Neutral Citation Number: [2019] EWHC 1315 (TCC)

Case No: HT-2019-000013

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/06/2019

Before :

SIR ANTONY EDWARDS-STUART

- -

Between :

CIRCLE NOTTINGHAM LIMITED	**Claimant**
- and -	
NHS RUSHCLIFFE CLINICAL COMMISSIONING GROUP	**Defendant**
-and-	**Interested Party**
NOTTINGHAM UNIVERSITY HOSPITAL TRUST	

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Ms Fionnuala McCredie QC and Mr Simon Taylor (instructed by **Blake Morgan LLP**) for the **Claimant**
Mr Jason Coppel QC and Ms Ligia Osepciu (instructed by **Gowling WLG (UK) LLP**) for the **Defendant**
Mr Michael Bowsher QC (instructed by **Browne Jacobson LLP) for the Interested Party**

Hearing date: 15th May 2019

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Approved Judgment

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

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SIR ANTONY EDWARDS-STUART

Introduction

1. This is an application by the Defendant to lift the suspension on entering into a contract imposed by regulation 95(1) of the Public Contracts Regulations 2015 ("the PCR").

2. In 2018 the Defendant carried out a procurement for the provision of medical services at the Nottingham Treatment Centre ("NTC"). The Claimant was the incumbent provider of the services at the NTC, and had been since 2008. The NTC provides a range of elective (that is, non-emergency) day case and patient treatments across a range of specialities, including gynaecology, rheumatology, dermatology, trauma and orthopaedics and gastroenterology.

3. On 22 January 2018, the Defendant commenced a competitive re-procurement of the services provided at the NTC under the contract between the Claimant and the Defendant, but this was abandoned following a challenge by the Claimant. Instead, the Claimant and the Defendant entered into a one year contract for the continuation of the provision of the services at the NTC, which is due to expire on 28 July 2019 ("the Contract").

4. A further procurement exercise was commenced by the publication of a Contract Notice in the Official Journal of the European Union ("OJEU") on 2 October 2018. The contract period was to be five years. Bids were submitted by 1 November 2018 and Standstill Letters under regulation 86 of the PCR were issued on 4 December 2018 informing the unsuccessful bidders (including the Claimant) that the contract would be awarded to the Nottingham University Hospital NHS Trust ("the NUH Trust").

5. The Claimant questioned the result and issued a claim form on 10 January 2019, thereby triggering an automatic suspension under the PCR ("the suspension"). However, matters then took an unusual turn. On 16 January 2019 the NUH Trust notified the Defendant of a material change in its financial circumstances pursuant to section 18.1 of the Invitation to Tender ("the ITT"), which included the fact that it was forecasting an £18.9 million deficit variance from the control total for the year ending 1 April 2019 (the "Notified Material Change").

6. The Notified Material Change then gave rise to a further re-evaluation of the bids in which the Claimant was again unsuccessful. The details of this process are described in more detail below. In the meantime, the suspension has continued.

7. At the hearing of the application the Defendant was represented by Mr Jason Coppel QC and Ms Ligia Osepciu, instructed by Gowling WLG (UK) LLP, the Claimant was represented by Ms Fionnuala McCredie QC and Mr Simon Taylor, instructed by Blake Morgan LLP, and the NUH Trust was represented by Mr Michael Bowsher QC, instructed by Browne Jacobson LLP.

Subsequent events and the issues between the parties

8. The Particulars of Claim served on 17 January 2019 alleged multiple breaches of the PCR, including (according to the Defendant's skeleton argument which has not been suggested to be an inaccurate summary):

(1) Failure to provide adequate debrief information and/or to maintain proper records of the evaluation process. However, the Defendant now contends that any defects in the information provided in the Standstill Letter have since been cured by the provision of early disclosure.

(2) Failure to disqualify the NUH Trust by reference to Qualification Question E1a concerning financial standing, which required bidders who chose Option A to provide evidence that their financial standing showed a "*positive, in-profit trading position*" over the last two financial years. In the light of the Notified Material Change the Defendant concluded that the NUH Trust failed to meet this requirement, but nevertheless exercised its discretion under the relevant sections of the ITT to accept the NUH Trust's bid. This has given rise to an issue as to whether the Defendant's exercise of discretion in favour of the NUH Trust was manifestly erroneous or irrational.

(3) Failure to disqualify the NUH Trust for submitting an unsustainable or abnormally low bid. The Defendant contends that all the bids received were sustainable and that, in any event, it was under no obligation in the circumstances to investigate the pricing of the bid which might have appeared to be abnormally low.

(4) Manifest errors in the scoring of both the Claimant's and the NUH Trust's bids against 20 of the Quality/Transformation sub-criteria. The Defendant contends that this amounts to no more than disagreement with its judgement on a number of detailed matters falling well within its margin of appreciation.

9. On 4 February 2019 the Defendant notified bidders of its decision to re-evaluate the bids against Qualification Question E1a (this has been referred to as "the financial re-evaluation"), and later confirmed that it would consider whether to exercise its discretion under the ITT to exclude any bids on the basis that the prices set out therein were unrealistic or unsustainable (this being referred to as the "sustainability re-evaluation"). These re-evaluations were motivated partly by the Notified Material change and partly by criticisms made of the Defendant in the Particulars of Claim, which the Defendant decided to address without accepting that they were well-founded.

10. On 5 March 2019 the Defendant issued fresh Standstill Letters to all bidders in the procurement, which explained the outcome of the financial and sustainability re-evaluations and gave notice of a fresh standstill period which expired on 15 March 2019. On 27 March 2019 the Claimant served amended Particulars of Claim, containing fresh allegations in relation to the financial and sustainability re-evaluations. In addition, the Claimant contends that the NUH Trust is effectively guaranteed by the Department of Health and Social Care and that this amounts to unlawful state aid.

11. On 28 March 2019 the Defendant's solicitors wrote to the Claimant's solicitors asking the Claimant to agree to a lifting of the suspension. By letter dated 3 April 2019, the Claimant refused to do this. On 9 April 2019, the Defendant made the current application to lift the suspension.

