Neutral Citation No: [2024] NIKB 49	*Ref:* HUM12544
*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* 07/06/2024

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION
(COMMERCIAL LIST)

Between:

CGI IT UK LIMITED

Plaintiff

and

DEPARTMENT OF FINANCE

Defendant

David Dunlop KC & Anna Rowan (instructed by Carson McDowell) for the Plaintiff
Richard Coghlin KC & Alistair Fletcher (instructed by Arthur Cox) for the Defendant
Robert McCausland (instructed by Tughans) for the interested party

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HUMPHREYS J

Introduction

[1] In this action, the plaintiff seeks to challenge the defendant's decision to award a contract under a public procurement process known as the DOF LPS Land Registration Delivery Partner Project. Land & Property Services ('LPS') is a division of the defendant department which, inter alia, maintains the registers relating to land ownership and property interests in Northern Ireland. The procurement project in question seeks to appoint a new partner to deliver a modern digitally enabled ICT solution to support the transformation of these services.

[2] The procurement exercise is subject to the Public Contracts Regulations 2015 ('PCR 2015') and was conducted using the competitive dialogue procedure prescribed by regulation 30 of PCR 2015.

[3] On 1 December 2023 the defendant issued standstill letters indicating its intention to award the contract to Fujitsu Services Limited ('Fujitsu').

[4] These proceedings commenced by way of writ of summons issued on 21 December 2023, which had the effect of requiring the defendant to refrain from entering into the contract pursuant to regulation 95 of PCR 2015.

[5] By this application, issued on 8 March 2024, the defendant seeks relief pursuant to regulation 96 of PCR 2015 bringing this requirement to an end.

The procurement competition

[6] In 1999 the defendant entered into a contract with British Telecommunications plc ('BT') for the provision of the LandWeb system which supports the main land registration functions of LPS. This contract was for a duration of 17 years but was subject to three separate extensions, firstly to 2019, then to 2021 and finally to 2026.

[7] The Public Accounts Committee published a report in January 2021 finding that the performance of the defendant in managing the LandWeb contract fell considerably short of the standards to be expected of a public body and criticising the repeated contract extensions and the resultant cost to the public purse. It concluded that:

> "DoF staff involved with these contracts did not have the necessary commercial skills or experience to negotiate the best deal for citizens or to manage contracts"

[8] The contract notice issued on 17 December 2021 inviting economic operators to submit a response to a selection questionnaire relating to technical and professional ability and economic and financial standing. It was intended to invite three economic operators to participate in the competitive dialogue.

[9] The contract was stated to be for a duration of 15 years in total, three of which would be an implementation period and 12 years in operation. The estimated total value was £125M excluding VAT.

[10] The Information Memorandum set out a detailed account of the procedure being adopted, including the various phases of the competitive dialogue procedure. The estimated time from contract notice to award was 91 weeks, thereby anticipating contract award in September 2023.

[11] In the event, on 6 July 2022, the three shortlisted bidders, namely the plaintiff, Fujitsu and BT, were notified that they were being invited to participate in the competitive dialogue. In September 2022, BT dropped out and was replaced by Terraquest Solutions Limited.

[12] The bidders' detailed solutions were submitted in February and March 2023 and were evaluated against set criteria before dialogue meetings commenced in April 2023. This continued until final tenders were submitted in September 2023. These were then assessed on the basis of:

(i) Technical, legal and social value responses 75%

(ii) Financial and commercial 25%

[13] In the standstill letter, the defendant outlined that the plaintiff had been ranked second in the evaluation, and its overall mark was very close to that of the successful bidder, Fujitsu.

[14] On 10 December 2023 solicitors acting for the plaintiff wrote outlining concerns in relation to the evaluation of certain aspects of the plaintiff's tender and seeking further information and documentation.

[15] Following the issue of proceedings, the parties have engaged in discussions and debate over the provision of early discovery in the action. This ultimately concluded by the making of a court order on 16 May 2024. The plaintiff has yet to serve its statement of claim but advanced a number of issues during the course of the discovery application which it says will be the foundation of its challenge to the outcome of the competition.

Regulation 96 of PCR 2015

[16] Regulation 96 states:

> "(1) In proceedings, the Court may, where relevant, make an interim order—
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> (a) bringing to an end the requirement imposed by regulation 95(1);
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> (b) restoring or modifying that requirement;
>
> (c) suspending the procedure leading to—
>
> (i) the award of the contract, or
>
> (ii) the determination of the design contest, in relation to which the breach of the duty owed in accordance with regulation 89 or 90 is alleged;
>
> (d) suspending the implementation of any decision or action taken by the contracting authority in the course of following such a procedure.
>
> (2) When deciding whether to make an order under paragraph (1)(a)—

(a) the Court must consider whether, if regulation 95(1) were not applicable, it would be appropriate to make an interim order requiring the contracting authority to refrain from entering into the contract; and

(b) only if the Court considers that it would not be appropriate to make such an interim order may it make an order under paragraph (1)(a).

