OUTER HOUSE, COURT OF SESSION

[2026] CSOH 37

CA61/25

OPINION OF LORD LAKE

In the cause

ST MARGARETS NURSERY LIMITED

Pursuer

against

CITY OF EDINBURGH COUNCIL

Defender

Pursuer: R Anderson; Freeths Scotland
Defender: O'Neill KC, (sol-adv) Watt; Brodies LLP

8 April 2026

[1] The pursuer contends that the defender has breached their obligations under the Public Contracts (Scotland) Regulations 2015 and, on that basis, seeks an ineffectiveness order under Regulation 91(6) and decrees for declarator and damages. The actings of the council that the pursuer relies upon concern the conclusion of Early Learning and Childcare Agreements (ECLAs). By way of background, as an education authority the council have an obligation to secure adequate and efficient provision of early learning and childcare. A means by which the council make that provision is to fund places for children made available by providers that meet the prescribed National Standard and selected by parents. The National Standard is not defined but appears to be a reference to the National Standard

for Funded Early Learning and Childcare published by the Scottish Government in 2023. The council concludes ECLAs with various providers. The ECLA is not concluded in relation to any particular child or children. Once an ECLA is in place, if the provider offers a place to the child which is accepted on behalf of the child, the council will provide funding to the provider.

[2] The pursuer operates a children's nursery in Edinburgh. It concluded an ECLA with the council in 2016 which has been renewed or extended on a number of occasions. The pursuer has provided places to children which have been funded or paid for by the council. By letter dated 18 February 2025 the council informed the pursuer that its intention was that it would not renew or extend that ECLA when it expired on 12 August 2025. The pursuer protested against this in a letter dated 28 February 2025. By letter dated 2 May 2025 and received on 5 May 2025, the council responded and confirmed that it would not renew or extend the ECLA. Permission to seek judicial review of that decision was sought but refused. The ECLA between the council and the pursuer came to an end on 12 August 2025 along with a number of ECLAs with other providers. The defender has concluded new ECLAs with a number of providers. A template of the ECLA which has been concluded has been lodged and is incorporated by the defender into its pleadings. The pursuer refers to it for its terms.

[3] The defender's position is that it was not required to comply with the requirements of the 2015 Regulations as the ECLAs they entered into do not fall within their scope. The pursuer disputes this and it formed the first issue to be determined in the debate before me. The second issue was whether the time permitted in the Regulations for making a challenge had passed before the summons was served and the third issue was whether the pursuer has standing or title and interest to being the proceedings.

Applicability of the 2015 Regulations

[4] Put briefly, the defender's contention is that that the 2015 Regulations do not apply because the ECLAs are not "public contracts" as defined there. They found on the absence of any enforceable obligations on the service providers when the ECLAs are concluded. They point to the possibility that there may be no application made to the provider in question to provide a place to a child. They note also that providers cannot be compelled to provide a place to any particular child or even to any number of children even if applications are made to them. That position was not disputed by the pursuer. Equally briefly, the pursuer's contention is that the ECLAs are capable of giving rise to enforceable obligations on the part of providers in future if a place is taken up by a child and that this is sufficient to mean that the ECLAs are "public contracts" and that the Regulations are engaged. In support of the parties' arguments, I was referred to *Helmut Müller GmbH* v *Bundesanstalt für Immobilienaufgaben* (Case C-451/08) 2010 3 CMLR 18, *Remondis GmbH & Co KG Region Nord* v *Hannover* EU:C:2016:985, *Tax-Fin-Lex doo* v *Ministrstvo za notranje zadeve* (C-367/19) EU:C:2020:685; [2021] PTSR 453, *R (Midlands Co-Operative Society Ltd)* v *Birmingham City Council* [2012] EWHC 620 (Admin), [2012] EuLR 640, *R (Faraday Development Ltd)* v *West Berkshire Council* [2018] EWCA Civ 2532, [2019] PTSR 1346, *Ocean Outdoor UK Ltd* v *Hammersmith and Fulham LBC* [2019] EWCA Civ 1642, [2020] PTSR 639, and *Professional Game Match Officials Ltd* v *HMRC* [2024] UKSC 29, [2024] ICR 1480.

