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*(subject to editorial corrections)**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

**CHANCERY DIVISION**

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**FEDERAL SECURITY SERVICES LIMITED**

**v**

**CHIEF CONSTABLE FOR THE POLICE SERVICE OF NORTHERN IRELAND**

**AND**

**RESOURCE GROUP LIMITED**

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**DEENY J**

[1] The plaintiff herein currently provides security, guarding, driving and associated services to the Police Service of Northern Ireland. This was on foot of a contract which was due to end on 1 December 2008. However, at the request of the Chief Constable the plaintiff agreed to extend the period of the contract until 1 March 2009. On that date the services concerned, and over 500 men and women currently employed by the plaintiff, will transfer to Resource Grafton Security. I use this name as the name used by the Police Service when awarding the contract to that company. When they applied subsequently, and successfully, to be joined as a second defendant in these proceedings they described themselves as resource (TM) Group Limited. They formerly traded, in whole or in part, as Maybin. I shall refer to it as Resource from now on, without prejudice to certain submissions the plaintiff may ultimately make. The plaintiff's claim, on foot of a writ and a summons, both of 16 January 2009, is for an injunction restraining the first defendant, the Chief Constable, from taking any steps towards implementing the contract so awarded. The court is dealing with the matter on an interlocutory basis, to consider making such an order pending the trial of the action or until further order of the court. A decision and judgment needs to be given prior to March 1st.

[2] The interlocutory hearing was heard before me on 10, 11 and 12 February. Mr Martin Bowsher QC led Mr David Dunlop for the plaintiff. Mr Gerard Simpson QC led Mr Rhodri Williams for the first defendant and Mr Nigel Giffin QC led Mr David Schofield for the second defendant. I am grateful to counsel for their able and helpful written and oral submissions. Particularly in the circumstances of urgency outlined above I will not attempt to address all these arguments but I have considered them carefully in arriving at my decision.

[3] The first defendant has accepted for the purposes of this stage of the proceedings that the plaintiff's affidavits disclose a serious issue to be tried. That is in respect of the steps taken by the first defendant in the award of the new contract to Resource. Some of the matters set out by the plaintiff are the subject of keen dispute, such as the possession of the necessary security licence by Resource. Others, such as the expansion of the clarification interview outwith the role of such an interview and to include a new criterion or sub-criterion in apparent breach of the relevant authorities seem less in dispute on the affidavits so far seen. See Ati v ACTV Venezia et alia [2005] ECR 1-10109; Lianakis v Alexandroupolis and Others, Case C53206 (24 January 2008); McLaughlin and Harvey Limited v Department of Finance and Personnel [No 2] [2008] NIQB 91. However the defendants contend that the court has no power or jurisdiction to grant an injunction of this kind in this case because the contract has already been awarded. They further argue that, even if the court were against them on the first point, the court in the exercise of its discretion should not grant an injunction to the plaintiff here. In the circumstances clearly it is appropriate to address the jurisdictional issue first.

[4] The Chief Constable's procedures leading to the award of this new contract took place in 2008. The plaintiff and second defendant were two of four short listed economic operators. They were the only two called for a clarification interview, soi-disant, in September 2008. The plaintiff learnt of the award of the contract to Resource by a letter of 22 December also. Their solicitors immediately wrote querying this in several respects and indicating their desire to challenge the decision. However they were then told that, contrary to a possibility mooted in an earlier letter on behalf of the Chief Constable, there was to be no stand still period to allow a disappointed tenderer to apply to the court. The contract had in fact already been awarded on 22 December to "Resource Grafton Security".

[5] The first defendant submits that he is perfectly entitled to take that position because it complies with the relevant statutory provisions in the United Kingdom and, he submits, with European law.

[6] The relevant statutory provisions in the United Kingdom are the Public Contracts Regulations 2006 which apply to England and Wales and to Northern Ireland. I think it best to address these seriatim to a degree.

Regulation 2 deals with interpretation. "To award" means to accept an offer made in relation to a proposed contract, pursuant to Regulation 2(1). "Public services contract" means a contract, in writing for consideration …, under which a contracting authority engages a person to provide services but does not include –

(a) a public works contract or
(b) a public supply contract . . .

It is common case here that this is a public services contract.

[7] Regulation 5 of the amended Regulations is of particular importance. 5(1) applies the Regulations to " proposed public supply contracts, public works contracts and Part A services contracts "as well as to framework agreements. The contract awarded here by the Chief Constable is a Part B services contract. The categorisation of the different services is to be found at Schedule 3 of these Regulations. It should be noted that these follow not only earlier Regulations but earlier and current European Directives. Without reciting them seriatim the distinction between them is that at some stage in the past a view has been formed that those in Part A are more likely to attract cross border interest than those in Part B. Part A includes, for example, telecommunications services, financial services and transport by air. Part B includes hotel and restaurant services, education, health and social services and, relevant for these purposes, security services. Mr Bowsher pointed out that the presence of transport by water in Part B seems slightly curious given the physical nature of Western Europe but the point here is that both the European institutions and the Parliament of the United Kingdom have chosen to make this distinction. It is not a distinction based on size. There are separate thresholds under Reg. 8 which vary depending on the nature of the contract. (The relevant threshold here, which is not relied on by the Defendants, appears to be 211,000 Euro, which is far below the value of this contract.) An assumption has been made about cross-border interest placing security services in Part B. The significance of this is seen when one returns to Regulation 5 where the provisions of (1) are reinforced by Regulation 5(2) –

> "Whenever a contracting authority seeks offers in relation to a proposed Part B services contract other than one excluded by virtue of Regulation 6 or 8 –
>
> (a) Parts 1, 9 and 10 apply and
> (b) The following provision in Parts 2 to 8 apply –"

namely Regulations 9, 31, 40(2), 41 and 42. This is of importance in the case before me because it means that Regulation 32 which is in Part 5 does not apply to a proposed Part B services contact, as here. Under the rubric of "Information about contract award procedures" the Regulation at (3) requires a contracting

authority, such as the Chief Constable, to "allow a period of at least 10 days to elapse between the date of dispatch of the notice referred to in paragraph (1) and the date on which that contracting authority proposes to enter into the contract or to conclude the framework agreement". Therefore if this had been a Part A services contract or a contract for public works, for example, as has happened in a number of the other recent cases in this jurisdiction, the disappointed tenderer could come into court and seek an injunction restraining the contracting authority from granting the contract. The Chief Constable, although the alternative was contemplated by those advising him, stood on what he was advised were his rights under the Regulations and awarded the contract forthwith to Resource on 22 December. Therein, his counsel submits he acted lawfully. It is common case that he could have quite lawfully allowed a standstill period but his counsel says he was not obliged to do so.

