Neutral Citation Number: [2012] EWHC 624 (Admin)

Case No: CO/12402/2011

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15 March 2012

Before :

THE HONOURABLE MR JUSTICE EADY

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Between :

THE QUEEN **on the application of** **UNISON**	**Claimant**
- and -	
NHS WILTSHIRE PRIMARY CARE TRUST **and nine others**	**Defendants**
- and -	
(1) NHS SHARED BUSINESS SERVICES LTD **(2) THE SECRETARY OF STATE FOR HEALTH**	**Interested Parties**

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Nigel Giffin QC and **Jane Oldham** (instructed by **Thompsons Solicitors LLP**) for the **Claimant**
Charles Béar QC (instructed by **DAC Beachcroft LLP**) for the **Defendants**
Michael Bowsher QC and **Valentina Sloane** (instructed by **Bird & Bird LLP**) for the **First Interested Party**
Kassie Smith (instructed by **DWP/DH Legal Services**) for the **Second Interested Party**

Hearing dates: 7 and 8 March 2012

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Approved Judgment

Mr Justice Eady :

1. Following a directions hearing before Haddon-Cave J on 10 February 2012, I am to determine certain threshold issues for the purposes of this application for judicial review. For convenience, they were referred to as the "delay issue" and the "standing issue". One of the reasons for ordering a two stage process, rather than a rolled up hearing, was that it might save a good deal of money, in particular, if the Claimant should be unsuccessful in relation to either. On that hypothesis, the proceedings would effectively be at an end and there would be no need to address the substantive issues (subject to any appeal).

2. The claim is brought by the Union ("Unison") to challenge the decisions of the ten Defendants, which are primary care trusts ("PCTs") in the south west of England. Those decisions were to enter into contracts with the First Interested Party, NHS Shared Business Services Ltd ("SBS"), as described in their letter to the Claimant dated 14 December 2011, with a view to the provision of what are called Family Health Services ("FHS"). These have hitherto been provided in-house, but the decision was taken to outsource them as part of the Defendants' ongoing efforts to reduce costs.

3. The essence of the challenge is that the Defendants were at some point in breach of the Public Contract Regulations 2006. (As it happens, Mr Bowsher QC for SBS submits that those Regulations are inapplicable, in any event, because the PCTs purported to be entering into the contracts pursuant to a Framework Agreement of 2004, to which the 2006 Regulations would not apply, but that is not for me to resolve at this stage.)

4. The first question to be decided, in the submission of Mr Giffin QC on behalf of Unison, is whether, arguably, the Defendants' challenge based upon the 2006 Regulations sounds in public law at all. As is well known, it is provided in Regulation 47 that they give rise to duties on the part of public bodies to "economic operators" who, in the event of breach, may have a statutory civil remedy available. Mr Giffin points out that nowhere is there any express exclusion of judicial review and, accordingly, it is right to proceed on the basis that public law remedies can exist alongside those private law remedies provided for in the statute: see e.g. *R (Law Society) v Legal Services Commission* [2007] EWHC 1848 (Admin) *per* Beatson J.

5. Furthermore, that submission would accord with the observations of Arden LJ in *R (Chandler) v Secretary of State for Children, Schools and Families* [2010] LGR 1 at [77]:

> "The judge accepted the submission that a failure to comply with any of the regulations gives rise only to a private law claim (see [2009] LGR 417 at [138]-[140]). Such a conclusion has potentially far-reaching implications. It means that a person who is not an economic operator entitled to a specific remedy under reg 47 can never bring judicial review proceedings in respect of that failure unless he can bring himself within the exceptional type of claimant in *R (on the application of the Law Society) v Legal Services Commission.* We consider that the judge's proposition goes too far. The

