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Judgment: approved by the court for handing down (subject to editorial corrections)*	*Delivered:* **30/01/2023**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
COMMERCIAL LIST

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BETWEEN:

OMAGH FORUM FOR RURAL ASSOCIATIONS

Plaintiff

and

THE DEPARTMENT OF AGRICULTURE, ENVIRONMENT AND RURAL AFFAIRS

Defendant

_____

Mr Anderson (instructed by PA Duffy & Co, Solicitors) for the plaintiff
Mr Hopkins (instructed by the Departmental Solicitors) for the defendant

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McBRIDE J

Introduction

[1] This is an application by the defendant, the Department of Agriculture, Environment and Rural Affairs ("DAERA") for an order pursuant to Regulation 96 of the Public Contracts Regulations 2015 ("PCRs") to lift the automatic suspension, imposed by Regulation 95, that the defendant refrain from entering into a contract for the provision of a rural community support service for the Fermanagh and Omagh District Council area ("the Contract"). The plaintiff objects to the application.

[2] The defendant was represented by Mr Hopkins of counsel and the plaintiff was represented by Mr Anderson of counsel. I am grateful to all counsel for their comprehensive skeleton arguments and well-presented oral submissions.

Background

[3] These proceedings concern a procurement competition to award the Contract. On 23 June 2022 the defendant, in conjunction with Construction and Procurement Delivery Section of the Department of Finance advertised a procurement competition to award the Contract. The competition sought proposals for the provision of the local community development support and advice service for the Fermanagh and Omagh District Council area ("the Services").

[4] Previously, in or around July 2021 the defendant advertised a procurement competition for the Services in all eight council areas in Northern Ireland. The tender documents and criteria were the same across all council areas. The plaintiff submitted a tender in July 2021 for the Fermanagh and Omagh District Council area and received an award letter dated 17 September 2021 stating it had been awarded the contract tendered for. An unsuccessful tenderer initiated legal proceedings during the statutory 10 day "standstill" period after the defendant indicated its decision to award the contract to the plaintiff. That procurement competition collapsed, and the present procurement competition was commenced.

[5] Tenders were received from the plaintiff and Fermanagh Rural Community Network. These tenders were evaluated by the Evaluation Panel and on 16 August 2022 correspondence was issued to both the plaintiff and Fermanagh Rural Community Network indicating the defendant's intention to award the Contract to Fermanagh Rural Community Network.

[6] Following an exchange of pre-action correspondence the plaintiff issued a writ on 5 September 2022 seeking a declaration that the defendant's actions were unlawful and/or a breach of contract and sought further and/or in the alternative damages for loss and damage.

[7] The plaintiff is the incumbent provider of the services on foot of a contract awarded in 2018. This contract was due to expire on 31 March 2021 but has been extended on 7 different occasions. Most recently it was extended to 31 January 2023.

Course of proceedings to date

[8] Following the issue of the writ on 5 September 2022, a memorandum of appearance was entered on 8 September 2022. The plaintiff's statement of claim was due 20 October 2022 but was not served until 6 January 2023. During the period the plaintiff was in default the defendant threatened to strike out the plaintiff's proceedings for failure to serve the statement of claim. At a Directions hearing on 15 December 2022 the court directed that the statement of claim was to be served on or before 21 December 2022.

[9] According to Mr Bunting the plaintiff wished to instruct senior counsel to draft the statement of claim subject to confirmation from the plaintiff's insurers that

it would cover such expenses. The insurers declined to provide such cover on 19 December 2022. Due to the Christmas break junior counsel was unable to consult with the plaintiff to draft the statement of claim until 5 January 2023 and the statement of claim was not served until 6 January 2023. An application for specific discovery was served by the plaintiff on 13 January 2023. The plaintiff's solicitors wrote to the defendant's solicitors on 5 January 2023 seeking amended directions to an expedited hearing.

The Evidence

[10] The application is grounded on the affidavit of Mr Jerome Burns sworn on 10 January 2023. Mr Burns is the head of Southern Rural Affairs Division of DAERA.

[11] Mr Burns avers that the defendant advised the plaintiff that the existing contract would not be extended beyond 31 January 2023. He avers:

> "I am advised by the defendant's solicitors, and believe, that this is due to the restrictions upon modification (ie extension) of a contract without a new procurement process taking place pursuant to Regulation 72 of the PCRs."

