[2021] IECA 305

Approved Judgment

THE COURT OF APPEAL

CIVIL

No Redaction Needed

Court of Appeal Record Number: 2021/24

Edwards J.
Faherty J.
Barniville J.

BETWEEN

WORD PERFECT TRANSLATION SERVICES LIMTIED

APPLICANT/
APPELLANT

- AND –

THE MINISTER FOR PUBLIC EXPENDITURE AND REFORM

RESPONDENT/
RESPONDENT

JUDGMENT of Mr. Justice David Barniville delivered on the 12th day of November, 2021

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1. Introduction

1. This is my judgment on an appeal by the applicant/appellant, Word Perfect Translation Services Limited (the "appellant"), from the judgment and order of the High Court (McDonald J.) delivered and made on 23 September, 2021. In the judgment and order under appeal, the High Court granted an application by the respondent, the Minister for Public Expenditure and Reform (the "respondent"), for an order pursuant to Regulation 8A of the European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010 (S.I. No. 130 of 2010) (the "2010 Regulations"), as inserted by the European Communities (Public Authorities' Contracts) (Review Procedures) (Amendments) Regulations 2015 (S.I. No. 192 of 2015) (the "2015 Regulations") and as amended by the European Communities (Public Authorities' Contracts) (Review Procedures) (Amendment) Regulations 2017 (S.I. No. 327 of 2017) (the "2017 Regulations") (together the "Remedies Regulations") permitting the respondent to conclude a Multi-Supplier Framework Agreement for the provision of Irish Language Translation Services (the "Framework Agreement"). The effect of the judgment and order under appeal was that the automatic suspension which arose under Regulation 8(2) of the Remedies Regulations and which prevented the respondent for entering into the Framework Agreement with tenderers who had successfully tendered under the relevant competition was lifted. The High Court placed a stay on its order permitting the respondent to enter into a Framework Agreement with those tenderers. That stay lasted

until 15 October, 2021. The appellant immediately appealed to this Court. The stay was not renewed after the 15 October, 2021 but was re-imposed by this Court at the conclusion of the hearing of the appeal on 27 October, 2021 on certain terms.

2. The Parties

2. The appellant is an Irish company which provides translation and interpretation services throughout the State to both public and private sector clients. The majority of its business appears to consist of work for public sector clients. The appellant has competed over many years in various public sector tender competitions. It is a small enterprise with an annual turnover of less than €5m. Its public sector clients include the Irish Naturalisation and Immigration Service, the Refugee Application Commissioners (Irish Protection Office), the Refugee Appeals Tribunal (Irish Protection Appeals Tribunal) and Immigration Border Control, the Department of Justice, the Irish Refugee Protection Programme and Office of Promotion and Migration, the Department of Social Protection, the Probation Service, An Garda Síochána and the HSE.

3. The respondent is the contracting authority in the competition the subject of the proceedings. The Office of Government Procurement (the "OGP") is an office within the Department of Public Expenditure and Reform which is tasked with sourcing goods and services on behalf of the public service. The OGP has oversight of the conduct of the tender process the subject of the proceedings.

3. The Competition/Tender Process

4. Following the publication of the required contract notice, on 15 May 2021, the respondent, acting through the OGP, published a Request for Tenders dated 12 May, 2021 to establish a "Multi Supplier Framework Agreement for the Provision of Irish Language Translation Services (the "RFT")" on the eTenders website. The respondent is to be the

contracting authority under the proposed Framework Agreement and under the contracts to be allocated to successful tenderers under the framework (the "2021 Framework"). The RFT invited tenders from economic operators for appointment to the 2021 Framework for the provision of certain Irish language translation services which, in summary, were described in the RFT as "*reliable and high quality Irish language translation services for Framework Clients as and when required*". The services were described in more detail in Appendix 1 to the RFT. The "Framework Clients" were described at para. 1.4 as comprising the respondent as well as the following:

"1. *Ministers of the Government of Ireland, Central Government Departments, offices and non-commercial Agencies and Organisations which have a formal reporting and legal relationship to Central Government Departments, including all local authorities in Ireland (themselves including regional assemblies, local enterprise boards and library bodies);*

2. *Entities in the Irish health sector including but not limited to the Health Service Executive (HSE) and the Health Information and Quality Authority (HIQA), provided that such entities are contracting authorities within the meaning of Regulation 2 of the European Union (Award of Public Authority Contracts) Regulation 2016 (Statutory Instrument 284 of 2016);*

3. *Contract authorities which are Third Level Educational Institutions (including universities, technical universities, institutes of technology and members of the Education Procurement Services); and*

4. *Contract authorities which are Education and Training Boards (ETBs) and ETB schools, and primary, post-primary, special and secondary schools as well as ETBs acting on behalf of schools;*

5. *An Garda Síochána (Police);*

6. *The Irish Prison Service; and*

7. *The Defence Forces."*

5. The 2021 Framework provides for the Framework Agreement to be entered into with successful tenderers to be divided into three lots, with each lot resulting in a separate Framework Agreement with the successful tenderers. The lots are as follows:

"Lot 1: "Translation of standard text";

Lot 2: "Translation of technical text"; and

Lot 3: "Translation and/proof reading of legal text and documents."

6. The RFT provides that contracts under the 2021 Framework will be awarded by a "*mixture of Rotation and Mini Competition depending on the value and the complexity or specialised nature of the requirement*". In respect of Lot 1, which involves the translation of standard text, the RFT provides that the awarding of contracts for work in that Lot, with an estimated value of less than €100,000, will be awarded by rotation. The rotation process is described in more detail in Clause 5.1 of the Framework Agreement itself which is contained in Appendix 5 to the RFT. All contracts of €100,000 or more in Lot 1 and all contracts in Lots 2 and 3 are to be awarded by mini competition among those tenderers with whom the respondent entered into a Framework Agreement.

7. Para. 1.7 of the RFT provides that the 2021 Framework will not be used for the award of contracts with an estimated value of less than €25,000.

8. Para 1.4 of the RFT provides that it is anticipated that a minimum of two and a maximum of 15 members will be appointed to the Framework Agreement for each of the three Lots. Those to be appointed are called "Framework Members". Contracts will then be awarded (or "called off") by the Framework Clients to the Framework Members in accordance with the procedures summarised in para. 1.3 at the RFT and set out in greater

detail in Clause 5.1 of Appendix 5 to the RFT. The contracts to be awarded, or "called off", under the 2021 Framework are called "Service Contracts".

9. Para. 1.5 of the RFT provides that the competition will be conducted in accordance with the open procedure under the European Union (Award of Public Authority Contracts) Regulations 2016 (S.I. No. 284 of 2016) (the "2016 Regulations") and that any Framework Agreement entered into under the competition would, subject to certain limited exceptions, be for a term of four years.

10. The respondent estimated that the aggregate expenditure on the services to be covered by the proposed Framework Agreements under the 2021 Framework could amount to up to €10m. (excluding VAT) over the four-year term of those Agreements and any possible extensions to them. That estimate was broken down as between the three lots as follows. Lot 1: up to €6m; Lot 2: up to €2m.; and Lot 3: up to €2m.

11. The 2021 Framework is intended to replace a framework put in place in 2016 (the "2016 Framework") which expired on 3 July, 2021.

12. Framework Agreements are often used where contracting authorities have ongoing requirements for services. They are expressly provided for in the governing European Directives, including the relevant Directive for present purposes, Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (the "Public Sector Directive") (Article 33) and in the domestic implementing regulations, the 2016 Regulations (Regulation 33).

13. The appellant was a participant in the 2016 Framework. Prior to the RFT seeking tenders for the 2021 Framework, the respondent put in place a consultation process. The appellant did not participate in that process. There is a significant issue between the parties as to whether that is a relevant factor for the court to consider. In any event, the appellant

did not participate in the process and explained that that was essentially due to its ongoing work commitments.

14. The appellant raised certain concerns in relation to the competition the subject of the RFT through clarification questions submitted to the respondent on 26 May, 2021 and subsequently in correspondence from the appellant's solicitors on 4 June, 2021. The original deadline for the submission of tenders was 12 noon on 11 June, 2021. It was later extended to 12 noon on 14 June, 2021. The appellant commenced proceedings on 11 June, 2021.

4. The Proceedings/Automatic Suspension

15. By an originating notice of motion and statement of grounds dated 11 June, 2021, the appellant brought proceedings in which it sought (*inter alia*) orders pursuant to Regulation 8(1)(a) and/or Regulation 9 and/or Regulation 14 of the Remedies Regulations setting aside, quashing or permanently suspending the decision of the respondent to adopt and publish the RFT as well as interlocutory orders suspending the tender process and/or the procedure for the award of any contract pursuant to the RFT and/or suspending the implementation of the respondent's decision to adopt and publish the RFT. Various other orders were sought, including declarations and damages.

16. As the Statement of Grounds made clear, the proceedings concerned the rules of the competition set out in the RFT. The proceedings did not, therefore, challenge a decision by the respondent to award or to enter into any particular contract.

17. The appellant has challenged three aspects of the competition described in the RFT. First, it challenges the intended use of the rotation system in respect of services in Lot 1 with a value of less than €100,000. It contends that the use of the rotation system as a method of allocation of work in respect of the contracts to which it applies in Lot 1 is a breach of public procurement law and inconsistent with the purported application of the

most economically advantageous tender ("MEAT") criterion as the award criterion. Noting that up to 15 tenderers will be admitted to the 2021 Framework, the appellant contends that the rotation system will allocate work in a random way, such that the value of work obtained by Framework Members will be random in that the entity which ranked in fifteenth place may, for example, obtain a much higher value of work over the lifetime of the 2021 Framework than the entity which ranked in first place. The appellant maintains that the rotation system will randomly allocate work in Lot 1 for jobs that are worth less than €100,000 which it says is likely to constitute a very significant proportion of all work under the Framework, without any regard for where a tenderer is placed in a competition. It further contends that the inconsistency of the proposed rotation system with the MEAT criterion is exacerbated by the number of potential Framework Members, i.e. up to 15.

18. Second, the appellant challenges the inclusion of a minimum pricing requirement in Lots 1, 2 and 3, which minimum rates are set out in Appendix 2 of the RFT in respect of work done in each of those lots. Tenderers were not permitted to offer rates below those minimum rates. The appellant contends that the imposition of minimum rates is detrimental to competition and efficiency and fundamentally undermines the ability of tenderers to compete on price, which in turn undermines the ability of the tender to obtain value for money for the public purse. It is also contended that the minimum rates requirement is inconsistent with the MEAT criterion. The appellant further maintains that the minimum rates in the RFT are, in some cases, higher than the rates which the appellant charges for translation services and higher than the rates which some other service providers in the market charge. It contends that the imposition of minimum rates in the RFT is an interference by the State in the market or markets for the provision of translation services and mandates undertakings to breach competition law which is not, and cannot be,

justified as it has the object and effect of artificially distorting competition and compels undertakings to breach domestic and EU competition law.

19. Third, the appellant contends that the RFT provides for minimum turnover requirements for an operator to be admitted to the 2021 Framework for each of the three Lots. In each case the minimum annual turnover requirement is €40,000, which the appellant contends is disproportionately low and risks the admission of tenderers who would not have the capability to perform contracts under the 2021 Framework, which in turn disadvantages operators who do have such capability. The appellant maintains that the minimum turnover requirements constitute a further unlawful and unjustified intervention by the respondent in the market or markets for translation services which favours undertakings with very limited financial capacity at the expense of other undertakings, including the appellant.

20. The appellant contends that the rules or features of the competition complained of, individually and in combination, breach general principles of EU law and are otherwise unlawful as being in breach of Regulation 18 of the 2016 Regulations and several Articles of the TFEU.

21. The effect of the commencement by the appellant of the proceedings on 11 June, 2021 was automatically to suspend the entitlement of the respondent to conclude a Framework Agreement with successful tenderers under the competition, having regard to the provisions of Regulation 8(2) of the Remedies Regulations. The commencement of the proceedings did not, however, have the effect of preventing the respondent from proceeding with the evaluation process under the competition. The respondent proceeded with the evaluation process and, at the hearing of the appeal on 27 October 2021, informed the Court that it had notified service providers who had tendered successfully and with whom the respondent intended to enter into a Framework Agreement, that it would do so

with effect from 3 November, 2021 on the expiry of the required standstill period. The effect of the stay re-imposed by this Court, with the agreement of the respondent, at the conclusion of the hearing on 27 October, 2021 was that, in the event that the Court delivered judgment after 3 November, 2021 and if the appellant failed in its appeal, the respondent would not enter into any Framework Agreement with a successful tenderer until three business days had expired following the delivery of the judgment.

5. Application to Lift Automatic Suspension

22. On 29 June 2021, the respondent applied to the High Court for an order pursuant to Regulation 8A of the Remedies Regulations lifting the automatic suspension and permitting the respondent to enter into a Framework Agreement with the successful tenderers. Several affidavits were exchanged between the parties in support of and for the purposes of opposing the respondent's application. I propose at this stage to set out in some detail the evidence provided in those affidavits. I have done so as the judge did not have the opportunity to do so in full as he was required to give an urgent *ex tempore* judgment on the respondent's application.

23. The respondents' application to lift the automatic suspension was grounded on an affidavit sworn by Roisin Killeen, a Portfolio Manager in the OGP, on 29 June, 2021 (Ms. Killeen's first affidavit). She explained that, but for the automatic suspension, the respondent was expected to be in a position to enter into Framework Agreements within approximately three months of the deadline for the submission of tenders on 14 June, 2021. Ms. Killeen explained the importance of the proposed framework for public bodies, having regard to the obligations imposed on such bodies to publish certain documentation in each of the two official languages of the State, Irish and English, simultaneously under the Official Languages Act 2003 (the "2003 Act"). Ms. Killeen explained that, in practice, all State forms, documents, reports, and web site content had to be made available in both

languages and that the Framework Agreements are intended to provide Framework Clients with access to "*high quality services from suitably qualified providers for these commonly procured services*" and intended to ensure value for money for the State in compliance with other procurement regulations and Government policy.

24. Ms. Killeen noted that the current framework, the 2016 Framework, for these Irish translation services was to expire on 3 July, 2021 and that there was a requirement, therefore, to have a new arrangement in place as soon as possible. The OGP anticipated that the Framework Agreements would be concluded in late August 2021 which would enable Framework Clients to access Irish language translation services in August 2021 by means of direct drawdown, rather than by recommencing mini competitions for individual "call off" of contracts, which had been the procedure for the awarding of contracts under the 2016 Framework, and that the arrangement envisaged by the RFT anticipated a significant reduction in the administrative burden on public sector bodies in securing high quality translation services which complied with public procurement requirements. Ms. Killeen explained that the demand for Irish language translations across the public service was high and that under the 2016 Framework (in place since August 2017), public sector bodies completed approximately sixty competitions for Irish language translation services. Three public sector bodies were, at that stage, awaiting the establishment of the new 2021 Framework in order to access their translation services and it was expected that further public sector bodies would require Irish language translation services over the coming weeks. Ms. Killeen explained that it was "*vitally important*" that the new framework was established as soon as possible in order to minimise the gap in service to public sector bodies who required Irish translation services in order to discharge their statutory obligations under the 2003 Act. She also explained that, with respect to Lot 3, relating to the translation and/or proof reading of legal text and documents, the material falling within

this lot included EU Treaties, Regulations, Directives and other legal text originating in the European Commission and that the translation requirements with respect to this material were particularly important in light of the fact that the derogation relating to the status of the Irish language in the European Union was due to expire at the end of 2021. Thereafter, the Irish language would be a full working language of the EU and all legislation enacted from that date would be required to be translated into Irish. She stated that it was anticipated that the expiry of the derogation would increase the demand from Framework Clients for translation services in respect of items originating in EU institutions and that the recruitment of Irish language translators by EU institutions would lead to pressure on translation services within the State. Ms. Killeen asserted that it was in the public interest that the automatic suspension be lifted immediately in order that public bodies reliant on those translation services would be able to have access to providers who had participated in a competitive tender process ensuring value for money for the State and compliance with public procurement regulations and Government policy. Accordingly, it was said that the 2021 Framework was vital to ensure ongoing compliance with national and international obligations in respect of the Irish language. Ms. Killeen also referred to the failure by the appellant to participate in the consultation process. She also expressed the view that the appellant had not raised any serious issue to be tried in respect of its grounds of challenge to the tender process.

