Neutral Citation No: [2023] NIKB 86 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* **McB12207** *ICOS No:* **23/43396** *Delivered:* **26/06/2023**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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COMMERCIAL DIVISION

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BETWEEN RIVER RIDGE RECYCLING (PORTADOWN) LTD

Plaintiff

and

ARC 21

Defendant

_____

Mr Coghlin KC with Ms Rowan (instructed by Carson McDowell Solicitors) for the Plaintiff
Mr Banner KC with Mr Fletcher (instructed by Arthur Cox Solicitors) for the Defendant
Mr D Dunlop KC with Mr Hopkins (instructed by Gateley Legal, Solicitors) for the Notice Party

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McBRIDE J

Application

[1] The plaintiff seeks an interim injunction until final order of the court restraining the defendant, whether by its servants, agents, employees or otherwise from:

(a) Continuing with the purported award of and/or entry into the contract and/or contract with Regen Waste Ltd for the supply of services relating to the treatment in energy recovery/disposal of residual waste arising, Dynamic Purchasing System (DPS) ID: 4320754/4522200 ("the contract");

(b) Taking any steps pursuant to and/or on foot of the contract;

(c) From implementing the contract; and/or

(d) From otherwise proceeding with the services which form the subject matter of the contract.

[2] The application was grounded on the affidavit of Brett Ross, Director of the plaintiff company, sworn on 24 May 2023. By order of the court dated 26 May 2023, the court made provision for filing of replying and rejoinder affidavits; service of pleadings and the listing of the injunction hearing.

[3] The evidence before the court now consists of the grounding affidavit by Brett Ross dated 24 May 2023, responding affidavit of Karen Boal dated 2 June 2023 and the rejoinder affidavit of Brett Ross dated 8 June 2023. John Murphy on behalf of Regen Waste Limited filed an affidavit dated 8 June 2023 and Mr Ross filed an affidavit, undated in response. Karen Boal filed a second affidavit dated 14 June 2023 and Mr Brett Ross filed a fourth affidavit dated 14 June 2023.

Representation

[4] The plaintiff was represented by Mr Richard Coghlin KC with Ms Anna Rowan of counsel. The defendant was represented by Mr Charles Banner KC with Mr Alistair Fletcher of counsel. The notice party Regen was represented by Mr David Dunlop KC with Mr Peter Hopkins of counsel. I am very grateful to all counsel for their detailed and comprehensive skeleton arguments and oral submissions. These proved to be of much assistance to the court. Although this application is for interim injunctive relief it raises a novel point of law in respect of the court's jurisdiction to grant interim injunctive relief when a contract has been entered into under a DPS carried out under the Public Contracts Regulations 2015.

The proceedings

[5] The main action concerns a competition designed and administered by the defendant for the award of a contract for services relating to haulage, treatment, recovery and disposal of waste. The competition was governed by the Public Contracts Regulations 2015 ("PCR").

[6] The plaintiff and the notice party Regen Waste Ltd both tendered for the contract. The plaintiff was the unsuccessful tenderer and by writ action seeks, inter alia, an injunction, a declaration of ineffectiveness and damages.

Background

[7] Given the nature of the dispute between the parties it is necessary to set out some details about each party, how the competition was designed and administered and the statutory framework.

The parties

The plaintiff

[8] The plaintiff is a company incorporated and registered in Northern Ireland. Originally it was a small skip hire and landfill business. It has now developed significantly and owns multiple landfill sites and is able to transport waste to these sites. Through its mechanical treatment infrastructure, it has the capacity to direct significant tonnage of waste away from landfill. It also owns a waste to energy facility located in Belfast. It employs approximately 286 employees.

The defendant

[9] In accordance with the Waste Framework Directive and the Waste Regulations (Northern Ireland) Order 2011, councils are under a duty to apply a waste management hierarchy in which priority is given to reuse, recycling and other recovery over disposal in landfill. On environmental grounds landfill is the least desirable treatment method for waste.

[10] Under the Local Government Act (Northern Ireland) 2014 local councils are empowered to discharge any of their functions jointly and it can arrange for the discharge of those functions by a joint committee. The department can by order make provision for the purpose of constituting a joint committee a body corporate by the name specified. Six councils in Northern Ireland including Belfast City Council appointed such a joint committee and it is now constituted as a body corporate known as Arc 21.

