



Neutral Citation Number: [2018] EWHC 200 (TCC)

Case No: HT-2017-00386

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: 08/02/2018

Before :

THE HONOURABLE MR JUSTICE FRASER

Between :

(1) LANCASHIRE CARE NHS FOUNDATION TRUST **Claimants**
(2) BLACKPOOL TEACHING HOSPITALS NHS FOUNDATION TRUST
-v-

LANCASHIRE COUNTY COUNCIL **Defendant**

Rob Williams (instructed by **Hempsons**) for the **Claimant**
Sam Karim QC (instructed by **Lancashire County Council**) for the **Defendant**

Hearing dates: 25 January 2018
Draft distributed to parties: 31 January 2018

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.

.....
THE HON MR JUSTICE FRASER

Mr Justice Fraser :

Introduction

1. This is an application to lift an automatic suspension on the award of a contract imposed by virtue of the claimants issuing a claim form, within the necessary time period, challenging the results of a procurement exercise for that contract in which they were unsuccessful. Due to the urgent nature and public importance of the subject matter of this application, I heard the application on the morning of 25 January 2018 and gave the parties the answer orally in the afternoon of that day. I gave only brief reasons for my refusal to lift the automatic suspension that was then (and as a result of my ruling on the application, currently still is) in place. I indicated that I would give detailed written reasons as soon as possible thereafter; this judgment on the application contains those reasons. There is one point in particular that has not, so far as I am aware, been considered before judicially and that is the point at [19] below.
2. The procurement the subject matter of these proceedings concerns Public Health and Nursing Services to be provided to children and young persons from birth up to the age of 19, including services that concern children and adolescent mental health, across the county of Lancashire. It therefore involves a sizeable population and includes some of the most vulnerable members of society. The procurement exercise and the contract are both subject to the Public Contract Regulations 2015 (“the Regulations”).
3. The two claimant trusts (“the Trusts”) are the incumbent providers of these services to the Lancashire County Council (“the Council”) and there can be no question of there being any interruption in the provision of these services. Apart from any other considerations, the Council is statutorily obliged to provide such services to the residents of Lancashire under the Health and Social Care Act 2012, and will and must continue to do so. These services are being provided now by the Trusts and the contracts under which they do so expire on 31 March 2018. Were it not for the automatic suspension to which I have referred, from 1 April 2018 onwards (for a five year term) these services would be provided by the winning bidder in the procurement exercise the subject of these proceedings, namely Virgin Care Services Ltd (“Virgin”). Only the Trusts, and Virgin, bid for the supply for the Services in the procurement exercise. I shall use Services to denote those to be provided under the new contract, as distinct from the services currently provided by the Trusts.
4. The programme that is the subject of the procurement is called the 0-19 Healthy Child Programme in Lancashire. The procurement exercise under challenge relates particularly to Lot 1 of that programme which is for Public Health Nursing Services. Lot 1 is worth approximately £104m over five years, and represents in excess of 95% of the estimated value of the programme as a whole (that higher total value being just under £108m). For children aged 0-5, the Service consists of screening and developmental reviews, promotion of antenatal health, new baby reviews, maternal mental health and breastfeeding and healthy weight assessments. For children aged 5-19 (and the upper age limit can be a little higher than this, for reasons that are not germane to this application) the services are different and are concentrated upon maintaining the staged health review, promotion of healthy lifestyles, and support of complex and additional health and wellbeing needs of this age group. The Council, after seeking costs reductions and also considering whether to extend the existing

arrangements with the Trusts, decided in the autumn of 2017 to put the service out to tender for a new contract to commence on 1 April 2018. The tender process was subject to what is known as the “Light Touch” Regime under Regulations 74 to 76 of the Public Contracts Regulations 2015. Under this regime, the Council was required to comply with those specific regulations and the general principles of procurement law.

