Neutral Citation No: [2020] NIQB 61 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **HOR11303** *ICOS No:* **2020/31722** *Delivered:* **09/10/2020**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION
(COMMERCIAL HUB)

_____

Between:

LAGAN CONSTRUCTION LIMITED t/a CHARLES BRAND

Plaintiff

and

NORTHERN IRELAND WATER LIMITED

Defendant

_____

Michael Humphreys QC (instructed by O'Reilly Stewart, Solicitors) for the Plaintiff
David Dunlop QC with Alistair Fletcher BL (instructed by Tughans, Solicitors) for the Defendant

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HORNER J

A. INTRODUCTION

[1] Lagan Construction Limited t/a Charles Brand ("Lagan") has issued a writ of summons against Northern Ireland Water Limited ("the defendant"). It related to the award of contracts under the Framework Agreement known as IF105. This comprises three separate Lots, that is, Lot 1, Lot 2 and Lot 3. Lagan's claim relates only to Lots 2 and 3 under IF105. However, it is important to appreciate that the Invitation to Tender at Section 3.1.5 emphasises that a tenderer can only be appointed to one Lot. Lot 2 deals with non-infrastructure work, that is work carried out above ground. Lot 3 deals with non-infrastructure work and infrastructure work, that is work carried out below ground. Infrastructure works tie in with and complement non-infrastructure works which I will explain later.

[2] The writ of summons issued by Lagan in respect of both Lots triggered an automatic suspension of the award of contracts under the competition by operation

of Regulation 110 of the Utility Contract Regulations 2016 ("the Regulations"). The consequence was that the defendant was unable to enter into contracts with those tenderers which had been successful in the tender competition for both Lots. The defendant seeks to bring to an end the restraint imposed upon it under Regulation 110(1). The application is brought pursuant to Regulation 111(1)(a) and accordingly the court in dealing with such an application has to decide whether, but for Regulation 110(1), it would be appropriate to make an interim order which required the defendant to desist from entering into contracts in respect of Lots 2 and/or 3.

[3] Lot 1 was also the subject of a challenge by an unsuccessful tenderer. However, that challenge was abandoned and the defendant has been able to award contracts to the successful tenderers in respect of Lot 1 although it is claimed by the defendant that the options for work under Lot 1 have been restricted by the automatic suspension imposed in respect of Lots 2 and 3. This judgment concentrates on the application by the defendant to remove the Order which prevents it from entering into contracts with the successful tenderers in respect of Lot 3. Lagan has made it clear that its express preference is for Lot 3 and this has been the primary focus of its submissions, both written and oral. TES Group Limited ("TES") has issued proceedings against the defendant solely in respect of Lot 2. I am giving a separate but complementary judgment in that case immediately after this which will necessarily concentrate on the award of tenders under Lot 2. So while the judgments are separate I have endeavoured, save where it is absolutely necessary, not to go over the same ground twice.

[4] There has been trenchant criticism by both sides of the other side's evidence and complaints have been made that the deponents have been guilty of exaggeration and hyperbole. There has been no oral evidence in these interlocutory proceedings. Both sides relied on the affidavits that they have filed. Mr Mitchell, the Head of Asset Delivery Performance and Business Unit within the defendant, provided sworn evidence. He has been accused by Mr McKenzie, a Director of Lagan, of constructing "a work of fiction" and, also, by Lagan's team of consciously "engaging in a mixture of hyperbole and hysteria." Deponents must appreciate that there will be a day of reckoning. If it turns out that they have tried to mislead the court with exaggerated or untruthful evidence they will have to answer to this court. By the same token ill-considered and unfair criticism is often self-defeating. As a general rule I have found that an understated but considered complaint of wrongdoing carries much more weight than a wildly overblown accusation of iniquity. Less is so often more.

[5] Leaving aside the criticisms made by each side of the other side's affidavit evidence, the quality of the oral and written submissions on behalf of Lagan and the defendant has been very high indeed. It is only right that I should pay tribute to all those involved on the respective legal teams, (including that of the TES). All the relevant material has been opened to me so as to permit me to reach a fair and just decision at this interlocutory stage in accordance with the overriding objective under Order 1 Rule 1(1)(a). I am acutely conscious not to rehearse all the arguments

advanced before me because to do so would make this judgment unnecessarily long but I can assure the parties I have taken them all into account in reaching my decision.

B. BACKGROUND INFORMATION

[6] The defendant is the statutory undertaker for water and sewerage services in Northern Ireland and has been since 1 April 2007 following the granting of a licence made pursuant to the Water and Sewerage Services (NI) Order 2006 ("the 2006 Order"). The defendant succeeded the Water Service. The 2006 Order introduced a system for the provision of water and sewerage services in Northern Ireland ("Water Services") which involved the defendant assuming the responsibilities of the Water Service but being overseen by, and being held accountable to, the Northern Ireland Authority for Utility Regulation ("the Utility Regulator"). It had been intended that consumers would pay for the Water Services and that this would allow the defendant to be self-funded. However, this has never happened. Non-domestic consumers do pay for Water Services in Northern Ireland but domestic consumers do not. They are subsidised by the Department for Infrastructure ("DfI").

[7] There are 16,000 kilometres of sewers in the network in Northern Ireland, 1,030 waste water treatment works and 1,300 pumping stations, all of which are operated and maintained by the defendant. The infrastructure work carried out by the defendant involves work below ground such as laying water or sewerage mains for new households or housing developments. But the work is intimately connected to the non-infrastructure work carried out by the defendant, which involves work to above ground assets such as water treatment plants and waste water treatment plants. In other words there is not much use in providing the infrastructure for water and sewerage if non-infrastructure work is ignored. An example given to the court was where a waste water works was expanded to allow a new housing development to be connected to sewerage network. The construction of plant for the new waste water works only made sense if the infrastructure required to ensure the sewerage pipework was in place and/or had sufficient capacity to cope with the demands of the new housing development. The relationship between infrastructure and non-infrastructure works has quite properly been described as symbiotic.

