunity to provide services within the meaning of Article 56 TFEU?'

39. As both parties recognised, this was one of the critical issues in the case. Mr Giffin argued that the development of the site was a service being provided by L&G, as developer, to the prospective tenants of Key Site 1, Phase 2. He said it was immaterial that the services were not being provided to the Council. On the other hand, Mr Bowsher maintained that L&G were not obliged to carry out any services under the proposed agreement and that any services would be provided not by but *to* L&G, by contractors, sub-contractors and suppliers. In essence, his argument was this was an agreement in relation to land which fell outside Article 56 altogether.

40. This debate was crystallised in the way in which counsel referred to the proposed agreement between the Council and L&G. Mr Giffin called it 'the Development Agreement', and that was certainly how it was referred to in the written recommendations to the Council which were considered and approved at the relevant Cabinet meeting. Mr Bowsher called it 'the Lease Agreement' because, on his analysis, that was what it was: an agreement to agree the terms for a long lease of the site.

41. In my judgment, for the reasons noted below, Mr Bowsher's submissions on this critical issue are to be preferred. In reality, this is not a case in which L&G are providing services of the type envisaged by Article 56. This is no more than an agreement to agree the terms of a long lease of Key Site 1, Phase 2.

42. First, I consider that that is the only conclusion that can be drawn from the draft heads of terms. On a proper construction of these terms, they amount to an agreement by the Council to grant a ground lease for a long period on Key Site 1, Phase 2. There is no express obligation on the part of L&G to develop the site or provide any services whatsoever. Whilst Mr Giffin may be right to say that this was the deliberate result of careful drafting, so as to avoid the consequences of the 2006 Regulations, the fact remains that the heads of terms require no services to be provided by L&G. If L&G subsequently find themselves faced with the commercial necessity of developing the site (as opposed, say, to landbanking it for 20 years), then that is a matter for them. The development would in any event be some way into the future, and is predicated on a number of uncertain events.

43. The proposed agreement amounts to no more than this: that a head lease will be granted to L&G once specified pre-conditions had been met. Those pre-conditions are designed to ensure that the Council owned the whole of Key Site 1, Phase 2 prior to the actual grant of the head lease, and that L&G was in a position to decide, at the relevant time, that entry into the head lease was commercially viable. In the meantime, all the costs incurred during the conditional period (apart from the Council's own legal costs) were to be borne by L&G. The granting of the head lease does not oblige L&G to carry out any development, and the Council were not required to provide any support to facilitate such development. On the grant of the lease, L&G would have a proprietary interest in Key Site 1, Phase 2; thereafter, it was a matter for them what they wanted to do with that interest.

44. In those circumstances, as a matter of construction, I conclude that the proposed agreement was not a contract for the provision of services as defined in the TFEU, and it fell outside Article 56.

45. Secondly, I consider that the difficulties with the position adopted by Quidnet become even more apparent when regard is had to the services which they claim would be provided in connection with Key Site 1, Phase 2. They have identified services such as demolition, the preparation of the land, the construction and the fitting-out of the new buildings, and all associated professional activities. Not only are those services which are not identified anywhere in the proposed agreement, but Quidnet also accept that they would not be services which L&G would themselves be providing in any event. If the development ultimately went ahead, those services would be provided by third party contractors and consultants. They would therefore be services provided *to* L&G as developers/employers, not *by* L&G as contractors.

46. In my view, the provision of services *to* L&G, which may or may not occur in the future, is plainly outside Article 56. L&G are a commercial organisation, not a public authority. Further and in any event, I consider that the provision of services to L&G by others down the contractual chain, conditional as that would be on so many future events, is too uncertain and remote in law to engage Article 56.

47. There was a suggestion that different considerations might apply to the management services which L&G might provide in connection with any future development of Key Site 1, Phase 2. But that seems to me to be unrealistic, because such services would also not be provided to the Council; as a result of the long lease, those services would be for L&G's own benefit, in order that they maximise their interest in the land. Again, they would not be caught by Article 56.

