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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* 03/10/2018

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (COMMERCIAL LIST)

2018 No. 58766

BETWEEN:

EIRCOM UK LTD

Plaintiff;

-and-

DEPARTMENT FOR FINANCE

Defendant;

BRITISH TELECOMMUNICATIONS PLC

Notice Party.

HORNER J

A. INTRODUCTION

[1] The Department of Finance ("the Department") has applied to the court for an order pursuant to Regulation 96 of the Public Contracts Regulations 2015 ("the Regulations") to set aside the automatic suspension of its decision to award the Northern Ireland Public Shared Network ("the NIPSSN Contract") to British Telecommunications Plc ("BT") and for permission to enter into the NIPSSN Contract with BT. Eircom UK Limited ("the plaintiff") objects to the application. It wants the Department to be prohibited from entering into the NIPSSN contract until after proceedings that they have brought against the Department are heard and determined by this court. Those proceedings challenge the award of the NIPSSN contract by the Department to BT on the grounds that BT's tender was abnormally low and also that the Department by its decision to award the NIPSSN contract to BT is "facilitating predatory pricing and/or a margin squeeze to force the plaintiff out of the Northern Ireland market completely" in contravention of competition law.

[2] I have received written and oral submissions from the plaintiff, the Department and BT, which has been made a notice party. I have taken all those detailed submissions into account. For reasons of brevity I do not intend to refer to each and every argument addressed to the court, although I have carefully considered them. A dispute did arise at the end of the hearing about the nature and value of the plaintiff's business in Northern Ireland. There have been further submissions on this issue from the plaintiff and Department. I will return to this later in the judgment. Finally, counsel are to be congratulated for their thorough and comprehensive submissions.

B. BACKGROUND FACTS

[3] It is important to set out the relevant facts against which this application must be viewed. I will try to do so as economically as possible.

[4] The plaintiff is a company which is part of the Eircom Group ("the Group") and trades as Eir Business NI in the UK. The Group currently has a turnover in excess of €1bn. The plaintiff was the successful tenderer for the original contract, which included some of the services now to be provided under the new contract. The award of the original contract was made in 2007. The plaintiff's success was at the expense of BT and Virgin Media. It won the contract on the basis that it had submitted the most economically advantageous tender. That contract has subsequently been extended by two years to September 2019, even though there is no express provision in the contract permitting the Department to grant such an extension. This is a matter to which I will also return to briefly later on in this judgment.

[5] The NIPSSN contract is for the provision of network services in Northern Ireland. These are provided in fibre, copper or other media. They permit data transfer and phone and video conferencing between different computers and IT systems throughout a wide range of public services in Northern Ireland. I was told that this includes voice and video conferencing services for the Northern Ireland Civil Service ("NICS") and the Police Service of Northern Ireland ("PSNI"). There are two main components:

(a) Telecom links for users; and

(b) Unified communications services for PSNI and IT NICS.

[6] The contract notice published by the Department in the Official Journal of the EU on 22 April 2017 made it clear that the maximum duration of the Contract was for a period of nine years. This was stated to be made up of an initial period of five years from "Go-Live" with two optional extension periods consisting of two years each. Subsequently this was varied during the competitive dialogue to an initial contract period of seven years with one optional extension for two years.

[7] The Contract Notice estimated that the total value of the contract excluding VAT was between £50m-£400m.

[8] Mr Steen has sworn an affidavit on behalf of Central Procurement Directorate ("CPD") who handled the Department's procurement. The contract is said to be a critical one for the NICS. The anticipated contract award date was June 2018. The existing NICS Shared Network Contract operated by the plaintiff is due to terminate on 30 September 2019. The competitive dialogue process involved four separate stages. These were:

(a) Pre-Qualification Questionnaire ("PQQ");
(b) Invitation to Submit Outline Solutions ("ISOS");
(c) Invitation to Submit Detailed Solutions ("ISDS"); and
(d) Invitation to Submit Final Tenders ("ISFT").