[8] As stated above Part 9 of the Regulations does apply to a Part B contract. Part 9, headed "Applications to the court" includes Regulation 47. Regulation 47(1) imposes on a contracting authority a duty, owed to an economic operator, such as the plaintiff, to comply with the provisions of these Regulations, with some exceptions, "and with any enforceable community obligation in respect of a public contract, framework agreement or design contest other than one excluded from the application of these Regulations by Regulation 6, 8 or 33." Mr Bowsher lays stress on those words. They emphasise that there may be obligations on a contracting authority outwith these Regulations. Regulations 6 and 33 are not relevant. Regulation 8 relates to financial thresholds which, as I have said, can disapply the Regulations. But this services contract will, according to the successful bidder, attract earnings in the region of £60 million over the contract life (if extended to 5 years) and therefore far exceeds the relevant Reg. 8 threshold.

[9] The plaintiff's claim therefore is expressed in statutory form by 47(1) but restricted by 47(9) which reads –

> "In proceedings under this Regulation the court does not have power to order any remedy other than an award of damages in respect of a breach of the duty owed in accordance with paragraph (1) or (2) if the contract in relation to which the breach occurred has been entered into."

Mr Simpson's position is that these words are entirely clear and leave the plaintiff here only a remedy in damages. Mr Bowsher's position is that independently of the Regulations and stemming from the decision of the European Court of Justice in Alcatel v Austria Case C-81/98, [1999] ECR I-7671 and fundamental principles of community law and consistently with the reference in Article 47(1)(a) the court must adopt one of two approaches to this Regulation. Either, on foot of what he submits is European law I should

interpret 47(9) as only applying to a contract entered into after a standstill period has been allowed or, in the alternative, that I should hold that such a contract entered into without a standstill period is void.

[10] While one is looking at Regulation 47 it is appropriate to take account of another submission of Mr Simpson with regard to 47(8) which paragraph I will set out in full.

> "(8) Subject to paragraph (9), but otherwise without prejudice to any other powers of the Court, in proceedings brought under this regulation the Court may –
>
> (a) by interim order suspend the procedure leading to the award of the contract or the procedure leading to the determination of a design content in relation to the award of which the breach of the duty owed in accordance with paragraph (1) or (2) is alleged or suspend the implementation of any decision or action taken by the contacting authority or concessionaire, as the case may be, in the course of following such a procedure; and
>
> (b) if satisfied that a decision or action taken by a contacting authority was in breach of the duty owned in accordance with paragraph (1) or (2) –
>
> (i) order the setting aside of that decision or action or order the contracting authority to amend any document;
> (ii) award damages to an economic operator which has suffered loss or damage as a consequence of the breach; or
> (iii) do both of those things."

He points out that the power of the court to make an interim order there is to "suspend the procedure leading to the award of the contract" or suspend the implementation of any decision or action taken by the contracting authority "in the course of following such a procedure." Here the contract has been awarded. He submits that the Regulation, and Parliament in enacting it, therefore contemplated no power in the court (which is the body in this Member State charged pursuant to Regulation 47(6) with responsibility for reviewing these matters) to interfere other than by awarding damages once the contract has been entered into. Of course, if this contract is not a "contract" within the meaning of Art. 47 (9) then the court could order a suspension of the

procedure leading to a qualifying contract until there had been a hearing on the liability issues.

[11] Other therefore than the words previously referred to at Regulation 47(1)(a) acknowledging a possible enforceable community obligation outside these Regulations, Mr Bowsher has to show that the Regulations do not reflect the current state of European law or, rather, the whole scope of it. It is common ground that the court should interpret domestic legislation in accordance with European law. Marleasing SA Case C-106/89; ECR 1-04135. Mr Bowsher's starting point is a recent decision of the Grand Chamber of the Court, Commission v Ireland [2008] 1 CMLR 34 (An Post). In this case the government in Dublin had allocated to its post office a contract, falling within Annex 1B to Directive 92/50 for public services, namely the payment of social benefits, without a prior contract notice to other parties. I set out the decision of the Grand Chamber at paragraphs 25 to 30.

> "25. For the services coming within the ambit of Annex 1B to Directive 92/50, and subject to a subsequent evaluation as referred to in Article 43 of that directive, the Community legislature based itself on the assumption that contracts for such services are not, in the light of their specific nature, of cross-border interest such as to justify their award being subject to the conclusion of a tendering procedure intended to enable undertakings from other Member States to examine the contract notice and submit a tender. For that reason, Directive 92/50 merely imposes a requirement of publicity after the fact for that category of services.
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> 26. It is common ground, however, that the award of public contracts is to remain subject to the fundamental rules of Community law, and in particular to the principles laid down by the Treaty on the right of establishment and the freedom to provide services (see, to that effect, H1, paragraph 42).
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> 27. In this regard, according to settled case-law, the purpose of coordinating at Community level the procedures for the award of public contracts is to eliminate barriers to the freedom to provide services and goods and therefore to protect the interests of traders established in a Member State who wish to offer goods or services to contracting

> authorities established in another Member State (see, inter alia, Case C-380/98 University of Cambridge [2000] ECR 18035, paragraph 16; Case C-19/00 SIAC Construction [2001] ECR 1-7725, paragraph 32; and HI, paragraph 43).
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> 28. Directive 92/50 pursues just such an objective. As the 20th recital in its preamble shows, it is designed to eliminate practices that restrict competition in general, and participation in contracts by other Member States' nationals in particular, by improving the access of service providers to procedures for the award of contracts (see HI, paragraph 44).
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> 29. It follows that the advertising arrangement, introduced by the Community legislature for contracts relating to services coming within the ambit of Annex 1B, cannot be interpreted as precluding application of the principles resulting from Article 43 EC and 49 EC, in the event that such contracts nevertheless are of certain cross-border interest.
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> 30. Also, in so far as a contract relating to services falling under Annex 1B is of such interest, the award, in the absence of any transparency, of that contract to an undertaking located in the same Member State as the contracting authority amounts to a difference in treatment to the detriment of undertakings which might be interested in that contract but which are located in other Member States (see, Telaustria and Telefonadress, paragraphs 60 and 61, and Case C-231/03 Coname [2005] ECR 1-7287, paragraph 17)."