48. Thirdly, contrary to Mr Giffin's submissions, I am in no doubt that the proposed agreement is not akin to a concession contract in any way. Pursuant to the proposed agreement, L&G are not being granted a concession. They are not being put in the shoes of the Council, obliged to provide services to the public but entitled to charge for such services. Unlike, for example, the company providing bailiff services to the Ministry of Justice in ***JBW Group Ltd v Ministry of Justice*** [2012] EWCA Civ 8, L&G are not being granted a concession to provide public services at all. Here the opportunity represented by the proposed agreement is simply the conferral upon them of an interest in land.

49. That leads on to the fourth and final reason why I have concluded that the proposed agreement does not trigger Article 56. The Council wants to grant a long lease on property they either own or are in a position to acquire. They want to grant that long lease to a particular lessee (L&G), not anyone else, because of L&G's ability to raise the necessary capital for the potential project. In my view, it would be stretching the ambit of Articles 56 and 57 beyond breaking point to suggest that European or domestic law requires a landowner in that situation, who happens to be a public authority, to grant a lease of its land to a party with whom it does not wish to contract. None of the authorities, whether in the UK or the EU, support such a radical proposition; indeed, for the reasons which I have endeavoured to explain, I consider that the cases run counter to any such suggestion.

50. In those circumstances, I consider that the answer to Issue 2 is no. That is therefore an end to Quidnet's alternative claim. However, I go on and address the remaining Issues in case I am wrong on Issue 2.

4.2 Issue 3: Would the Defendant's entry into the proposed agreement with L&G, without certain positive steps being taken, place a restriction on the Claimant's ability to provide services? In particular:

i) What is the nature of the opportunities supplied to the party entering into the proposed agreement?

ii) Would any such opportunity be available elsewhere?

51. These particular issues arise for two reasons. First, Quidnet appear to suggest in their pleadings that the development of Key Site 1, Phase 2 was a unique commercial opportunity, a proposition disputed by the Council. Secondly, Quidnet argue that the proposed agreement imposes a restriction upon developers and that it is irrelevant that there is land elsewhere in the region which could be developed. On this issue, there is some late 'expert' evidence from Dr Gunnar Niels which broadly supports the Council's case that this was not a unique opportunity and that there are many commercial development opportunities such as this one available in the UK in any given year.

52. I deal with these specific issues below. However, for the reasons that I go on to note in paragraphs 56 and 57 below, I do not consider that these questions are ultimately of any real relevance to the matters that I have to decide. In my view, what matters is whether the proposed agreement comprises a restriction on services, which would be prohibited by Article 56. I do not consider that it does.

53. Dealing first with the particular issues, I consider that the categorisation of this site as a unique development opportunity depends entirely on the criteria being applied. On the one hand, all development sites are different and therefore each one could be said to be unique; on the other, a company that is in the business of property development will never be able to develop every site that it might wish to, but will know that, in the round, there will always be new potential sites coming on to the market.

54. On all the evidence available to me, I conclude that the answer to Issue 3(i) is that the opportunity to develop Key Site 1, Phase 2 in Hounslow was an opportunity to carry out a potentially prestigious development in an important town centre not far from the

heart of London. It is not an opportunity which could be said to arise very often. Although there is evidence about other potential development sites in Croydon and the like, the reality is that this particular opportunity, although plainly not unique, could be classified as relatively rare.

55. In those circumstances, the answer to issue 3(ii) is that, although similar opportunities might come up from time to time in and around London, they would not arise very often. The proposed agreement does, therefore, deny others a possible development opportunity, although other development opportunities in the South East of England, some of which will be similar to this one, will inevitably become available from time to time in the future. That is another reason why this situation is not directly comparable to a unique concession contract.

56. However, in my judgment, none of this is of any real significance to the outcome of this case. That is because what matters for the purposes of Article 56 is not the particular nature of the development opportunity, but whether there is a restriction placed by the public authority on the services to be provided to that authority. In my view, even if I am wrong in my answer to Issue 2, and the proposed agreement amounts to the provision of services, there is no restriction at all.