> failure to comply with the regulations is an unlawful act, whether or not there is no economic operator who wishes to bring proceedings under reg 47, and thus a paradigm situation in which a public body should be subject to review by the court. We incline to the view that an individual who has a sufficient interest in compliance with the public procurement regime in the sense that he is affected in some identifiable way, but is not himself an economic operator who could pursue remedies under reg 47, can bring judicial review proceedings to prevent non-compliance with the regulations or the obligations derived from the Treaty, especially before any infringement takes place (see generally *Mass Energy v Birmingham City Council* [1994] Env LR 298 at 306, cf *Kathro's* case [2001] 4 PLR 83, where Richards J held that that the claimants were not affected in any way by the choice of tendering procedure). He may have such an interest if he can show that performance of the competitive tendering procedure in the directive or of the obligation under the Treaty might have led to a different outcome that would have had a direct impact on him. We can also envisage cases where the gravity of a departure from public law obligations may justify the grant of a public law remedy in any event. … "

6. Mr Béar QC for the Defendants goes so far as to submit that the Court of Appeal "nodded" on this point and that actually such a breach as is alleged in this case should not sound in public law at all. In particular, he argues that it is unfortunate that the Court of Appeal in *Chandler* did not address two relevant cases, namely *R v Brent LBC, ex parte O'Malley* (1997) 30 HLR 328, 355-356 (Schiemann J) and 373-374 (Court of Appeal) and *Risk Management Partners Ltd v Brent LBC* [2010] LGR 99 at [250]. This, however, must be an argument for another day. It seems to me that the answer to the first question must be in the affirmative. In certain circumstances, a breach of the 2006 Regulations may give rise to public law remedies. This is fundamentally important, of course, so far as Unison is concerned, since it is not an economic operator and would have no right to enforce any statutory duty, whether owed to itself or to its members. Its only possible means of challenge is by way of public law.

7. Mr Béar also submits, in the alternative, and assuming the law to be accurately stated in the passage I have cited from the *Chandler* case, that the Claimant is unable to satisfy the criteria for standing contemplated by Arden LJ. Mr Béar urges me to determine that question, rather than merely its arguability, since it was one of the purposes of Haddon-Cave J's order to have the issue disposed of at this stage.

8. I was, however, reminded by Mr Giffin of the words of Lord Wilberforce in *R v IRC ex parte National Federation of Self-employed and Small Businesses* [1982] AC 617. It was there made clear that the issue of standing should normally be disposed of at the permission stage only in those cases where the lack of sufficient interest is obvious. Mr Giffin suggests that standing should only be determined against a claimant where his or her status is that of a "busybody": see e.g. the summary of the law by Sedley J (as he then was) in *R v Somerset County Council, ex parte Dixon*

[1998] Env LR 111. On the other hand, this is a very specific context; that is to say, the relationship between the 2006 Regulations and the availability of public law remedies.

9. Given the statutory structure of the Regulations, and the underlying policy as embodied in the corresponding European Directive, it is likely that breaches of the Regulations are more often going to give rise to private rather than public law remedies, which are going to be relatively rare. It is thus important to focus carefully upon the suggested criteria in the *Chandler* case and not to interpret them too freely. Mr Béar submits that it plainly cannot extend to permitting any trade union, or any individual worker, to have a potential public law remedy every time it is proposed that a particular service in the NHS, or in any other public sector, should be outsourced. There is a general disinclination to permit challenges to commercial decisions by public bodies: see e.g. the discussion in *R (Menai Collect Ltd) v Dept of Constitutional Affairs* [2006] EWHC 727 (Admin). Moreover, in the particular context of procurement, there has apparently been a decision by the legislature to confine the specified remedies to commercial competitors. That too needs to be borne in mind when attempting to give effect to the *obiter dicta* in *Chandler*.

10. Mr Bowsher QC gave examples of entities which might bring themselves within the words of Arden LJ. He suggested regular suppliers of an economic operator, who might themselves be significantly affected by the grant or withholding of a particular public contract. He also posited the possibility of a trade association which might need to take steps in a case in which (say) there had been discrimination against a class of economic operators.

11. There seems to be no previous example of a trade union seeking a public law remedy in the context of these Regulations or their predecessors, but that is no reason to suppose that it is not legally possible. One can envisage circumstances in which a breach of the Regulations *could* so affect the members of a union that the law should afford a remedy in public law. I am not concerned at this stage, however, to speculate about possible scenarios, but rather to investigate whether the Court of Appeal criteria have been shown to apply on the present facts. I remind myself, in doing so, that I am not construing a statute but trying to give effect to the spirit and general tenor of the words I have quoted. Can Unison show that performance of the competitive tendering procedure might have led to a different outcome that would have a direct impact on it or its members? Not surprisingly, Mr Giffin emphasises the word "might", selected by Arden LJ rather than "would". That is a fair point to make but, even so, I apprehend that in order to *show* even what might have happened the burden would rest upon an applicant to support the proposition by some evidence, presumably related to the particular facts of the case before the court, rather than to generalities or mere speculative possibilities.