[11] Its functions are set out in Terms of Agreement. At clause 3.1.3 it states:

> "The functions of the joint committee shall be fixed by reference to these terms of agreement (including the statement of principles)."

In the Statement of Principles under the Principle of Functional Responsibilities it states:-

> "The core functions shall be the acceptance, treatment and disposal of waste in accordance with the Waste Plan. In relation to the Core Functions …the joint committee shall
>
> - Approve the specifications and award criteria for the contracts.
>
> - Invite tenders for and award the contracts…"

[12] Historically in Northern Ireland residual waste often referred to as black bin waste went to landfill. Arc 21 compiled a Waste Management Plan which has been approved by the councils. Under this plan the amount of waste going to landfill is reduced in line with the Waste Framework Directive and the Waste Regulations. Arc 21 has also identified the need for a public infrastructure project to deal with residual waste arising as part of its statutory waste management plan.

[13] In 2014 Arc 21 submitted an application for planning permission for the proposed development of a largescale residual waste treatment facility and related infrastructure at Hightown quarry. Due to numerous legal challenges the planning application has been delayed. As a result of the delay to the long-term solution Arc 21 needed to implement interim measures to deal with waste. This led to a Decision document dated 7 December 2021 which set out its decisions concerning the future arrangements for residual waste.

The notice party

[14] Regen has been operating since 2004 initially through recycling of household recyclable waste. This waste is delivered to or collected by Regen and processed so that it separates out the materials into saleable streams of materials. In 2014 it expanded its business to build a new plant to sort and process household residual waste. It now extracts recyclable elements from the waste and converts the remainder into fuel which is sent to "energy from waste" facilities.

Chronology relating to the contract

[15] Belfast City Council has been in contract with the plaintiff for collection and disposal of waste since 2012. Under this contract, which has been renewed on a rolling basis since 2012 the plaintiff collects all of Belfast's residual waste from its transfer station at Dargan Road. Approximately 3000 tonnages per month is then transported by the plaintiff to landfill operated by Biffa Waste Services. The remaining approximately 5750 tonnes per month is transported by the plaintiff to its own facilities for processing. Table 3.3 in the tender documents shows that under the existing contract the plaintiff was recovering 13% of recyclates and disposed 22.4% to landfill.

[16] On 7 December 2021 Arc 21 approved a Decision document setting out its decisions concerning the future arrangements for residual waste.

[17] Arc 21 proposed to procure in the interim on behalf of the councils it represented, contracts for disposal of residual waste. It noted that each council had different circumstances regarding waste. Arc 21 decided upon a dynamic purchasing scheme (DPS) and thereafter to run competitions for individual contracts pursuant to the DPS.

[18] The DPS involves a two-stage process. The first is an initial set up stage where interested parties are evaluated against the contracting authority's selection criteria and those who qualify are admitted to the DPS. Interested parties can apply to join the DPS at any time so this first stage is not time-barred.

[19] The second stage is where individual contracts are awarded based on the individual bids by the members of the DPS. In this case, Arc 21 decided to divide the DPS into a number of lots. The procurement was divided into four lots and this action concerns the procurement of lot 3 namely "combined residual kerbside residual waste from commercial (trade collections) and HWRC waste stream which may be mixed with other three residual waste streams."

[20] The "call off" contracts were to have minimum requirements. Firstly, there was a minimum recycling level of 7% and 70% of the waste was to be diverted from landfill. Such diversion can be achieved by sending waste for energy recovery.

[21] The Decision document then set out selection criteria and award criteria and noted weighting of criteria would depend on the importance of that criteria to the council for the call off contract being procured and, hence, the contracts were in some ways bespoke for each council.

[22] Arc 21 then invited tenders for the call off contract for lot 3, which was in respect of Belfast City Council. The contract related to collecting, transferring and processing of waste with the requirement to ensure it was pre-treated to extract a minimum percentage of recyclates in accordance with the need to meet minimum landfill diversion targets.

[23] The contract was to be for an initial period of three years with the authority having an option to extend for another four years.