25. The appellant responded to Ms. Killeen's first affidavit by an affidavit sworn by Agim (Jimmy) Gashi on 23 July, 2021 ("Mr. Gashi's first affidavit"). Mr. Gashi acknowledged that the competition at issue concerns the procurement of Irish translation services for "*most of the public section, which itself constitutes the vast majority of the demand for Irish language translation services in the State*" and that the services at issue are *"obviously of importance to a large number of different public bodies"* (para 7). He

stated that the appellant was part of the 2016 Framework under which services were provided by mini competitions and that the appellant had supplied such services under that Framework to numerous public sector clients. He explained that the 2016 Framework and any replacement framework is of *"considerable importance"* to the appellant and that the provision of Irish language translation services is *"very important"* to it, not only because of the business generated from providing such services but also from a reputational perspective. He noted that it was important for any substantial Irish-based translation services company to be in this particular segment of the business (para. 11).

26. The appellant has ten staff members in its Irish language translation department, including project managers and translators. It also uses the services of approximately 50 external Irish language translators who are engaged regularly by the appellant. All of the appellant's translators are highly qualified and are accredited by Foras Na Gaelige. Mr. Gashi expressed concern that if the appellant is not included in the new Framework, it will not be able to source work for Foras certified translators and would lose them from its business. Without them, Mr. Gashi stated that the appellant would not be able to win or perform contracts for Irish language translation. Mr. Gashi then dealt with the three particular complaints which the appellant has in relation to the competition for the 2021 Framework, namely, the rotation system in respect of contracts below €100,000 in Lot 1; the imposition of minimum prices in each of the three Lots and the €40,000 turnover requirement for tenderers. Having asserted that those features of the competition are unlawful in various respects, Mr. Gashi contended that damages would not be an adequate remedy for the appellant were it ultimately to succeed in the proceedings. He asserted that the appellant has been denied the opportunity to participate in a lawful competition which was a very serious matter and which is exacerbated by the fact that the proceedings concern the structure of the framework competition. He said that it was unclear how, if the

appellant was ultimately successful, damages could be calculated to reflect the damage the appellant would have suffered from been denied the opportunity from participating in a lawful contest for a Framework Agreement where the ultimate allocation of work would still be uncertain. He asserted that the only remedy which would have any meaning for the appellant would be one where the competition is stopped on a permanent basis and the decision to adopt the RFT is quashed. He further said that maintaining the automatic suspension would preserve the status quo and would ensure that the appellant would not be deprived unfairly of obtaining a remedy.

27. Mr. Gashi then addressed the arguments advanced by Ms. Killeen to the effect that it was in the public interest that the automatic suspension be lifted. He made a number of points. First, he said that there would not necessarily be a gap in services if the automatic suspension was not lifted for a number of reasons. He explained that public bodies are not dependent on an OGP framework agreement in order to procure Irish translation services and that they could procure those services directly, with many of them doing so. He gave an example of an RFT issued by the Housing Agency on 25 May, 2021. He asserted that it is a *"straightforward"* process for a public body to go out to tender itself and that this happens on a continual basis. He did not accept that there was an administrative burden which required that the automatic suspension be lifted. He asserted that individual tenders, such as the Housing Agency tender, are straight forward to issue and assess (para. 59). He also referred to an RFT issued by the Seafood Development Agency for Irish language translation services on 8 June, 2021 which sought services to be provided on an interim basis pending the establishment of the 2021 Framework which was expected to be in place by September, 2021. Mr. Gashi described this as *"quite a straightforward form of tendering"* and that there was no reason why the services had to be limited to September, 2021. Mr. Gashi exhibited a screen shot of search results from the eTenders website

showing Irish language translation tenders advertised by a wide range of public bodies, which, he said, showed that public bodies do in fact go out to tender themselves, outside any framework.

28. Second, Mr. Gashi asserted that, notwithstanding that the 2016 Framework expired on 3 July 2021, contracting authorities could continue to utilise that Framework while the proceedings were pending and that it was not unusual for that to be done.

29. Third, Mr. Gashi ascertained that there would, in any event, be a gap between the expiry of the 2016 Framework on 3 July, 2021 and the conclusion of new contracts under the proposed 2021 Framework. He contended that this case did not have the kind of features which ought to lead to the lifting of the automatic suspension and that there was no *"pressing or urgent public interest"* which required that a new framework be entered into immediately.

30. Mr. Gashi contended that it was in the public interest that the suspension be maintained and that no contracts be awarded on foot of the RFT until the proceedings were determined. He stressed the public interest in the public having confidence that public monies are expended in a way which achieves value for money. He expressed the view that the proceedings could be ready for hearing in *"short order"*.

31. Finally, Mr. Gashi explained the reason why the appellant did not participate in the consultation process, which was that as an SME, the appellant had to focus on the day-to-day provision of its services rather than participating in consultation processes. He further contended that the fact that the appellant did not participate in the consultation process could not have any bearing on the proceedings. Finally, Mr. Gashi submitted that the appellant was willing to provide an undertaking as to damages if required by the Court in order to maintain the automatic suspension.

32. Ms. Killeen responded in her second affidavit which was sworn on 5 August, 2021 ("Ms. Killeen's second affidavit"). She described the proposed 2021 Framework as an *"essential framework"* having regard to Article 8 of the Constitution and the 2003 Act. Ms. Killeen explained that while the 2016 Framework did not contain the three features the subject of the appellant's challenge, it was necessary for frameworks to evolve and change over time and that the respondent had to decide on the most appropriate framework based on prevailing market conditions and changing requirements. She was not impressed with the explanation provided by Mr. Gashi for the appellant's failure to participate in the consultation process.

33. A fair portion of Ms. Killeen's second affidavit was directed to the respondent's response to the three substantive grounds of challenge advanced by the appellant and it is unnecessary to discuss those further here.

34. Ms. Killeen then turned to the question of the adequacy of damages. She contended that damages would be an adequate remedy for the appellant for various reasons which were set out at para. 43 of her third affidavit. First, she contended that any damages which might ultimately be awarded to the appellant would be capable of calculation *"by reference to the value of work actually awarded under the Framework Agreement and its component parts"* and also that the appellant would be in a position to provide an estimate of the value of the damage suffered by it by reference to its business under the 2016 Framework (para. 43a). Second, Ms. Killeen doubted the appellant's contention that the only meaningful remedy for the appellant was one which permanently stopped the competition on the basis that the appellant had failed to engage in the consultation process and had failed to submit a tender (para. 43b). Third, Ms. Killeen contended that the automatic suspension would not preserve the status quo in that the 2016 Framework had expired and there was, therefore, no framework in place and no way for public bodies to

assess services under a framework which no longer exists. She asserted that there was an *"imperative need"* for the Framework which had to be established *"as expeditiously as possible"* (para. 43d).

35. Ms. Killeen then addressed the risk of harm for the respondent in the event that the automatic suspension is not lifted. She disputed Mr. Gashi's contention that individual public bodies could procure Irish language translation services on a piecemeal basis by issuing their own individual tenders which would be straightforward. With respect to the examples giving by Mr. Gashi, Ms. Killeen said the following. The RFT issued by the Housing Agency was below the required advertising threshold and well below the EU threshold. The procurement rules applicable to that RFT were simple as the value of the services did not exceed €25,000. The contracting authority only needed to seek three quotes for the work. The proposed 2021 Framework was for procurements in excess of that amount. She contended, therefore, that the example given was irrelevant. With respect to the Seafood Development Agency tender, Ms. Killeen stated that this tender was done on an interim basis, demonstrating, she asserted, the public sector expectation that the proposed 2021 Framework would be concluded imminently. Ms. Killeen also disputed the relevance of the screen shot of examples of recent procurement exhibited by Mr. Gashi. Ms. Killeen contended that there was no evidence of the widespread, straightforward or "*easy*" procurement of Irish language translation services outside the 2016 Framework or the proposed 2021 Framework. On the contrary, she contended that there was a *"mounting, unmet need for Irish language translation services"* and that the respondent had received *"numerous enquiries"* from public sector bodies who are awaiting the new Framework. She gave some examples of such bodies (para 48).

36. Ms. Killeen disputed the contention that it was legally open to contracting authorities to continue using the 2016 Framework while the proceedings are pending as that

Framework, and all allowable extensions under it, expired on 3 July, 2021. While acknowledging that there would have been a short gap between the expiry of the 2016 Framework and the conclusion of the proposed new Framework Agreements, there was an urgent need to minimise the gap in order to ensure that the high and urgent demand for important translation services could be met by a mechanism which complies with public procurement rules. Ms. Killeen did not believe that the proceedings could be determined as expeditiously as the appellant believes, even with the best efforts of all parties. Finally, Ms. Killeen contended that damages would not be an adequate remedy for the respondent as the harm occasioned by the automatic suspension is not quantifiable damages. She described the harm as being a *"significant disruption in the State's compliance with its constitutional, national and international obligations in respect of the Irish language and its ability to secure access to high quality and compliantly procured services"*. (para. 54)

37. Mr. Gashi swore a second affidavit on behalf of the appellant on 26 August, 2021 ("Mr. Gashi's second affidavit"). He continued to assert, on behalf of the appellant, that the procurement of Irish language translation services through the respondent, as a central purchasing body, on behalf of other contracting authorities, is not the only way by which public bodies can procure such services since those bodies can themselves issue tenders and procure services on their own behalf. He contended, therefore, that the 2021 Framework was not absolutely essential and that there are other ways for those services to be procured while the proceedings are pending. The principal point made by Mr. Gashi was that public bodies can, and do, go out to tender themselves and that that does not give rise to any particular difficulty or create onerous administrative burdens. Mr. Gashi referred to a number of recent examples of public bodies tendering for Irish translation services, including tenders published by the National Transport Authority (in June 2021), the National Disability Authority (in July 2021), the Waterford and Wexford Education

and Training Board (July 2021), the Ombudsman for Children (Summer 2021), as well as the requests for tender from the Housing Agency and the Seafood Development Agency referred to in his first affidavit. He contended, therefore, that there is no difficulty in contracting authorities tendering themselves for Irish translation services and that, therefore, it was not essential for the 2021 Framework to be in place in order for public bodies to comply with their statutory obligations in terms of translating documents into the Irish language, even if the appellant was wrong in its contention that the 2016 Framework could continue to be used, notwithstanding its expiry, while the proceedings are pending.

38. Mr. Gashi drew attention to the fact that many contracts entered into by public bodies on foot of many competitions under the 2016 Framework remain operational and within their term and many will continue for a number of years. He maintained, therefore, that there was no need for those contracting authorities to conclude new contracts now or in the near term. Mr. Gashi prepared a table referring to 42 supplementary requests for tender issued by contracting authorities under the 2016 Framework (which he identified from the eTenders website) under which the expiry date for the relevant contracts for the supply of Irish translation services ranged from Summer/Winter 2021 to Summer 2025 (on the basis that all those contracts were extended in accordance with their terms and he said that "*these types of contracts are almost always extended*"). The contracting authorities in the table include various Government departments, local authorities and other bodies such as An Garda Síochána and the Arts Council. Mr. Gashi relied on the table as demonstrating that a significant number of the contracting authorities, which are intended to benefit from the proposed 2021 Framework, will not have any need to use the new Framework in the immediate term or at least during the currency of the proceedings.

39. As regards the adequacy of damages, Mr. Gashi disputed the contention that damages could easily be quantified. He did not agree that the estimates of the total spend

on the 2021 Framework would make the calculation of damages more straightforward since they do not indicate what value of work would actually be procured or what value of work would be allocated to a particular tenderer. He also rejected the contention that damages could be calculated by reference to the value of work actually awarded under the 2021 Framework since, if the appellant succeeds in the proceedings, it will have established that the 2021 Framework should never had been adopted and was unlawful. He explained that there would be a number of *"imponderables"* which would have to be considered in any assessment of damages. Nor could the appellant estimate damages by reference to the business it achieved under the 2016 Framework, since the work obtained by the appellant under the 2016 Framework might be entirely different to the work which would have been allocated to the appellant in the new framework had it been given the opportunity of participating in a lawful competition. He drew attention to the fact that there was no guarantee that even if the appellant did establish a breach of public procurement law it would have an entitlement to damages, having regard to the application of the *Francovich* criteria (from joined cases C-6/90 and C-9/90 *Francovich* [1991] ECR 1-5357 (*"Francovich"*)).

40. Mr. Gashi gave some further information as to the importance of the 2021 Framework for the appellant. He described it as of *"immense importance"* to the appellant and stated that Irish language translation is a very significant part of the appellant's business, accounting for approximately €867,000 in turnover in the most recent year, over which 90% arose from contracts under the 2016 Framework. He stated that this contributes approximately 25-30% to the appellant's total turnover and that Irish language translation amounts to over 50% of the appellant's total translation work. Mr. Gashi estimated that the case should be capable of being ready for hearing by the end of October,

2021 and that that was relevant in assessing whether the automatic suspension should be lifted.

41. The respondent's application to lift the automatic suspension was listed to be heard by the High Court on 21 September, 2021. Written submissions were exchanged by the parties. In addition, the parties exchanged further affidavits shortly before the hearing.

42. Ms. Killeen swore her third affidavit on 15 September, 2021. In that affidavit she addressed the appellant's contention that public bodies could enter into their own *ad hoc* tendering arrangements pending the determination of the proceedings. She disagreed with that and made a number of points in response. First, she stated that if the automatic suspension was lifted and if other bodies had to commence their own procurement processes for Irish language translation services in order to comply with the provisions of the 2003 Act, there would be significant delay as those processes would have to be advertised and there would be further delays to allow the process to be lawfully conducted which could take a number of weeks or months before contracts could be awarded. Ms. Killeen contended that the suggestion that public bodies should enter into a *"plethora of ad hoc contracts"* with their own delays, uncertainties, risks and potential for legal challenges had insufficient regard for the public interest and for the legal requirements involved. She contended that it would not be *"just or realistic"* for public bodies to be required to put such arrangements in place at this stage. She also reiterated the anticipated increasing demand for Irish translation services from the end of 2021 when the derogation relating to the status of the Irish language in the European Union is due to expire. She explained that the Department of Foreign Affairs, a Framework client under the proposed 2021 Framework, had contacted the respondent several times in recent weeks regarding the availability of qualified translators under the 2021 Framework to translate EU legal documentation. She noted that 2021 Framework provides in Lot 3 for the provision of the

specialist services of lawyers/linguists which were not provided for under the 2016 Framework.

