Neutral Citation Number: [2024] EWHC 3039 (TCC)

Case No: HT-2024-000271

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (KBD)

Royal Courts of Justice
Rolls Building
London, EC4A 1NL

Date: Wednesday 27th November 2024

Before :

MR ROGER TER HAAR KC

Sitting as a Deputy High Court Judge

Between:

ROBERT HEATH HEATING LIMITED

Claimant

- and –

ORBIT GROUP LIMITED

Defendant

Rhodri Williams K.C. and Tom Walker (instructed by **Simons Muirhead Burton LLP**) for the **Claimant**
Parishil Patel K.C. (instructed by **Trowers & Hamlins LLP**) for the **Defendant**

Hearing date: 12 and 13 November 2024

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APPROVED JUDGMENT

This judgment was handed down by the court remotely by circulation to the parties' representatives by email and released to The National Archives. The date and time for hand-down is deemed to be 27 November 2024 at 10:30am.

Mr Roger ter Haar KC :

1. In this procurement case, there are two applications before the Court:

(1) The Defendant's application for an order as follows:

> Any requirement arising by virtue of Regulation 95 of the Public Contracts Regulations ("PCR") 2015 that the [D] refrain from entering into the Contracts which are the subject of these proceedings to Aaron Services Limited ("Aaron") is hereby brought to end with immediate effect.

(2) The Claimant's application for early specific disclosure.

The Parties

2. This section and the next section of this judgment are taken from the skeleton argument filed by Mr Patel K.C. on behalf of the Defendant. There is no significant factual dispute as to the matters which I set out in this and the following section of this judgment.

3. These proceedings arise out of a procurement conducted by the Defendant ("OGL") for the provision of domestic and commercial heating services to its properties in the Midlands and East and South-East of England ("the Procurement"). OGL is a charitable registered provider of social housing with a portfolio of around 47,000 properties within the relevant geographical areas.

4. The Claimant ("RHH") is a limited company specialising in installing and maintaining domestic and commercial heating and water systems. RHH is a substantial commercial organisation. Its latest accounts (up to 30 June 2023) show: (i) revenue of c.£43.4m (ii) an operating profit of c.£6.68m and (iii) net assets of c.£17m. In January 2024, RHH was acquired (through its parent, Robert Heath Group Limited) by Daikin UK Limited, a wholly owned

subsidiary of Daikin Europe UK. The global group, Daikin Industries, employs over 96,000 people worldwide and achieved €28.2 billion turnover in sales in 2022.

5. In the proceedings, RHH challenges OGL's decision in the Procurement to award the contracts for the provision of domestic heating services (Lots 1.1 and 1.2) to Aaron. There is no challenge to the decision to award contracts for the provision of commercial heating services (Lots 2.1 and 2.2).

The Procurement

6. The Procurement was commenced by way of the issue of a Contract Notice on 13 November 2023. Interested bidders had to respond by noon on 8 December 2023 to the Standard Selection Questionnaire ("SSQ") issued by OGL. RHH did so.

7. Following evaluation of RHH's response to the SSQ, OGL invited RHH and other bidders to submit a tender for the Procurement. OGL did so by issuing the Invitation to Tender ("ITT") on 29 January 2024.

8. The ITT required submission of tenders by noon on 13 March 2024 and provided that the contracts would be awarded to the most economically advantageous tender ("MEAT") identified on the basis of the best price-quality ratio. The ITT stated that the ratio was 40% price and 60% quality (paragraph 6.2 of the ITT).

9. RHH submitted a tender by the deadline stipulated in the ITT.

10. By contract decision notices dated 23 July 2024, OGL informed RHH that it had been unsuccessful in its tenders for the provision of domestic heating services (Lots 1.1 and 1.2) and that Aaron was identified as submitting the MEAT in both lots. The notices provided that RHH had scored 78.86 for Lot 1.1 and 80.15 for Lot 1.2 compared to scores of 93.75 and 96.25 for the winning bidder. RHH was ranked third and fifth respectively.

11. On 29 July 2024[1], RHH's solicitors, Simons Muirhead Burton ("SMB"), wrote to OGL alleging that the contract decision notices failed to comply with the requirements of Regulation 86 of the Public Contracts Regulations 2015 ("the 2015 Regulations") and requesting that compliant notices be sent to RHH and that the standstill period be extended until at least 10 days after compliant contract decision notices had been sent.

12. On 31 July 2024, OGL's solicitors, Trowers & Hamlins ("T&H"), responded to SMB's letter stating that OGL accepted that the contract decision notices were not fully complaint with the 2015 Regulations, that they would be withdrawn, new contract award notices would be issued and a new standstill period observed following issue of the further notices.

13. New contract decision notices were issued to RHH and the other bidders on 7 August 2024. Those notices confirmed that RHH had been unsuccessful in its tenders and Aaron had submitted the MEAT in both lots. The scores awarded to RHH and Aaron and the rankings remained the same as was previously

[1] The letter is incorrectly dated 29 July 2021.

provided in the original notices. The new notices provided that the standstill period would expire at midnight on 19 August 2024.

14. By an email sent at 17.21 on 16 August 2024, SMB served upon OGL the Claim Form issued by RHH dated 15 August 2024. The Claim Form contained generic particulars, at paragraphs 8 and 9 thereof:

> On the basis of the limited information made available to [RHH] by [OGL] so far, [OGL] has breached its duties under regulation 89 as well as other obligations under the [2015 Regulations], including (without limitation) regulations 19, 24, 28, 55, 59, 86 and 87 and/or has breached enforceable general principles of retained/assimilated EU law (including (without limitation) those of equal treatment, transparency, non-discrimination, non-arbitrariness, proportionality, good administration, procedural fairness, protection of legitimate expectation and a duty to avoid conflicts of interest and collusion between tenderers, as well as a duty to conduct the procurement process free from manifest error and in accordance with the stipulated procedure set out in the ITT.
>
> As a result of these breaches (or any of them), [RHH] has suffered and/or risks suffering loss and/or damage, consisting of the loss of opportunity to be awarded a contract or contracts under the Lots for which it tendered.

15. Prior to the issue of the Claim Form, RHH had not provided OGL with any specific particulars of breach and/or any matters upon which it relied in alleging that OGL had breached its duties in the conduct of the Procurement. The only correspondence was a letter from SMB to T&H dated 14 August 2024 in which they had asked T&H to confirm that they were instructed by OGL to accept service of proceedings and that OGL should provide wide-ranging disclosure. T&H responded to SMB on 15 August 2024 confirming that it was instructed to accept proceedings but explaining the procedural concerns expressed in previous correspondence had been rectified, that no substantive concerns about the Procurement had been raised and therefore in those circumstances it was

unclear why it had been asked to accept service of proceedings and/or why wide-ranging requests for disclosure had been made. T&H responded that, in those circumstances and in the absence of any grounds of claim having been raised, the requests for disclosure were refused.

16. The requests for disclosure made in SMB's letter were reiterated when the Claim Form was served: see SMB's letter dated 16 August 2024.

17. T&H responded by letter dated 22 August 2024 stating that, although RHH had issued and served a Claim Form, it had still not set out any grounds and continuing that if RHH "had genuine concerns about the Procurement … it should (at the very least) have set these out in correspondence to [OGL] before issuing a Claim and could have requested an extension to the standstill period … [i]nstead, and despite the fact that litigation should be a last resort, [RHH had] issued a Claim on unknown grounds, triggering the automatic suspension under Regulation 95". In those circumstances, T&H said that OGL would await receipt of the Particulars of Claim to understand the claims it was required to defend and would not be providing disclosure.