(3) If the Court considers that it would not be appropriate to make an interim order of the kind mentioned in paragraph (2)(a) in the absence of undertakings or conditions, it may require or impose such undertakings or conditions in relation to the requirement in regulation 95(1).

(4) The Court may not make an order under paragraph (1)(a) or (b) or (3) before the end of the standstill period.

(5) This regulation does not prejudice any other powers of the Court."

[17] The Public Contracts (Amendment) Regulations 2009 amended the then principal regulations, the PCR 2006, to give effect to the Remedies Directive, 2007/66/EEC, which was intended to make public procurement remedies more effective. This introduced, inter alia, the requirement to refrain from entering into a contract once legal proceedings had been issued. Prior to these amendments, an aggrieved tenderer was obliged to seek an injunction to restrain any contract award. Following the 2009 amendments, it became incumbent upon the contracting authority to make an application to the court to lift the statutory suspension on contract award. Regulations 47G and 47H of the PCR 2006, post-amendment, are identical in terms to regulations 95 and 96 of the PCR 2015.

[18] In *Exel Europe v University Hospitals Coventry and Warwickshire NHS Trust* [2010] EWHC 3332 (TCC) Akenhead J held that the approach of the courts to the question of interim relief which prevailed prior to the 2009 amendments should be maintained. *Exel Europe* was followed in this jurisdiction by Stephens J in *John Sisk & Son v Western Health and Social Care Trust* [2014] NIQB 56. As such, the principles deriving from *American Cyanamid v Ethicon* [1975] AC 396 continue to govern regulation 96 applications as they did to applications for injunctions brought by tenderers.

[19] Since this time, several authorities have suggested the courts should approach the question in a mechanistic fashion, asking itself the following questions:

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

(ii) If so, would damages be an adequate remedy for the plaintiff?

(iii) If not, would damages be an adequate remedy for the defendant?

(iv) Where there is doubt as to the respective adequacy, then where does the balance of convenience lie?

(v) What does the public interest say in relation to the balance of convenience?

(vi) Where the other factors are evenly balanced, how does one preserve the status quo?

(vii) Any there any other special factors in play?

[20] However, I entirely agree with the analysis of Fraser J in *Lancashire Care NHS Trust v Lancashire County Council* [2018] EWHC 200 (TCC):

> "It may therefore be that, rather that the rigid step by step approach, the consideration of whether damages are an adequate remedy is undertaken as part of a more rounded overall consideration of the case, as suggested in both *Covanta* and *Sysmex*. It may, in any event, be that the outcome is always (or almost always) likely to be the same whether a step by step, or more rounded overall, approach is taken to this question. Regardless, the issue of whether damages will be an adequate remedy remains a central part, in my judgment, of the task upon which the court is engaged on an application such as this one." (para [30])

[21] I do so for the following reasons. It is important to recall that the statutory basis for the court to make an injunction is found in section 91 of the Judicature (Northern Ireland) Act 1978. The court may make such an order where it appears to be just and convenient to do so. This is therefore also the starting point for any interlocutory application brought by a contracting authority.

[22] In *American Cyanamid* itself, Lord Diplock stated:

> "If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should <u>normally</u> be granted" (underlining added)

[23] In *Covanta Energy Ltd v Merseyside Waste Disposal Authority* [2013] EWHC 2922, Coulson J commented:

> "The cases following American Cyanamid make clear that it will normally be the case that, if damages are an adequate remedy, the claim for an interim injunction will fail. However, such an outcome is not guaranteed and there are cases where, in the exercise of the court's discretion, an interim injunction has been granted even though damages might be capable of being an adequate remedy." (para [41])

[24] The same judge continued:

> "In more recent times, the simple concept of the adequacy of the damages has been modified at least to an extent, so that the court must assess whether it is just, in all the circumstances, that the claimant be confined to his remedy of damages" (para [48])

[25] It is therefore not the law that the court's enquiry stops if it is established that damages is an adequate remedy for the plaintiff. This remains an important factor in the overall analysis but it is not determinative. At all times, the court is exercising its jurisdiction to do what is just and convenient and this will require a consideration of all the relevant circumstances in any given situation.