[5] In *Helmut Muller* the ECJ noted that Directive 2004/18/EC (the one implemented by the 2015 Regulations) applies only to contracts concluded for "pecuniary interest" and that this infers that the contractors will undertake to carry out the service in question in return for payment (paragraphs 47 and 60). The court said also that the execution of the works in

question must be legally enforceable (paragraph 62). This was reiterated in *Remondis* where, in the context of considering the requirement that the contract be for pecuniary interest, the court said, "The synallagmatic nature of the contract [ie that it places reciprocal obligations on both parties] is thus an essential element of a public contract". In *Tax-Fin-Lex*, a bid which had been submitted to provide the required services for a price of €0.00 was rejected and that rejection was challenged. One of the issues was whether that contract price had the result that it was not entered into "for pecuniary interest". The CJEU, referencing *Helmut Muller* and after noting that consideration need not consist in payment of a sum of money said,

> "even if that consideration need not necessarily consist of the payment of a sum of money, so that the supply of the service is compensated for by other forms of consideration, such as reimbursement of the expenditure incurred in providing the agreed service … the fact remains that the reciprocal nature of a public contract necessarily results in the creation of legally binding obligations on both parties to the contract, the performance of which must be legally enforceable."

On that basis the court concluded that, although there might be a benefit other than a monetary one that accrues to the contractor, because the contracting authority would not be legally obliged to provide any consideration the contract was not one for pecuniary interest. *Midlands Co-operative Society Ltd* and *Ocean Outdoor UK Ltd* add little to these cases. They applied the law as stated in *Herman Muller*. In *Midlands Co-operative Society*, Hickinbottom J noted that in relation to the requirement that the contractor assume obligations, that this is not the position if the contractor is entitled not to perform the works.

[6] If these cases clearly establish a requirement that for the 2015 Regulations to apply the tenderer must undertake a legally enforceable obligation, the decision of the Court of Appeal in *R (Faraday Development Ltd)* addresses the issue as to the stage at which the obligation must exist. The case concerned the plans of a local authority to sell land for

redevelopment. The decision to sell to one party was challenged by an unsuccessful party on the basis that the process was unlawful in terms of the Public Contracts (Regulations) 2006 - the then current English regulations implementing Directive 2004/18/EC. In terms of the development agreement which the council had concluded, the prospective developer, St Modwen, was not under any obligation to acquire the site. It was, however, in the developer's discretion to serve an acquisition notice requiring that the land be sold to them. If such a notice was served and the land was transferred, the developer would become subject to a binding obligation owed to the council to carry out the development in accordance with plans agreed before the notice was served. Until the notice was served, the developers were free to walk away. The only substantive judgment was given by Lindblom LJ. He noted that the authorities indicated that an agreement would not be a "public works contract" unless the contractor assumed an obligation (paragraph 46). Considering the position prior to service of an acquisition notice, he noted that the developer was not committed to the development works and concluded that "the development agreement was not yet a 'public works contract'" (paragraph 51). Matters did not rest there, however. Once the acquisition notice was served and the developer came under obligations, he considered that it would become a such a contract (paragraph 57). He noted that the decisions in *Helmut Muller* and *Remondis* required that the relevant contract arrangements should be viewed as a whole. It remained the position that the commercial substance of the agreement should be considered as at the date it was entered into but the court should consider whether, at that date, "it embodied defined obligations that will, once they take effect, compose a 'public works contract'" (paragraph 60). Applying that test to the facts of the case, he said the following:

> "When it entered into the development agreement, the council had nothing more to do to ensure that a 'public works contract' would come into being. It had, in fact, done all that it needed to do to procure. It had committed itself contractually, without any further steps being required of it, to a transaction that will fully satisfy the requirements of a 'public works contract'. It had committed itself to procuring the development from St Modwen. The development agreement constitutes a procurement in its result, and a procurement without a lawful procurement procedure under the 2004 Directive and the 2006 Regulations. The procurement crystallises when St Modwen draws down the land. The ground lease entered into by St Modwen will contain an unqualified obligation to carry out works, and a corresponding obligation will also be brought into effect in the development agreement itself. The development agreement made that commitment on the part of the council final and provided also for a reciprocal commitment on the part of St Modwen. It did so without a public procurement process, and without affording any opportunity for such a process to be gone through before the 'public works contract' materialises. At that stage it would be too late. Thus a 'public works contract' will have come into being without a lawful procurement process. The regulation of the council's actions in procuring the development will have been frustrated."

On that basis, Lindblom LJ concluded that in entering into the agreement, the council had agreed to act unlawfully in the future.