I note the court's view that the award of public contracts is to remain subject to the fundamental rules of community law. These are regarded as including Article 43 which confers freedom of establishment and Article 49 of the treaties which confers freedom to provide services. I note further the emphatic terms of paragraph 29 that the "advertising arrangement, introduced by the community legislature for contracts relating to services coming within the ambit of Annex 1B cannot be interpreted as precluding application of the principles resulting from Articles 43EC and 49 EC in the event that such contracts nevertheless are certain cross-border interests." Therefore a duty is

found to exist on Member States to advertise Part B Public Service Contracts if they have a certain cross-border interest. By analogy the plaintiff submits that there is an obligation to give a standstill period for disappointed tenderers on foot of such contracts once they have been advertised. I observe that it might be said that the absence of a standstill period is a less fundamental breach of the Treaty rights than failing to advertise the contract at all. In the latter case there can be no transparency and no exposure to the right to competition which is the essence of the economic provisions of the Treaties. The absence of a standstill agreement, while very important, still leaves the remedy in damages to a disappointed tenderer to be used a contracting authority. The Plaintiff says that is not an effective remedy in this case. Nor is it, it might be said, in the public interest that a wrongly awarded contact be immune from review, even if it were to last for five or twenty five years and/or be of enormous cost to the public purse.

[12] The paragraphs of the decision of the Grand Chamber from 29 to 35 are, in the submission of Mr Giffin for the second defendant, of importance for a second reason. He suggests that the plaintiff here fails at a preliminary hurdle by not showing cross-border interest. He relies on these paragraphs in particular paragraph 32 as leaving the test of cross-border interest to be one which the Commission establishes to the satisfaction of the court. However, that part of the decision of the court, which caused Ireland to succeed in that case, was in a situation where no other body had in fact tendered for the contract because it was not advertised. The Commission had received a complaint but they had not satisfied the court that the cross-border interest existed in substance i.e. that there were entities in other Member States which would have and could have tendered for the payment of social welfare payments in the Republic of Ireland.

[13] The facts here are very different. The plaintiff company is a subsidiary of a company with a headquarters in Dublin and which is quoted on the Irish Stock Exchange. The second defendant itself is local but operates, either through its partner Grafton or otherwise, on both sides of the Irish border although not to the extent of the Plaintiff. The third short-listed entity operates in over 100 countries worldwide including a number of the Member States of the European Union. The fourth short-listed party is a subsidiary of a Danish company. Mr Giffin's submission is that because they all have emanations in the United Kingdom there is no cross-border interest. I reject that submission, for which no authority was offered. To accept that submission would act as a deterrent to economic operators from establishing subsidiaries in other Member States of the Union. If Mr Giffin is right, doing so would deprive them of actual or potential rights under European law. That must have a deterrent effect on establishing subsidiaries, which otherwise may be useful for legal, revenue or other reasons. To rule thus would tend to deter trade between Member States. The Commission was the plaintiff in the case against Ireland and had not proved that aspect of their case. I find that the plaintiff in this

action has proven the cross-border interest by showing the strong relationship of a number of the short-listed parties with other Member States.

[14] The plaintiff next relies on the decision of the First Chamber of the Court in Parking Brixen Gmbh [2006] 1 CMLR 3. This was a reference to the Court from a court dealing with the award of a contract for a public pay carpark in a German speaking province of Italy. The decision of the court is forcefully set out at paragraphs 44-49 of its judgment in response to the second question from the court. It found that this contract was a public service concession contract which as community law stands at present was wholly excluded from the scope of Directive 92/50. Nevertheless it found that the contract was subject to the fundamental rules of the EC Treaty including Article 43 and Article 49 as mentioned above. Both of those were "specific expressions of the principle of equal treatment." Again, in Coname v Comune di Cingia de'Botti [2005] ECHR 1-7287 the Grand Chamber at paragraphs 15-19 also held that in the absence of any community legislation governing public service concession contract "the award of such concessions must be examined in the light of primary law and, in particular of the fundamental freedoms provided for by the Treaty" including Articles 43 and 49.

[15] Again, in Telaustria Verlags Gmbh, Case C-324-98, the Sixth Chamber made a ruling in connection with a contract awarded by an emanation of the State to a private undertaking for the printing and distribution digitally of telephone directories, which was accepted to be a public service concession contract excluded from the Directives. At paragraph 60 the court said:

> "In that regard it should be borne in mind that, notwithstanding the fact that, as Community law stands at present, such contracts are excluded from the scope of Directive 93-38, the contracting entities concluding them are nonetheless, bound to comply with the fundamental rules of the Treaty, in general, and the principle of non discrimination on the ground of nationality, in particular."

The case was remitted to the National Court to assess the evidence.

[16] Mr Bowsher also relied on the Commission Interpretative Communication on the Community law applicable to contracts awards not fully subject to the provisions of the Public Procurement Directives (2006/C179/02). This document in its introduction records that the Public Procurement Directives do not apply to all contracts and that there are a number of contracts which are only partially covered by them such as Annex B. I note with agreement the sentences in the introduction. "Ensuring the most efficient use of public money is of particular importance in view of the budgetary problems encountered in many Member States. One should also not

forget that transparent contract awarding practices are a proved safeguard against corruption and favouritism." The document states at 1.1, correctly in the light of the case law, under the rubric : Rules and Principles of the EC Treaty, the following.

> "Contracting entities from Member States have to comply with the **rules and principles of the EC Treaty** whenever they conclude public contracts falling into the scope of that Treaty. These principles include the free movement of goods (Article 28 of the EC Treaty), the right of establishment (Article 43), the freedom to provide services (Article 49), non discrimination and equal treatment, transparency, proportionality and mutual recognition."

At paragraph 1.2 the Commission quotes the court in Bent Mousten Vestrgaard [2001] ECR 1-9505, paragraph 20, as stating:

> "Although certain contracts are excluded from the scope of the Community Directives in the field of proper procurement, the contracting authorities which conclude them are nevertheless bound to comply with the fundamental rules of the Treaty."

[17] At 1.3 the Communication, which I note was published in the official journal of the European Union on 1 August 2006, states:

> "It is the responsibility of the individual contracting entities to decide whether an intended contract award might potentially be of interest to economic operators located in other Member States. In the view of the Commission this decision has to be based on an evaluation of the individual circumstances of the case such as the subject matter of the contract, its estimated value, the specific of the sector concerned and the geographic location of the place of performance."