12. On 1 May 2019 the Claimant informed both the Defendant and the NUH Trust that it intended to remove all moveable equipment and furniture from the NTC when it moved out, effectively leaving the building as an empty shell. Under the Contract the Claimant is permitted to remove its furniture and equipment (except for certain items of major clinical equipment), but if it wishes to sell them it must give the Defendant first refusal. The Contract makes provision as to how the price is to be determined in the absence of agreement. The Defendant describes this as "*an unexpected and commercially inexplicable position given the age of the equipment and furniture, its current market value, the costs of transport and storage and the lack of plausible alternative uses by [the Claimant]*" (see paragraph 41-42 of Ms Sullivan's second witness statement dated 10 May 2019).

13. As is common in these applications, both the pleadings and the witness statements refer to numerous confidential documents and so a confidentiality ring was established on 3 April 2019 in the usual way. However, the Claimant wanted to have a client representative included in the ring, and following an application to the court its General Counsel, Mr Cobb, was admitted into the confidentiality ring.

14. To the limited extent that it may be necessary to refer to confidential information, I propose to do so either in the most general terms or by reference to the relevant part of the evidence or document containing it.

The relevant legal principles

15. It is common ground that regulation 96(2) of the PCR provides that in an application of this sort the approach to be adopted by the Court is to decide whether, if there were no suspension in place, it would be appropriate to grant an interim injunction to the claimant preventing the defendant from entering into the new contract. It is now well established (and again common ground) that the principles set out in *American Cyanamid v Ethicon* [1975] AC 396 apply to that question.

16. The first question for the court is whether the claim raises a serious issue to be tried. On this application, that has been expressly conceded by the Defendant so it need not be considered further. The court must then approach the matter in the following way:

    (1) If the claimant were to succeed at trial, would damages provide adequate compensation for its loss? Or, putting it another way: is it just, in all the circumstances, that the Claimant is confined to its remedy in damages? If the answer is yes, and the defendant is likely to be in a position to pay any damages awarded, then an interim injunction would not ordinarily be granted and so, in a procurement case, the stay will be lifted.

    (2) If damages would not provide an adequate remedy to the claimant, then the court should consider whether, if the injunction was granted, the defendant would be adequately compensated under the claimant's cross-undertaking in damages.

    (3) If the answer to either of these questions is no, then the court must consider whether the balance of convenience favours the grant of an injunction. Or, as O'Farrell J put it, the court must consider which course of action is likely to carry the least risk of injustice if it transpires that it was wrong (see, for

example, *DHL Supply Chain Ltd. v Secretary of State for Health and Social Care* [2018] EWHC 2213 (TCC), at paragraph 36).

(4) If the factors relevant to the balance of convenience do not point in favour of one side or the other, then the prudent course will usually be to preserve the *status quo* (or, perhaps more accurately, the *status quo ante*), that is to say to lift the suspension and allow the contract to be entered into.

(5) If the extent of the loss which each party might sustain over and above that which can be compensated by damages in the event of success at trial is not evenly balanced, that is a significant factor when assessing where the balance of convenience lies.

(6) By contrast, where such loss to each party does not differ widely, it may be legitimate to take into account the relative strength of each party's case (as revealed by the written evidence on the application), but only if there is no credible dispute that the strength of one party's case is disproportionate to that of the other party.

(7) Finally, there may be other special factors to be taken into account in the particular circumstances of that case.

17. As to (6), the Claimant, whilst submitting that its case was strong on the merits, does not seek to persuade the court that this is one of those cases where the relative strength of the parties' cases should be taken into account (see paragraph 13 of the Claimant's skeleton argument).

18. It follows that if the court is satisfied that it would not be unjust to confine the claimant to its remedy in damages, that is usually the end of the inquiry. Lifting the suspension will then almost invariably follow as a matter of course.

19. Nevertheless, I consider that it is probably prudent for the court to go on and consider the balance of convenience in any event in case there is some factor that is so compelling that it ought to be taken into account in spite of the court's conclusion about the adequacy of damages as a remedy. I shall therefore follow that course.

20. Before I turn to the question of whether damages are an adequate remedy, I should mention one other point. In *Nuclear Decommissioning Agency v Energy Solutions* [2017] UKSC 34, it was held by the Supreme Court that a claimant no longer has an automatic right to damages where it has established a breach of the PCR, unless that breach is sufficiently serious to justify an award of damages. To meet this point Mr Coppel expressly conceded that if it was found at a trial that the Claimant should have been awarded the contract for the NTC then, on the basis of the current law (as stated by Fraser J in *Energy Solutions v Nuclear Decommissioning Authority* [2016] EWHC 3326 (TCC)), that would be a sufficiently serious breach to justify an award of damages. Mr Coppel emphasised that the Defendant's concession was expressly based on the current law (and he was insistent that this concession was accurately recorded to avoid disputes at a later stage of the proceedings). I therefore do not need to consider the interesting discussion by Fraser J of the impact of this point in *Lancashire Care NHS Foundation Trust v Lancashire County Council* [2018] EWHC 200 (TCC), at paragraphs 16 to 27.

Are damages an adequate remedy?

The Claimant's evidence

21. It is the Defendant's position that it would not be unjust to confine the Claimant to its remedy in damages because in this case damages would be an adequate remedy. The Defendant submits that the starting point for the calculation of damages will be the loss of the profits that the Claimant would have made if it had been awarded the Contract and that, so far as this head of claim is concerned, there has been no suggestion from the Claimant that there would be any difficulty in assessing its loss on that basis.

22. For the purpose of the application to lift the suspension the Claimant served witness statements from two witnesses, Mr Shane Cobb, the General Counsel and Group Company Secretary for the Circle Group of companies, and Mr Massoud Keyvan-Fouladi, the Group Medical Director of the Circle Group. The latter is an eye surgeon who was the co-founder of the Circle Group in 2004.

23. At paragraph 8 of his witness statement Mr Cobb identified six reasons for opposing the application. These were as follows:

> (1) patient safety;
>
> (2) risks of an unplanned transfer;
>
> (3) an extension of the contract period was required in order to ensure a properly planned transfer;
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> (4) theNUH Trust's financial position (it did not have the financial resources to deliver the significant transformation proposed);
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> (5) concern about the impact of the Defendant's approach to this procurement on the 72,000 patients who are currently on active treatment pathways at the Treatment Centre; and
>
> (6) damages would not be an adequate remedy, in that (a) the lack of an orderly and safe handover as well as the loss of the contract itself would have significant adverse reputational consequences for "Circle" and (b) "Circle" would also suffer the loss of a critical part of its overall business.