5. The competition took place over a shortened period between 29 September 2017 and 27 November 2017 and the decision was announced on that latter date. The Invitation to Tender (“ITT”) was published on 29 September 2017. Notification of the outcome of the procurement was given by the Council by way of letter dated 27 November 2017. The Trusts lost the tender for Lot 1 to Virgin by a score of 78.5% to 74.43% - a margin of 4.07%. The competing bidders’ prices were almost identical, accounting for a difference of just 0.07% in their overall scores based on that factor. The remaining margin of 4% on the quality evaluation of the two bids in fact represents just 2 actual marks in that evaluation of the two bids, before the relevant weightings were applied.
6. Upon the issuing of these proceedings by the Trusts, what is called the automatic suspension under Regulation 95 came into effect which prevented the Council from entering into the intended contract with Virgin. There was an exchange of letters before the issue of proceedings between the Trusts and the Council, which in summary amounted to requests for information by the Trusts together with complaints (based on such information as the Trusts in fact were given and had at that time); together with increasingly robust rejection by the Council of any breach of Regulation or unlawfulness in the procurement exercise at all. The proceedings were then issued by the Trusts on 14 December 2017, and on 9 January 2018 the Council applied to the court to lift that automatic suspension under Regulation 96(1)(a) of the Regulations. The relief sought in the proceedings is principally that the award decision in Virgin’s favour be set aside and that the Trusts be awarded the contract. Damages are claimed as an alternative. The Trusts had already issued an application in respect of disclosure on 29 December 2017 and this had been listed before me for hearing on 25 January 2018. In the days leading up to that hearing, the disclosure issues between the Trusts and the Council were, finally, compromised (as in my judgment they generally ought to be in such a case). Sensibly advised parties such as the Trusts and the Council should strive to save the collective public purse unnecessary expenditure on legal costs, and arguing at length about disclosure is one of the ways in which such wasted expenditure can readily be incurred.
7. I will not therefore go through the factual background both to the provision of limited documentation by the Council, and eventual agreement to produce further documentation, between the parties. It was therefore suggested and agreed that the court time available for the disclosure application be used instead for the Council’s application, which was plainly urgent. I am indebted to counsel on both sides for their extremely helpful submissions. I am also most grateful to the clerks to counsel who, between them, were able and willing to provide the necessary documentation for the actual hearing bundles so that the hearing could be effective. It is no part of the function of the court staff to prepare the actual hearing bundles for parties, and such preparation remains the obligation of the solicitors, whether they be in-house or not. Given the wide use of email, it is a temptation sometimes to solicitors to use that

medium to provide an avalanche of documents directly to the court and hope, or assume, that the court staff will prepare the hearing bundles. This temptation should be resisted.

8. In the Particulars of Claim, the Trusts allege a number of deficiencies in the evaluation including unequal treatment as between the bids of the Trusts on the one hand and Virgin on the other, a failure to apply the scoring criteria correctly and manifest errors in the evaluation. Pleadings in procurement cases sometimes, in due course, require amendment as a result of the disclosure. However, regardless of that, the actual pre-weighting adjusted scores of the two bids were only 2 marks apart in any event on what could be called the technical content (as distinct from the costs content) of the two bids.

The application to lift the automatic suspension

9. The Council relies upon three witness statements of Ms Christine Rishton dated 9 January 2018, 22 January 2018 and 23 January 2018. The latter statement served just before the hearing became necessary as Ms Rishton realised that what she had said in her second statement the day before was not factually correct. This point was whether, in contractual terms, the Council could simply extend the existing contracts with the Trusts in the event that the automatic suspension were not lifted by the court. She had said that the Council could not do so. It was then realised that the Council could under the terms of the contracts do so, as the contracts themselves contained a contractual option (or “extension clause”) to this effect. The Trusts relied upon the witness statements of Ms Louise Giles and Ms Pauline Tschobotko, one from each of the two Trusts, and both being dated 19 January 2018.
10. The Council relies upon two features which Mr Karim QC on its behalf submits apply in this case. Firstly and most importantly, he submitted that damages would be an adequate remedy for the Trusts in the event that the suspension were to be lifted and the Trusts’ case to succeed at trial. To this end he pointed out that the difficulties identified in the witness evidence for the Trusts, which included loss of staff, restructuring of the relevant pathways, the effect upon their economic model and so forth, as well as other similar points, would all potentially have been suffered in the event of lack of success by the Trusts in the competition. Some had a money value specifically attached to them in the evidence, hence they could be compensated for by damages. Others did not have such a value ascribed to them, but were of the type that could be quantified in money terms and hence compensated for by damages. Overall, he submitted that the adequacy of damages as a remedy for the Trusts was in favour of lifting the suspension.
11. On the other hand, he pointed out that the consequences of not lifting the suspension for the Council were as he described them, significant. As outlined in the witness evidence, the Services are predicated upon the need to safeguard and promote the health and wellbeing of children from birth. The Council is statutorily bound to provide these Services. If the suspension were not lifted he submitted that the Council would not be able to provide these vital services, which would have a significant and detrimental effect on care. Damages could not be an adequate remedy for the young members of the public (some of whom are vulnerable) who are entitled to receive the Services. The Trusts accept that potential harm would be caused to service users including children and their families if the Services were suspended. Further, he