12. Here, it is not known what might have happened if the procedures contemplated under the Regulations had been meticulously carried out. There are no known candidates who could have expected to present themselves as bidders; nor can one speculate as to the terms which possibly have been offered to provide the relevant services. It is thus extremely difficult to see how the Claimant could discharge the burden contemplated in the passage of Arden LJ's judgment from which I have quoted. Contemplation of any such hypothetical scenario is bound to be speculative.

13. I cannot conclude on the limited evidence before me that Unison is capable of discharging that burden. It has not demonstrated that its members "are affected in some identifiable way" by the decision to outsource with SBS as opposed to going down the route prescribed by the 2006 Regulations. It has not established a "sufficient interest".

14. My decision is made very much in the specific context of the 2006 Regulations and of the *obiter* remarks of the Court of Appeal relating to them. It is thus not necessary for me to go so far as to apply the terminology used by Sedley J in *Dixon* and to hold that the Claimant is a "busybody". That would be inappropriate and unnecessarily offensive. I confine myself to concluding that I cannot see how Unison can fulfil the specific criteria identified by Arden LJ.

15. Some debate took place on whether an analogy could be drawn between Unison in this case and Mrs Chandler, who was characterised as seeking to use the 2006 Regulations for an impermissible purpose, that is to say as a means of seeking to advance her political standpoint, which was opposition to the adoption of academy schools: see also *R (Kathro) v Rhonddha Cynon Taff County BC* [2002] Env LR 15. Here, it may be said that Unison, albeit acting conscientiously in what it perceives to be the interests of its members, is not primarily concerned to see open competition encouraged for the outsourcing of family health services, but rather to put a spoke in the process of outsourcing to SBS. In that sense, therefore, there may be an analogy. The comparison is not, however, a necessary element in the reasoning process.

16. Reliance was placed by Mr Giffin also on the alternative scenario contemplated by Arden LJ in the passage I have cited; namely, where the "gravity" of a departure from public law obligations may justify the grant of a public law remedy. That is a submission that Mr Béar characterises as unrealistic, however, since the PCTs at the various stages of their discussions took into account advice from the Department of Health and also had very much in mind the recent precedents whereby other PCTs, in different parts of the country, had contracted to outsource their "back office" requirements to SBS. No challenge has hitherto been made to those decisions. Thus, says Mr Béar, there is no reasonable basis on which to speak of a "grave departure". It is, of course, conceivable in theory that the Department's advice was flawed and that all the other PCTs had been equally guilty of "grave" infringements of their obligations. The argument cannot therefore be determinative. It merely underlines the need for a cautious approach. Certainly I am not persuaded on the evidence before me that it would be possible here to reach that high threshold.

17. I turn to delay and lack of promptitude. First, it is said by Mr Giffin that time may conveniently be taken to be running as from 14 December 2011 when the Defendants sent a letter setting out their position, but it seems clear that this was no more than a reaffirmation of a consistent stance going back for many months. It is part of Mr Giffin's argument that the relevant breach or breaches would only occur when the Defendants entered into a binding commitment by signing contracts for their services with SBS, something which has not happened even today, although they are ready to do so and wish to proceed. Indeed, it is part of their case that it is necessary for them to do so by 31 March 2012.

18. It is important, however, to focus again on the particular context of the 2006 Regulations. They lay down, as did their predecessors, a series of steps to be taken.