18. On 22 August 2024, RHH filed and served Particulars of Claim, running to 31 pages and 116 paragraphs. RHH advanced three grounds:

    (1) first, that there was a conflict of interest in relation to Ms. Emma Nicklin, a pervious employee of OGL, who was now employed by Sureserve Group Limited ("the Conflict Challenge");

    (2) second, that OGL committed manifest errors and/or breached its obligation to act with transparency in the scoring of some of the

responses to the quality questions in RHH's tenders ("the Scoring Challenge");

(3) third, that OGL committed a breach of its obligation of equal treatment in awarding the maximum score of 5 (excellent) to Aaron for its responses to the quality questions, demonstrating the alleged conflict of interest.

19. By reason of the alleged breaches, RHH claimed damages for its wasted tender costs "if the tender procedure is abandoned" (paragraph 115) and that "had [OGL] acted lawfully in its conduct of the Procurement, the tender of Aaron … would have been disqualified and [RHH] would have obtained a significantly higher score on its tender for both Lots 1.1 and 1.2 and has, as a consequence, lost the opportunity to be awarded a contract for Lots 1.1 and/or 1.2" (paragraph 116). No claim for damages for lost profits was made by RHH.

20. On 23 August 2024, SMB wrote to T&H requesting disclosure of all documents sought in previous correspondence but also a copy of the tender submitted by Aaron.

21. On 9 September 2024, T&H wrote to SMB seeking RHH's agreement (by 4pm on 13 September 2024) to an order lifting the automatic suspension by consent on the basis that: (i) the three grounds advanced in the Particulars of Claim did not establish a serious issue to be tried (ii) damages were an adequate remedy for RHH and (iii) in any event the balance of convenience favoured the lifting of the automatic suspension. T&H sought confirmation from RHH that, if it was not prepared to consent to an order lifting the automatic suspension, it

would provide a "cross-undertaking in damages to compensate [OGL] for any losses suffered as a result of [OGL] being unable to enter into the contract and subsequently succeeding at trial …"

22. The only response received was SMB's letter dated 17 September 2024 in which it only stated that RHH "will not consent to the automatic suspension being lifted". RHH did not set out the basis upon which it objected and did not respond to the request for a cross-undertaking in damages.

23. On 19 September 2024, OGL filed and served its Defence[2], which denied (i) the breaches alleged by RHH in the conduct of the Procurement and the evaluation of the tenders and (ii) that any breach which could be established deprived RHH of being awarded the contracts under Lots 1.1 and/or 1.2 (or the opportunity thereof).

24. On 3 October 2024, SMB wrote to T&H requesting disclosure of a wide range of documents (explicitly stated to be wider than those previously requested although disclosure of Aaron's tender was no longer sought). In addition, disclosure was sought of the "moderation feedback" referred to in the Defence. SMB sought disclosure by 4pm on 8 October 2024 (within three working days) failing which RHH would make "the necessary application to court".

25. T&H responded by letter dated 8 October 2024 saying that:

[2] An Amended Defence was filed and served on 3 October 2024.

(1) in line with the principles of early disclosure set out in the case law and the TCC's Guidance Note, OGL's initial position was that RHH would not be entitled to early disclosure of all the information sought;

(2) nonetheless, OGL was considering RHH's wide-ranging requests;

(3) but OGL would require a reasonable period to respond and would respond substantively by 17 October 2024.

26. T&H disclosed the moderation feedback referred to in the Defence which RHH had requested.

27. On 8 October 2024, RHH filed and served its Reply and a Request for Further Information.

28. By letter dated 9 October 2024 from SMB to T&H, RHH objected to the time which OGL had sought in providing a substantive request and confirmed that it would be proceeding with its application. Less than an hour later, RHH filed and served its sealed application for specific disclosure, enclosing a draft order for specific disclosure "within 14 days" and a detailed witness statement in support.

29. On 15 October 2024, OGL filed and served its application to lift the automatic suspension, with a draft order and witness statement in support.

30. As promised, T&H provided OGL's substantive response to RHH's requests for specific disclosure in a letter dated 17 October 2024. Save that OGL agreed to disclose a copy of the Regulation 84 report in due course, it refused the other requests.

31. On 22 October 2024, OGL filed and served a Response to RHH's Request for Further Information.

32. By letter dated 31 October 2024, OGL disclosed, having redacted personal data and confidential and commercially sensitive information:

    (1) a copy of the Regulation 84 report;

    (2) a full copy of the moderation feedback for RHH's responses to the quality questions.

33. On 1 November 2024, OGL filed and served its evidence in relation to RHH's application for specific disclosure.

34. On 4 November 2024, RHH filed and served its evidence in relation to OGL's application to lift the automatic suspension.

35. On 6 November 2024:

    (1) OGL filed and served evidence in response in relation to the automatic suspension application;

    (2) RHH filed and served evidence in response in relation to the specific disclosure application. Included within the exhibit was a letter from SMB to T&H dated 6 November 2024 narrowing the scope of the specific disclosure application considerably.

THE LAW

Automatic Suspension

36. The applicable legal principles relevant to the Defendant's application to lift the automatic suspension are not in dispute in any significant way between the parties. The following summary is taken from the skeleton argument of Mr Williams, leading counsel for RHH.

37. The commencement of proceedings brought into effect the automatic suspension under Regulation 95(1) of the 2015 Regulations, preventing OGL from entering into the contracts with Aaron.

38. The automatic suspension may be lifted by the Court as provided by Regulation 96 of the 2015 Regulations:

> (1) In proceedings, the Court may, where relevant, make an interim order –
>
> (a) bringing to an end the requirement imposed by regulation 95(1);
>
> (b) restoring or modifying that requirement;
>
> (c) suspending the procedure leading to –
>
> (i) the award of the contract; or
>
> (ii) the determination of the design contest,
>
> in relation to which the breach of the duty owed in accordance with regulation 89 or 90 is alleged;
>
> (d) suspending the implementation of any decision or action taken by the contracting authority in the course of following such a procedure.
>
> (2) When deciding whether to make an order under paragraph (1)(a)-
>
> (a) the Court must consider whether, if regulation 95(1) were not applicable, it would be appropriate to make an interim order requiring the contracting authority to refrain from entering into the contract; and

> (b) only if the Court considers that it would not be appropriate to make such an interim order may it make an order under paragraph (1)(a).
>
> (3) if the Court considers that it would not be appropriate to make an interim order of the kind mentioned in paragraph (2)(a) in the absence of undertakings or conditions, it may require or impose such undertakings or conditions in relation to the requirement in regulation 95(1).
>
> …
>
> (5)This regulation does not prejudice any other powers of the Court.

39. It is now well established that the applicable principles to an application to lift the automatic suspension are those set out in *American Cyanamid v Ethicon* [1975] AC 396 as explained in *Covanta Energy Ltd v Merseyside Waste Disposal Authority* [2013] EWHC 2922 per Coulson J (as he then was) at [34] and [48], and summarised by the Court in *Alstom v Network Rail Infrastructure Ltd* [2019] EWHC 3585 (TCC) at [29] (see further, the explanation of the legal principles provided by Fraser J in *Lancashire Care NHS Foundation Trust & Anor v Lancashire County Council* [2018] EWHC 200 (TCC) at [14] to [30])). Accordingly, the Court must consider the following issues (*Draeger Safety UK Limited v The London Fire Commissioner & Anor* [2021] EWHC 2221 (TCC) at [21])):

(1) Is there a serious issue to be tried?

(2) If so, would damages be an adequate remedy for the claimant if the suspension were lifted and they succeeded at trial; is it just in all the circumstances that the claimant should be confined to its remedy of damages?

(3) If not, would damages be an adequate remedy for the defendant if the suspension remained in place and it succeeded at trial?

(4) Where there is doubt as to the adequacy of damages for either of the parties, which course of action is likely to carry the least risk of injustice if it transpires that it was wrong, that is, where does the balance of convenience lie?

