



Neutral Citation Number: [2019] EWHC 3585 (TCC)

HT-2019-000293

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

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 20/12/2019

**Before:**

**MRS JUSTICE O'FARRELL DBE**

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**Between:**

**ALSTOM TRANSPORT UK LIMITED**

**Claimant**

- and -

**NETWORK RAIL INFRASTRUCTURE LIMITED**

**Defendant**

- and -

**SIEMENS MOBILITY LIMITED**

**Interested Party**

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**Sarah Hannaford QC and James Frampton** (instructed by **Hogan Lovells International LLP**) for the **Claimant**

**Philip Moser QC and Stephen Kosmin** (instructed by **Eversheds Sutherland International LLP**) for the **Defendant**

**Rob Williams** (instructed by **Osborne Clarke LLP**) for the **Interested Party**

Hearing date: 26<sup>th</sup> November 2019

Further written submissions: 29<sup>th</sup> November, 2<sup>nd</sup> December, 3<sup>rd</sup> December 2019

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**Approved Judgment**

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

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MRS JUSTICE O'FARRELL DBE

**Mrs Justice O'Farrell:**

1. The matter before the Court is an application by the Defendant (“Network Rail”), for the lifting of the automatic suspension which arose on issue of a procurement challenge by the Claimant (“Alstom”) pursuant to regulation 110 of the Utilities Contracts Regulations 2016, SI 2016/274 (“the Regulations”). The application is supported by the Interested Party (“Siemens”). Alstom opposes the application and seeks to maintain the suspension, preventing Network Rail from entering into a framework contract with the successful tenderer, Siemens, for delivery of a digital train control system on the East Coast Main Line (“ECML”) pending the outcome of the trial.

*Background*

2. The European Train Control System (“ETCS”) is a common digital signalling and control standard adopted by the EU to improve interoperability between the railways in different Member States.
3. The ETCS uses digital radio to allow continuous communication and supervision between trains and infrastructure. The benefits of the ETCS are greater efficiency, reliability and safety. Conventional trackside signalling operates using a fixed block system. Safe distances are maintained between trains by allowing only one train in any part of a block at any time. The length of the block is determined by the worst braking distance for trains using a particular route, creating artificial constraints on efficiency. A digital signalling system can identify the precise location of each train. As a result, even where the block system is retained, additional blocks can be introduced so that headway between trains can be reduced whilst maintaining a safe distance. This enhancement to signalling facilitates mitigation of the impact of delays and quicker recovery from adverse incidents. ETCS requires fewer lineside signalling assets, increasing the reliability of the system and reducing long-term maintenance and renewal costs. ETCS includes an automatic train protection (“ATP”) system, that can reduce the risk of a signal passed at danger (“SPAD”) incident or speeding, and therefore reduce the risk of train collision or derailment.
4. Following the Southall and Ladbroke Grove rail accidents, the Uff/Cullen “Report of the Joint Inquiry into Train Protection Systems” was published in 2001. The recommendations of the report included the introduction of trackside ETCS on the ECML, installation of ETCS on all new trains and retrofitting of ETCS on existing trains within a realistic timetable.
5. The Railway (Interoperability) Regulations 2011 were introduced to implement the provisions of Directive 2008/57/EC, which is intended to improve technical compatibility between rail systems within the European Union. The 2011 regulations restrict the introduction of new infrastructure, trains and equipment that fail to comply with the EU technical specifications for interoperability (“TSIs”). It is possible to obtain a derogation, or exemption, from the requirement to conform with the relevant TSIs in specified circumstances, including any proposed renewal, extension or upgrading of an existing sub-system where the application of the relevant TSI would compromise the economic viability of the project or the compatibility of the project with the rail system operating in the UK.

6. Network Rail owns, operates and is responsible for the maintenance and development of Britain's railway infrastructure.
7. On 10 May 2018 the Secretary of State for Transport and Network Rail set out a joint fifteen-year digital train control strategy for the railway industry:

“The technology will be fully operational from next year on the Thameslink service in central London, which will see 24 trains pass through every hour. The Digital Railway Strategy is being launched in York, on the Transpennine route ...