The scheme is directed towards ensuring fairness and access to procurement opportunities in the interests of competition. In circumstances in which those regulatory obligations come into play, the duties arise at an early stage and there are a series of traps for the unwary from then onwards. The situation was conveniently described by Langley J in *Keymed v Forest Healthcare NHS Trust* [1998] Env LR 71, 94:

> "In a case where, as here, the Regulations are not observed from the outset, the authority will inevitably have committed substantive breaches some time prior to the actual award of the contract, and in this case Keymed was aware or at least apprehended that it had done so on 11 January 1996 or shortly thereafter. The overriding duty on a contracting authority is 'to comply with the provisions of these Regulations' generally, and in my judgment grounds will first arise for the bringing of proceedings once it could be shown that they were not complied with from the outset of the award procedure. If it were otherwise and a supplier could select the last breach available to him, apart from obvious problems of proving causation, it would mean that he could sit back and do nothing even in respect of breaches of which he was aware or which he apprehended. That would again be contrary to much of the purpose of reg 29. I think Mr Barling is right in his submission that in a case where the whole procedure is conducted in breach of the Regulations (as Keymed alleges in this case) the failure to comply with them first arises and is established by failure to give the requisite notices to the [Official Journal]. Thereafter the regulatory procedures cannot effectively be complied with."

19. Mr Béar argues, on Unison's own case, that the Defendants would have been in breach when they embarked upon their discussions with SBS outside the regulatory framework. Mr Giffin, on the other hand, seeks to finesse the reasoning of Langley J by drawing a fundamental distinction between the situation where a public authority is intending to adopt and comply with the regulatory procedure and the circumstances here – where the Defendants did not have it in mind to go down that route. Yet it is inherent in Unison's case that they should have done so and, indeed, that a breach or breaches took place at least by 19 December 2011. Why should the Defendants' behaviour only qualify as a breach at that late stage? I shall shortly turn to the relevant authorities, but first I need to summarise the facts.

20. It is necessary to bear in mind the chronology. It is relevant both for assessing when the relevant three month period began for commencing judicial review proceedings and for judging also the more general concept of promptitude or lack of it: see e.g. *R (Derwent Holdings) v Trafford BC* [2009] EWHC 1333 at [33] *et seq*.

21. In October 2008 a number of London PCTs contracted with SBS, in reliance on the Framework Agreement of 2004, for delivery of the family health services. It is clear from the evidence of Ms Edwards, Head of Human Resources at SBS, that Unison was aware of what was going on at the time. The provisions for outsourcing are, to all intents and purposes, the same as those currently under consideration. Similar objections could have been made at that stage.

22. In December 2010 nine of the PCTs in the East Midlands Region contracted with SBS on a similar basis, and again in reliance on the Framework Agreement.

23. From January 2011 onwards the various Defendants decided to consider a proposal from SBS for outsourcing. These matters are considered in some detail in the evidence of Mr James, who was the Chief Executive of the Wiltshire PCT until 31 December 2011. He was also the leader of the Project Group for all the Defendants. Following his retirement as Chief Executive, he was retained as a consultant thereafter to manage and lead the Project Group until completion.

24. At a meeting on 16 May 2011, at which Unison was represented by Mr Roger Davey, the basis of SBS' proposal was explained. The minute records that Mr Davey expressed his concern about "the people who would be providing and replacing our staff". It would be likely, in his view, to have a dramatic impact on the administrative and support staff.

25. Between July and September of 2011 it emerges from the evidence of Mr James and also of Mr Kemsley, who is the Director of Finance for the Devon "cluster" of NHS PCTs, that an evaluation was taking place of the SBS proposals in comparison with an in-house alternative. Thereafter decisions were made by individual PCTs at various stages.

26. On 8 September 2011 the Dorset and Bournemouth PCTs decided to proceed with the SBS proposal. On 13 September, a staff consultation paper was made available for the Dorset PCT staff, because a transferor employer is required to consult with staff over the ancillary measures accompanying transfer and to inform them as to their rights. This document referred to the Framework Agreement.

27. On 15 September 2011 the three Devon PCTs decided to proceed with the SBS proposal and at some point, on or before 20 September, four other PCTs took a similar decision. It is of some note that on 20 September the Chief Executive of the Devon PCTs told staff that there had been a recent decision in relation to the transfer of FHS to another provider and that 12 South West Region PCTs had decided that SBS should be allowed to "proceed to contract" with regard to provision of the services.