[8] Sadly, it is common case that Northern Ireland's Water Services are in a dire state requiring massive investment. There is a lack of capacity in many areas which inhibits commercial and residential development and limits the retail, agriculture, manufacturing, tourism and leisure sectors. Whether this is a consequence of lack of funds or bad management, or a combination of both, I am not equipped to reach a judgment. But it is common case that the Water Services are in a sorry state. The problems associated with lack of investment are likely to become worse unless and until capacity constraints in the provision of Water Services are resolved. For example there are 27 priority hub towns earmarked for economic development and growth in Northern Ireland. On the analysis of the defendant, 25 of these towns will have their future economic development potential limited because of inadequate

sewerage capacity. The Business Plan prepared by the defendant labels these towns as "Economically Constrained Areas". The consequence is that economic development will be stunted right across Northern Ireland.

[9] In many areas in Northern Ireland there has been an expansion of the population to such an extent that the infrastructure struggles to support it. There are significant pressure points in the water and sewerage network and the condition of a number of assets is poor. Without works to upgrade the network in those areas, the network is placed at risk with the consequence of potential sewer or in-house flooding in certain areas. In his sworn evidence Mr Mitchell said:

> "Lack of capacity is therefore limiting many areas of residential and commercial development including in the retail, agricultural, manufacturing, leisure and tourism sectors and the problem will become more pronounced unless and until the capacity constraints are resolved."

This statement has not been challenged by Lagan.

[10] In addition to the Economically Constrained Areas, there are 91 other towns with sewerage infrastructure that has reached the limit of its capacity. These towns are known as "Serious Development Restrictions". The defendant's aim is to improve the sewerage services at 12 Economically Constrained Areas and 37 Serious Development Restrictions during the course of the next 6 years commencing in April 2021.

[11] The problem with the provision of Water Services is one that is common to all six counties – from Belfast to Ballyclare, Coleraine to Cookstown, Limavady to Larne. There is not a major town in Northern Ireland that is not affected by the capacity constraints of the water and/or sewerage infrastructure. Indeed, a number of households are at risk of internal flooding, which is the result of hydraulic incapacity in the sewerage systems.

[12] Further, there are drainage problems. During heavy rainfall the waste water treatment works at Belfast (Duncrue Street) and Kinnegar cannot cope with the volumes flowing into the works. Rather than have extra pressure resulting from sewage backing up into homes and businesses, raw sewage is permitted to flow into Belfast Lough with serious consequences for the Lough's water quality, a matter I will return to later on in this judgment.

[13] In the background there are potential disasters waiting to happen. To take but one example of a number of imminent possible catastrophes provided to the Court, the Strathfoyle sewerage syphons under Lough Foyle are beyond their design life and in a very poor condition. They leak and there is a risk of a catastrophic failure. Should that occur millions of litres of raw sewage will spill into the Lough Foyle estuary. This will have untold environmental consequences for marine life.

The shellfish industry in the event of such an escape will be eviscerated. The court's attention was also drawn to other major projects which require urgent execution if significant future problems are to be avoided and to improve the provision of Water Services in Northern Ireland.

[14] The overall picture painted to the court is one of a chronically underfunded industry struggling to cope with present day demands and urgently in need of a major capital injection to arrest years of decline.

[15] Funding is determined by the price controls imposed by the Utility Regulator, whose responsibility it is to protect the interests of the Water Services' consumers in Northern Ireland. The Utility Regulator sets prices for these Services with the goal of ensuring that the water quality is of the requisite standard and meets environmental and customer service objectives at the lowest reasonable overall cost. The price controls put in place set out what funds the defendant requires and the prices it is permitted to charge. Accordingly, charges which would otherwise be paid by domestic consumers are paid by way of government subsidy.

[16] The defendant has to submit a detailed business plan which sets out what revenue is required to allow the defendant to deliver services according to standards which are informed by legal requirements and guidance on social and environmental standards provided by the Minister for Regional Development (now the Minister for Infrastructure). The current Price Control 15 ("PC15") commenced in April 2015 and finishes in March 2021. Under PC15 the Utility Regulator determined funding requirements and highlighted key outputs that the defendant was required to deliver during the course of PC15.

[17] While the Utility Regulator determines the revenue needs of the defendant, it does not follow that those needs, so determined, will be satisfied by the funding given by the DfI together with the revenue generated from the non-domestic consumers such as industry and agriculture. For PC15 the defendant received £900m for capital expenditure. This was only just more than 50% of the capital that it required, namely £1.7bn. Further, while PC15 is to last for 6 years, the DfI provides funding on an annual basis and reviews that budget quarterly. It also operates a "use it or lose it" policy so if the budget allocated to the defendant for any particular year is not used, then the defendant has to return the unused portion to the DfI. The sum retained is not then provided for future use by the defendant, but in fact is almost certainly lost for good. The defendant emphasised that it was important for the court to understand that any further stay in the award of contracts also had the potential to deprive the defendant of much needed capital. Price Control 21 (PC21) commences in April 2021 and will run to March 2027. The defendant has submitted its business plan to the Utility Regulator and a final determination is expected from the Utility Regulator in December 2020. The business plan from the defendant indicates that it requires an investment of approximately £2.5bn in respect of capital expenditure for PC21 over its 6 year duration to address the deficiencies in the present system for the provision of Water

Services in Northern Ireland and that it simply cannot afford to be deprived of any capital investment for whatever reason.

[18] Contracts have been and are awarded under various Framework Agreements designed to promote efficiency and effectiveness. IF105 is intended to and will replace a number of existing Framework Agreements with the intention that "it will permit a new route to the delivery of works that need to be undertaken otherwise it would have to be subject to the less efficient method of open competition" according to Mr Mitchell. I have already briefly touched upon the distinction between infrastructure works and non-infrastructure works which is broadly speaking that infrastructure work generally involves work to the underground assets such as pipes, drains and sewers and also to reservoirs. Non-infrastructure work is concerned with work to above ground assets such as water treatment plants and waste water treatment plants. The two are however closely related. For example, a waste water treatment plant not connected to the pipes, drains and sewers is wholly useless. So infrastructure and non-infrastructure work are different but closely connected and depend on each other. At present the infrastructure across the whole of Northern Ireland is at breaking point as I have described. But non-infrastructure work cannot proceed sensibly until the new infrastructure has been delivered and fully integrated into the network to service the enhanced demand.

[19] IF019 expired on 18 December 2019 with the exception of a specific extension to allow certain small sewer works to proceed. Lots 2, 3 and 4 are to be replaced by IF105, the present framework agreement under consideration. These works comprise:

(a) Lot 2 – non-infrastructure minor works up to £500,000;

(b) Lot 3 – non-infrastructure major works greater than £500,000;

(c) Lot 4 – minor works up to £500,000

The effect of this is that with the sole exception of the small sewer works referred to above there is no current contractual arrangement available to allow the defendant "to award contracts to undertake major infrastructure projects which are critical to the water and sewerage network in Northern Ireland".