[9] At the conclusion of the ISFT it was recommended that the NIPSSN contract be awarded to BT. Notification of the award was sent to the plaintiff on 4 June 2018. The award of the contract to BT was queried by the plaintiff on 8 June 2018 and an extension of the standstill period under the Regulations to 4 July 2018 was requested while the plaintiff sought further information about how the selection process had been conducted. CPD responded promptly to the plaintiff providing the information requested save that the request for "copies of the notes and comments made by each member of the evaluation team in respect of (Eircom's) tender and the tender submitted by BT" was not given but the plaintiff was advised to pursue these through the Freedom of Information Act. It is not disputed that the cost of BT's services in its tender are significantly cheaper than the offer of the plaintiff. However both tenders offer substantially reduced prices to those under the present contract.

[10] The plaintiff's solicitors, A and L Goodbody wrote to CPD on 13 June 2018 expressing concern that the procurement process had not been conducted in accordance with the Regulations, the Directive 2014/24, the general Treaty principles under EU law and in fact had offended "Northern Ireland public procurement policy in terms of equal treatment, transparency, fairness and value for money". A and L Goodbody again sought to have the standstill period extended until 4 July 2018. CPD responded on 14 June 2018 indicating that the plaintiff had been provided with sufficient information in response to 4 June 2018 and 11 June 2018 letters. CPD made clear that the contract would not be awarded before 15 June 2018. The plaintiff issued a writ of summons on 14 June 2018. This was followed with an application for pre-statement of claim discovery. I heard this over the summer vacation because of its urgency and made a limited order for disclosure of certain documents in favour of the plaintiff. To date the statement of claim remains outstanding. Thus only the broad nature of the twin pronged attack of the plaintiff is known.

[11] The Department, supported by BT, is keen to have the plaintiff's challenge determined as soon as ever possible. The Department's concern is that "any delay to the award of the contract and the start of transition will place an unacceptable risk

on the transition and could lead to failures in the supported key systems of PSNI, Health and Education and the NICS" according to Mr Steen. He is supported in these claims by Mr Ewart, Head of Major Deals and Business Development in BT who while emphasising the importance of the services BT propose to provide to the public sector under the new contract, stresses the huge range of sites which require the provision of network services, the 871 circuits which have to be provided across Northern Ireland, some of which will involve work of a civil engineering nature and further that the contract provides not only for the provision of telecommunications hardware and software but "also for the ongoing management of network services, to include support, monitoring, maintenance, development and enhancement of the proposed network of the Unified Communications (UC) System which is required for the NICS and PSNI". Mr Ewart describes the deadline at the end of September 2019 as being "very challenging". He supports that claim by highlighting the fact that BT was obliged to start mobilisation before the signing of the contract. Indeed BT in its final tender submissions claimed to need to commence mobilisation "even before the date when the preferred bidder was selected with a break point if BT was not named as preferred bidder".

[12] The plaintiff had acknowledged that the BT tender is considerably cheaper than its tender, and indeed to the prices currently being charged to the NICS. Indeed it is common case that it is the lower prices offered in BT's tender that have secured its success. The plaintiff is prepared to charge NICS the same rate as it has proposed in its tender submission from the end of the existing contract in September 2019 if it succeeds in the claim that the contract should not be awarded to BT in the meantime. However, if it is unsuccessful ultimately in those proceedings, the plaintiff would undertake to "provide a 30% discount on existing rates from 1 October 2019 for the 3-4 months" extension period it considers it would take for the court to hear and determine the present proceedings. This concession is made against a background where it claims that if it fails to secure this contract it will have to "wind up its operations in Northern Ireland with an inevitable loss of jobs. While 40 of its current staff might well be transferred to BT under TUPE, the remaining 10 jobs not connected with the contract would be almost inevitably lost". Since the hearing I have received further written submissions from the plaintiff and the Department on what proportion of the plaintiff's overall business in Northern Ireland will be lost if it does not secure the new contract.