Digital rail technology will ensure the best use is made of the almost £48 billion being invested in maintenance, modernisation and renewal on the rail network between 2019 and 2024, which includes new and replacement signalling. The government has also earmarked £450 million specifically for digital railway schemes...”

8. Part of that strategy is the introduction of a digital train control system on the ECML. The ECML is a key, strategic rail network, running between London and Edinburgh. It carries more than 80 million passenger journeys and tens of millions of freight tonnes with a value of £30 billion per year.
9. On 7 August 2018 Network Rail published in the Official Journal of the European Union (“the OJEU”) a procurement notice for a train control partner for delivery of the ECML digital railway train control infrastructure. The notice stated that the contract would comprise a single supplier framework agreement for the delivery of digital train control systems on the ECML route, using two main types of call-off contracts:
  - i) professional services based on the NEC 4<sup>th</sup> edition form of contract for outline designs, commercial and financial models and business case submissions; and
  - ii) design, build and maintain works based on the NEC 4<sup>th</sup> edition form of contract for the detailed design, supply, installation and commissioning of the system together with ancillary conventional signalling as required to facilitate delivery of the digital system and long-term, 30 year maintenance of the system.

The estimated value of the procurement was £1.8 billion.

10. On 22 October 2018 Network Rail issued the invitation to tender stage one (“ITT 1”) documents to four shortlisted bidders, including Alstom and Siemens.
11. Paragraph 1.2.13 of ITT 1 stated:

“The southern section of ECML has been identified and prioritised for the deployment of digital train control technologies in the first instance. The southern section of the ECML has a unique alignment of the following factors:

- i. The need to renew critical signalling assets in Control Period 6 (“CP6”) and Control Period 7 (“CP7”). CP6 runs from April 2019 and CP7 from April 2024.

- ii. The opportunity to address targeted capacity and performance constraints to delivery passenger and freight benefits, as well as enhance safety for passengers and workers, and;
  - iii. 70% of all passenger trains on the southern section of ECML will have digital (ETCS Level 2) capability in the early stages of CP6.”
- 12. ITT 1 indicated that the first call-off contracts to be awarded pursuant to the framework agreement would be:
  - i) Commission Contract 000: professional services for the outline design for a train control system covering the southern section of the ECML from London Kings Cross to Peterborough North, with an anticipated duration of approximately 8 months and an estimated value of £10 million; and
  - ii) Commission Contract 001: a design, build and maintenance contract for a train control system for the Northern City Line (“NCL”) from Finsbury Park to Moorgate, with an anticipated duration of 32 years and an estimated value of £46 million.
- 13. ITT 1 stated that Network Rail would evaluate the tender responses to identify the most economically advantageous tender, having regard to the award criteria and weightings set out in the ITT. The criteria were weighted as indicated in section 4 of the ITT: (a) technical (70%) and (b) commercial (30%).
- 14. Tenders were submitted by three tenderers.
- 15. By letters dated 8 February 2019 Alstom and Siemens were notified that they had been selected as the two highest aggregate scoring bidders to proceed to tender stage two (“ITT 2”).
- 16. At ITT 2, different weightings were applied to the award criteria, namely: (a) technical (30%) and (b) commercial (70%).
- 17. By letter dated 1 July 2019 Network Rail notified Alstom that it had been unsuccessful in the procurement exercise:
  - i) Alstom scored 60.62% against the commercial criteria; the winning bidder scored 58.53%;
  - ii) Alstom scored 15.77% against the technical criteria; the winning bidder scored 19.18%;
  - iii) Alstom had an overall score of 76.39%; the winning bidder had an overall score of 77.71%.
- 18. By letter dated 10 July 2019, Network Rail identified Siemens as the successful bidder.

*Proceedings*

- 19. On 19 August 2019 Alstom issued proceedings seeking to challenge the procurement.