[20] IF100 which relates to non-infrastructure work expired on 23 August 2020. It can be extended by the defendant but it does not want to do so because:

(a) An extension will mean that the opportunity to make savings under IF105 is lost;

(b) Non-infrastructure works are intimately connected with the infrastructure works as described above;

(c) An extension of 1 year or more would not be efficient in the context where the defendant wants to reap the efficiency rewards of planned work over an 8 year period.

[21] IF103 is a modest specialised Framework Agreement concerned with the rehabilitation of service reservoirs and trunk mains. It is worth £2M-£5M per annum and expires in 2022. It cannot assist with the works envisaged under IF105. IF102 is another infrastructure Framework Agreement which expires in September 2020. It can be extended for two 1 year periods. It will be replaced by Lot 1 of IF105. It can be used as a vehicle to award some urgent projects under Lot 1 but cannot help to unlock blockages caused by the inability to award large infrastructure and non-infrastructure works. The defendant had hoped to incorporate the works under this contract into Lot 1 of IF105 to effect efficiency savings.

[22] IF101 is another specialist and relatively modest Framework Agreement to deliver 14km of distribution water mains and associated ancillary mechanical and electrical work under the PC15 business plan already described. It neither covers the construction of new mains networks nor removes the need of being able to implement the works needed under IF105.

[23] IF102 is another infrastructure Framework Agreement due to expire in September 2020 although it can be extended for two separate 1 year periods. It will then be replaced by Lot 1 of IF105.

[24] IF105 comprises 3 specific Lots. They are:

(i) Lot 1 involves "infrastructure works associated with water treatment and distribution, sewage collection and treatment assets" up to a value of £1M. This was originally challenged but that challenge, as I have noted, has been withdrawn.

(ii) Lot 2 deals "with non-infrastructure works associated with water treatment and distribution, sewage collection and treatment assets to be carried out under individual time charge and work orders, each up to a maximum value of approximately £1M". This encompasses minor works such as servicing water treatment works and reservoirs, fitting monitoring equipment and constructing/improving flow chambers. While works under Lot 2 in IF105 do not involve new infrastructure they do involve an important upgrade to existing equipment and therefore are very important to the maintenance of the water treatment and sewerage infrastructure across Northern Ireland. This work was previously carried out under IF109 up until December 2019. It can only be carried out under IF105 unless it is packaged up into various work orders, then these are accumulated together and then awarded under the envelope of the much larger proposal.

(iii) Lot 3 deals with "infrastructure and non-infrastructure works associated with water treatment and distribution, sewage collection and treatment assets to be carried out under individual time charge and work orders, each up to a maximum value of approximately £10M". This encompasses similar works to Lots 1 and 2 but on a much grander scale.

[25] There was much discussion before me about whether Lot 3 could be carried out under other Framework Agreements. It seems to me there is strong evidence that the defendant would be unable to use other Framework Agreements and, in particular, IF019 to award Lot 2 and Lot 3 contracts without breaking its obligations as a Utility and in doing so would exceed the Departmental levels of funding available on Lot 2 and 3 of IF019. It is also asserted that any extension of IF019 in respect of Lots 2 or 3 would involve an infringement of Regulation 88 of the Regulations. It is not possible for me to reach a concluded view on this without having further argument. But there is certainly a serious question to be tried on the papers.

[26] It was suggested by Mr McKenzie of Lagan that IF100 could be the way to deliver urgent works intended to be undertaken through IF105. But IF100 relates to major non-infrastructure works. It is not possible for this Framework Agreement to encompass contracts involving infrastructure works. The only way to undertake urgent infrastructure work is through individual competitions. This would result in further delay of at least a year and in addition would be less efficient. It is not in the public interest to countenance further delay when it can be eliminated.

[27] I am unable to come to a final conclusion as to whether there are other contractual routes available to the defendant to deliver the improvements to the Water Services which are so clearly needed. However, there is prima facie evidence that the defendant will have major difficulties if it seeks to have all the urgent work which it has identified carried out without IF105 being in place. In any event, at the very least it is not disputed that it will be more efficient to have such work carried out under IF105, although the precise nature of how much will be saved by increased efficiency is also disputed.

C. THE APPLICATION

[28] I have deliberately set out at some length the background to this dispute about whether the automatic stay imposed by the Regulations should be set aside. I do appreciate there is much more I could have said but I have tried to highlight the key areas. I have read all the affidavits filed by the parties, I have considered the very full and detailed written submissions of both parties and listened carefully to the arguments advanced orally by counsel on behalf of all the parties with skill. I have taken all those relevant matters into consideration and tried to reach a conclusion at this interlocutory stage which enables the court "to hold the balance as justly as possible in [a situation] where the substantial issues between the parties can only be resolved by a trial": see *Cambridge Nutrition Ltd v BBC* [1990] 3 All ER 523 at

[534] per Kerr LJ. I am also reminded that in considering whether to continue the automatic suspension the burden of proof is upon Lagan who supports its continuance: see Stuart-Smith J in *Open View Security Solutions Ltd v The London Borough of Merton Council* [2015] EWHC 2694 (TCC) at [39].

D. RELEVANT STATUTORY PROVISIONS, LEGAL PRINCIPLES AND CONSIDERATIONS

[29] Regulation 110 of the 2016 Regulations provides:

> "(1) Where –
>
> (a) a claim form has been issued in respect of a utility's decision to award the contract;
>
> (b) the utility has become aware that the claim form has been issued and that it relates to that decision; and
>
> (c) the contract has not been entered into, the utility is required to refrain from entering into the contract.
>
> (2) The requirement continues until any of the following occurs –
>
> (a) the court brings the requirement to an end by interim order under Regulation 111(1)(a);
>
> (b) proceedings at first instance are determined, discontinued or otherwise disposed of and no order has been made continuing the requirement (for example in connection with an appeal or the possibility of an appeal) …"

[30] In this case the court has been asked to bring the "requirement" to an end under Regulation 111(1)(a). This provides:

> "111(1) In proceedings, the Court may, where relevant, make an interim order –
>
> (a) bringing to an end the requirement imposed by Regulation 110(1);
>
> (b) restoring or modifying that requirement;
>
> (c) suspending the procedure leading to –

(i) the award of the contract; or

(ii) the determination of the design contest …

(2) When deciding whether to make an order under paragraph (1)(a) –

(a) the Court must consider whether, if Regulation 110(1) were not applicable, it would be appropriate to make an interim order requiring the utility to refrain from entering into the contract; and

(b) only if the Court considers 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 110(1).