[24] The information provided to tenderers made it clear that TUPE may apply as services similar to those which were the subject of the new contract were currently being provided by Biffa and the plaintiff. The tender documentation describes the incumbents as the plaintiff and Biffa Waste Services Ltd. The documentation set out that the plaintiff had an existing contract with Belfast City Council to manage the loading and transfer of residual waste and to recover and dispose of the waste. Table 3.3 in the tender documents shows that under the existing contract the plaintiff was recovering for Belfast City Council 13% of recyclates and disposed 22.4% to landfill. Accordingly, the past performance of the plaintiff shows that it was meeting the minimum requirement set out under the new contract for recyclates and diversion from landfill.

[25] On 1 December 2022 the plaintiff's representatives met Belfast City Council representatives and the minutes indicate that Belfast City Council advised the plaintiff that the current contract would be superseded by Arc 21's DPS which was due to go live on 1 April 2023.

[26] At the end of December 2022 stage 1 of the DPS was completed and both the plaintiff and Regen were successful applicants admitted to the DPS.

[27] In January 2023 the call off competition concerning the present contract under challenge was launched.

[28] On 24 January 2023 clarification was sought by Regen who asked Arc 21 whether the authority would be providing a standstill period once the tender was awarded. In response Arc 21 said "in view of the wish to award the contract as quickly as possible and the fact that there is no obligation under PCR 2015 to observe a standstill period, the authority does not currently intend to observe a standstill period prior to award of the contract." The plaintiff's representatives viewed this clarification on 24 January 2023. A further clarification was issued on 27 January 2023 to similar effect which was also viewed by the plaintiff's representatives.

[29] Due to delay the contractual starting date of 1 April was pushed back to 1 July 2023. As a result of this delay the temporary contract needed to be extended and on 28 March 2023 Belfast City Council extended the plaintiff's contract until 30 June 2023.

[30] On 12 May 2023 Arc 21 awarded the tender to Regen and immediately entered into contract with them as there was no standstill period.

[31] On 16 May 2023 the plaintiff was advised it was unsuccessful in this call off competition and that Regen had been awarded the contract and that the contract had been entered into with Regen.

[32] On 16 May 2023 the plaintiff sought a voluntary standstill. The defendant's solicitors replied on 19 May confirming the defendant and Regen had entered into contract and the contract was in the process of being implemented and that any delay in implementation would cause disruption to both the defendant and Regen.

[33] The plaintiff then issued the present proceedings, and it was agreed between the parties and ordered by the court that there be an expedited trial in this case commencing on 23 October 2023.

[34] The new contract is therefore due to commence on 1 July 2023. Accordingly, this application was treated as an emergency application.

The statutory Framework

PCR – provision for a DPS

[35] Regulation 34 of the PCR provides for a DPS. It states, "contracting authorities may use a DPS for commonly used purchases, the characteristics of which, as generally available on the market, meet their requirements."

[36] Arrowsmith, The Law of Public & Utilities Procurement, (Sweet and Maxwell) (2014) at para 19.99 states "essentially dynamic purchasing is a type of approved list… of interested and qualified economic operators for 'off the shelf' products and services, advertised in general terms to the market." She further states at para 19.104:

> "What types of purchases can the dynamic purchasing system be used for?
>
> The directive/regulations state that a dynamic purchasing system is a system "for commonly used purchases, the characteristics of which, as generally available on the market, meet the requirements of the [procuring entity]. That such a system may only be used for purchases that are "commonly used" and which meet the procuring entities requirements "as generally available on the market" – that is, apparently, without adaptation for the entities use."

Remedies available under PCR

Where the contract has been entered into

[37] Regulation 98 deals with remedies where the contract has been entered into. It states:

> "…
> (a) If the court is satisfied that a decision or action taken by a contracting authority was in breach of the duty owed in accordance with the regulation 89 or 90; and
>
> (b) the contract has already been entered into.
>
> (ii) In those circumstances, the court –
>
> (a) Must, if it is satisfied that any of the grounds for ineffectiveness applies make a declaration of ineffectiveness in respect of the contract…

(b) … impose penalties…

(c) May award damages to an economic operator which has suffered loss or damage as a consequence of the breach, regardless of whether the court also acts as described in subparagraphs (a) and (b).

(d) Must not order any other remedies."

Where the contract has not been entered into

[38] Regulation 97 sets out remedies where a contract has not been entered into and these include the power of the court to make an order for the "setting aside of the decision or action concerned."