24. At paragraph 16 of his witness statement Mr Cobb made a further point that the Defendant's ability to tender for the contract was being unfairly subsidised by NHSI loans.

25. In relation to the inadequacy of damages as a remedy, Mr Cobb said that the loss of this contract would have a "*serious and largely unquantifiable impact on Circle and on the wider Circle Group of Companies*". It is necessary to set in full out how he developed this in paragraphs 22-25 of his witness statement:

> "22 Circle is a wholly owned subsidiary of Circle Health Ltd. (CHL). CHL provides central management and support for the Group's operating businesses. An organigram of the Circle Group is at . . .

23 Circle has an annual turnover of c. £55 m at the Treatment Centre. The Treatment Centre is a flagship hospital established in 2008 as part of a major procurement brought by the Department of Health to introduce new capacity for elective services in the NHS and plurality of choice for patients. Circle's revenue of £55 million, comprising c. 98% NHS work, represents 35% of total Group revenue in 2018 and delivers slightly more than 50% of Group EBITDA.

24. Circle operates two other hospitals in Bath and Reading, which provide primarily private services and a new hospital is to be opened in Birmingham in September 2019. Turnover of each of these hospitals is c £25 m.

25 Circle also has musculoskeletal service contracts ("MSK") in Bedfordshire and Greenwich (turnover of c. £25 m each). Circle currently provides services under a two-year MSK contract with Rushcliffe CCG from the Treatment Centre (which is being extended to 2021). Circle also runs an innovative rehabilitation service, which is to be expanded with the opening of the Birmingham Hospital. This ground breaking service helps accelerated recovery of stroke victims."

26. At paragraph 26 Mr Cobb says that "*Circle itself*" derives all its income from the Contract "*and the much smaller MSK Contract referred to above*". I was told that this was a reference to the "*two-year MSK contract with Rushcliffe CCG*".

27. I was shown the organigram of the Circle Group, to which reference has already been made, which shows that there are five operating companies each of which is a wholly-owned subsidiary of Circle Health Limited. I was not told which of these companies, if any, is a party to the MSK contracts in Bedfordshire and Greenwich, but it is obviously not the Claimant. In addition to the five operating companies, there are also property and joint venture companies.

28. Mr Cobb went on to set out various heads of loss under the following headings:

(1) "*Impact on Circle as an entity*": Mr Cobb said that the Claimant itself derived all its income from the Contract and the much smaller Nottingham MSK contract. He said that the loss of the Contract would therefore wipe out most of the Claimant's revenue, leaving only the small MSK contract (with a revenue of about £640,000 per annum).

(2) "*Circle Group - Loss of Contribution to Central Support Services*". This took the form of the loss of the annual management charge of about £2.5 million which the Claimant paid to Circle Health Limited. Mr Cobb said that the loss of the management charge would in turn result in staff redundancies "*across those central functions by Circle Health*".

(3) Mr Cobb then turned to the "*Reputational Impact on Circle Group*", of which he identified two particular aspects:

- Loss of flagship hospital (the NTC);

- Loss of Circle Training and Fellowships;

(4) The next head of loss was "*Significant loss of capability due to TUPE transfer*". Under this head Mr Cobb identified a number of key roles and specialist services that would be lost to the Circle Group as a result of TUPE transfers following the loss of the Contract.

(5) The final head was the loss of academic research and training. He said that the Claimant produced an extensive and unique academic output, which provided national and international clinical credibility. He referred to some 200 clinical studies and trials and the fact that the Claimant's medical workforce also contributed to clinical research and medical conferences which benefit "*the wider Circle Group*".

29. Mr Cobb summarised the position as follows, under the heading "*Summary on adequacy of damages to Circle and the Circle Group*":

(1)The Defendant's application was an "*existential threat*" to the Claimant as "*Circle's revenue*" will reduce to a very small sum (about £600,000 rather than £55 million), and would cause the loss of consultants and other employees of the Claimant who provided an "*essential contribution to the Group-wide clinical, regulatory, facilities maintenance and IT function of the Circle Group*". He said that these resources underpinned the "*Circle Group's reputation*".

(2)He said that in addition to "*brand impact*", the consequences of losing the Contract is that the Circle Group "*will be deprived of the skills, experience and know-how of key members of Circle's clinical and non-clinical staff*", which would "*undermine the agility, commercial capability and delivery at the Group's other facilities*".

(3) He said also that the loss of the NTC would undermine the Circle Group's ability to "*grow and support business*" (sic) due to weaker covenant strength and a perception that the NHS has "*rejected the Circle model and/or Circle's ability to deliver it*".

30. The evidence of Mr Keyvan-Fouladi explained how the NTC separated routine hospital surgery from hospital emergency work so that the NHS could concentrate on getting waiting times down. He explained how the 2006 White Paper "*Our health, our care, our say*" also set out the direction for care to be undertaken outside of hospitals, in line with Lord Darzi's drive for innovation in the delivery of ambulatory care, and for it to be delivered outside traditional acute hospital settings and supported by strong clinical leadership.

31. At paragraph 10 of his first witness statement, Mr Keyvan-Fouladi said that there were over 240,000 patient attendances at the NTC per year, for a range of services including skin, colonic and gynaecological cancers. He said that the NTC had consistently delivered high quality patient care in line with NHS access standards, as well as moving care to more appropriate delivery settings through innovative models of care such as tele-dermatology. He said that their future plans "*envisaged further services moving closer to home through integrated care in conjunction with primary*

care". However, there was no mention of any future plans to open or manage other treatment centres or to provide similar services elsewhere.

32. He went on to say that the NTC had five operating theatres, three skin surgery theatres, an endoscopy suite and an on-site diagnostics imaging service, including MRI, CT, x-ray and ultrasound. There were 60 outpatient consulting rooms, 26 day case bays and 16 short stay beds.

33. I can readily accept that the NTC has been a successful and outstanding innovation in terms of medical treatment, and that this is in large measure the result of its management and operation by Circle and Circle Group.