57. The proposed agreement does not contain any restriction being placed by the Council on the provision of services. The Council does not seek to restrict L&G's ability to contract with whom they like, if and when they decide to develop the site, in order that the relevant services might be provided. For example, they are not requiring L&G only to use demolition contractors based within 30 miles of Hounslow. That might well have been an illegitimate restriction. But the Council has placed no restriction on what might be called the downstream market, the contractors, suppliers and the like who might one day have a part to play in any development of Key Site 1, Phase 2. There are no restrictions at all on those who may carry out the services outlined in paragraph 45 above. That is a further reason why Article 56 is not engaged: there is no relevant restriction on the provision of services.

4.3 Issue 4: Does the case law impose a requirement that the Defendant has to take positive steps to comply with general principles of EU Law, such as transparency and equality, before it enters the proposed agreement? In particular:

(i) Does the EU case law only impose the requirement in certain limited types of contractual situation, and if so what situations, or does the obligation have wider application?

(ii) Does Article 345 TFEU affect the conclusions in relation to Question 4(i)?

58. As discussed with the parties during the hearing, there is something of the exam question about this Issue. I consider that it is some way removed from the real issues that arise between the parties in this case.

59. As set out in **Section 3** above, the EU case law can broadly be interpreted as imposing Article 56 obligations in situations where that might fairly be described as a sort of consolation prize; where it has been found that the Directive 2006 Regulations are, for whatever reason, excluded. Thus, Article 56 has been applied principally in the three types of situation noted in paragraphs 31-36 above. For the reasons that I have given,

I do not consider that any of those are analogous to the present case. In particular, this is not similar to a concession contract; it is a one-off agreement for lease in relation to a single parcel of land.

60. However, it would not be right to say that, merely because the case law is capable of being categorised in this way, Article 56 obligations can only apply in those three situations. That would be to overstate it. Indeed, this very issue (namely, whether the applicability of Article 56 was limited to these three types of case) arose, in a rather unsatisfactory way, in the General Court in 2010. The somewhat curious circumstances in which that happened are set out below.

61. In 2006, in the Official Journal of the European Union, Commission Interpretive Communication (2006/C 179/02) was published. The Communication pointed out that there was a wide range of contracts that were not covered, or were only partially covered, by the Public Procurement Directives. The Communication then went on to summarise some of the European cases, and to spell out what rights and obligations existed in such cases. It was controversial because, whilst many of the propositions were footnoted by reference to authorities (principally those referred to in paragraphs 31-36 above) a number of them were not, and appeared on their face to comprise new law.

62. In particular, in a section headed 'Relevance to the Internal Market', the Communication said as follows:

> "The standards derived from the EC Treaty apply only to contract awards having a sufficient connection with the functioning of the Internal Market. In this regard, the ECJ considered that in individual cases 'because of special circumstances, such as a **very modest economic interest at stake**', a contract award would be of **no interest to economic operators located in other Member States**. In such as case, 'the effects on the fundamental freedoms are…to be regarded as too uncertain and indirect' to warrant the application of standards derived from primary Community law. [***CoNaMe*** was cited in the applicable footnote].
>
> It is the responsibility of the individual contracting entities to decide whether an intended contract award **might potentially be of interest to economic operators located in other Member States.** In view of the Commission, the decision has to be based on an **evaluation of the individual circumstances of the case**, such as the subject-matter of the contract, its estimated value, the specifics of the sector concerned (size and structure of the market, commercial practices etc) and the geographic location of the place of performance."

No footnote was provided for this paragraph, and no authority was cited in support of the propositions it set out.

63. The lawfulness of the Communication was challenged in ***Case T-258/06 Commission v Germany*** [2010] ECR 00. The Federal Republic of Germany argued that the

Communication was invalid because, amongst other reasons, the relevant authorities (such as ***Telaustria***, ***CoNaMe*** and ***Parking Brixen***) concerned public contracts relating to service concessions which were comparable to those which were covered by the Directive, and that, consequently, the line of authority explained in those judgments was not applicable to other types of contracts. That argument was rejected by the General Court at paragraph 83:

> "…by contrast, the fact that the contracts at issue in those judgments were, in terms of their importance, comparable to the public contracts in which the Public Procurement Directives apply, is not mentioned anywhere in those judgments in order to justify an obligation to advertise adequately and, specifically, before the contract is awarded. It follows that, contrary to the assertions made by the Federal Republic of Germany, that case-law can be transposed to the public contracts covered by the Communication, to which, as has already been pointed out, the principle of equal treatment and the corollary obligation of transparency also applies."