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

[31] So in this case the writ has been issued and there is a requirement on the part of the defendant to refrain from entering into any contract in respect of the procurement competition. The defendant has asked the court to make an interim order under Regulation 111 to bring to an end the requirement imposed by Regulation 110.

Abnormally Low Tenders

[32] Regulation 84 of the 2016 Regulations deals with abnormally low tenders. Regulation 84(1) states:

"Utilities shall require economic operators to explain the price or costs proposed in the tender where tenders appear to be abnormally low in relation to the works, supplies or services.

> (4) The utility may only reject the tender where the evidence supplied does not satisfactorily account for the low level of price or cost proposed …"

[33] In *SRCL Ltd v National Health Service Commissioning Board (also known as NHS England)* [2018] EWHC 1985 (TCC) Fraser J looked in some detail at the issue of abnormally low tenders. He determined at paragraph [193]:

> "[193] I consider that there is no basis for imposing a general duty to investigate such tenders in all cases. If, in any particular competition, the contracting authority considers that a particular tender has the appearance of being abnormally low, ***and*** **the contracting authority considers that the tender should be rejected for that reason**, there is a duty upon the contracting authority to require the tenderer to explain its prices. Absent a satisfactory explanation, it is obliged to reject that tender as expressly stated in Article 69, namely non-compliance with certain legislation in the specified fields of environmental and social legislation. Otherwise, it is entitled to reject it if the evidence does not satisfactorily account for the low level of price, but is not required to do so." [Emphasis added]

[34] Under the Regulations there is only a duty to investigate if the contracting authority considers a particular tender is abnormally low **and** that contracting authority considers that the tender should be rejected for that reason. Further under the Regulations, there is no duty to reject a tender if no satisfactory explanation is given for the low level of price, but there is a power to do so.

The Proper Approach to Set Aside Applications

[35] In *DHL Supply Chain Ltd v Secretary of State for Health and Social Care* [2018] EWHC 2213 [TCC] O'Farrell J said at [36] that the proper approach the court should take to applications under Regulation 111 is as follows:

> "The Court must consider the following issues:
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> (i) Is there is a serious issue to be tried?
>
> (ii) If so, would damages be an adequate remedy for DHL [the plaintiff] if the suspension were lifted and if it succeeded at trial?

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

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

[36] Both parties agreed that this clearly sets out the approach which the court should follow to ensure that it takes the "course which seems likely to cause the least irremediable prejudice to one party or the other": see Lord Hoffmann in *National Commercial Bank Jamaica Ltd v Olint Corp Ltd* [2009] UKPC 16.

Affidavit Evidence

[37] Order 41 Rule 5 states:

> "An affidavit may contain statements of information or belief with the sources and grounds thereof."

[38] *Supreme Court Practice* Volume 1, at 41/5/4 states:

> "Further, a party against whom an affidavit of information or belief which omits the relevant grounds is made is entitled to take the objection and if the objection is one of substance, the Court is bound to pay regard to it and the Court of Appeal has commented strongly on the irregularity of an affidavit founded upon the information and belief merely, without giving the source of such information and belief: see *Lumley v Osborne* [1901] 1 KB 532".

[39] In *Third Chandris Shipping Corp v Unimarine* [1979] 2 All ER 972 Lawton LJ said at 987(d) that judges "should remember that affidavits asserting belief in, or the fear of, likely default are of no probative value unless the sources and grounds thereof are set out …"

[40] In the present case, as I have observed, affidavit evidence was given on behalf of Lagan by Mr Neil McKenzie, Civil Engineer, who is a Director of Lagan. He purported to include in his affidavit specific information which he claimed contradicted averments made by Mr Mitchell in his affidavit(s) on behalf of the defendant but for reasons "of confidentiality and commercial sensitivity", he did not wish to reveal the identity of his sources. While he claimed that he had done his best to cross-check and verify such information as being accurate, little weight can be

attached to such averments in circumstances where he has failed to reveal the identities of the witnesses upon whom he relies. Those witnesses may be truthful ones. However equally they may also be spiteful and malicious ones. The court is unable to form a view. Thus, the court is not in a position to give weight to such unattributed sources.

Expert Evidence

[41] Lagan also sought to rely on a letter sent by Ms Niblock, a Chartered Accountant, from ASM, Chartered Accountants to Mr Turner of Lagan's solicitors. Ms Niblock appears regularly in the Commercial Hub and has established a reputation for reliability and independence. However, Ms Niblock's report does not comply with the Practice Direction on Expert Evidence. There is no Expert's Declaration as is required. Furthermore, the report is expressly stated to be addressed to her instructing solicitor and it also requires her prior consent before it can be released beyond "those parties that have an interest through their involvement in this action." The letter asserts that no duty of care is owed to any party other than to Mr Turner to whom the letter was addressed. The letter expressly states no responsibility is accepted for any reliance placed upon the letter should it be "used for any purpose other than that stated above." But it goes on to say "whilst we have been instructed by O'Reilly Stewart, Solicitors, we recognise our primary duty is to assist the court."

[42] Ms Niblock, and those instructing her, will have been aware that her report on behalf of Lagan did not comply with the Practice Direction on Expert Evidence when it was submitted in these proceedings. Ms Niblock purported to give her expert opinion on various issues about, for example, the sustainability of the Lagan "Waterworks Division" in the event that the tender for Lot 3 was unsuccessful, but did so in a manner which did not comply with the Commercial Hub's Practice Direction. Those instructing her must have known that as this was an interlocutory matter it would almost certainly be impossible for the defendant to challenge her evidence on cross-examination. However, while Ms Niblock did not give evidence, her report was the subject of some excoriating criticism from Mr Dunlop QC on behalf of the defendant. These criticisms, for which there appeared to be a reasonable foundation, and which were not adequately addressed in reply, included:

(a) The failure by her to obtain and comment on the most up-to-date accounts of Lagan, which would show Lagan's present financial position.

(b) The failure to explain to the court why if the sales of the defendant were so important, the statutory accounts for the year up to 31 March 2019 revealed a turnover of £43m and sales to the defendant of only £4.6m.