The effect of the evidence in the context of the application

34. Although at the outset of his witness statement Mr Cobb defined the Claimant as "Circle", he did not use this abbreviation consistently in his statement, with the result that he frequently referred to "Circle" when it is reasonably obvious from the context that he meant the Circle Group (see, for example, paragraphs 24 and 25 that I have quoted above, where the references (save one) must be to other companies in the Circle Group). I make this observation because there are some paragraphs in which it is not wholly clear to which entity he is referring: in the context of an application such as this, where there is a mass of material (much of it confidential) it is perhaps unsurprising that mistakes such as this have occurred, and I make no criticism of either Mr Cobb or those who assisted in the preparation of his witness statement. I have interpreted Mr Cobb's use of "Circle" to refer to whichever entity appears most appropriate in the context.

35. From the extracts of Mr Cobb's evidence to which I have referred above, it is clear that the thrust of his evidence is that the loss of reputation that has been or will be suffered is a loss suffered by the Circle Group or the Circle brand, rather than by the Claimant. Much the same theme runs through paragraphs 28 to 38 of the Claimant's skeleton argument (see, in particular, paragraphs 28, 29, 30, 34, 37 and 38). Mr Coppel submitted that there was a threshold question as to whether the effect on group companies could be relevant at all at this stage in the inquiry. However, he accepted that the effect on other companies in the Circle Group may be relevant when it came to considering the balance of convenience.

36. Further, as I have already mentioned, the Circle Group carries out its operational functions through a series of wholly-owned subsidiary companies. It seems that they are, broadly speaking, special purpose vehicles. There is nothing unusual or objectionable about this: no doubt there are very good commercial reasons for doing it.

37. In this context I was referred to the decision of Horner J in *Eircom UK Ltd v Department for Finance* [2018] NIQB 75 in the Commercial List of the Queen's Bench Division of the High Court in Northern Ireland and, in particular, to his observations at paragraphs 25 and 26, where he said:

> "[25] The plaintiff, the incumbent 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 the 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."

38. He then said, at [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 would 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) . . .
> (ii) . . . 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 offshoots might go out of business if it failed to win a tender, and that therefore the award of that contract should be suspended, it will 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."

39. Horner J went on to observe (at [33]) that the plaintiff was formed specifically to service the existing Northern Ireland contract, so that it must follow that it was clearly foreseeable that if it did not service that 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.

40. It seems to me that these observations are pertinent to the present application and they reinforce my view that if a commercial undertaking chooses to carry out its operations through a series of special purpose vehicles, it cannot really complain if that carries disadvantages as well as advantages. Further, to answer Mr Coppel's threshold question, in my judgment it is the position of the Claimant that must be considered on this application, and not the position of the Circle Group or the Circle brand. No other Circle Group company is a party to this litigation. Ms McCredie did not really have a direct answer to this point: what she said was that "*the world doesn't just look at the Claimant - it associates it with the group as a whole*". I am prepared to accept in principle that this may be so, but it still requires the court to assess how this might affect the Claimant in the circumstances of this case and whether it will do so in a manner that cannot be compensated by damages.

41. What is missing from the Claimant's evidence on this application is any link between damage to the reputation of the Claimant itself (to the extent that the evidence establishes that there is any) and its effect on the Claimant's future commercial operations. For example, there is no evidence that, had the Contract been renewed, the Claimant would - on the back of it - have sought additional opportunities to provide medical facilities at sites other than the NTC – for example, by establishing additional similar treatment centres in other parts of the country. This is quite different from the position in some of the cases mentioned below in which the loss of reputation allegedly suffered by a company resulting from the failure to secure a valuable contract was said to matter because it was regarded as likely to have an adverse effect on the ability of that company to win future business.

42. Further, if the Claimant were to suffer damage to its reputation, there is no evidence (or suggestion) that this would last longer than the five year period of the new contract. If the Claimant succeeds at trial it will recover by way of damages its loss of profit over that contract period, less any profit that it has earned or might earn from other activities. Were the Defendant to allege that the Claimant had failed to take reasonable steps to mitigate its loss by not finding other outlets for profitable activity, the Claimant could respond by saying that it was prevented from doing so as a result of the damage to its reputation. At a practical level, therefore, any loss resulting from damage to its reputation can be taken into account in that way. However, if the Claimant recovers its loss of profit in full, it will have been fully compensated: to award additional damages for loss of reputation would amount to double counting.

43. For these reasons alone, and unless there is authority that points to a different conclusion, I consider that it has not been shown that any damage to reputation that the Claimant may have suffered will have any commercial repercussions: no such commercial repercussions have been identified in the evidence.

44. I accept that the Circle Group may suffer a loss of reputation or some tarnishing of the Circle brand as a result of losing this Contract, but no company in the Circle Group is a party to this action other than the Claimant. As I have already held, the adequacy of the damages that has to be considered is the damages that may be awarded to the Claimant if its claim succeeds at trial.

45. I would add also that, if the claim succeeds and it is held that the Contract was wrongly awarded to the Defendant, any damage to the reputation of the Claimant (or, indeed, to that of the Circle Group) will be largely swept away. In this context, I agree with what Coulson J said in *Sysmex (UK) Ltd. v Imperial College Healthcare NHS Trust* [2017] EWHC 1824 (TCC), at paragraph 50:

> "Moreover, it is fundamentally wrong in principle to say that an award of damages would not restore a reputation lost because of the rejection of a tender, but the award of the contract itself would. What would matter in those circumstances would be the public acknowledgement that their bid had been wrongly rejected, not the precise remedy which the court provides in consequence of that finding."

46. More generally in the context of loss of reputation, I was referred also to the decision of Stuart-Smith J in *OpenView Security Solutions v The London Borough of Merton* [2015] EWHC 2694 (TCC). I agree entirely with his observations at paragraph 33, where he said:

> "The Courts have on occasions referred to "loss of reputation" as a possible basis for holding that damages are not an adequate remedy. In principle, the underlying assumption appears to be that a "loss of reputation" may be a real commercial disadvantage but one that is not capable of being included in any assessment of damages. This would be most likely to apply because of the application of principles of remoteness. For example, it might not in general be open to an aggrieved tenderer to recover damages for the chance of securing other contracts on the back of the contract at issue because the law would regard those losses as legally too remote. The outcome might in principle be different if both the tenderer and the contracting authority knew and intended that participation in the contract at issue was a necessary and sufficient qualification for participating in another contract as well. It is not self-evident that the exclusion of a particular head of damage on grounds of remoteness automatically renders damages an inadequate remedy, not least because the principles of remoteness are intended to be a principled response to the assertion of losses that are too speculative to justify recovery under a just and adequate system of law."