64. Accordingly, the General Court expressly confirmed that the mere fact that the contract in question was not one of the three broad types discussed in Section 3 above did not, of itself, mean that Article 56 would not apply to it. Given the wide-ranging nature of Article 56, that seems to me, with respect, to be right. However, that conclusion does not alter my view that the types of contract to which Article 56 has been held to apply in the reported cases are of at least some assistance in deciding whether the contract in question is or is not within the relevant protection of Article 56.

65. Accordingly, the answer to Issue 4(i) is that the obligation to take at least some positive steps applies to all situations where Article 56 applies. It therefore has a wider application than merely the three types of situation covered by the EU case law. That said, for the reasons which I have given, it seems to me that the case law is instructive as a guide.

66. For the reasons that I have already given in **Sections 4.1 and 4.2** above, I consider that this particular contract does not engage Article 56. That is principally because of the nature of the proposed agreement, the absence of any services being provided by L&G to the Council, and the absence of any relevant restriction on those who actually provide the services. I therefore draw some additional comfort, in reaching that conclusion, from the reported case law, because I consider that this proposed agreement is not in any way similar to a concession contract, much less the other types of situation in which Article 56 has previously been found to have been engaged.

67. For completeness, I should add that I do not consider that Article 345 is of any direct relevance to the disputes between the parties. No one is suggesting that this is a case where the UK system of property ownership is affected.

5. ISSUE 1: IS THIS AN INTERNAL MATTER ONLY?

68. The Issue between the parties is this:

> "1. If the present matter is wholly internal to the UK it is agreed that Article 56 TFEU will not apply. The questions are therefore:
>
> (i) What is sufficient to ensure that the requirement for a cross-border element is satisfied?
>
> (ii) Has that requirement been satisfied on the facts of the present case?"

69. Article 56 cannot be applied to activities which are confined in all respects within a single Member State: see ***RI.SAN*** [1999] ECR 1-05219 and ***Case C-97/98 Jagerskiold*** [1999] ECR 1-07319. Those cases demonstrate that activities are to be treated as being confined in all respects within a single Member State where the parties to the proceedings are nationals of that Member State, or established in that Member State, and the activities at issue take place within that Member State. In ***RI.SAN***, all the various parties and the activities were based in Italy. The CJEU found that the situation did not have "any connecting link with one of the situations envisaged by Community law in the area of free movement of persons and services" and that, because all the facts in the proceedings were confined within a single Member State, the provisions of the Treaty relating to movement of services did not apply. The mere fact that there might be third parties in other Member States, who could potentially also be affected, was held to be insufficient to engage the rights to free movement of services and/or the freedom of establishment.

70. This approach has been upheld much more recently in the case of ***Case C-245/09 Omalet*** [2010] ECR 00 where, at paragraph 12, the court said:

> "It is settled case-law that the Treaty provisions relating to the freedom to provide services do not apply to situations where all the relevant facts are confined within a single Member State…"

Accordingly, Mr Bowsher maintains that, since both parties and the land in issue in this case are all confined to the UK, Article 56 is not engaged in any event.

71. In response, Mr Giffin points out that in both ***CoNaMe*** and ***Parking Brixen***, the parties to the proposed contracts and the activities were all based in one country (in each case, Italy) and yet the Treaty was still said to be engaged. The rationale was that an undertaking in another Member State might be interested in bidding for the work in question but, if that undertaking does not know about the opportunity, it will be deprived of the opportunity. Thus Mr Giffin argued that, in accordance with those authorities, the fact that both parties and Key Site 1, Phase 2 are all located in the UK is irrelevant, and what matters is the potential restriction on developers in other Member States.