Standstill provisions under PCR

[39] Regulation 86 provides that notice of decisions to award a contract or conclude a framework agreement are to be sent to each candidate.

[40] Regulation 86(5) sets out exemptions to this requirement and one of the exemptions to this requirement is where the contracting authority awards a contract under a framework agreement or a dynamic purchasing system.

[41] Regulation 87 provides for a standstill period where regulation 86(1) applies. When a standstill period operates "the contracting authority must not enter into the contract or conclude the framework agreement before the end of the standstill period."

[42] As regulation 86(1) does not apply to a dynamic purchasing system no standstill period applies.

[43] Under regulation 95 where there is a challenge to the award decision by action then contract-making is suspended pending further order of the court or determination of the claim.

[44] Regulation 96 then provides that the court may bring to an end the statutory suspension and regulation 96(5) provides "this regulation does not prejudice any other powers of the court."

Legal principles applicable to the grant of injunctive relief

[45] The applicable principles for determining an application for interim injunctive relief are set out in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 per Lord Diplock at 408 to 409. These principles are often expressed as a series of questions as follows:

(i) The court should consider first whether if the claimant were to succeed at trial, he would be adequately compensated in damages. If damages were an adequate remedy and the defendant would be in a position to pay them, then an interim injunction would ordinarily not be granted.

(ii) If damages would not be an adequate remedy, on the other hand then the court should consider whether, if the injunction were granted, the defendant would be adequately compensated under the cross-undertaking in damages.

(iii) It is where there is doubt as to the adequacy of the respective remedies in damages that the question of balance of convenience arises.

(iv) Where other factors are evenly balanced, or appear to be, then it is a counsel of prudence to take such measures as are calculated to preserve the status quo.

(v) The extent to which the disadvantages to each party would be incapable of being compensated for in damages in the event of success at trial is always a significant factor in assessing the balance of convenience.

(vi) If the extent of the damage that could not be compensated (referred to as the uncompensatable disadvantage) to each party would not differ widely, it may not be improper to take into account in tipping the balance the relative strength of each party's case as revealed by the written evidence on the application. This should, however, only be done if it is apparent that there is no credible dispute that the strength of one party's case is disproportionate to that of the other party.

(vii) In addition to these factors there may be many other special factors to be taken into consideration on the particular circumstances of the individual case. In *Lancashire Care NHS Foundation Trust v Lancashire CC* [2018] EWHC 200 Fraser J further noted that the public interest should be taken into consideration as part of the balance of convenience and Coulson J considered the modern approach in *Sysmex (UK) Ltd v Imperial College Healthcare NHS Trust* [2017] EWHC 1824 when he observed at para [22] that:

> "(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 the damages has been modified at least to an extent, so that the court must assess whether it is just, in all the circumstances, that the claimant be confined to his remedy of damages"

[46] The *American Cyanamid* principles have been applied in the procurement context both in England and Wales and in this jurisdiction.

[47] Before turning to the *American Cyanamid* questions a novel point of law arises in this case concerning the question whether the court has jurisdiction to grant interim injunctive relief in light of the statutory scheme set out by the Public Contracts Regulations.

The Statutory Scheme

[48] In most procurement competitions the PCRs require the contracting authority to send each tenderer a notice communicating its decision to award the contract – see regulation 86(1) and thereafter the contracting authority must observe a standstill period during which it is prohibited from entering into the contract – see regulation 87.

[49] If a tenderer issues proceedings during the standstill period or before the contract is entered into then the contracting authorities are required to refrain from entering into the contract – see regulation 95.

[50] In contrast where a DPS is adopted by the contracting authority there is no requirement to publish a notice and no requirement to observe a standstill period before a contract is entered into and no automatic suspension of a contract which has been awarded under the DPS, even where proceedings are issued.

[51] The defendant and the notice party submit that it was a deliberate legislative choice by parliament not to grant an automatic suspension when a contract is awarded under DPS and therefore the plaintiff's application for an interim injunction subverts the statutory scheme.

[52] The defendant, however, accepts the court's inherent jurisdiction to grant an interim injunction has not been completely ousted by the PCRs but submits that such relief should only be granted in extraordinary circumstances so as not to undermine the statutory scheme.

