| Neutral Citation No: [2022] NIQB 64 | *Ref:* **MOR12140** |
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| | *ICOS No:* |
| *Judgment: approved by the court for handing down (subject to editorial corrections)** | *Delivered:* **22/08/2022** |

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

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**COMMERCIAL DIVISION**

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**Between:**

**WORLDWIDE ENVIRONMENTAL PRODUCTS INC**

**Plaintiff**

**and**

**DRIVER AND VEHICLE AGENCY**

**Defendant**

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**Richard Coghlin QC and Alistair Fletcher (instructed by Tughans Solicitors) for the Plaintiff**
**David Dunlop QC and Anna Rowan (instructed by Arthur Cox Solicitors) for the Defendant**

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**SIR DECLAN MORGAN**

[1] Worldwide Environmental Products Inc ("WEP") is a company incorporated in the USA in the state of California. It started life as an emissions supply company and began selling vehicle inspection and repair equipment, parts, and consumables to inspection stations as part of the California Smog Check Programme. It has a presence in the Asia/Pacific region, Central and South America, the Middle East, Africa and Europe. It claims to be a world leader in the provision of innovative vehicle emissions and safety inspection technologies and turnkey vehicle inspection programme management systems.

[2] The Driver and Vehicle Agency ("DVA") is a public body with responsibility for licensing and testing vehicles and drivers in Northern Ireland. In 2018 the DVA commenced a procurement exercised entitled "Supply, Delivery, Installation, Calibration and Maintenance of new vehicle testing equipment, associated integrated test lane software, all associated IT Hardware, licences and management information system." WEP was the successful bidder and entered into a contract with the DVA in March 2019.

[3] There were numerous meetings and exchanges between the parties in connection with the development of the project. These included the preparation of an Equipment Implementation Project shared between the parties, a written document generally indicating the state of play in relation to the progression of the project. The document was reviewed from time to time and there were a number of Project Programme Versions generated. In December 2020 Project Programme Version 1.7 was followed by Version 1.8. That version set out in a schedule a list of tasks associated with each of the aspects of the contract, the duration of the particular task, the start date in relation to the task and a finish date representing the expected date by which the task would be completed. Version 1.9 dealing with changes to the dates for completion of certain items was circulated between the parties on 4 February 2021.

[4] On 12 April 2021 the DVA wrote to WEP in respect of the Equipment Implementation Project. The letter included the following passage:

> "We have a number of important key milestones over the next number of weeks, so I just wanted to take this opportunity to set out what those are, from my point of view as the SRO for the project, and to seek your reassurance that these are all on track for achievement. To assist, I have attached with this letter a copy of the Work Programme/Key Activity/Critical Path for the Infrastructure Project so as to convey to you the planned work, and its pace, dependencies on the new equipment being delivered, tested, and commissioned."

[5] The letter referred to 3 specific issues. First it noted that work was progressing on the development of the Integrated Test Lane ("ITL") software indicating that if the Alpha project, scheduled for delivery on 23 April 2021, were not delivered by that date it would consequentially affect other activities. Secondly, it stated that the DVA was reassured to learn that WEP had engaged Cyphra to assist with the writing of the Risk Management Accreditation Document Set ("RMADS") which would require input from the DVA and the Departmental IT Security Officer. The writer insisted that there were no further delays with its production and the first iteration should be with the DVA no later than 16 April 2021.

[6] The third issue concerned the timeframe for completing the process for the homologation of the EIS 5000 emissions analyser. The writer noted that software and hardware documentation approval was due to be completed by 26 February 2021 but had not happened. Realistically the earliest date for certification was likely to be 1 July 2021. It was noted that it was frustrating for all parties for these delays to occur and that the delay with the emissions analyser would not have an immediate negative impact on the work of the Pilot Test Lane ("PTL"). The writer considered it important that the certification should not go beyond 1 July 2021.