He states that if the statutory stay remains in place:

> "there is a significant risk that the Services will not be able to be provided after 31 January 2023. … The defendant is considering whether there (are) any alternative options that might allow it to continue to provide these Services but, as yet, none are readily apparent."

[12] Mr Burns avers that the Services are of "vital importance" in these rural areas as they are needed to encourage and support and enhance infrastructure to deliver services to vulnerable rural dwellers and to tackle isolation and exclusion in rural areas.

[13] Mr Aidan Bunting, Network Manager for the plaintiff, filed an affidavit in reply to Mr Burn's affidavit and filed a second affidavit at the request of the court to provide evidence to support its contention that damages were not an adequate remedy.

[14] As appears from Mr Bunting's affidavits the plaintiff is a registered charity and a not-for-profit organisation concerned with the provision of rural community development support. The plaintiff has engaged in this activity since 1989. It is staffed by four people who are uniquely experienced in delivering these types of services to the rural community.

[15] A letter from the plaintiff's accountants, dated 25 January 2023 is exhibited which states:

> "Omagh Forum for Rural Associations is financially dependent on their contract with DAERA which enables them to provide the high level of services currently to the community.
>
> Should this contract be withdrawn, this would have a detrimental impact on the services that can be provided moving forward and would inevitably lead to staff redundancies."

[16] In addition to the monies received under the contract the plaintiff receives additional monies, known as the Micro Grant Scheme, for providing additional services.

[17] As appears from the financial returns exhibited for year ending March 2022, the contract is worth £135,000 per annum. When one includes the Micro Grant Scheme monies the contract with the defendant represented 69% of the plaintiff's income in 2021 and 38% of their income in 2022. 78% of the income generated by the contract goes towards salaries and 22% goes towards costs and administration. These figures are not disputed by the defendant.

[18] Mr Bunting avers that if the plaintiff lost the contract "the impact would be critical as we would have to lay off staff as the contract provides us with our core financial costs. He further states that the loss of the contract would "make it unsustainable for the plaintiff to continue as a charity" and would "inevitably lead to staff redundancies" as the "provision and continuation of the subject contract constitutes the plaintiff's reason d'etre without which its charitable purpose would be caused to suffer and be fundamentally undermined."

[19] Mr Bunting states that the plaintiff has carried out work with groups and individuals since 1989 which has been hugely effective and supportive of local communities. If the plaintiff was not successful in securing the Contract all that work and the relationships built with vulnerable and low capacity groups would be lost. Given the nature of the organisation; its financial dependence upon the subject contract, and the fact that the loss of the Contract would render it unsustainable for the plaintiff to continue as a charitable enterprise and would inevitably lead to the loss of staff who are highly and uniquely experienced to deliver its services, he submits that damages would not be an adequate remedy.

[20] He further avers that 31 January 2023 is an arbitrary date fixed by the defendant for ending the Services and confirms that the plaintiff is able and willing to continue to provide the Services after 31 January 2023.

[21] Mr Bunting explains that the delay in service of the statement of claim arose because of the need to obtain expenses insurance to cover certain actions and that further delay arose over the Christmas vacation. He indicates his commitment to an expedited trial. The plaintiff further states that the matter could not proceed to trial on the hearing date because of outstanding discovery.

The relevant legal principles

[22] Regulation 95 of PCR provides:

> "**Contract-making suspended by challenge to award decision**
>
> 95.—(1) Where—
>
> (a) a claim form (writ) has been issued in respect of a contracting authority's decision to award the contract,
>
> (b) the contracting authority has become aware that the claim form has been issued (writ) and that it relates to that decision, and
>
> (c) the contract has not been entered into,
>
> the contracting authority 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 96(1)(a)."

