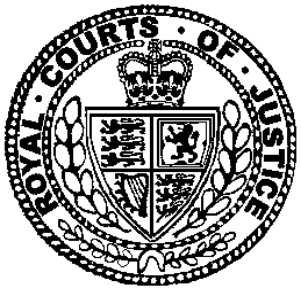

Neutral Citation Number: [2025] EWHC 354 (TCC)

Case No: HT-2024-000378
HT-2024-000399
HT-2024-000155

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS (TCC)**
**KING'S BENCH DIVISION**

Royal Courts of Justice, Rolls Buildings,
Fetter Lane, London, EC4A 1NL

Date: 20 February 2025

**Before** :

**MR JUSTICE CONSTABLE**

- - - - - - - - - - - - - - - - - - - - -

**Between :**

(1) UNIPART GROUP LIMITED
**(2) DHL SUPPLY CHAIN LIMITED**

**Claimants**

**- and -**

SUPPLY CHAIN COORDINATION LIMITED

**Defendant**

**-and-**

**GXO LOGISTICS UK LIMITED**

**Interested Party**

- - - - - - - - - - - - - - - - - - - - -
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Sarah Hannaford KC and James Frampton (instructed by Eversheds Sutherland (International) LLP) for Unipart Group Limited
Jason Coppel KC (instructed by Addleshaw Goddard LLP) for DHL Supply Chain Limited

Valentina Sloane KC and Jonathan Lewis (instructed by Mills and Reeve LLP) for the Defendant
Ewen West KC (instructed by DLA Piper UK LLP) for the Interested Party

Hearing dates: 12-13 February 2025

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# JUDGMENT

**This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 on Thursday 20TH of February 2025.**

**MR JUSTICE CONSTABLE:**

Introduction

1. This hearing involves three sets of related proceedings which all challenge the conduct by Supply Chain Coordination Limited T/A NHS Supply Chain ("SCCL") of the same procurement in relation to the provision of a contract for logistics services ("the New Contract"). The Defendant in the three proceedings is SCCL, a company which was established in 2018 to manage the NHS Supply Chain. It is a contracting authority for the purpose of the Public Contracts Regulations 2015 ("the PCR").

2. Proceedings HT-2024-000155 were issued by Unipart Group Limited ("Unipart") ("the First Unipart Proceedings") on 26 April 2024 which challenged the outcome of the Invitation to Submit Initial Tenders ("ISIT"); proceedings HT-2024-000378 were issued by Unipart ("the Second Unipart Proceedings") on 11 November 2024, following the award of the contract to GXO Logistics UK Ltd ("GXO"). Proceedings HT-2024-000399 were issued by D.H.L. Supply Chain Limited ("DHL"), another unsuccessful bidder, on 28 November 2024 ("the DHL Proceedings"). A fourth set of proceedings exists in respect of the procurement, brought by Wincanton Holdings Limited, a further unsuccessful bidder ("Wincanton"). Wincanton has no direct role in the applications before the Court to which this judgment relates.

3. Three separate applications to lift the automatic suspension pursuant to regulation 96(1) of the PCR have been issued by SCCL: one in each set of proceedings**.** The applications have been heard together. GXO has made submissions as an Interested Party in the Defendant's applications to lift the automatic suspension presently in place.

4. The following evidence has been provided by the parties in support of their respective positions taken, supporting or resisting the applications:

   (1) For SCCL, three statements from Mr Andrew New, CEO of SCCL, and two statements from Dr Barry, a Principal Associate at Mills and Reeve LLP, solicitors for SCCL;

(2) For DHL, two statements from Mr Peacock, a Director of DHL. The admissibility of the second statement is contested;

(3) For Unipart, statements from Mr Pyne, Chief Sustainability Officer for Unipart, and Ms Rowland, a Partner at Eversheds Sutherland (International) LLP, the firm of solicitors representing Unipart;

(4) For GXO, statements from Mr Finton James, Senior Operations Director – Life Sciences at GXO, and Mr Holmes, Director of CJI Supply Chain Solutions Ltd.

5. The New Contract replaces an existing contract, for which Unipart is the incumbent provider and which was procured in 2017-18 ('the Existing Contract'). DHL was an unsuccessful bidder in that procurement process, and it sought unsuccessfully to oppose the lifting of the suspension (see DHL Supply Chain Limited v SS for Health and Social Care [2018] EWHC 2213 (TCC)). The Existing Contract expired on 22 February 2024 but is continuing under termination assistance provisions. Its long stop final expiry date is 23 August 2025, which allows for a transition period of 6-7 months. There is an issue as to whether this can be extended further.

6. SCCL notified the market of the procurement by a prior information notice which was published on 26 February 2022. The subsequent Contract Notice, which formally started the procurement, was published on 28 June 2023. The estimated value in the Contract Notice was £4.4bn plus VAT (excluding termination assistance): the value of the base contract for the 7-year term is around £1.26 billion, and if extended and all additional options are taken by SCCL, its value is about £4.4 billion. It is for an initial term of 84 months, plus a 5-month initial implementation period and a termination assistance period, and can be extended for a further 36 months. In total, therefore, it could last nearly 12 years.

7. The four tenderers I have identified were successful at the Selection Questionnaire stage, and each were invited to complete the next stage, ISIT. In November and December 2023 bids were evaluated and moderated. Following a review of the moderation, SCCL considered that there were some aspects of the moderation process which were not in accordance with the published criteria, and decided to amend the wording of the scoring criteria for the ISIT and to re-evaluate the bids. Following the re-evaluation in February and March 2024, Wincanton (third-placed) and Unipart (fourth-placed) were excluded. On 28 March 2024 bidders were advised of this outcome. Wincanton and Unipart each brought claims against SCCL in April 2024. No applications to suspend the procurement process were made. SCCL admitted a breach in its Defence to Wincanton's claim, and invited Wincanton to participate further in the procurement process, which it declined to do. Wincanton's continuing claim is limited to a claim for damages, which is denied by SCCL.

8. SCCL proceeded to the negotiation and Invitation to Submit Final Tender ("IFST") stages. On 5 August 2024, Final Bids were submitted. GXO was announced as the winning bidder on 30 October 2024. Across the four claims, virtually every aspect of the procurement process is challenged. The claims include, variously, allegations of bias; conflicts of interest; "undue influence" by one of the evaluators; manifest errors and undisclosed criteria in the evaluation of the initial tenders; and the failure to exclude an abnormally low tender.

9. Of particular relevance to the issues before me is DHL's claim, since adopted by Unipart, that the tender evaluation was irredeemably compromised by the alleged failure of SCCL to identify and remedy the potential for unfairness and unequal treatment of tenderers which, DHL says, was created by the contribution to GXO's tender of Mr Chris Holmes. DHL alleges that Mr Holmes was employed by SCCL as a senior executive responsible for (amongst other things) logistics transformation until 30 September 2023 and had done extensive work on the logistics transformation aspects of the procurement before he left SCCL's employment, including meeting potential bidders such as DHL to discuss their logistics operations. When Mr Holmes left, he started to work for GXO. This fact was declared by GXO as part of its submission, but SCCL "*misfiled*" the declaration. DHL, and now Unipart, contend that SCCL did not take the steps which were required of it by regs. 24 and 41 of the PCR. It is this issue which DHL, with Unipart's support, contend should be dealt with by the Court by way of expedited Preliminary Issue.