20. On 2 September 2019 Alstom served its Particulars of Claim, alleging breaches of Network Rail's obligations of equal treatment, transparency, good administration, proportionality and manifest error/irrationality. The remedies claimed by Alstom include an order setting aside Network Rail's decision to award the contract to Siemens, a declaration that the contract should have been awarded to Alstom and damages for lost profits and wasted tender costs.
21. On 9 October 2019 Network Rail served its Defence.
22. On 21 October 2019 Network Rail issued its application to lift the automatic suspension.
23. On 5 November 2019 Alstom served its Reply.
24. By a consent order dated 8 November 2019, Siemens was joined as an interested party to the claim for the purposes of the suspension application and issues concerned with the disclosure or inspection of Siemens' confidential information.
25. At a case management conference on 14 November 2019, Fraser J fixed the trial on issues of liability and causation for 1 February 2021 with a time estimate of 12 days (including 2 reading days).

*Principles to be applied*

26. The issue of proceedings by Alstom resulted in an automatic suspension imposed by Regulation 110, preventing Network Rail from entering into the framework contract with Siemens.
27. The automatic suspension may be lifted by the Court as provided by Regulation 111:  

“(1) In proceedings, the Court may, where relevant, make an interim order -

  - (a) bringing to an end the requirement imposed by regulation 110(1);
  - (b) restoring or modifying that requirement;
  - (c) suspending the procedure leading to—
    - (i) the award of the contract; or
    - (ii) the determination of the design contest,

in relation to which the breach of the duty owed in accordance with regulation 104 or 105 is alleged;
  - (d) suspending the implementation of any decision or action taken by the utility in the course of following such a procedure.

(2) When deciding whether to make an order under paragraph (1)(a)—

- (a) the Court must consider whether, if regulation 110(1) were not applicable, it would be appropriate to make an interim order requiring the utility to refrain from entering into the contract; and
- (b) only if the Court considers that it would not be appropriate to make such an interim order may it make an order under paragraph (1)(a).

(3) If the Court considers that it would not be appropriate to make an interim order of the kind mentioned in paragraph (2)(a) in the absence of undertakings or conditions, it may require or impose such undertakings or conditions in relation to the requirement in regulation 110(1).

(4) The Court may not make an order under paragraph (1)(a) or (b) or (3) before the end of the standstill period.

(5) This regulation does not prejudice any other powers of the Court.”

28. It is settled law that the applicable principles for determining such an application are the *American Cyanamid* test as explained in: *Covanta Energy Ltd v Merseyside Waste Disposal Authority* [2013] EWHC 2922 per Coulson J at [34] and [48], *OpenView Security Solutions Limited v The London Borough of Merton Council* [2015] EWHC 2694 per Stuart-Smith J at [10]-[15]; *Alstom Transport UK Ltd v London Underground Ltd* [2017] EWHC 1521 per Stuart-Smith J at [20]-[22]; *Lancashire Care NHS Foundation Trust v Lancashire County Council* [2018] EWHC 200 per Fraser J at [16]-[18].
29. When determining an application to lift the automatic suspension in a procurement challenge case, the Court must consider the following issues:
- i) Is there a serious issue to be tried?
  - ii) If so, would damages be an adequate remedy for the claimant if the suspension were lifted and it succeeded at trial; as formulated by Coulson J in *Covanta*, is it just in all the circumstances that the claimant should be confined to its remedy of damages?
  - iii) If not, would damages be an adequate remedy for the defendant if the suspension remained in place and it succeeded at trial?
  - iv) Where there is doubt as to the adequacy of damages for either of the parties, which course of action is likely to carry the least risk of injustice if it transpires that it was wrong, that is, where does the balance of convenience lie?

*Serious issue to be tried*

30. Network Rail concedes, for the purpose of this application, that there is a serious issue to be tried.

*Adequacy of damages for Alstom*

31. Ms Hannaford QC, leading counsel for Alstom, submits that damages would not be an adequate remedy for Alstom if the suspension were to be lifted and it succeeded at trial for two reasons:

- i) Alstom may not be able to recover damages even if successful on liability; in effect Alstom could be confined to no remedy; and
- ii) significant harm, which cannot be adequately compensated in damages, would be caused to Alstom if Network Rail were permitted to place the framework agreement with Siemens.