The Communication deals with advertising and contract award and does not mention a standstill period directly. However at 2.3 it deals with judicial protection and the whole section is worthy of consideration. It includes the following statement at 2.3.2, after recording that Annex B contracts are not covered by the Directives. "Review procedures for such contracts have to comply with the Directives on review proceedings and the relevant caselaw.

These principles remain unchanged in the recently adopted proposal for a new Directive and review procedures."
At 2.3.3 "Basic standards derived from primary community law" one sees, inter alia, the statement that:

> In accordance with the case law on judicial protection, the available remedies must not be less efficient than those applying to similar claims based on domestic law (principle of equivalence) and must not be such as in practice to make it impossible or excessively difficult to obtain judicial protection (principle of effectiveness)."

Mr Bowsher submits that the remedy he seeks is required here under both these principles.

[18] He referred to an article by Ammar Al-Tabbaa of Simmons & Simmons in the Construction Law Journal (2004) 159 Cons Law 26 in which the author expressly contemplated that the national rule that damages were the only remedy "must be read subject to whether or not a reasonable period between award and conclusion has been observed. Should the legality of an award decision be successfully challenged by a disappointed bidder after the contract has been entered into, in a situation where no such reasonable period has been observed by the contracting authority, then an English court may find itself obliged to declare the contract void in order to give effect to the remedies directive, notwithstanding that to do so would in effect be to disapply a provision of national law. Whilst there has not yet been such a decision in the UK, on 1 April 2003 the Administrative Court of Paris set aside a contract award decision after the contract had been entered into on the basis that the contract had been concluded before the unsuccessful bidders had been informed that their bids had been rejected (Socitet Sodiform, AJDA 2003 page 1111)." Mr Bowsher referred in his written materials to Halsbury's Laws of England on Contract Volume 9.1 (re-issue) at 836. "There are several classes of contract which, though perfect as to form, agreement and consideration were not given full effect because they offend against the policy of the law." He submitted that breach of Community law was a modern example of that. The article on the Construction Law Journal may have been prescient. In Fleming v Revenue and Customs Commissioners [2008] 1 All ER 1061 the House of Lords had to consider the validity and applicability of regulations which reduced the time in our domestic law for reclaiming input tax which ought not, the ECJ had found, to have been paid to the Commissioners. All Their Lordships gave judgments and there was some difference of emphasis between them. But the decision of the house in Fleming's case was unanimous that the national Regulations had to be disapplied in the case of all claims for deduction of input tax that had accrued before the introduction of the time limit. The matter is

succinctly put in the opening paragraph of the judgment of Lord Walker of Gestingthorpe.

> "[24] My Lords, it is a fundamental principle of the law of the European Union (EU) recognised in Section 2(1) of the European Communities Act 1972, that if national legislation infringes directly enforceable Community rights, the national court is obliged to disapply the offending provision. The provision is not made void but it must be treated as being (as Lord Bridge of Harwich put it in Factortame Limited v Secretary of State for Transport [1989] 2 All ER 692 at 701 [1990] 2 AC 85 at 140):
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> 'without prejudice to the directly enforceable Community rights of nationals of any Member State of the EEC.'"

At paragraph 29 Lord Walker goes on to say that this application "is called for only if there is an inconsistency between national law and EU law. In an attempt to avoid an inconsistency the national law will, if all possible, interpret the national legislation so as to make conform to the superior order of EU law: Pickstone v Freemans plc [1988] 2 All ER 803; Litster v Forth Dry Dock and Engineering Co Ltd (In Receivership) [1989] 1 All ER 1134. Sometimes however a conforming construction is not possible, and disapplication cannot be avoided."

This authority was not cited to this court but it seems to me that the position would therefore be that if the court were persuaded that it has jurisdiction in the matter and that it is right to exercise that jurisdiction the alternatives are either to interpret Regulation 47(9) to exclude a contract entered into in breach of fundamental Community rights or to disapply the relevant national law. In this case the court is dealing with a single contract. In that case the House of Lords was disapplying the regulations to all persons within the United Kingdom who may have a claim to repayment.

[19] In Alcatel A.G. v Austria Case C-81/98; [1999] ECR 1-7671 the Court was addressing Article 2 of Directive 89665 – the Remedies Directive which, as amended, applies here. Article 2(1) required Member States to provide for interlocutory procedures with the aim of correcting alleged infringement of rights including measures to suspend the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority. Article 2(6) expressly permitted Member States to provide that after the conclusion of a contract following its award the remedies available might be limited to damages. The court interpreted those provisions to the effect that

they "must" nevertheless require that Member States ensure that the contracting authority's decision prior to the conclusion of the contract as to the bidder in a tender procedure was in all cases open to review under procedure whereby unsuccessful tenderers may have that decision set aside if the relevant conditions are met, notwithstanding the possibility once the contract has been concluded, of obtaining an award of damages. That standstill period has since been incorporated into the amendments to the Remedies Directive at Regulation 32. Although the contracts there were public supply and public works contracts, counsel for the defendant accepted this was an authoritative statement of European law. It is evident from the ruling that the court placed less overt emphasis on fundamental rights under the Treaty than the later decisions already recorded under Community law but the view of the court was unanimous and emphatic.

[20] On the face of it therefore the decision of the Chief Constable to confirm the contract award and enter into contract with Resource on 22 December 2008 would, were it not for the Regulations, fly in the face of that decision. The plaintiff relies on the views of the Advocate General at paragraphs 36-39 to reinforce its submissions. He pointed out that the wording of the Directive implied that the award followed the contract. As previously indicated the wording of the Regulations does not follow that pattern. That decision of the court in Alcatel was reinforced by a further decision in Commission v Austria ECHR 2004 0000; Case C-212/02 where the Court at paragraph 23 held that complete legal protection "also requires that it be possible for the unsuccessful tenderer to examine in sufficient time the validity of the award decision. Given the requirement that the Directive be of practical effect, a reasonable period must elapse between the time when the award decision is communicated to unsuccessful tenderers and the conclusion of the contract in order, in particular, to allow an application to be made for interim measures prior to the conclusion of the contract."

[21] Directive 2004-18-EC, of the European Parliament and of the Council on the Coordination of Procedures for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts, can be dealt with expeditiously. Article 2 is headed Principles of Awarding Contracts and reads:

> "Contracting authorities shall treat economic operators equally and non discriminatorily and shall act in a transparent way."