43. Second, Ms. Killeen noted that Government policy is to use central arrangements, put in place by central purchasing bodies such as the respondent/the OGP in order to facilitate the efficient and cost-effective award of public contracts. She drew attention to the fact that that policy, as further expressed in a circular, Circular 10/14, issued by the Department of Public Expenditure and Reform in April 2014 and that it also represents EU policy as expressed in the Recitals to the Public Sector Directive.

44. Third, Ms. Killeen stated that the establishment of centralised framework agreements, such as the 2021 Framework, is a *"core part"* of the State's procurement programme and that procurement outside the proposed framework and by individual public bodies on an *ad hoc* and piecemeal basis did not represent value for money for the State.

45. Ms. Killeen contended that piecemeal procurement involves too much delay and uncertainty and was not a means of ensuring that the obligations on public bodies with regard to the translation of documents into Irish could properly be met. Ms. Killeen further contended that the examples of public bodies procuring translation services directly given by Mr. Gashi in his second affidavit were not relevant. The request for tenders by the National Transport Authority, Waterford and Wexford Education and Training Board, the Ombudsman for Children and the Housing Agency were outside the scope of the 2021 Framework. One of the bodies referred to (Bus Éireann) is not a Framework Client and is not, therefore, eligible to use the respondent's frameworks.

46. Ms. Killeen rejected the contentions that public bodies could easily, and without difficulty, run their own tender processes to procure Irish language translation services. She again rejected the contention that the 2016 Framework could continue to be used following its expiry.

47. With respect to the 42 tender competitions referred to by Mr. Gashi, Ms. Killeen made a number of points. First, she stated that the contracts, the subject of those tenders, were all awarded under the expired 2016 Framework which demonstrated the importance of that Framework and the 2021 Framework. Second, she contended that the examples given represented *"a small cohort"* compared to the many hundreds of public bodies eligible to use the proposed Framework, including 32 local authorities (only 8 of which were listed by Mr. Gashi). Third, she queried the certainty with which Mr. Gashi assumed the contracts would be extended and noted that extensions are optional and might not happen. Fourth, Ms. Killeen observed that Mr. Gashi did not cite the remaining 24 contracts which were awarded under the 2016 Framework which are expired. She stated that the public bodies who entered into those contracts would *"presumably"* put in place new arrangements under the 2021 Framework. She listed the 24 contracting authorities involved. Ms. Killeen stated that it was anticipated that more public bodies which had entered into contracts under the 2016 Framework would seek to avail of the 2021 Framework. She noted that the respondent considered the 2021 Framework to be "*absolutely essential*" and necessary to enable public bodies to access Irish translation services so that they can comply with their obligations with respect to the translation of documents into Irish. She referred to a *"mounting, unmet demand"* for such services.

48. Finally, Ms. Killeen reiterated the points she had made previously in relation to the adequacy of damages. In response to Mr. Gashi's reference to the *Francovich* criteria, Ms. Killeen confirmed, for the purposes of the application, that in the event that the Court were to accede to the respondent's application to lift the automatic suspension, the respondent will not dispute that the breaches alleged by the appellant *"would, if made out, be sufficient in theory to justify an award of damages in accordance with the Francovich criteria,*

provided of course that the separate requirement of proof of loss and causation were met"(para. 15).

49. Finally, with regard to the prospect of an early trial, Ms. Killeen was of the view that there was no reality to the suggestion that the proceedings could be ready for hearing by the end of October 2021.

50. The final substantive affidavit sworn for the purposes of the respondent's application was the third affidavit of Mr. Gashi sworn on 20 September 2021, the day before the hearing. While accepting the importance of Irish language and of the obligations on public bodies to translate certain documents into Irish, Mr. Gashi maintained that the actual requirements for Irish translation of many public bodies are quite limited and mainly involve translating annual reports or accounts. Mr. Gashi did not accept that there would be significant delays if public bodies had to go out to tender themselves. He made the point that many would have contracts falling below the threshold for the application of formal public procurement rules which could be done quickly. He further stated that any contracting authority that had to go through the formal process could do so and have a contract concluded before the 2021 Framework could be concluded .

51. Mr. Gashi rejected the contention that the 2021 Framework is essential or necessary and noted that the RFT for the 2021 Framework makes clear that its use is optional for contracting authorities (referring to para. 2.1.2 of the RFT).

52. On the detail of the 24 contracting authorities identified by Ms. Killeen whose contracts have expired, Mr. Gashi made a number of observations. First, he noted that some of the contracting authorities listed have limited demand for Irish language services, such as the Competition and Consumer Protection Commission and The Heritage Council (each with work valued at €1,000 - €1,500 per annum), the Department of Rural and Community Development (work valued at in or around €8,000 - €10,000 per annum) and

the Department of Finance (work valued at in or around €7,000 - €10,000). Mr. Gashi asserted that it was not credible to suggest that those bodies could not obtain the required Irish translation services and that they, in fact, continue to obtain such services, even though their previous contract under the 2016 Framework may have expired. He asserted that most of the contracting authorities with significant needs for Irish translation services have contracts in place. He referred to his previous evidence in that regard. Second, Mr. Gashi observed that of the 19 contracting authorities listed in Ms. Killeen's list, a number of contracting authorities, do, in fact, obtain Irish language translation services by themselves outside any Framework. Mr. Gashi referred to Letterkenny Institute of Technology, to whom the appellant provides services on foot of a direct request from the contracting authority. The appellant also provides such services to Tusla (The Child and Family Agency) and Irish Rail outside the 2016 Framework and on the basis of direct procurement. Third, he noted that some of the contracting authorities referred to by Ms. Killeen have another contract. The appellant has a contract with the Department of Employment Affairs and Social Protection and provides services under that contract. Fourth, three of the 24 competitions under the 2016 Framework listed by Ms. Killeen were cancelled by the relevant contracting authorities.

6. Application to Lift Automatic Suspension: The Relevant Test

53. There was no real dispute between the parties in the High Court or in this Court as to the test applicable to an application to lift an automatic suspension under the Remedies Regulations. As noted earlier, the automatic suspension of the respondent's entitlement to enter into a Framework Agreement with the successful tenderers under the competition for the 2021 Framework arose on the commencement of the proceedings by the appellant on 11 June, 2021 by reason of the provisions of Regulation 8(2) of the Remedies Regulations.

54. Under Regulation 8(2A), the contracting authority may conclude a contract which is subject to the automatic suspension where the court so orders on an application by the contracting authority to the court under Regulation 8A.

55. The court has the power to make an order permitting the contracting authority to conclude the relevant contract under Regulation 8A(1). Regulation 8A was inserted by the 2015 Regulations. The test to be applied by the court in deciding whether to make an order under Regulation 8A(1) is set out in Regulation 8A(2) which provides as follows:

> *"(2) When deciding whether to make an order under this Regulation-*
>
> *(a) the Court shall consider whether, if Regulation 8(2)(a) were not applicable, it would be appropriate to grant an injunction restraining the contracting authority from entering into the contract, and*
>
> *(b) only if the Court considers that it would not be appropriate to grant such an injunction may it make an order under this Regulation."*

56. The background to the amendment of Regulation 8 of the Remedies Regulations by the insertion of Regulation 8A by the 2015 Regulations was discussed by the High Court (Barrett J.) in *BAM PPP PGGM Infrastructure Cooperatie U.A. v. National Treasury Management Agency and another* [2015] IEHC 756 ("*BAM*") and by the High Court (Costello J) in *Powerteam Electrical Services Limited v. The Electricity Supply Board* [2016] IEHC 87 ("*Powerteam*") and was further considered by this Court in a judgment delivered by Hogan J. in *Word Perfect Translation Services Limited v. Minister for Public Expenditure and Reform* [2018] IECA 35 ("*Word Perfect*"). Those cases (and others including *Beckman, Coulter Diagnostics Limited v. Beaumont Hospital* [2017] IEHC 537 (Twomey J.) ("*Beckman*") and *Homecare Medical Supplies Unlimited Company v. Health Service Executive* [2018] IEHC 55 (Barniville J.) (*"Homecare"*)) made clear that the test is the same as would be applicable on an application for an interlocutory injunction to

restrain the awarding of the relevant contract in which the applicant in the proceedings notionally has to be treated as the moving party who bears the onus of proof on the application, notwithstanding that the respondent is actually the party who is seeking the lifting of the suspension. In this case, therefore, although the respondent brought the application to lift the automatic suspension, the onus of proof rested on the appellant to demonstrate that an interlocutory injunction should be granted to restrain the respondent from entering into the Framework Agreements with the successful tenderers. There was no dispute about any of that.

57. At the time cases such as *BAM*, *Powerteam*, *Beckman*, *Homecare* and *Word Perfect* were decided, the test applicable to the granting of interlocutory injunctions was that contained in *Campus Oil Limited v. Minister for Industry and Energy (No. 2)* [1983] IR 88 (*"Campus Oil"*) and so far as the balance of convenience was concerned, *Okunade v. Minister for Justice* [2003] 3 IR 153 ("*Okunade*"). However, since those cases were decided, the Supreme Court gave judgment in *Merck, Sharp & Dohme Corporation v. Clonmel Healthcare Limited* [2020] 2 IR 1 (*"Merck"*).[1] It will be necessary to consider the judgment in *Merck* in greater detail later. For present purposes, however, it is sufficient to record that the Supreme Court in *Merck* made it clear that the elements of the test for the grant of an interlocutory injunction are:

(1) Whether there is a fair question or serious issue to be tried; and

(2) whether the balance of convenience, or the balance of justice, as it is now often termed, is in favour of or against the grant of the interlocutory injunction sought, with the adequacy of damages being considered as part of the that balance rather than as a separate component of the test.

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[1] Neutral Citation [2019] IESC 65. Note the paragraph numbers from the judgment referred to in this judgment are from the report of the judgment in the Irish Reports.

58. Much of what was said by O'Donnell J. in his judgment for the Supreme Court in *Merck* on the question of the adequacy of damages is highly relevant to the issues which arise on this appeal.

59. Once the respondent brought its application to lift the automatic suspension, the onus of proof was, therefore, on the appellant to demonstrate that it would be appropriate for the court to grant an interlocutory injunction to restrain the respondent from entering into the Framework Agreements with the successful tenderers. Therefore, following *Merck*, the appellant had to persuade the court that (1) there was a serious issue(s) or a fair question(s) to be tried and (2) the balance of convenience or the balance of justice lay in favour of the grant of an interlocutory injunction and that as part of the consideration of that balance, that damages would not be an adequate remedy for the appellant in the event that the automatic suspension were lifted and the appellant ultimately succeeded at trial.

60. It is also necessary to refer to another aspect of the decision of the Court of Appeal in *Word Perfect*. In his judgment for the Court in that case, Hogan J. concluded that the damages provided for in Regulation 9(6) of the Remedies Regulations, which gave effect to Article 2(1)(d) of Directive 89/665/EEC (as amended) (the "Remedies Directive"), were *Francovich* damages as they were provided for by Article 9(6) of the Remedies Regulations, a statutory instrument made under s.3 of the European Communities Act, 1992 and not conferred by an Act of the Oireachtas, and *Francovich* damages were all that EU law required (Case c-568/08 *Combinatie Spijker Infrabouw/De Jonge Konstruktie* [2010] ECR 1-12655). Hogan J. concluded that the entitlement to damages for breach of public procurement rules under Regulation 9(6) of the Remedies Regulations was an entitlement to *Francovich* damages which required the injured party to demonstrate that the breach of EU law was *"sufficiently serious"* and that there was *"a direct causal link between the breach and the loss or damage sustained"* by the injured party (*Spijker*, para

92). Therefore, Hogan J. held that in order to obtain damages under Regulation 9(6), it was necessary to show *"not simply that there had been an objective breach of EU law, but rather that such breach was either 'grave or manifest' or 'inexcusable'"*. (*Word Perfect*, para. 56). Hogan J. noted that Judge Anthony Collins (then a judge of the General Court and now Advocate General) made the same point in his article "*Damages in Public Procurement – An Illusory Remedy*" in "*Of Courts and Constitutions – Liber Amicorum in honour of Nial Fennelly" (Ed Bradley, Travers and Whelan)* (Hart Publishing, 2014) where (at p. 431) he referred to the requirement to establish a *"sufficiently serious"* breach of EU law. He made the point that not every infringement of public procurement rules will constitute a *"sufficiently serious"* breach entitling the injured party to damages. Hogan J. concluded (at para. 58) that:

> *"It would have to be accepted, therefore, that a claimant such as Word Perfect would not find recovery of damages straightforward, even if, following a full hearing, a material breach of the procurement rules were actually to be established."*

61. Hogan J. stated that the implications of that conclusion were that, since the Supreme Court had stressed in *Okunade* that the task of the court in dealing with an interlocutory application was to assess the facts and to apply the legal principles in such a way as *"to ensure the minimum possible injustice to the parties pending the outcome of the case"* and since the ability of the applicant in that case to recover damages was *"highly restrained"*, that clearly impacted on the manner in which the various factors to be considered should be weighed and balanced (para. 59). Hogan J. concluded that it could not be said that damages had been shown to be an adequate remedy for the applicant in that case. He then went on to consider whether there was a fair question or a serious issue to be tried and where the balance of convenience lay.

62. Although he went on to weight the various factors relevant to the assessment of the balance of convenience, Hogan J. concluded that the fact that damages were not an adequate remedy for the applicant was *"decisive"* in terms of determining where the *"greatest risk of possible injustice"* lay (para. 64). He would, therefore, have granted an interlocutory injunction on the hypothetical basis contemplated under Art. 8A(2) of the remedies Regulations and so allowed the appeal from the decision of the High Court lifting the automatic suspension.

63. Following the judgment in *Word Perfect*, and the Court's conclusion that the only damages to which an applicant would be entitled for breach of public procurement rules under Regulation 9(6) of the Remedies Regulations were *Francovich* damages, and having regard to the high bar which must be cleared in order to establish an entitlement to such damages, there were very few applications by contracting parties to lift the automatic suspension which arose on the commencement of proceedings under the Remedies Regulations. So far as I am aware, this is the first such case to come before the Court of Appeal since the judgment in *Word Perfect* in 2018. It is also the first case in which this Court has had the opportunity of considering the implications of *Merck* for the Court's assessment of the balance of convenience or the balance of justice on an application to lift an automatic suspension in a public procurement case. As I have indicated earlier, a concession was made by the respondent in Ms. Killeen's third affidavit (at para. 15) and in the respondent's written submissions to the High Court (dated 31 August, 2021) as well as in the oral submissions in the High Court designed to address the particular difficulty identified by Hogan J. in *Word Perfect*. As we shall see, the High Court was satisfied that the concession (as clarified and explained by the respondent's counsel at the hearing) was sufficient to deal with that difficulty. It is appropriate at this point to turn to the judgment of the learned High Court judge.

7. The Judgment of the High Court

64. The respondent's application to lift the automatic suspension was heard by the High Court on 21 September, 2021. With exceptional speed and efficiency, the High Court judge delivered an incredibly detailed and impressive *ex tempore* judgment on 23 September, 2021 in which he granted the respondent's application for the reasons set out in his judgment.[2] At the outset of his judgment, the judge noted that the parties were agreed as to the test which the court had to apply in determining the application, namely, the test applicable to the grant of an interlocutory injunction, as was recently considered by the Supreme Court in *Merck*. The judge also referred in that context to *BAM* and *Powerteam*.