32. As to the first reason, Ms Hannaford relies on Network Rail's pleaded case at paragraph 39 of the Defence:

- “(1) In accordance with the principle in Energy Solutions EU Ltd v Nuclear Decommissioning Authority [2017] 1 WLR 1373, it is denied that the alleged breaches, either individually or cumulatively, are sufficiently serious to warrant the award of damages.
- (2) Further and in any event, Alstom's claim for wasted tender costs at paragraph 32 is excluded by operation of paragraph 2.3.4 of ITT 1.”

33. In *Francovich v Italian Republic* (Joined Cases C-6/90 and C-9/90) and *Brasserie du Pêcheur SA v Federal Republic of Germany; R v Secretary of State for Transport, Ex.p. Factortame (No.4)* (Joint Cases C-46/93 and C-48/93), the European Court of Justice decided that EU Member States are obliged to make good loss and damage caused to individuals by breaches of EU law for which they can be held responsible. However, the ECJ laid down three conditions that must be met by an individual who seeks reparation under the Remedies Directive as a result of a breach of EU law, namely, cases where (i) the rule of EU law breached is intended to confer rights upon that individual, (ii) the breach is sufficiently serious and (iii) there is a direct causal link between the breach and the damage sustained by the individual (“the Francovich conditions”).

34. In *Nuclear Decommissioning Agency v Energy Solutions EU Ltd* [2017] UKSC 34 the Supreme Court held that the Francovich conditions applied to claims made for breaches of UK regulations implementing EU directives. Lord Mance explained at [37] that there is a distinction to be drawn between a claim for breach of an EU-based duty, even where founded on secondary domestic legislation, and a private law claim for breach of a domestic statutory duty. UK domestic law could have extended the available remedies by legislating for damages in all cases of breaches of EU principles but did not do so.

Therefore, the Francovich conditions limit the remedy available in damages for a breach based on EU law to circumstances in which the breach is sufficiently serious.

35. Although there have been suggestions in academic papers that the Francovich conditions should be reconsidered, particularly having regard to the EFTA Court judgment in *Fosen-Linjen* (E16-16), they remain part of EU jurisprudence and the *Nuclear Decommissioning* case is binding authority.
36. Ms Hannaford submits that the impact of the Supreme Court decision raises the real prospect that if the suspension were lifted and Alstom established its claim against Network Rail, so that the lifting of the suspension were shown to be wrong, it could be deprived of any damages.
37. At this stage of the proceedings, the Court is not in a position to determine whether the alleged breaches, individually or cumulatively, would be sufficiently serious to satisfy the second Francovich condition. As a preliminary observation, in the context of a procurement challenge, although each case must be examined on its merits, if a breach of EU-based law is not sufficiently serious to satisfy the Francovich conditions for an award of damages, it is unlikely to be sufficiently serious to justify setting aside the contract under challenge. In those circumstances, even if Alstom could identify losses that would not be compensated by an award of damages, it is unlikely that it would justify maintenance of the suspension having regard to the balance of convenience test. However, in this case, it is likely that any breach of the Regulations that deprived Alstom of a framework contract worth £1.8 billion would amount to a sufficiently serious breach to satisfy the Francovich conditions.
38. Mr Moser QC, leading counsel for Network Rail, has confirmed that if Alstom succeeded in establishing that it had awarded the contracts to the wrong bidder, the breach would be sufficiently serious to justify an award of damages. I consider that this concession would be sufficient to address any potential difficulty caused by the threshold requirement of a sufficiently serious breach.
39. At the oral hearing of this application, I indicated that it would be appropriate for the concession to be formerly recorded in the pleaded Defence and Mr Moser agreed that this would be done.
40. As to the second reason Alstom submits damages would not be an adequate remedy, reliance is placed on the evidence of Tristan McMichael, business development and strategy manager for Alstom, who makes the following points:
  - i) The framework agreement envisages two long-term design, build and maintenance contracts which will be the first major ETCS schemes in the UK. The ECML(S) outline business case describes these works as the “flagship digital deployment for CP6”.
  - ii) The DBM call-off contracts will be the first long-term maintenance contracts as opposed to just design and build contracts. This will provide the winning bidder with a substantial advantage from its involvement in the long-term maintenance strategy and development of a collaborative partnership with the Network Rail digital railway programme team.