Serious issue to be tried

40. The test for establishing that there is a serious issue to be tried is whether the Court is satisfied that the claim is not frivolous or vexatious. In *Bristol Missing Link Ltd v Bristol City Council* [2015] EWHC 876 (TCC), Coulson J (as he then was) held at [33] that:

> …in the ordinary procurement case, where there may be points to be made on both sides, it will often be unproductive for the parties (and a waste of judicial resources) to spend a good deal of time arguing about the merits or otherwise of the underlying claim. The threshold is, after all, a low one: see *The Newcastle upon Tyne NHS Foundation Trust v Newcastle Primary Care Trust* [2012] EWHC 2093 (QB).

41. Coulson J further held at [34] that:

> …in cases where there are clear issues arising out of individual scores, it will be difficult for the court to conclude that there is no serious issue to be tried; and, second, that this difficulty arises, at least in part, because the relevant documents have yet to be disclosed.

Adequacy of damages

42. On the issue of the adequacy of damages in the procurement context, the following relevant guidance can be derived from the authorities (see *Bristol Missing Link Ltd* at [49]):[3]

(1) If damages are an adequate remedy, that will normally be sufficient to defeat an application for an interim injunction, but that will not always be so.

(2) The Court must assess whether it is just, in all the circumstances, that the claimant be confined to its remedy of damages.

(3) If damages are difficult to assess, or if they involve a speculative ascertainment of the value of a loss of a chance, then that may not be sufficient to prevent an interim injunction.

(4) In procurement cases, the availability of a remedy of review before the contract was entered into, is not relevant to the issue as to adequacy of damages, but it is relevant to the balance of convenience.

(5) The difficulty of assessing damages based on the loss of a chance and the speculative or 'discounted' nature of the ascertainment, has been a factor which the Court has taken into account in concluding that damages would not be an adequate remedy.

43. I return below to the authorities on when adequacy of damages as a remedy will justify lifting of the automatic suspension on a procurement process.

[3] See further the discussion of adequacy of damages in *Central Surrey Health Ltd v NHS Surrey Downs CCG* [2018] EWHC 3499 (TCC) at [56] to [63].

Balance of convenience

44. In *Bristol Missing Link Ltd* Coulson J identified at [48] four elements of the balance of convenience that need to be considered on an application to lift the automatic suspension:

(1) The adequacy of damages;

(2) The importance of the remedy of review;

(3) The advantages and disadvantages to the parties if the suspension is not lifted; and

(4) The advantages and disadvantages to the parties if the suspension is lifted.

45. The Court in *Alstom Transport UK Limited* at [51] provided the following relevant guidance for determining where the balance of convenience lies:

(1) The Court should consider how long the suspension might have to be kept in force if an expedited trial could be ordered.

(2) The Court may have regard to the public interest.

(3) The Court should consider the interest of the successful bidder, alongside the interests of the other parties.

(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 lift the suspension and allow the contract to be entered into.

The Conflicts Challenge: the Law

46. As set out above, and as discussed further below, RHH's challenge is based firstly upon an alleged conflict concerning a former employee of OGL, Ms Nicklin.

47. Conflicts of interest are dealt with by Regulation 24 of the 2015 Regulations:

> (1) Contracting authorities shall take appropriate measures to effectively prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures so as to avoid any distortion of competition and to ensure equal treatment of all economic operators.
>
> (2) For the purposes of paragraph (1), the concept of conflicts of interest shall cover at least any situation where the relevant staff members have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure.
>
> (3) In paragraph (2)-
>
> > "relevant staff members" means staff members of the contracting authority, or of a procurement service provider acting on behalf of the contracting authority, who are involved in the conduct of the procurement procedure or may influence the outcome of that procedure; and "procurement service provider" means a public or private body which offers ancillary purchasing activities on the market.

48. Pursuant to Regulation 57(8)(e) of the 2015 Regulations, contracting authorities may exclude from participation in a procurement procedure any economic operator where a conflict of interest within the meaning of Regulation 24 cannot be effectively remedied by other, less intrusive, measures.

49. O'Farrell J provided relevant guidance on conflicts of interest in procurement cases in *Siemens Mobility Ltd v High Speed Two (HS2) Ltd* [2023] EWHC 2768 (TCC) at [747] to [754]. In particular:[4]

(1) The Regulations impose an obligation on the contracting authority to investigate, identify and remedy any conflicts of interest (at [748]).

(2) The reference in the Regulations to any interest which might be perceived to compromise the impartiality and independence of those involved in the procurement raises the test of the fair-minded and informed observer by analogy with the test for apparent bias at common law (at [749]).

(3) The common law test for apparent bias, as formulated by the House of Lords in *Porter v Magill* [2002] 2 AC 357 at [102]-[103], is as follows:

> The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased.

The Scoring Challenge: The Law

50. The second main limb of RHH's challenge concerns the scores attributed by OGL to RHH's bid.

[4] *Siemens v HS2* concerned a claim under the Utilities Contracts Regulations (**"UCR"**) 2016. However, the relevant Regulation, Regulation 42, is in materially the same terms as Regulation 24 the 2015 Regulations.

51. Regulation 18 of the 2015 Regulations imposes on contracting authorities obligations of equal treatment and transparency:

> (1) Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.
>
> (2) The design of the procurement shall not be made with the intention of excluding it from the scope of this Part or of artificially narrowing competition.
>
> (3) For that purpose, competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.
>
> ….

52. The applicable legal principles to a scoring claim were set out by O'Farrell J in *Siemens v HS2* at [135] to paragraphs [146]. At paragraph [146], O'Farrell J held that the approach to be adopted in respect of a scoring challenge is as follows:

> (i) The tender documents must be construed objectively on the basis of the standard of the RWIND tenderer.
>
> (ii) The court must consider whether the assessment criteria and tender process set out in the tender documents were applied objectively, uniformly, without discrimination or consideration of undisclosed criteria, and in a proportionate manner to all tenderers.
>
> (iii) The court must consider whether there was any manifest error in the tender evaluation exercise, such as a failure to consider all relevant matters, consideration of irrelevant matters, or a decision that is irrational in that it is outside the range of reasonable conclusions open to the utility.
>
> (iv) The court must not substitute its own assessment for that of the contracting utility. Its role is limited to a review of the process to determine whether the published rules of the

> procurement were followed in compliance with the regulations."[5]

Is there a serious issue to be tried?

53. The first issue which I have to consider is whether there is a serious issue to be tried.

54. Although the Particulars of Claim set out three grounds of challenge (see paragraph 18 above), the third ground is really a consequence or development of the first two grounds. Accordingly, it is convenient to consider first the Conflict Challenge and then the Scoring Challenge.

The Conflict Challenge

55. The first ground is pleaded at paragraphs 32 and 33 of the Particulars of Claim:

> 32. In breach of the obligations arising, in particular under regulations 18 and 24 of the 2015 Regulations, and in breach of the implied Tender Contract and the procedure set out in the ITT, the Defendant's Procurement and Commercial Lead, Ms Emma Nicklin, who was responsible for and involved in the management and procurement of the Defendant's contracts, left the Defendant's employment in or about December 2023, after the commencement of the Procurement in June 2023 but before the deadline for submission of tenders in March 2024, and became a board director of the parent company of the preferred bidder, Aaron Services Limited, which thereby became privy to knowledge of the tender evaluation process, including possible model answers, which were unknown to all other tenderers.
>
> 33. Although, pending full disclosure by the Defendant, the Claimant is unaware of whether Aaron Services Limited declared at Appendices 1 and 2b of its tender the conflict of interest which had arisen and/or any canvassing or soliciting which had occurred, the Defendant was at all material times aware, at the very least, of the potential for a conflict of interest and, in breach of regulations 18 and 24 and the terms of the implied tender contract, it failed to take any measures to effectively prevent,

[5] As above, the relevant Regulation of the UCR 2016, Regulation 36, is in materially the same terms as Regulation 18 the 2015 Regulations.