[43] Needless to say, I am not in a position to reach any final conclusion about the Expert Evidence which has been adduced and Ms Niblock does qualify her opinion by stating "on the basis of financial information available to us." However, it is

important for both practitioners and experts to appreciate that if Expert Evidence is to be adduced before the Commercial Hub it must comply, save in exceptional circumstances, with the Practice Direction on Expert Evidence. This includes the requirement that all such expert evidence must be accompanied by an Expert's Declaration in accordance with Practice Direction No: 7/2014 (which will be amended imminently to give it more teeth). Failure to include a Declaration undermines the report, devalues the expert's opinion, and makes it unwise for the court to attach any weight to the views expressed in that report. (Unfortunately, these errors were mirrored by Mr McLaughlin, who is also a chartered accountant in ASM, in the related case brought by TES.) I cannot emphasise enough that if a party intends that the court should rely on the expert opinion of a suitably qualified witness, that Expert Evidence must comply with the Practice Direction if the court is to have any confidence in either its reliability or independence.

E. DISCUSSION

Is there a serious issue to be tried?

[44] The present application is an interlocutory one. The court should be careful not to turn it into a trial or a quasi-trial of the issues that will ultimately be determined after a full hearing. In *Alstom Transport UK Limited v London Underground Limited and Another* [2017] EWHC 1521 (TCC) Stuart-Smith J said at paragraph [15]:

> "It is as well to remind myself at the outset of the fact that the present application is an interim application that does not and cannot amount to a trial or quasi-trial of the issues that will ultimately be determined."

[45] In *Open View Security Solutions Limited v LB Merton Council* [2015] EWHC 2694 (TCC) Stuart-Smith J said at [26]:

> "The first prerequisite to the application of *American Cyanamid* principles is no more demanding than that there is a serious issue to be tried. In some cases, of which the present is one, the party resisting the interim injunction may consent to the application proceeding on the assumption that this pre-requisite is satisfied while maintaining that, if put to the test, the Court would conclude that it was not. It will only be in rare cases that the potential outcome of the ultimate hearing can be predicted with any confidence, and *American Cyanamid* itself is clear about the caution to be exercised when attempting to assess the relative strength of the parties' cases at this

> stage. First, it features in the House of Lords' statement of principle if there are uncompensatable disadvantages to *each* party and the extent of their disadvantages would not differ widely. Secondly, it is worth repeating that:
>
> **This, however, should be done only where it is apparent upon the facts disclosed by evidence as to which there is no credible dispute that the strength of one party's case is disproportionate to that of the other party. The court is not justified in embarking upon anything resembling a trial of the action upon conflicting affidavits in order to evaluate the strength of either party's case**."

[46] In *Sysmex (UK) Limited v Imperial College Healthcare NHS Trust* [2017] EWHC 1824 (TCC) Coulson J said in respect of the argument that one party had a strong case which should be taken into account at paragraph [19]:

> "I do not consider, on an application to lift the suspension in a typical procurement case, that this is an appropriate matter for the court to investigate. Such cases are a long way from a straightforward claim for an interlocutory injunction, where a particularly good point on the substantive dispute (an admission, say, or an unequivocal contractual term in one side's favour) might well be of assistance to the court's consideration of the application overall. It is not appropriate to have a mini-trial in a complex procurement dispute like this. Where, as here, it is accepted that there is a serious issue to be tried, then (save in exceptional circumstances) both sides should resist any further temptation to argue about the merits."

I endorse the views of both Stuart-Smith J and Coulson J. I agree that it will only be in exceptional circumstances where one party has a "simple knockout point" that a Judge in the Commercial Hub on an application for an interim injunction will attempt to conduct a mini-trial to try and reach a conclusion about what the ultimate outcome of proceedings will be after a fully argued case.

[47] In the instant case there has been a concession that there is a serious issue to be tried by the defendant and I consider it would be unwise for me to attempt to conduct what would in effect be a quasi-trial. I am far from persuaded that, for example, the argument put forward by Lagan, albeit with some circumspection, in respect of abnormally low tenders ("ALT") is a knockout blow. This attempt to

persuade the court that Lagan had an unbeatable argument in respect of ALTs was based on a breach of the procurement rules in the Procurement Guidance Note ("PGN") by the defendant when it failed to investigate a tender which appeared to be abnormally low. There are two obvious answers to this claim which require further argument and at the very least, should cause the court to pause before reaching any concluded view. Firstly, there is no duty under the Regulations to investigate unless the contracting authority is considering rejecting the tender: see the comment of Fraser J in *SRCL Limited v National Health Service Commissioning Board* which I have quoted above and also the comments of Professor Arrowsmith in Volume 1 of *The Law of Public and Utilities Procurement* (2nd Edition) at 7-257. Secondly, there is no doubt that the PGN requires the investigation of tenders which appear to abnormally low. But even if the PGN does give rise to an independent duty on the defendant in this competition to investigate ALTs, there is only a power invested in the defendant to exclude such an ALT from the competition. Lagan would have to prove that following such an investigation of the abnormally low tender, the defendant must then necessarily exercise that power to exclude that tender if it was found to be abnormally low. This court is not equipped to carry out any such exercise on the basis of the information currently before it. It is not the role of the court in an interlocutory process such as this. In respect of this point and the other points made by Lagan, the court is unable, by reading the evidence and considering the submissions, to form any clear view that there is no credible dispute that the strength of Lagan's case is "disproportionate to that of the defendant". In fact, there are obvious defences to Lagan's claims, but it is unnecessary for me at this stage to explore them given the sensible concession of the defendant.

Inadequacy of Damages to Either Side

Lagan and Damages

[48] At the outset it has to be acknowledged that there is a possibility that the defendant will end up paying compensation twice over should Lagan win its claim. Firstly the defendant will pay the contract sum due to the successful tenderers. On top of that if it loses it will have to pay damages to Lagan. But the threat of paying damages on top of the contract price is built into the Regulations and it is that threat that helps to keep the contracting authority honest as it should want to do everything reasonably possible to avoid paying public money out twice.