65. As he was required to do, the judge noted that the onus of proof was on the appellant to satisfy the court that the suspension should remain in place and that it was necessary first to consider whether the appellant had raised a fair question to be tried and, if it had, the court was then required to consider where the balance of convenience lay, taking into account as part of its assessment of that balance, the adequacy of damages on either side. The judge also noted that in considering the balance of convenience, the court was also entitled to take into account other interests which were likely to be harmed in the event that the automatic suspension were not lifted, including the public interest: *Okunade* and Article 2(5) of the Remedies Directive and Regulation 9(4) of the Remedies Regulations.

66. The first issue which the judge considered was whether the appellant had established a fair question to be tried. He concluded that the appellant had done so in respect of each of the three features of the competition provided for in the RFT in respect of the 2021 Framework, namely, the rotation mechanism in respect of certain contracts in Lot 1, the minimum pricing requirement and the minimum turnover requirement in respect of all the lots. The judge was satisfied that the appellant had surmounted the relatively low bar to

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[2] The page references from the judgment of the High Court judge are taken from the transcript of the judgment.

establish a fair question to be tried and that the appellant had raised an arguable case in respect of each of the three features complained of.

67. On being satisfied that the appellant had established a fair question to be tried, the judge then considered the balance of convenience. As part of that consideration, the court first considered (a) whether damages would adequately compensate the appellant and (b) whether the respondent could adequately be compensated on foot of the appellant's undertaking as to damages. The judge quite properly considered the question of the adequacy of damages from the perspective of both parties as part of his consideration of the overall balance of convenience or balance of justice, as he was required to do under *Merck.*

68. In considering the adequacy of damages from the appellant's perspective, the judge considered the decision of the Court of Appeal in *Word Perfect* and the conclusions of Hogan J. in that case that the entitlement to damages under Regulation 9(6) of the Remedies Regulations was subject to compliance with the *Francovich* criteria which required an applicant to show *"a sufficiently serious"* breach of the relevant provision of EU law at issue. The judge referred to the relevant portions of the judgment of Hogan J. in *Word Perfect*, including his reference to Judge Collins' article. He then addressed the concession made by Ms. Killeen on behalf of the respondent in her third affidavit which was intended to address this point and to the clarification given by the respondent's counsel at the hearing to the effect that the respondent was willing to concede that, if upheld at the trial, the breaches of public procurement rules alleged by the appellant would be *"sufficiently serious"* to sound in damages and that this was the price which the respondent was willing to pay in the event that the court were to accede to the respondent's application to lift the suspension. The respondent's counsel noted that, insofar as Ms. Killeen has used the words *"in theory"* in her affidavit, those words were intended to

reflect the fact that the breaches would have to be established as would the causal connection between the breaches and the alleged loss. Counsel confirmed that, in the event that the suspension was lifted and the appellant was left to a remedy in damages, the respondent would not make the case that, in the event that the appellant established the breaches alleged, they are not *"sufficiently serious"* to sound in damages. The judge recorded his understanding of the position that, in the event that any of the three complaints made by the appellant with respect to the competition were upheld, the respondent would not raise an issue as to the seriousness of the breach. There was no disagreement by the respondent to that understanding by the judge in the court below or in this Court.

69. Having addressed the respondent's concession in that manner, the judge then observed that the fact that the remedy of damages is available does not mean that damages are necessarily an adequate remedy for the appellant. He referred to the many difficulties in assessing damages on which the appellant's counsel had relied. First, counsel had relied on the problems identified by Judge Collins in the Academic article to which reference was made by Hogan J. in the Court of Appeal in *Word Perfect* and to which I have referred earlier. Second, counsel maintained that damages would, in any event, be extremely difficult to calculate on the facts of this case, in circumstances where, unlike many public procurement challenges, the challenge here is not to the award of a contract but to the rules of the competition. While in the case of a successful challenge to the award of a contract, damages could be assessed on the basis of a "loss of chance". There is no *"readily identifiable counterfactual"* in this case, the applicant contended, as it was *"entirely unknown how the competition would be structured in the absence of the rules under challenge"*. (see p.18 of the judgment). The appellant relied on the observations of Stuart-Smith J. the English case of *OpenView Security Solutions Limited v. The London Borough*

of Merton Council [2015] EWHC 2694 (TCC) (*"OpenView"*) where it was said that the more variables that are fed into the loss of chance calculation, *"the more likely it becomes that compensation will not match the outcome"* (p. 18). The appellant submitted that in order to quantify damages in this case it would be necessary to speculate as to how the competition would have proceeded had it been re-run in its entirety, for example, with a cascade method of allocation of work or mini-competitions and, if so, how highly the appellant would have ranked and how much work the appellant would have received. Similarly, if the competition had been run on the basis of different pricing with no minimum prices, there may have been different tenderers who would have applied, and it was speculation as to where the appellant would have ranked among those tenderers.

70. The judge addressed these concerns and the other factors put forward by the appellant in support of its contention that damages would not be an adequate remedy for it. With reference to Judge Collins' article, the judge referred to the decision of the CJEU in *Spijker* and to the conclusions in that judgment that it is for the legal order of each Member State to determine the criteria on the basis of which damages arising from an infringement of EU law, in respect of the award of public contracts, had to be determined and estimated subject to the principles of equivalence and effectiveness. He noted that Judge Collins' article was published in 2014 before a number of judgments of the Irish courts which, the judge stated:

> *"...outlined in clear terms an entirely rational basis on which to conclude that the relevant test for the award of damages under Irish law will be met in the case of an operator who has been wronged in a serious way by a contracting authority in a procurement process."* (p. 21)

71. In that context, he referred to the judgment of Barrett J. in *BAM* and, in particular, to the views expressed by Barrett J., by reference to the observations of Fennelly J. in the

Supreme Court in *Glencar Exploration plc v. Mayo County Council (No. 2)* [2002] 1 IR 84 (*"Glencar"*) where Fennelly J. drew attention to the fact that a breach of statutory duty could only give rise to an entitlement to damages in limited circumstances. The judge quoted from para. 15 of the judgment of Barrett J. in *BAM* to the effect that it was difficult to see how a duty of care would not arise in a procurement situation, potentially giving rise to a liability in damages in the event that due care was not taken in the decision-making process. The judge stated that while Barrett J.'s views had yet to be tested at trial, he *"entirely agreed"* with the views there expressed. He also noted that in *Powerteam*, Costello J. accepted that *"damages can be awarded and are an appropriate remedy in a procurement case"* and noted that Costello J. referred to a number of other Irish judgments to similar effect. The appellant criticised the judge for suggesting, or so it contended, that damages are always an appropriate remedy in a procurement case. However, that criticism is misplaced as it is quite clear from the context that the judge was not saying that damages would always be an appropriate remedy in a procurement case. Indeed, Costello J. in *Powerteam* decided that damages would not be an adequate remedy for the applicant in that case, on the basis of uncontested evidence that it would have to cease operations in Ireland if the suspension were lifted.

72. The judge concluded that confining the appellant to an award of damages would not, as a matter of principle, give rise to *"any serious level of uncertainty as to the ability of a court to award damages"* in the event that the appellant was successful at trial in establishing the wrongs alleged. He referred to the judgment of Akenhead J. in *European Dynamics SA v. HM Treasury* [2009] EWHC 3419 (TCC) *("European Dynamics")* which he said showed that there is a basis for calculating damages in the context of a framework agreement and referred in that context to para. 22(c) of the judgment. The judge rejected the appellant's contention that the assessment of damages in this case would be subject to

greater levels of uncertainty having regard to the particular facts of the case and referred in that context to the observations of McCloskey J. in the High Court of Northern Ireland in *Lowry Brothers Limited v. Northern Ireland Water Limited (No. 2)* [2013] NIQB 23 (*"Lowry Brothers"*) where, in the context of an equivalent application to the application in this case, in connection with a framework agreement, McCloskey J. stated (at para. 38) as follows:

> *"In commercial cases generally, expert forensic accountants, duly aided by discovered documents, rarely display any inhibitions in constructing and advocating a claim for financial loss. I accept that, from the Court's perspective, there would be several shades of grey in the exercise. However, Courts are well used to grappling with all kinds of claims for damages. Moreover, the standard of proof to be applied is that of the balance of probabilities."*

73. The judge noted that, from his experience, courts frequently do have to grapple with difficult issues in evaluating damages but that the courts are well able to do so. He did not accept that damages would be *"incapable of measurement in this case"*. However, he continued that, notwithstanding that it may not be *"impossible"* to measure damages, that did not mean that damages would be an adequate remedy and referred in that context to an important passage in the judgment of O'Donnell J. in *Merck* (at para. 48 of the reported judgment) concerning the relevance of the difficulty at the interlocutory stage of calculating damages and in which he used the pillow and feather metaphor (which I will return to later). Having regard to the approach referred to by O'Donnell J. in *Merck*, the judge decided that the fact that there is likely to be *"a greater level of difficulties"* in assessing damages in this case *"is a factor which it is appropriate for the Court to take into account in weighing the balance of convenience"*.

74. As a matter of principle, therefore, the judge did correctly take the difficulties in assessing damages into account in his consideration of the balance of convenience. The judge then looked at a number of other aspects of damage for which the appellant contended it would not be adequately compensated by an award of damages including (a) loss of staff, (b) loss of turnover and (c) damage to reputation. With respect to each of these, the judge's conclusions where are follows: (a) *Loss of staff*: The judge referred to the evidence as to the number of translators on the appellant's staff and the number of external translators to which it had recourse, as well as the concern that it would lose translators and would be unable to win or perform contracts for Irish language translation. He concluded that loss of staff in itself was not a loss for which damages would be an inadequate remedy and referred in that context to another English case, *DHL Supply Chain Limited v. Secretary of State for Health and Social Care* [2018] EWHC 2213 (TCC) (*"DHL"*); (b) *Loss of turnover*: The judge referred to the evidence and stated that he did not accept that loss of turnover or loss of profit flowing from such loss is something which is incapable of being remedied by an award of damages, although he accepted that the difficulty in accurately assessing loss was a matter which had to be considered as part of the balance of convenience; (c) *Damage to reputation*: The judge observed that an apprehended loss of reputation is not always accepted in cases of this kind but that he was prepared to accept that there could be some loss of reputation, particularly if the appellant had to let staff go. He also accepted that the assessment of loss of reputation is a *"very inexact science"* and that it, therefore, may be difficult to quantify such a loss as part of the assessment of damages.

75. Notwithstanding that, however, he stated that courts are required from time to time in different circumstances to make awards for loss of reputation and that the task, in a commercial case such as this, is not as inexact as it might be in other cases. It is clear,

therefore, that the judge was prepared to take the difficulty of assessing damages into account as part of the balance of convenience.

76. The judge then referred to a number of public interest factors advanced by the appellant in favour of maintaining the suspension in place, including the following. First, relying on the comments of Deeny J. in the High Court in Northern Ireland in *McLaughlin and Harvey Limited v. Department of Finance and Personnel* [2008] NIQB 25 (*"McLaughlin and Harvey"*), the appellant contended that there is a public interest in ensuring that there is no double payment by the contracting authority, in the form of payment for the performance of the contract and then payment of damages to the disappointed tenderer. Second, on the appellant's case, the minimum prices in the RFT are above market prices and the appellant contended that there is a public interest in maintaining current market rates which would be cheaper for public bodies, rather than the minimum prices in the 2021 Framework. Third, the appellant contended that there is a public interest in ensuring compliance with public procurement rules and with the relevant general principles of EU law (referring to my judgment in the High Court in *Homecare*). Fourth, the appellant relied on the importance under EU law of upholding pre-contractual remedies, although the respondent contended that reliance on that factor was less relevant here where the proceedings do not involve a challenge to the award of a contract but to the rules of the competition itself. Referring to the comments of Clarke J. in the Supreme Court in *OCS One Complete Solution Limited v. Dublin Airport Authority* [2015] IESC 6 (*"OCS"*), the judge had *"significant reservations"* as to whether this was a factor which should be taken into account in light of the analysis of the damages issue by Barrett J. in *BAM* which, the judge noted, was not doubted by the Court of Appeal in *Word Perfect*. The judge did, however, indicate that, notwithstanding his reservations, he did have regard to this factor in assessing the balance of convenience. However, he did say that it was safe

to take the view that the remedy of damages under Irish law has significantly less of the difficulties referred to by the European Commission in its Impact Assessment Report in 2006 which was referred to by Clarke J. in *OCS* and in Judge Collins' article in 2014. The judge expressed the view that, having regard to the judgment of Barrett J. in *BAM*, it should be possible for the appellant, if it succeeds in the case, to pursue a claim for damages, particularly in light of the respondent's concession with respect to the *Francovich* criteria.

77. The judge then looked at the position from the perspective of the respondent in the event that the automatic suspension is lifted. While noting that the appellant offered an undertaking as to damages, the judge queried whether damages would adequately compensate the respondent in the event that the suspension were not lifted and the respondent ultimately succeeds at trial. The appellant contended that there was no reality to the suggestion that the respondent would suffer any real damage and that the sort of inconvenience which might arise in the event that the suspension were lifted is not of the same order as persuaded the court to lift the suspension in cases such as *Powerteam*, *Beckman* and *Homecare*. I note here that the judge ultimately concluded that damages would not adequately compensate the respondent (pp. 43-44 of the judgment).

78. The judge then addressed the appellant's point that public bodies would be free to undertake their own individual procurement exercises, noting that the 2021 Framework is not mandatory and that public bodies would be free to procure services outside the Framework. The judge addressed the evidence put forward in that regard by the appellant (as summarised earlier in this judgment).

79. In considering the position of the respondent, the judge stated that it was necessary to bear in mind the approach taken by the Supreme Court in *Okunade* where, at para. 92, Clarke J. drew attention to the entitlement of those exercising statutory or other power and

authority to carry out their remit without interference and that that *"is an important feature of any balancing exercise"*. Clarke J. then stated that *"significant weight needs to be placed in the balance on the side of permitting measures which are prima facie valid to be carried out in a regular and orderly way"* and that *"regulators are entitled to regulate, lower courts are entitled to decide and ministers are entitled to exercise powers lawfully conferred by the Oireachtas...all due weight needs to be accorded to allowing the system and processes by which lawful power is to be exercised to operate in an orderly fashion"*. (Clarke J. at para. 92, quoted by the judge on p.32-33 of the judgment). In that context, the judge then considered why the requirement for Irish language translation services exists, referring to Article 8.1 of the Constitution and the provisions of the 2003 Act and in particular ss.9(3) and 10. The judge observed that s.9(3) is extremely wide in its terms, applying to a wide range of communications, and that the number of public bodies covered by the section which are subject to the duty imposed under that provision is also *"extremely wide"*(p. 34).

80. There was general agreement in the High Court and on the appeal that the number of public bodies subject to the wide obligations contained in s.9(3) is about 298. In that regard the judge stated:

> *"One can see having regard to the sheer volume of material that requires translation under the Act and the sheer number of public bodies that will require translation services why it might be considered desirable in the public interest that a centralised purchasing body should be put in place."* (p. 35 of the judgment)

81. The judge then referred to the evidence given on behalf of the respondent by Ms. Killeen in her third affidavit as to the consequences for the respondent and others if the suspension of the 2021 Framework were continued. I have summarised that evidence earlier. Having referred to Ms. Killeen's evidence the judge stated:

"In light of what is said by Ms. Killeen in her affidavit, if the system proposed under the new Framework is not put in place, one can readily appreciate the damage to the public interest identified by Ms. Killeen and one can also readily appreciate that this would not be capable of being remedied by the undertaking as to damages offered by the [Appellant]." (p. 38)

82. The judge then referred to the *"difficulty, if not impossibility, of quantifying damage to the public interest"* and noted that the appellant's undertaking as to damages was offered to the respondent alone and not to the individual public bodies who would be put to additional expense if they had to run their own procurement processes. He then referred to public bodies who have no existing contract in place for Irish translation services and who he said do not have the option to seek such services, having regard to the statutory obligations contained in s.9(3) of the 2003 Act. He stated that the effect of the suspension was to require those public bodies to pursue individual procurement processes with *"all of the attendant costs and uncertainty that this will entail"* (p.38).