[13] That is the briefest history of the dispute to date. Each side accuses the other side of overstating the harmful consequences which will be visited on it should its arguments fail to convince the court. Certainly, no party to the present proceedings can be accused of minimising the harm that will befall it or the Department's customers if its arguments are rejected.

C. THE PROPER APPROACH TO THIS APPLICATION

[14] Fortunately, all counsel are agreed on the approach which the court should adopt to the Department's application to set aside the automatic suspension created

by the plaintiff issuing proceedings which challenge the award of the NIPSSN contract to BT. That approach is to apply the *American Cynamid* principles to the present application. Professor Arrowsmith on the Law of Public and Utilities Procurement (3rd Edition) at Volume 2 22-134 states:

> "… The regulations themselves have never spelt out how the general power of suspension is to be exercised but have left this to the courts. The courts have taken as a starting point the general principles laid down by the House of Lords in the *American Cynamid* case, which governs interim measures in other contexts generally in domestic law."

[15] In American Cynamid Co v Ethicon Limited [1975] AC 396 the House of Lords considered how a court should approach the grant of an interlocutory injunction. Lord Diplock said at 408A to 409C as follows:

> "So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.
>
> As to that, the governing principle is that the court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be

adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction.

It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises. It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo. If the defendant is enjoined temporarily from doing something that he has not done before, the only effect of the interlocutory injunction in the event of his succeeding at the trial is to postpone the date at which he is able to embark upon a course of action which he has not previously found it necessary to undertake; whereas to interrupt him in the conduct of an established enterprise would cause much greater inconvenience to him since he would have to start again to establish it in the event of his succeeding at the trial.

Save in the simplest cases, the decision to grant or to refuse an interlocutory injunction will cause to whichever party is unsuccessful on the application some disadvantages which his ultimate success at the trial may show he ought to have been spared and the disadvantages may be such that the recovery of damages to which he would then be entitled either in the action or under the plaintiff's undertaking would not be sufficient to compensate him fully for all of them. The extent to which the disadvantages to each party would be incapable of being compensated in damages in the event of his succeeding at the trial is always a significant factor in assessing where the

> balance of convenience lies, and if the extent of 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 affidavit evidence adduced on the hearing of the application. This, however, should be done only where it is apparent upon the facts disclosed by evidence as to which there is no credible dispute that the strength of one party's case is disproportionate to that of the other party. The court is not justified in embarking upon anything resembling a trial of the action upon conflicting affidavits in order to evaluate the strength of either party's case." (emphasis added)

This is the approach which has been adopted in a succession of Northern Ireland cases, such as First ForSkills v Department of Employment and Learning [2011] NIQB 59, Resource v University of Ulster [2013] NIQB 64, John Sisk v WHSCT [2014] NIQB 56, Allpay Ltd v Northern Ireland Housing Executive [2015] NIQB 54 and Fox Building and Engineering Ltd v Department of Finance and Personnel [2015] NIQB 72.

[16] Carr J said in Counted 4 Community Interest Co v Sunderland City Council [2015] EWHC 3898 (TCC) at [10]:

> "The effect of Regulation 96 is that the court will determine an application to lift a suspension according to the same American Cyanamid principles that the court applies in determining applications for interim relief. This approach has been confirmed by the courts, and notably in this particular jurisdiction, on numerous occasions. It is important to note that the exercise is not weighted in some way in favour of maintaining the suspension. The court will lift the suspension unless it would have been appropriate to grant an injunction under American Cyanamid principles: see, for example, the judgment of Akenhead J in Exel Europe Limited v University Hospitals Coventry and Warwickshire NHS Trust [2010] EWHC 3332 (TCC) at paragraph 28."

(I am proceeding on the basis that the present interlocutory proceedings also include an application for an interim injunction to restrain breaches of competition law.)

In DHL Supply Chain Ltd v Secretary of State for Health and Social Care [2018] EWHC 2213 (TCC) O'Farrell J set out the approach which the court should adopt as follows:

> "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?
>
> (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 or both 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?"