[49] In his affidavit Mr McKenzie for Lagan makes two important points. Firstly, he says that Lagan faces financial disaster if it fails to win Lots (2 and) 3. Secondly, he claims that Lagan would inevitably lose key staff and thus its ability to compete in similar competitions in the future will be compromised. It is not Lagan's case that any damage suffered by Lagan cannot be measured and/or paid by the defendant. Lagan's case was summarised by Mr McKenzie in his affidavit when he concluded that:

> "Losing this stream of work will result in an end to the business and the jobs its carries."

[50] The defendant challenges this conclusion of Mr McKenzie. It argues with considerable force that such a doomsday scenario has not begun to be made out on the evidence. Indeed, there is every reason to believe that Lagan will continue to operate successfully in the provision of Water Services.

[51] Firstly, Lagan is part of a much wider group. In *Eircom UK v Dept of Finance & Anor* [2018] NIQB 75 at [29] I made it clear that I would expect cogent and convincing evidence explaining why a member of a successful group of companies would be left to fail if it did not win a certain contract, especially when no company can expect to win every competition it enters. No such evidence has been placed before this court.

[52] Secondly, the expert evidence relied upon by Lagan on this issue was provided by Ms Niblock, the Forensic Accountant. As I have noted the absence of an expert's declaration and her apparent lack of access to up-to-date financial information relating to Lagan's performance has fatally undermined the reliability of the conclusions contained in her report.

[53] Thirdly, those problems with the expert opinion were compounded by the failure of Lagan to file up-to-date management accounts and the limited nature of the financial information put before the court by Lagan. If Lagan was truly serious about making a case of imminent financial collapse and loss of key workers, then the very least that the court could expect would be the most up-to-date financial information available to support such claims.

[54] Fourthly, the last set of statutory accounts filed indicated a turnover of approximately £43m with a contribution of £4.5m from the defendant, approximately 10% of Lagan's entire business. It has never been satisfactorily explained to the court why the loss of 10% of its business would have such a devastating effect on Lagan.

[55] On the evidence placed before me, I remain wholly unpersuaded that Lagan's Waterworks Division will face financial collapse if it fails to win Lot 3. There is the availability of work in this particular area both in the Republic of Ireland and in Great Britain. On all the evidence filed the only reason for the collapse of Lagan will be if the Lagan Group of Companies consider it to be in the Group's best interests. It will not be because of any failure to win Lot (2 or) 3 of the IF105.

[56] Further, I do not consider on the evidence that Lagan will lose its employees if it fails to win Lot (2 or) 3. First of all there is other potential work available which Lagan can tender for both in the Republic of Ireland and Great Britain. Secondly, as I have already noted, if Lagan is correct then it will win damages from the defendant and those damages will enable it to retain such employees as it wishes to retain. In

Braceurself v NHS England [2019] EWHC 3873 (TCC) Judge Bird was faced with a similar claim of potential financial collapse by an unsuccessful tenderer (which was not, as here, part of a successful group of companies). He said in setting out the defendant's argument at [33]:

> "… it borders on the implausible to suggest that the business would fail. It is far more likely that the business would evolve and seek out more private work. He points out that once damages were to be awarded, the injection of those damages would clearly help to avoid a collapse."

[57] But Bird J then goes on to accept it at [45]:

> "It seems to me also important to note that an award of damages would, once the damages are paid, and there can be no doubt about the ability to pay them, be designed to in effect prevent collapse. That is the whole aim and rationale of the award of damages – to put the claimant in the position it would have been in if the contract had been awarded. Bearing that point in mind, and bearing in mind the evidence that I have …, it does seem to me that taken in the round the evidence of potential collapse of the business is weak, and so weak that I can, to all intents and purposes ignore it. The evidence or potential of collapse between now and trial is in my judgment minimal, and there is no evidence that deals directly with that point of any weight."

I have reached a similar conclusion on the evidence put forward in the present case.

[58] As Edwards-Stuart J said in *Mitie Ltd v Secretary of State for Justice* [2020] EWHC 63 (TCC) at [104]:

> "In relation to the adequacy of damages as a remedy I have concluded that damages would be an adequate remedy for *Mitie*. But if I am wrong about this, I do not consider that the points raised by Mitie go very far towards tipping the balance of convenience in Mitie's favour. Its strongest point is probably that relating to the loss of employees if it is not awarded the new FM Contract, but even in relation to that the evidence is conflicting and I do not find it sufficiently compelling to give it much weight in the context of the balance of convenience. "

The evidence in the instant case is conflicting, it is unpersuasive and it is therefore difficult to afford it much weight in seeking to hold the balance justly between the parties at this interlocutory stage.

[59] I draw attention yet again to Professor Arrowsmith's observations at 22-139 in her book *The Law of Public Utilities Procurement* where she said:

> "… The courts are cautious about accepting such arguments namely that loss of the contract would result in catastrophic failure."

As I have observed in *Eircom,* to make such a claim clear, convincing and cogent evidence has to be adduced. Such evidence has been singularly lacking in the instance case. I reject the claim that damages would not be an adequate remedy for Lagan.

The Defendant and Damages

[60] Mr Dunlop has submitted that damages would not be an adequate remedy for his client for a number of different reasons. I consider that the loss of efficiency in providing Water Services if IF105 cannot be used by the defendant could be calculated in monetary terms with the assistance of a forensic accountant. However, I do consider that there is force in the claim he makes in respect of other heads of loss. To take one example, excessive rain will result in the discharge of raw sewage into Belfast Lough. This will lower the water quality. It will affect the environment. However, it would be almost impossible to measure in damages the loss caused by the deterioration in water quality. Of course, there may be some economic consequences from such a discharge but primarily it will affect the environment in ways it would be difficult to measure in money terms. So I do not consider that damages will be an adequate remedy if the order preventing the defendant from awarding contracts under Lot 3 remains in place.

[61] There is also the risk of a major catastrophe such as the failure of the Strathfoyle sewerage syphons during the period when the defendant will be precluded from awarding tenders to successful tenderers. There will also be the inability to commence housing developments in some areas and the real possibility of delay in building - for example, a school in Limavady - because of the inadequate state of the Water Services in that area. These are matters which have a potential significance for the public interest and are better weighed in the balance of convenience which I will consider next.

[62] In any event the case made by Lagan is that it will face financial disaster if it is excluded from the list of tenderers for Lot 3. As I have said I am not in a position to judge whether this is correct because of the absence of any up-to-date financial information. But taking Lagan's own case at face value, it is clear that Lagan will not be in a position to pay damages if it does not win the Lot 3 contract.