The Second Witness Statement of Mr Peacock

10. No permission existed in respect of the service of Reply evidence by the Claimants. Nevertheless, at the same date as service of Skeleton Arguments, on 10 February 2025 (two days before the hearing), DHL issued an application to rely upon a second statement of Mr Peacock. The application asserts that the evidence in Mr New's second and third statements (served in reply, as agreed between the parties, to the evidence served by DHL and Unipart respectively) could have been adduced sooner and that the evidence from Mr Peacock was responsive in nature.

11. At least in one important respect, this characterisation is not correct. The evidence given by Mr Peacock in paragraphs 5 to 14 dealing with what effectively goes to the adequacy of damages for DHL is all evidence that DHL could, and should, have served in accordance with the directions agreed by the parties. It is 'responsive' only in the sense that it is responding to what Mr New had (rightly) identified as an important lacuna in DHL's evidence. Similarly, the suggested inconsistency between Project Tokyo and the Service Description is not properly responsive and could and should have been in Mr Peacock's First Statement.

12. I agree with the observation of Mr West KC, for GXO, that parties should not be permitted to submit evidence late which could, or should, have been served in accordance with the directions agreed by the parties. Ordinarily, it may be that the contention that SCCL and GXO have been prejudiced by the inability to respond to this late evidence would have been sufficient for me to exclude it. However, it is notable that some parts of the Second Statement of Mr Peacock were relied upon quite forcefully in SCCL's own submissions, and I was not being invited to cherry-pick which bits of the statement should be in or out. In these circumstances, I do not exclude the evidence. In terms of the weight I give the evidence, I will bear in mind the timing of its service and, at least in the context of the adequacy of damages for DHL, the fact that the evidence seems to me to have been served to plug the gaps which had been pointed out by Mr New in his responsive evidence.

The Legal Framework

13. When considering whether to lift a suspension, the Court will apply the familiar American Cyanamid test. As summarised by O'Farrell J in Camelot Global Lottery Solutions Limited v Gambling Commission [2022] EWHC 1664 (TCC), at [48]:

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

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

14. There are numerous, generally first instance, decisions, and each of these turns on their own facts. Each counsel has, entirely fairly, drawn to the attention of the Court certain passages from certain authorities which place particular weight on particular factors. To the extent necessary, I refer to these in the context of the particular stage of the test I am assessing.

Serious Issue to be Tried

15. The "*test is whether the Court is satisfied that the claim is not frivolous or vexatious*" (Robert Heath Heating Ltd v Orbit Group Ltd [2024] EWHC 3039 (TCC) at paragraph 40). As Coulson J (as he then was) said in Sysmex (UK) Ltd v Imperial College Healthcare NHS Trust [2017] EWHC 1824 (at paragraph 21), save in exceptional circumstances, it is not appropriate as a matter of principle for the Court to conduct a mini-trial or to endeavour to reach any conclusions as to the strength or weakness of one or both parties' cases.

16. There is no dispute that in the DHL Proceedings, there is a serious issue to be tried.

17. There is, however, an issue with regard to the Second Unipart Proceedings. Ms Sloane KC, for the Defendant, argues that the First Unipart Proceedings makes numerous wide-ranging allegations in respect of the conduct of the procurement process and is targeted at its exclusion from the ISIT stage of the Procurement. These proceedings did not trigger the automatic suspension, and Unipart did not seek injunctive relief at that point. She contends that the only *new* allegation of breach in the Second Unipart Proceedings is an allegation against SCCL of breach of the principle of transparency and/or of regulation 86 PCR by failing to provide any information in the Contract Award Notice in relation to the reasons for the decision, the characteristics of GXO's bid or its scores. SCCL's defence is that it was entitled to rely upon the exemption provided at reg.86(6) PCR. Since the Second Unipart Proceedings were issued SCCL has in any event provided the missing information to Unipart (as a result, it says, of commercial information being revealed by another bidder in its pleading). Ms Sloane KC therefore contends that the Second Unipart Proceedings are entirely academic and a waste of court time, and they are being used solely as a mechanism to remedy Unipart's failure to apply for injunctive relief. Ms Sloane KC says in terms that it is

not now open to Unipart to challenge the Contract Award, as opposed to claiming damages.

18. In response, Ms Hannaford KC, for Unipart, argues that Unipart are entitled to challenge the Contract Award in circumstances where, pursuant to the PCR, Unipart has not been 'definitively excluded'. Regulation 86(1) of the PCR provides that a contracting authority shall send to each candidate and tenderer a notice communicating its decision to award the contract. Paragraph 7(b) defines "tenderer" as that term is defined in regulation 2(1), which has not been definitively excluded. Unipart clearly satisfies the definition of "tenderer" for the purposes of Section 2(1), being an economic operator that has submitted a tender. For the purposes of paragraph (7)(b), an exclusion is definitive only if the tenderer has been notified of the exclusion and either (a) the exclusion has been held to be lawful in proceedings under Chapter 6; or (b) the time limit for starting such proceedings has expired even on the assumption that the Court would have granted the maximum extension permitted by regulation 92(4) and (5). Proceedings under Chapter 6 have started and the exclusion has not been held to be lawful. It follows that, as Ms Hannaford KC says, Unipart were entitled to be served with the Contract Award notice. Ms Hannaford KC then relies upon Randstad Italia SpA v Umana SPA (Case C-497/20), a Judgment of the Grand Chamber of the CJEU. Randstad had been excluded at a preliminary stage in the evaluation, which proceeded then in its absence. After the contract was awarded to another bidder, Randstad disputed both its exclusion from the tendering procedure and its action concerned not just its exclusion but the award of the contract. At paragraphs [72] and [74], the Judgment stated:

> "*In the case of tenderers which have been excluded from the tendering procedure, Article 2a of Directive 89/665 makes clear that these are no longer to be deemed to be concerned and the contract award decision must not therefore be communicated to them if their exclusion has become definitive. However, where those tenderers have not yet been definitively excluded, the contract award decision, accompanied by a summary of the relevant reasons and a statement of the standstill period for conclusion of the contract following that decision, must be communicated to them. It is apparent from reading paragraphs 1 and 2 of that article together that compliance with those minimum conditions is intended to enable such tenderers to seek an effective review of that decision.*
>
> *74 The fact that the exclusion decision is not yet definitive thus determines, for those tenderers, their standing to challenge the contract award decision […].*"

19. Ms Hannaford KC is therefore correct that, at least in principle, Unipart remains entitled to challenge the Contract Award.