[7] In a response dated 21 April 2021 WEP indicated that it was arranging to deploy and deliver the initial Alpha product to DVA on 23 April 2021. This required a great deal of time customising requirements for ITL software beyond that set out in the DVA tender documents. It was also indicated that several iterations of the software would be deployed subsequent to that period. Secondly it was asserted that specific requirements in relation to the RMADS were not included in the DVA tender documents. WEP were working as quickly as possible to meet those requirements. In a response dated 26 May 2021 DVA took issue with those explanations. Thirdly, WEP stated it was no longer pursuing the homologation process in Spain but had begun the process with the certifying authority, NMi, in the Netherlands. WEP were optimistic that certification would be achieved in three months.

[8] On 30 June 2021 the DVA issued a letter entitled "First Written Warning of Unsatisfactory Performance." It stated that the DVA had on several occasions raised issues regarding the delivery of four elements which WEP had failed to remedy and as such its performance on the above contract was not satisfactory. The undelivered requirements were the Alpha version of the ITL Equipment Software, the PTL IT Architecture, the RMADS and the remedial action plan for the repairs to the pit. The letter stated:

> "Worldwide has continually failed to achieve the agreed programme dates for delivery in the four areas listed above, despite providing assurances on a number of occasions that these milestones would be met. The DVA now expects to see an improvement in the delivery and quality of service from Worldwide, with the outstanding issues as listed above satisfactorily delivered and implemented no later than the date specified below…
>
> If you are unable to provide a satisfactory and suitable remedy by 5 PM GMT Friday, 30 July 2001, the matter will be escalated to senior management in CPD…
>
> If this occurs and your performance does not improve to satisfactory levels within the specified period, this can be considered grounds for termination of the contract at your expense as provided for in clause 23.1.1 "the Contractor is in material breach of any obligation which is not capable of remedy" of the Terms and Conditions of Contract.
>
> In lieu of termination, CPD may issue a Notice of Written Warning or a Notice of Unsatisfactory Performance. A supplier in receipt of multiple Notices of Written Warning or a Notice of Unsatisfactory Performance may, in

> accordance with The Public Contracts Regulations 2015 (as amended), be excluded from future public procurement competitions for a period of up to 3 years."

[9] WEP replied on 4 July 2021 accepting that work needs to be completed to remedy the items listed in the letter of 30 June 2021. It was accepted that there were numerous issues that needed to be fixed in the Alpha version of the ITL/Equipment Software and an update was to be provided by 9 July 2021. Aspects of the PTL IT Architecture were up and running. The DVA and WEP were working on an alternative solution to some of the software. Version 2 of the RMDAS was provided on 2 July and version 3 would be provided by 9 July. The response time from Cyphra was disappointing. The remedial action for the repairs to the PTL would be effected by 16 July 2021. The DVA sent an email on 9 July 2021 taking issue with some of these explanations.

[10] On 10 August 2021 the DVA issued a second written warning of unsatisfactory performance stating:

> "I can confirm that we are now in receipt of the Alpha version of the ITL/Equipment Software, which was delivered on 16 July 2021 and functioning in a manner that allowed for end to end testing since 26 July 2021. However, as you have failed to deliver the Pilot Test Lane IT Architecture; Risk Management Document Set; and a remedial action plan for the repairs to the pit (internally), before the date specified above, your performance is not sufficiently improved and still does not meet the contract requirements. In addition, you are now in delay with the delivery of the Beta product of the ITL/Equipment Software, which was scheduled for delivery on 2 August 2021. Given that Worldwide has specified a period of 70 days for the Alpha testing phase, the delay in delivering a functioning Alpha project will have a detrimental impact on the delivery of the project goals and objectives."

The letter give a final opportunity to remedy the delays by 20 August 2021 failing which the matter would be referred to senior management in Construction and Procurement Delivery.

[11] WEP did not respond until 13 September 2021. In that letter it indicated the substantial progress that had been made on the PTL IT Architecture. The RMADS was reviewed by Cyphra and feedback had been provided at an internal workshop on 26 August 2021. Cyphra's representative then went on annual leave. It was submitted that the document was in a sufficient state to be a working version but would need constantly changed throughout the project as the risk profiles would

change as things went forward. The remedial action plan for repairs to the pit had been completed.