> identify or remedy the conflict of interest which had arisen in the conduct of the procurement and instead allowed Aaron Services Limited to tender in a manner which distorted competition and did not ensure equal treatment of all tenderers.

56. In the Amended Defence, OGL responded as follows:

> 22. Paragraph 32 is denied. There is no proper basis to allege conflict of interest. Without prejudice to the foregoing, Orbit relies upon the following:
>
> 22.1 Until Emma Nicklin's resignation in October 2023 (and subsequent departure in January 2024) from her employment with Orbit, she was Head of Commercial Delivery, with her role being related to commercial delivery and contract management. For the avoidance of doubt, she was purely involved in the commercial side of Orbit's business and her role was not procurement related;
>
> 22.2 In January 2024, upon her departure from Orbit, Ms. Nicklin moved to, and is employed by Sureserve Group, not Aaron. Ms Nicklin's last day of employment with Orbit was 9 January 2024, prior to the issue of the ITT on 29 January 2024;
>
> 22.3 In respect of the Procurement, Ms. Nicklin played no role and was not involved at all in the design and management of the Procurement. The Procurement was designed by an interim Procurement Business Partner contracted to Orbit at the time, in close collaboration with Orbit's procurement team (of which Ms. Nicklin was not a part);
>
> 22.4 Ms. Nicklin gave notice of her resignation from Orbit in October 2023, prior to the commencement of the Procurement on 8 November 2023. Notwithstanding that she was not involved in the Procurement, Orbit took steps to ensure that no conflict of interest could arise in respect of the Procurement and in respect of other projects and commercially sensitive matters. By 31 October 2023, Orbit removed Ms. Nicklin's access to her commercial email address, had suspended her membership of Orbit's internal assurance and approval board (known as the Commercial Group Board) and restricted her access to commercial and sensitive data.
>
> 23 In the premises, it is denied that there is any basis for the allegation that, by reason of Ms. Nicklin's employment with Orbit and then Sureserve Group or otherwise, Aaron became privy to knowledge of the tender evaluation process not known to the other bidders. Such an allegation amounts to no more than pure speculation. It is further denied, as alleged in paragraphs 40, 51, 57, 64, 70, 76, 92, 98, 104, 110 and 111, that Orbit breached

> its duty of equal treatment or otherwise acted unlawfully in awarding a maximum score of 5 following evaluation of the answers submitted by Aaron as part of its tender. It is pure speculation that this evidenced that Aaron had been privy to information not known to the other bidders.
>
> 24. Paragraph 33 is denied. It is averred that Aaron did not declare any conflict of interest in Appendices 1 and 2b to the ITT in the submission of its tender. It is denied, insofar as it is alleged, that it was required to do so and/or that Orbit acted unlawfully in not disqualifying Aaron from the Procurement by reason of Ms. Nicklin's employment with Sureserve Group.

57. In the Reply, RHH responded:

> 10. Paragraphs 22.1 to 22.4 are not admitted, as being matters within the knowledge of the Defendant and Ms Nicklin alone and the Defendant is put to strict proof of the matters alleged therein. Without prejudice to the generality of the foregoing, the Claimant will aver:
>
> a. That Ms. Nicklin's official job was advertised as and was "Procurement and Commercial Lead", as averred in paragraph 32 of the Particulars of Claim;
>
> b. That, on the Defendant's case, Ms. Nicklin did not give her resignation notice to the Defendant until October 2023, long after the procurement procedure had been commenced in June 2023;
>
> c. That, further on the Defendant's case, Ms. Nicklin remained in post until 9th January 2024, after the Contract Notice was issued on 13th November 2023 and during the period when the contract documentation was being drafted and prepared before being issued to tenderers on 29th January 2024;
>
> d. That it is admitted by the Defendant that Ms. Nicklin did join the Sureserve Group, the parent company of the successful tenderer, Aaron Services Ltd, as averred in paragraph 32 of the Particulars of Claim;
>
> e. That following her departure from the Defendant and her taking up a post within the Sureserve Group, but before the original award decision was notified by the Defendant on 23rd July 2024, in May 2024, Ms. Nicklin indicated to the Claimant that, a company in the group of her new employer was very likely to be awarded the contract or contracts for which it had tendered;
>
> f. That it is to be inferred that this was stated as a result of information in relation to the tender procedure which Ms. Nicklin had gained as a result of her employment with the Defendant and

> was able to and did pass on to the successful tenderer, within the Sureserve Group;
>
> 11. As to paragraph 23, it is repeated and averred that the Defendant has refused to provide the Claimant with any disclosure of the tender evaluation documentation in respect of the tender submitted by the successful tenderer, Aaron Services Ltd.
>
> 12. The admission in the second sentence of paragraph 24 is noted. It is averred that the Defendant was aware of this conflict of interest and, based on the information provided by Ms. Nicklin to the Claimant, the Defendant should, at the very least, have sought clarification of the declaration made by Aaron Services Ltd in Appendices 1 and 2b to the ITT in the submission of its tender and of what steps had been taken by it to prevent a conflict of interest and/or any unfair advantage from arising and, in the absence of a proper explanation of such steps, should have disqualified its tender.

58. In support of its application for an order lifting the automatic suspension, OGL has provided two statements from Mr. Warwick, its Interim Procurement Delivery Lead. In the first statement, he deals with the alleged conflict of interest:

> 40. I am however able to address the grounds relating to the alleged conflict of interest (the first and third grounds of challenge), and my direct knowledge of these matters has been supplemented by information provided to me by Mr Van Kampen:
>
> > 40.1 Prior to 9 January 2024, Ms Nicklin was Head of Commercial Delivery at Orbit, with her role covering commercial delivery and contract management. Ms Nicklin was not involved in the procurement function of Orbit (and had no role or involvement whatsoever in the Procurement) and was purely involved on the commercial side of Orbit's business.
> >
> > 40.2 Ms Nicklin handed in her notice to Orbit during October 2023 and her final day of employment with Orbit was 9 January 2024. I understand from LinkedIn that Ms Nicklin is now employed by Sureserve Group as 'Board Director, Commercial, Change & Transformation Director' **….**. I also understand that Aaron Services is a group company of Sureserve Group.

40.3 Following Ms Nicklin handing in her notice, Mr Van Kampen was contacted by Daniel Churton, Commercial and Transformation Director at Orbit, on or before 26 October 2023 to discuss limiting Ms Nicklin's access to commercially sensitive data, including in relation to the Procurement specifically.

40.4 On 26 October 2023, Mr Van Kampen was copied into an email from Mr Churton to Richard Wright, Orbit's Head of Governance and Group Company Secretary, and Paul Richards, Group Director of Customer and Communities, about the measures which were proposed to be taken …. In that email, Mr Churton states:

> *"Following the resignation of Emma Nicklin earlier this month, I've reflected on the organisation that she is moving to (Sureserve, as Group Commercial Director) and the portfolio of services that they provide to this sector, and I want to make sure that we don't get into a position of accusations by other tenderers of a conflict of interest through her exposure to commercially advantageous information, albeit I see this as a very low risk.*
>
> *In particular, we are currently working towards retendering the Heating Services category and K&T Heating and Aaron Services (both part of Sureserve Group) are likely to submit a tender response. Emma isn't in the Procurement Team and hasn't been involved in any of the procurement process to date, and the tender doesn't go to market until next February, with Emma leaving us at Christmas. However, although this gives a 2-month gap, I have been prudent and asked Erik to ensure that there is an air gap with Emma and she will specifically have no exposure to the profile of the market and our current thoughts on things like the tender scoring mechanism or evaluation process.*
>
> *I've also decided to step Emma down from the Procurement and Commercial Change Board to limit her exposure to future opportunities, and focus her remaining 2 months on a couple of key projects that I need her to deliver…".*

40.5 Upon receipt of Mr Churton's email on 26 October 2023, Mr Van Kampen contacted Keitlina Gashi, Commercial Officer at Orbit, on the same day to ask her to ensure that Ms Nicklin was removed from shared mailboxes, was not sent papers for the Change Board and did not have access on Sharepoint to the shared folders for the Change Board ….