- iii) This is a prestigious and lucrative project, offering a unique opportunity in the UK signalling market.
  - iv) The successful bidder will have an advantage in future tender competitions by reason of its experience on the project and its knowledge from the research and software development it will undertake as part of the works.
  - v) Loss of this procurement will have a negative impact on Alstom's resources and employees.
  - vi) Siemens has a greater share of the market in Network Rail projects, up to 74% of Network Rail's total expenditure on signalling, compared to just 19% for Alstom.
41. The general points made by Mr McMichael do not establish that Alstom will suffer losses for which damages are not an adequate remedy. Inherent in any tendering process is the risk that the bid will be unsuccessful, resulting in wasted costs of the tender, staff that need to be re-deployed and lost profits. These losses can be quantified and could result in an award of damages in the event that Alstom were to succeed at trial.
42. The framework agreement envisages implementation of the first major ETCS scheme in the UK but it is not a unique project and it will not be the last ETCS scheme in the UK or elsewhere. Alstom has already been involved in the prestigious and lucrative Paddington to Heathrow ETCS scheme as part of the Crossrail project, albeit by way of an overlay system. Alstom has the opportunity of tendering for the Trans-Pennine route ETCS upgrade. Significantly, Alstom is part of a global group and has extensive experience in delivering ETCS projects with long-term maintenance contracts elsewhere in Europe, including Denmark and Spain. The ETCS is intended to facilitate compatibility of control systems throughout the EU and therefore will allow research, development and experience on one project to be used on other projects. It is not credible for Alstom to suggest that it would be at a disadvantage in future tenders for ETCS schemes in the UK.
43. Mr McMichael states that Alstom currently has very little signalling work with Network Rail, which has resulted in it reducing its UK signalling resources and making a large number of redundancies in the past 12-18 months. If, and to the extent that, the loss of the framework agreement caused Alstom to incur redundancy and other human resources costs, such losses could be quantified and damages awarded in compensation. Mr McMichael's suggestion that Alstom's ability to develop resources with UK market experience will be impeded by loss of this project is not a valid argument. The common standard applied throughout Europe would enable Alstom to use its specialist expertise acquired on the Danish and Spanish ETCS projects on any future UK schemes.
44. It is common ground that Siemens has a greater share of Network Rail's existing signalling work but both Siemens and Alstom are significant, global operators in this industry. There is no evidence that Alstom's solvency is threatened by the loss of the framework agreement. There is no obligation on Network Rail to ensure equitable apportionment of its projects; on the contrary, the procurement rules would preclude the use of such criteria in a competitive tender process.

45. For the above reasons, it is likely that damages would be an adequate remedy for Alstom if it were to establish its claim at trial. It is just in all the circumstances that Alstom should be confined to its remedy of damages.