[7] The template ELCA which has been lodged states that the council will make funding available for the Partner Provider - the nursery - to provide early learning and childcare as set out in the agreement to the National Standard. It states that the Partner Provider undertakes to deliver early learning and childcare services in accordance with the National Standard. The template ELCA has various provisions as to standards and procedures that will apply in the event that the Partner Provider is providing a place to an eligible child. There is, however, no obligation until a place is offered to and taken up by a child. The situation is analogous to that in *Faraday*. Until a Partner Provider chooses to provide a place to a child which is taken up, there are no obligations on them. In that state, there is no public contract in terms of the Regulations. However, once a place is offered and taken up, the ECLA will mean that there are obligations on the Partner Provider and the council will come under an obligation to provide funding. At that stage, it will be a public works

contract. The transition to that situation is brought about by agreement between the Partner Provider and the parents of the child. There is no scope or any procurement exercise to be carried out after the award of the ELCAs. By entering into the ECLA, the council have done all they need to do for a public works contract to be brought into being and if they have not complied with the Regulations they have acted unlawfully. There remains an issue as to how the unlawfulness should be recognised and what consequences it might have but it can be said as a matter of relevancy, that the pursuer is not bound to fail in its case.

Time limits

[8] Regulation 88 in the 2015 Regulations sets time limits within which proceedings alleging a breach of the duty owed to economic operators to comply with the Regulations must be commenced. For an ineffectiveness order sought in terms of Regulation 91, the period is 6 months from the date that the contract that is to be declared ineffective was entered into unless certain conditions are met. On the basis of the pleadings and materials made available to me, those conditions do not apply. The defender does not argue that the 6-month time limit was not met.

[9] For all other proceedings, Regulation 88 requires that they are raised, "within 30 days beginning with the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen". The 30-day period can be extended by up to 3 months and that issue is considered below. The courts have considered what is meant by "known" in this regulation and others based on EU Directives. In *SITA UK*, Elias LJ said that it required knowledge of facts which clearly indicated, though need not absolutely prove, an infringement and went on to say,

> "Once the prospective claimant has sufficient knowledge to put him in a position to take an informed view as to whether there has been an infringement in the way the process has been conducted, and concludes that there has, time starts to run". (paragraph 22)

Although this appears to require that a claimant has actually reached a conclusion that the Regulations have been breached, in *Mermec UK Limited* v *Network Rail Infrastructure Limited* [2011] EWHC 1847 (TCC) Aitkenhead J noted that, "All that is needed is a knowledge of the basic facts which would lead to a reasonable belief that there is a claim." Both cases were considered in Scotland in the Opinion of Lord Woolman in *Nationwide Gritting Services Limited* v *The Scottish Ministers* [2013] CSOH 119. He noted that in paragraph 37 of his decision in *SITA*, Elias LJ had gone on to refer to the issue as being whether the tenderer has sufficient information to commence proceedings. I have applied this approach to consider to what extent the pursuer had knowledge of the relevant facts.

[10] By reference to the decision of Coulson LJ in *Brookhouse Group Ltd* v *Lancashire County Council* [2024] EWCA Civ 717, [2024] PTSR 1513, the pursuer contends that the 30-day period does not start to run until the contracting authority has communicated the reasons for their decision to the unsuccessful party. The provision of information by the contracting authority may be relevant to the time limit for seeking an ineffectiveness order but the judgments in that case do not support the proposition that was advanced. It may be that until there is such communication, the disappointed party is in ignorance of the position. It may be that a communication from the contracting authority is what imparts the "sufficient knowledge" referred to by Elias LJ or knowledge of the basic facts as referred to by Aitkenhead J. When considering the time limit for remedies other than an ineffectiveness order, however, the focus should be on whether there is that knowledge from any source and not whether the contracting authority has communicated information.

[11] The summons was served on 31 July. In relation to the issue of when the necessary knowledge was present with the result that the 30-day period began to run, the defender identifies four dates - 18 February 2025, 14 March 2025, 1 May 2025 and 5 May 2025. It submits that the knowledge existed at the date in question by reference to documents. The pursuer is less clear as to when it considers the 30-day period began to run. They note that the summons was served before the existing ELCAs came to an end and that the template for the new ECLA was disclosed to them only after the action was raised. They note that no information was provided by the council about its view of the applicability or otherwise of the procurement regime even in the letter dated 2 May 2025 (and received on 5 May 2025) which is the reason for the last date. They note that the pursuer raised proceedings before its existing ECLA had expired and before at least some of the new ECLAs had been entered into. They placed weight on comment in *Faraday* that the claimant could only be aware of the grounds for a procurement challenge when the terms of the new contracts were disclosed. They contended that even if the proceedings were not raised in the 30-day period, the court should exercise its discretion to extend it.