[63] Of course, the issue of whether or not Lagan could pay damages to the defendant if it turned out that the stay should not have been extended might well be resolved if the Lagan Group of Companies guaranteed an undertaking from Lagan to reimburse any damages the defendant suffered as a consequence of an extended stay. There has been no such offer forthcoming. It is scarcely surprising. The parlous state of the Water Services in Northern Ireland and the damages that could flow from a major disaster on the evidence before this court is such that the Lagan Group of Companies in giving such a guarantee to the defendant for Lagan would be imperilling the very future of the Group. Looking at all the circumstances, I do not consider that damages will be an adequate remedy for the defendant.

[64] Having considered that damages would be an adequate remedy for Lagan but not the defendant, it should usually be unnecessary for me to consider the balance of convenience. However that is not invariably the case as Coulson J makes clear below and for the sake of completeness I propose to deal with the balance of convenience.

Reputational Damage of Lagan and the Defendant

[65] Lagan raises the issue of reputational damage, which is normally not compensatable in damages in an action such as this being both speculative and too remote. In any event I do not agree that the failure to win (Lot 2 or) Lot 3 will damage Lagan's reputation.

[66] Lagan argues that it will suffer reputational damage if it fails to become a successful tenderer under Lots 2 or 3. In *Unity OSG FZE v Council of the European Union and EUPOL Afghanistan* T-511 08R the President said giving judgment at paragraph 26:

> "… a company taking part in a tendering procedure never has an absolute guarantee that it will be awarded the contract, but must always keep in mind the possibility the contract could be awarded to another tenderer. Under those circumstances, the adverse financial consequences which the company in question would suffer as a result of the rejection of its tender have, generally, to be considered to be part of the normal commercial risk which each company active in the market must face …"

[67] In *Open View Security Solutions Ltd v The London Borough of Merton Council* [2015] EWHC 2694 (TCC) Stuart-Smith J said at [37]:

> "I am not persuaded that loss of reputation as such affects the question of adequacy of damages as a remedy.

> If damages were otherwise an adequate remedy, I see no reason why the "reputation" of a tendering party as such should affect the giving or withholding of interim relief. With commercial parties, what ultimately matters is whether the loss of the contract in question will reduce their profitability in a way that is not recognised by the normal principles on which damages are awarded. This in turn suggests that what is generally of concern is whether the aggrieved tenderer will lose out on other contracts which it might have obtained if it had added lustre to its reputation by getting the contract at issue. In other words, the real subject of the "loss of reputation" argument is financial losses which the law of damages does not normally recognise."

[68] He then goes on to consider what criteria should be applied before a court accepts that loss of reputation is a good reason for concluding that damages which would otherwise be an adequate remedy are an inadequate remedy for *American Cyanamid* purposes. He suggests the following:

> "(i) Loss of reputation is unlikely to be of consequence when considering the adequacy of damages unless the Court is left with a reasonable degree of confidence that a failure to impose interim relief will lead to financial losses that would be significant and irrecoverable as damages;
>
> (ii) It follows that the burden of proof lies upon the party supporting the continuance of the automatic suspension and the standard of proof is that there is (at least) a real prospect of loss that would retrospectively be identifiable as being attributable to the loss of the contract at issue but not recoverable in damages;
>
> (iii) The relevant person who must generally be shown to be affected by the loss of reputation is the future provider of profitable work."

[69] There was no evidence adduced in the present case which would allow the court to conclude that Lagan had suffered or will suffer reputational damage because of the failure to become a successful tenderer for Lot (2 or) 3.

[70] On the contrary, there is a risk of considerable reputational harm to the defendant if a major catastrophe occurs because of the delay in awarding Lot 3 contracts. In any event, the continuing restriction on development in many parts in Northern Ireland caused by inadequate Water Services will inevitably result in

significant reputational damage to the defendant. Added to that is the real risk of the defendant falling foul of the Utility Regulator for failing to meet targets and expectations. There is a risk of the Utility Regulator imposing fines or even taking enforcement action.

Balance of Convenience

[71] Coulson J considered the approach that the courts should adopt in procurement cases when assessing whether it was just for a plaintiff to be confined to damages. He commented in *Sysmex (UK) Limited v Imperial College Healthcare NHS Trust* [2017] EWHC 1824 (TCC) at [22]:

> "[22] It was agreed by the parties that the first two principles that I identified in paragraph 48 of my judgment in *Coavanta* remain an accurate summary of the law, namely:
>
> **(a) If damages are an adequate remedy, that will normally be sufficient to defeat an application for an interim injunction, but that will not always be so (*American Cyanamid*, *Fellowes* and *National Bank*);**
>
> **(b) In more recent times, the simple concept of the adequacy of damages has been modified at least to an extent, so that the court must assess whether it is just, in all the circumstances, that the claimant is confined to his remedy of damages (as in *Evans Marshall* and the passage from Chitty)…"**

[72] In this case I consider that it is just that Lagan be confined to an award of damages if the court finds the defendant has breached procurement law in awarding the successful tenderers in (Lot 2 and) Lot 3. There is further support for this approach because on the evidence an award of damages will not adequately compensate the defendant if the plaintiff loses its case and it becomes obvious that the suspension of the award of contracts should not have been imposed or been permitted to continue for so long. However, for the sake of completeness I am going to consider where the balance of convenience lies.

[73] In *American Cyanamid Co v Ethicon Ltd (No 1)* [1975] AC 396 Lord Diplock said at 408(e):

> "It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of the balance of convenience arises."

[74] The use of the phrase balance of convenience has been criticised in a number of cases and it is probably better described by May LJ in C*ayne v Global Natural Resources plc* [1984] 1 All ER 225 at 237(h) thus:

> "The balance that one is seeking is more fundamental, more weighty, than mere **convenience**. I think it is quite clear … that although the phrase may well be substantially less elegant, the **balance of the risk of doing an injustice** better describes the process involved".