40.6 Mr Van Kampen also asked Emma Wolfe, former Business Intelligence Lead at Orbit, on or around that date to remove Ms Nicklin's access from the shared Microsoft Teams channels where any information on the Procurement may have been kept. As an extra precaution, and despite Ms Nicklin's access to those channels having been revoked, I recall that Ms Holland also removed any Procurement information from the Microsoft Teams channels, and held information related to the Procurement on a shared drive that was restricted to the Procurement Team only (which, for the avoidance of doubt, Ms Nicklin did not have access to). Ms Nicklin was also removed from the attendee list for the Change Board and was not included in any discussions related to the Procurement. I am told by Mr Van Kampen that he and Mr Churton agreed that Ms Nicklin's work during her notice period would be limited to handing over responsibilities for managing the Commercial Delivery Team and progressing the design and delivery elements of the Contract Management Framework.

40.7 Both Mr Richards and Mr Wright agreed with the approach set out in Mr Churton's email of 26 October 2023, with Mr Wright responding on 31 October 2023 …. to say that:

> *"I feel that this should be sufficient and reasonable. If we are sure that Emma has had no involvement in the procurement of the Heating Services contract to date and this will remain the case during her notice period; the separation measures, as described, are put in place with appropriate oversight; and she is removed from the PCCB and any exposure to our evaluation and scoring processes; then I think we will have done what could be reasonably expected to protect Emma and Orbit in these circumstances.*
>
> *So I'm happy with what has been, and will be, put in place. The only other issue will be Emma's access to sensitive/confidential/commercial data but I'm sure this will have been considered.".*

40.8 In response to Mr Wright's email, Mr Van Kampen replied on 31 October 2023 …. to *"confirm that we have created the 'air gap' operationally now and Emma now longer has access to the Commercial Email address, has been removed from Change Board, and will no longer be involved in discussions around the pipeline of work and tender activity… Access to commercial and sensitive data has been taken into account.".*

> 40.9 Ms Nicklin's access to any information related to the Procurement (amongst other things) had therefore been restricted by 31 October 2023, prior to commencement of the Procurement on 8 November 2023. Further, by the time that the ITT was issued on 29 January 2024, Ms Nicklin had left the organisation.
>
> 41 For the reasons set out above, I do not consider that any conflict of interest in respect of Ms Nicklin could have arisen. The grounds of claim reliant on an alleged conflict of interest are therefore unsustainable.

59. RHH filed one witness statement from Mr McIntosh in which he said:

> 42. I also understand there to be a serious issue to be tried in respect of RHH's conflict of interest claim concerning Miss Nicklin, which is addressed by Mr Warwick at paragraphs 39 to 41 of Warwick1.
>
> 43. Miss Nicklin is a former employee of Orbit, who from the beginning of 2024 became an employee of the Sureserve Group (the owner of the successful bidder, Aaron Services). This was after the commencement of the Procurement in June 2023, but before the deadline for the submission of tenders in March 2024.
>
> 44. RHH contends that Miss Nicklin's employment at Orbit and later the Sureserve Group, gave rise to an unlawful conflict of interest. By virtue of her previous employment at Orbit, she would have been privy to knowledge of the tender evaluation process which would have given an unfair advantage to the successful bidder, Aaron Services. For example, Miss Nicklin may well have had access to model answers. I note that Orbit has conspicuously failed to say whether Miss Nicklin had access to model answers, despite this point being raised in paragraph 32 of RHH's Particulars of Claim.
>
> 45. Various titles have been assigned to Miss Nicklin in relation to her employment at Orbit. However, it is clear that her role(s) pertained to Procurement. In the email chain exhibited to RW1 (RELW1p.166), she is described as being *"from the Procurement and Commercial Change Board"*. She is described at page 38 of the power point presentation, prepared by Orbit for a Leadership Day on 10th January 2023 (where all the senior staff at Orbit were present) as representing the area of *"Procurement and Commercial"* (WGM1 p.806). On 22nd December 2023, Rhys Warwick provided a LinkedIn Recommendation for Emma Nicklin, saying that he has *"worked with Emma for a few years"…"and more recently reported directly to her"* (WGM1 p.811). So, around the time of the Procurement, which Mr Warwick was involved in the manner (at

least) explained in RW1 paragraph 7, he worked with and was reporting into Emma Nicklin.

46. RHH first became acquainted with Miss Nicklin in May 2022, when Martin Bird, Orbit's *"Interim Head of Procurement"* at the time emailed Stuart Cocks, RHH's former Commercial Director, on 5th May 2022, (WGM1 p.815-826) saying *"As a matter of urgency I would like to meet with you along with our new Head of Commercial Delivery (Emma Nicklin) to talk through and give you an insight into what is happening with Orbit with Procurement and Commercial, understand the challenges you are currently facing and your views on our current partnership"*. The meeting on 12th May 2022 was attended by myself, Stuart Cocks, and Michael Heath (from RHH). This was the start of the negotiations relating to RHH's 2022 Contract which Miss Nicklin managed on behalf of Orbit. During these negotiations, myself, Stuart Cocks and Michael Heath got to know Miss Nicklin well. She was always presented by Orbit, and held herself out, as being a senior level member of the Procurement and Commercial Department. On account of the relationship between Miss Nicklin and RHH, she came to have a detailed understanding of RHH's business and the details of its contract pricing arrangements.

47. Mr Warwick says only that Miss Nicklin handed in her notice during October 2023. The precise date is not provided, but I would expect her to have a 3 month notice period, which would accord with her departure on 9th January 2024, (which I note is contrary to Miss Nicklin's LinkedIn profile which says that she left in February 2024). If she did hand in her notice at the beginning of October 2023, there seems to me to be a long period after she handed in her notice but before her Procurement involvement and visibility was restricted in the circumstances described at paragraphs 40.2-40.9 of Warwick1.

48. In relation to those circumstances, with the exception of Keitlina Gashi, all those on the relevant email chain (RELW1 p.166) have left Orbit, and so there is no one there to provide a first-hand account of the precise circumstances. I also note that Mr Warwick says an *"Emma Wolfe"* was also involved, but there is nothing to support this.

49. After Miss Nicklin joined the Sureserve Group, I saw her on 8th May 2024, at the Chartered Institute of Housing Conference in Brighton. Before dinner, Miss Nicklin and I got chatting, together with some other guests at the conference, during which she said to me that she believed the Orbit tender to be *"as good as secured by Sureserve".* I knew that she couldn't mean the Sureserve Group, because it hadn't made a bid; she clearly meant Aaron Services or K&T. This insight from Emma Nicklin was

> consistent with my understanding that she continued to have close involvement with and knowledge of the Procurement.
>
> 50. On 11th June 2024, at the ASCP Conference at Celtic Manor I engaged in conversation with employees of the Sureserve Group (although Miss Nicklin was not there) about the Procurement. Although nothing was expressly said, I had the impression that they knew something which I didn't about the outcome of the tender being favourable to the Sureserve Group. I can only infer that this was a result of Miss Nicklin's insider knowledge.
>
> 51. Later that evening, I mentioned these matters to Shelley Yeomans. A few weeks later, I heard that these matters had been reported to Eric Van Kampen, but I do not know the circumstances. Given the seriousness of these matters, I expected Orbit to formally contact me, but to my surprise no one ever has.
>
> 52. In summary, my understanding is that Miss Nicklin's employment at the Sureserve Group amounted to an unlawful conflict of interest. At the very least, myself, my colleagues, and indeed others in the industry, felt that that there was an appearance of bias.