20. However, the fact of this legal entitlement does not automatically translate into the conclusion that there is a serious issue to be tried as to whether the remedy of setting aside the award is one to which Unipart would be entitled at trial. Ms Sloane KC referred the Court to CSC Computer Sciences Limited v Business Services Organisation [2019] NIQB 18 in relation to the fact that, in this regard, Unipart did not seek an interim injunction suspending the procurement immediately following its exclusion. CSC concerns a claimant that was excluded from the second phase of a particular procurement exercise. A claim was issued within the limitation period

required by the PCR, but the plaintiff waited 3 months from this point before seeking an injunction. The Court held that:

> "*the delay of the plaintiff severely impedes the court in the practical act of doing justice on this application. In a procurement case such as this, delay will mean that substantial benefits are denied to the public for a period of time, 6 months at a minimum, which will have adverse public interest consequences, which I have discussed above. The court is entitled to take this delay into account, and who is responsible for that delay in determining whether to grant an interim injunction. In this case the court has concluded that the majority of the delay was occasioned by the plaintiff and that the consequences for this delay must be borne by the plaintiff. In the court's view the public interest is the decisive factor in considering "the balance of doing an injustice". There is considerable public interest in ensuring the procurement process is completed as soon as possible so that the citizens of Northern Ireland can enjoy the benefits that the EHCR will bring. In this case the effect on the public interest has been magnified by the time the plaintiff has taken to bring this application to the court's attention.*"

21. Ms Hannaford KC realistically conceded that were Unipart to be the only party seeking to set the Contract Award aside (or where, for example, DHL fails to establish damages were not an adequate remedy, and so cannot seek injunctive relief), persuading the Court that, in due course, setting aside the Contract would be appropriate where it had not, many months earlier, sought to stop the procurement process, would be 'more challenging'. It is at least possible in such circumstances that a Court could determine on an application such as this that the prospect of doing so was sufficiently remote that no serious issue arose. That said, it is generally more likely to be appropriate to consider the question of this delay in the balance of convenience rather than at the 'serious issue to be tried' stage. For present purposes, Unipart is not the only challenger to the Contract Award, and it plainly has standing to advance the complaints it does. The underlying allegations further to which Unipart seeks relief give rise to serious issues to be tried. On the facts of this case, it is appropriate to proceed to consider the adequacy of damages in respect of the Unipart claim, too.

Adequacy of Damages for the Claimants

22. The Claimants raise the following points which either separately or in the aggregate, they contend, mean that it is arguable or likely that damages will not be adequate: (1) the prestigious/high value of the project and its impact on reputation/future bids/irreparable harm; (2) the complexity of calculation of loss; (3) that they may be left with no effective remedy if the breaches found are not 'sufficiently serious' (the Francovich point). I must consider the first issue as it applies to each Claimant separately, although there will be common themes; the second and third issues apply to each Claimant in the same way and can be considered together.

23. In Covanta Energy Ltd v Merseyside Waste Disposal Authority [2013] EWHC 2922 (TCC), Coulson J (as he then was) summarised the authorities on adequacy of damages:

> "*(a) If damages are an adequate remedy, that will normally be sufficient to defeat an application for an interim injunction, but that will not always be so (American*

*Cyanamid, Fellowes [v Fisher [1976] 1 QB 122 (CA)], National Bank [v Olint Corp [2009] 1 WLR 1405]);*

*(b) In more recent times, the simple concept of the adequacy of damages has been modified at least to an extent, so that the court must assess whether it is just, in all the circumstances, that the claimant be confined to his remedy of damages (as in Evans Marshall [[1973] 1 WLR 349] and the passage from Chitty); …"*

24. When deciding if the claimant should be so confined, the question is whether, if the automatic suspension is lifted, the claimant will arguably or likely suffer a loss for which damages are not an adequate remedy: see Draeger Safety UK Ltd v The London Fire Commissioner [2021] EWHC 2221 at [41], DHL Supply Chain Ltd v Secretary of State for Health and Social Care [2018] EWHC 2213 at [48] and One Medicare v NHS Northamptonshire *ICB* [2025] EWHC 63 at [12] and [15]. This is a question which might be answered with a varying degree of certainty (hence the different language used in some of the authorities). Providing the point is arguable – or, put another way – that the risk is a real one, the threshold has been met to avoid the outcome identified at (a) in the quotation above. However, the degree of certainty may be a factor then to weigh in the overall balancing exercise when considering where the least risk of injustice lies.

*Prestigious Contract/Loss of Reputation/Irreparable Harm*

25. Both Claimants rely upon the fact that, they say, the New Contract is a large and prestigious one. Neither Claimant suggests that loss of this contract would be an existential threat to their business.

26. There are a number of cases where the contract has been perceived as highly prestigious and that this has contributed to a greater or lesser extent to the conclusion that damages would an inadequate remedy for the unsuccessful bidder: see Alstom Transport v Eurostar Internation Limited [2010] EWHC 2747; DHL (above), specifically in the context of the Existing Contract; Bombardier Transportation UK Limited v London Underground Ltd [2018] EWHC 2926 (TCC); Vodafone Ltd v Secretary of State for Foreign, Commonwealth & Development Affairs [2021] EWHC 2793 (TCC); NATS (Services) Limited v Gatwick Airport Limited [2014] EWHC 3133 (TCC).

27. It is nevertheless to be remembered that, as Coulson J (as he then was) pointed out in Sysmex (UK) Limited v Imperial College Healthcare NHS Trust [2017] EWHC 1824 (TCC), [2017] All ER (D) 155, merely because the contract in question is large and/or prestigious, that does not somehow mean that, necessarily, a failure to win it cannot be compensated for in damages. The relevance of whether the contract is particularly prestigious or high value feeds into the question of whether the failure to win the tender is likely to damage the tenderers' reputation in the marketplace and/or make it harder for the tenderer to win other bids in the future, such that the tenderer will suffer financial losses which would be irrecoverable as damages. In this context, I remind myself of the helpful observations of Stuart-Smith J (as he then was) in Openview Security Solutions Limited v London Borough of Merton at [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."*

28. Whilst the more prestigious a contract is the more readily a Court may be to conclude that its loss will produce collateral negative financial effects beyond a direct loss of profit, that does not obviate the need for a claiming party to provide by way of evidence a proper foundation upon which a Court can conclude to the appropriate degree of certainty not just that the contract is prestigious or high value, but that its loss will lead to financial losses that would be significant and irrecoverable as damages. What evidence a Court might expect to see will differ from case to case.

*DHL*

29. First, Mr Coppel KC, for DHL, relies heavily upon the fact that O'Farrell J was persuaded in DHL that the Existing Contract was a prestigious and high value one and that, as a result, damages were likely to be inadequate for DHL. At paragraph 46, the Judge said:

> "*I accept Mr Jones' evidence that the loss of this contract is likely to have a substantial adverse effect on* [DHL's] *reputation which would be very difficult properly to quantify. The logistics contract is prestigious and high value.* [DHL] *is the incumbent provider of the logistics services. The fact that the MSA has been broken into a number of separate contracts does not detract from the fact that* [DHL] *will be seen in the marketplace as having lost a valuable contract for the provision of these services in a procurement exercise where the outcome is not determined solely on price.* [DHL] *will lose a unique selling point when bidding for other, similar projects that is likely to affect its ability to win them.*"

30. It might immediately be observed that the basis for at least some of what O'Farrell J concluded reputationally rests on the perception created by DHL having lost the contract, as the previous incumbent. That is no longer the case, of course (although it may be relevant to Unipart's position). To this extent, Mr Coppel KC is not right that the facts as they are before me cannot be distinguished from those considered by O'Farrell J; they can. More significantly, however, the evidence before O'Farrell J was the evidence before her; and the evidence before me is the evidence before me.

Indeed, I do not know what the evidence was in any real detail, other than the conclusion that O'Farrell J drew from it. The size of the companies, the market share, and the global and domestic logistics markets have all changed in the intervening 7 years. The extent or nature of any reputational risk is a question of fact for me to decide on the evidence before me. Contrary to Mr Coppel KC's submission, I am plainly not bound by O'Farrell J's finding of fact, made at a different time on different evidence. It is not for Ms Sloane KC to '*distinguish*' the decision as though, if she did not do so, it would be binding on me (any more than it is for Mr Coppel KC to '*distinguish*' the present facts from those which led O'Farrell J to determine, against DHL, that (a) damages were not adequate for SCCL and (b) the balance of convenience lay with lifting the suspension and allowing the contract with Unipart to proceed).