72. To my eyes, anyway, there is a conflict between these two strands of authority. The only attempt to resolve that conflict can be found in the Advocate General's opinion in ***CoNaMe*** where at paragraph 27, he said:

> "As regards substance, it is essential to caution against dogmatising the approach adopted in the ***RI.SAN*** case. In the

> specific context of procurement law, which is aimed at opening up national markets, whether or not all the parties in a given award procedure and/or in the subsequent national review procedure come from the same Member State as the contracting authority must not be the decisive factor. That approach could even be construed as an indication that the requisite announcement of the award procedure had not in fact taken place and, therefore, that no foreign undertaking could participate in it. That is the case not only for the procurement directives but also for the fundamental freedoms concerned. Thus protection must be afforded not only to the undertakings actually participating in an award procedure but also to potential tenderers. Therefore, undertakings from other Member States need only be potentially concerned for there to be a cross-border situation and, thus, for a criterion for the applications of the fundamental freedoms to be met."

However, that approach, which must lead logically to the conclusion that ***RI.SAN*** was wrongly decided, was not adopted by the court in ***CoNaMe***, which declined to express any agreement with it. Moreover, as noted above, ***Omalet*** is more recent authority for the proposition that the ***RI.SAN*** approach remains correct.

73. As a result of what I perceive to be a conflict between these two lines of authority, I have not found this issue easy. I do not consider that the cases can be satisfactorily reconciled. I therefore address the issue on first principles.

74. L&G are a UK company. The Council is a UK authority. Quidnet are a UK company. The land in question is in the UK. There is no evidence that any undertaking in any other Member State is interested in the development of Key Site 1, Phase 2, in Hounslow Town Centre. In those circumstances, I conclude that this is an internal matter, and that the ***RI.SAN*** principle applies. Accordingly, for that third reason, I do not consider that Article 56 is engaged in this case.

6. ISSUE 5: HAVE PROPER STEPS BEEN TAKEN?

75. Issue 5 between the parties is in these terms:

> "5. If Article 56 TFEU does require the defendant to take positive steps before it enters into the proposed agreement in order to comply with the general principles of EU law:
>
> (i) What positive steps need to be taken by the Defendant; and
>
> (ii) Has the Defendant already taken those positive steps?"

Of course, this issue only arises if I am wrong in my primary conclusion that Article 56 is not engaged.

76. The general nature of the steps to be taken is set out in Section 3.4 above. I note that this point too was the subject of the controversy about Communication 2006/C 179/02, referred to in paragraphs 61-64 above. Paragraph 2.1.1 of the

Communication was entitled 'Obligation to ensure adequate advertising'. The full text of the paragraph was in these terms:

> "According to the ECJ, the principles of equal treatment and of non-discrimination imply an **obligation of transparency** which consists in ensuring, for the benefit of any potential tenderer, **a degree of advertising sufficient to enable the market to be opened up for competition.**
>
> The obligation of transparency requires that an **undertaking located in another Member State has access to appropriate information regarding the contract before it is awarded**, so that, if it so wishes, it would be **in a position to express its interest** in obtaining that contract."

A number of cases are cited in the footnotes for this passage, including ***CoNaMe*** and ***Telaustria***. The Communication then goes on:

> "The Commission is of the view that the practice of contacting a number of potential contenders would not be sufficient in this respect, even if the contracting entity includes undertakings from other Member States or attempts to reach all potential suppliers. Such a selective approach cannot exclude discrimination against potential tenderers from other Member States, in particular new entrants to the market. The same applies to all forms of 'passive' publicity where a contracting entity abstains from active advertising but replies to requests for information from applicants who found out by their own means about the intended contract award. A simple reference to media reports, parliamentary or political debates or events such as congresses for information would likewise not constitute adequate advertising."

No cases were footnoted in relation to that entire paragraph. Neither were any authorities cited for the next passage:

> "Therefore, the only way that the requirements laid down by the ECJ can be met is by **publication of a sufficiently accessible advertisement prior to the award of the contract**. This advertisement should be **published by the contracting entity in order to open up the contract award to competition**."

77. In ***Commission v Germany***, there was a complaint that, in particular, the paragraph starting "The Commission is of the view…", noted above, was not grounded in authority. At paragraph 100 of the judgment, the General Court said about that argument:

> "Moreover, it must be held that, in order for it to be possible to review the impartiality of the award procedures, the obligation of transparency demands that the contracting authority must

> actively divulge information, just as it must ensure the appropriateness of the detailed arrangements for putting the contract out to competitive tender (***Parking Brixen***). Accordingly, the content of the third paragraph of section 2.1.1 of the Communication, as contested by the Federal Republic of Germany and the French Republic, does not create specific obligations."