pointed out - which is undoubtedly the case - that Virgin will have to undergo a period of mobilisation in order to start providing the Services from 1 April 2018, which is after all only nine weeks from the hearing of the application. This extraordinary urgency - which I should say for the avoidance of doubt I accept - meant that a decision on the application was required by no later than the following day. It also meant that unless the suspension were lifted, Virgin would not be able to commence providing the Services from that date. However, the spectre of the services no longer being provided by the Trusts after the current (as not yet extended) end date of the existing contracts of 31 March 2018 somewhat overlooks the fact that the Trusts are prepared to continue to provide such services as they currently do beyond that date and until trial.

12. The public interest was also raised by both parties but in different ways, and by each of them in a manner said to be supportive of their position on the application. I will deal with this in a little more detail below, but there is one aspect of the public interest in this case that I consider to be relevant, but which was not argued to any degree. It is that, unusually, in this case all three of the parties to the litigation are publicly funded bodies. The two Trusts are currently performing the services, and would (had they been successful in the competition) have provided the Services under the new contract, without profit. They would however recover contribution to their respective overheads through payments from the Council in respect of the Services. Any damages, were damages to be awarded, would of course be based upon that, but would in this case be paid also by a publicly funded body, the Council. It is true that funding of the Council is at least partially obtained from the council tax payers of Lancashire (some will come from central Government) and it is true that in the 21st century the notion of public funding is rather different to, say, that of thirty or more years ago. Public bodies now “buy in” services from other entities, both from those in the private and public sectors. However, the life of the new contract in terms of duration is five years. It seems to me to be at least a factor that if damages are an adequate remedy, they would be being paid by one public body to another. It is in no way a determinate factor, but it cannot be ignored. This situation is at least partly recognised by the parties in that even if I refuse to lift the automatic suspension, the Council do not seek an undertaking in damages as a quid pro quo from the Trusts, and a cross-undertaking does not arise at all. I do not introduce this as a new factor to be considered when injunctions are sought by or against publicly funded bodies; I consider it a special circumstance in this case that falls to be considered generally.
13. I therefore turn to the relevant legal principles that I must apply on an application such as this.

The legal principles

14. Regulation 95 prohibits the Council from entering into the contract with Virgin given a claim form was issued by the Trusts. It states:
 - 95.—(1) *Where—*
 - (a) *a claim form has been issued in respect of a contracting authority’s decision to award the contract,*
 - (b) *the contracting authority has become aware that the claim form has been issued and that it relates to that decision, and*
 - (c) *the contract has not been entered into,*

the contracting authority is required to refrain from entering into the contract.

(2) The requirement continues until any of the following occurs—

(a) the Court brings the requirement to an end by interim order under regulation 96(1)(a);

(b) the proceedings at first instance are determined, discontinued or otherwise disposed of and no order has been made continuing the requirement (for example in connection with an appeal or the possibility of an appeal).

(3) This regulation does not affect the obligations imposed by regulation 87.

15. Regulation 96(1)(a) allows the Court to make an interim order to bring to an end the requirement imposed by Regulation 95(1). Regulation 96 further states:

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

(a) the Court must consider whether, if regulation 95(1) were not applicable, it would be appropriate to make an interim order requiring the contracting authority 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 95(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.

16. The principles to be applied on such an application are widely accepted as being analogous to those that are applied on an application for an interim injunction. This test therefore now, under these Regulations, explicitly incorporates the *American Cyanamid* principles as summarised by Coulson J in *Covanta Energy Ltd v MWDA* [2013] EWHC 2922 (TCC) (even though that decision pre-dates these particular Regulations):

“[34] The first question is whether there is a serious issue to be tried. If there is, then there are two further questions: namely whether damages are an adequate remedy for a party who was injured by the grant or the failure to grant the injunction, and the more general question as to where the balance of convenience lies. These two questions have to be considered in stages because, as Lord Goff noted in *R v Secretary of State for Transport ex parte Factortame Ltd (No 2)* [1991] 1 AC 603, the relevance of the availability of an adequate remedy in damages, either to the claimant seeking the injunction or to the defendant in the event that an injunction is granted against him should always be considered first.”