The impact of EnergySolutions

[26] In *Nuclear Decommissioning Agency v EnergySolutions EU Ltd* [2017] UKSC 34 the Supreme Court held that the approach in *Francovich v Italy* [1991] ECR 1-5357, governing the liability of a state to pay damages for breach of relevant EU law, applied to public procurement claims. Thus a plaintiff must show that the breach in question was "sufficiently serious" in order to found a damages claim.

[27] In *Lancashire Care NHS Trust*, Fraser J considered how this additional requirement may bear upon the assessment of the adequacy of damages at the interlocutory stage. In the absence of full argument in that case, the court accepted the position adopted by the parties to the effect that it was a relevant matter given that a plaintiff may ultimately recover no damages at all even if breach were established. However, Fraser J did caution that the matter may require further detailed consideration in the future.

[28] One way in which the issue has been addressed is illustrated by the agreement in *Bombardier Transportation v London Underground* [2018] EWHC 2926 (TCC) that in the event breach and causation were established, the contracting authority would not seek to argue the breach was not sufficiently serious. O'Farrell J commented that this:

> "would be sufficient to address the potential difficulty caused by the threshold requirement of a sufficiently serious breach." (para [64])

[29] A similar approach was adopted in *Boxxe v Secretary of State for Justice* [2023] EWCH 533 (TCC) where the defendant had specifically pleaded that the alleged breach was not sufficiently serious to justify an award of damages. Constable J observed the problem:

> "…having established breach, causation and loss, the unsuccessful tenderer is still potentially left without an *effective* remedy, because the breach is not sufficiently serious." (para [42])

[30] However, the defendant indicated it would give an undertaking that, if its interlocutory application was successful but it was ultimately established at trial that the contract should have been awarded to the claimant, it would not pursue its pleaded case that the breach did not meet the *Francovich* conditions. The judge considered this was a sensible way to cut through that issue.

[31] At this point in the jurisprudence, the problem presented by *EnergySolutions* may have appeared more illusory than real. Many procurement lawyers held the view that if it were established that some breach of the PCR had caused a contract to be awarded to the wrong bidder, this would always be sufficiently serious to ground a damages claim.

[32] However, the Court of Appeal in England & Wales has recently confirmed that a manifest error, resulting in the wrong economic operator being awarded a contract, does not necessarily result in an award of damages to the aggrieved bidder. In *Braceurself v NHS England* [2024] EWCA Civ 39, the claimant had been the runner up in a procurement competition for dental services. The trial judge found that there had been a manifest error in the marking of one question which, if correctly assessed, would have resulted in the claimant being awarded the contract. Despite this, he found that the breach in question was not sufficiently serious to entitle the claimant to an award of damages. The requirement to refrain from awarding the contract had earlier been set aside on the basis that damages was an adequate remedy for the claimant.

[33] The trial judge had concluded that this was a "single breach case" in a "very close competition." In his analysis, the breach was inadvertent and excusable although its impact was clearly significant since the claimant was not awarded the contract and thereby sustained financial loss.

[34] Coulson LJ in the Court of Appeal commented:

> "In my experience, the present case is therefore unusual, if not unique, because of the vast gap the judge found between the very low culpability on the part of the respondent and the extreme consequences of the marking error." (para [44])

[35] The experience of procurement disputes in this jurisdiction is quite different. Many of those involving marking challenges in very close competitions. Indeed, it would be futile to pursue such a challenge unless the claimed error would have made a causative difference to the outcome of the process. Rarely is it alleged that those charged with the evaluation exercise were acting deliberately or in bad faith. Reported examples include *BAM Civil v Department for Infrastructure* [2018] NIQB 68 and *John Sisk & Son v Western Health and Social Care Trust* (supra).

[36] It is not surprising that counsel for the appellant in *Braceurself* described the outcome of the litigation as "unjust and incoherent". It would be difficult for an economic operator to understand how, having been denied the remedy of set aside of contract award by reason of the adequacy of damages, no damages are awarded despite having established a manifest error which resulted in the award of the contract to a rival tenderer.

[37] Coulson LJ dealt with this proposition by emphasising that there are two different regimes in play:

(i) At the interlocutory stage, the question is whether damages are an adequate remedy in principle; and

(ii) At the final stage, the court must determine whether damages are, in fact and in law, recoverable which includes a consideration of the "sufficiently serious" requirement.

[38] The court also rejected the argument that the outcome breached the principle of effectiveness, holding that this speaks to the process by which a party entitled to a remedy can obtain that in court, rather than providing a guarantee of success.