28. It is also clear from the evidence that from the time these decisions were taken no other possibilities were under active consideration. That would have been apparent to Unison or anyone else concerned about lack of competition or a supposed need to comply with the 2006 regulatory procedures.

29. By 1 November 2011, each of the relevant PCTs had signed an "instruction to proceed" of binding contractual force. Upon withdrawal, the relevant PCT would be liable to pay the costs of SBS up to a stated maximum.

30. On 22 November, Unison first wrote to express its view that the contractual arrangements would be unlawful without a full tendering process and claimed that the Official Journal notice in 2004, relating to the Framework Agreement, was insufficient to permit a contract for the outsourcing to be entered into.

31. Two days later a pre-action protocol letter was sent identifying six specific objections by reference to procurement law. The assertion was made that Unison had only become aware of the proposals very recently (i.e. in November 2011). That claim is, of course, controversial in the light of the history I have briefly summarised.

32. On 25 November, a response was sent to Unison seeking to refute each of the six points made and claiming that Unison had been aware of what was going on from at least May 2011. These proceedings were begun on 19 December 2011.

33. One can see, on the logic of Unison's case, that the Defendants' supposed breaches of the regulatory scheme would have begun many months earlier, when they failed to give notice and to proceed in accordance with the prescribed steps thereafter. The position would by then have become irretrievable for the reasons identified by Langley J in the *Keymed* case. Mr Béar gave some examples. There must have been a failure to issue a fresh Official Journal notice in accordance with either Reg 15(2) or Reg 17(3). There would also have been a failure to use the relevant procedure, either open or restricted, for the purpose of seeking offers. There was also the very fact of opening negotiations with SBS without reference to Reg 14(1). It was selected as a tenderer outside the regulatory scheme and without applying the criteria identified in Regs 23-26.

34. Mr Béar would, therefore, seem to be correct in principle when he pursues that claim to its logical conclusion and seeks to identify the point where his clients would have first gone wrong.

35. Mr Giffin has, however, placed considerable reliance in this context on the *Risk Management* case and on the speech of Lord Steyn in *Burkett*. He says it is simply not open to Mr Béar to argue that there were any material breaches of the Regulations at the time(s) for which he contends. That would not be consistent with the outcome in *Risk Management*. In any event, that would not affect the issue of when time begins to run for judicial review purposes. He says that in a "no procurement" case, such as this, there cannot be deemed to be a breach of the Regulations until a final decision has been taken to conclude a contract on particular terms and that this was the conclusion in *Risk Management*. As Lord Steyn put the matter in *Burkett*, at [50], it would be unreasonable to require a claimant to apply for judicial review of a decision which may never take effect.

36. The test to apply under CPR 54.5 relates to the time when the grounds to make a judicial review claim first arise. That may well be distinct from the time when the proposed defendant has first acted unlawfully. Mr Giffin submits that grounds for judicial review (being properly regarded as a remedy of last resort) do not arise until the defendant has done, or finally decided to do, the unlawful act which affects the claimant. A claimant cannot be required to challenge a decision that is not final but only provisional. That principle applies "across the board", in respect of judicial review claims generally, and it makes no difference that the illegality relied upon is in the context of the 2006 Regulations.

37. On the present facts, Mr Giffin is prepared to assume that a breach or breaches took place as early as March 2011 when the Defendants began negotiations with SBS, or in the following September when the internal alternative was rejected in favour of SBS but, he says, at either of those points there was no certainty of outcome. As it

happens, this general proposition is borne out by the fact that some PCTs, having put toes in the water, chose not to take the plunge. Thus, says Mr Giffin, Unison is not to be criticised for not applying for permission at either of those stages, when it would have been premature to do so.

38. Alternatively, Mr Giffin seeks to refute Mr Béar's argument as to when a relevant breach of the 2006 Regulations occurred. Both referred to the decision of the Court of Appeal in *Risk Management*. As with the Defendants in this case, the Council in *Risk Management* believed that it was entitled to enter into contracts of insurance with London Authorities Mutual Ltd ("LAML") without going through the regulatory procedures. It passed two resolutions (in October and November 2006 respectively) to enter into contractual arrangements with LAML but each was conditional. If in fact the 2006 Regulations were applicable, contrary to its understanding, then on the basis of Mr Béar's analysis each of those resolutions would have involved a breach. The court, however, took the view that there had been no final commitment until March 2007. Time only started to run from that point both in relation to judicial review and to a claim under the regulatory scheme. The earlier resolutions only gave rise to the apprehension of a future breach. That concludes the matter, according to Mr Giffin, since there is no material difference between those circumstances and the facts of the present case.