17. As to adequacy of damages, Coulson J observed in *Covanta* at [48]:

“(b) In more recent times, the simple concept of the adequacy of damages has been modified at least to an extent, so that the court must assess whether it is just, in all the circumstances, that the claimant be confined to his remedy of damages.”

18. This approach, now specifically enshrined in the wording of the Regulations, had been considered in other earlier cases. In *NATS (Services) Ltd v Gatwick Airport Ltd* [2014] EWHC 3133 (TCC) Ramsey J dismissed an attempt by the unsuccessful tenderer for the provision of air traffic control services to have the “balance of interests” test under European law applied, rather than the *American Cyanamid* test. In *Group M UK Ltd v Cabinet Office* [2014] EWHC 3659 (TCC) Akenhead J considered the Remedies Directive No.2007/66/EC and found that the *American Cyanamid* test was consistent (or at the least, not inconsistent) with that, and that *NATS* had been correctly decided.
19. Akenhead J held at [16](f) that it must be legitimate, when considering all interests likely to be harmed, to have regard to whether, if the lifting of the suspension were to be ordered, the claimant would be left with a remedy, “and that must include an effective remedy”. It is in this context that a novel point arises and it is this. A claimant no longer has an automatic right to damages since the decision of the Supreme Court in *Nuclear Decommissioning Agency v Energy Solutions EU Ltd* [2017] UKSC 34. To what extent, if at all, can and should this be addressed when considering the adequacy of damages?
20. That case was an appeal on preliminary points of European Union and domestic law regarding the circumstances in which damages may be recoverable for failure to comply with the requirements of the Public Procurement Directive (Parliament and Council Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L134, p114) (“the PP Directive”)), as given effect in the United Kingdom by the Public Contracts Regulations 2006 (SI 2006/5) (“the 2006 Regulations”). Although it was an earlier version of the Regulations that was being considered than the one that applies in this case, I consider the reasoning and findings are still applicable to this later version of the Regulations, namely the 2015 Regulations.
21. At [9], Lord Mance, delivering a judgment with which the other four Justices of the Supreme Court agreed, set out what the Court of Appeal had found. Vos LJ as he then was (delivering the judgment with which Lord Dyson MR and Tomlinson LJ agreed) had concluded (at [62]-[65]) that breaches of the PP Directive must, in the light of the Remedies Directive, be actionable under the following three minimum conditions (what are called the “*Francovich*” conditions). These are (1) the rule of law infringed must be intended to confer rights on individuals, (2) the breach must be sufficiently serious, and (3) there must be a direct causal link between the breach of the obligation and the damage sustained by the injured party. Vos LJ had also held that it was open to national law to lay down “criteria that provide a less restrictive remedy in damages than would be provided by the *Francovich* conditions” (at [66]). However, he had held that the disaffected tenderer’s claim constituted a private law claim for breach of statutory duty, which, under English law, was not subject to any restrictive condition limiting its availability to cases of “sufficiently serious” breach. A separate point which arose in that case, which went to mitigation arguments where the claim form

was issued within the limitation period but outside the period within which the automatic suspension would have been activated, is not relevant for present purposes.

22. The Supreme Court held on the relevant issue was that the Court of Appeal was wrong to hold that, even though European Union law only requires a remedy in damages for a sufficiently serious breach, domestic law goes further by requiring a remedy in damages for any breach, whether serious or not. The NDA succeeded on that point and its appeal was allowed on that one issue, thus imposing a “sufficiently serious” requirement for a breach to entitle a party to damages. This does however raise the following point. If a breach has to be “sufficiently serious” to qualify as satisfying the second *Francovich* condition, to give an entitlement to damages, how (if at all) is that to be taken into account when the court is faced with an application to lift the automatic suspension where adequacy of damages is a consideration?
23. This point was not fully argued before me on the Council’s application, and in the particular circumstances of this case it was not necessary for it to be fully argued. Both parties were agreed that at an interlocutory stage of a case – and in particular, at the interlocutory stage in this particular case on these particular facts – the court could not come to a decision on the question of whether the alleged breaches were or could be classified as “sufficiently serious”. Both parties were agreed that the point should be taken into account when considering the question of adequacy of damages as presenting an additional requirement which any claimant had to satisfy to recover damages at all. That is therefore the approach, by agreement in this case, which I adopt. It does however form part of the consideration necessary to arrive at a preliminary conclusion of the effectiveness of the remedy, and it may arise for further and more detailed consideration in the future.
24. In performing that exercise, namely considering the adequacy of damages, the dicta of the Privy Council in *National Commercial Bank Jamaica v Olint* [2009] 1 WLR 1405 is of wide application:

“[17] In practice, however, it is often hard to tell whether either damages or the cross-undertaking will be an adequate remedy and the court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irredeemable prejudice (and to what extent) if it turns out that the injunction should not have been granted or withheld, as the case may be. The basic principle is that the court should take whichever course seems likely to cause the least irredeemable prejudice to one party or the other.”