47. In the following paragraph he went on to consider the cases of *Alstom Transport v Eurostar International and Siemens plc* [2010] EWHC 2747; *DWF LLP v The Secretary of State for Business Innovation and Skills* [2014] EWCA Civ 900, and *NATS (Services) v Gatwick Airport* [2014] EWHC 3133 (TCC). In each of those cases the court held that the loss of the contract in question would have an adverse effect on the claimant's business activities - in terms of winning future contracts - which it would be difficult or impossible to quantify fairly. That was a conclusion reached on the facts of each case.

48. Stuart-Smith J noted that those cases did not identify any test or touchstone to be applied when asking the question whether "loss of reputation" renders damages an inadequate remedy. He said that two questions arose. First, whether "loss of reputation" is an abstract notion or one that requires to be closely linked to the concept of compensatory damages. Second, whether what matters is "loss of reputation" in general or whether the reputation needs to be lost in the eyes of any particular constituency. He thought that the two questions were to some extent interrelated.

49. He went on to suggest (at paragraph 39), albeit somewhat tentatively, three criteria to be applied before the court should accept that "loss of reputation" is a good reason for holding that damages which would otherwise be adequate are an inadequate remedy for *American Cyanamid* purposes. These were as follows:

> (1) Loss of reputation is unlikely to be of consequence when considering the adequacy of damages unless the Court is left with a reasonable degree of confidence that a failure to impose interim relief will lead to financial losses that would be significant and irrecoverable as damages;
>
> (2) It follows that the burden of proof lies upon the parties supporting the continuance of the automatic suspension and the standard of proof is that there is (at least) a real prospect of loss that would be retrospectively identifiable as being attributable to the loss of the contract at issue but not recoverable as damages;
>
> (3) The relevant person who must generally be shown to be affected by the loss of reputation is the future provider of profitable work.

50. Ms McCredie drew my attention to the gloss on those observations made by Waksman J in *Central Surrey Health Ltd. v NHS Surrey Downs CCG* [2018] EWHC 3499 (TCC), at paragraph 34, where he said that cases of this type were highly fact sensitive and so it was difficult to be prescriptive about the weight which should or should not generally be given to a particular factor, like reputation, in the abstract.

51. Whilst accepting the note of caution raised by Waksman J, I respectfully agree that these criteria are helpful starting points and I propose to adopt and apply them. I have already explained that there is no evidence before the court that the Claimant intended to use a successful renewal of the Contract as a springboard from which to obtain further work of the same type. There is, therefore, no class of providers of potentially profitable work which has been identified in the present case.

52. In response to the argument that if the NUH Trust is successful the Claimant would lose a number of key personnel as a result of the operation of the Transfer of Undertaking (Protection of Employment) Regulations 2006 ("TUPE"), Mr Coppel made three points:

> (1) the argument proceeded on a basic misunderstanding of how TUPE operates, because it is not the case that key employees would be compelled to transfer to the NUH Trust;
>
> (2) there is uncertainty and confusion on Mr Cobb's part as to which staff in specialist roles are employed by the Claimant (rather than being employed by other organisations or being self-employed) and therefore potentially affected by TUPE;
>
> (3) a substantial proportion of the medical staff working at the NTC are not employees of the Claimant or the Circle Group, but are employees of the NUH Trust who have been seconded to the Claimant until 28 July 2019 only.

53. It seems to me to be reasonably likely that if the suspension is lifted so that the contract is awarded to the NUH Trust, the Claimant will have to make some key personnel redundant. But expenses such as redundancy payments are losses that will form part of the assessment of damages if the Claimant succeeds at trial. If the Claimant is compensated for its loss of profits as a result of the non-renewal of the Contract, then it will be compensated also for the contribution to those profits made by the key personnel. To the extent that the loss of those employees adversely affects the Circle Group, that is not a loss for which in this action the Defendant could be liable.

54. The loss of the academic research and training is one that may well be felt by the Circle Group (which is what is suggested at paragraph 30 of the Claimant's skeleton argument). There is no explanation as to how a reduction of these activities could give rise to a financial loss on the part of the Claimant. For example, there is no evidence that the Claimant proposed to rely on those activities in support of future projects (other than the NTC). Indeed, those activities were in truth a by-product of running the NTC: if they would have generated any income for the Claimant, the loss of that income can be taken into account the assessment of damages.

55. This leaves the "existential threat" to the Claimant if the Contract is not renewed. It is accepted, as it must be, that the Claimant will remain in existence as a company, but the complaint is that it will lose the revenue from running the NTC: this is obviously correct, but from a commercial point of view the purpose of earning the revenue is to generate a profit. If the Claimant succeeds at trial, it will be compensated for that loss of profit.

56. Having considered all the evidence and the arguments advanced by each party, my conclusion is that no head of loss has been identified by the Claimant that could be attributed to the loss of the Contract and for which the Claimant would not be properly compensated by an award of damages. As I have mentioned, the Claimant will, I assume, suffer a loss of profit as a result of not winning the renewal of the Contract and may possibly, in addition, suffer other losses such as expenditure thrown away or the value of equipment that has to be discarded and which cannot be sold. However, there has been no suggestion that there might be any insuperable difficulty about calculating that loss of profit or any other losses of the type I have mentioned and I cannot see any reason why a claim for damages should not be adequately and fairly assessed by the court.

57. For all these reasons I can see nothing unjust about confining the Claimant to its remedy in damages.

    This finding is, in itself, sufficient to dispose of this application in favour of the Defendant. However, since the greater part of the evidence was devoted to the effect of lifting the suspension on the continuity of the services that will be provided to patients if the Contract comes to an end on 28 July 2019, and because I consider it prudent to do so in any event, I should say something about it.