*Adequacy of damages for Network Rail*

46. Alstom has confirmed that the usual undertakings in damages would be given to Network Rail and to Siemens, namely, that if the suspension were maintained and the Court were to find that Alstom should compensate Network Rail and/or Siemens for any losses, Alstom would comply with any order the Court might make.
47. Mr Moser submits that damages would not be an adequate remedy for Network Rail. Reliance is placed on the evidence of Philip Bennett, commercial director for the digital railway programme within Network Rail, and Adrian Moss, route asset signalling manager for Network Rail. They identify the following categories of harm that would be suffered in the event that the suspension is not lifted that could not be compensated adequately by an award of damages:
- i) Delay in carrying out the works prolongs the safety risks that would be mitigated by the introduction of ETCS, including the risk of speeding and passing signals at danger.
  - ii) The ECML operates with 1970s signalling assets which have already reached or are reaching the end of their scheduled design life and pose an increased risk of failure and rising maintenance costs. Delay in carrying out the ETCS works would give rise to prolonged disruption to services, leading to inconvenience and wider socio-economic impacts on those using the infrastructure and their businesses.
  - iii) Network Rail would suffer reputational harm as a result of the delays, disruption and continuing safety risks, including damage to its relationship with the unions.
  - iv) Network Rail has contingent liabilities to train operating companies under franchise agreements but such liabilities have not yet crystallised and therefore can't be quantified for the purposes of compensation.
48. The concerns raised as to potential harm to Network Rail's reputation and damaged labour relations are too vague and lacking in particularity to carry any weight. The courts are experienced in assessing damages based on chance or future events. The contingent liabilities identified could be assessed for the purpose of an award of damages or an indemnity. However, I accept Mr Bennett's evidence that the delayed improvements to safety, and the wider impact on businesses and the travelling public caused by delays and disruption to rail services, are matters that could not be quantified properly or fairly compensated for by way of damages.
49. On that basis, it is likely that damages would not be an adequate remedy for Network Rail if it were to succeed at trial.

*Balance of convenience*

50. The above determination, namely, that if Alstom succeeded at trial damages would be an adequate remedy, whereas if Alstom's challenge failed damages would not be an adequate remedy for Network Rail, would generally be conclusive in favour of lifting the suspension. However, for completeness, I have gone on to consider the balance of convenience.
51. The balance of convenience test requires the Court to consider all the circumstances of the case to determine which course of action is likely to carry the least risk of injustice to either party if it is subsequently established to be wrong. When determining where the balance of convenience lies:
- i) the Court should consider how long the suspension might have to be kept in force if an expedited trial could be ordered: *DWF LLP v Secretary of State for Business Innovation and Skills* [2014] EWCA Civ 900 per Sir Robin Jacob at [50];
  - ii) the Court may have regard to the public interest: *Alstom Transport v Eurostar International Limited* [2010] EWHC 2727 per Vos J at [80];
  - iii) the Court should consider the interests of Siemens, as the successful bidder, alongside the interests of Alstom and Network Rail: *Openview* (above) at [14];
  - iv) if the factors relevant to the balance of convenience do not point in favour of one side or the other, then the prudent course will usually be to preserve the status quo (or, perhaps more accurately, the status quo ante), that is to say to lift the suspension and allow the contract to be entered into: *Circle Nottingham Ltd v NHS Rushcliffe Clinical Commissioning Group* [2019] EWHC 1315 (TCC) at [16].

### *Expedition*

52. Ms Hannaford submits that an expedited trial in June 2020 would be realistic. The evidence filed by Alstom and Network Rail contemplated a potential trial date in June 2020. Although the current trial is listed for 1 February 2021, the directions given by Fraser J at the CMC would enable the parties to be ready for trial in June 2020. On that basis, I am satisfied that an expedited trial in June 2020 would be achievable.
53. However, that would not limit the duration of the suspension in this case. It is necessary to take into account the time required for judgment to be given and the time taken for any likely appeal. Allowing for these matters would increase the period of the suspension to at least one year, until the end of 2020.

### *Public interest*

54. The public interest is a strong factor tipping the balance of convenience in favour of lifting the suspension for the following reasons.
55. Firstly, the signalling assets are reaching the end of their design lives and require replacement as Mr Moss explains in his witness evidence:
- i) The wiring forming part of the interlockings on the ECML(S) line is approximately 40 years' old and is in a state of degradation. At Wood Green,

the interlocking wiring is so degraded that non-urgent works have been prohibited since January 2016. The interlockings are a safety-critical part of the signalling system that avoid conflicting movements between trains by preventing the display of a signal to proceed unless the route to be used is safe. The planned ETCS works will enable the interlockings' wiring to be replaced by 2024.