31. As it happens, I agree that this is plainly a prestigious contract. It is also of very high value, at least in absolute terms. It is common ground that if extended beyond the base period, and if all the options are taken up by SCCL, the value could be in the region of £4.4bn and could last for over a decade. Although SCCL respond that the base value, without extension or options, would be £1.26bn, representing about £200m a year out of an annual logistics market value of around £16bn a year, it is fair for the purposes of this exercise to use the figure advertised by the Defendant in its Contract Notice.

32. That is not the end of it, though. A particular feature of the present case is that DHL lost the procurement of the Existing Contract, which was, as O'Farrell J described, (also) prestigious and high value. In these circumstances, I accept Ms Sloane KC's submission that it would be anticipated that in the particular circumstances of this case DHL should be able to go well beyond broad assertions as to the reputational impact of losing a prestigious tender, and give some real examples of how, <u>in fact</u>, things transpired following loss of the bid for the Existing Contract having been the incumbent provider. Perhaps surprisingly, there is no such evidence at all within the first witness statement of Mr Peacock. It is this absence, pointed out by Mr New, which Mr Peacock sought to address in his Second Statement.

33. At paragraph 6 of his Second Statement, Mr Peacock asserts generically that being the provider of the logistics services contract for SCCL gives the chosen supplier a huge advantage in the wider health and life sciences market, including other NHS and healthcare suppliers. However, this assertion cannot be taken at face value: the history of this particular contract and its predecessor tells the opposite story. DHL was the incumbent in 2017, yet it lost the bid for the Existing Contract. Unipart was the incumbent in 2024, yet it lost the bid for the New Contract. In neither case did the fact of being the provider for this very contract prove a "*huge advantage*".

34. Paragraph 7 deliberately shies away from providing any detail on the basis of '*obligations of confidentiality*' and adds little. Those obligations of confidentiality would not have prevented concrete, if anonymised, examples of particular difficulties or advantages had DHL wished to do so. At paragraph 8, Mr Peacock claims that a long-term contract with SCCL would be the bedrock of operations for any winning bidder, but does not give any practical detail of what actually happened negatively to DHL when that bedrock was removed. Did it in fact have to make people redundant? How many? Were specialist skills lost as a result? What other specific issues in fact arose which impacted their ability to bid for new work? What specific bids did it go on to lose that can be (even anecdotally) attributed to the loss of the Existing

Contract? The closest Mr Peacock comes to providing any evidence along these lines is where, at paragraph 9, he states that he '*understand*[s] *from my colleagues within the business that DSC did find it harder to win healthcare and other public sector contracts after losing the previous SCCL logistics contract in 2018 and the loss of the 2018 contract was the start of a wider decline in* [DHL]*'s market position in the healthcare sector.*'

35. However, rather than substantiate this, he continues by way of speculation: '*There are a number of reasons why that might be so….*'. The asserted decline, if established, would be a key piece of evidence and would go a long way to providing a reasonable degree of confidence that there was in the past a real but unquantifiable impact to losing the SCCL contract. As Mr Coppel KC accepted, this point should have been capable of easy substantiation with clear financial data. Yet none has been provided. Indeed, Mr New provided the accounting information for DHL (specifically the Claimant, not the DHL Group) over the past 7 years in terms of turnover and profit. It is characterised by him as demonstrating that DHL has continued to deliver impressive financial results annually since 2017-18, COVID aside. Mr Peacock, in response to this information, did not dispute Mr New's characterisation, which on the numbers appears to be a fair one. The accounting information does not, at least on its face, suggest DHL obviously suffered financially in the years after 2017-18 (taking COVID into account), following the loss of the SCCL logistics contract to Unipart. If it did not suffer irrecoverable loss when it failed to win the Existing Contract, particularly having been the incumbent, there is no basis to presume that, notwithstanding the prestigious nature of the contract, it will do so now. This may be because of growth in other areas, which may have been made possible by the availability of resources following the loss of the Existing Contract tender. It may be that because DHL has such a significant share of the market, it has plenty of other high value and prestigious contracts by which to demonstrate its capabilities without the NHS logistics contract. It is not necessary to speculate. The burden is on DHL, and on the evidence before me (and taking account of the absence of evidence which could have been provided but has not), DHL has not established to a reasonable degree of confidence that, notwithstanding the prestigious and high value nature of the New Contract, any reputational impact such as there may be will lead to financial losses that would be significant and irrecoverable as damages.

*Unipart*

36. Ms Hannaford KC, on the basis of the evidence from Mr Pyne, also relies upon the prestigious and high value nature of the contract and the fact that it is one of the largest public sector contracts in the UK. It is contended that Unipart would suffer irreparable harm for which it is not just to confine it to a remedy in damages.

37. As set out above, Unipart is the incumbent and the value of the New Contract is significantly greater than the Existing Contract. I accept that the fact of lost incumbency may increase the risk of reputational damage, as pointed out by O'Farrell J when considering the adequacy of damages for DHL in the last tender for the equivalent (though smaller) contract. That said, as pointed out above, incumbency does not appear to have provided any particularly strong advantage in winning either the Existing Contract in 2017-8 or the New Contract in 2024. Unipart is a considerably smaller player than DHL and in these circumstances I accept that it is likely that the loss of a contract such as this will have a larger influence on its

reputation and its catalogue of existing contracts from which it can demonstrate its capabilities.

38. Ms Hannaford KC also relies upon the Competition and Markets Authority's investigation into the merger of GXO and Wincanton, and its Phase 1 report published in November 2024. As referred to at paragraph 20 of Mr Pyne's Witness Statement, the CMA identified in a number of comments drawn from the market that experience, track record and reputation are all important, together with the scale of the operation, in the selection of logistics providers. This is no doubt correct.

39. However, it is in this context relevant that Unipart 'lost' the New Contract a year ago. In April 2024, when Unipart had already been excluded from the tender (albeit, to be fair, only recently), Unipart's Chief Executive went on record stating, '*With a clear growth strategy across our seven core market sectors, a robust order book and a talented, committed team of experts, I am confident in the outlook for 2024 and our next chapter of growth*.' At around the same time it described its 'pipeline' for 2024 to be strong. Almost a year later, Mr Pyne simply asserts that – in effect – the growth plans will be materially different in the future. However, he does not provide any examples to substantiate this assertion. Such material must exist within Unipart if it is correct.

40. I accept that it is foreseeable that growth plans may have to change if anticipated revenue and/or profit reduces. The financial impact of the Existing Contract coming to an end is set out by Mr Pyne in paragraph 23. Of itself, however, this is just a financial loss which is readily compensable if Unipart win. Moreover, this loss assumes that there has been no effort during 2024 to mitigate the impending termination of the Existing Contract by securing a pipeline of other work. In this context, Mr Pyne does not provide evidence, even anecdotally, of bids in the healthcare or the wider setting which Unipart has in fact lost in the past year which were or could have been contributed to by its failure to win the New Contract. It may be said that is because a company can refer to other contracts up to three years old in bids, and so it has still been possible to use the Existing Contract as evidence of its capabilities and track record. Indeed, it will be able to until 2028 or so. In this context, the remarks of Coulson J (as he then was) at [50] in Sysmex are of some relevance:

> "*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.*"

41. It may also be that it has secured other contracts in the past few years with clients requiring similar services/scale as noted by Mr Pyne at para 16, and so is readily able to demonstrate its track record irrespective of its failure to win the New Contract. (It is right that the headline figures appear to suggest a smaller scale than the New Contract, although it is not clear if the figures are annual or over the course of the project and the description of 'similar services/scale' is Mr Pyne's).