[12] On 14 October 2021 the DVA issued a "Notice to Remedy Breach of Contract" ("the Notice"). Paragraph 1.2 of the Notice identified the contract specification, the standard conditions for supply and installation, the standard conditions for maintenance services and the supplementary conditions to the standard conditions for supply and installation and to the standard conditions for maintenance services as documents included as part of the Agreement setting out specific contract requirements with which the parties must comply.

[13] Paragraph 1.3 added as follows:

> "In addition, since the Agreement was entered into, the parties agreed in writing on 9 December 2020 to comply with Project Programme Version 1.8 (the "Programme"). This Programme sets out various tasks required to be carried out by Worldwide, DVA and O'Hare McGovern, together with associated timelines, in order to deliver the scope of work envisaged in the Agreement. The Programme included a number of key milestones (the "Milestones"), together with key milestone dates by which those Milestones were to have been achieved. It was the intention of the parties that the Programme form part of the Agreement and that any failure by a party to carry out the activities for which they had been allocated responsibility within the Programme (or a failure to achieve a Milestone by its associated milestone date) would be a breach of the Agreement, and treated as such with associated consequences."

[14] The Notice went on to identify alleged material breaches of obligation in respect of the timescale for delivery of the emissions testing process, the RMADS, the PLT IT Architecture Design and Development, the MIS (Management Information System) Application Customisation, the light vehicle equipment and heavy vehicle equipment software customisation and the Integrated Test Lane Software Design and Development. It was contended that Clause 6.5 of the Standard Conditions for Supplying and Installation made time of delivery of the essence.

[15] There were two further complaints. First it was contended that WEP had agreed to provide an emissions testing process which was certified in compliance with EU Road Worthiness Directive 2014/45/EU. WEP had stated in their tender that their emissions testing process would fully comply with that requirement. Secondly, WEP had represented to the DVA in its tender submission that it was proposing an off-the-shelf solution for the ITL software. It was contended that this was not true and that there was a breach of clause 56.1 of the Standard Conditions

for Supply and Installation as a result. If these breaches were not remedied within 30 days of the date of the Notice DVA would be entitled to give notice terminating the Agreement with immediate effect pursuant to clause 23.1.2 of the Standard Conditions for Supply and Installation.

[16] WEP responded on 29 October 2021. It rejected the suggestion that Project Programme Version 1.8 had become a document with any contractual effect. Since 1 April 2021 the parties had been working off an updated Project Programme Version 1.9. The Project Programme has evolved, has been modified and has been subject to continuous review throughout the course of the Agreement with a number of versions having been produced and used. The dates in any version were at best estimates. The letter then went on to deal in detail with each of the allegations.

[17] On 3 December 2021 the DVA responded to the WEP letter of 29 October 2021. It asserted that the dates set out within Project Programme 1.8 were agreed and that they satisfied the variation requirements within clause 2.2 of the Standard Conditions for Supply and Installation within the Agreement. The letter then went on to take issue with some of the explanations provided in relation to the delivery of some of the items.

[18] Paragraph 14 of the letter of 3 December 2021 asserted that there had in addition been a breach of clause 62.1 of the Supplementary Standard Conditions for Supply and Installation by reason of a failure to comply with Good Industry Practice as defined within the contract. Paragraph 14.2 stated that WEP had not been discharging the performance of its obligations with all due skill, care and diligence as evidenced by the many delays and unsatisfactory performance of its obligations under the Agreement. WEP's performance had been unsatisfactory, slow, inefficient and ineffective. The DVA asserted that WEP had breached numerous obligations under the Agreement and had failed to remedy such breaches within 30 days as requested. The DVA was therefore entitled to give notice terminating the Agreement with immediate effect and reserved all of its rights.