The balance of convenience

58. Although I have used the heading "balance of convenience", the expression adopted in *American Cyanamid*, it has been said that in this type of case the object of adopting

that approach is to enable the court to take whichever course seems likely to cause the least irremediable prejudice to one party or the other (see the decision of the Privy Council in *National Commerce Bank Jamaica Ltd v Olint Corp Ltd* [2009] 1 WLR 1405, at [17] per Lord Hoffmann). I take this to be no different from the test referred to by O'Farrell J (see paragraph 16(3) above).

The likely timeframe for the determination of the issues at a trial

59. In *DWF v The Secretary of State for Business Innovation and Skills* [2014] EWCA Civ 900, Sir Robin Jacob, with whom the two other members of the Court agreed, said that, once it had been concluded that there was a serious issue to be tried, "*the next question is to ask how long a period the suspension might be and to what extent it should be inforce. You cannot assess the later Cyanamid questions without this essential background*" (at paragraph 50).

60. Enquiries have been made and the TCC Registry has confirmed that the court could take a 2-3 week hearing in October 2019. Although the issues are likely to be complicated, I had anticipated that judgment could be delivered reasonably swiftly, and by the end of November 2019. That would enable the mobilisation period to start in December 2019 with a view to the changeover taking place in mid 2020. This view appeared to be shared by the Claimant. But that timetable makes no allowance for the possibility of an appeal. If there were to be an appeal, that would probably delay the whole process by a further 6 to 9 months.

61. However, Mr Bowsher, for the NUH Trust, was having none of this. He submitted that this was not just a case about incorrect scoring, which was detailed enough, but also involved fundamental issues about the financial position as between a large NHS Trust and the Government. He said that the disclosure in relation to this issue would be enormous and that it was not sensible to assume that this could be achieved in time for a trial in October 2019, particularly at a time when many of the key personnel would be stretched to the utmost in dealing with the preparations for or consequences of the changeover.

62. Accordingly, Mr Bowsher submitted that the timetable which had been canvassed before the court – as set out above - was simply not a sensible option.

63. I can see the force of this. I am therefore prepared to accept Mr Bowsher's submission that a trial in October 2019 is not a viable proposition. That would mean that if the suspension is not lifted until the conclusion of the trial it may well be 15-18 months before satisfactory arrangements could be made for the NUH Trust to take over the provision of the services at the NTC. Even that period is not certain, because any judgment may be the subject of an appeal.

64. As a way round this it has been suggested by the Claimant that there might be an expedited trial in October 2019 limited to a trial of preliminary issues relating to the assessment of the NUH Trust's financial standing and sustainability and that, if this were to be determined against the Claimant, the suspension would be lifted and the trial of the remaining issues would be held at a later date. This proposal is opposed by the Defendant.

65. However, I am not satisfied that this proposal would address the practical difficulties raised by Mr Bowsher. These are the very issues that are likely to give rise to the very extensive disclosure that he mentioned during the hearing. I must therefore work on the assumption that if the suspension is not lifted a new contract could not be entered into for about 15-18 months, and possibly more (if, for example, there were to be an appeal).

The evidence

66. The witness statements put before the court for the purpose of this application run to about 250 pages, excluding the several hundred pages of exhibits. The greater part of this evidence has been devoted to the consequences for the patients of lifting the suspension, which would result in the NUH Trust taking over provision of the services at the NTC on 29 July 2019, both in terms of continuity of treatment - and hence, in some cases, patient safety – and, on the other hand, the consequences of deferring the implementation of the transformation of the service (and financial savings) which it is said the new contract will provide.

67. I have already mentioned the witnesses who produced statements on behalf of the Claimant. On the Defendant's side, there were three witness statements from Ms Amanda Sullivan, the Defendant's Joint Accountable Officer, a post she has held in CCGs for over 6 years. She is a qualified nurse and midwife by background. The NUH Trust served a witness statement from Dr Keith Girling, its Medical Director, a consultant in critical care medicine. He was formerly its Deputy Medical Director (from 2012 to 2017). The NUH Trust also served a witness statement from Mr Rupert Egginton, its Director of Finance and Procurement, a position that he has held since 2011. He is a qualified accountant with 27 years accountancy experience in the NHS.

68. As Ms McCredie and Mr Taylor put it, at paragraph 16 of their skeleton argument: "*the evidence is contradictory and presents the Court with an almost impossible task*". Mr Coppel did not disagree. During his submissions he accepted that the Court could not resolve conflicts of evidence about the length of the mobilisation period necessary to achieve a proper and orderly handover.

69. However, Ms McCredie submitted that it was clear that the Defendant had changed its position about the length of the required mobilisation period from that taken in Ms Sullivan's first witness statement dated 9 April 2019 served on behalf of the Defendant. In her first witness statement Ms Sullivan stressed that continuity of service was of paramount importance and that any gap in continuity "*would ultimately be detrimental to patient outcomes and cause a risk to patient safety*" (paragraph 12); that the fast track mobilisation plan proposed by the NUH Trust indicated that 3.5 to 4 months was the shortest practicable mobilisation plan, so that, if the suspension were to be lifted, there would be a month long hiatus in service provision.

70. The Defendant's position was that the 12 month contract extension proposed by the Claimant would not be practical or acceptable because it was not in the patients' interests to wait 12 months for the benefits of the new service envisaged under the new contract. I was reminded that the Defendant has statutory responsibilities to improve services (see the National Health Services Act 2006, at paragraph 14R).

71. The thrust of the evidence of Mr Keyvan-Fouladi was that in his professional opinion a 3.5 to 4 month mobilisation would not be safe, particularly in relation to six specialities which he identified (for example, dermatology). What he and Mr Cobb saw as being the risks of rapid mobilisation were identified at paragraph 47 of the Claimant's skeleton argument. These included the following:

> (1)the fact that the Claimant had 40 self-employed consultants working at the NTC who, it was said, would not transfer to the NUH Trust under TUPE;
>
> (2)the experience in 2012 of the difficulties that were faced when the dermatology staff had to be transferred from the NUH Trust to the Claimant (an independent review referred to the "*near collapse of acute and paediatric dermatology services*" which had been triggered by the transfer);
>
> (3)the NUH Trust's financial problems, which had led to 15 "Black Alerts" during a four-month period from 1 December 2018;
>
> (4)the Claimant's contracted off-site services and the transfer of patient data; and
>
> (5)the NUH Trust's need to buy medical equipment, IT and telephone equipment, and furniture etc.