83. The judge then addressed Ms. Killeen's evidence (which I have summarised earlier) with respect to the 42 contracts which Mr. Gashi had suggested are likely to continue in place. The judge's conclusion from Ms. Killeen's evidence was that: *"So, there are a significant number of public bodies that will have to conclude individual contracts if the suspension remains in place. They will have no alternative but to do so."* (p. 41).

84. The judge considered when the case could be ready for hearing and noted that it would be a *"very tall order"* to have the case ready for trial in November 2021 since expert evidence would have to be exchanged but that, even assuming that the trial could be held in November, it would be unlikely for a judgment to be delivered until sometime in the first quarter of 2022 at the earliest, having regard to the severe pressure on the judges in the Commercial List. The judge concluded, therefore, that if the automatic suspension is

not lifted, the public bodies who do not have the benefit of an existing contract for their Irish translation services will have to pursue individual procurement processes for such services with the result that the 2021 Framework would not be capable of taking effect for a considerable period of time, irrespective of the outcome of the proceedings and, in turn, that would mean that the *"obvious efficiencies and cost savings"* which the Framework is designed to achieved will not be realised.

85. The judge considered that there were *"significant factors"* in favour of lifting the suspension, particularly in light of the approach taking by the Supreme Court in *Okunade*. However, he stressed that the factors identified by the appellant also had to be taken into account. He ultimately came to the conclusion that the balance tilted in favour of lifting the suspension for a number of reasons.

86. First, he concluded that the losses to which the appellant would be exposed, if the suspension was lifted but the appellant ultimately succeeded at trial, are capable of being the subject of an award of damages. While not perfect, damages are available and the court would *"do its best to make a fair award"* in the event that the appellant succeeded in the case.

87. He concluded that any claim that the appellant might have for loss of turnover or loss of profit and in respect of loss of staff or damage to reputation were all capable of being compensated by an award of damages. He stated that:

> *"Those are matters in respect of which courts are often required to carry out assessments. For example, loss of reputation arises very frequently in passing off disputes"*. (p. 43)

88. Second, the judge concluded that the damages would not be an adequate remedy for the respondent since no award of damages could address the damage to the public interests

relied on by the respondent. In addition, he noted that the appellant's undertaking as to damages could not be said to remove the risk to those public interests.

89. Third, the judge disagreed with the appellant's submission that the public interests at issue here do not come close to those which persuaded the Court to lift the suspension in the *BAM* or in *Powerteam* or in some of the other cases. He was of the view that the public imperative of allowing "*badly needed public projects to proceed*" and to the "*importance of preserving public funds*", to which Barrett J. had regard in *BAM*, applied with *"even greater force here"* (p. 44). He felt that putting in place a centralised system of procurement for Irish translation services to enable public bodies to perform their statutory obligations is "*by any standard a badly needed public project which is manifestly in the public interest*" (p. 44). He stated that it was likely to lead to efficiencies and cost savings and to avoid the need for duplication of effort by a large number of public bodies subject to the statutory obligation.

90. While the appellant had relied on countervailing public interests, which the judge did take into account, they were not such as to tilt the balance in its favour. With regard to the point about need to avoid the double transfer of funds, the judge felt that that consideration did not carry very much weight, in circumstances where, on the other side of the equation, there is a potential for achieving increased efficiencies and cost reduction. With regard to the contention that the minimum prices provided for in the 2021 Framework are above market rates, the judge stated that it cannot be presumed at this stage that the respondent will not be able to justify the approach taken for the reasons relied upon by it. With respect to the public interest in adhering to the general principles of EU law and the importance of pre-contractual remedies, the judge acknowledged that they merited *"serious consideration"* but he felt that their weight was not as great as might otherwise be the case as, due to the respondent's concession in relation to the *Francovich* criteria, the

appellant will be relieved of the need to establish that the breaches are "*sufficiently serious*" to enable the appellant to pursue a claim in damages. The judge observed that the ability of the appellant to obtain an award of damages is not subject to the same obstacles that might otherwise apply and that its damages claim could not be said to be *"illusory"*. He concluded, therefore, that an award of damages against the respondent would be a significant vindication of the public interests concerned.

91. The judge made it clear that he had also considered the appellant's contention that if the public interest in this case trumped the appellant's concerns there would be no case in which an applicant could succeed in maintaining a suspension under the Remedies Regulations. The judge made it clear that he was not suggesting that the public interest would always trump the position of an applicant in the assessment of the balance of convenience. He stressed that every case had to be examined and assessed by reference to the individual features of the case and that that was what he had sought to do in the present case. He made clear that his judgment should not be treated as suggesting that the public interest always had to outweigh the private interests of a commercial operator.

92. The judge concluded that the interests of the appellant in this case has to be balanced against the public interest in allowing a project of *"systemic importance to the public service as whole"* to proceed and that the *"sheer scale of the project and the sheer number of public bodies covered by the 2003 Act strongly underscores this."* (p. 46)

93. The judge concluded, therefore, that in the particular circumstances of the case and having regard to his conclusion that the remedy of damages is *"not illusory or uncertain"*, the balance of convenience lay in favour of lifting the suspension.

94. The judge made a final comment that he had not taken into account, as part of the balancing exercise, the respondent's submission that the court should take into account as part of the assessment of the balance of convenience the fact that the appellant could have

participated in the competition while pursuing the proceedings, thereby avoiding any of the losses or apprehended losses relied on by the appellant in support of its claim that damages would not be an adequate remedy and that the balance, therefore, favoured the lifting of the suspension. The parties made submissions on that question based on the judgment of the CJEU in Case c-230/02 *Grossmann Air Service v. Republik Osterreich* [2004] ECR I-1829. However, the judge did not find it necessary to resolve the dispute between the parties as to the application of that case, although he felt that it was capable of being distinguished on the basis that the appellant was qualified to tender and could have participated in the tender the subject of the RFT, unlike the applicant in *Grossmann*. However, he did not feel it necessary to decide that issue and did not take it into account as part of his assessment of the balance of convenience.

95. In summary, the judge, therefore, held: (1) the appellant had established a fair question or serious issue to be tried in respect of each of the three features of the competition about which complaint is made in the proceedings; (2) the balance of convenience, or the balance of justice, lay in favour of lifting the automatic suspension in circumstances where damages would be an adequate remedy for the appellant but not for the respondent and where the public interests relied on by the respondent with respect to the "*systemic importance*" of the project the subject of the 2021 Framework, the "*sheer scale*" of the project and the "*sheer number of the public bodies covered by the 2003 Act*" tilted the balance in favour of lifting the automatic suspension and against keeping the suspension in place.

8. The Appeal

96. In its Notice of Appeal, the appellant raised several grounds of appeal which were directed towards the judge's determination that the balance of convenience, or the balance of justice, was in favour of lifting the automatic suspension and to his failure to conclude

that damages would not be an adequate remedy for the appellant. However, in its written and oral submissions on the appeal, counsel for the appellant very helpfully summarised the essence of the appeal as being that the judge:

> (1) Erred in principle, or made a decision which would lead to an injustice for the appellant, in his treatment of the question of the adequacy of damages and ought, on the basis of the decision of the Supreme Court in *Merck*, have concluded that damages would not be an adequate remedy for the appellant and
>
> (2) Erred in his assessment of the balance of convenience such as to give rise to an injustice to the appellant, and, in particular, made findings in support of his conclusion that the balance of convenience required the lifting of the suspension which were not supported by the evidence and included errors of fact.

97. The respondent, in its Notice and in its written and oral submissions, strongly supported the judgment of the High Court judge and his conclusions as to the adequacy of damages and as to the overall assessment of the balance of convenience. The respondent contended that the judge carefully considered and weighed up all of the evidence and correctly concluded that damages would be an adequate remedy for the appellant and not for the respondent and that the judge's findings with regard to the balance of convenience were fully supported by the evidence.

9. The Approach of this Court on Appeal

98. The approach which this Court is required to take when considering an appeal from a decision of the High Court to grant or refuse an interlocutory injunction is well settled. The approach was outlined by Collins J. in *Betty Martin Financial Services Limited v. EBS DAC* [2019] IECA 327 (*"Betty Martin"*) by reference to the earlier judgments of Irvine J. in *Lawless v. Aer Lingus* [2016] IECA 235 (*"Lawless"*) and *Collins v. Minister for Justice, Equality and Law Reform* [2015] IECA 27 ("*Collins*"). In *Lawless*, which was an appeal

from a discovery order in the High Court, Irvine J. referred to the observations she had made in *Collins*, which concerned an appeal from the refusal of the High Court to dismiss proceedings on the grounds of delay, where (at para. 79) she stated:

> *"For all of these reasons, therefore, we consider that the true position is that set out by MacMenamin J. in Lismore Homes, namely, that while the Court of Appeal (or, as the case may be, the Supreme Court) will pay great weight to the views of the trial judge, the ultimate decision is one for the appellate court, untrammelled by any a priori rule that would restrict the scope of that appeal by permitting that court to interfere with the decision of the High Court only in those cases where an error of principle was disclosed."*

99. In *Lawless*, Irvine J. added the following (at para. 23):

> *"However, it seems to me that all too often parties who are somewhat dissatisfied by interlocutory orders made in the High Court seek to use this Court as a venue to re-argue their application de novo in the hope of persuading this court to exercise its discretion in a somewhat different fashion from that which was adopted by the High Court judge at the original hearing. That is a practice which I believe is not to be encouraged. In order for this Court to displace the order of the High Court in a discovery matter the appellant should be in a position to establish that a real injustice will be done unless the High Court order is set aside. It should not be sufficient for an appellant simply to establish that there was a better or more suitable order that might have been made by the trial judge in the exercise of their discretion."*

100. Collins J. in *Betty Martin* summarised the position as follows (at para. 39):

> *"Accordingly, while as a matter of principle, 'great weight' is to be given to the views of the High Court judge, the ultimate decision on this appeal is for this Court.*

It is also clear that the [Appellant] *is not required to establish any error of principle as a pre-requisite to this Court coming to a different conclusion to the judge."*

101. This approach was recently endorsed by the Supreme Court in *Trinity College Dublin v. Kenny* [2020] IESC (paras. 61-65)

102. In *Clare County Council v. Bernard McDonagh & Helen McDonagh* [2020] IECA 307, Whelan J., giving judgment for the Court, having referred to the passages from *Collins*, *Lawless* and *Betty Martin* to which I just referred, succinctly summarised the approach to be followed by the Court in the case of an appeal from a discovery order of the High Court, where no error in principle is involved, as follows (at para. 32):

"In summary therefore, a party seeking to set aside an interlocutory order of the High Court made in the exercise of its discretion must establish that an injustice will be done unless the order is set aside. In making its assessment, this court will place great weight on the views of the trial judge but is untrammelled by any a priori rule restricting the scope of that appeal...".

103. That is the approach which I am required to take in considering the appellant's appeal. It is clear that *"great weight"* must be given to the views of the High Court judge, but ultimately it is for this Court to determine the appeal. If the appellant establishes an error in principle, it should be entitled to succeed in its appeal. However, in the absence of an error of principle, it should also be entitled to succeed on its appeal if it can establish that a real injustice will be done to it if the decision of the Judge is left undisturbed.

10. The Issues to be Decided on the Appeal

104. There is no dispute between the parties as to the test which the High Court judge had to apply in determining the respondent's application under Regulation 8A of the Remedies Regulations to lift the automatic suspension which arose by virtue of Regulation 8. The test was that applicable to the grant of an interlocutory injunction, albeit that the appellant

was to be treated as the applicant for the interlocutory injunction and it bore the onus of demonstrating that the suspension should remain in place pending the determination of the proceedings. The appellant persuaded the judge that it had established a fair question or serious issue to be tried but failed to persuade him that the balance of convenience lay in favour of keeping the suspension in place.

105. There is no cross appeal by the respondent from the judge's conclusion that the appellant had established a fair question or serious issue to be tried. Having regard to the relatively low threshold which must be established to demonstrate the existence of a fair question or serious issue to be tried, I have no doubt that the judge was correct in his conclusion that the appellant had satisfied that part of the test.

106. The two issues which must be decided on this appeal, and I have reversed the order in which they were presented to the court by the appellant, are:

(1) whether the trial judge erred in principle in concluding that damages would be an adequate remedy for the appellant, as part of his assessment of the balance of convenience or alternatively whether his conclusion that they were would do a real injustice to the appellant; and

(2) whether the findings of fact made by the judge to support his conclusion that the balance of convenience lay in favour of lifting the suspension and permitting the 2021 Framework to proceed were supported by the evidence and whether the judge's conclusion, in the particular circumstances of the case, that the balance favoured the lifting of the suspension would give rise to real injustice to the appellant.

107. Before considering each of these two questions, it is appropriate to note what the Supreme Court in *Okunade* said was the guiding principle for the court to follow in determining whether to grant or refuse an interlocutory injunction. At para. 67 of his

judgment, Clarke J. pointed to the difficulty faced by the court when asked *"on the basis of limited information and limited argument, to put in place a temporary regime pending trial in the full knowledge that the court does not know what the result of the trial will be"*. He continued:

> *"It seems to me that, recognising that a risk of injustice is an inevitability in those circumstances, the underlying principle must be that the court should put in place a regime which minimises the overall risk of injustice...The court must, in all cases, act so as to minimise the risk of injustice"*. (para. 67)

108. Before turning to a close consideration of the judgment in *Merck*, it should be noted that Collins J. in *Betty Martin* described the decision in *Merck* as effecting:

> *"a significant (and,...welcome) restatement of the appropriate approach to applications for interlocutory injunctions, mandating a less rigid approach, both generally and with particular reference to the issue of the adequacy of damages and emphasising that the essential concern of the Court is to regulate matters pending trial pragmatically and in a manner calculated to minimise injustice."* (para. 85)

109. In *Merck*, O'Donnell J. stressed the *"essential flexibility"* of the remedy of the interlocutory injunction (para. 28). Later, he described the *"underlying theme"* of the decision in *American Cyanamid v. Ethicon Limited* [1975] AC 396 as adopted in *Campus Oil* as being:

> *"to reassert the flexibility of the remedy and the essential function of an interlocutory injunction in finding a just solution pending the hearing of the action"*. (para. 34)

110. I turn now to consider the two essential issues which arise for consideration on this appeal which I summarised earlier.

(1) Adequacy of Damages: Error of Principle or Injustice?

111. The appellant contends that the judge erred in failing to hold that damages would be an inadequate remedy for it in the event that the suspension were lifted and the appellant ultimately succeeds at trial, as part of the judge's assessment of the balance of convenience. The appellant's case in that regard can be boiled down to two points. First, the appellant contends that the judge applies the wrong test in determining the adequacy or otherwise of damages for the purposes of the balance of convenience assessment. Second, it contends that the judge did not give sufficient weight to the significant difficulties which would be involved in assessing damages in favour of the appellant in light of the nature and complexity of the competition, the number of variables involved and the uncertainty surrounding damages in procurement cases.