[53] I reject the submission that the court lacks jurisdiction to grant interim injunctive relief in DPS cases, in accordance with the *American Cyanamid* principles for the following reasons. First, under the statutory scheme provision is made for automatic suspension in some cases. In other cases no such automatic suspension is

granted under the statute, but nowhere in the scheme does it state that the court's power to grant injunctive relief is extinguished in such cases. Given the long-established power of the court to grant interim injunctive relief one would have thought parliament if it intended to remove this power would have done so expressly. Although Parliament decided not to grant automatic suspension in case of DPS nowhere does it expressly remove the court's jurisdiction to grant interim interlocutory injunctive relief.

[54] I consider the only possible way in which this statutory scheme could be seen to oust the court's jurisdiction is that by granting statutory suspension the courts no longer have a role in granting the initial injunctive relief. However, the legislative scheme specifically provides that the automatic suspension can be lifted and under Regulation 96 in deciding whether to lift the statutory suspension "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 further Regulation 96(5) states the regulation does not prejudice any other power of the court.

[55] In *Counted4 Community Interest Company v Sunderland CC* [2015] EWHC 898 at para 10 Carr J held:

> "The effect of (Regulation 96) is that the court will determine an application to lift a suspension according to the same American Cyanamid principles that the court applies in determining applications for interim relief. This approach has been confirmed by the court and notably in this jurisdiction on numerous occasions. It is important to note that the exercise is not weighted in some way in favour of maintaining the suspension. The court will lift the suspension unless it would have been appropriate to grant an injunction under American Cyanamid principles."

[56] The effect of the statutory scheme is that when an automatic suspension is in place the contracting authority has to apply to have it lifted. In contrast when no automatic suspension is in place it is for the unsuccessful bidder to apply for injunctive relief. In each case, however, injunctive relief will only be granted or continue if the court considers it appropriate in accordance with the *American Cyanamid* principles.

[57] I therefore consider that the statutory scheme set out in Regulation 96 specifically recognises and preserves the inherent power of the court to grant injunctive relief and in so doing I consider it thereby accepts that the court has power to grant injunctive relief even in cases where there is no automatic statutory suspension. Therefore nowhere within the statutory scheme does it explicitly or implicitly oust the court's jurisdiction to grant such relief.

[58] Thirdly, the only difference which arises between cases where an automatic stay is imposed and those where no automatic suspension applies is that in the latter situation a contract can be entered into. I consider that parliament in enacting the statutory scheme must be taken to have known that the courts on deciding whether to grant interim injunctive relief apply *American Cyanamid* principles and in accordance with these principles the fact a contract is in place is not per se a bar to injunctive relief although it is clearly a matter the court will give weight to when considering the balance of convenience. Accordingly, parliament cannot be taken to have intended to oust the court's jurisdiction to grant interim injunctive relief just because contracts can be entered into because no automatic suspension applies.

[59] Fourthly, although the scheme under Regulation 98 restricts the remedies that the court can impose when the contract has been entered into this regulation applies only to final and not interim orders. At the final stage the court can only grant a declaration of ineffectiveness which in accordance with Regulation 101(1) is prospective and not retrospective together with an award of damages. The court is denied the ability to make an order for any other remedy. Regulation 98, however, has nothing to say about interim injunctions.

[60] Fifthly, when enacting the scheme parliament was required to give an unsuccessful bidder an effective remedy and accordingly, I consider it must therefore have preserved the court's power to grant interim injunctive relief in all cases where a party would otherwise be left without an effective remedy. This is another way of stating that the courts power to grant injunctive relief remains in cases where it is just and convenient to do so.

[61] Mr Banner KC on behalf of the defendant submitted that the court if it had jurisdiction should only exercise it in exceptional cases and therefore by implication was stating the court should apply a different test to the usual *American Cyanamid* test.

[62] I do not accept this submission. When deciding whether to grant interim injunctive relief the court applies the *American Cyanamid* principles. These require the court to take into account the specific facts of each case. Therefore, in a DPS case the court will, when considering the balance of convenience, take into the account the fact the contract has been concluded and will take into account all the consequences which flow from this fact. Further in assessing whether it is just to leave the plaintiff with its award of damages the court will take into account all the facts to ensure that the unsuccessful bidder has an effective remedy. This means the court will take into consideration the final remedies available to it under the statutory scheme and consider whether these are adequate in all the circumstances of the case. In considering all the other circumstances of the case the court will have regard to the fact the plaintiff did not have an opportunity of review before the contract was concluded and will in the balance of convenience consider whether it was just for no standstill period to be voluntarily put in place having regard to the

fact it was a DPS, the clarification given, the reasons given by the defendant for having no standstill period, and whether the absence of a standstill was justified having regard to the size and nature of the contract and determining whether the usual reason for having no standstill in DPS (applied efficiency gains) applied in this case and whether there was a need for expedition. Further the court will take into account any delay and or acquiescence.