Regulation 96 provides:

> "**Interim orders**
>
> 96.—(1) In proceedings, the court may, where relevant, make an interim order—
>
> (a) bringing to an end the requirement imposed by regulation 95(1);
>
> …

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

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

…

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

Relevant Legal Principles

[23] Although the regulations themselves do not spell out how the power to suspend is to be exercised it is now well settled that in approaching an application to lift an automatic suspension the court should apply the principles set out in *American Cyanamid Company v Ethicon Ltd* [1975] AC 396. This approach has been endorsed by the courts in this jurisdiction on numerous occasions and, in particular, in *Eircom UK Ltd v Department of Finance* [2018] NIQB 75, *CSC Computer Sciences v Business Services Organisation* [2020] NIJB 480, *TES Group Ltd v Northern Ireland Water Limited* [2020] NIQB 62 and *Sisk v Western Health and Social Care Trust* [2014] NIQB 56. In accordance with the *American Cyanamid* principles the court must consider the following questions:

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

(ii) If so, would damages be an adequate remedy for the plaintiff if the suspension was lifted and it succeeded at trial?

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

[24] By answering these questions the court is seeking to carry out its principal task of ensuring that it identifies which of the two options open to it, namely to lift

the suspension or to allow it to remain in place, is likely to cause the least irremedial prejudice to one party or the other.

[25] The question arises whether the existence of an automatic statutory suspension means that the court ought to weight the exercise in favour of maintaining the prohibition on the contracting authority against entering into the contract in question. In *Excel Europe Limited v University Hospital Coventry and Warwickshire NHS Trust* [2010] EWHC 3 332 Jefford J rejected such a contention at paragraph [28] and stated that the Regulations means in practice that the court should go about the *Cyanamid* exercise in the way which courts in this country have done for many years.

Consideration

(i) Serious issue to be tried

[26] The defendant conceded that there is a serious issue to be tried.

(ii) Adequacy of damages

[27] In *Covanta Energy Ltd v Merseyside Waste Disposal Authority* No.2 2013 151 Con LR 146, Coulson J summarised the relevant authorities dealing with the adequacy of damages in the procurement context. At paragraph [48] he summarised the applicable principles. For present purposes it is sufficient to refer to the first two principles, 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.
>
> (b) In more recent times, the simple concept of the adequacy of damages has been modified at least to an extent, so that the courts must assess whether it is just, in all the circumstances, that the claimant be confined to his remedy in damages."

[28] As noted by Jefford J in *Perinatal Institute v Healthcare Quality Improvement Partnership* [2016] EWHC 2626 at paragraph [39] the effect of Coulson's formulation is:

> "to blur the line between the issue as to the adequacy of damages and the balance of convenience, or to bring the issue of adequacy of damages under the umbrella of the balance of convenience, by recognising the court should take into account the justice of a party being confined to its remedy in damages."

[29] Professor Sue Arrowsmith in the *Law of Public and Utilities Procurement: Regulation EU and UK* Volume 2, 3rd Edition at paragraph 22.140 queries whether the adequacy of damages condition and its application in UK law is compatible with the Remedies Directive. Jefford J in *Excel Europe* held at paragraph [29] that there was nothing in the application of the *Cyanamid* principles which offended or was not consistent with the Remedies Directive and she was satisfied that the *Cyanamid* principles were "positively consistent with it." I consider the approach of Coulson J in asking "is it just in all the circumstances that a party should be confined to its remedy in damages?" is sufficient to meet Arrowsmith's objection especially as Arrowsmith herself state at paragraph 22.141:

> "Were a strict advocacy of damages condition ruled out, it would still be important to consider how far availability of damages could be one relevant factor in the exercise of the court's discretion to refuse a remedy, as it is at present in those cases in which damages are not considered to be adequate."

[30] Although it is trite to state that cases in these applications are very fact sensitive nonetheless, I consider that some principles can be drawn from the existing jurisprudence.

[31] First, the burden of proof lies on the plaintiff. Arrowsmith at paragraph 22-193 states:

> "… the courts have held that the burden of proof … lies on the party seeking suspension and there must be a real prospect of loss attributable to the loss of the contract at issue that would not be recoverable in damages – *Open View Security Solutions v the London Borough of Merton Council* [2015] EWHC 2694 at para [39]."

[32] Second, the plaintiff must produce solid, cogent evidence that damages are not adequate. Mere bald assertions are usually not sufficient – see *TES Group* at paragraph [32]. In *TES Group*, Horner J, set out the types of evidential materials which should normally be provided where a party is seeking to establish that damages are not adequate. Obviously, the documentation which should be provided will vary depending on the facts of the case.

[33] Third, the amount of damages that may be recoverable is immaterial. The question is always whether damages are an *adequate* remedy.