[17] Finally, it is worth remembering that the guidelines set out by Lord Diplock in the American Cynamid case are nothing more than an attempt by him to provide a way of ensuring that a court is, in the words of Lord Hoffman in National Commerce Bank Jamaica Ltd v Olint Corp Ltd [2009] 1 WLR 1405 equipped to "take whichever course seems likely to cause the least irremediable prejudice to one party or the other."

[18] The Department and BT have taken to heart the advice of Coulson J in Sysmex (UK) Ltd v Imperial College Health Care NHS Trust [2017] EWHC 1824 (TCC) at paragraph [19] when he said:

> "I do not consider, on an application to lift the suspension in a typical procurement case, that this is an appropriate matter for the court to investigate. Such cases are a long way from a straightforward claim for an interlocutory injunction, where a particularly good point on the substantive dispute (an admission, say, or an unequivocal contractual term in one side's favour) might well be of assistance to the court's consideration of the application overall. It is not appropriate to have a mini-trial in a complex procurement dispute like this. Where, as here, it is accepted that there is a serious issue to be tried, then

(save in exceptional circumstances) both sides should resist any further temptation to argue about the merits."

Accordingly the Department has conceded that there are serious issues to be tried in respect of both the abnormally low tender issue and the competition law issue. There has been no real evidence filed that would allow the court to make any assessment of the respective strengths and weaknesses of the cases advanced on either side of these proceedings.

[19] Therefore given the concession which has been made, the court has to consider:

(a) The inadequacy of damages to either side.

(b) The balance of convenience.

D. RELEVANT STATUTORY PROVISIONS

[20] Regulation 95 of the Regulations provides:

"**Contract-making suspended by challenge to award decision**

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);"

Regulation 96 which deals with interim orders provides:

> "(1) In proceedings, the Court may, where relevant, make an interim order—
>
> (a) Bringing to an end the requirement imposed by Regulation 95(1);
>
> …
>
> (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).
>
> …
>
> (4) The Court may not make an order under paragraph (1)(a) … before the end of the standstill period."

[21] In the present circumstances a claim has been made which prevents the Department from entering into the NIPSSN contract. An application has now been made by the Department, supported by BT to allow it to enter into the contract with BT. Consequently the court now has to consider whether it would be appropriate to require the Department to refrain from entering into the contract with BT.

[22] Regulation 72 of the Regulations permits modification of contracts without a new procurement procedure in the following cases. Under Regulation 72(1)(c) a contract can be extended:

> "(c) Where all of the following conditions are fulfilled:-
>
> (i) The need for modification has been brought about by circumstances which a diligent contract and authority could not have foreseen;

(ii) The modification does not alter the overall nature of the contract;

(iii) Any increase in price does not exceed 50% of the value of the original contract or framework agreement."

The Department denies that it could rely on Regulation 72(1)(c) because it says that it could not possibly be said that the present circumstances could not have been foreseen. There does appear to be force in this argument.

[23] Alternatively the plaintiff says that reliance could be placed on Regulation 72(1)(e) which permits modification of a contract which is not substantial within the meaning of paragraph (8). Paragraph (8) provides that a modification of a contract shall not be considered substantial where one or more of the following conditions is met:

"(a) The modification renders the contract or the framework agreement materially different in character from the one initially concluded.

(b) The modification introduces conditions which, had they been part of the initial procurement procedure, would have -

(i) Allowed for the admission of other candidates than those initially selected,

(ii) Allowed for the acceptance of a tender other than that originally accepted, or

(iii) Attracted additional participants in the procurement procedure;

(c) The modification changes the economic balance of the contract or the framework agreement in favour of the contractor in a manner which was not provided for in the initial contract or framework agreement."

The Department states that in light of the fact that the contract has already been extended by two years, any further extension is likely to be considered substantial and thus reliance could not be placed on this ground.