42. The cost cutting impact described by Mr Pyne and relied upon by Ms Hannaford KC as irreparable harm is the natural result of the (lawful) bringing to the end of the

Existing Contract. The negative financial effect is said to be that, having cut staff, it will then incur increased rehiring costs. If this is so, it is a quantifiable loss which is recoverable and capable of being proven subject to causation and calculation in the usual way. There is no cogent evidence which suggests that Unipart will irremediably lose staff with such specialisms they cannot, when required, replace in the marketplace or that its ability to continue with its other contracts will be impacted.

43. Finally, a further specific reputational risk relied upon by Mr Pyne and by Ms Hannaford KC in her written (although not oral) submissions is said to be that, should Unipart succeed in being awarded damages, it will cause damage to its reputation by having sought to take money out of the NHS, requiring it to pay twice for the services. If the only purpose of suing is to repair a reputational loss, this could be achieved by succeeding in the declaration it seeks that it was wrongly excluded, and/or by declining to seek or take any damages awarded. If the purpose of the litigation is to in fact extract damages if SCCL has breached its obligations, then any reputational damage caused by Unipart's decision to pursue its rights is caused by its own decision to follow that path. People are entitled to make of that what they will. In any event, the suggestion that exercising its lawful rights will create a tangible but unquantifiable reputational loss is wholly speculative.

44. In conclusion, I have clear concerns, as expressed above, which reflect the level of confidence the Court can have in the likelihood that significant and irrecoverable losses will in fact be incurred by Unipart. That said, those concerns are balanced against the fact that I accept this is a high value and prestigious contract, and Unipart's position on the impact of losing the New Contract is stronger than DHL's, given that it is much smaller and it is the incumbent, which make Unipart more readily susceptible to the type of impact described by Mr Pyne. My concerns notwithstanding, therefore, I am prepared to accept that it is at least arguable that some losses of the nature described may be sustained by Unipart and that it (just) crosses the threshold at this stage of the analysis. The degree of confidence I have about the risk of unquantifiable losses is nevertheless to be considered when balancing the risks in the overall analysis.

*Complexity of Calculation of Loss*

45. Both Mr Coppel KC and Ms Hannaford KC argue that the present case is one of the relatively unusual cases where difficulties of assessment of damages would give rise to potential injustice if DHL were confined to that remedy. Mr Coppel KC relies upon another passage from Stuart-Smith J (as he then was) in Openview, in which he said:

> "*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.*"

46. The Judge then concluded his analysis on this topic with the following '*tentative*' view:

> '*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.*'

47. It is said by Mr Coppel KC that the assessment for the Court in due course, were it to become necessary, could be particularly complex. He points to the facts that (a) in ruling upon the extent of DHL's lost chances of winning the contract, the Court will be required to take into account the position of four different bidders, the three which have brought claims, and GXO; (b) two of those bidders, Wincanton and Unipart were not permitted to submit final tenders so it is not known, and the Court must seek to predict, what those tenders would have stated and how highly they would have been marked, as compared to DHL and GXO; and (c) the nature of DHL's claims, in particular those complaining of the application of undisclosed criteria and the involvement of Mr Holmes, require speculation as to how bids would have been different if SCCL had acted lawfully, and then how those modified bids would have been marked. Ms Hannaford KC relies upon these issues and adds the complexity within Unipart's claim which alleges undue influence of one of the evaluators, 'JT'.

48. Ms Sloane KC points out, in response, that in DHL's Amended Particulars of Claim damages are not sought on the basis of a loss of a chance. It claims squarely that but for the breaches it would have won. It is correct, therefore, that the concern raised as to the difficulty of calculating the lost chances of winning are presently academic at least in respect of DHL. Unipart's claim is based upon lost opportunity. Considering the substance of the point, the fact that there will be more than two bids to consider is not of itself a particularly troubling point: indeed, it is axiomatic in a 'loss of a chance' claim (if there are only two bidders, the issue is binary), and there are other authorities where multiple bids are considered. As to the prediction of what the final tenders would be for those that did not submit them, it will be for those parties to provide by way of evidence (if they are to establish the chance they have lost) what that tender would have been, which the Court will assess, no doubt in the face of criticism from others. I accept that this adds a layer of complexity and variability, but in the context of a loss of a chance analysis, not one which a Court will be unable to assess fairly. Similarly, I accept that conflict of interest/undue influence are more nuanced cases than those which rely solely on incorrect application of disclosed criteria, because the counter-factual is not as readily obvious. However, taking the undue influence point, considering the counter-factual is in fact all part of the exercise the Court is likely to have to consider to determine whether there has in fact been undue influence in the first place: a claim that X actually influenced Y may well need to consider, when determining liability, what Y would have done but for X's conduct i.e. was there any 'influence'? The liability investigation then, of itself, goes a long way in providing the necessary counter-factual for the purposes of bid evaluation output and the assessment of the loss of a chance.

49. Whilst accepting therefore that this is a more complex case than many, I do not regard it as one where the number of variables is so complex that the Court will not be able to assess damages, including loss of a chance (to the extent a party claims that) in accordance with the appropriate legal principles.

*Sufficiently Serious Breach*

50. Third, both Mr Coppel KC and Ms Hannaford KC argue that it is a possibility that DHL or Unipart will establish breach of the PCR but be unable to claim damages for failure to satisfy the Francovich criteria. This would leave the Claimant without an effective remedy. In this respect, Mr Coppel KC relies upon Boxxe Limited v SS for Justice [2023] EWHC 533 (TCC) at [42]. Unlike in Boxxe, the point has not been rendered academic because SCCL has not accepted that it will not argue in due course that the breach(es) is not sufficiently serious to warrant damages.

51. Since Boxxe, the tension described above has been subject to appellate consideration in Braceurself Ltd v NHS England [2024] EWCA Civ 39; [2024] KB 914. The context of the exploration was different, as in that case the argument by the claimant was that it was incoherent and unjust to hold that a breach was not 'sufficiently serious' to warrant an award of Francovich damages where it had been held at the interlocutory stage that damages would be an adequate remedy.