[19] On 4 February 2022 the DVA served a Notice of Termination for Material Breach. This Notice was headed "Unremedied material breaches of obligations by Worldwide." Nine material breaches were alleged:

(i) Failure to complete the Emissions Testing Process by June 2021, in material breach of Worldwide's obligation to deliver this Milestone by its agreed Milestone Date;

(ii) Since the draft RMADS provided to date are not yet complete and are subject to further review by Worldwide's lead NCSC CCP, Worldwide has failed to deliver the RMADS by 6 April 2021, in material breach of Worldwide's obligation to deliver this Milestone by its agreed Milestone Date;

(iii) Failure to complete the wider IT Architecture Design and Development by 18 December 2020, in material breach of Worldwide's obligation to deliver the Milestone by its agreed Milestone Date:

(iv) Failure to complete the MIS Application Customisation by 11 June 2021, in material breach of Worldwide's obligations to deliver this Milestone by its agreed Milestone Date;

(v) Failure to complete both the light vehicle equipment and heavy vehicle equipment software customisation by 25 October 2021, in material breach of Worldwide's obligations to deliver this Milestone by its agreed Milestone Date;

(vi) Failure to complete the ITL Software Design and Development by 9 November 2021, in material breach of Worldwide's obligation to deliver this milestone by its agreed Milestone Date:

(vii) Clause 6.5 of the Standard Conditions for Supply and Installation provides the time of delivery shall be of the essence. Worldwide is therefore in material breach of its obligations under Clause 6.5 due to its failure to deliver:

(a) a fully compliant Emissions Analyser within the time promised by Worldwide;

(b) the RMADS within the time promised by Worldwide; and

(c) the MIS Application within the time promised by Worldwide.

(viii) Worldwide has failed to obtain appropriate certifications for the Emissions Testing Process, which is:

(a) a material breach of Worldwide's obligations in respect of the representation and warranty Clause 5.1.2 of the Standard Conditions for Supply and Installation, pursuant to which Worldwide "warrants, represents, undertakes and guarantees that the Goods supplied under this contract will… comply with any applicable statutory and regulatory requirements relating to the manufacture, labelling, packaging, storage, handling and delivery of the Goods"; and

(b) a Material Breach of Worldwide's obligation under the warranty in Clause 56.1 of the Standard Conditions for Supply and Installation that as at commencement date, all information contained in the tender remains true, accurate and not misleading, as the Emissions Testing Process does not in fact meet the applicable requirements as set out in Worldwide tender.

(ix) Since Worldwide's tender proposed an "off-the-shelf solution" for the ITL software, which Worldwide has failed to deliver, that is a material breach of Worldwide's obligations under the warranty provided at Clause 56.1 of the Standard Conditions for Supply and Installation, that as at commencement date, all information contained in the tender remains true, accurate and not misleading.

[20] By letter dated 7 February 2022 solicitors on behalf of WEP responded to the Notice of Termination arguing that there was no obligation under the contract providing for delivery of milestones or meeting milestone delivery dates. The first 7 grounds in the schedule did not, therefore, give rise to an entitlement to terminate the contract and the client had dealt with the allegations at paragraph 8 and 9 in correspondence. The letter required an undertaking in writing to:

> "(a) Refrain from taking any step on foot of, or to implement, the disputed termination;
>
> (b) Taking any steps to prevent our client from performing its obligations under the contract; (*sic*)
>
> by noon on 8 February 2022."

[21] On 8 February 2022 the DVA's solicitors responded stating that their client was fully entitled to terminate the contract for the unremedied material breaches and breach of obligations under clause 62.1 of the contract. As a result the contract between the clients had been terminated with effect from 4 February 2022.

[22] On 11 February 2022 WEP issued injunction proceedings and a notice of motion on the same date seeking:

- an interim injunction, until final judgment or further order of the court, restraining the defendant from:

  (a) Taking any step in foot of, or to implement, the purported termination of the contract entered into between the plaintiff and defendant on 5 March 2019 under the contract reference ID 121 3759 ("the Contract");

  (b) Taking any steps to prevent the Plaintiff performing its obligations under the Contract.

***The Terms of the Contract***

[23] There is a fundamental difference between the parties as to whether the dates specified in Project Programme Version 1.8 have contractual force in the sense that failure by WEP to achieve the dates specified gives rise to a right by the DVA to terminate the contract. In this interim application it is not the function of the court to

determine the precise terms of the contract, but the court has had oral and written submissions on this issue. It is an issue which does not depend on conflicting oral evidence and given its importance in the determination of this application it is appropriate for the court to examine the relative strength of the competing submissions.