E. DISCUSSION

[24] There can be no doubt that the decisions which have been made in respect of these types of applications by other courts are fact specific. No two cases are the same and it would be quite wrong to try and draw unrealistic parallels from different facts.

Are damages an adequate remedy for the plaintiff?

[25] The plaintiff, the encumbent supplier for much of the services to be offered under the new NISSPN contract, complains that damages are not an adequate remedy because the loss of this contract will mean that its Northern Ireland business will have to be wound up as the NISSPN contract is critical to the overall viability of its business in Northern Ireland. However there was little hard evidence filed by the plaintiff on this issue. Further the court was asked to look at the plaintiff as a single legal entity and ignore the fact that it is part of a large and successful Group with cross guarantees. Indeed the main company is guaranteeing the cross undertakings as to damages offered by the plaintiff.

[26] There were no cogent submissions that any loss suffered by the plaintiff could not be calculated and quantified by forensic accountants and awarded by the court. Instead, the central thrust of the plaintiff's argument was that the plaintiff's Northern Ireland business would be eviscerated leaving an uneconomical rump and that damages could not provide adequate compensation when such an outcome was inevitable. Given that such a claim lay at the heart of the case which the plaintiff made for a continuing suspension of the award of the contract, it is disappointing that the court was not supplied, chapter and verse, with the various figures to demonstrate why this outcome was likely, never mind inevitable. Instead the plaintiff's approach has been at best elliptical. The court was referred to the statutory accounts of the plaintiff which was not a satisfactory approach. It raised a number of questions. If the central contract was the network contract with the Department, what were the other multi-million pound, multi-year contracts with customers across all the Government and Enterprise sections served by the plaintiff in the previous five years and referred to by the Board in the accounts for the year ending June 2017? As a consequence of a very broad brush approach to this issue by the plaintiff, there was a certain amount of guessing and speculation as to the plaintiff's financial health, present and future.

[27] Needless to say the Department challenged the various assumptions and assertions of the plaintiff. It calculated that the plaintiff's Northern Ireland income would be reduced from £18m to £9m because of the 50% drop in its tender price. The effect would be therefore of a £9m loss against a turnover of £29m equating to approximately one third. The plaintiff does not accept that. It responded by claiming that the Department did not take into account £1.9m of one-off revenue which was specific to 2017 and £3.2m of revenue generated outside the NIPSSN

contract. The revenue generated by the Northern Ireland business amounted to £23m from which approximately £5m had to be deducted. The percentage of business loss was thus 74%,that is £9m out of a total business of £12.2m. The 2018 figures are worse, it is asserted, hence the figure of 80% used by Mr Lemon in his affidavit.

[28] Of course this submission on behalf of the plaintiff has to be taken on trust. There is no affidavit dealing specifically with exactly how the plaintiff's income stream is made up. No satisfactory reason for this omission has been offered. Accordingly the court is left with having to choose between the Department's calculation that 30% of the plaintiff's turnover will be lost against the 80% of the turnover which the plaintiff claims will be lost if it is not awarded the NIPSSN contract. It is highly regrettable that this dispute has arisen. On the basis of the evidence filed in this application I remain unpersuaded of the claim that the loss of this contract will sound the death knell of the plaintiff.

[29] However, even if, contrary to my finding above the loss of the NIPSSN contract was to result in the winding up of the Northern Ireland business, I still remain of the view that damages, which should be capable of ready calculation on the basis of the plaintiff's loss of profits, will constitute an adequate remedy for the plaintiff for a number of reasons:

(i) The claim that the plaintiff would be effectively shut out of the Northern Ireland market by BT's competitive pricing is not borne out by the facts. In 2007 the plaintiff together with BT and Virgin Media sought to win the contract for network services in Northern Ireland. I have seen no evidence to suggest that what the plaintiff was able to accomplish in 2007 could not be accomplished when the NIPSSN contract comes up for renewal in 2024/2026.