Article 21 provides that service contracts listed in Annex 2B shall be subject solely to Article 23 (Technical Specifications) and Article 35(4) (Post Contract Announcement). Therefore, despite the cases referred to above, there was no express requirement to advertise such contracts in advance. As the earlier cases have said this is on the assumption that such contracts are not of certain cross-border interest. It is the submission of the plaintiff that there was

unequal treatment here because the second defendant is in a protected position by the decision of the Chief Constable to grant the contract instanter, if such award leaves the plaintiff only with a right of remedy in damages.

[22] The decision of the European Court in Impact v Minister for Agriculture (Ireland) Case C-268-06, ECR 2008 is of assistance to this court in its task. I quote paragraph 4 in the summary.

> "When applying domestic law and, in particular, legislative provisions specifically adopted for the purpose of implementing the requirements of a Directive, the national courts are bound to interpret that law, so far as possible in the light of the wording and the purpose of the Directive in order to achieve the result sought by it and thus to comply with the third paragraph of Article 249 EC. The obligation on a national court to refer to the content of a Directive when interpreting and applying the relevant rules of domestic law is, however, limited by general principles of law, particularly those of legal certainty and non retroactivity and that obligation cannot serve as the basis for an interpretation of national law contra legum."

Therefore when the court turns, as it will to the amendments to the 1989 Remedies Directive it cannot confine itself solely to that Directive but still has to bear in mind the general principles of the law. See also paragraphs 27, 42, 43 and 53 of the judgment of the Court.

[23] The plaintiff also relied on the decision of the Court of Appeal in England in Cookson & Clegg v Ministry of Defence [2006] EULR 1092. In that case the court declined to entertain a judicial review public law hearing in parallel with a procedure similar to the one before me. The point at issue was the very standstill point which concerns this court. I think the matter can be put shortly in this way. Buxton LJ, with whom Sedley LJ and Sir Martin Nourse agreed, clearly entertains the possibility that the court considering this application could conclude that a standstill period was necessary despite the absence of any requirement for it in Part B cases. He also says at paragraph 18:

> "This analysis makes a distinction between statutory fault in not following statutory rules (here, the failure to follow the regulations) on the one hand; and actions of what might be called a normal commercial nature in awarding the contract itself. I would, however, immediately

> agree that that analysis does not and should not exclude public law entirely from the contract awarding process, even if there were no statutory breaches involved: for instance, if there were bribery, corruption or the implementation of a policy unlawful in itself, either because it was ultra vires or for other reasons as was the case in Roberts v Hopwood and Wheeler v Leicester City Council both of which was cited by Elias J in Molinaro v Kensington & Chelsea Borough Council [2002] LGR 336."

The plaintiff also relies on the decision of Evans-Lombe J in Vodafone 2 v Revenue & Customs Commissioners [2008] EWHC 1569 (Ch) as authority for the proposition that interpretation could extend as far as implying words into legislation even when the existing text is unambiguous. The reference to Lord Scott is distinguished on the basis that the proposed amendment which he was concerned about was a very bold one of introducing a transitional period. However as I have pointed out above the method adopted by the court there was to disapply in its entirety the relevant offending regulation. Mr Bowsher also relied on a number of cases relating to public policy which I think it is not necessary for me to set out.

[24] Mr Simpson QC for the first defendant addressed the matter with his customary directness. I have already taken into account some of his submissions in dealing with the Regulations and other matters above. He laid considerable stress on the decision of the Court of Appeal in Ealing Community Transport Ltd v Ealing LBC (unreported) OBENI 1999/0489/1. However, it must be borne in mind that this decision was prior to the decision of the European Court of Justice in Alcatel. The ratio of the decision has been overruled by the ECJ. It seems to me therefore that I must, with respect, view the obiter dicta of the learned judges with reservation in the light of that. I take into account, nonetheless, his valid point that the court should avoid where possible disruption of third party rights. The third party rights here arise from the granting of the contract without the standstill period and the opportunity of the court to examine the proprietary of the grant of the contract. I have already mentioned that the 2004 Directive did not apply the Alcatel principle to Part B contracts. He submitted that it was not therefore open to the court to do so.

[25] He supported his argument with reference to a consultation document from the Office of Government Commerce of August 2005 addressing draft amendments to the UK Procurement Regulations implementing the ECJ (Alcatel) Judgment. At 2.1 the authors recorded that the European Court had twice clarified the position that a mandatory standstill period is required and that the European Commission had issued a reasoned opinion against the UK

prior to infringement proceedings. But at 3.3.1 it reiterates that this period does not apply to procurements of Part B services.

[26] Mr Simpson contrasts that with an Action Note dated 7 August 2006 from the Office of Government Commerce where at paragraph 8 it clearly states that the standstill period would also apply to Part B services. He points out, with the assistance of documents which came to light in the course of the hearing before me that the draft amendments to the Remedies Directive from the Commission of 4 May 2006 did not exclude Part B contracts such as this. As the Action Note referred to just above indicates Member States were asking for "clarification on the application of the standstill period to Part B services …". He says that clearly what happened is that the European institutions accepted the view from Britain, and possibly others, that Part B should be excluded from some mandatory obligations and that that was done in the Remedies Directive as enacted. This seems a reasonable inference to draw. It is appropriate therefore to turn now to the amendments to the Remedies Directive.

[27] Directive 2007/66/EC of 11 December 2007 amended Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts. It should be borne in mind that the 1989 Directive was a Remedies Directive and this amending directive addresses that topic. I heard lengthy submissions from Mr Bowsher and from Mr Simpson with regard to the terms of the Directive. It is necessary to briefly address the status of this Directive. It is now in force and was in force when the Chief Constable made his decision about the award of this contract. However, the two year period in which Member States can make regulations to implement the Directive have not been completed. In default of such regulations the Directive becomes of direct effect. I was persuaded by Mr Simpson that in this context of considering what duty lay on the Chief Constable under European Law it was appropriate to take this Directive into account in the current transitional period and in this factual situation.

[28] The Directive begins with a number of recitals which are relevant to the interpretation of the Directive and are relevant to some of the issues here. Recital (3) comments on the fact that the Court of Justice and consultations "have revealed a certain number of weaknesses in the review mechanisms in the Member States." It should be borne in mind that this Directive is expressly dealing with remedies. Recital (4) expressly notes that those weaknesses included the absence of a period allowing an effective review between the decision to award a contract and the conclusion of the contract in question. "This sometimes results in contracting authorities and contracting entities who wish to make irreversible the consequences of the disputed award decision proceeding very quickly to the signature of the contract. In order to remedy this weakness, which is a serious obstacle to effective judicial protection for the tenderers concerned, namely those tenderers who have not yet been definitively excluded, it is necessary to provide for a minimum standstill

during which the conclusion of the contract in question is suspended, irrespective of whether conclusion occurs at the time of signature of the contract or not." The plaintiff understandably relies on this recital and also on the subsequent recitals at (5) and (6).