[24] The principal contract documents are the DVA Procurement of Vehicle Testing Equipment Contract Specification ("the Contract Specification") and the Standard Conditions of Contract for the Supply, Installation and Commissioning of Vehicle Testing Equipment, Associated Integrated Testing Software, All Associated IT Software, Licences and Management Information System as supplemented ("the Contract"). Where there is a conflict the Contract Specification has priority by virtue of Clause 59 of the Contract.

[25] The project is described in paragraph 1.3.1 of the Contract Specification. The DVA are progressing plans to build an additional new Belfast test centre to address immediate capacity issues in the greater Belfast area. This will add a further 9 test lanes making a total of 70 available lanes in Northern Ireland. Paragraph 2.1 of the Contract Specification explained that the DVA wished to establish a contract to appoint a contractor to supply, install, commission, calibrate and maintain a total of 70 new vehicle testing lanes of equipment, the associated integrated testing software, all associated IT hardware, licences, and a Management Information System to services network of test centres.

[26] Construction of the new Belfast test centre was proposed to commence during January 2020 with completion due around June 2021. Annex A of the Contract Specification set out an indicative rollout programme based on the existing network plus the additional new Belfast test centre. As a result of Covid the construction of the new Belfast test centre was delayed until October 2022 and the corresponding work to other centres was programmed to take place thereafter.

[27] The issue of delay in performance of the contract is dealt with at paragraph 68 of the Contract as supplemented which provides:

> "If the Contractor fails to install and commission the Goods by the dates agreed, specified in the Specification or (where an extension of time has been agreed by the Parties) the revised date for install and commission (as the context requires, the "Agreed install and commission Dates"):
>
> (i) The Contractor shall pay the Client the sum by way of liquidated damages per lane affected for each day between the Agreed install and commission Dates and the dates on which the Goods are installed and commissioned to the

Client, equal to the fee income loss per lane affected, per day £2882.50, up to a maximum amount of £433K for the relevant Goods ("Liquidated Damages Threshold"). Subject to clause 68.3, during the period in which liquidated damages are payable under this clause, the liquidated damages payable in accordance with this clause shall be the Client's only remedy for any loss or damage suffered or incurred by the Client in relation to the failure by the contractor to install and commission the Goods by the Agreed install and commission Dates; and

(ii) where the Liquidated Damages Threshold is met or exceeded (being that install and commission continues not to be performed after the Liquidated Damages Threshold has met), the Client shall be entitled to:

(a) claim any remedy available to it (whether under this Contract or otherwise) for loss or damage incurred or suffered by it after the end of the Liquidated Damages Period; and

(b) without prejudice to clause 68.1 (ii) (a), the Client shall be entitled to terminate this Contract with immediate effect by giving notice in writing to the Contractor."

[28] In this case there was no specific date agreed for installing and commissioning but the contents of Annex A in the Contract Specification together with the overall scope of the contract as described in the same document point towards installation and commissioning being achieved by the date of the opening of the Belfast test centre. It is agreed that the parties were working towards an opening in October 2022.

[29] Clause 24 of the Contract provides for variation at the request of the client. In order to achieve variation clause 24.2 provides that the client may request a variation by notifying the contractor in writing of the variation by means of a variation to contract form and giving the contractor sufficient information to assess the extent of the variation and consider whether any change to the contract price is required in order to implement the variation. The client has to specify the time limit within which the contractor should respond to the request for a variation in such time limits have to be reasonable. If the contractor accepts the variation, it shall confirm the same in writing.

[30] The Notice to Remedy dated 14 October 2021 argued that it had been agreed that the time limits set out in Project Programme Version 1.8 were to have contractual status. In light of the provisions in relation to variation it appears highly unlikely that a new contractual term could be introduced in such a casual manner. The version upon which the defendant relies was one of a number generated in the course of the contract and, in my view, it is highly likely that these time limits are targets for performance rather than specific contractual terms.

[31] The second basis upon which the defendant contends that the time limits have effect is by virtue of Clause 6.5 of the Contract. This provides:

> "Time of delivery shall be of the essence and if the Contractor fails to deliver the Goods within the time promised or specified in the Specification, the Client may release itself from any obligation to accept and pay for the Goods and/or terminate the Contract, in either case without prejudice to any other rights and remedies in the Client."