This appears to me to be an acceptance that the apparent obligations set out in the paragraph in question strayed beyond any reported authority.

78. Accordingly, I conclude that, if Article 56 applies, the authorities require as a minimum a degree of advertising, sufficient to enable the market to be opened up to competition. That advertising must allow undertakings in other Member States to access appropriate information so as to express an interest prior to the award of the contract.

79. In the present case, the Council says that, if Article 56 applied, they complied with it. In support of that proposition, Mr Bowsher relies on the publication of the Vision Report, and subsequently the Masterplan, and argues that any undertaking, including Quidnet, was free to come and ask to be considered in connection with the proposed agreement for Key Site 1, Phase 2. He also relies on the evidence, which is undisputed, that Quidnet were told early on in their involvement with the Treaty Centre that the Council were in talks with L&G about Key Site 1, Phase 2.

80. In my view, if Article 56 applied, it cannot be said that the Council complied with its limited obligations thereunder. I do not consider that the Vision Report amounted to an advertisement of anything at all. It was a high-level and general publication dealing with the possibilities of development in Hounslow as a whole. It was not specific to Key Site 1, Phase 2. It did not constitute an advertisement for anything in relation to that site. The same can also be said of the Masterplan, which was in any event not finalised until after the decision was taken by the Council on 17 January 2012 to enter into the Lock Out Agreement.

81. The fact that the Quidnet representatives were aware of the discussions between the Council and L&G is also of no assistance to the Council on this issue. I reach that view for two reasons. First, the provision of limited information to Quidnet alone could not amount to a discharge of the positive steps that would have to be taken to open up the market for competition. Secondly, the evidence is that, throughout these conversations, it was made clear by the Council that they were in exclusive negotiations with L&G; that, in other words, they had already decided on L&G as the contracting party. Again, that could hardly comply with even the most limited transparency and publishing obligations.

82. Accordingly, if Article 56 had applied to the proposed agreement then I consider that an advertisement was required, inviting expressions of interest in the proposed development of Key Site 1, Phase 2. The absence of such an advertisement means that the Council did not comply with Article 56.

7. ISSUE 6: DISCRETION AND THE CLAIM FOR A DECLARATION

83. Quidnet seek a declaration that the Council may not enter into the proposed agreement. Issue 6 is therefore in these terms:

> "Issue 6: Can and should the court refuse, as a matter of discretion, to grant a declaration and limit any relief to the award of damages on the basis of one or more of the following matters if they are established by the Defendant:
>
> (i) The Claimant has unreasonably delayed in bringing the present action;
>
> (ii) The Defendant has detrimentally relied on the absence of any challenge from the Claimant;
>
> (iii) The breach of Article 56 TFEU is hypothetical in this case as the Claimant does not operate on the UK market by virtue of its right to freedom to provide services and the potential parties whose rights might be affected are not represented before the court;
>
> (iv) Damages would be an adequate remedy?"

84. The grant of a declaration is discretionary and, when considering whether to grant a declaration or not, the court should take into account all the circumstances of the case, including justice to the claimant; justice to the defendant; whether the declaration would serve a useful purpose; and whether there are any other special reasons why or why not the court should grant the declaration: see ***Financial Services Authority v Rourke*** [2002] CP Rep 14. The four matters identified at Issue 6(i)-(iv) arise out of the four reasons why the Council say that, even if Article 56 applies, a declaration should not be granted. I deal with each in turn below.

(i) Delay

85. In my view, there are two separate reasons why, if Article 56 applied, and I otherwise considered a declaration appropriate, delay would not lead me to modify that conclusion.