[75] What the court is seeking to achieve at this interlocutory stage is a just interim decision pending the trial of this action and a judgment being handed down, which I consider realistically given the present COVID-19 pandemic and court restrictions is likely to be at the end of the summer term, although this can only be an educated guess given the number of cases that are waiting to be heard. When considering where the balance of convenience lies I agree with Mrs Justice O'Farrell on the approach that should be adopted. She said *in Alstom Transport (UK) Limited v Network Rail Infrastructure Limited* [2019] EWHC 3585 (TCC) at [51]:

> "The balance of convenience test requires the Court to consider all the circumstances of the case to determine which course of action is likely to carry the least risk of injustice to either party if it is subsequently established to be wrong. When determining where the balance of convenience lies:
>
> (i) The court should consider how long the suspension might have been kept in force if an expedited trial could be ordered: DWF LLP v Secretary of State for Business Innovation and Skills [2014] EWCA Civ 900 per Sir Robin Jacob at [50];
>
> (ii) The court may have regard to the public interest: Alstom Transport v Eurostar International Limited [2010] EWHC 2727 per Vos J at [80];
>
> (iii) The court should consider the interests of Siemens, as a successful bidder, alongside the interests of Alstom and Network Rail: Open View Security Solutions Ltd v The London Borough of Merton Council [2015] EWHC 2694 at [14];
>
> (iv) If the factors relevant to the balance of convenience do not point in favour of one side or the other, then the prudent course will usually be to preserve the

> status quo (or, perhaps, more accurately, the status quo ante), that is to say to lift the suspension and allow the contract to be entered into: Circle Nottingham Ltd v NHS Rushcliffe Clinical Commissioning Group [2019] EWHC 1315 (TCC) [16]."

Delay

[76] Realistically it is unlikely that a judgment will be handed down in this action between Lagan and the defendant before the end of the summer term.

[77] Proceedings in this case to set aside the suspension were commenced promptly and properly. There has been no undue delay by the defendant in seeking relief. There has been considerable criticism of the defendant for what happened before proceedings were instituted, but I do not feel, nor am I able on the evidence adduced before me to reach a conclusion about who is to blame for, inter alia, a previous procurement exercise that collapsed. The court has enough on its plate in looking at the present application. As Coulson J said in *Sysmex (UK) Ltd v Imperial College Healthcare Trust & NHS Trust* [2017] EWHC 1824 (TCC) at [77]:

> "In my view, the time before the procurement process began is completely irrelevant in an application of this sort."

Public Interest

[78] There is no doubt that it is in the public interest to ensure that procurement law is observed. The defendant has conceded there is a serious issue to be tried in respect of that contention. Whether there is a breach or not will have to await a full hearing and a determination by the court.

[79] To be weighed in the balance is the public interest in permitting the defendant to award contracts under (Lot 2 and) Lot 3 to the successful tenderers. I have no doubt that the public interest comes down overwhelmingly in favour of permitting the defendant to award such contracts.

[80] Firstly, there is a significant risk, I find, that in the interim period while the suspension of the award of contracts continues, that a major catastrophe will engulf a part of Northern Ireland because of the worn out state of the Water Services. There are many obvious and serious risks relating to different areas of Northern Ireland. The Strathfoyle sewerage syphons need to be upgraded immediately. They are "beyond their design life and in a very poor condition." At present they leak sewage into Lough Foyle which is adversely affecting the water quality. In any event it cannot be in the public interest to permit the award of new contracts for Lot (2 or) 3 under IF105.

[81] Secondly, there are over 30 properties in the Ravenhill Road and Sicily Park/Marguerite Park areas which are at risk of internal flooding, a risk which includes flooding from sewage. The defendant is in a position to award contracts in these areas immediately to ensure this does not happen. But it is prevented by the suspension which has been imposed as a consequence of Lagan's claim.

[82 Thirdly, the failure to upgrade equipment and resources means that many areas of Northern Ireland are unable to develop in the way they wish because of constraints imposed by the limitations of the Water Services. This means for example that there will be citizens in Limavady unable to obtain new housing because of the inability to develop the former Gorteen House Hotel for housing. Perhaps more importantly, children will be denied the opportunity to attend a new school which cannot be built on agricultural land in the area close to the Ballyquin Road, which has been earmarked for the project, because the Water Services in the area do not have sufficient capacity.

[83] Fourthly, there is Meadow Lane, Portadown, where the Water Services need major upgrading to avert a serious potential problem in the future and where the defendant is in a position to award a contract immediately and so remedy years of neglect.

[84] In the circumstances it is impossible not to conclude that it is overwhelmingly in the public interest to remove the suspension and allow the urgent work to be carried out under Lot 3. (I will examine Lot 2 in the related action of the TES Group but I have reached the same conclusion in respect of Lot 2 for the reasons which I have set out in that judgment although Lot 3 does give rise to different considerations.)

Interests of the other successful parties

[85] There are the interests of the other parties who successfully tendered for (Lot 2 and) Lot 3. Their interests require that they should be awarded the contracts for which they successfully tendered. They are being denied the opportunity to revamp, improve and transform the Water Services and earn profits because of this legal action by Lagan. It is not suggested that any of the successful tenderers have done anything untoward.

Status Quo

[86] Lord Diplock in *American Cyanamid* stated that:

> "Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo." (See 408(f)).

[87] In this case the status quo ante bellum is to lift the suspension and allow the defendant to award contracts to the successful tenderers. But in this case it is unnecessary to resort to the status quo ante bellum because the balance of convenience is so overwhelmingly in favour of the defendant.

Strength of Case

[88] Finally, it was suggested on behalf of Lagan that the strength of its case should also be weighed in the balance. I am not sure that this is in fact the case legally. In any event I am unpersuaded that Lagan's claim is *likely* to succeed - never mind that success is guaranteed. Indeed, on the evidence before me all that can be said is that, at its height, Lagan's case discloses a serious question to be tried.

CONCLUSION

[89] In this case I remove the suspension on the defendant awarding Lot 2 and Lot 3 contracts imposed as a consequence of these proceedings. (I deal with Lot 2 contracts in the related judgment in more detail.) I consider that if Lagan wins damages would represent an adequate remedy, such damages being capable of quantification by this court and being paid by the defendant. I do not consider that an award of damages is an adequate remedy for the defendant if Lagan's claim fails for the reasons which I have given.

[90] I am satisfied the proceedings have been pursued vigorously and without undue delay. I do not have sufficient information to make any ruling on whether there was undue delay before the present application was made. Importantly I have concluded the balance of convenience comes down heavily in favour of the defendant. Even if the balance of convenience had been evenly distributed, which it is not, the status quo ante bellum requires that suspension should be removed. In the circumstances, I remove the stay preventing the defendant from awarding contracts to successful tenderers in respect of Lot (2 and) 3.

[91] I propose to reserve the costs of this application to the trial judge unless either of the parties wish to make submissions for some different costs order.