52. At paragraphs [44], [118] and [119], Coulson LJ said:

> "*44. In Alstom, O'Farrell J had said that, if a breach was not sufficiently serious enough to justify the Francovich conditions, it was unlikely to be sufficiently serious to justify setting aside the contract under challenge, Constable J said in Boxxe that there was force in that observation. I agree. In my experience, the present case is therefore unusual, if not unique, because of the vast gap the judge found between the very low culpability on the part of the respondent, and the extreme consequences of the single marking error*.
>
> …
>
> *118. I acknowledge that there is some tension between the test to be applied at the interim stage, and the Francovich conditions. That tension was first identified by Fraser J in Lancashire Care, and ways to ameliorate the practical issues that can arise were noted in Bombardier and Boxxe. Furthermore, I acknowledge that, as per O'Farrell J in Alstom, it is not a tension that is likely to come to the surface very often, since in most cases, a breach that would have reversed the result of a tender process is more likely than not to be sufficiently serious to justify Francovich damages.*
>
> *119. That of course brings us straight back to our starting point. This was a very unusual and, as the judge said, "most unfortunate", situation. It was also, in my experience, very rare. A single, inadvertent breach in an otherwise impressive and careful procurement exercise caused the wrong result. The judge agonised over the competing factors and in the end concluded that Francovich damages were not justified. Some judges might have come to a different view: that is not the point. The only issue is whether the judge erred in principle in undertaking that exercise. For the reasons that I have given, I conclude that he did not."*

53. It was urged upon me by the Claimants that the risk of being left with no damages notwithstanding a breach of the PCR and the consequence that, but for the breach, the Claimants have suffered financial losses is not as low as might be suggested in Braceurself. On its face, this case seems a long way from Braceurself. Whilst, of course, I do not by these observations bind any future Court, it would seem unlikely in the present case that if all the claimed breaches together with causation are made out, those breaches would not be sufficiently serious to warrant damages. The question of course remains – what if a single breach is the only one DHL or Unipart make out from their litany of claims, which breach nevertheless has causative impact. If that breach was of particularly low culpability, this may align with Braceurself. But even if the Court could see reliably into the future in this way, whilst the inadequacy of damages test may be passed, this ignores the fact that the Court must also assume when considering the 'balance of convenience' that the only relevant breach is one which is of very low culpability and insufficient to pass the Frankovich test. This of itself would weigh, in the exercise of discretion, heavily against setting the Contract Award aside.

54. Even if I am wrong about this analysis, the probability that this case will turn into the rare circumstances grappled with in Braceurself is sufficiently remote to be discounted.

*Adequacy of Damage for the Claimants: Conclusion*

55. DHL has not discharged the burden of establishing to 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. In these circumstances, it is not necessary (were DHL to be the only party) to go on to consider the adequacy of damages for SCCL. Given the position of Unipart, I nevertheless go on to do so.

56. Unipart has, just, discharged that burden although the degree of confidence is at the lower end of the spectrum. I note, however, that in light of my finding above, the primary basis I should consider where the balance of convenience lies between Unipart and SCCL must be on the basis that DHL has failed to establish that damages are inadequate and that Unipart is effectively the only party able to argue that interim relief is open (at least as a matter of principle) to it.

Adequacy of Damages: SCCL

57. Mr New gives evidence in support of SCCL's position which, as summarised by Ms Sloane KC, falls into two broad categories of loss should the suspension not be lifted: the loss of benefits of the New Contract v the Existing Contract; and the integral part the New Contract plays in part of a broader and urgently needed modernisation programme (known as 'Project Tokyo'). The attack on this evidence focusses principally on Mr New's evidence about Project Tokyo: in summary, the Claimants argue that the urgency is exaggerated; no funding is secured and the prospects of funding are remote not just in the current financial year but more generally given the widely known public sector funding constraints; documents supporting the 'highly confidential' project are scant; and Project Tokyo formed no part of the services specification for the tender, such that it would represent a fundamental change to the specification which cannot be introduced through the change process pursuant to Regulation 72 and/or the contract provisions themselves.

58. At paragraphs 69 to 76 of his first statement, Mr New states that the NHS Supply Chain currently faces a risk of systemic failure. SCCL provides a critical service to the NHS and if it were to be disrupted, it would quickly have a major and catastrophic effect on the NHS's ability to provide care. The Court has been referred to the National Audit Office report, which concluded that the NHS Supply Chain was not yet fulfilling its potential. In Mr New's evidence to the Public Accounts Committee, he stressed the limitations of aged/legacy technology, as did the Boardman Review of Government Procurement in the COVID pandemic.

59. Mr New then explains that SCCL's infrastructure is based on a system called RESUS, which is around 30 years old. At paragraph 74, Mr New states that there were 35 P1 (highest priority) alerts in the period of 11 months to the end of November 2024. Mr New explained the effect of one such alert on 1 November 2024, which resulted in 17,000 lines not being picked, and consequent delays which affected the shipping of those products to hospitals. The SCCL Board Minutes for the November 2024 meeting stated:

> "*…it was noted that the Committee had considered the principal risk register in its most recent meeting and that 6 of the 11 principal risks were outside of the stated risk appetite for those risks. It was noted that the fragility of the existing IT system meant that the risk relating to IT stability had crystallised and was now creating wider issues for the Company meaning that it was suffering contagion between risks and the Committee felt that this position was intolerable…."*

60. Although Mr Pyne's responsive evidence suggested that the number or severity of P1 alerts had been overstated, the document he has relied upon to substantiate this point appears not to be comprehensive. For example, it does not contain the P1 alert on 1 November 2024, which Mr Pyne accepts occurred (he appends the Major Incident Alert itself which substantiates the P1 event). It also does not appear to include the '*6 separate and unrelated incidents over 4 months, each resulting in widespread disruption for a large number of orders for at least one day'* as reported in the Board Minute of 15 November 2024 under the heading '*Severe (P1) IT/Data failures….*' These failures obviously happened but are not in the schedule relied upon by Mr Pyne. The discrepancy is not explained by different time periods as (to be fair, somewhat tentatively) suggested by Ms Hannaford KC. The schedule relied upon by Mr Pyne is not therefore a reliable basis upon which to undermine Mr New's evidence about the increasing severity of the problem SCCL, and the NHS, is facing.

61. Mr New's responsive evidence explains, in my view credibly, how Mr Pyne has misunderstood the integral nature of RESUS and the IT architectural challenge facing SCCL. Mr New explains that Project Tokyo is seeking to address this by replacing the entire architecture with a modern Software As A Service solution. Importantly, it is not suggested that it will be the new logistics supplier who will implement this. Mr New's point is that the new provider must work with SCCL to devise what is feasible and fit for the future, and it makes no sense to do that with the provider who will not be in place for the following duration of the New Contract. It is on this basis that delay to the letting of the New Contract impacts the progression of the IT modernisation project, even though the logistics supplier is not carrying out that project itself.

62. To demonstrate the interface, Mr New provides a document (which is part of the Confidentiality Ring) showing the timelines for critical paths to be started and completed over the course of Project Tokyo. As Ms Hannaford KC rightly says (and as Mr New's evidence itself accepts) there is more than one critical path through the duration of the project which runs from 2025 to 2029. However, it is clear that one such path runs through the letting of the new logistics supplier and the completion of the transition. Without needing to understand the complexities, it seems to me entirely plausible that interaction with the new logistics supplier and the strategic plan that that supplier has to produce and the IT modernisation programme is essential, and that delay to one will either cause delay to the other, or, if the latter proceeds without the relevant input, problems down the line. I accept that the 'Key Milestone' document is, notwithstanding Ms Hannaford KC's scepticism, taken from the existing Business Case. According to the document, letting the logistics provider contract is a key milestone in the planned modernisation programme. It might be more surprising if it were not. It also seems to me that Mr New's evidence that IT modernisation is now critical is effectively a statement of public record. I do not regard the fact that the failure to have been able to progress this sooner – whether through funding difficulties or otherwise – detracts from that urgency or means that further delay is tolerable for the NHS or the public who may be impacted.

63. I therefore do not consider that either the importance of Project Tokyo or the importance of the establishment of the long-term logistics provider to progressing that infrastructure modernisation programme has been exaggerated by Mr New.

64. I then consider the point that the New Contract does not presently include Project Tokyo and that its introduction would not be possible in any event because of Regulation 72 of the PCR. If this were correct, DHL and Unipart argue that it cannot, therefore, be relevant to the question of the importance of not delaying Contract Award.