60. Mr. Warwick responded to that evidence in his second witness statement:

> 10. At paragraph 45 of his statement, Mr McIntosh again seeks to characterise Ms Nicklin's role at Orbit as one which was related to the Procurement. That is not correct.
>
> > 10.1 In my First Witness Statement, I explained that Orbit removed Ms Nicklin from the Commercial and Procurement Change Board (the **Change Board**) as part of the actions taken to ensure that no conflict of interest arose after Ms Nicklin handed in her notice. The Change Board comprises a panel of commercial, procurement and operational colleagues who make decisions on contract changes and future procurement exercises. The Change Board is an approvals board, and the panel does not see any copies of procurement documentation. A copy of the Terms of Reference for the Change Board can be found at *[pages 1 to 5]*.
> >
> > 10.2 In relation to the Procurement itself, the Change Board approved three "Gateway" papers, the first to approve the decision to conduct the Procurement, the second for approval to execute the Procurement, the third to approve the final contract award decision. Ms Nicklin was only in attendance at the Change Board meeting which approved the first of the Gateway Papers, on 8 June 2023, i.e. to approve the decision to commence the Procurement. Ms Nicklin was not in

> attendance at either of the subsequent Change Board meetings on 1 November 2023 and 3 July 2024 (by which time, Ms Nicklin had left the business) and so she did not have sight of any of the tender documentation (including, for the avoidance of doubt, any model answers).
>
> 10.3 Further, whilst Ms Nicklin was described in the power point presentation referred to in Mr McIntosh's statement as representing the area of "Procurement and Commercial", Ms Nicklin's actual role was as Head of Commercial Delivery and she was not involved in the procurement function of Orbit at all. Indeed, the previous slide exhibited at page 806 of WGM1 lists Ms Nicklin under "*Repairs Transformation Business Leads (Commercial & CSC)*". The reference to Ms Nicklin representing "Procurement and Commercial" elsewhere in the presentation is a misnomer.
>
> 10.4 Finally, whilst I did report directly to Ms Nicklin who was my line manager between August 2023 until her resignation, I reported to her purely in relation to commercial matters and not for any procurement activities. Where I assisted with the procurement function for this tender, I liaised with Ms Holland, Ms Bishop and Mr Van Kampen.

61. As I have set out above, my task is to decide whether there is a serious issue to be tried in relation, here, to the conflicts challenge. That involves asking whether the claim is frivolous or vexatious. As Coulson J. said in the *Bristol Missing Link* case, "the threshold is a low one."

62. Mr Patel submits in his skeleton argument that:

> 52.1 although D is mindful that the court should not embark on a trial or mini-trial of the claims raised in the proceedings, those claims (properly considered) do not raise a serious issue to be tried:
>
> 52.1.1 the evidence relied upon by D establishes that Ms. [Nicklin] was not involved in the Procurement to give rise to a conflict of interest on D's part in the conduct of the Procurement. In any event, the evidence further establishes that D took appropriate steps to identify, prevent and remedy any conflict of interests arising and to ensure equal treatment of all economic operators. Prior to the Procurement commencing, her access to the relevant (and sensitive) material was restricted. The ITT (which contained the evaluation criteria on which the bids were assessed) was not

> issued until she had left the D's employment. C's assertions to the contrary are not based on evidence but instead amount to no more than (wild) speculation. Further, the "off-the-cuff" conversation which Mr. McIntosh of C is alleged to have had with Ms. Nicklin on 8 May 2024 and/or other unparticularised conversations at the ASCP conference on 11 June 2024 (see WGM1 at paragraphs 49-50 [**412**]) do not establish (even arguably) that Ms. Nicklin had any knowledge of the Procurement which could have given Aaron an unfair advantage.

63. I do not accept that submission. In my judgment, the evidence which I have set out above establishes a claim which passes the low threshold to show that there is a serious issue to be tried. The evidence at least calls into question what exactly was Ms Nicklin's role at OGL, and what information she had which might have been of use to the ultimately successful bidder. However, I should record that on the second day of the hearing before me, which was concerned with the disclosure application referred to below, it was stated by Mr Patel on instructions that there never were any "model answers". To that extent, assuming no such model answers come to light on further investigation, it would appear that the case as pleaded will require refinement.

64. I do not have to decide whether RHH's case is strong or weak – it is obvious that it faces some evidential difficulties. It is enough that in my view it clears the low threshold required.

The Scoring Challenge

65. The scoring challenge is pleaded in detail at paragraphs 34 to 110 of the Particulars of Claim. At points the pleading overlaps with the Conflicts Challenge. Thus, in an allegation repeated in respect of a number of places in respect of different parts of the scoring process, paragraph 40 of the Particulars of Claim pleads:

> Further, in breach of the duty of equal treatment, and despite the patent conflict which existed, the preferred bidder was awarded a maximum score of 5 (9.00%) (Excellent) for this question, thereby evidencing that it had been privy to information about the evaluation of tenders not known to other tenderers.

66. This and the other similar pleas (paragraphs 45, 51, 57, 64, 70, 76, 81, 86, 98, 104 and 110) mean that investigation of the Conflicts Challenge will also require investigation of the process by which marks were awarded.

67. Even if those pleas are set on one side, in my judgment the Particulars of Claim set out a case in respect of the Scoring Challenge which is neither frivolous nor vexatious. In that regard, I bear in mind the guidance given by Coulson J. in *Bristol Missing Link Ltd* at paragraph [34]:

> In my view, those passages make clear two things: first that, in cases where there are clear issues arising out of individual scores, it will be difficult for the court to conclude that there is no serious issue to be tried; and, second, that this difficulty arises, at least in part, because the relevant documents have yet to be disclosed.

Conclusion

68. For the above reasons, I hold that RHH has established that there is a serious issue to be tried in respect of the procurement.

Are damages an adequate remedy for the Claimant?

69. Having determined that there is a serious issue to be tried, I have next to consider whether, upon the assumption that the RHH's challenges (or one or other of those challenges) succeed, would damages be an adequate remedy?

70. I was referred to a number of authorities on this topic. I have already set out above the principles to be applied. There are helpful expansions of the principles in the authorities.

71. In *Openview Security Solutions Ltd v Merton London Borough Council* [2015] EWHC 2694 (TCC); [2015] BLR 735, Stuart-Smith J. said:

> 28. There are now a number of examples of public procurement challenges where the Courts have concluded that damages would not be an adequate remedy for the aggrieved contractor. Counsel were unable to identify (and I have not found) any statements of general principle about what uncompensatable disadvantages should or should not be regarded as rendering damages an inadequate remedy. However, the Claimant suggested that three categories of case may be identified, namely:
>
> > (i) Cases where the assessment of damages is difficult because it is speculative e.g. where the contract concerned is a framework contract and there can be no certainty about what level of call-off will eventuate, with the result that the Claimant cannot predict what amount of potentially profitable work may be lost;
> >
> > (ii) Cases where assessing the value of a loss of a chance may be difficult or unsatisfactory because of the number of unknowns and variables; and
> >
> > (iii) Cases where it is unjust to leave the aggrieved party to his remedy in damages even if damages would be an adequate remedy.
>
> 29. This categorisation is neither satisfactory or justified. First, in principle, there need be no pre-ordained limit upon when and in what circumstances damages may be regarded as an inadequate remedy: the categories of inadequacy need not be closed. Second, difficulty of assessment does not of itself demonstrate that the damages once assessed will be inadequate. Third, I am not convinced that a framework contract gives rise to particular difficulties. Normal principles suggest (for good reason) that damages should be awarded on the basis of the contracting authority's minimum or least onerous obligation. Fourth, the Claimants' third suggested sub-category is self-contradictory: if it would be unjust to leave a party to his remedy in damages, the damages are by definition an inadequate remedy.