[32] The plaintiff suggested that the word "promised" is governed by the phrase "in the Specification." I consider that extremely unlikely. The Specification is drawn up by the client and it seems rather odd to think that it would contain promises on the part of the contractor. I accept, however, that the promise must be one which both parties intended to have contractual effect. That might include a promise in the tender prior to the making of the Agreement. It is possible that a promise made after the making of the Agreement could have contractual force but in such a case both parties would have to understand the promise to have that effect.

[33] In that regard the variation provisions in Clause 24 are of some importance in showing the nature of the formality that should attend reliance upon any such promise. Those formalities were not engaged in the preparation of the Project Programme Version 1.8 and the reliance on the variation argument in the letter of 3 December 2021 appears to be without merit. I consider it highly unlikely that the agreement of targets in Project Programme Version 1.8 constituted a promise giving rise to legal consequences under Clause 6.5.

[34] The alternative basis upon which the defendant relies for its entitlement terminate the contract depends upon Clause 62 of the Contract as supplemented. That clause provides that the contractor shall perform its obligations under the contract with appropriately experienced, qualified, and trained personnel with all due skill, care, and diligence and in accordance with Good Industry Practice. Good Industry Practice is defined in the Contract as meaning standards, practices, methods, and procedures conforming to the law and the degree of skill and care, diligence, prudence, and foresight which would reasonably and ordinarily be expected from a skilled and experienced person or body engaged in a similar type of undertaking under the same or similar circumstances.

[35] Under Clause 23.1.1 the client may terminate the contract by written notice to the contractor with immediate effect if the contractor is in material breach of any obligation which is not capable of remedy. By Clause 23.1.2 the client may terminate the contract if the contractor is in material breach of any obligation which is capable of remedy, and that breach is not remedied within 30 days of the contractor receiving notice specifying the breach and requiring it to be remedied.

[36] I accept that I am not in a position to come to a view about whether the contractor has acted in accordance with Good Industry Practice. That is a matter upon which expert evidence may well have to be considered. I also accept that the DVA were entitled under the contract management arrangements in clause 7 of the Contract Specification to regularly monitor the performance of the contractor and where the contractor failed to reach satisfactory levels of contract performance to be given a specified time for improvement.

[37] In examining that issue I take into account that this is not a contract in which key performance indicators were established against which to judge contractual performance. I also bear in mind the basis upon which the defendant resisted this application in reliance on the affidavit of Patrick Delaney. The essence of the case made in that affidavit is contained in paragraph 27 and 28:

> "27. The letter dated 14 October 2021 was yet another letter specifying material breaches of WEP's obligations under the contract, and affording a period of 30 days for those breaches to be remedied failing which the DVA intended to terminate the Agreement. I consider it important that the Court read the contents of this detailed letter of 14 October 2021 in full. In short, it identified:
>
> (a) That there were a number of serious issues with WEP's performance that have persisted for a long period of time. Despite multiple attempts by the DVA, WEP had failed to reach a satisfactory level of improvement which was required to meet its obligations.
>
> (b) The letter then set out the material breaches in respect of obligations to deliver the milestones by their associated milestone dates:
>
> (i) the Emissions Analyser Homologation Process (the "Emissions Testing Process") testing would be complete by June 2021;

(ii) the Risk Management Accreditation Document Set ("RMADS") would be received by 6 April 2021;

(iii) the IT Architecture Design and Development would be completed by 18 December 2020;

(iv) the MIS Application Customisation would be completed by 11 June 2021;

(v) both the light vehicle equipment and heavy vehicle equipment software customisation would be complete by 25 October 2021; and

(vi) the Integrated Test Lane Software Design and Development would be completed by 9 November 2021.

(c) Despite repeated assurances from WEP to me as the SRO for the project and to the project board, that the milestones would be achieved (and all relevant items delivered), WEP failed to meet the milestones identified at (a) to (f) above.

(d) Subsequent dates that WEP promised completion by have all passed with all of the above items remaining outstanding as at the date of this affidavit. WEP's failure to achieve the milestones referred to at (a) to( f) above is a material breach by WEP of its obligations under the contract

(e) The letter then set out the material breaches in relation to WEP's obligations to deliver goods within the time agreed, concerning the Emissions Analyser Homologation Process, and concerning the Integrated Test Lane Software.