72. A number of detailed criticisms of the updated NUH Trust plan, on which Ms Sullivan relies in her second witness statement, are set out in paragraph 48 of the Claimant's skeleton argument, where the point is made that the mobilisation plan is "*based on certain assumptions which may not be deliverable*", including the assumption that the necessary staff can be engaged by the NUH Trust "*to continue to provide capacity*". This, like the other points raised in that paragraph, is one on the soundness of which I am in no position to express an opinion.

73. In Ms Sullivan's second witness statement, dated 10 May 2019, she said that the Defendant had concluded, on the basis of the updated mobilisation plan (which had been presented to the Defendant the day before by the NUH Trust), that there would be no hiatus in the provision of the services because the Defendant was now satisfied that the NUH Trust's "live" updated plan to mobilise within some 2 months was "*robust*" and "*credible and workable*" (at paragraphs 48-65). However, Ms Sullivan did not respond directly to some of the points made by Mr Cobb: for instance, in relation to the provision of adult dermatology services, an area where he said the NUH Trust had limited resources and so would have to rely on the transfer of existing employees to the Trust under TUPE and the agreement of the 30% of the current dermatology workforce that was self-employed to work for the Trust.

74. Another area of dispute is what is known as the prevention agenda, which is to focus on the early detection of disease and thereby reducing symptoms. This was dismissed by Mr Cobb as a "*vague aspiration*" which was not capable of being the subject of an enforceable contractual requirement (at paragraph 108). There are similar issues in relation to patient experience and the improvement of performance (Ms O'Sullivan at paragraphs 15.6 and 15.7 of her first witness statement, and Mr Cobb at paragraph 109 – where he makes a similar point).

75. Ms Sullivan also raises the question of the delay in receiving the benefit of the savings that the new contract will bring (first witness statement, paragraph 15.9). Mr Cobb questions the extent to which the Defendant has tested the financial assumptions contained in the NUH Trust's financial model (at paragraph 110 of his witness statement). Some of the material relied on in each statement is confidential, but Mr Cobb makes the further point that the NUH Trust will not be able to fund the necessary expenditure without further borrowing. This, of course, is also relevant to the Claimant's point that the NUH Trust is at an unfair advantage owing to the receipt of state aid. Again, these are not issues that I can begin to determine on this application.

76. On behalf of the NUH Trust, Dr Girling said that it started mobilisation on 1 April 2019, four months before 28 July 2019, and that its mobilisation plan was now in its fifth iteration (paragraph 32 of his witness statement).

77. I have not gone into these issues in any detail because some of the material is confidential. However, the principal differences include matters of professional opinion on which, I suspect, there is room for legitimate difference of view. But whether that is so or not, they are not issues which I can resolve simply on the material in the documents.

78. Leaving aside the difficulty of resolving the disputed issue as to whether or not there will be a hiatus period following the changeover, and, if so, what its impact would be on the continuity of patient treatment and, possibly, safety, the court is faced with a further problem. As I have already mentioned, the Defendant's case is that the extended period which the Claimant says is necessary in order to achieve an orderly changeover will have a disproportionately adverse impact on the patient population generally because it would delay the introduction of the "*transformative benefits*" of the winning tender, some of which are set out in paragraph 37 of the Defendant's skeleton argument (they are confidential so I will not repeat them). To decide whether or not the drawbacks of a given period of delay do or do not outweigh the hiatus which (it is alleged) will or may occur if the changeover takes place on 28 July 2019 is, at best, a very difficult balancing exercise.

79. In the circumstances I do not see how on this application the court can attempt to resolve the conflicts in the evidence on these issues. This view is confirmed by the fact that, as I have already said, both Ms McCredie and Mr Coppel have accepted that the Court cannot safely resolve the differences in the views held by the Claimant and the Defendant (and the NUH Trust).

80. However, I would make three observations to which I invite the parties to give serious consideration. These are:

> (1) Whilst I do not doubt the integrity and professionalism of those who have compiled the mobilisation programme, in spite of the firm views expressed by Ms Sullivan there must be serious concerns about the viability of a programme that has been produced in such short order and has then been so radically revised.
>
> (2) I have reservations as to whether sufficient consideration has been given to the time needed to procure items of equipment that the Claimant said (on 1

> May 2019) that it proposed to remove from the NTC (as it is entitled to do). The Defendant has expressed surprise at the Claimant's intention to do this, which suggests that it had not been anticipated when Ms Sullivan prepared her first witness statement (and has therefore been taken into account only very recently, if at all).
>
> (3) There appears to be no allowance for anything going wrong.

81. I must emphasise that these are concerns, not findings of fact. But if the suspension is to be lifted, I consider that serious consideration must be given to some extension of the Contract in order to ensure that there is no hiatus and that the change to the new regime is as smooth as possible. At the time of preparing this judgment I am aware that there have been discussions about this, but no concluded agreement has emerged.

82. In relation to the balance of convenience, Mr Bowsher submitted that the Defendant was an entity that could be relied on because it had considerable expertise in taking this sort of decision. He submitted that there must be some degree of presumption of validity of its decisions because it was an experienced decision maker in this field. He pointed out that the Defendant's position was wholly supported by Dr Girling, who had submitted a witness statement on behalf of the NUH Trust. By contrast, he submitted that the evidence of Mr Cobb should be treated with some reservation because, as a lawyer, he did not have proper qualifications to address what were essentially issues of mobilisation and programming of medical resources.

83. The Claimant's counter to this was that Mr Keyvan-Fouladi's evidence was based on 10 years' experience as a provider of the services at the NTC and so it should not be lightly dismissed.

84. In *Kent Community Health NHS Foundation Trust v NHS Swale Clinical Commissioning Group and NHS Dartford* [2016] EWHC 1393 (TCC), Stuart-Smith J faced a similar problem. He said, at paragraph 38:

> "I do not ignore or underestimate the public interest in procurement exercises being conducted lawfully. But the likely knock-on effect of even a modest delay in resolving this case at trial must be brought into account as a significant counter-balance since it will prevent the efficient and timely introduction of the arrangements which the CCGs consider to be in the best interests of the people of Kent for whose welfare they too are responsible. As I have indicated, the public interest of the people of Kent is in principle a material factor that may affect the balance of convenience in an appropriate case. But here, the court is confronted by two limbs of the NHS, each having the same responsibilities and commitment to the public good and the efficient provision of healthcare services, and they take diametrically opposed views of what is in the public interest in the circumstances now prevailing. I am not in a position to conclude that the public interest would be better served by the Trust being the provider of these services or Virgin Care. I am therefore not in a position to bring the public interest arguments relied on into account as a significant weight on one side or another when assessing the balance of convenience."