65. The Claimants rely upon the summary of Project Tokyo set out at paragraph 79 of Mr New's First Witness Statement. Having explained that '*the only option is to build a new network, deploy new ERP technology and at the same time transform the service proposition and then transition demand between the old network and new network before changing the use or closing the legacy warehouses'*, Mr New then identifies the broad process as follows:

    (1) Global Process Design (SCCL, ADSM, Logistics);

    (2) Global ERP design (ADSM);

    (3) Global automation design (Logistics);

    (4) Develop new north warehouse and fit out with new automation and deploy the new ERP (SCCL, Logistics, ADSM);

    (5) Migrate customer demand to the new site to free Gorsey Point (SCCL, Logistics);

    (6) Transition stock from Daventry to Gorsey Point for pandemic resilience (Logistics);

(7) Develop the new south warehouse and fit out with new automation and deploy the new ERP (SCCL, Logistics, ADSM);

(8) Concurrently, develop the new midlands warehouse and fit out with new automation and deploy the new ERP (SCCL, Logistics, ADSM);

(9) Mobilise all customer orders into the new sites (SCCL, Logistics);

(10) Network collapse/change of use for legacy sites (SCCL, Logistics).

66. Both parties rely upon the Service Description provided at ISIT and the later version at ISFT; the Claimants say that this plan is entirely outwith the specification for which they have bid at each stage and would be a substantial change excluded by Regulation 72; and the Defendant to contend that there are sufficient indicators and flexibility in the New Contract identified in the specification that the expected involvement in the implementation of Project Tokyo sits within it.

67. It is common ground that at least some parts of the new supplier's involvement in Project Tokyo will be managed through change procedures. It is not necessary, or possible, to do an exhaustive analysis of the specification(s) and the extent they may or may not permit potential changes about which there is at best very limited and general information. In the context of this application, it is therefore not feasible or appropriate for me to make any determination as to whether any such change request, in the absence of seeing what it is in detail, could give rise to legitimate complaints either as to changes between ISIT and IFST (insofar as Unipart is concerned) and/or valid Regulation 72 challenges. Nothing I say in the following paragraphs predetermines any such questions that may arise.

68. By way of example, however, in relation to the emphasis placed by Mr Coppel KC on the reference by Mr New to the development of new warehouses, Ms Sloane KC relies upon paragraph 3.21, which appeared in both versions. This states:

> "*3.21.1 The Supplier will be managing the network and associated infrastructure on behalf of the Authority. As Customer activity changes throughout the lifetime of the Operating Model, the Supplier must undertake ongoing reviews of the suitability and capability of that infrastructure to support the changes.*
>
> *3.21.2 The Supplier is required to advise and work with the Authority in order to ensure that the network continues to meet the needs of the Operating Model. This may lead to decisions to change the existing network infrastructure which may include additional warehouses. There is a possibility that some network expansion activity will be underway at the commencement of the Contract.*
>
> *3.21.3 The Authority may task the Supplier with either leading or participating in this work. The Variation Procedure, as defined within the Contract, will underpin and support these decisions and subsequent actions*".

69. The new logistics suppliers' involvement in those elements of broad outline process explained by Mr New would, at least in principle, fall within what is very broadly

envisaged in these paragraphs. Whether or not they do, in due course, will depend on what precisely is required. However, it is not possible for me to say that the Claimants are obviously correct that the logistic suppliers' interaction with Project Tokyo falls outside that which they may legitimately be required to carry out (with or without a variation) with regard to the supporting of the development of new warehousing capacity.

70. Similarly, in respect of IT Infrastructure, paragraph 8.5.7 of the ISIT Specification identifies, amongst other things, RESUS as a legacy application. Paragraph 8.5.8 states:

> "*The Supplier ADSM function will be responsible for the development of the technical roadmap that supports modernization/replacement of all legacy Logistics and transport applications and services. With changes being agreed through the Change Control process.*"

71. Similar wording is included in paragraph 8.18.9 of the updated draft (which also contains more details). This is, on its face, consistent with the sort of interaction with the IT modernisation programme which lies at the heart of SCCL's plans. Whether or to what extent is ultimately required of the logistics supplier gives rise to Regulation 72 challenges is a different matter and not one I can determine on this application.

72. I also reject the suggestion, at least from DHL, that it came as a surprise to them that SCCL considered that the new logistics supplier would be required to be involved in transformational change at SCCL. Of course, the internal name of 'Project Tokyo' may have been new to DHL, as may have been some of the objectives of the broader modernisation programme with which the logistics supplier would have to interact. But that the Contract would be 'transformational' was not news. First, in Mr Peacock's initial Witness Statement, he did not suggest that anything Mr New had set out about Project Tokyo was new to him. Far from suggesting that the connection between Project Tokyo and the role required of the new logistics supplier was wholly incompatible with the contract he thought DHL had bid for (the thrust of the argument now run), Mr Peacock specifically relied upon that transformational growth as the basis for contending that the Contract was a unique contract in the healthcare sector such that its loss could not be adequately compensated for in damages. Mr Coppel KC tried to suggest that Mr Peacock was simply explaining Mr New's evidence about the New Contract's transformational qualities, but this is plainly not what Mr Peacock is doing at [41] and [42] of his First Witness Statement. He is plainly agreeing that, in his view, the project is in part transformational and then relying upon that fact. The suggestion that this transformational quality is only what SCCL '*apparently envisages*' only appears in his Second Statement, and lacks credibility when viewed against the content of his First Statement.

73. Finally, it is right that Project Tokyo does not presently have funding and Mr New is clear about the steps for approval that lie ahead. There is no evidential basis for the claim that the prospects of it receiving funding are 'remote' merely because of general financial constraints, given the significance of the project to national infrastructure and the indication Mr New refers to that, whilst not guaranteed, funding may be available in the remainder of the current year and in the next. What is clear is that such prospect as exists for approval is will be put at significant risk if not

extinguished in circumstances where SCCL is not able to demonstrate that a critical dependency for the success of the project, the Contract Award with the new logistics supplier, is in place.

74. I am entirely satisfied on the evidence before me that there is a very credible risk (to put it at its lowest) that delaying the letting of the New Contract will cause real delays to SCCL's broader modernisation programme, the progress of which is obviously very important to the NHS and of extremely high public interest. The loss to SCCL in being able to progress these plans for any significant duration would plainly not be compensatable adequately in damages.

The Balance of Convenience

75. The first question to be considered is how long the delay is likely to be (DWF LLP v Secretary of State for Business Innovation and Skills [2014] EWCA Civ 900.

76. In this context, it is necessary to consider first DHL's contention (supported by Unipart) that there should be a preliminary issue "*as to whether the Defendant breached its duties under reg. 24 and/or 41 of the Public Contracts Regulations 2015 by failing to identify that Chris Holmes, a recently-employed senior executive of the Defendant, was advising GXO on the preparation of its tender and to take action to ensure equal treatment of tenderers and that competition was not thereby distorted (see §17 of the Amended Particulars of Claim and §§9-10 of the Amended Defence)*".

77. DHL seeks the listing of this preliminary issue with a time estimate of 2 days (or, as Mr Coppel KC said in oral submissions, no more than 4 days).