- ii) On the NCL a significant proportion of the track-side assets, including the interlockings, are already beyond the end of their design life. Some components are obsolete, spares are no longer available and training is not available for staff. The planned ETCS works will enable these NCL assets to be replaced by 2022, before some of the critical equipment, such as the Moorgate interlocking area, reaches the end of its nominal life in 2023.
56. Secondly, if the ETCS works are delayed by the current suspension for the anticipated period of one year, it will be necessary for Network Rail to carry out conventional signalling asset replacement works. Although lineside signalling assets could be retained and maintained until implementation of the ETCS, the safety-critical interlockings must be replaced. Mr Moss explains that it would be necessary for a decision to be made in early 2020 for such alternative works to allow for the necessary design, planning and lead-in times to ensure that conventional replacement could be achieved by the current planned dates. The replacement of the interlockings could not be carried out as one project because of the complexity of the affected electro-mechanical relays and wires. Such works would involve substantial costs and disruption without achieving the benefits of the digital train control project.
  57. Thirdly, if Network Rail is forced to undertake conventional signalling asset replacement works, it will not be possible for it to carry out the work of designing and installing the ETCS infrastructure in parallel. The ETCS works would not commence until the conventional replacement works were completed, causing years of delay to the digital train control project.
  58. Fourthly, if Network Rail is unable to proceed with the ECML framework contract as planned, the business case for funding the project will be adversely affected. Network Rail will no longer be able to rely on the need to carry out necessary replacement of the degraded signalling assets to justify the substantial investment in the ECML as a priority over other infrastructure projects.
  59. In summary, delay to the ETCS project caused by the continuing suspension would delay the anticipated benefits of the planned works, result in abortive costs and could jeopardise the business case for the project.
  60. Ms Hannaford submits that there has already been delay to the procurement, originally planned for 2013. Maintaining the suspension in place pending an expedited trial would not have the adverse impact on the project suggested by Network Rail.
  61. Firstly, she points out that the professional services call-off contract does not involve any physical works and therefore does not have any safety or other benefits. That analysis is too simplistic. The framework agreement contemplates a number of call-off contracts, forming part of the overall ECML project. As explained by Messrs Bennett and Moss, although the professional services call-off contract is for design, planning

and costs services, contracts will be issued for critical renewal work, such as the interlockings at Wood Green, and funding has been included for such works in Network Rail's budget for Control Period 6.

62. Secondly, Ms Hannaford argues that in relation to the ECML(S) DBM contract, there is no urgency. The freight fitment works have already been delayed by up to 12 months, no full business case or funding have yet been given for this contract and the full benefits would only be obtained once the ETCS is fully operational by 2027 or 2029. In response to that suggestion, Mr Bennett has stated in his fourth statement that the freight fitment works are not on the critical path and do not affect the current project programme. In any event, it is wrong for Alstom to suggest that no benefits will be achieved until the full project has been completed. Mr Bennett explains in his second statement that all rolling stock has already been fitted with digital signalling equipment on the NCL, as has a significant proportion of the rolling stock on ECML(S), and therefore will benefit from the reduced headway between trains using the additional blocks as and when the ETCS works are progressed.
63. Thirdly, Ms Hannaford submits that the NCL is relatively minor and already has the benefit of ATP. This is wrong and not supported by the passage referred to in Mr Bennett's evidence. Mr Bennett explains that additional safety measures were put in place following the Moorgate disaster in 1975 but ATP will be introduced as part of the ETCS works.
64. Fourthly, Ms Hannaford submits that the business case focuses on the economic cost of signalling renewal and performance reliability rather than safety issues. Mr Moser identifies references to safety factors in the business case. However, regardless of the economic drivers for the project, the clear recommendations in the Uff/Cullen report are that ETCS, including ATP, should be installed on the ECML.
65. Fifthly, Ms Hannaford submits that the benefits of improved reliability and capacity of the ECML and NCL can only be achieved in full once the ETCS system has been fitted in full. No doubt that is correct but it ignores the substantial benefits of improved reliability and capacity that will be achieved as the project progresses.
66. In her additional written submissions, Ms Hannaford submits that there is no evidence on the programmes provided that the realisation of benefits from the project would be delayed by the automatic suspension or that the commissioning would be delayed such that additional conventional renewals were necessary. That argument ignores Mr Bennett's explanation that the programme has not yet been updated to show the impact of any future suspension.
67. The main difficulty with the arguments raised by Alstom is that they fail to address the key issue identified by Network Rail, that is, the urgent need to replace the degraded signalling assets, either by proceeding with the ETCS framework agreement and call-off contracts or by deciding to implement conventional replacement. That decision needs to be taken in early 2020 for the reasons explained by Mr Moss. It can't wait until after the trial.
68. Complaint is made by Alstom that there was delay on the part of Network Rail in issuing its application to lift the automatic suspension. The claim form was issued on 19 August 2019. The particulars of claim were served on 2 September 2019. The application to lift