28. As such, the material contractual failures of WEP were captured under the following headings:

(a) Material breaches in respect of obligations to deliver the milestones by their associated milestone dates.

(b) Material breaches in respect of obligations to deliver goods within the time agreed.

(c) Material breaches in respect of obligations concerning the Emissions Analyser Homologation Process.

(d) Material breaches in respect of obligations concerning the integrated test lane software, IT Architecture and MIS."

[38] At the very least the burden of the complaint is the failure to comply with time limits. If the requisite time limit set by the contractual documents was delivery by way of installation and commissioning in accordance with the Contract Specification, which I consider to be highly likely, the defendant's entitlement to terminate by reason of delay will depend upon its ability to demonstrate that the failings upon which the DVA relied indicated an incapacity to complete the project or alternatively that those failings were such that there was no prospect of the project being completed within a timeframe that did not go beyond the limits of the liquidated damages clause.

[39] I am not in a position to reach a clear conclusion on those matters but there is very little evidence advanced to support those cases. I recognise that there is a separate issue in respect of lack of certification of the emissions analyser but again the issue is whether it will be certified by the agreed date for installation and commissioning. The last issue raised was criticism of the assertion by WEP in its tender that it had an off-the-shelf solution for the ITL Software and consequently was in breach of warranty under Clause 56.1 of the Contract. The DVA letter of 3 December 2021 indicates that the DVA were presented at an early stage in the project with a demonstration of the test lane equipment at Burgos, Spain and recognised that it displayed the potential for the development of an ITL suitable for DVA's needs. I cannot make any judgment on this issue but there is little in the early correspondence to indicate that this was a significant issue in the termination of the contract.

[40] I now turn to damages. Clause 19 of the Contract deals with indemnity. Clause 19.4 is a damage limitation clause which provides that the liability of either party for defaults shall be subject to the following financial limits:

(i) the aggregate liability of either party for all defaults resulting in direct loss of or damage to the property of the other under or in connection with this contract shall in no event exceed £5 million; and

(ii) the annual aggregate liability under this contract of either party for all defaults (other than a default governed by clauses 19.4 (i) shall in no event exceed £1 million.

[41] Clause 19.5 goes on to exclude liability for loss of profits, business, revenue or goodwill an indirect or consequential loss or damage. This clause appears to catch any default under the contract which gives rise to a right to terminate but it is not clear that the clause applies in circumstances where there is a termination by the client of the contract in the absence of a contractual right to do so for default.

[42] By way of comparison Clause 60 of the Contract as supplemented makes provision for recovery of loss in the event that the client terminates the contract giving three months written notice to the contractor. The client is obliged to indemnify the contractor against any commitments, liabilities or expenditure which represent an unavoidable direct loss to the contractor by reason of the termination of the contract. Clause 60.3 states that the client should not be liable to a claim by the contractor for loss of profit due to early termination of the contract but that begs the question as to whether the contractor is entitled to claim for loss of profit accrued up to the date of termination. Damages for termination on this basis do not appear to be limited by Clause 19.

[43] Both parties approached this application on the basis that the limitation on damages in Clause 19 would apply. It is not clear to me that this is correct but in light of the limited argument advanced and the need to look at the contract as a whole I approach the case on the basis that Clause 19 may well apply to limit WEP's damages even if the DVA were not entitled under the contract to terminate.

***Consideration***

[44] I am satisfied that what is sought in this case is effectively a mandatory injunction. I consider that the legal principles which I should apply were set out by Lord Hoffmann in *National Commercial Bank Jamaica Ltd v Olint Corp* [2009] UKPC 16; [2009] 1 WLR 1405 and referred to at para [3]–[38] of the 14th edition of Bean on Injunctions. What is required is to examine the consequences of granting or withholding the injunction and to assess the resulting prejudice to each party.