(ii) In any event as I have recorded the plaintiff is part of a group of companies with a turnover of well in excess of €1bn. If those in control of the group want to compete with BT they have adequate resources at their disposal to do so either now or in the future. The concentration on the turnover of the plaintiff is both artificial and contrived. The plaintiff is not a small fish swimming through hostile and uncharted waters. It is a member of a Group with access to very substantial assets. If the Group wants the plaintiff, or indeed any of its companies, to compete with BT or one of its subsidiaries in Northern Ireland, then it has the assets and the expertise to do so. I reject the submission that the plaintiff must be viewed in splendid isolation. That would be to ignore reality.

(iii) If a large, successful commercial organisation was able to claim successfully that because one of its off shoots might go out of business if it failed to win a tender, and that therefore the award of that contract

> should be suspended, it would allow such an organisation to game the system. All such organisations would place their bids through small companies, which they could then claim would be "wiped out" if was proposed at the next procurement exercise to award the tender to another competitor and thus sabotage the prompt award of these types of contracts.

[30] Mr Randolph QC for the plaintiff urged on the court that it could take comfort from the decision in *Counted 4 Community Interest Company v Sunderland City Council* [2015] EWHC 3898 (TCC) in which he claimed an almost identical position arose. As I have already made it clear, the court should be hesitant about deciding these cases on other cases with so called identical facts. These applications are highly fact sensitive. In any event in that case the plaintiff was a not for profit organisation and had been the encumbent supplier for seven years. It had been unsuccessful in its tender. The consequence for the plaintiff was that it would lose it uniquely skilled staff. Carr J stated at paragraph [40]:

> "But that is not the gravamen of the claimant's position, which is as follows. On Mr. Devitt's evidence, if the suspension is lifted, the claimant will lose its highly and uniquely trained workforce under TUPE regulations, that workforce being predominantly engaged on the existing contract. It is a team that has taken years to develop; its skills are not available on the wider market. The defendant ripostes by stating that in such circumstances the highly trained team would not be lost to the general public. But that ignores the irremedial harm to the claimant which is the issue under consideration here. Even with income over the mobilisation period, the claimant states that it would not be in a position to continue with this claim. This prejudice, it is said, should not be surprising given that the claimant was set up for the very purpose of providing services *to* the defendant.
>
> I therefore conclude on the evidence that damages would not be an adequate remedy for the claimant."

But there are some obvious and important differences between that the case and the present one. They include:

(i) The plaintiff in that case was a not for profit organisation and was not part of a substantial and successful conglomerate.

(ii) Its team was described as unique whereas there is no suggestion or no evidence that any employees required by the plaintiff 7 years hence could not be hired by the plaintiff to take on the necessary roles whether from inside the Group or outside. In the *Counted 4 Community Interest Company* case the not for profit organisation was being completely swept away. In the present case the plaintiff and its parent organisation need simply fold their tent, knowing that they can erect it some years later if circumstances dictate that it is in the Group's financial interest.

[31] Ms Hannaford QC on behalf of the Department suggested that the facts here are much closer to those of *Alstom Transport v London Underground Ltd* [2017] EWCH 1521 where Stuart-Smith J rejected an argument that damages would not be an adequate remedy because the unsuccessful tenderer would be unable to maintain the centre of expertise for traction technology in the United Kingdom. The court concluded that in fact the traction system could be designed and tested and the motors manufactured outside the United Kingdom.

I agree that the facts of the present case are more similar to *Alstom* than to those of *Counted 4 Community Interest Company* case. But this application deserves to be decided and will be decided on its own particular facts and its own merits.

[32] There is no convincing evidence before this court to demonstrate that the Group could not, if it wished, submit a tender through a company vehicle (including the plaintiff) seven years hence and that such a company would have access to both employees with the necessary experience and expertise and also access to any necessary resources. If that is not correct, I would have expected a detailed affidavit explaining why such a conclusion is wrong

[33] The plaintiff was built specifically to service the existing Northern Ireland contract. It must follow that it was clearly foreseeable that if it did not service the Northern Ireland network, it might have to withdraw or look elsewhere for work. That was a risk that the plaintiff was willing to assume and cannot be used to tie the court's hands.