[29] However the defendants rely on recital (8) from which I quote.

> "This type of minimum standstill period is not intended to apply if Directive 2004/18/EC or Directive 2004/17/EC does not require prior publication of a contract notice in the official journal of the European Union, in particular in cases of extreme urgency as provided for in Article 31(1)(c) of Directive 2004/18/EC or Article 40(3)(d) of Directive 2004/17/EC. In those cases post contract review is sufficient."

Obviously this is not a case of extreme urgency but it is a case where prior publication of a contract notice in the official journal is not required because the contract is a Part B contract.

Mr Bowsher however submits that the wording of Recital (8) does not exclude the inference that as well as "this type of minimum standstill period" to be found within the Directive there was another type of minimum standstill period i.e. where other factors exist which require the contracting authority to apply a standstill period in order to comply with underlying principles of European law. Counsel sought support from other recitals. For example the plaintiff relied on Recital (13) to this effect.

> "In order to combat the illegal direct award of contracts, which the Court of Justice has called the most serious breach of community law in the field of public procurement on the part of a contracting authority or contracting entity, there should be provision for effective proportionate and dissuasive sanctions. Therefore a contract resulting from an illegal direct award should in principle be considered ineffective. The ineffectiveness should not be automatic but should be ascertained by or should be the result of a decision of an independent review body."

Mr Simpson on the other hand relies, inter alia, on Recital (18) with its reference to contracts which were concluded in breach of "the standstill period" as indicating that the only standstill period contemplated is the one under this Directive which does not apply to Part B contracts.

[30] I turn to the amending articles themselves. The mechanism here is that Articles 1 and 2 of Directive 89/665/EEC are replaced by new Article 1 and Articles 2(a) to (f). The general thrust of Article 1 and Article 2 is undoubtedly to ensure that a court or similar review body in another Member State has the power to suspend the conclusion of a contract while it reviews the award procedure. But Article 2.7 also provides that a Member State may itself provide that after the conclusion of a contract the powers of the body responsible for review procedures shall be limited to awarding damages to a party like the plaintiff here. Article 2a expressly addresses the standstill period and reiterates that persons disappointed with a procedure have sufficient time for effective review of the contract award decisions. Article 2a.2 provides for the minimum period of at least 10 calendar days as a standstill period.

[31] The defendants rely on Article 2b headed "Derogations from the Standstill Period". Again Part B contracts are not expressly referred to but are covered at 2b(a) by the exclusion of contracts which do not require prior publication in the official journal of the European Union. Mr Simpson again draws attention to the use of the singular in the heading of 2b but that is also open to the interpretation that it is referring to the standstill period set out in Article 2a. The plaintiff relies on Article 2d.1(b) and argues that there is a wider duty under the Directive to ensure an effective review which is reinforced by Article 2d.2.

[32] The 2007 Directive does not impose the minimum standstill period under Article 2(a) on all Part B contracts. But the language of the Directive undoubtedly emphasises the importance of the ability of a court such as this to suspend contracts and to provide effective remedies, if necessary by declaring such a contract ineffective. Some of the language of the Directive is ambiguous. What I do not see in the Directive is any prohibition on the argument of the plaintiff here that a contract such as this, while not subject to the automatic standstill period provided in this incoming Directive, may nevertheless necessitate a standstill period before the contract is concluded because compliance with the principles of transparency, non discrimination and equal treatment under the European Treaty and its case law so require. The decisions of the European Court of Justice in Alcatel, Telaustria, Ireland, Parking Brixen, Bent Mousten Vestrgaard et alia make it clear that "contracting entities concluding [contracts such as Part B contracts] are nonetheless, bound to comply with the fundamental rules of the Treaty, in general, and the principle of non discrimination on the ground of nationality, in particular." (Telaustria paragraph 60). Such compliance may, in particular factual situations, require the use of a standstill period in contract procedures normally excluded from that obligation.

[33] I was concerned at one point that such a finding might cause considerable uncertainty to contracting authorities dealing with Part B or other

excluded contracts. However it seems to me that the degree of uncertainty is not in fact extensive. What an authority in the position of the Chief Constable has to decide is whether he is obliged to have a minimum standstill period before awarding the contract in any particular case. If he answers that question in the affirmative then, except in cases of extreme urgency, the sensible course is to adopt the 10 day standstill period already set out in the Directive and indeed the regulations. We know from the correspondence here that the mind of the Chief Constable, or the Deputy Chief Constable on his behalf as he is said to have signed off on this, was drawn to the advisability of a standstill period. He declined to have one nevertheless.

[34] Having found that a contracting authority dealing with a Part B public services contract may be under a duty under European law to have a minimum standstill period it appears to me that it is then my duty to consider whether the Chief Constable ought to have held one here. Ideally the prior decision would be taken by the European Court of Justice itself but given the restraints of time this court must form its own view. The question of whether the obligation to hold a standstill period for a Part B public services contract in a particular case naturally falls to the national court, as here. In arriving at the decision on the principle of an obligation to follow the treaties I take into account but am not persuaded by the observations in the opinion of the Advocate General in Finland Case C195/04. Mr Giffin accepted the treaties apply but submitted that they could not impose an obligation expressly derogated by a Directive. It can be seen however that the new Directive does not prohibit another community obligation in this regard of the sort contemplated, indeed, by regulation 47(1). It does derogate from the mandatory imposition in every case of a standstill period for Part B cases. It seems to me that it does not follow, because the decisions of the European Court of Justice are clearly against such a proposition, that a contracting authority dealing with a Part B case can ignore the principles of European law. But it follows that the duty to grant such a standstill period in a Part B case will only occur as an exception to a general rule that such a period is not required. I conclude, a little tentatively as the matter was not fully argued before me, that the plaintiff must satisfy the court here that there was such exceptional circumstances as should have led the Chief Constable or his Deputy to conclude that a standstill period was called for. If they concluded that it was called for, as previously indicated, it would be both simple and wise to follow the procedures set out in regulation 31 of the Regulations.