the suspension was not issued until 21 October 2019. It is unfortunate that the parties were unable to agree a timetable for an earlier consideration by the Court of this application. In cases where there is a dispute as to urgency, expedited trial and impact of delay, it must be in the interest of all parties to have an early determination by the Court. However, I appreciate that in large, complex cases such as this case, greater speed is not always possible. The timing of the application in this case is not a material factor in deciding where the balance of convenience lies.

69. Alstom relies on the detriment to the public interest if Network Rail has to pay twice, i.e. under the framework agreement to the successful tenderer and by way of lost profit to the claimant. There is a risk that Network Rail would have to pay damages to Alstom if it lost but that is balanced against the risk that Alstom would have to pay damages to Network Rail if Alstom lost. In each case, it is a matter for the parties to assess the risks of the litigation. Mr Moser confirms that his client is prepared to take that risk.
70. Alstom relies on the public interest in Network Rail complying with its legal obligations in respect of a public procurement. However, that is balanced against the public interest in Network Rail's entitlement to proceed with the successful tenderer following a lawful and fair procurement exercise. At this stage, the Court is not in a position to judge which case will prevail. Therefore, this point is a neutral one.
71. The evidence produced by Network Rail establishes that there is a strong public interest in proceeding with the ETCS works as soon as possible. Maintaining the suspension is likely to cause the abortive costs of urgent replacements, years of delay and risks putting in peril funding for the project.

#### *Siemens*

72. Mr Williams, counsel for Siemens, supports Network Rail's position with regard to the impact of further delay and submits that a continuation of the suspension would cause Siemens to suffer both financial and non-financial harm. Reliance is placed on Mr Brady's evidence. He explains that Siemens has assembled a specialised workforce for the project. Some of those staff were redeployed until the end of August 2019 but that alternative project has ended and there is limited opportunity for further redeployment. Mr Brady is concerned that Siemens will not be able to retain its expert workforce during any further suspension and they will be recruited to work elsewhere. In addition to the disruption suffered, Siemens will lose the commercial advantage it would otherwise gain by undertaking the work now.

#### *Status Quo*

73. Alstom submits that where the balance of convenience is finely balanced, the course which carries the least risk of irremediable prejudice and which the Court should adopt is that which maintains the status quo. However, as set out above, maintaining the status quo in this case is to lift the suspension and allow Network Rail to enter into the framework contract with Siemens.

#### *Alstom's alternative case*

74. Alstom's alternative case is that the automatic suspension should only be lifted in respect of the NCL DBM call-off contract under the framework agreement. It is

submitted that a partial lifting of the automatic suspension follows the approach of the Court of Appeal in *DWF* (above) at [51].

75. A partial lifting of the automatic suspension would not be appropriate in this case. Firstly, the urgent replacement works affect the ECML(S) works in addition to the NCL works as set out above. Secondly, as Mr Williams submitted, there is no reasonable prospect of the project proceeding in part. The commercial basis of Siemens's tender, including its research and development costs, was the framework agreement with two initial call-off contracts. Siemens has based its supply chain contracts on the assumption of this package. Thirdly, on the facts of this case the strong public interest in lifting the automatic suspension extends to the full ECML project.

### *Conclusion*

76. For the reasons set out above, the balance of convenience lies in lifting the automatic suspension and permitting Network Rail to enter into the framework agreement with Siemens. Accordingly, Network Rail's application is granted.