[63] Accordingly, I consider that the jurisdiction of the court is not curtailed in any way by the statutory scheme and that it should continue to apply the usual *American Cyanamid* test when asked to grant interim injunctive relief as this is a flexible test and one which has regard to all the specific facts of each case. It is therefore eminently suitable to ensure that the court will only grant relief when it is just and convenient to do so.

Application of the American Cyanamid principles

[64] Turning then to the *American Cyanamid* principles the first question to be considered is whether there is a serious issue to be tried.

[65] It has been conceded for the purposes of this application that there is a serious issue to be tried. I consider this is a sensible concession as this is an interlocutory application and the court would find it difficult to form a final view of contested issues on the basis of affidavit evidence and it would be wrong to turn this into a trial or quasi-trial of the issues which will ultimately be determined at trial.

Are damages an adequate remedy for the plaintiff?

[66] The second question the court has to answer is whether damages are an adequate remedy for the plaintiff. Coulson J summarised the relevant authorities dealing with the adequacy of damages in the procurement context in *Covanta Energy Ltd v Merseyside Waste Disposal Authority 2* [2013] EWHC 2922 at para 48 as follows:

> "Accordingly, I would summarise the relevant principle concerning the adequacy of damages as follows:
>
> (a) If the 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 court must assess whether it is just, in all the circumstances, that the claimant be confined to his remedy of damages.

(c) If damages are difficult to assess, or if they involve a speculative ascertainment the value of the loss of a chance, then that may not be sufficient to prevent an interim injunction.

(d) In procurement cases, the availability of a remedy of review, before the contact was entered into, is not relevant to the issue of the adequacy of damages, although it is relevant to the balance of convenience.

(e) There are a number of procurement cases in which the difficulty of assessing damages based on the loss of a chance in the speculative or discounted nature of the ascertainment has been a factor which the court has taken into account in concluding that damages would not be an adequate remedy… There are also cases where on the facts, damages have been held to be an adequate remedy and the injunction therefore refused."

[67] Mr Ross on behalf of the plaintiff in his various affidavits sets out the losses he avers the plaintiff will sustain between now and the date of the expedited hearing if an injunction is not granted and he submits that these losses are not compensatable in damages. Turing to each head of loss in turn.

(i) TUPE disruption

[68] He avers that approximately 40 employees would become eligible for transfer under TUPE to the new service provider. If the court later finds the contract was incorrectly awarded, then these same employees would have to transfer back to the plaintiff, and this would cause disruption to their lives and stress. Following completion of TUPE, the plaintiff would then have to undertake a restructuring process which would involve redundancy, and this would adversely impact on staff morale and cause them to feel insecure and anxious.

[69] There is a dispute about whether TUPE will apply in the current situation and the parties disagree about whether the new contract is a continuation of the old contract. Without determining this dispute and on the basis that TUPE does apply I do not consider that the stress and inconvenience suffered by the plaintiff's employees is a loss to the plaintiff. Even if employees could, which is doubtful, bring a claim against the plaintiff, the remedy would sound in damages and therefore damages would constitute an adequate remedy.

[70] In relation to the claim that refusal to put in place an injunction will lead to reorganisation of the plaintiff company and possible redundancies, I consider this amounts to a bald assertion as no evidence has been provided to the court in respect of this matter. No time frame for such a reorganisation has been set out and there is no evidence about when or whether employees have been given notice of redundancy. This claim is all expressed in a rather vague and generic manner. If the plaintiff wanted to rely on this ground much more detailed evidence would have been needed. Further, I consider like Fraser J in *Lancashire Care NHS Foundation Trust v Lancashire CC* [2018] EWHC 20 at para 39, that a reorganisation involving redundancies is an inevitable consequence for any incumbent bidder who loses the bid. Given that this is a hazard inherent in this type of business and in the circumstances of this case where it appears the loss of this contract would impact on 40 out of 286 employees, I consider that this is a factor which does not "have any significant impact when assessing the adequacy of damages as a remedy" – see *Milie Ltd v Secretary of State for Justice* [2020] EWHC 63 at para 59.