(emphasis added)
25. In my judgment the expression “least irredeemable prejudice” is very similar, if not precisely identical, to other expressions such as which course of action has the least risk of harm or injustice. They effectively amount to the same exercise, simply expressed in different phraseology. It is all part of considering the balance of convenience.
26. At its starting point therefore the court must consider the approach in *American Cyanamid Co (No 1) v Ethicon Ltd* [1975] UKHL 1. The principles set down in that seminal case have been expounded since, most usefully in *Fellowes & Son v Fisher*

[1976] 1 QB 122, a Court of Appeal case in which Brown LJ set out Lord Diplock's guidelines in an enumerated series numbered 1 to 7. They are as follows:

1. The governing principle is that the court should first consider whether, if the claimant were to succeed at trial, he would be adequately compensated in damages. If damages were an adequate remedy and the defendant would be in a position to pay them, then an interim injunction would ordinarily not be granted.
 2. If damages would not be an adequate remedy, on the other hand, then the court should consider whether, if the injunction were granted, the defendant would be adequately compensated under the cross-undertaking in damages.
 3. It is where there is doubt as to the adequacy of the respective remedies in damages that the question of balance of convenience arises.
 4. Where other factors are evenly balanced, or appear to be, then it is a counsel of prudence to take such measures as are calculated to preserve the status quo.
 5. The extent to which the disadvantages to each party would be incapable of being compensated for in damages in the event of success at trial is always a significant factor in assessing the balance of convenience.
 6. If the extent of the damage that could not be compensated (referred to as the "uncompensatable disadvantage") to each party would not differ widely, it may not be improper to take into account in tipping the balance the relative strength of each party's case as revealed by the written evidence on the application. This should however only be done if it is apparent that there is no credible dispute that the strength of one party's case is disproportionate to that of the other party.
 7. In addition to these factors, there may be many other special factors to be taken into consideration on the particular circumstances of the individual case.
27. The public interest should be taken into consideration as part of the balance of convenience: *Alstom Transport v Eurostar International Limited* [2010] EWHC 2747 (Ch) at [80].
28. Coulson J considered the modern approach in *Sysmex (UK) Ltd v Imperial College Healthcare NHS Trust* [2017] EWHC 1824 (TCC). He observed at [22] that:
- It was agreed by the parties that the first two principles that I identified in paragraph 48 of my judgment in Covanta remain an accurate summary of the law, namely:*
- "(a) If damages are an adequate remedy, that will normally be sufficient to defeat an application for an interim injunction, but that will not always be so (American Cyanamid, Fellowes, National Bank);*
- (b) In more recent times, the simple concept of the adequacy of damages has been modified at least to an extent, so that the court must assess whether it is just, in all the circumstances, that the claimant be confined to his remedy of damages (as in Evans Marshall and the passage from Chitty)..."*
29. Similar arguments were deployed in that case as are relied upon by the Trusts in the instant application. In *Sysmex* the Court observed at [57] – [60]:
- "57. Fourthly, and of potentially greater importance, is Mr Howes' assertion that there will be a significant loss of volume for Sysmex if the suspension is lifted which will affect/increase their service costs across the business. But I*

agree with Mr Sears QC that, on analysis, this part of the evidence is unpersuasive. Again, it is largely a matter of assertion rather than proper evidence.

58. The suggestion is that, because they did not win the MSC, Sysmex's costs base is too large, so that cuts will have to be made. But, not only is there no evidence to support that, it also appears on its face to be illogical. Sysmex must have the staff and overheads appropriate for their current contracts. They cannot have taken on extra staff in anticipation of winning the MSC; if they did, that was entirely their own responsibility. So the fact that they did not win the MSC should not have had any effect on their staff levels or cost base, which must relate to their current contracts, and not any that might have been won in the future.