[45] Applying the matters referred to in the American Cyanamid case I accept that there is an issue to be tried. I consider it is highly likely, however, that the DVA has misconstrued the contract by asserting a failure to comply with milestones which were not part of the contractual obligations. The evidence indicating that there was a legal entitlement to terminate is very limited. I do accept, however, that failure by the contractor to achieve the time limits set out in the Project Programme Versions provides some evidential base for questioning Good Industry Practice.

[46] In light of the uncertainty over the question of damages I am not satisfied the damages would represent an adequate remedy for the plaintiff. I consider that the correct principle to apply in this case is that set out in *Bath and North East Somerset District Council v Mowlem plc* [2004] EWCA Civ 115 and followed in *AB v CD* [2014] EWCA Civ 229. The injunction is designed to enforce the primary obligations under

the contract and not the liquidated damages clause. I also accept, for the reasons set out below, that if at any trial it were determined that the termination of the contract was lawful the assessment of loss to the defendant is likely to be assessable but that the effect on the public is not capable of assessment.

[47] Turning to the possible prejudice to each party in addition to the uncertainty over damages I accept that the plaintiff will lose the opportunity to demonstrate the capacity to successfully carry out a prestigious contract in the European environment. It is also likely that the plaintiff will be disadvantaged in pursuing any public procurement contracts in Northern Ireland and possibly throughout the United Kingdom unless this case went to trial and the plaintiff was ultimately successful. Both parties recognised that a full trial would take some time and it may not be realistic to think that it will take place in any immediate timeframe. I consider that this impact is different from the argument about reputation upon which I place limited store.

[48] I accept that senior management within the DVA had displayed a lack of confidence in WEP. I consider that there are two reasons for that. The first is the failure of WEP to honour sometimes very demanding timetables sought by the DVA. The second reason in my view is that it is highly likely that the DVA have misunderstood the contract. As a result, the performance management of the contract has proceeded down the wrong path. This discussion of the contractual terms may help to focus minds on securing a positive outcome to the contract. It should also address the question of the degree of supervision by the court as the obligations of each party should now be clearer.

[49] I accept that the DVA are at risk of not being able to deliver a public service and quite apart from any financial consequences the interests of the public have to be taken into account. This is a potent factor to bear in mind. If, however, it is ultimately concluded that the DVA terminated the contract because they misunderstood its terms the chance of completing the contract within the contractual time limits will have been lost if the injunction is refused.

[50] I have also considered the status quo in case it should point firmly in one direction. The defendant contended that since notice of termination had been served upon the plaintiff that represented the status quo. In my view the position is more balanced. The relevant guidance is contained in *Garden Cottage Foods Ltd v Milk Marketing Board* [1984] AC130 at 140C:

> "The history of the trading relations between the company and M.M.B., as I have outlined them, make it difficult to identify what was the relevant status quo which it was said in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 it is a counsel of prudence to preserve when other factors are evenly balanced. The status quo is the existing state of affairs; but since states of affairs do

> not remain static this raises the query: existing when? In my opinion, the relevant status quo to which reference was made in *American Cyanamid* is the state of affairs existing during the period immediately preceding the issue of the writ claiming the permanent injunction or, if there be unreasonable delay between the issue of the writ and the motion for an interlocutory injunction, the period immediately preceding the motion. The duration of that period since the state of affairs last changed must be more than minimal, having regard to the total length of the relationship between the parties in respect of which the injunction is granted; otherwise the state of affairs before the last change would be the relevant status quo."

[51] In my view the period of one week between the termination on 4 February 2001 and the issue of these proceedings in the context of a relationship which had been ongoing since March 2019 tends to suggest that the status quo is the position prior to the termination. I do not, however, give great weight to that outcome.

***Conclusion***

[52] Balancing these considerations I am satisfied that taking into account in particular the likely outcome of the interpretation of the contractual relationships the injunction should be granted in the terms sought by the plaintiff. I consider, however, that the plaintiff must give an appropriate undertaking in damages and as the plaintiff is a company incorporated outside the jurisdiction with no property within this jurisdiction and that this is an interim injunction which might be more difficult to enforce, I consider that the undertaking should be fortified.

[53] The injunction can issue forthwith with the necessary undertaking if it is provided, and I will consider the question of fortification at a time to be agreed with counsel.