[34] At least 40 of the employees will enjoy the benefit of the TUPE regulations. Four other employees have already left for other employment. There is no convincing evidence that if any employees remain, they cannot be effectively deployed in the Group, should they not be needed to service the plaintiff's remaining customers.

[35] Finally, I agree with Professor Arrowsmith when she says at 22-139 that "the courts are cautious about accepting such arguments, namely that loss of the contract will result in catastrophic failure". If such claims are to be made then they need to be supported by convincing and cogent evidence as it is a claim which is all too easily made. In the present case such proof of imminent catastrophe if the NIPSSN

Contract is singularly lacking. Accordingly the claim that damages will not be an adequate remedy to compensate the plaintiff if it is ultimately successful is not made out.

F. Are damages an adequate remedy for the Department (and BT)?

[36] Mr Randolph QC confirmed that he had authority to provide a cross undertaking in damages to both the Department and BT. Although it did come with some restrictions I am satisfied that it provides adequate protection for any loss to which the Department or BT might suffer in the event that the court does order an early trial and the plaintiff's claims are ultimately rejected. Furthermore the cross undertakings were guaranteed by the main company so there is no risk that if such undertakings are called upon, they will not be paid. The complaint of the Department and BT was that if the suspension on awarding the contract continued then:

(a) The plaintiff might seek to use the delay to "time out" BT's tender. BT has made it clear that if there is delay then the court should not assume that BT's offer would remain on the table in precisely the same form as it was originally made. Mr Ewart averred that it was likely to "lead to BT's bid no longer being available for acceptance". BT and the Department thought that the plaintiff would try and go slow. Mr Randolph QC stated that the plaintiff wanted an early trial and he handed in directions that provided for an expedited trial in 3 to 4 months. Both the Department and BT were highly sceptical of the timescale suggested. As the judge in charge of the Commercial List I have no problem in pushing a suitable case on for an early trial and have done so many times. However it is necessary to be realistic.

(b) No statement of claim has been served, so what the plaintiff is going to actually claim is only known in a very broad way. The statement of claim is likely to be the subject of considerable scrutiny, especially the competition law claim which may be the subject of a strike out application. A detailed notice for particulars and interrogatories can be expected.

(c) Discovery will be difficult involving as it does access to confidential documents and confidentiality rings. The breadth of discovery is likely to be both wide and contentious.

(d) There is a competition law claim. I agree with the Chancellor, Sir Andrew Morritt in *Humber Oil Terminals Trustee Ltd v Associated British Ports* [2011] EWHC 352 (Ch) when he observed that such claims needed to be pleaded properly, and that the person alleged to be in breach of competition law needs to know what specific conduct or

agreement is complained of and how that is alleged to violate the law. Laddie J observed at paragraph [43] in *BHB Enterprises Plc v Victor Chandler (International) Ltd* [2005] EWHC 1074 (Ch) about these types of claims:

> "These are notoriously burdensome allegations, frequently leading to extensive evidence, including expert reports from economists and accountants. The recent history of cases in which such allegations have been raised illustrate that they can lead to lengthy and expensive trials."

[37] It is also likely that any judgment will be reserved. With the best will in the world I consider that if the judgment is delivered before the summer vacation 2019, that will be a good outcome no matter how vigorously the court tries to bring this case on for a hearing. Further this is a case in which the law is not settled. There is every reason to think that there could be an appeal on new areas of law. Novel points can and do arise in procurement litigation which is still relatively untrodden. I will give two examples:

(a) Whether any extension to the present contract is lawful under Regulation 72 (see above)?

(b) Whether the only obligation which arises in respect of an apparently abnormally low tender is to give the tenderer an opportunity to explain or justify the tender before rejecting it: see paragraph 202 and 203 of Fraser J's judgment in *SRCL v The National Health Service Commissioning Board* [2018] EWCH 1985 and the discussion at paragraphs [163]-[201]?