[35] It seems to me appropriate, before turning to see whether I should exercise my discretion to grant interim relief in this case, to see whether the facts and circumstances presenting themselves to the contracting authority in this case, in December 2008, were such as to constitute an exception to the general rule that a standstill period was not required. I have come to the view that such circumstances did exist. I outline these briefly. Firstly, the derogation for Part B is based, as the Commission has said, on the assumption

that these will not be of certain cross-border interest. However the first defendant here knew as a fact of the cross-border interest arising from not only the plaintiff but two of the other short-listed parties. Secondly the contract was a very large one. Its value, on the second-defendant's own estimate, was approximately 300 times the exemption on financial grounds provided for in the Directive. The first defendant does not rely on that exemption but it must alert him to a limit above which other public contracts must be subject to a stand still period. Thirdly, the Chief Constable was already aware that there were elements in the procedure which he was concluding which were controversial. As indicated above the decision of this court in McLaughlin & Harvey No 2 had alerted those advising him, if they required such prompting, in September 2008, that it was unlawful to introduce a new criterion or sub-criterion after the tenders had been submitted. Yet there is strong prima facia evidence that such a criterion was taken into account by the panel. Fourthly, the Chief Constable had had to ask the plaintiff to extend their operation of the contract for 3 months from the 1 December because of uncertainties in this very procedure. Those may have arisen from the question mark over the second defendant's security licence, which as I have pointed out appears to be awarded neither to the second defendant under its right name nor to the party to whom the Chief Constable awarded the contract by his letter of 22 December. It may be that this arose because of the query raised by Mr Dennis Licence, a member of the panel, a former banker, about whether the appropriate accounts had been submitted by Resource as part of the tender procedure. What ever the reason it indisputably alerts any contracting authority to the possibility that there will be legal proceedings thereafter arising. Fifthly, the Chief Constable, or those advising him, knew already that Federal were indignant at the way in which the clarification interview had been conducted. It matters not whether they thought that the indignation was justified. For these purposes it certainly alerted the procurement unit, who were apparently represented at the interview, and the panel, to a real possibility of Federal challenging in the future an award to their competitor. In fairness to the first defendant he would not have known in December 2008 that the decision of the Northern Ireland Court Service in not wholly dissimilar circumstances to abort their procedure would be upheld by the High Court. But even if it was not thought right to abort the procedure, about which I say nothing, why not ensure transparency and equal treatment by introducing a standstill period which would allow the validity and lawfulness of the award of the contract to be tested in the High Court? Federal had agreed to a three month extension of the contract until 1 March. That would have allowed sufficient time between 22 December and that date for any application by them to the High Court for an injunction to be adjudicated upon, as has in fact proven to be the case. If the Chief Constable had chosen to take advice at that time he would have been informed that several such applications had been heard timeously in the previous 18 months. Sixthly, it seems relevant to point out that this contract was already in place and was being operated by one of the two tenderers

rated most highly by the panel. By having a stand still period here he was not delaying the coming into effect of an important new service. Seventhly, a number of the criticisms raised by the plaintiff on affidavit have not been addressed by the first defendant. In the circumstances of their concession of triable issues I do not hold that against them. It does rather preclude me from assessing the strength of some of these additional points but a number of them read persuasively. One at least I think is relevant to the decision the Chief Constable had to make and that is that whatever about the other subjective evaluations here the plaintiffs offer was at a lower cost than that of the successful second defendant. In the past that would simply have determined the matter at the time of opening of tenders. It is the contemporary view that a wider consideration of these matters should be assessed, on a more subjective basis, which renders all the more important the transparency and fairness of the award procedure. Eighthly, we know from the correspondence that a voluntary standstill period was considered by some person or persons advising the Chief Constable. No reason has been advanced as to why that good advice was not accepted, save that he was standing upon the wording of the regulations.

[36] It is interesting to note that the contracting authority here, voluntarily but wisely, did choose to advertise this proposed contract sufficiently to retract attention, although that obligation was not to be found in the new Directive or the regulations. Counsel submits that by analogy with that decision they ought also have had a standstill agreement. Why fasten on the strict wording of the regulations to avoid a standstill period when this was not done with regard to advertising? On one view it is not strictly necessary for me to form a separate view about that aspect of the decision of the contracting authority but I consider that it is of assistance to do so. I conclude that a contracting authority faced with some but not all of these factors, would be obliged under the principles of community law to apply a standstill period.

[37] In Factortame, the House of Lords initially held that as a matter of English law the courts had no jurisdiction to grant interim relief in terms that would involve either overturning an English statute in advance of any decision by the European Court of Justice that the statute infringed community law or granting an injunction against the Crown, in that case with regard to the licensing of fishing vessels. On a reference from the House to the European Court of Justice on the question whether European law either obliged its national court to grant interim protection of the rights claimed or gave the court power to grant such interim injunction the Court held, at [1991] 1 AC 603, at 644, that community law must be interpreted as meaning that a national court which, in a case before it concerning community law, considers that the sole obstacle which precludes it from granting interim relief is a rule of national law must set aside that rule. In Factortame No 2 the House of Lords then concluded that in considering whether interim relief should be

granted the court had to consider first, the availability to either plaintiff or defendant of an adequate remedy in damages and secondly if no such adequate remedy existed the balance of convenience, taking all the circumstances of the case into consideration; that where a public authority seeking to enforce the law was involved, an adequate remedy in damages would not normally be available to either party, and in considering the balance of convenience the court had to take into account the interests of the public in general to whom the authority owed duties; that there was no rule that the party challenging the validity of the law sought to be enforced had to show a strong prime facie case that it was invalid, and the matter was one for the discretion of the court; but that the court should nevertheless not restrain the public authority from enforcing the law unless it was satisfied that the challenge to its validity was sufficiently firmly based to justify that exceptional course being taken. (Pages 604, 605). As to that it can be seen that so far as the need for a standstill period here is concerned I am satisfied that the challenge is sufficiently firmly based to justify that exceptional course being taken. I will return to that point in a moment.

[38] In the light of those conclusions it then falls to me to decide whether I should grant to the plaintiff the injunction which it seeks with regard to this contract. This court must exercise a discretion in that regard. In exercising that discretion I am governed but also greatly assisted by the decisions of the House of Lords in American Cyanamid Company v. Ethicon Limited [1975] AC 296 and R v. Secretary of State for Transport, ex parte Factortame Limited and Others (No 2) [1991] 1 AC 603. I have recently addressed the former authority in McLaughlin and Harvey Limited v. Department of Finance and Personnel [2008] NIQB 25, paragraphs [5] and [6].