[39] The courts in Northern Ireland are not bound by *Braceurself* and this is not the occasion to consider whether it ought to be followed. It does, however, illustrate that when one is considering the adequacy of damages as a remedy, the impact of the *Francovich* conditions is a live one. As the editors of the Construction Law Reports said in relation to the decision in *Braceurself*:

> "In cases where scores are close and there is no reason to impugn the good intentions of the authority, the argument that damages would in principle not be adequate to the claimant looks to have been strengthened"

Serious issue to be tried

[40] Whilst denying that it committed any manifest error or otherwise breached the PCR 2015, the defendant accepts, for the purposes of this application, that there is a serious issue to be tried.

Adequacy of damages

[41] As set out above, the test is not whether the plaintiff has an adequate remedy in damages but whether, in all the circumstances, it would be just to confine the plaintiff to its remedy in damages. However, for the reasons set out, this is nonetheless an important issue in the overall evaluation.

[42] The plaintiff accepts that its lost profits on foot of this contract are capable of calculation. It does however refer to certain additional areas of uncompensatable loss:

(i) Reputational damage

The plaintiff says that it entered into an agreement with Invest NI to create 50 new jobs in Northern Ireland and the loss of this opportunity means it may be unlikely to fulfil this requirement and receive grant monies, thereby adversely affecting its reputation. The evidence to support this contention is thin, and must be seen in the context of an agreement entered into without the security of the contract award in this particular competition.

(ii) Loss of staff

The plaintiff contends that this loss of this contract may result in staff being lost. No particulars are given of who these staff are, what roles they fill or why they could not be relocated to other aspects of the plaintiff's business. Again, this suffers from a lack of any evidential foundation and ought to be seen, in any event, as a natural byproduct of the procedures around competitive tendering.

(iii) Loss of a prestigious contract

There is no doubt that the contract under consideration is a high value, long term contract with potential to provide a launch pad for further opportunities. The plaintiff has made a strategic decision to invest in Northern Ireland but the opportunities which this contract might provide are necessarily unknown and unquantifiable. It should be borne in mind that, in the words of the deponent Mr Shorthouse, the plaintiff is "among the largest IT and business consulting services firms in the world". In this context, there is no assertion that the loss of this opportunity represents an existential threat to the plaintiff's business.

[43] Aside from the *Braceurself* issue, I would have found that damages are an available and adequate remedy for the plaintiff. This is, however, a very close

competition result in which any manifest error in the marking of the bids is likely to have a significant effect. There is no suggestion of any deliberate wrongdoing or bad faith on the part of the contracting authority. No undertaking of the type referred to in *Boxxe* has been given in this case.

[44] I therefore approach the question of whether it would be just to confine the plaintiff to its remedy in damages on the basis that one possible outcome of this case is that the plaintiff succeeds at trial on the basis of a breach which is not sufficiently serious to found an award of damages. If that were to occur, the contract would have been awarded to the wrong bidder and the plaintiff would have spent considerable money and resources on a wholly Pyrrhic victory.

[45] The plaintiff has offered an undertaking in damages in the event that the requirement to refrain from entering into the contract remains in place. It has not been suggested that the plaintiff would be unable to meet any damages claim on foot of such undertaking.

[46] The position of the defendant, as now made clear in evidence, is that the incumbent supplier of the LandWeb service, BT, will in principle enter into an extension of the existing contractual arrangements if the automatic suspension on contract award remains in place. The defendant states that it will have to pay for this extended service but this is easily calculated in damages.

[47] The defendant stresses that it wishes to upgrade and improve its services as soon as possible in order that its customers, and the public more widely, may avail of a proper modern digitalised system. This is no doubt a worthy aim but the urgency to implement it may stand in contrast to the poor contract management and repeated extensions which have characterised the existing arrangements.

[48] The only point of substance advanced by the defendant in relation to the adequacy of damages for it relates to the possibility that Fujitsu may not extend the period of validity of its tender. The bidders were asked by the defendant in April 2024 whether they would extend the period of validity until 31 March 2025. Fujitsu's response was:

> "We confirm that the validity of our tender response is extended…for a period of 3 months to 30 June 2024."

[49] There is no evidence to suggest that this is a final extension. Indeed, the intentions of Fujitsu in this regard could have been made clear to the court during the course of this application but it chose not to do so. As matters stand, therefore, it must be recognised that there is a risk of this bidder refusing to maintain tender validity beyond a certain date, but this risk cannot be quantified.

[50] I have therefore concluded that damages would be an adequate remedy for the defendant in the event that the suspension on contract award remains in place but the plaintiff's claim is unsuccessful at trial.