30. The Court has not been deterred by difficulty of assessment as such. But it has recognised that the more variables are fed into a "loss of chance" calculation, the more likely it becomes that the compensation recovered by the aggrieved party will not match the outcome after the features that were uncertain in prospect have resolved themselves and determined what in fact happens. One example illustrates the problem: if the procurement is limited to two tenderers there may be circumstances in which, even at the interim suspension stage, the Court can be confident that if the impugned successful tenderer had not been awarded the contract, the aggrieved one would have been. However, the more tenderers there are, the less certain this may be – leading to a discounting of the aggrieved tenderer's chance when calculating damages. This was, I think, what Arnold J was referring to in *Morrison Facilities Services Limited v Norwich City Council* [2010] EWHC 487 (Ch) at paragraph 30 when he said:

> "Counsel for Morrison submitted that damages would not be an adequate remedy for three reasons. The first and most important one is that, in a case where one of the key complaints is that of undisclosed criteria, it is very difficult indeed for the Court at trial to assess damages because assessment of what chance has been lost by the claimant in those circumstances is virtually impossible. In such a case, the Court is faced with the question of considering the scenario that would have arisen if there had been proper disclosure of all the criteria in advance. In those circumstances, it is very likely that all bids submitted in response to the ITT would be different. How then, he asks, can the Court decide what chance of success in obtaining the tender the claimant has lost?"

31. Arnold J relied upon the decision of the Court of Appeal in *Lettings International Limited v London Borough of Newham* [2007] EWCA Civ 1522 where the submission was that damages would be an inadequate remedy because quantification of the loss "will have to take [into] account *not only that the claim will be for the loss of a chance of being successful in a fairly operated tender process (which will have to take account of how other bidders would have acted under those circumstances),* but also the consequential loss of the chance of being called on by the council to provide services pursuant to the framework contract." (paragraph 32 - emphasis added). The response of the Court of Appeal at paragraph 36 was that "A loss of opportunity to take part in a fair tendering process on equal terms with other bidders may be difficult to evaluate in monetary terms but cannot be said to be [of] no commercial value at all."

> 32. Counsel in the present case were not in a position to address the question whether the lost chance in a case of unpublished criteria is properly to be assessed on the basis that the contract assessment would have been on the basis of the published criteria or on the basis of the published and the unpublished criteria. In the absence of full submissions on the point, my tentative conclusion is that there may be two different categories of case: the first could be where the criteria to be applied were fully pre-determined but inadequately publicised (as in *Emm G Lanakis AE v Dimos Alexandroupoulis* (C-542/06)); the second could be where the intended criteria are properly advertised but the contracting party deliberately or otherwise relies on additional unpublished criteria when it comes to assess the bids. While flagging that question for possible future resolution, I accept for present purposes that there may be circumstances where the number of uncertainties or variables that have to be brought into the calculation of the aggrieved tenderer's lost chance may persuade the Court that damages would not be an adequate remedy. However, the mere fact that the damages will be for loss of a chance and will be assessed as such is not of itself evidence that the damages are an inadequate remedy. The reverse is likely to be true in many or most cases because the principles that have been developed have been designed to reflect the true commercial value of the chance that has been lost.

72. In *Medequip Assistive Technology Ltd v Royal Borough of Kensington and Chelsea* [2022] EWHC 3292 (TCC); [2023] BLR 127, Eyre J. referred to part of the above passage, saying:

> 42. The fact that the assessment of damages after a trial will not be straightforward and that there will be difficulty in such an assessment does not necessarily mean that damages will not be an adequate remedy for a claimant. However, this is a matter of degree and "there may be circumstances where the number of uncertainties or variables that have to be brought into the calculation of the aggrieved tenderer's lost chance may persuade the court that damages would not be an adequate remedy" (per Stuart-Smith J in *Openview* at paragraph 32) ….

73. After the passage to which I have referred above, Stuart-Smith J then considered the significance in this context of an allegation by a claimant that because of a breach or breaches in a procurement process that claimant has suffered or will

suffer loss of reputation, a loss which cannot be compensated in damages. He said:

> 39. What then are the criteria to be applied before a court accepts 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? In the absence of prior authority directly in point (none having been cited by the parties) but with an eye to the approach adopted by the Court in *Alstom*, *DWF* and *NATS* I suggest the following:
>
> > (i) 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;
> >
> > (ii) It follows that the burden of proof lies upon the party 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 retrospectively be identifiable as being attributable to the loss of the contract at issue but not recoverable in damages;
> >
> > (iii) The relevant person who must generally be shown to be affected by the loss of reputation is the future provider of profitable work.
>
> 40. These are general criteria, which need to be reviewed and considered in the light of the facts of each case. I readily accept that there is more to be said on the subject and that principles such as those I have suggested are not to be applied by rote.

74. In RHH's counsel's skeleton argument, it is submitted as follows:

> 68. Damages would not be an adequate remedy for the Claimant, and it would not be just, in all the circumstances, for the Claimant to be confined to its remedy in damages (see the guidance at paragraph 42 above):
>
> 68.1 The Contracts represent a rare opportunity that could bring significant rewards. There are only so many 27,000 property contracts with one of the country's leading housing associations, such as the Defendant. The ITT provided that the tender would be for a 5-year contract, with the option to extend for a further 2 years. Accordingly, the next time that the Claimant might have another opportunity to bid for the Contracts may not be until 2032. Had the Claimant been successful, the Contracts would

> have been worth approximately £4 million in profits to the Claimant over 7 years (see paragraphs 53 to 54 of McIntosh1 **….)**
>
> 68.2 The Claimant's failure to retain what is its second largest contract is likely to have an adverse effect on its reputation. The Claimant expects that some of its engineers will choose to resign rather than be TUPE transferred in the event that the automatic suspension is lifted (see paragraph 55 of McIntosh1 ….).
>
> 68.3 The principal loss claimed by the Claimant is for the loss of the opportunity to take part in a fair competition. Plainly, damages in the sum of £20,800.00 (the Claimant's costs of preparing its bid), would not adequately compensate the Claimant for the loss of the opportunity to take part in a fair competition for important contracts, or for the damage to its reputation that will likely follow its loss of its second largest contract (see paragraph 53 of McIntosh1 **….**).
>
> 68.4 The Claimant has not claimed loss of profits because, by virtue of there being no fair competition, it is not possible for it to say what percentage chance it may have had of winning the competition. In particular, four companies from the Sureserve Group were allowed to take part in the Procurement, all of which could have benefited from Ms Nicklin's conflict of interest (see paragraph 13 of McIntosh1 **….**).

75. In my judgment, contrary to those submissions, damages would be an adequate remedy for RHH if its challenges succeed.

76. This is not a case like the *Bristol Missing Link* case, where the claimant was a non-profit organisation. I have set out at paragraph 4 above the undisputed facts as to RHH's financial situation: it is a moderately substantial company and is a subsidiary of a substantial group with a worldwide reach. The potential contracts with OGL were substantial, but if awarded would not have been a dominating part of RHH's turnover.

77. Given the size of RHH and of the group of which it is part, I do not accept that even an arguable case for damages for loss of reputation is made out.

78. I accept that these would have been substantial contracts, and a useful base for RHH to expand its business: these are relevant matters in an assessment of damages. However, these are the sorts of issues with which the courts are used to dealing when assessing damages.