39. One of the planks in Mr Béar's argument was that Moore-Bick LJ in *Risk Management*, at [245], had approved the analysis of Langley J in *Keymed*. It is necessary, however, to reconcile that with the decision actually reached on the *Risk Management* facts. It was *not* concluded, on the basis of Langley J's reasoning, that time for judicial review purposes had begun to run with the earliest of the notional breaches (i.e. when the October Council resolution had been passed). It was recognised that those breaches might give rise to a claim for *quia timet* relief in respect of an apprehended breach, but the first actual breach was accepted as occurring only in March 2007 (see e.g. Hughes LJ at [255]). A putative judicial review claimant cannot be accused (in the words of Langley J) of sitting back and doing nothing if he waits for the first actual breach. A step along the path which is only tentative or conditional would not count.

40. In this case, even in September 2011, the decisions taken by the various PCTs were being expressed in qualified terms. The Wiltshire Chief Executive's Report for the meeting of 29 September contained the following passage:

> "The preferred provider is NHS SBS as their bid gave the required degree of detail to provide assurance to the PCT on the services to be delivered and the standards to be achieved. The PCT will now enter contract discussions with NHS SBS and enter into a contract with NHS SBS once discussions have been concluded."

That is significant because the Board in July had delegated to the Chief Executive and Director of Finance the authority to select the preferred proposal for FHS.

41. Following the meeting, it was minuted that:

> "It has been agreed to go forward on FHS which is currently hosted by NHS Wiltshire. Contract discussions are being held on how to take this forward."

42. Mr Giffin cited these passages and also passages in Mr James' witness statement in seeking to demonstrate the conditional nature of the arrangements being made at that point. I will set out what Mr James said at paragraphs 26-27:

> "26. From September the PCTs proceeded with due diligence to confirm that SBS would be able to provide FHS in accordance with the SW PCTs requirements and to establish the details and full implications of the new operating model that SBS would implement. Those discussions proceeded satisfactorily and so between 27 October and 2 November 2011 all of the SW PCTs felt able to sign the Instructions to Proceed documents. These set out the basis on which SBS would be able to take the necessary practical steps to implement the contract on the agreed date of 1 December 2011, i.e. to prepare for transfer of staff and delivery of services from the existing PCT premises under SBS management from that date.
>
> 27. This decision making process beginning in early 2011 and continuing until September 2011 may appear protracted. In my experience it is not unusual in PCTs, where decision making can be an iterative process of narrowing alternatives, testing options, and proceeding to greater level of detail. So for example the decision not to hold an open procurement can be located no later than March 2011. At that point the options were SBS or in house only. When the in house bid was tested and found wanting SBS became the only viable option. Once that was the case and given the financial situation I have referred to the reality is that PCTs would have had little option but to pursue the SBS contract. At that point the course was set. That decision was formally taken no later than September 2011 (Gloucestershire being an exception). The fact that the detail of the contract remained to be worked out can in no way detract from the finality of that decision. There was simply no other option. It might have been that if some radical change took place, then the decision making process could have been taken back to an earlier stage. I and I think the PCT boards would be very surprised if it was suggested that this possibility, which did not in fact happen, means that the PCTs had not decided on their course of action no later than September 2011."

43. The references to the *Burkett* and *Risk Management* cases were clearly helpful in identifying the principles but they cannot be dispositive in themselves. As the passages from the evidence in the present case illustrate, much may turn on the individual facts of the particular case. To what extent is it right on the evidence before me to regard the decisions as final?

44. I do not think it appropriate to take too legalistic a view on finality. As I have pointed out already, if the Defendants chose not to go ahead at some point, after signing the "instruction to proceed" documents, there would be financial consequences. Because they could be released from their commitment on payment of the appropriate sum, does that mean that the decisions taken at that stage had only been conditional? I think not. It seems to me that those binding agreements, en route to the final agreements then contemplated, cannot be equated to conditional agreements. They reflect contractual obligations.