[38] I have no doubt that the network services could continue to be provided in the meantime by the plaintiff. I do consider that any court should treat sceptically any claim by a successful tenderer that any delay caused by the unsuccessful tenderer is such that it will imperil the original offer. However given the likely delay I am satisfied that there is a real risk that BT may refuse to stand over its original tender. Another procurement process will have to be started with further delay. Any re-tender is likely to be on different terms from the present successful tender. I am satisfied that damages would not represent an adequate remedy to the Department in all the circumstances.

F. BALANCE OF CONVENIENCE

[39] Looking at the balance of convenience or as May LJ said in Cayne v Global Natural Resources Plc [1984] 1 All ER 225 at 237:

> "… the balance that one is seeking to make is more fundamental, more weighty, than mere **convenience**. I think it is quite clear … that, although the phrase may well be substantially less eloquent the **balance of the risk of doing an injustice** better describes the process involved."

[40] The Department rely on:

(a) The increased efficiency and decreased costs coupled with enhanced network security.

(b) The unlawfulness of any extension given that there is no provision for the same in the contract between it and the plaintiff.

(c) Continued delay being the enemy of good administration.

[41] The plaintiff's response is –

(a) There will be no risk to current services, which are presently being discharged sufficiently by the plaintiff, and that includes there being no risk to network security.

(b) The existing contract can be extended under Regulation 72.

(c) It is in the public interest to ensure that BT is not permitted to benefit from its abnormally low tender and/or anti-competitive actions.

[42] There is no doubt that the members of the general public will suffer to some extent as a consequence of any delay because they will be deprived of the benefit of increased efficiencies and the prospect of reduced charges that those efficiencies will bring. I do not think it is appropriate or even necessary for me to determine whether an extension can be obtained under Regulation 72 in the circumstances of this case by the plaintiff in respect of the original contract. It is safe to say that the issue is not clear cut and that some court may have to make a positive ruling on this issue if BT's threat to challenge any extension has to be made good. Mr Randolph QC submitted that BT's threat was an empty one and that it had not moved in respect of the earlier extension for 2 years. I do not think that anything can be read into BT's earlier failure to act, except to note that it had been reluctant to become involved in legal proceedings the outcome of which was far from certain. I consider that there is a real risk that BT will now act because it has too much to lose, although it is impossible to know BT's present intentions.

[43] There has been much debate about what is in the public interest. But the case made by the plaintiff that it is in the public interest to ensure that there is no

abnormally low tender and/or breach of competition law is flawed. This argument presupposes that there is an abnormally low tender and/or breach of competition law. But those issues remain to be determined by a court. To conclude that it was in the public interest to remove the suspension on this basis is to prejudge the issues that will at a later date be before the court. However it is in the public interest that the public should benefit from the increased efficiencies of BT's tender and the possible savings that bid may bring.

[44] I consider that on balance the risk of a greater injustice comes from leaving the suspension in place and/or maintaining an injunction. This is because it cannot be in the public interest to deprive the public generally of the benefits of increased efficiencies and possible price reductions that the new contract may bring to the public networks by delaying its award for a period of nine months and perhaps up to 15 months. The greater risk by far of irremediable prejudice lies in leaving the suspension in place and/or preventing the Department from awarding this contract to BT.

G. CONCLUSION

[45] I consider that the order suspending the award of the NIPSSN contract to BT and/or the order restraining the Department from awarding the contract to BT because of competition law issues should be removed for the following reasons:

(a) Damages will be adequate remedy for the plaintiff if it succeeds at trial.

(b) Damages are unlikely to be an adequate remedy for the Department if it is vindicated.

(c) The balance of convenience and the public interest favours removing the suspension (and not imposing any injunction).

[46] I will hear the parties in the issue of costs when they have had an opportunity to read this judgment. At the same time I will provide pre-trial directions to enable a hearing of this dispute to take place.