Balance of convenience

[51] The balance of convenience is concerned with the risks of injustice to each party in the event of each possible course of action. There are a number of factors for consideration, including per O'Farrell J in *Camelot UK Lotteries v Gambling Commission* [2022] EWHC 1664 (TCC) at para [126]:

(i) The length of the period of suspension and the prospects of an expedited trial;

(ii) The public interest; and

(iii) The interests of the successful bidder.

[52] The defendant's position on the delay issue is predicated on a trial taking place in 12 months' time. I entirely reject this proposition. This is a significant high value procurement challenge which the court will rigorously case manage and prioritise. There is no reason why a trial could not be heard in November 2024 with a judgment before Christmas. This would represent a delay of just over six months from the date of this decision.

[53] There are different public interests in play. There is a clear interest in these services being provided in a modern, efficient manner but, given the indication from BT in relation to an extension, this is not a case where there will be any gap in service provision. Equally, the public has a proper interest in such significant contracts being awarded lawfully to the most economically advantageous tenderer and in not paying damages to a bidder which ought to have been successful.

[54] The successful bidder has been represented throughout these proceedings through the medium of its principal sub-contractor, The Land Administration Company Inc. An affidavit from its CEO has been filed and it expresses a clear desire to move to contract award as soon as possible. LAC has committed significant resources in the preparatory work necessary for the commencement of the implementation period including staff recruitment and relocation, software development and engagement with other sub-contractors. It estimates that it has spent £500,000 to date and any delay in contract award will result in significant additional cost to it. I have taken account of all these competing interests in determining this application.

The undertaking in damages

[55] The plaintiff has offered an undertaking to pay damages in the following terms:

> "…in the event that the court refuses the defendant's application and the plaintiff is subsequently unsuccessful at trial in proving the defendant was in breach of its duties pursuant to the Public Contracts Regulations 2015. This means the plaintiff will satisfy such damages sustained by the defendant as the court deems appropriate (if any) in the period from the date that the defendant's set aside application is refused until such date as the court deems appropriate."

[56] I am satisfied that this represents an appropriate undertaking in damages. The court can, following a trial, determine the basis for and timing of any assessment of damages.

Conclusion

[57] In all the circumstances, I have determined that it would not be just to confine the plaintiff to its remedy in damages. I do so for the following reasons:

(i) There will be no disruption of the land registration services being provided by the defendant;

(ii) The court will facilitate an expedited trial and judgment within a six month period;

(iii) In the overall context of the management of the contract and the procurement process, this represents only a modest additional delay;

(iv) The public has a significant interest in a £125M contract being awarded to the correct bidder;

(v) The plaintiff's damages action may be met by a *Francovich* argument and thereby it could find itself in the same position as the claimant in *Braceurself*;

(vi) Any losses which may be occasioned to the defendant can be compensated on foot of the plaintiff's undertaking in damages.

[58] The defendant's application is therefore refused, and the requirement imposed by regulation 95 will remain in place. I propose to reserve the costs of this application and I will hear the parties on the directions towards an expedited trial.

Postscript - Procurement Act 2023

[59] The Procurement Act 2023 received Royal Assent on 26 October 2023 but is not yet in force. It will repeal PCR 2015 and replace the remedies provisions with a new

set of rules. The Act contains a similar prohibition on contract award following the commencement of legal proceedings in section 101. Section 102 states that in an application to lift or modify this restriction, the court must have regard to:

> "(a) the public interest in, among other things—
>
> (i) upholding the principle that public contracts should be awarded, and contracts should be modified, in accordance with the law;
>
> (ii) avoiding delay in the supply of the goods, services or works provided for in the contract or modification (for example, in respect of defence or security interests or the continuing provision of public services);
>
> (b) the interests of suppliers, including whether damages are an adequate remedy for the claimant;
>
> (c) any other matters that the court considers appropriate."

[60] It remains to be seen how this test is applied by the court but, at the very least, it can be seen that there has been a shift in emphasis towards the public interest. On the current approach, little regard is had to the importance of awarding contracts lawfully since that principle will often yield to the concept of damages being an adequate remedy. The consequence of this, if it results in a contracting authority paying damages, will often be that the taxpayer ends up paying twice for the same goods or services.

[61] It is noteworthy that Coulson LJ commented, obiter, in *Braceurself* that the requirement that the breach be "sufficiently serious" to warrant an award of damages "remains unamended by the new Procurement Act 2023".

[62] This is a matter which will no doubt be the subject of argument and determination in due course. The 2009 Amendment Regulations were enacted to implement the Remedies Directive and this was the context in which the Supreme Court determined that the *Francovich* conditions applied. By contrast, a claim for damages under section 105 of the 2023 Act does not arise on foot of the implementation of any EU law. These are all issues with which procurement lawyers will grapple in the near future.