85. He went on to say that if it were to be concluded that the damages were not an adequate remedy for the Trust, it was a counsel of prudence to maintain the *status quo*. In this case that would mean allowing the Contract to end on 28 July 2019.

86. I was referred by Mr Coppel to the decision of Akenhead J in *Solent NHS Trust v Hampshire County Council* [2015] EWHC 457 (TCC), where he said, at 38:

> "I am very concerned, on the evidence, about the "service users" and the impact of a delayed contract on the services to be provided for their benefit. Whilst, decently, Solent has agreed in principle to continue to provide the current level of services for as long as is reasonably necessary, what is not going to be provided is the new, improved and integrated service which this proposed contract was intended to provide. Although I detect an inferential argument from Ms Austen that the proposed improvements are either not important or do not provide a significantly better service than is currently being provided, the whole tendering process for the new contract has been predicated on there being substantial and important improvements in the county wide provision of services for the unfortunate "service users". At 3,200 people, this is not a small and insignificant number of people. The effect of a significantly delayed contract which plans to bring greater integration and improvements to the services for these people will, I assess, be harmful and detrimental to them. On one scenario, there will be a delay of over some 10 months and on the other scenario a delay of five months. It would be unfortunate not to say tragic if even one person died or suffered unavoidable serious physical or mental deterioration as a result of unavoidable delays in the provision of the improvements planned by the new contract. . . . I do not think that the Court should take risks with people's lives and health; by this I do not infer that Solent, if it continued under the existing regime would put "service users'" lives at risk but I do infer that the integrated and improved service to be provided under the new contract has a better chance of better outcomes and it would be wrong to risk "service users" not having the benefit of those improvements as soon as possible."

87. In my judgment, the Court is in a not dissimilar position here. Although I have the concerns that I have already set out, I am not in a position to conclude which party's evidence is more likely to be right or where the balance of convenience really lies. I think that I must assume that the witnesses putting forward the Claimant's case genuinely believe that the patients' interests are paramount and are reflected in the views that they have expressed, and that the witnesses for the Defendant and the NUH Trust have done the same. There are no obvious flaws in either side's approach, even though I do have some reservations about the feasibility and robustness of the NUH Trust's mobilisation plan.

88. I must assume, in the absence of any agreement to the contrary, that if the suspension were to be lifted the Contract will come to an end on 28 July 2019. Although there have been proposals and counter proposals, I cannot assume that arrangements will be put in place to extend the Contract for a few months in order to ensure that there is an orderly changeover.

89. Finally, in relation to the public interest Ms McCredie submitted that the consequence of maintaining the suspension and the Claimant being successful at trial would be, if the breaches were found to be sufficiently serious, a significant award of damages in favour of the Claimant in respect of its loss of profit. This would involve the Defendant paying that element of profit twice over: once to the NUH Trust as part of the price for the services, and once to the Claimant by way of damages. In support of this submission, she referred to some observations by Coulson J in *Covanta Energy v Merseyside Waste Disposal Authority* [2013] EWHC 2922 (TCC), where he said (at paragraphs 59 and 60):

> "59. In considering the balance of convenience, I find that the following factors favour granting the interim injunction. First, it is in the public interest that authorities such as MWDA comply with procurement legislation. This is a major contract involving a large sum of public money. Secondly, for the reasons that I have given, damages would not be an adequate remedy for Covanta. Thirdly, if an injunction was not granted, Covanta would be deprived of the remedy prescribed by EU law, a relevant factor in relation to the balance of convenience (Arnold J in *Morrisons*).
>
> 60. Fourthly, if Covanta did not obtain an injunction but were successful at trial, their financial claim, however it is ascertained, is likely to be considerable, and much larger than MWDA have the resources to meet. Covanta say their loss of profit is in the order of £160 million. Whatever the final amount of any damages claim, the money would have to be paid for by the customers, namely those on whose behalf MWDA collect waste. Essentially, therefore, those taxpayers would be paying for this service twice over: one payment to SITA to actually perform the service pursuant to the RRC, and one payment to Covanta who (on this hypothesis) were unfairly denied the opportunity of providing the same service. It cannot be in the public interest for taxpayers to make two payments for one service. Realistically perhaps, Miss Hannaford did not contradict this aspect of Covanta's case on the balance of convenience."

90. I accept that it is not in the public interest for the taxpayer to pay twice over for the same service. However, in any case where the breach is sufficiently serious to justify an award of damages this is, at least to some extent, an ordinary consequence of the operation of the PCR[1]. Since this duplication is potentially built in to the legislative scheme (if there is a serious breach), I consider that it must have been considered to be a price worth paying in order to achieve proper compliance with procurement legislation. But I accept that there will be cases, such as *Covanta*, where the price may be unduly high, in which case I would accept that it can become a factor which can properly be taken into account. However, there is no evidence which persuades me that this point should carry any significant weight in this case.

Conclusion

91. For the reasons given at paragraphs 21 to 56 above, I have concluded that there is nothing unjust about confining the Claimant to its remedy in damages. These would be an adequate remedy.

92. For the reasons given at paragraphs 58 to 90 above, I have not been able to reach a conclusion that the balance of convenience favours the course put forward by either party. In these circumstances, I would conclude that the least irremediable prejudice would result from preserving the *status quo* - that is to say, to leave the Contract to run its course until 28 July 2019.

93. Accordingly, the suspension must be lifted and so the Defendant's application succeeds. However, this decision does not mean that the parties cannot extend the Contract by consent if they are willing to do so. That is entirely a matter for them; but

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[1] It will not be a duplication pound for pound if the claimant's claim for loss of profit is based on the loss of a chance, but there will still be some duplication nevertheless.

I hope that when considering whether or not to adopt that course the concerns that I have already mentioned will be taken into account.