86. First, as a matter of law, I agree with Mr Giffin that the Council's delay argument amounts to an attempt to bring back the old requirement that procurement claims must be brought "promptly". In ***Uniplex (UK Ltd) v NHS Business Services Authority*** [2010] 2 CMLR 47, it was held that a requirement to issue proceedings "promptly" was invalid in cases involving the assertion of EU rights because it was too uncertain. Moreover, in ***R (on the application of Eduard Berky) v Newport City Council & Others*** [2012] EWCA Civ 378, the majority of the Court of Appeal held that the exercise of the general discretion under Section 31(6) of the Senior Courts Act 1981, to refuse relief for undue delay, was also affected by the decision in ***Uniplex***. At paragraph 52, Moore-Bick LJ said:

> "Moreover, the power under section 31(6) to withhold a remedy on the grounds of undue delay is one to be exercised in accordance with the judgment of the court in the individual case. As a result, relief may be refused on the grounds of delay in commencing proceedings, if the court thinks that appropriate, despite the fact that the three-month time limit has not been exceeded. That seems to me to infringe the community law principles of certainty and effectiveness just as much as a rule which requires proceedings to be brought promptly."

87. In short, if the proceedings were commenced within the limitation period, the issue of undue delay is unlikely to arise. Here, it is common ground that the claim against the Council by reference to Article 56 is properly seen as a claim for breach of statutory duty: see ***Phonographic Performance Limited v Department of Trade and Industry*** [2004] 1 WLR 2893. The breach of statutory duty occurs only when a final decision, in breach of the statutory duty, has been taken: see ***R(Burkett) v Hammersmith and Fulham LBC*** [2002] 1 WLR 1593. There is then a limitation period of 6 years.

88. Given that the Council has not entered into any binding agreement with L&G, it could be argued that a final decision has not yet been taken, so any breach of statutory duty has not yet occurred. Even if that is wrong, the breach only occurred in January 2012, when the decision in principle was taken. Any claim for breach of statutory duty is therefore well within time. There can be no question of any failure to comply with the limitation period. In those circumstances, it would be wrong as a matter of law to take delay into account to Quidnet's detriment.

89. The second reason why I do not consider that there is anything in the delay point is that, on analysis of the facts, Quidnet have not been guilty of unreasonable delay. They only purchased the Treaty Centre in December 2011, so it seems to me that their conduct can only be relevant from then on. By February 2012 they were concerned about the possible exclusive arrangements between the Council and L&G. They made a FoI request in early March but that request was not properly answered and the answer was in any event late in arriving. Further requests were properly made but not satisfactorily dealt with by the Council. In all of those circumstances, it seems to me unrealistic to say that Quidnet delayed at any stage.

90. For these reasons, delay is not a reason why, in my judgment, declaratory relief should not be granted if, in relation to all other matters, it had been appropriate.

(ii) Reliance

91. The Council argue that a declaration should not be granted because they have relied on Quidnet's conduct to their detriment. This can be dealt with shortly. There is no evidence of any substantive reliance on the part of the Council upon any conduct by Quidnet. The Council resolved, long before Quidnet bought the Treaty Centre, to deal exclusively with L&G. They sensibly took leading counsel's advice before embarking too far down that road. They then incurred some relatively modest expenditure in pursuit of the Lock-Out Agreement. I find that this money would have been spent in any event, whenever Quidnet had registered their challenge.

92. Further, it appears that the sums incurred by the Council were around £6,000. In view of the significant expenditure that will be involved in the potential development of Key Site 1, Phase 2, it would not be unfair to describe the £6,000 as a drop in the ocean. Thus, even if (which I do not accept) the money was spent in reliance on Quidnet's failure to challenge the decision earlier, such expenditure is properly described as *de minimis* and would not affect the exercise of the court's discretion. For these reasons, the Council's reliance case fails.

(iii) The Hypothetical Nature of the Case

93. Of course, my primary view is that Article 56 does not apply because the proposed agreement does not involve the provision of services within the meaning of Article 56, because there is no restriction on the provision of services, and because, in any event, this is an entirely internal matter within the UK in accordance with the ***RI.SAN*** line of authorities. Moreover, part of my reasoning for that conclusion was the absence of any interest from any party from any other EU Member State.