79. I also accept that assessment of damages may not be entirely straightforward, but that in itself is not sufficient to establish that damages would not be an adequate remedy, see the passages from the judgments of Stuart-Smith and Eyre JJ set out above. In my judgment this is not a case in which the number of uncertainties or variables that have to be brought into the calculation of the RHH's lost chance mean that damages would not be an adequate remedy.

80. For the above reasons, I hold that damages would be an adequate remedy.

The Application to Lift the Automatic Suspension Succeeds

81. In the *Medequip* case Eyre J. said:

> 44. If damages will be an adequate remedy for a claimant or if it is just to confine the claimant to that remedy then that will normally be the end of the matter and save in exceptional circumstances the suspension will be lifted.

82. In my judgment, there are no exceptional circumstances in this case to justify departure from the normal course given my conclusion as to the adequacy of damages as a remedy.

83. Accordingly, OGL's application to lift the suspension succeeds.

The Claimant's Application for Disclosure

84. The second matter with which I have to deal is RHH's application for disclosure.

85. This has gone through several iterations, but as formulated in the draft order appended to RHH's Counsel's Skeleton Argument, the documents which are sought are as follows:

    (1) All evaluation notes of the individual evaluators;

    (2) All moderation notes of the individual moderator;

    (3) All notes and/or minutes of all evaluators' meetings, including moderation meetings;

    (4) All documents produced for the purposes of the training, guidance or instruction of the evaluators/moderators, to include any model answers that were drafted; and

    (5) All documents relating to any actual or potential conflict of interest and/or any steps taken to address any actual or potential conflict of interest.

86. In the course of submissions before me, Mr Williams made it clear (as, I understand, he had previously made clear to OGL's Counsel) that the disclosure sought is confined to documents relating to RHH's tender, not competing tenders.

The Law: Disclosure

87. In *Roche Diagnostics Limited v. Mid Yorkshire Hospitals NHS Trust* [2013] EWHC 933 (TCC), Coulson J set out the following "broad principles" which apply to applications for early specific disclosure in procurement cases:

(a) An unsuccessful tenderer who wishes to challenge the evaluation process is in an uniquely difficult position. He knows that he has lost, but the reasons for his failure are within the peculiar knowledge of the public authority. In general terms, therefore, and always subject to the issues of proportionality and confidentiality, the challenger ought to be provided promptly with the essential information and documentation relating to the evaluation process actually carried out, so that an informed view can be taken of its fairness and legality.

(b) That this should be the general approach is confirmed by the short time limits imposed by the Regulations on those who wish to challenge the award of public contracts. The start of the relevant period is triggered by the knowledge which the claimant has (or should have) of the potential infringement. As Ramsey J said in *Mears Ltd v Leeds City Council* [2011] EWHC 40 (QB), "the requirement of knowledge is based on the principle that a tenderer should be in a position to make an informed view as to whether there has been an infringement for which it is appropriate to bring proceedings".

(c) However, notwithstanding that general approach, the court must always consider applications for specific disclosure in procurement cases on their individual merits. In particular, a clear distinction may often be made between those cases where a *prima facie* case has been made out by the claimant (but further information or documentation is required), and those cases where the unsuccessful tenderer is aggrieved at the result but appears to have little or no grounds for disputing it.

(d) In addition, any request for specific disclosure must be tightly drawn and properly focused. The information/documentation likely to be the subject of a successful application for early specific disclosure in procurement cases is that which demonstrates how the evaluation was actually performed, and therefore why the claiming party lost. Other material, even if caught by the test of standard disclosure, is unlikely to be so fundamental that it should form the subject of a separate and early disclosure exercise.

(e) Ultimately, applications such as this must be decided by balancing, on the one hand, the claiming party's lack of knowledge of what actually happened (and thus the importance of the prompt provision of all relevant information and documentation relating to that process) with, on the other, the need to guard against such an application being used simply as a fishing exercise, designed to shore up a weak claim, which will put the defendant to needless and unnecessary cost. (emphasis added)

88. Mr Patel referred to *OCS Group UK Limited v Community Health Partnerships Limited* [2023] EWHC 3369 (TCC), in which His Honour Judge Pearce emphasised that, for an order for early specific disclosure to be granted, the need for the applicant to show a *prima facie* case and that the reasons for the decision given are inadequate. At [73]-[74], he concluded:

> 73. The defendant complains that the result of the claimant's application if successful will be that there is an automatic right to specific disclosure for a disgruntled tenderer in a regulated procurement case. I do not accept this. First of all, the claim is filtered by the claimant's need to show a prima facie case. The claimant does so here; it will not be the case that every claimant is able to do so. It will not be sufficient, it seems to me, simply to show a lack of transparency unless one shows – arising from that lack of transparency – some kind of prima facie argument that the reasoning or scoring is inadequate.
>
> 74. Second, of course, the claimant has to show that the reasons given are inadequate. If adequate reasons have been given within the award letter, then the claimant would simply fail in an application for specific disclosure on the basis that an early application for specific disclosure is for reasons I have given already, to be limited, only very narrowly, to the documents necessary to judge the adequacy of the reasons given.

I do not understand H.H. Judge Pearce to be saying that disclosure can only be ordered in a "reasons" challenge. He was considering such a challenge. Here, the challenge is not as such to the adequacy of the reasons given, but more as to the process by which the scoring system was carried out. I do not accept that disclosure going to such an issue cannot be ordered.

Application of the above authorities to this case

89. As set out above, the application for disclosure has been restricted both before and during the hearing before me.

90. The first matter I must consider is whether a *prima facie* case has been made out by RHH that there has been a failure to approach the procurement process correctly.

91. I have already concluded in the context of the application to lift the automatic suspension that there is a serious issue to be tried. In those circumstances I also conclude that RHH has established a *prima facie* case for the purpose of deciding whether to order early specific disclosure of documents.

92. In my judgment all the documents sought in categories (1) to (4) as now limited (as applying only to consideration of RHH's tenders) are relevant documents.

93. I have inquired through Mr Patel as to the volume of documentation falling within categories (1) to (4). It became apparent in relation to category (4) that there are no "model answers" – a matter to which I have referred above. This should be formally confirmed. Otherwise, there is apparently one document to be disclosed in respect of category (4).

94. As to categories (1) to (3) there were, I am told, 14 evaluators and 1 moderator. Their files and notes are held electronically. It does not seem to me that the volume of documentation will be very substantial.

95. Whatever the volume of the documentation, Mr Patel, on behalf of OGL, objects to disclosure not only on the basis that RHH has not made out a *prima facie* case (a submission which I have rejected above) but also on the basis that the reasons and explanations already given give RHH all it needs to plead its case.

96. In my view, these documents will be documents to be disclosed upon standard disclosure in these proceedings in respect of the Scoring Challenge, which raises

fairly and squarely issues as to how the scoring process was carried out. Thus, the question is whether this disclosure should be given now.

97. In my judgment, this relatively limited disclosure is appropriate at this stage. It will enable RHH to consider whether its claim is appropriately pleaded, and, more importantly, to assess whether it is appropriate to proceed with this action at all.

98. As to category (5), I indicated during the hearing that I would only be minded to order disclosure in respect of the allegation that the role of Ms Nicklin gave rise to a conflict of interest. It seems to me likely that the emails referred to in the evidence (see paragraph 55 above) are likely to be either the totality of disclosable documents, or close to that total. It is possible that there might also be some documentation concerning the conversations referred to in paragraphs 49 and 50 of Mr McIntosh's witness statement quoted at paragraph 55 above, if, for example, these were matters discussed internally within OGL's organisation.

99. If there is such documentation, then it is in the interests of justice that it should be disclosed.

100. Accordingly, the application for disclosure succeeds, but in respect of items (1) to (4) in the more restricted form sought during the hearing, and in respect of item (5), only in respect of any conflict of interest arising out of the role of Ms Nicklin.