[34] Fourth, the party seeking suspension must show a *real* prospect of loss attributable to the loss of the contract at issue that would not be recoverable in damages – see *Open View*.

[35] A question arises whether the adequacy of damages test is applied differently to not-for-profit entities.

[36] In *Bristol Missing Link Ltd v Bristol City Council* [2015] EWHC 8766 a not-for-profit organisation bid for a contract for the provision of support services for victims of domestic violence. It included nothing for profit in its tender and only a nominal allowance for overheads. Coulson J said at paragraph [55]:

> "In my view, a non-profit making organisation, which has bid for a contract making no allowance for profit at all, and a minimal amount for overheads, is entitled to say that, in such circumstances, damages would not be an adequate remedy."

[37] He then noted the following five consequences for the organisation if the suspension were lifted;-

> "(a) The work done for the council in relation to domestic violence amounted to a third of their total turnover. Without this contract they would suffer catastrophic harm.
>
> (b) The not-for-profit organisation provided a range of services dealing with the linked problems of domestic violence, sexual violence and mental health. The lifting of the suspension would disconnect the services in respect of domestic violence.
>
> (c) This part of their work could not be replaced so there would be a knock-on effect on the provision of services in other locations.
>
> (d) If the suspension was lifted, they would be locked out from this core element of their work for three to five years of the contract which would have a knock-on effect on other services.
>
> (e) The lifting of the suspension would have a significant effect on their reputation."

[38] Coulson J described these consequences as catastrophic and, in those circumstances, concluded that damages were not an adequate remedy.

[39] In contrast in *Perinatal*, the court when dealing with not-for-profit organisation held that damages were an adequate remedy. The court held at paragraph [45]:

> "I do not read what Coulson J said at paragraph 55 of the judgment, quoted above, as setting out an absolute rule or principle that a non-profit organisation can never be adequately compensated in damages. Rather, in my view, he identifies that this is an argument open to a non-profit organisation against which background he then considered the consequences for BMLL of the lifting of the suspension in order to answer the question of whether it would be just to confine BMLL to recovering its minimal financial loss. The fact that an organisation is non-profit may make it more likely that it cannot be adequately compensated in damages and the BMLL case itself provides an example where that was the case because the project in question was at the heart of its activities, there would be a significant knock on effect to its other activities, and it would suffer significant reputational damage."

[40] In *Kent Community Health NHS Foundation v NHS Swale Clinical Commissioning Group and others* [2016] EWHC 1393, Stewart-Smith J similarly questioned the breadth of Coulson's statement in paragraph [55] and adopted the approach taken in *Perinatal*.

[41] In accordance with the existing jurisprudence, the fact a body is a not-for-profit entity may make it more likely that it cannot be adequately compensated in damages but the burden nonetheless remains on the not-for-profit organisation to prove by evidence why this is so.

[42] The plaintiff is a not-for-profit organisation and is the incumbent supplier of the Services to be offered under the Contract. In *Counted4 Community Interest Company v Sunderland City Council* [2015] EWHC 3893 the plaintiff was a not-for-profit organisation which had been the incumbent provider of the service for a period of seven years but had not been successful in its tender. Carr J stated at paragraph [40]:

> "On Mr Devitt's evidence, if this suspension is lifted, the claimant will lose its highly and uniquely trained workforce under TUPE regulations, that workforce being predominantly engaged on the existing contract. It is a team that has taken years to develop; its skills are not available on the wider market. The defendant ripostes by stating that in such circumstances the highly trained team

> would not be lost to the general public. But that ignores the irremedial harm to the claimant which is the issue under consideration here. Even with income over the mobilisation period, the claimant states that it would not be in a position to continue with this claim. This prejudice, it is said, should not be surprising given that the claimant was set up for the very purpose of providing services to the defendant.
>
> I therefore conclude on the evidence that damages would not be an adequate remedy for the claimant."

[43] Given that the plaintiff is the incumbent provider of the Services I am satisfied on the evidence of Mr Bunting, that the loss of the Contract would inevitably lead to a loss of staff who are uniquely experienced. As a consequence, the plaintiff would be unable to carry out its charitable purpose and the activities which lie at the very heart of its existence, namely providing support and assistance to community and voluntary groups in the local rural area.