45. Final decisions had already been taken in September, according to Mr James' evidence, which might in theory have been reversed, but there was no indication that this would happen. The 29 September minute referred to contract discussions on *how* (not whether) to take matters forward. If an agreement is truly conditional, one can envisage at least two possibilities occurring. There will come, as it were, a fork in the road at some point. Either the condition(s) will be fulfilled or not. There is an inherent degree of uncertainty. Here, the decisions were "final", although there were arrangements to be worked out. There could be a change of heart. One or more of the Defendants could have extracted themselves from the commitment – perhaps on making the appropriate contractual payments. But that seems to me to be qualitatively different from a resolution to go ahead only on the fulfilment of certain conditions.

46. Here, the situation had developed beyond the point when it could be said, in Mr Giffin's phrase, that there was merely the apprehension of a future breach. That appears to me to be an analysis which ignores the practical realities. He points also to the terms of the Defendants' letter of 14 December, which purported to give an account of what had happened up to that point. This does not seem to me to be inconsistent with my conclusion, in that it referred to there being at that stage "no basis for *delaying* or *pulling out* of the proposed arrangements" (emphasis added). That seems entirely consistent with a decision to commit having already been taken.

47. Mr Giffin submits that, in a "no procurement" case, the only breach to be contemplated is the actual award of a contract without a prior procurement. No breach up to that point would count. I believe this proposition needs to be qualified to the extent that a positive decision to go with a particular contracting party will also count as a breach (unless, of course, it is genuinely conditional). Indeed, Mr Giffin's own formulation seemed to recognise that a "final decision" to do the supposedly unlawful act would suffice.

48. Accordingly, there was in my judgment a lack of promptitude. I bear in mind the importance attached by Lord Steyn in *R (Burkett) v Hammersmith and Fulham LBC* [2002] 1 WLR 1593 to the need for clarity and certainty when judging the appropriate time for the commencement of judicial review proceedings. On the evidence, which I have summarised above, the three month period would have expired before 19

December 2011 at least in relation to five of the Defendants (see paragraphs [26] and [27] above).

49. I must have regard to the impact of delay upon the Defendants. There is evidence, in particular, from Mr Kemsley, identifying the urgency of the matter from their point of view and the losses which will be incurred if they are not permitted to proceed in accordance with their intentions. These considerations would weigh heavily against any suggestion that time should be extended.

50. My attention was also drawn to the provisions of s.31(6) of the Senior Courts Act 1981. The effect of this was addressed and summarised by Lord Steyn in *Burkett* at [18]:

> "It is also necessary to draw attention to section 31(6) of the Supreme Court Act 1981. It provides:
>
> > 'Where the High Court considers that there has been undue delay in making an application for judicial review, the court may refuse to grant – (a) leave for the making of the application; or (b) any relief sought on the application, if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.'
>
> … Pertinent to the present context is the fact that section 31(6) contains no date from which time runs and accordingly no specific time limit. It is, however, a useful reserve power in some cases, such as where an application made well within the three month period would cause immense practical difficulties … "

51. It is clear from the evidence of Mr Kemsley that the present application would cause "immense practical difficulties", and not least at the eleventh hour when the Defendants are about to clinch the deal. Against the background of seeking cost savings on as wide a front as possible, considerable resources have already been committed to exploring the SBS option. I have already referred to the binding commitment entered into in the autumn which carried the exposure to financial penalties. It is also an important part of the context that the controversial bill currently going through Parliament contains a provision for the abolition of PCTs early next year. One effect of this would be that any realistic opportunity to initiate a tendering process has probably now, for all practical purposes, disappeared. Obviously, it is also true that the savings planned to be achieved by using the services of SBS have not been achieved so far and will not be achieved for so long as the proposed arrangements cannot be implemented. That will naturally lead to cost cutting in other areas. I can well believe that it would also adversely affect staff morale. The grant of permission in these circumstances would in my view be "detrimental to good administration".

52. For these reasons I would rule against Unison also on the issue of "delay".