(ii) Loss of critical staff

[71] In his averments Mr Ross states that if the injunction is not granted there is a high likelihood the plaintiff will lose critical staff, and in the event it ultimately succeeds at trial these staff will not return and the plaintiff will have difficulty in recruiting staff with the requisite skills and knowledge, due to widespread skill shortage and the plaintiff could therefore be left with a diminished team to run the contract.

[72] I consider the evidence in support of this ground lacks detail. Mr Ross does not define why the staff are critical and he does not state how many critical staff may leave. It also appears that they are considered to be critical due to their knowledge and skills. In his affidavit, however, Mr Ross accepts that these skills and knowledge have been acquired by them since joining the plaintiff company. I therefore consider the staff's knowledge and skills are not so unique that they could not be replicated by hiring new staff and training them up. Further, I consider that other employees could be deployed from within the plaintiff company to this contract until new staff are recruited and trained to administer the contract.

[73] Mr Ross refers to the difficulty in recruiting staff as there is full employment in Northern Ireland and notes the particular shortage in the Northwest. Again, I consider there appears to be no reason why employees cannot be recruited from elsewhere including the Republic of Ireland or the mainland or indeed further afield.

[74] In addition it is unclear from his affidavit evidence why staff would fail to return to work for the plaintiff in the event that the plaintiff was ultimately awarded the contract. To rely on this point, I consider much more detailed and cogent evidence was required. In addition, I do not consider that this factor is of significant weight when assessing adequacy of damages as staff can leave for many reasons including offers of alternative employment, health, retirement, etc. Even if it were

shown that valuable or critical employees would be lost this is as Edwards-Stuart J noted in *Milie Ltd v Secretary of State for Justice* [2020] EWHC 63 at para 57:

> "A hazard that is inherent in this type of business…" as "from time to time valuable employees will be lost when the employer fails to win a new contract or … the renewal of an existing contract."

(iii) Feedstock agreement

[75] The plaintiff avers that its formal and informal feedstock agreements will be impacted if the Belfast City Council contract tonnage is withdrawn until the date of trial. In particular the plaintiff avers that it will be unable to supply a customer with the fuel during this period and this customer will then look to replace the tonnage with another supplier and thereafter the plaintiff will struggle to regain the supply arrangement should it ultimately regain the Belfast City Council contract.

[76] I consider the loss of such a customer is a purely financial loss which can be compensated in damages. If there is an argument that damages are difficult to calculate because the plaintiff would lose such a customer going into the future and would not be able to find alternative customers, I do not consider that such a claim has been properly evidenced on the papers.

[77] In relation to the formal feedstock arrangement the plaintiff avers that under this agreement if it fails to meet its quota it could be liable for penalties under the contract of up to £9 million together with liquidated damages of £40,000 per day.

[78] Mr Ross says that there is "a significant likelihood that the plaintiff will not be able to provide X with its required feedstock requirement should the service cease at the end of June."

[79] The customer has been put on notice and discussions are ongoing. Given the remedies available to the customer and the catastrophic impact it would have on the plaintiff Mr Ross avers that should the Belfast City Council contact transfer on 1 July 2023 "there is a high likelihood that the plaintiff would be exposed to material claims long before the court hearing in October."

[80] If a party wishes to submit that catastrophic consequences will flow from failure to grant an injunction there is a burden on it to provide cogent and convincing evidence to support such a claim. I consider that such evidence is singularly lacking in respect of the plaintiff's claim that catastrophic consequences will flow from the loss of the Belfast City Council contract due to the loss of this formal contractual arrangement and at best it is a speculative claim entirely unsupported by any concrete evidence.

[81] The potential loss to the plaintiff points to and depends on a number of contingencies. First, it must fail to meet the quota under the contract. There is no evidence about what the quota is and therefore it has not been established that the plaintiff could not meet the quota from waste it currently receives from other existing contracts or by procuring additional tonnage from other waste producers. Mr Ross gives no evidence about this and simply without giving reason states that the plaintiff would "struggle" to replace the tonnage lost. I consider that if he had wanted to make this claim good it would have been necessary for him to refer to the state of the market and the amount of waste producers and the ability of the plaintiff to attract additional tonnage.