[12] The pursuer contended on the basis of *Faraday* that the period would not start running until they had been made aware of the terms of the new ECLAs by the council and that this had not happened until after the action was brought. However, the point that arose in *Faraday* is not as broad as the pursuer contends and depends on the circumstances that existed in that case. Although the court there concluded that knowledge existed only when the terms of the development agreement in question was disclosed to the claimant, Lindblom LJ accepted that the agreement was complex and there was a need for the claimant to understand its terms before it could identify the grounds of its claims. Neither of those considerations applies here. The ECLA was not a complex agreement and, more

importantly, the challenge does not depend on its terms. There is no obligation on the council to disclose its view of the applicability of the procurement regime and knowledge of that plays no part in the statutory test for knowledge considered above. It is irrelevant and so too is the fact that challenge was brought before the existing contracts had terminated and before some of the new contracts were entered into. The test is based on possessing knowledge which enables a party to take a view that there has been an infringement rather than by reference to the new arrangement being entered into. With that in mind, it is appropriate to consider the position at the time points identified by the defender.

[13] The first point arose on 18 February 2025 when the defender sent a letter to the pursuer that informed them that the existing ELCA would not be renewed when it ended on 12 August 2025. It indicated that funding would be continued for places for children where it was already in place. It does not say that all ECLAs will be terminated and it does not say that new ones are to be put in place. The defender refers also to a letter sent by the pursuer to parents of children that had funded placed with them but it does not indicate any additional awareness on the part of the pursuer. I do not consider that either letter indicated knowledge sufficient to start the 30-day period running. The essence of the challenge made is that new ECLAs were concluded in the absence of a procedure complying with the 2015 Regulations. The council's letter gave no intimation that new ECLAs were being concluded. Although it said that the agreement with the pursuer was being terminated, it did not say that all the existing ECLAs were to come to an end. There was therefore no basis on which it could readily be inferred that there was to be an award of new ECLAs.

[14] The significance of the second date of 14 March 2025 referred to by the defender is that it was the date on which the Report to the committee of the defender describing the new proposals for providing early learning and childcare was made available on their website.

It bears a date of 25 March 2025 but that is the date of the meeting of the Education, Children and Families Committee at which it was anticipated that the Report would be considered. It is apparent from this Report that the ELCAs between the council and all Partner Providers were to end on 12 August 2025 and that the council would not be offering new ECLAs to nurseries which had not met criteria 6, 8 or 9 of the National Standard. By stating that all ECLAs will end and that new ECLAs will not be offered to nurseries falling within that group, it is can readily be inferred that they will be offered to the ones not falling within that group. The pursuer had been subject to procedures under the ECLA in respect of their performance in relation to the National Standards in question and would not be eligible to enter into a new ECLA in terms of the policy. It is significant that the Report discloses that new agreements will be put in place and it is apparent from the narrative of the basis on which a decision has been made as to who will be able to enter into them that a procurement exercise has not been carried out. A person reading this would have been in a position to take an informed view on that issue of whether there was compliance with the 2015 Regulations. Proceeding for the purposes of this debate on the hypothesis that the pursuer's claim is well-founded, such a person would have been able to take an informed view that there has been a failure to comply with the Regulations.

[15] The third time point referred to by the defender is the date on which the Report was actually considered by the committee. This was later than had been anticipated in the Report and it took place on 1 May 2025. The minutes of the committee meeting on that day record that it did not require to take any decision in relation to the Report and simply considered it and noted its terms. The minutes do not add anything to the contents of the Report but indicate that on this date the matter was the subject of consideration in public.