59. It is sometimes said in these cases that the aggrieved bidder has had to make redundancies as a consequence of failing to win the tender. There is no evidence in the present case of any such redundancies. Ms Hannaford QC said that they had not yet reached that point, and that the existing contract had in any event been extended for a period, so redundancies might happen in the future. I acknowledge that, but it hardly amounts to a persuasive case that, as things presently stand, damages would not be an adequate remedy.

60. Furthermore, even if any of these wider arguments as to impact had been established, it seems plain that the loss of revenue and/or the increase in costs allegedly caused by these events would be capable of being calculated, thus making damages an adequate remedy in any event."

30. It may therefore be that, rather than the rigid step by step approach, the consideration of whether damages are an adequate remedy is undertaken as part of a more rounded overall consideration of the case, as suggested in both *Covanta* and *Sysmex*. It may, in any event, be that the outcome is always (or almost always) likely to be the same whether a step by step, or more rounded overall, approach is taken to this question. Regardless, the issue of whether damages will be an adequate remedy remains a central part, in my judgment, of the task upon which the court is engaged on an application such as this one.

Illegality

31. There is a further point that arises in this case. This is that the Council argue that because no procurement competition was conducted for the current supply of the services by the Trusts (even though a contract was entered into between the Council and the Trusts), then there are residual doubts or concerns about the legality of the Council using the Trusts to continue to provide these services if the automatic suspension is not lifted. These doubts, which are essentially to the effect that the Council ought already to have conducted an open competition and are concerned that they did not do so, will only be magnified (or continued) if the court leaves the automatic suspension in place. A different way of expressing this same concern is to state that the Council is extremely reluctant to operate the contractual option as that will continue the current unsatisfactory state of affairs.

32. I will deal with this point first. There are three answers to it, and they all arrive at the same point, namely a conclusion that there is nothing in this argument and it ought not to affect the exercise explained above. If there were something in this point and it was a sound legal point, it would fall to be considered as one of the special factors that ought to be taken into account in the seventh step above. To be fair to Mr Karim QC, this point is advanced far higher in the evidence for the Council, rather than in his written skeleton where it was put in a more measured way. The Council's evidence in the second witness statement of Ms Rishton states that were the suspension to continue the Council "will act unlawfully (and inappropriately) in being forced to continue with or commence anew a contract with the Claimant". The third witness statement states that the existing contracts, referred to as the "Incumbent Contracts were awarded by [the Council] in breach of the 2015 Regulations and any extension of such contracts must similarly amount to a breach of the 2015 Regulations". In the skeleton, the concept of illegality is sensibly not advanced and all that is said is that the Council "is of the view that it would be inappropriate to extend the same, as to do so would amount to a breach of the Regulations despite the fact that the contract allows for an extension."
33. I do not consider that this is a good point or one in the Council's favour at all on this application. The three answers to this point to which I have referred are as follows.
1. The Council may be of that view, but there is nothing to suggest, in my judgment, that such a view is even superficially correct or has even been the subject of any specialist advice. The Council's subjective view of "appropriateness" is not relevant.
 2. I cannot, for myself, see why continuing the existing current provision of the services by the Trusts for a short time pending a legal challenge to the procurement exercise, whilst the Council is under an automatic suspension imposed by the Regulations themselves, could be said to be a breach of the Regulations. This would be the case whether there was a contractual option within the existing contractual obligations which can be exercised or not. The suspension is imposed specifically by the Regulations if a claim form is issued within a particular period. Those same Regulations set out the circumstances in which that suspension can be lifted. If those circumstances, in any particular case, do not justify at law the lifting of the suspension, then the suspension must continue as a result of lawful operation of the Regulations themselves. I cannot see how that can lead to a breach of the Regulations.
 3. In any event, here there is already in place a legal right on the part of the Council to extend the provision of the Services in the sense of the ability to exercise the contractual obligation. That legal obligation, which is admittedly contingent upon being exercised, is an obligation into which the Council has already entered.
34. There is also a further point. It would be odd (to say the least) that if the Council were in breach of its legal obligations in awarding the existing contracts to the Trusts, it could rely upon its own breach in this respect and be in a stronger position concerning its application than if it had not been in breach of the Regulations in the first place. I consider the evidence from the Council on this point to be a little muddled. There is no question of the Council being ordered to enter into a new contract with the Trusts on this application, as suggested in Ms Rishton's second witness statement. Yet further, the Incumbent Contracts had a commencement date of 1 October 2015. Any arguable unlawfulness in their award (were there any, a point upon which it is not necessary to come to a finding) would have given a disaffected party (were there one, and there is no evidence that there was) a right to challenge that decision, but it would

have become time barred after a period of 3 months, which at the very latest could only have been 1 January 2016. Accordingly, this application is being argued over 2 years after that period could, at the very latest, have expired.