[44] Further, the Contract accounted for well over half the plaintiff's turnover in 2021 and over a third of its turnover in 2022. In these circumstances I consider the Contract is essential to the long term survival of the organisation and without this Contract I consider the plaintiff would suffer catastrophic consequences which are not compensatable in damages.

[45] For all these reasons I am, therefore, satisfied that damages are not an adequate remedy in this case.

Are damages an adequate remedy for the defendant?

[46] It was conceded on behalf of the defendant that damages would be an adequate remedy.

Balance of Convenience

[47] Even though a plaintiff can show damages are not an adequate remedy it still has to persuade the court that the balance of convenience lies in favour of continuing the suspension.

[48] The balance of convenience requires the court to weigh in the balance all the factors in favour and against a suspension, so that the court can determine whether a suspension should or should not be granted.

[49] The factors to be taken into account include (non-exhaustively), the effect of delay, the public interest, the impact on other tenderers, the impact on the plaintiff of

refusing suspension, the strength of the plaintiff's case and the extent to which damages are available.

[50] Where the various interests involved do not weigh significantly more in favour of one side than the other, it is an established principle under the *American Cyanamid* approach that the status quo should be favoured, which in a procurement case will generally mean allowing the contract to go ahead – see *Kent Community Health NHS Foundation Trust v NHS Swale Clinical Commissioning Group* [2016] EWHC 1393 at paragraph [40].

[51] In the present case the defendant submits that there has been delay and a substantive hearing will not take place for many months. In the Commercial Court, as a result of strict case management, I am satisfied that there can be an expedited hearing and to that end I have made directions to ensure that the matter can proceed to a full hearing before the Easter recess. I am therefore satisfied that there will be no undue delay.

[52] The public interest weighs heavily in the balance in procurement cases as noted by Horner J in *TES Group* at paragraph [48]. In this case the defendant says the public interest lies in awarding the contract to ensure that there is continuity of vital services to rural areas. Mr Hopkins submitted that the Services will cease from 31 January2023 as the defendant has received legal advice indicating they should not extend the contract beyond this date. Mr Anderson on behalf of the plaintiffs submitted that this was an arbitrary date and it still lay within the power of the defendant to extend the contract beyond 31 January 2023, and the defendant has been advised not to do so because of a risk of a challenge by a third party.

[53] I do not accept that there will, of necessity, be a gap in the provision of Services. Firstly, Mr Bunting in his evidence, did not say this definitively. He indicated that this was a risk. I note that the defendant has extended the contract with the plaintiff several times in the past. I am satisfied that it could, if it so chose to, again, extend the contract but in doing so it will make a judgment about the risks, weighing the risk of a challenge against the risk of Services not being provided to the public. In these circumstances I am not satisfied that there will, of necessity, be a cessation of Services after 31 January 2023 especially as the plaintiff remains able and willing to provide the Services.

[54] Secondly, even if there is a gap in the continuity of the Services that would be because of a decision made by the defendant. Thirdly, I consider that the services are not acute services and, whilst they are vital services, the impact of a gap would not be as detrimental as those involving the provision of acute services.

[55] Fourthly, given that I have made directions for an expedited hearing, I consider that any gap in services will be of short duration.

[56] In the present case there is another party who had successfully tendered for the contract. Their interests require that they should be awarded the contract for which they successfully tendered. The interests of the other successful party is a matter which must also be taken into account in the balancing exercise.

[57] In carrying out the balancing exercise, I have taken all the factors set out above into consideration. I have also taken into account the merits of the case, (although I have given little weight to this) and I have also taken into account the fact that the plaintiff cannot be compensated in damages and the fact that it is the incumbent provider of the Services. Balancing all these various factors it is my view that the balance of convenience tips in favour of the suspension remaining in place.

[58] In these circumstances, I do not need to consider the question of the status quo.

Conclusion

[59] For the reasons set out, I am satisfied that not lifting the suspension is likely to cause the least irremedial prejudice to the plaintiff. I, therefore, refuse the application to lift the stay. Although the court has power to impose conditions, and, in particular, to require a party to give an undertaking in damages, in the present case I do not consider it is appropriate to place such a condition upon the plaintiff and therefore, I do not make any order as to conditions to be placed on the suspension.

[60] I reserve costs to the trial.