94. If therefore I was wrong on those three issues, it is appropriate to consider the potentially hypothetical nature of these proceedings. ***Ainsbury v Millington*** [1987] 1 WLR 379 and ***Rolls Royce PLC v Unite the Union*** [2009] EWCA Civ 387 are both authorities for the proposition that the court should be wary of granting declaratory relief in a hypothetical situation. In the latter case, the breach of EU law was hypothetical on the facts before the court and the real parties who might have been affected (i.e. undertakings in other Member States) were not represented. Here, the problem is even more acute because there is nothing to suggest that such interested parties exist at all.

95. Again, I have not found this an easy issue. But I have concluded that the hypothetical nature of the proceedings, and the absence of any declared interest from an undertaking in any other Member State, would have been factors which, had I found that a declaration prohibiting the Council from entering into the proposed agreement was otherwise appropriate, would have led me to conclude that such discretionary relief should not be granted. In reaching that view, I have considered all the circumstances of the case, but I have concluded that the hypothetical nature of the claim is the most compelling reason why justice does not require a declaration of the kind sought.

(iv) Damages as an Adequate Remedy

96. On the basis of the material before the court, it is not easy to say whether damages are an adequate remedy or not. Mr Giffin rightly points out that damages may be very difficult to ascertain but, as I put to him in argument, the assessment of loss in complex cases involving land is one of the exercises that the TCC is regularly required to undertake. Moreover, the court has to be very careful before deciding that damages are not an adequate remedy when, in truth, the proposition is that damages may be adequate in principle, but may simply be difficult to calculate.

97. There is a further point which introduces another element of EU law. It is agreed that damages would only be payable if the breach was sufficiently grave. Mr Giffin is therefore concerned that, if the court concludes now that damages would be an

adequate remedy, the Council will subsequently argue that damages should not be awarded at all because the breach was not sufficiently grave.

98. I cannot reach a view as to the gravity of the breach. That is not a matter before me. I certainly accept that the Council should not be allowed to have their cake and eat it; they should not be allowed to argue, on the one hand, that damages are an adequate remedy, and then, on the other, subsequently maintain that no damages are appropriate because the breach is not sufficiently grave. In my view, in all the circumstances of this case, damages would be an adequate remedy if Article 56 was engaged, and the question of gravity or otherwise of the breach should be viewed in that light.

(v) Conclusions

99. I find against the Council on the questions of delay and reliance. I find against Quidnet on the critical issue as to the hypothetical nature of the claim and the question of the adequacy of damages. On balance, if (contrary to my primary views) Article 56 was engaged, I would probably not have granted a declaration, although before reaching a final conclusion on that point, I would have satisfied myself that damages would be payable, so as not, through inadvertence, to deprive Quidnet of a remedy altogether.

8. CONCLUSIONS

100. For the reasons set out in **Section 4.1** above, I do not consider that the proposed agreement imposes any obligations on L&G which engage Article 56 of the Treaty. L&G are providing no relevant services.

101. If I am wrong about that, I consider, for the reasons noted in **Section 4.2** above, that Article 56 was not engaged because there was no restriction imposed by the Council on the provision of the relevant services (demolition, construction, fitting-out etc).

102. In addition, for the reasons set out in **Section 4.3**, I consider that, whilst the applicability of Article 56 is not confined to specific types of contract, the fact that the proposed agreement in this case was very different to any of the types of contract where Article 56 has been found in the EU cases to apply, provides at least some limited further support for my conclusion that Article 56 did not apply to the present case.

103. For the reasons set out in **Section 5** above, I consider that this is an internal matter only, such that Article 56 is again not engaged.

104. If all of the above conclusions are wrong, I consider that, for the reasons set out in **Section 6** above, the Council has not taken proper steps to advertise the proposed development opportunity presented by Key Site 1, Phase 2 in accordance with Article 56. However, for the reasons set out in **Section 7** above, all the circumstances of this case, including the hypothetical nature of the claim, and the adequacy of damages as a remedy, would lead me to conclude that, had Quidnet had been successful on the other Issues, I would not have ordered the declaration sought. However I have made clear that I would only have reached that definitive conclusion if I had satisfied myself that damages could otherwise have been awarded.

105. For all these reasons, the Claimant's alternative claim, pursuant to Article 56, fails.

106. With the agreement of leading counsel, this judgment does not deal with any issues relating to the claim for an injunction (although that is likely now to be academic), nor does it deal with any question of costs.