[39] Reading these two authorities together I approach the matter under the six headings identified in Lord Diplock's judgment, adapted for the purposes of this case in the light of Factortame to eight headings:

(1) Has the plaintiff shown there is at least a serious issued to be tried?

The plaintiff has shown this and indeed it has been so conceded by the first defendant. I am satisfied that the challenge is sufficiently firmly based to justify the exceptional course of disapplying Regulation 47(9), if necessary.

(2) If an injunction were refused would damages be an adequate remedy for the plaintiff?

It seems to me they would not be. The plaintiff has through its director averred that some 70% of its business in Northern Ireland, which is the business of the actual plaintiff rather than its parent company, is concerned with this contract. If an injunction is not granted it would be

transferring over 500 employees to the first defendant on Saturday on foot of transfer of undertaking regulations. These employees will not only be drivers and security staff, important as they are, but a significant part of the management of the company as well. While the first defendant is clearly a mark for damages and while no doubt such an award would be a pleasant windfall it does not seem to me that the plaintiff could, in all likelihood, restore itself to its existing position merely by an award of damages, if it succeeded.

(3) Will the defendant be compensated in damages by the plaintiff's undertaking if the plaintiff ultimately loses?

The plaintiff company has undertaken through its counsel or offered to undertake to compensate in damages both defendants if it ultimately fails in the action. A doubt was cast on this undertaking, chiefly because of the sharp and pronounced fall in the share price of the parent company of the plaintiff in recent times. The court is mindful of the fact that this is true of a number of very long established and famous concerns at the present time. Of greater note however is the simple factual position here. If I grant this injunction the plaintiff will go on employing these people for the period of time until the trial of the action and the judgment of the court. On past history this is likely to be about 6 months. It does not seem to be doubted that the plaintiff enjoys a profit from this contract. I cannot see why they would not be in a position to pay that profit to the second defendant, if the court ultimately were to decide against the plaintiff. As raised with counsel I will consider whether any additional safeguards are required in relation to the plaintiff's undertaking but this need not prevent the grant of an injunction at this stage. I take into account but I am not persuaded by the affidavit evidence of Mr Joe Stewart that some major disruption will occur in the discharge of the first defendant's duties as a result of such an injunction. The plaintiff is the company that has been performing these functions for several years and no doubt it can go on doing so for at least another 6 months. I acknowledge the possibility that appeals by either side or references might prolong that estimate of time, but am not dissuaded by that.

(4) I remind myself that American Cyanamid was a commercial case. I take into account the observations of Lord Goff of Chieveley and Lord Bridge of Harwich with regard to the public nature of Factortame. In a commercial action the profit of one party may well be the measure of the loss of the other party. A different position applies here. If the plaintiff is right, and in my view they have established a clear prima facie case, the damages it will recover will be its loss of profits on the contract for 3 to 5 years measured against the likelihood of it having secured that contract if the procedure had been correctly followed, its loss of a chance

in effect. But those damages will not be paid by the second defendant. They will be borne by the public. If the plaintiff succeeds the public will have to pay the profits of the second defendant and the loss of profit of the plaintiff. That cannot be in the public interest. It is literally a waste of money. The damages will not, to state the obvious, be borne by the Chief Constable or his deputy, who ever made the decision. It will be borne by the public in extra taxation or extra borrowing or by the reduction in some other service which the public would otherwise enjoy. It seems to me therefore that the issue of damages and undertakings should weigh less in the context of public procurement than perhaps in truly commercial cases. However in any event I am satisfied here as to the proper view to be taken on the issue of damages.

(5) If there is doubt about the issue of damages the court will then address the balance of convenience between the parties. I follow the views of Lord Diplock set out below:

> "If the defendant is enjoined temporarily from doing something that he has not done before, the only effect of the interlocutory injunction in the event of his succeeding at the trial is to postpone the date at which he is able to embark upon a course of action which he has not previously found it necessary to undertake; whereas to interrupt him in the conduct of an established enterprise would cause much greater inconvenience to him since he would have to start again to establish it in the event of his succeeding at the trial."

In this case it seems to me that the balance of convenience is not something that I have to decide because I do not have doubt about the issue of damages but in case a contrary view is taken elsewhere I consider that it clearly favours the plaintiff also.

(6) Where other factors are evenly balanced it is prudent to preserve the status quo.

The plaintiff enjoys the factual status quo. The second defendant may be said to enjoy the legal status quo as the contract has been awarded to it, but subject to the admission that there is a serious issue to be tried as to the lawfulness of that award.

(7) If the relative strength of one parties case is significantly greater than the other that may legitimately be taken into account.

The decision of the first defendant to accept there was a triable issue had the consequences of shortening the time of hearing before this court, helpfully, but also of largely excluding a discussion of the strength of the plaintiff's case. I do not wish to prejudge that in the absence of detailed affidavit or other evidence from the defendants but I have to say that at the present time this seems to be one of the stronger public procurement cases which I have encountered.

(8) There may be special factors in individual cases.

It is not necessary for the determination of the exercise of my discretion to look at special factors in this case, although it might be thought that my remarks above with regard to the failure to hold a standstill period might constitute such a special factor. However, this is not necessary to the exercise of the discretion. The factor identified at (4) above may constitute a special factor in favour of the plaintiff. Furthermore the public interest in the best economic operator being selected, after a review by the court, may also constitute a special factor favouring the plaintiff. I think it proper to add this, as a more general point. If Mr Simpson is right in his submissions an important " safeguard against corruption and favouritism", per European Commission at [16] above, will be removed for a significant class of large and long lasting contracts.

[40] I therefore conclude that it is just and convenient to grant an injunction to the plaintiff in the terms sought for the reasons set out in the entirety of this judgment. I do so on the basis that Regulation 47(9) of the Public Contract Regulations should be read as referring to a contract complying with the principles of European Community law including transparency, effectiveness of remedies and equality of treatment. There is inequality of treatment because if the contract is allowed to stand without being considered by the court the second defendant is in a protected position and the first defendant is excluded from any possibility of now winning the contract even if the procedure adopted was unlawful. In my view the contract was awarded in breach of a Community obligation pursuant to Regulation 47(1).

[41] In the alternative, and in compliance with the decision of the House of Lords in Fleming v. Revenue and Customs Commissioners [2008] 1 All ER 1061, if that interpretation is not open to me, I disapply Regulation 47(9) for the reasons set out above. I will hear counsel on the precise wording of the injunction in due course.