35. Yet further, the third witness statement states the following:
“Instructions from all officers engaged in this matter (from Legal Services, Procurement Services and Public Health Services) have at all times been consistently of the view that there was no available extension period under the terms of these Incumbent Contracts. Further enquiries with those officers offer no explanation which accounts for the actual presence of any extension clauses, save that all were of the belief that under no account could the Incumbent Contracts be lawfully extended. Investigations into the position do not reveal a conclusive answer.”
36. Finally, the third witness statement (which disclosed that such extension clauses, or options to extend, were in fact expressly included in the existing contracts, contrary to the assertion in the second witness statement that they did *not* contain such clauses, and contrary to the “consistent” view of all the relevant officers at the Council that there were none) accepted that both the contracts (one with each Trust) “are based upon the standard template issued by the Department of Health and Social Care and all contain a clause at C2” that states the following:
“[The Council] may extend the term of this Contract by a maximum of two periods of up to 2 years each (the Extension Period). If [the Council] wishes to extend this Contract, it shall give the [Trust] at least 6 months’ written notice of such intention before the Expiry Date set out in clause A3.3.....”
37. It is highly unlikely that operation of such a clause in the standard template from the relevant Government Department could be even borderline unlawful. In all the circumstances therefore, I might be forgiven if I do not weigh the evidence of the Council on this point to any appreciable degree in the exercise of considering whether to lift the automatic suspension. I reject any submission that a failure to lift the automatic suspension would lead the Council to be acting unlawfully. There is an associated point that can also be disposed of readily. The Council argue that a failure to lift the suspension would mean that the Council had to continue in contractual relations with two Trusts with whom it was in litigation. That is the case, but again, this is a point of no import. I have no doubt that healthcare staff are sufficiently professional that a procurement dispute in the Technology and Construction Court in London will not affect the day to day provision of healthcare services to children in Lancashire, or the relations between the parties at operational level.

Analysis

38. That there is a serious issue to be tried is rightly and sensibly conceded by Mr Karim QC for the Council. This therefore means that the next steps in the process must be addressed. I consider that the correct approach is firstly to decide the question of whether damages would be an adequate remedy. The Trusts argue that damages in their cases would *not* be an adequate remedy, and indeed in all the circumstances would be what Mr Williams their counsel described as a “weak remedy”. Whether the balance of convenience arises at all, Mr Williams submits that if I were to find that damages were not an adequate remedy, that should be the end of the matter. He submitted that the issue should be considered in the round as set out above, rather than

as a strict step by step approach. Regardless, he submits that a definitive answer on that point should be provided in the Trusts' favour

39. In my judgment, the fact that the incumbent providers of the Services are NHS Trusts is an important factor. Any incumbent provider of any service who is then unsuccessful in a procurement competition for those services will face inevitable reorganisation of its business as a result of that lack of success. Such reorganisation will (very often but not invariably) involve redundancies. However, here, the reorganisation is not just to the staff, or even in relation to the provision of Services to children. The evidence served for the Trusts makes it clear that the Trusts only recently restructured their operations to deliver these Services, and if they lose the procurement the Trusts will have significantly to restructure their operations a second time. This is a restructuring of delivery of healthcare across the population, and what are called "pathways" which are delivery routes through which healthcare is supplied. In addition to the cost and disruption that will cause – which I find would be considerable -- the loss of the Contract will make it more difficult for the Trusts to deliver other similar public services which they are contracted to deliver, and these will require new pathways to care to be developed. All of this reorganisation is different to the staff situation, which in a sense is inevitable (or to put it another way, is an inevitable consequence for any incumbent bidder of having lost the bid). The impact upon the provision of healthcare as a whole to those in the catchment areas of the two Trusts is said to be considerable and I accept that.
40. A financial cost has been placed by the Trusts on some of these effects – indeed, a specific figure of £2.085 million is given by Ms Giles as lost funding for sustainability and transformation. However, that is not the entirety of the consequences and it is clear to me, on the evidence, that the effect upon both the Trusts goes far wider than simply those aspects to which a money figure can be attributed. For example, Ms Tschobotko states that the loss of skilled staff -which she estimates at 160 people – will result in a reduction in the ability of her employer, the Second Claimant, to maintain *other* contracts for other children's health services in addition to the ones the subject of the procurement challenge. It is undoubtedly the case that lifting the automatic suspension would also result in the loss of senior staff who currently manage the full range of children's services provided across *all* contracts. These are precisely the sort of effects, in my judgment, that cannot be compensated for by damages. There will be a significant impact upon the operational activities of the two Trusts, and as a result, upon the quality of healthcare generally which they provide.
41. I find that damages would not be an adequate remedy for the Trusts. This is the same result whether that question is considered first in isolation, or whether the same point is approached as an issue of the justness, in all the circumstances, of the Trusts being confined to their remedy of damages. The answer is one favourable to the Trusts on this application whichever way it is framed.
42. On the other hand, damages would be an adequate remedy to the Council. Given the very slim difference in the costs of provision of the Services by the Council compared to Virgin, the successful bidder, the financial differential would in any event either be small or non-existent. But even if that were not the case, the actual services would remain uninterrupted up to the date of the judgment in the proceedings, and there