112. The judge found that the remedy of damages would be available to the appellant in the event that it succeeded at the trial. I agree with the judge that the remedy of damages would be available to the appellant if it succeeds in its case. Damages are clearly provided for in Article 2.1(c) of the Remedies Directive and Regulation 9(6) of the Remedies Regulations. Regulation 9(6) provides:

> *"(6) The Court may award damages as compensation for loss resulting from a decision that is an infringement of the law of the European Communities or the European Union, or of a law of the State transposing such law."*

113. As noted earlier, in his judgment for this Court in *Word Perfect*, Hogan J. held that the damages available under Regulation 9(6) are damages which must comply with the *Francovich* criteria, including the requirement to establish that the breach of EU law at issue is *"sufficiently serious"*. That was the reason why the respondent's application to lift the automatic suspension failed in *Word Perfect*. Hogan J. held that because of the requirement to satisfy the *Francovich* criteria, and because the recovery of damages would not be straightforward, it had not been shown that damages would be an adequate remedy

for the applicant in that case. Having then turned to consider other factors relevant to the balance of convenience, Hogan J. found that his conclusion that damages were not an adequate remedy was "*decisive*" in terms of an evaluation of where the greatest risk of possible injustice lay.

114. The rock on which the respondent's application to lift the automatic suspension in *Word Perfect* perished was the obligation on the appellant to demonstrate a *"sufficiently serious"* breach of EU law as a pre-condition to seeking damages. It was to address that issue that the respondent offered the concession described earlier that if the appellant established that the competition, the subject of the RFT for the 2021 Framework, was in breach of public procurement rules by reason of the presence of one or more of the features complained of by the appellant, the respondent would not dispute that the breach was *"sufficiently serious"* to sound in damages, subject to the appellant's requirement to establish proof of loss and causation.

115. A similar concession was made in a number of the English cases brought to the attention of the Court on the appeal in order to address the same issue: including *DHL*, *Circle Nottingham v. NHS* [2019] EWHC 1315 (TCC) ("*Circle Nottingham*"), *Alstom Transport v. Network Rail* [2019] EWHC 3585 (TCC) ("*Alstom*") and *Draeger v. London Fire Commissioners* [2021] EWHC 2221 ("*Draeger*"). In each of those cases, the court was satisfied that the concession was sufficient to address the *Francovich* issue, albeit that in some cases the court went on to conclude, despite the concession made, that damages would not be an adequate remedy for the applicant on the particular facts of the case.

116. In its written submissions, on the appeal, the appellant sought to downplay the impact of the respondent's concession on the basis that in each of those cases it was tied to the question as to whether the claimant could prove that the contract was awarded to the wrong bidder. However, I agree with the respondent that in each of the English cases the

concession was made in order to address the particular breaches of procurement law alleged in those cases and the court's acceptance of the concession was not limited to any particular type of case. In my view, the judge was correct to conclude, on the basis of the respondent's concession, that the remedy of damages would be available to the appellant in the event that it succeeds in its claim in respect of one or more of the three features of the competition of which it complains in the proceedings. However, the judge was also correct in concluding that the fact that damages may be available, does not mean that they are necessarily an adequate remedy for the applicant. That is a separate matter altogether.

117. I also agree with the judge's acceptance, on the basis of the observations of Barrett J. in *BAM* and Costello J. in *Powerteam*, that there is no uncertainty, as a matter of principle, that the court can award damages in respect of the alleged breaches of public procurement rules relied upon by the appellant, in the event that the appellant succeeds at trial. In *BAM*, Barrett J. referred to the observations of Fennelly J. in *Glencar (No. 2)* that damages for breach of statutory duty would only be available in limited circumstances. Fennelly J. stated in *Glencar (No. 2)* that:

> *"...it would have to be shown that the statutory power in question was of the type which is designed to protect particular interests and that the plaintiff comes within its scope. In addition, it would probably be necessary for the claim to arise from the context of the type of individual transaction which was the subject matter of Ward v. MacMaster [1998] IR 337 or perhaps from the sort of reliance on the expertise of another which formed of the background to Hedley Byrne v. Heller & Partners Limited [1964] AC 465."* (at 159)

118. Having referred to that passage, Barrett J. stated:

> *"It is difficult to see how a significant decision taking by a contracting authority in the course of a procurement process, which decision has direct, predictable and*

perhaps adverse consequences for a very small number of tenderers relying on the contracting authority to discharge properly its obligations under the procurement law regime, could successfully be argued not to be a decision with such a foreseeable effect on so limited a number of persons as to require that the decision making process be exercised with due care, and potentially yield a liability in damages if not so exercised." (at para. 15)

119. While the judge noted that the views of Barrett J. have yet to be tested at a full damages assessment hearing in a procurement case, he agreed entirely with the view expressed by Barrett J. in that passage. So do I. In my view, it correctly reflects the legal position. However, it must again be observed that the fact that damages can, in principle, be awarded, does not mean that they would provide an adequate remedy to the appellant in this case.

120. The approach to be taken by a court in determining whether damages would be an adequate remedy in the context of the court's assessment of the balance of convenience or the balance of justice in an interlocutory injunction application is the subject of detailed guidance by O'Donnell J. in *Merck*. At para. 36, having stated that the preferable approach is to consider the adequacy of damages as part of the balance of convenience rather than as a separate standalone requirement, O'Donnell J. stated:

"That approach tends to reinforce the essential flexibility of the remedy. It is not simply a question of asking whether damages are an adequate remedy. As observed by Lord Diplock (in American Cyanamid), in other than the simplest cases, it may always be the case that there is some element of some unquantifiable damage. It is not an absolute matter: it is relevant. There may be cases where both parties can be said to be likely to suffer some irreparable harm, but in one case it may be much more significant than the other. On the other hand, it is conceivable that while it can

be said that one party may suffer some irreparable harm if an injunction is granted or refused, as the case may be, there are nevertheless a number of other factors to apply that may tip the balance in favour of the opposing party..."

121. At para. 37, he said:

"Even if a very structured and sequential approach is taken, therefore, it is important to keep in mind that, while the end point of most civil cases is the award of damages, the interests that the law exists to protects often extend before the purely financial."

122. O'Donnell J. rejected the contention that the dicta of Finlay C.J. in *Curust Financial Services Limited v. Loewe-Lack-Werk* [1994] 1 IR 450 ("*Curust*") (at 468-469) meant that it had to be completely impossible to assess damages before damages could be said to be an inadequate remedy for a plaintiff (para. 42). At para. 43, O'Donnell J. stated that *"the fact that it is possible to award damages does not preclude the grant of a permanent injunction and it should not be understood as an absolute bar to the grant of an interlocutory order on full facts"*. Later (at para. 45), O'Donnell J. stated that *"damages are not a perfect remedy, and cannot be a complete answer to an application for an injunction whether permanent or interlocutory"*. He stated (at para. 47) that the *"sole question"* at the interlocutory stage is *"whether the remedy in damages can be said to be necessarily commensurate with any possible injury so as to preclude the possibility of the grant of an injunction"*. Then, in a very significant passage which was quoted by the judge at pp. 24-25 of the judgment, O'Donnell J. said the following (at para. 48):

"Difficulty of calculation of damages may be relevant at the interlocutory stage because the more complex the calculation and the greater the number of variables involved, the more likely it is that a court at trial would be forced to make an estimate or indeed to compound one hypothesis with another to arrive at its best

assessment of damages to do justice in the case. But that necessarily increases the risk that the award of damages, although the best the court can do, may be something less than the doing of justice to either the plaintiff or indeed the defendant. In such as case, it may be more convenient not to leave one or other party to the possibility of an assessment of damages which is theoretically possible, but highly imprecise, speculative and therefore inconvenient. The fact that it is in theory possible to gather every feather does not mean that it is not more convenient to stop the pillow being punctured in the first place."

123. Later in the same paragraph, O'Donnell J. said:

"The fact that it is not completely impossible to assess damages should not preclude the grant of an injunction to the plaintiff in an appropriate case."

124. Towards the end of his judgment O'Donnell J. observed that:

"While the question of the adequacy of damages to either party and the capacity of the parties to pay them is often the largest single element in the balance of convenience, and will often be decisive in most cases, there are other factors which are relevant and which, in a closely balanced case, may tip the balance." (para. 61)

125. Those comments were echoed by Collins J. in *Betty Martin* where, at para. 34, he made the point that *"particular (and, in many cases, decisive) weight"* should be given to the question of the adequacy of damages within the overall assessment of the balance of justice, although he acknowledged that *"there are likely to be multiple considerations to be weighed in the balance, pointing in different directions, none of which are likely to be decisive in itself"*.

126. While the judge did state (at p.25) that, having regard to the approach described in *Merck*, the fact that there are likely to be difficulties in assessing damages in this case was a factor to be taken into account in considering the balance of convenience, the appellant

contends that sufficient weight was not given to that factor and that the test for assessing the adequacy of damages described and then applied by the judge did not comply with the guidance set out in *Merck* and, in practice, required the appellant to demonstrate that it would be impossible to calculate damages, a test rejected by the Supreme Court in *Merck*. With great respect to the judge, I think there is some merit to the appellant's contention.

127. For understandable reasons, having regard to the great urgency and speed with which the judge was required to determine the application, without the relative luxury of being in a position to reserve his judgment for even a short period, unlike this court, some of the language used by the judge is capable of giving the impression that the bar for finding that damages would not be an adequate remedy is somewhat higher than it actually is, in light of what was said in *Merck*. The judge did make the point (at p.24) that, while courts frequently do have to deal with difficult issues in the assessment of damages, the courts are well used to doing so and he could not accept the damages would be incapable of measurement in this case, although the fact that it was not impossible to measure damages did not mean that damages would be an adequate remedy. He then quoted from para. 48 of the judgment of O'Donnell J. in *Merck* in which the pillow-feather metaphor was used. Having done so, he stated that the fact that there are likely to be greater difficulties in this case in assessing damages was a factor which should be taken into account in assessing the balance of convenience.

128. The appellant made the case that the calculation of damages in this case would be particularly difficult having regard to the many different variables which would have to be taken into account in such assessment. It also pointed to heads of loss for which it would not be adequately compensated by an award of damages including (1) loss of staff; (2) loss of turnover/loss of profit and (3) damage to reputation. I will come back to those three items shortly.

129. I first want to consider how the judge dealt with the suggestion that it would be so difficult and complex to calculate damages that the judge ought, on the basis of the guidance in *Merck*, to have concluded that damages would be an inadequate remedy. The appellant argued that since its challenge was to a number of features of the competition itself rather than to the award of a single contract, the calculation of damages would be far more complex than would otherwise be the case. It is not in dispute that damages in such a case could be a assessed on a "loss of chance" basis referred to in *Chaplin v Hicks* [1911] 2 K.B. 786; Costello J. in *Powerteam* (para. 41), referring to *Vavasour v. O'Reilly* [2005] IEHC 16, McKechnie J. in *Minister for Communications v. Figary Watersports Development Company Limited* ([2010] IEHC 541) and *European Dynamics* (para. 22(c)). However, the appellant argued that since this is a challenge to the rules and structure of the competition, it is unclear how the competition would be structured without those rules and, in particular, without one or more of the three features complained of. The appellant argued that this was not a case where a tenderer was complaining that a breach of procurement rules occurred and that, if the breach had not occurred, the tenderer would or might have been the first rather than the second ranked tenderer which would be a more straightforward analysis. However, here, it would be necessary to speculate how the competition would be re-run in its entirety without the elements complained of and to consider all of the many different variables involved. The appellant's counsel raised a number of very pertinent questions, as follows: What would happen if the competition was run without the requirement for minimum prices or with that requirement but without the requirement for the minimum €40,000 threshold requirement? What difference would it make if the competition did not contain provision for contracts worth less than €100,000 in Lot 1 to be awarded by rotation? How could one anticipate the outcome of the competition in terms of the number of successful tenderers and the ranking of the appellant in the list of

successful tenderers in the event that it was run without one or more of the features complained of? The appellant, in my view, correctly points to the very significant number of variables which one would have to attempt to accommodate in seeking to assess damages on a "loss of chance" basis. I agree with the appellant that the complexity of the analysis and the existence of so many variables would make it extremely difficult, if not actually possible, for a court to assess damages on a "loss of chance" basis or otherwise, notwithstanding the undoubted skills possessed by experienced forensic accountants whose services would undoubtedly be engaged by the appellant in seeking to pursue a damages claim at trial (and, of course, recognising the ingenuity of professionals in that field to which reference was made by McCloskey J. at para. 38 of his judgment in *Lowry Brothers* which the judge quoted with approval at pp. 23-24 of his judgment).

130. In light of these significant difficulties and variables, I consider that this type of case falls squarely within the type of situation which O'Donnell J. was referring to at para. 48 of his judgment in *Merck* where he remarked that *"the more complex the calculation and the greater the number of variables involved"* the more likely that the court at trial would have to make an estimate in assessing damages or "*to compound one hypothesis with another*" and that that necessarily increases the risk that justice might not be done. The complexities inherent in the assessment of damages in cases such as this and the existence of the many variables touched on earlier, in my view, greatly increases the greater the risk that the award of damages might lead to an injustice, even though the court would undoubtedly attempt to do its best. It was because of that risk that O'Donnell J. stated that it may be more convenient to restrain the conduct concerned, rather than to leave one or other of the parties *"to the possibility of an assessment of damages which is theoretically possible, but highly imprecise, speculative and therefore inconvenient"* (para. 48). While he quoted the passage with approval, the judge did not follow the course suggested by O'Donnell J.

131. The respondent submitted on the appeal that if the suspension were lifted and the appellant succeeded in the case, the assessment of damages would take place sometime later in 2022 by which stage the 2021 Framework would have been in place for about a year and a significant amount of work would have been allocated under it so that it will be known what work was allocated and the service providers to whom it was allocated. The respondent argued that that would assist the court in assessing damages in a manner suggested in the English decision of *European Dynamics*, to which the judge referred at p.23 of the judgment. However, I agree with the appellant that the facts of *European Dynamics* are quite different to the facts of this case. It did not give rise to the sort of complexity or throw up the wide range of variables which a court would have to try to take into account in attempting to assess damages in this case. I also agree with the appellant that the variables which would have to be considered in attempting to assess damages would probably not include those operators getting contracts under the 2021 Framework as it is, but rather the operators who would be in the Framework and where they would be ranked, if the competition did not include any or all or a combination of the features complained of by the appellant. To follow through on striking O'Donnell J.'s analogy, the feathers would be flying all around the place and the parties, their forensic accountants and, perhaps, more than anyone, the judge attempting to assess the damages, might well be wishing that the pillow had never been punctured in the first place.

132. Another English case in which consideration was given to the relevance of a large number of variables to the court's task of determining whether damages are an adequate remedy is *OpenView*. The judge referred to this case at p. 18 of the judgment. The English High Court (Stuart-Smith J.) was not convinced that a framework contract gave rise to particular difficulties in the assessment of damages. However, he went on to state (at para. 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."