[16] While a person who read the Report and Minute might have the necessary knowledge, there was nothing before me to suggest that the pursuer had read either of them. The issue that then arises is as to whether the pursuer "ought to have known", to use the wording of Regulation 88, of either or both of the Report or Minute of meeting. Both were in the public domain but were not documents which would routinely have come to the attention of the pursuer. This issue is rendered rather academic, however, when regard is had to the fourth document referred to by the defender - the council letter dated 2 May 2025 which was received by the pursuer on 5 May 2025. I have already noted I do not attach any weight to the defender's submission that this did not set out the view of the council as to the applicability of the procurement regime. It referred to an Early Years Commissioning Team and explained that it had "made the necessary arrangements for the procurement of a new ELC partnership". It noted that it was a requirement of this that existing providers that were not meeting certain of the National Standards - including the pursuer - would not be admitted to the new partnership. It was apparent that by this time the pursuer clearly had an interest in what would be done in future by the council and a wished to object to the decision. Thay had been made aware in this letter that there was to be procurement of a new partnership. Obtaining information about what was proposed by the council and the contents of the Report and Minute would have been straightforward and would have entailed little effort or expenditure.

[17] It was not necessary that the pursuer have sight of the template ECLA for the period to start running. The nature of the challenge does not depend on the terms of the template. Although the analysis of the application of the 2015 Regulations to the ECLAs in the light of the decision in *Faraday* outlined above requires that there is the potential for the Partner Provider to be bound to provide services if a place was taken up, in this regard there is no

material difference between the existing ECLA to which the pursuer was a party and the template new one. There could not therefore be said to be any reason to wait for sight of the new one before having awareness that a situation might come about in which a Partner Provider would become bound to provide a service.

[18] In view of the above factors I conclude as a result of the Report, the Minute of the meeting on 1 May 2025 and the 2 May letter taken together mean that the test under Regulation 88 would be met. To allow some time for the pursuer to make the inquiries after having received the letter and to obtain and consider the Minute, I conclude that the pursuer ought to have been aware of the position by the end of May 2025. As the facts are clear and I have allowed a margin of time for the pursuer to acquire knowledge, I do not consider that there is any doubt that has to be resolved in the pursuer's favour as they submitted.

[19] On this analysis the 30-day period started running by latest at the end of May 2025 and this means that the proceedings were not brought within the 30-day period. The issue that then arises is whether an extension of the 30-day period should be granted. The pursuer submits that the court should take a "pragmatic approach" to the question of extension of time having regard to the requirement for a letter before action. However, having regard to the dates when the pursuer had the necessary awareness and the 30-day period started running, it cannot be said that the requirement for a letter played a determinative role in the failure to meet the time limit. The pursuer submitted that it is significant that the claim for an ineffectiveness order was made within the time limit specified for that and the court should ensure that it has the lesser remedy of damages and declarator rather than just the more drastic remedy of an ineffectiveness order. In response, the defender notes that in *Faraday*, Lindblom LJ states that the 30-day time limit is not disapplied when a declarator of ineffectiveness is sought (paragraph 97). That being the

position, the existence of the remedy with the longer time bar period does not justify an extension of the shorter period. The pursuer has not identified other grounds on which it would be appropriate to extend the 30-day period. In that situation, the 30-day time limit remains, the proceedings were not raised timeously and, as a result, they are barred in terms of Regulation 88.

Standing / title and interest

[20] The third element of the defender's challenge to the pursuer's case was to the effect that they had not demonstrated title and interest sufficient to seek an ineffectiveness order. It was common ground between the parties that, in the circumstances, this should be considered as a matter of title and interest rather than standing. It was submitted for the defender that the fact that ELCs has been granted to others did not result in prejudice to the pursuer and there were no averments in the summons that loss or damage would result. This was not a situation in which the various providers were competing against each other. For the defender, it was submitted that Regulation 87 was sufficient to give title and interest in stipulating that the obligation on a contracting authority to comply with the 2015 Regulations was owed to economic operators. Although there was not a finite number of contracts, the Council has carried out a procurement exercise with the result that the number of providers was limited. The pursuer had not been able to participate in this. While the defender contended that the pursuer would have been unsuccessful if it had participated, this was not an issue that could be resolved at debate.

[21] Having regard to Article 87 and the existence of the factual dispute between the parties, it a decision cannot be made as a matter of relevancy to the effect that the pursuer

lacks title and interest. Therefore, if I had not been sustaining the defender's challenge based on time limits, I would not have dismissed the action on this basis.

Disposal

[22] In view of the above, I sustain the first plea in law for the defender, repel the defenders remaining pleas, repel the pleas for the pursuer and dismiss the action.