would be essentially an accountancy-type exercise to compare and compute the financial loss after a trial. That is an entirely different matter, and of a different nature, to the damage that would be caused to the Trusts were the suspension to be lifted and the Trusts succeed at trial.

43. I consider the inadequacy of damages to the Trusts to be conclusive on this application. However, in case I am wrong about that, I will also provide my short conclusions on the issue of balance of convenience. Mr Williams for the Trusts also argues what he calls “proportionality” in considering that balance. Whichever way it is expressed, the balance is overwhelmingly in the Trusts’ favour on this point too, when taking account of all the evidence. The only point in the Council’s favour is its stated intention and preference to bring Virgin on board as soon as possible, together with the mobilisation period required by that provider. However, the whole procurement exercise itself was only initiated in September 2017. This procurement exercise has been conducted to a very brisk timetable indeed. Given the nature of the Services, their subject matter, and the sector of the population for which they are provided (the children and young people of Lancashire) *and* the importance to the public interest of these Services, a desire by the Council to get on with the new contract (although entirely understandable) does not weigh much in the balance. That may appear a disparaging summary of the Council’s case, but in essence that is what their evidence amounts to. On all the material before me, the balance of convenience is overwhelmingly in the Trusts’ favour. To adopt a phrase used by Chadwick J (as he then was) in *Nottingham Building Society v Eurodynamics Systems* [1993] FSR 468, maintaining the suspension is a course that has “the least risk of injustice”. That dicta was adopted and approved by Coulson J at [14] in *Sysmex*. There will be no break at all in the provision of the Services as the Trusts will continue to provide them, and has undertaken to do so. In my judgment, the least risk of injustice is clearly to maintain the automatic suspension.
44. There is a further factor that is available to be put in the balance in the Trusts’ favour as well, which was not known to the parties before the hearing of the application. That is that the court is able to offer the parties an expedited trial. Such an approach should not be used by the court as an easy way out, and is not being used as such on this application. Other litigants in other cases have a legitimate expectation that their trials will be heard without undue delay, and an expedited trial will sometimes have an effect upon the other business of the court. However, procurement challenges do occasionally throw up disputes of considerable public importance in terms of their subject matter, where urgency is justified. In my judgment, this is one of those cases and this trial can be brought on in a very few months – indeed, almost as soon as the parties themselves can be ready to conduct such a trial. That too is a point in favour of refusing to lift the automatic suspension.

Conclusions

45. I do not consider that damages would be an adequate remedy to the Trusts. I consider that damages would be an adequate remedy for the Council. Were I to consider the balance of convenience, this falls conclusively in the Trusts’ favour on the application in any event. The application by the Council to lift the automatic suspension therefore fails.

46. In the evidence, and during argument, the Trusts made an offer to the Council to perform the existing services past 31 March 2018 on the same pricing structure as their tender. This would mean that the Council could only suffer financial loss in whatever amount the 0.07% differential in the bids equates to in money terms. I do not propose to make any order in this respect. I do not consider it to be necessary, and I am confident that the parties can organise such matters for themselves, conscious as they all are of their publicly funded status, with all that entails. Nor have I thought it necessary to consider the detail of the exercise of the extension clause or option in the existing contracts. The Council has a statutory obligation to provide the Services, and has the contractual mechanism at its disposal to do so whilst the automatic suspension is in place. I do not consider it either desirable or necessary to make any order about that at all, and I was not asked (when I gave my short decision orally on the day of the application) to do so.