133. At para. 32 the judge stated:

"...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." (Para. 32)

134. The court in that case referred to the earlier judgment of the English Court of Appeal in *Lettings International Limited v. London Borough of Newham* [2007] EWCA Civ 1522 (*"Lettings"*) where the Court of Appeal took the view that on the facts of that case, which also involved a framework contract, damages were not an adequate remedy for the tenderer largely due to the uncertainties involved, although the court did observe (at para. 36) that:

"A loss of an 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."* (para. 36)

135. In my view, the present case is one which falls squarely within the range of cases referred to by the judge in *OpenView*, where the more variables there are which are fed into a "loss of chance" calculation and the more tenderers involved, the more uncertain will be the damages calculation exercise. This chimes very much with what O'Donnell J. stated at para. 48 of his judgment in *Merck*.

136. Apart from *Clare Civil Engineering Limited v. Mayo County Council* [2001] 1EHC 135, in which damages were awarded but without discussion of the basis on which they were assessed, the parties were unable to identify any Irish judgment in which damages were awarded for breach of procurement rules. However, the recent judgment of Colton J. in the High Court in Northern Ireland in *FP McCann Limited v. Department for Regional Developments* [2020] NIQB 51 ("*FP McCann*") shows the real difficulty faced by a judge in assessing damages in a procurement case. In an earlier judgment, the court had found that the defendant had acted in breach of procurement rules and in breach of a duty owed to the plaintiff in circumstances where a consortium, of which the plaintiff was a member, submitted a tender for a contract to design and construct a dual carriageway, which tender was rejected on the grounds that it was *"abnormally low"*. The plaintiff had argued that the consortium ought to have been awarded the contract and sought damages on that basis. Colton J. came to the conclusion that there was a significant chance that the defendant may have taken a different decision were it not for the breaches of procurement rules by the defendant and that the plaintiff was entitled to damages. The court assessed damages in a subsequent judgment (being the judgment bearing the neutral citation [2020] NIQB 51). At para. 5 of his judgment, Colton J. stated:

"The court has had great difficulty in coming to a determination on damages. It is often said that a court should not intervene by way of injunctive relief in circumstances where an award of damages is an appropriate alternative remedy. This case demonstrates the potential difficulty with such an approach. Ideally this is a case in which the plaintiff's joint tender (BBMC) should have been reconsidered by the defendant in light of the breaches identified by the court, but that is simply not an option. The court is compelled to determine the issue of damages."

137. At para. 6, Colton J. said:

"The matter is of course further compounded by the fact that the court has come to the conclusion that what the plaintiff has lost is an opportunity to be awarded the contract rather than a loss of the contract itself, contrary to the plaintiff's submissions."

138. Having made those comments, the court then went on to attempt to assess damages on the "loss of chance" basis set out in *Chaplin v. Hicks*. The court repeatedly referred to the complexity of the exercise in assessing damages and the uncertainties involved and that is evident from the judgment. If anything, the complexities in the assessment of damages in the present case in light of the many variables involved would be even greater.

139. While the judge had said that the difficulty in assessing damages was a factor which should be taken into account in assessing the balance of convenience, I believe that when one looks at how this was done, the judge did not attach sufficient weight to the complexity of the exercise and to the approach suggested by O'Donnell J. at para. 48 of *Merck*. Leaving aside for the moment the issues concerning loss of staff, loss of turnover/profit and damage to reputation, in holding that (a) the losses to which the appellant would be exposed if the suspension were lifted were capable of being the subject of an award of damages albeit that damages would not be a perfect remedy (p.43), (b) that

the damages claim could not be said to be *"illusory"* (p.45) and (c) that the remedy of damages is not *"illusory or uncertain"* (p.46), it seems to me that the judge may inadvertently have raised the bar for demonstrating that damages would not be an adequate remedy as part of the balance of convenience assessment. I am sure that this was inadvertent, as the judge had previously made the point that it was not necessary to establish that it would be impossible to measure damages in order to demonstrate that damages would be an inadequate remedy. However, the use of those phrases could well give the impression that the bar is higher than it is.

140. One of the additional grounds in the Notice of Appeal on which the appellant contends that damages would not be an adequate remedy for it is that the judge failed to have adequate regard in his assessment of the question of the adequacy of damages for the appellant to potential loss by the appellant of specialist staff, turnover and damage to its reputation. In her oral submissions on the appeal, the appellant's counsel accepted that the judge did have regard to those factors (pp.25-27 and 43 of the judgment). In his oral submissions, the respondent's counsel addressed the contention that the alleged damage to the appellant's reputation could not adequately be compensated by an award of damages and rejected that contention.

141. It must first be said that the assessment of the potential loss of staff and damage to reputation as part of the court's consideration of the adequacy of damages in terms of the overall balance of convenience assessment is very fact specific and dependent upon the individual circumstances of each case. For example, the impact of the loss of specialist staff was an important factor which lead Costello J. in *Powerteam* to conclude that damages would not be an adequate remedy for the applicant in that case were the suspension lifted (see para. 44). There was uncontroverted evidence in that case that the applicant would lose staff, would be forced to cease operations in Ireland and would find it

very difficult to start again from scratch. Claims about the potential loss of staff and the inadequacy of damages if such occurred, if the suspension were lifted, were not accepted by the court in *Homecare* on the particular facts of that case. In *Word Perfect*, Hogan J. accepted, as part of his consideration of the balance of convenience, that if the applicant in that case was to lose the translation business at issue in that case, it would hamper its ability to retain specialist staff (para. 62). That was one of the finely balanced competing factors which Hogan J. weighed up in that case, although ultimately, for the reasons already discussed, he concluded that the decisive factor was that damages would not be an adequate remedy for the applicant by reason of the requirement to satisfy the *Francovich* criteria. The English cases too go different ways on the loss of staff point.

142. Similar considerations arise when the court has to consider a contention that an applicant would suffer irreparable damage to its reputation if it did not either obtain the contract or have the opportunity of participating in a lawfully run competition. The Irish and English cases go both ways. For example, in *BAM*, Barrett J. did not regard the claim of damage to reputation to be such as to render damages an inadequate remedy making the point that when it comes to tendering for contracts, *"you win some, you lose some"* (para. 19). Nor did Costello J. in *Powerteam* (para. 37). Hogan J. in *Word Perfect* did regard as relevant to the assessment of the balance of convenience the fact that there was a *"real risk of significant reputational damage to the company which might possibly prove to be terminal"* (para. 62). The English cases go both ways and it is unnecessary for present purposes to consider those cases here. The most important point to make here is that the potential loss of staff and potential damage to reputation are relevant to the question as to whether damages would be an adequate remedy for an applicant, but the facts of each case are critically important in the consideration of that issue.

143. It does not seem to me that the evidence in this case with regard to the potential loss of staff is anything like as strong as it was in *Powerteam*. Nor is it comparable to the evidence in the English cases where the potential damage to reputation was found to be such that damages would not be an adequate remedy (such as *Alstom Transport v Eurostar International Ltd* [2010] EWHC 2747 or *NATS Services Limited v. Gatwick Airport* [2014] EWHC 3133). These factors were all considered by the judge and he felt that, on the evidence, they were not such as to persuade him that damages would not be an adequate remedy for the appellant or to tilt the balance of convenience in favour of keeping the automatic suspension in place.

144. However, all of this is subject to my overall view that, because of the complexity of the task which a court would have in seeking to assess damages by reason of the many variables involved, as discussed earlier, it is very difficult to see how it could be said at this stage that damages would be an adequate remedy for the appellant. I believe that, consistent with the approach suggested by O'Donnell J. at para. 48 of *Merck*, the judge ought to have concluded that for those reasons damages would not be an adequate remedy for the appellant. The judge's failure to so find had the real risk of doing an injustice to the appellant, in circumstances where Hogan J. in *Word Perfect*, O'Donnell J. in *Merck* and Collins J. in *Betty Martin*, all stated the view that adequacy of damages is often the decisive factor in the assessment of the overall balance of convenience or the balance of justice. Subject to my consideration of the other issues relevant to that balance, there is a very real risk that confining the appellant to its claim for damages would give rise to an injustice in circumstances where, if the suspension is lifted and the respondent proceeds to enter into the Framework Agreement with the successful tenderers, it will not be possible to reverse that action and annul those agreements. The appellant will be left to its remedy in damages with all of the attendant risks and complexities involved in that exercise. For

those reasons, therefore, in my view, the judge ought properly to have concluded that damages would not be an adequate remedy for the appellant and his conclusion to the contrary runs the real risk of doing an injustice to the appellant. Of course, the fact that damages may not be an adequate remedy for the appellant, while a decisive factor in many cases, is not the end of the matter and it is necessary to consider all of the other factors relevant to the balance of convenience or balance of justice, but it is unquestionably a very significant factor and very often the decisive factor.

145. As regards the adequacy of damages for the respondent in the event that the suspension is left in place and the respondent is successful at trial in defeating the appellant's claim, I completely agree with the judge's conclusion that damages would not be an adequate remedy for the respondent for the reasons he set out at p.38 of the judgment. I agree with the judge that the damage to the various public interests involved by maintaining the suspension and requiring those public bodies which need to avail of Irish translation services in order to comply with their statutory obligations under the 2003 Act and which do not have a current contract for such services is that they would, if the suspension were kept in place, have to go out to tender themselves as part of individual tender processes (in the case of services valued at above €25,000) or seek quotations (in the case of services valued at less than that amount) rather than being able to avail of the 2021 Framework. In its written submissions the appellant contended that the respondent would not suffer any prejudice if the suspension were maintained for the relatively short period until the trial, as there would be no interruption in service for contracting authorities and they would not have to pay the minimum prices, thereby, allegedly, saving monies. However, those are all issues which will have to be determined at the trial. The court cannot at this stage presume that the appellant will succeed in its challenge to the minimum pricing feature in the competition. The appellant also contends that if there is an

administrative cost caused by the delay in concluding the 2021 Framework, that could be compensated in damages and it has provided an undertaking as to damages in that regard. However, I see no reason to disagree with the judge's conclusion that the potential damage to the public interests involved and the difficulty of quantifying that damage means that damages would not be an adequate remedy for the respondent (pp. 38 and 43-44 of the judgment). Insofar as there is a greater administrative cost involved in public bodies having to proceed with individual tender processes and while the appellant has confirmed that any costs associated with that could be compensated in damages on foot of the appellant's undertaking as to damages, the judge rightly pointed out that the appellant has only offered an undertaking as to damages to the respondent and not to individual public bodies who may be put to additional expense if they have to run their own procurement processes. Therefore, I completely agree with the judge that damages would not be an adequate remedy for the respondent.

146. In summary, therefore, I have concluded that damages would not be an adequate remedy for the appellant, and the judge ought to have so found. His contention to the contrary was either an error in principle, by failing to follow the approach suggested by O'Donnell J. in *Merck* or, alternatively, the adoption of an approach in the exercise of his discretion which has the real risk of doing an injustice to the appellant by leaving the appellant to its remedy in damages. I have concluded that the judge was right to conclude that damages would not be an adequate remedy for the respondent. It is necessary now to proceed to consider the second issue arising on the appeal, namely, whether the findings made by the judge support his conclusion that the balance of convenience or the balance of justice requires that the 2021 Framework be put in place immediately, or whether the facts, and justice, require that it should await the early trial of the proceedings.

(2) Balance of Convenience: Assessment of Factors and Evidence

147. Had he concluded that damages would not be an adequate remedy for the appellant, that was by no means the end of the analysis which the judge was required to and, in fact, did carry out as part of the balancing of the various interests involved. He correctly concluded that damages would not be an adequate remedy for the respondent and also proceeded to consider a range of other factors relevant to the balance of convenience or the balance of justice. In considering where the overall balance lay, it was critical, in my view, to bear in mind the period for which it might be necessary to keep the suspension in place. This has been described, in some of the English cases, as the *"starting point"* in the assessment of the required balance: *DWF LLP v. The Secretary of State for Business Innovation and Skills* [2014] EWCA Civ 900 (*"DWF"*) (per Sir Robin Jacob at para. 50) and *DHL*, (per O'Farrell J. at para. 55). It seems to me that this is a crucial piece of information in terms of assessing where the balance of convenience or the balance of justice should lie in respect of which there is considerably more clarity now than there was when the judge had to make that assessment. In the court below there was great uncertainty as to when the full trial could proceed. While the appellant was hoping for trial in November 2021, that was unrealistic in circumstances where the respondent had just made discovery (on the day of the hearing of the application before the judge, 23 September 2021) and where the parties were exchanging evidence (including expert evidence). That process, we were told, at the hearing, would continue up to the end of November/beginning of December 2021. The judge was, therefore, understandably very cautious in terms of expressing a view as to when the trial could take place and was rightly concerned about the capacity of the judge hearing the case to give judgment soon after the hearing, in light of the complexity of the issues and the enormous demands on the judges assigned to the Commercial List.

148. The position has, however, become a far bit clearer in the period since the judge heard and determined the respondent's application and since the appeal was heard. On 5 November, 2021, the court was informed that there is a possibility of the trial being listed for hearing on 14 December, 2021 (subject to another case not proceeding in respect of which further clarity was expected imminently) or else on 11 January 2022, when it might be heard alongside another case also brought by the appellant. On 11 November, 2021 the Court was informed that the trial has now been listed for hearing on 11 January, 2022. In light of that development, and without in any way attempting to interfere with the case management of the case in the Commercial List or the hearing of the case, it does seem realistic to think that it should be possible for the trial to take place and for judgment to be delivered by the end of the Hilary term in 2022. If the suspension were to remain in place, we would, therefore, be looking at a further period of 4-6 months, in circumstances where it has been in place since the proceedings were commenced in early June, 2021 (almost 5 months ago) and where the 2016 Framework expired on 3 July, 2021 with no framework being in place since then. In my view, this is a very significant factor in assessing where the balance should lie as between lifting the suspension or leaving it in place until after the trial

149. The judge correctly took into account a whole range of factors in assessing the balance. He considered the various public interests relied upon by the respondent and by the appellant and felt that the balance lay in favour of lifting the suspension. In doing so, he stressed that it was necessary to bear in mind the observations of Clarke J. at para. 92 of his judgment in *Okunade* (referred to earlier) and, in particular, the weight which needed to be placed in the balance on the side of permitting *prima facie* valid measures to be carried out in a *"regular and ordinary way"*.

150. He concluded that there were several public interests' factors which lay in favour of lifting the suspension. They included the following. First, the very significant statutory obligation on many public bodies under s.9(3) of the 2003 Act (as well as under s.10 of that Act) reflecting Article 8.1 of the Constitution, requiring them to translate a wide range of documents covered by the section into the Irish language. He was understandably concerned about the extremely wide scope of the obligations imposed on public bodies under the 2003 Act and the large number of public bodies subject to those obligations, estimated at 298 public bodies. This led the judge to conclude (at p.35 of a judgment) that, having regard to the *"sheer volume"* of the material required to be translated and *"sheer number"* of public bodies subject to the obligation, it could readily be seen why it would be considered desirable in the public interest that there be a centralised purchasing body in place.

151. Second, he was satisfied that the delay and uncertainty which would ensue if public bodies were required to go out to tender themselves, together with the potential for legal challenges to any such individual tendering processes, would not be in the public interest.

152. Third, he was satisfied that there was likely to be an increase in demand for Irish translation services in light of the imminent end to the derogation relating to the status of Irish as a working language in the European Union at the end of 2021, after which Irish would be a full working language and all legislation enacted from that date would have to be translated into Irish. He was satisfied that there was a public interest in ensuring certainty in terms of the supply of such translation services with the same consideration applying to the anticipated greater uptake by public bodies of services under the 2021 Framework than was the case under the 2016 Framework.