78. The claim regarding Chris Holmes relies upon regs. 24 and 41 PCR:

> *24: "(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 at least cover any situation where 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."*
>
> *41: "(1) Where a candidate or tenderer, or an undertaking related to a candidate or tenderer -*
>
> *(a) has advised the contracting authority, whether in the context of regulation 40 or not, or*
>
> *(b) has otherwise been involved in the preparation of the procurement procedure, the contracting authority shall take appropriate measures to ensure that competition is not distorted by the participation of that candidate or tenderer.*
>
> *(2) Such measures shall include—*

> *(a) the communication to the other candidates and tenderers of relevant information exchanged in the context of or resulting from the involvement of the candidate or tenderer in the preparation of the procurement procedure; and*
>
> *(b) the fixing of adequate time limits for the receipt of tenders*."

79. DHL says that GXO correctly declared Mr Holmes' involvement according to the rules of the procurement. However, since SCCL "originally misfiled" GXO's declaration, DHL contends that there has already been a *prima facie* breach.

80. Whilst the cause and impact of the 'misfiling' would no doubt play some role, this characterisation of the dispute seriously underestimates the nature of the 'preliminary issue'. The heart of the dispute relates to what steps SCCL took to remove Mr Holmes from the procurement process once he resigned and their adequacy, in light of the involvement and knowledge Mr Holmes had already acquired and the role he went on to perform for GXO. What DHL propose is essentially staging the liability trial, taking one allegation of breach first. It is not a 'preliminary issue' in the traditional sense, and would require the potential for further pleadings, extensive disclosure and factual evidence.

81. As to pleadings, Ms Sloane KC is correct that various allegations or at least possible allegations which go further than the pleaded case are made in Mr Coppel KC's skeleton and in the witness evidence of Mr Peacock. SCCL are entitled to know with some precision (as is Mr Holmes) what the precise ambit of the allegation is. At present, it is not clear and the ambit of the pleaded case would need to be clarified.

82. As became clear when the issue was explored with Mr Coppel KC, disclosure would be wide ranging. DHL would, understandably, be seeking disclosure of all the documents which showed Mr Holmes' involvement in the development of the procurement process up to the point he announced his resignation. They would also require documents relating to what Mr Holmes was *in fact* doing between that date and the date he ended his employment with SCCL, so as to interrogate the assertion of fact that Mr Holmes had nothing to do with the ongoing procurement process whilst working at SCCL. I have no doubt that that documentation may include any interaction Mr Holmes had during that time with prospective tenderers, including specifically GXO, and any representations Mr Holmes made about the value he could bring during his recruitment process. That may go beyond GXO, as it appears that DHL themselves at one point sought to engage Mr Holmes, which SCCL wish to explore (even if DHL do not) as it goes potentially to a question of limitation. Mr Coppel KC suggested that this would not be all of Mr Holmes' documents during this time, but did not formulate any basis upon which disclosure could rationally be limited. On its face, documents demonstrating what Mr Holmes was doing A: are relevant in demonstrating that at the time he was not doing B: SCCL may wish to disclose all such material in order to prove the negative. After Mr Holmes started with GXO, documents evidencing what he was doing are potentially relevant if DHL intends to investigate (as suggested at 13(2) of the skeleton) whether Mr Holmes had contact with his former colleagues during the procurement, and in any event to consider what causative effect any potential conflict may have had.

83. Added to this is the suggestion that one of Mr Holmes' former team is the evaluator about whom specific complaint is made by Unipart. It seems to me that if Mr Holmes'

conduct is to be investigated, that should be in the context of all or any allegations which may concern him, directly or indirectly. This interaction would widen disclosure and the scope of any preliminary issue.

84. The issue could not be determinative of litigation without causation being considered. It is difficult to see how causation could properly be investigated in a vacuum from all the alleged breaches, and it certainly would be a most inefficient way of doing so.

85. The amount of factual evidence and exploration would therefore be significant. This is obviously an extremely serious allegation both for GXO, SCCL and of course for Mr Holmes personally. The suggestion that it could be carried out in a few days with limited disclosure and limited evidence in the near term is wholly implausible. It is difficult to think of the sort of issue that is further away from the situation considered by Kerr J in Vodafone Ltd v SS for Justice [2021] EWHC 2793 (TCC), (2021) 200 Con LR 82, which related to a straightforward, largely document based evaluation criteria analysis, with limited scope for disputed factual evidence.

86. I therefore dismiss the application for a preliminary issue as advanced by DHL.

87. In relation to the possibility of expediting the whole of the trial generally, as the exploration of just one of the issues has illustrated, preparation for trial will involve considerable work. As indicated at the outset, virtually every type of complaint is made and the trial will involve the claims by three bidders, and the central involvement of a member of staff from the successful bidder, together with the Defendant. It seems highly unlikely that even with an expedited timetable, this matter would be ready for trial in less than 12 months, but assuming the hearing is (at best) 16 days and (perhaps pessimistically) 24 days, the TCC is not likely to be able to accommodate such a trial until Autumn 2026. With judgment (and ignoring any appeal), a delay to Contract Award if SCCL is successful is likely to be in the order of 2 years.

88. The Claimants identify between them a number of factors which, they say, weigh heavily in the balance of convenience in their favour. The first is problems that the procurement process has encountered so far, both in terms of the 'mistakes' that have been made and the general length of time/delays. In circumstances where I cannot and should not form a view on the merits of the parties' positions substantively, it is difficult to see where the point about the 'mistakes' goes. At least in the circumstances of this case, the fact that certain admissions have been made make it no more or less likely that the allegations which are disputed will be made out. There has been some delay in the process so far, and it is a factor which weighs to some degree in the Claimants' favour, but it is far from an overwhelming or determinative point.

89. The next is the risk that the Defendant will have to 'pay twice'. It could be said that the odds of SCCL having to pay, if not twice, at least more than once have increased in circumstances where there are complaints from all three complaining bidders. Moreover, liability has been admitted in respect of a breach in the Wincanton claim, although liability for damages has not. The related point is the understandable and strong public interest in SCCL complying with its legal obligations in respect of public procurement. However, these points, as stated by Joanna Smith J in Kellogg Brown & Root v Mayor's Office for Policing and Crime at [2021] EWHC 3321; 200

Con LR 116, have already been answered by the judgments of Stuart-Smith J in Openview, Kent, and Alstom. As he made clear, important though these factors are, they should not be a reason for maintaining the automatic suspension if it is otherwise inappropriate to do so.

90. In circumstances where DHL have not established that it would be unjust, in all the circumstances, that it be confined to a remedy of damages, the balance of convenience question does not in reality arise; and if it did, in the circumstances where damages are likely to be inadequate for SCCL, the balance of convenience falls firmly in SCCL's favour.

91. In these circumstances, when considering Unipart as the only party able to demonstrate that it would at least arguably be unjust for it to be confined to a remedy in damages, the balance of convenience question must be considered in the context of its own decision not to challenge the procurement process when excluded. In line with CSC, this delay counts heavily against Unipart, and the balance falls determinatively again in favour of SCCL.

92. For the sake of completeness, I consider the position had DHL established, contrary to my finding above, that damages were inadequate. Had this been the case, I would nevertheless have concluded that the risk of creating the least injustice lies with allowing the suspension to be lifted. The public interest in the circumstances of this case in light of the importance of the contract for national infrastructure and the potential implications for considerable delay plainly outweigh the potential injustice to DHL and Unipart (even putting to one side Unipart's own failure to challenge the progression of the procurement when it was excluded).

93. In the circumstance, the application to lift the suspension succeeds.