153. Fourth, the judge was satisfied that there was a public interest in the use of centralised procurement programmes through frameworks and that the 2021 Framework is a core part of the State's procurement programme.

154. The judge was rightly conscious of the fact that public bodies covered by the 2003 Act had no choice but to comply with the obligations to translate the documents covered into the Irish language. Based primarily on the evidence contained in Ms. Killeen's third affidavit, the judge was satisfied that there are a *"significant number of public bodies that would to have conclude individual contracts for their translating services if the suspension remained in place"*.

155. On the other hand, the judge also referred to, and took into account, various public interests relied upon by the appellant. They included the following: First, the public interest in avoiding a double transfer of funds or a double payment, initially to the successful tenderers under the competition and then by way of damages to the appellant. However, he did not believe that very much weight should be attached to that factor having regard to what he saw as the potential achievement in increased efficiencies and cost reductions under the 2021 Framework. Second, the judge considered the public interest in public bodies obtaining value for money in respect of services procured by them. This is relevant to the appellant's case based on the inclusion of minimum prices for the services the subject of the 2021 Framework. The judge did not appear to attach much weight to this factor in circumstances where the respondent has sought to justify the inclusion of minimum prices and it could not be presumed that it would not be in a position to sustain those justifications at trial. Third, the judge accepted that there was a public interest in ensuring compliance with the general principles of EU law and with the provision of pre-contractual remedies. However, while noting that those factors deserved *"serious consideration"*, he felt that they were not as significant in this case in light, in particular, of

the concession made by the respondent with respect to compliance with the *Francovich* criteria.

156. Ultimately, in weighing up the various interests involved, including the public interests referred to, the judge was satisfied that the project at issue was *"of systemic importance to the public services as a whole"* and that the *"sheer scale of the project"* and *"the number of public bodies"* covered by the obligations under the 2003 Act led him to the conclusion that the balance of convenience lay in favour of lifting the suspension.

157. The principal point made by the appellant in asking the court to reverse the trial judge in his assessment of the balance of convenience is that his conclusion that the balance lay in favour of lifting the suspension on the basis of the *"systematic importance"* of the 2021 Framework, *"the sheer scale"* of the project and *"sheer number"* of the public bodies affected was not supported by the evidence. In particular, the appellant contended that the judge did not take into account what was said in Mr. Gashi's third affidavit in response to Ms. Killeen's third affidavit on which very considerable weight was placed by the judge. The respondent contended that the judge's conclusions were supported by the evidence and that another relevant factor in the assessment of the balance of convenience was, and ought to be, the appellant's failure to participate in the consultation process which preceded the publication of the RFT in May 2021.

158. I am satisfied that the judge correctly identified most, if not all, of the public interests which ought to be taken into account in assessing the balance of convenience. Those are all factors which would have to be taken into account in assessing the balance of convenience as part of the test the court applies in deciding whether to grant or refuse an interlocutory injunction in a case with a public law dimension as discussed in *Okunade* and, now very fully set out by the Supreme Court in *Merck*. However, those interests are also expressly required to be considered in the context of an application to lift an automatic

suspension in a procurement case, by Regulation 9(4) of the Remedies Regulations. It states:

> *"When considering whether to make an interim or interlocutory order, the Court may take into account the probable consequences of interim measures for all interests likely to be harmed, as well as the public interest, and may decide not to make such an order when its negative consequences could exceed its benefits."*

159. I am satisfied that the judge did correctly take into account the fact that there is a public interest in centralised procurement programmes and that this has been recognised in the Public Sector Directive and in the 2016 Regulations: see Recitals (60 – 62) and Article 33 of the Public Sector Directive and Regulation 33 of the 2016 Regulations.

160. The court was also correct to consider as part of its assessment, that the State regards centralised framework Agreements as a core part of its procurement programme and to that end has published a circular reflecting that policy: Circular 10/14 of 16 April 2014. The judge was also right, on the evidence, to regard as an important public interest provision for the security of supply of translation services for the large number of public bodies who are subject to the extensive statutory obligations under the 2003 Act to translate their documents into Irish. He was right to attach significant weight to the importance of ensuring that public bodies subject to translation obligations under the 2003 Act are able to comply with their obligations.

161. However, I am not convinced that the evidence supported the conclusions expressed by the judge at pp. 35 and 46 of the judgment concerning the *"sheer volume of the material"*, *"the sheer number of public bodies"* and the "*sheer scale of the project*", which findings were crucial to the judge's conclusion that the balance of convenience lay in favour of lifting the suspension. I completely agree with the judge that the obligations contained in the 2003 Act are extensive and extremely important , having regard to their

source in Article 8.1 of the Constitution, and that a very large number of public bodies are subject to those obligations, somewhere in the region of 298 bodies. However, the respondent's evidence was that there were only in the region of 60 competitions conducted by public authorities under the 2016 Framework over the 4-year lifespan of that framework. The number in the evidence varied from between 56 and 66 competitions/contracts, but I have taken it that there were in or about 60 such competitions over that 4-year period or approximately 15 competitions per year under the 2016 Framework.

162. As outlined earlier, Ms. Killeen and Mr. Gashi exchanged evidence in relation to those competitions and the judge attached particular significance to the evidence set out in Ms. Killeen's third affidavit. However, Mr. Gashi responded to that affidavit in his third affidavit which was sworn on 20 September 2021, a day prior to the hearing and which was before the judge and undoubtedly considered by him. However, it seems to me that greater weight ought to have been given to the evidence contained in Mr. Gashi's third affidavit than was actually the case, particularly in light of the weight placed by the judge on what Ms. Killeen had said in her third affidavit with particular reference to the 60 competitions conducted under the 2016 Framework.

163. When considered in its entirety, the evidence appears to show that of these approximately 60 competitions conducted under the 2016 Framework, 42 contracts issued under those competitions remain in place with only 4 of those contracts expiring in 2021/early 2022, with the remaining contracts expiring later in 2022 and up to dates in 2025. While those expiry dates were based on Mr. Gashi's belief that the contracts have been extended in accordance with their terms and while Ms. Killeen stated that extensions were optional, Mr. Gashi's evidence was that such contracts are *"almost always extended"* (para. 19 of his second affidavit). While Ms. Killeen stated in her third affidavit (para.

13c) that the extensions were optional and that there was no guarantee that they would be exercised, she did not dispute the evidence that they are almost always extended. While Ms. Killeen noted in her third affidavit that those 42 contracts represent a *"small cohort"* compared to the hundreds of public bodies eligible to use the Framework, nonetheless they appear in fact to be the cohort which actually used the 2016 Framework. Ms. Killeen referred to 24 other contracts which had expired. Mr. Gashi addressed these in his third affidavit. It appears that 3 of the competitions in the list of 24 were cancelled by the public bodies concerned, some were of relatively small value and, in the case of some of the contracts referred to in the list of 24, the relevant public bodies obtain their Irish translation services outside the 2016 Framework. In the case of two of them (Letterkenny Institute of Technology and the Department of Employment Affairs and Social Protection), the appellant provides Irish translation services to those bodies (paras. 15-16 of Mr. Gashi's third affidavit).

164. In my view, there is considerable merit to the submission made on behalf of the appellant that, while the obligations under the 2003 Act are extensive and the number of public bodies required to comply with those obligations is great (almost 300), the history under the 2016 Framework which the new 2021 Framework is intended to replace shows that a relatively small number of public bodies did, in fact, use the Framework to obtain Irish translation services and in the case of many of those who did, their contracts remain in existence and will do so at least into 2022 and in some cases up to 2025.

165. While it is by no means ideal, the evidence establishes that public bodies can and do obtain Irish translation services by engaging in their own tender processes or, where the value of the services required is less than €25,000, by seeking quotations under the terms of Circular 10/14. I note the evidence of Ms Killeen (at paras. 24 and 40 of her second affidavit) that the average value of contracts awarded under the 2016 Framework was

€23,000, although that was disputed by Mr Gashi. Bearing in mind the number of public bodies covered by the statutory obligations under the 2003 Act, and the small number that procured their Irish translation services through the 2016 Framework, the balance of the public bodies covered by the obligation must have done so either by going out to tender themselves or, in the case of lower value services, by seeking quotations. I, of course, acknowledge that the State is entitled to have a policy of centralised tendering and one can readily see why that would be more efficient, more certain and likely in most cases to lead to better value for the State, rather than requiring public bodies to engage in their own tender processes. That is not the issue for consideration at this stage of the assessment. The issue is how to balance the potential inconvenience and cost to those public bodies who might otherwise have sought to avail of the proposed 2021 Framework to procure their translation services over the next few months against the potential injustice to the appellant who, if the suspension is lifted, will be left to its remedy in damages with all of the problems going with that, as discussed earlier. Can it be said that it would be just to leave the appellant to its remedy in damages in those circumstances?. I do not believe, in the particular circumstances of this case, that it would be.

166. In the assessment of the balance of convenience, the real question was not the large number of public bodies covered by the obligations under the 2003 Act or indeed the significant importance of the 2021 Framework, none of which can seriously be disputed, but rather the number of public bodies who availed of the previous Framework and who may be anticipated to avail of the 2021 Framework in the period between now and the date of the trial (11 January 2022), in circumstances where many public bodies have conducted their own tender processes and where participation in the new Framework will be optional. It is, of course, also necessary to bear in mind the respondent's evidence of anticipated increase in demand under the 2021 Framework as well as the impact of work which may

come following the end of the derogation for the Irish language as a working language in the EU. They are all matters appropriately weighed in the balance but in attempting pragmatically to regulate matters between now and the date of trial in a manner which minimises the risk of injustice, it seems to me that it would not be fair or just to leave the appellant to its remedy in damages with all of the difficulties which that would involve.

167. In that context, while I have set out earlier what Clarke J. stated at para. 92 in *Okunade*, it should also be noted that at para. 94, he went on to state:

> *"That is not to say, however, that there may not also be weighty factors on the other side. It is necessary for the court to assess the extent to which, in a practical way, there is a real risk of injustice to an applicant for judicial review in being forced to comply with a challenged measure in circumstances where it may ultimately be found that the relevant measure is unlawful. The weight to be attached to such considerations will inevitably vary both from type of case to type of case and by reference to the individual facts of the case in question."*

168. In a similar vein, O'Malley J. in her judgment in the Supreme Court in *Kirkke v. Barranafaddock Sustainability Electricity Limited* [2020] IESC 42, having referred to what Clarke J. had said in paragraph 92 of *Okunade*, stated (at para. 99):

> *"...However, it is of course also necessary to assess the extent to which the party challenging the validity of the decision or measure may be subjected to real injustice if forced to comply with something that is ultimately found to be unlawful."*

169. In those circumstances, I am satisfied that the judge did correctly identify most, if not all, of the relevant public interests and other interests involved in his assessment of the balance of convenience. However, I believe that a consideration of all of the evidence before the court demonstrates that it was not sufficient to support the findings made on pp. 35 and 46 of the judgment which led the judge to conclude that the balance of justice lay in

favour of lifting the automatic suspension. In my view, the evidence did not support the claimed overriding urgency that the 2021 Framework should be put in place immediately and in advance of the trial which will now take place in early January 2022.

170. While it is invidious to compare the nature or order of the public interests involved here with those at issue in *BAM*, *Powerteam*, *Beckman* and *Homecare*, as important public interests were involved in all those cases and in this case, the real distinguishing feature between those cases and the present case, is the real and pressing urgency in those cases to proceed with the particular contract or competition. That overriding or compelling urgency is not, in my view, on the evidence, present in this case.

171. I should also say that other considerations properly to be taken into account in the assessment of the balance of convenience are the interests of the successful tenderers for a place on the 2021 Framework who were expecting to start getting work under the Framework with effect from 3 November, 2021. However, those interests, and the delay in the commencement of the 2021 Framework pending the trial of the proceedings, are not, in my view, sufficient in themselves or in combination with the other interests engaged to tilt the balance in favour of lifting the suspension.

172. I agree with the respondent that the failure by the appellant to participate in the consultation process which pre-dated the publication of the RFT for the 2021 Framework is a factor which should be considered as part of the balance of convenience. While the appellant did explain on affidavit why it did not participate in the consultation process, it is somewhat surprising that it did not respond to any of the communications from the respondent in respect of the process or attempt to put its views across as part of the consultation. I accept that the failure by the appellant to participate in the consultation process is not relevant to the legality of the competition which is a matter which must be determined at trial. However, the failure to participate in a consultation process designed

to elicit the views of interested parties may well be a factor in the assessment of the balance of convenience. However, I would not regard that factor in the present case as outweighing the significant potential injustice to the appellant if it were left to its remedy in damages.

173. For those reasons, I believe that the suspension should remain in place until the trial and that it should at that stage be a matter for the trial judge to decide whether to continue the suspension for the period between the conclusion of the hearing and the delivery of the judgment in the case.

11. Summary of Conclusions

174. In summary, I have concluded that the trial judge ought to have found that damages would be an inadequate remedy for the appellant, having regard to the complexity of the exercise in assessing damages and the number of variables involved in that exercise. I have concluded that in failing to find that damages would be an inadequate remedy for the appellant, the judge erred in principle in light of the approach suggested by the Supreme Court in *Merck*. Alternatively, the judge's conclusion that damages would be an adequate remedy for the appellant, in light of the significance (and often decisive nature) of that issue as part of the balance of convenience, has the potential to lead to a real injustice for the appellant as it would be left to its remedy in damages at the trial where the assessment of those damages would be an extremely difficult, if not impossible, exercise in light of the complexities of the case and the number of variables involved.

175. I am also satisfied that the judge ought to have concluded that the balance of convenience or balance of justice lay in favour of keeping the suspension in place, in the particular circumstances of this case, and having regard to the likely duration of the suspension. In my view, the judge approached the assessment of the balance of convenience by focussing on the amount of material required by the 2003 Act to be

translated and the number of public bodies required to comply with the obligations under the 2003 Act rather than on the number of bodies who would potentially be affected by a relatively short delay in the implementation of the 2021 Framework, in the event that the appellant were to fail at trial. Significant clarity was given to the Court in the course of the appeal as to the likely trial date which was not present when the judge had to decide the application. The case has now obtained a hearing date in the High Court (Commercial List) in early January 2022. I regard that as a very significant development in terms of the likely length of the suspension and its impact on the balance of convenience.

176. In my view, however, the evidence did not support the conclusion that the balance of convenience required the immediate lifting of the suspension by reason of the *"sheer volume of the material"* which the 2003 Act requires to be translated or the *"sheer number of public bodies"* covered by the obligations under the 2003 Act or the *"sheer scale"* and *"systemic importance to the public service"* of the 2021 Framework.

177. The real question to be asked was whether it would minimise the risk of injustice to keep the suspension in place for a relatively short period until the trial (which we now know will take place on 11 January 2022), having regard to the potential injustice to the appellant, or to lift the suspension, in light of the evidence as to the use by public bodies of the recently expired 2016 Framework and the likely use of public bodies of the 2021 Framework, in circumstances where the Framework is optional and many public bodies do conduct their own tender processes. I am quite satisfied that the approach which best minimises the risk of injustice is to keep the automatic suspension in place until the conclusion of the trial, with the continuation of the suspension thereafter to the date of judgment in the High Court being a matter for the trial judge, and that it would create a serious injustice for the appellant if the suspension were lifted at this stage. Accordingly, I

would allow the appellant's appeal and would refuse the respondent's application to lift the suspension.

178. Edwards J. and Faherty J. agree with this judgment and with the Orders I propose.