[82] Secondly, the penalties under the contract with the supplier only arise if the conditions upon which they are based are met and the customer decides to enforce them. The court has not had sight of the contract and is therefore unaware if there are any conditions or time limits placed upon the exercise of the penalties referred to by Mr Ross. Further no details have been given about the customer involved or its relationship with the plaintiff. Consequently, the court cannot make an informed decision about the likelihood of it enforcing the penalties. This must however be considered in circumstances where Mr Ross is a director of both companies and in such circumstances the court considers that the likelihood of enforcement by the customer must be diminished as there is clearly an interest in the mutual success of the plaintiff and this customer.

[83] For all these reasons, I consider that this claim is at best speculative as it is not supported by any concrete evidence.

[84] I will, however, later consider the scenario that if the plaintiff is correct and it is subjected to these penalties what impact this financial loss may have on the plaintiff's continued viability when I consider its cumulative losses.

(iv) Transport

[85] Mr Ross avers that the Belfast City Council tonnages provide it with a complete transport route as it collects waste from Belfast City Council and transports it to its Craigmore facility. The suspension of one of these legs will have a significant "financial impact on the business."

[86] Mr Ross does not define what the loss will be in real or in percentage terms. In the absence of it affecting the plaintiff's viability which is a matter I now turn to such a loss is clearly of a pure financial nature and therefore compensatable in damages.

(v) Cumulative losses

[87] Mr Ross submits that the cumulative impact of the losses set out above together with the reduction in turnover could force a covenant breach for the

plaintiff under its loan facility agreement and lead to an insolvency situation. In response Ms Boal on behalf of the defendant refers to recent inward investment recently received by the plaintiff and states "given the size of these investors it does not seem credible that they would simply let the plaintiff default on the terms of its facility agreement… or stand by and allow it to enter into an insolvency process."

[88] In response Mr Ross avers that these investors could write off their initial investment and let the plaintiff move into insolvency and might do so as responsible business people if they see their investment has turned manifestly bad due to unforeseen events. If the plaintiff's contract is withdrawn and no injunction is granted, he avers that the investors would have to look at a potential investment of £19 million before the court even gets to consider the case and that the investors may not be prepared to make such an investment in circumstances where there was no possibility to review the granting of an award before it was granted.

[89] In *J Lyons and Son v Wilkins* (1896) 1 Chancery 811 Kay LJ stated at page 827:

> "In all these cases of interlocutory injunctions where a man's trade is affected one sees the enormous importance that there may be an interfering at once before the action can be brought on for trial; because during the interval, which may be long or short according to the state of business in the courts, a man's trade might be absolutely destroyed or ruined by a course of proceedings which, when the action comes to be tried, may be determined to be utterly illegal, and yet nothing can compensate the man for the utter loss of his business by what has been done in that interval."

[90] It is correct in principle that if the grant or refusal of an interim injunction would put a party out of business it is likely that damages would not compensate adequately for that loss. However, it is necessary to consider the factual context of each case to see if that principle applies. As Professor Arrowsmith said at para 22.139:

> "The courts are cautious about accepting arguments that the loss of a contract will result in catastrophic failure."

Further, Horner J in *Eircom UK v Department of Finance* [2020] NIJB 355 stressed that if a claim is made that the loss of the contract will result in catastrophic failure, then this needs to be supported by convincing and cogent evidence.

[91] On the basis of the evidence in this case I do not consider that the evidence establishes that if an injunction were not granted the plaintiff's business would be utterly destroyed.

[92] I do so for the following reasons:

(a) It is speculation on the part of the plaintiff that the bank would call in the loan. I do not consider that the plaintiff has provided any evidence that such a scenario is likely to arise before the trial date. This is because the plaintiff's accounts show it is very solvent now.

(b) Secondly, there is no evidence the feedstock customer would impose penalties available to him under the contract immediately and even if it did, I consider it unlikely that the bank would immediately call in the loan when the trial is to take place within a few months.

(c) Thirdly, there is no evidence the plaintiff could not continue to service the loan from other work it undertakes as there is no evidence about what percentage of the plaintiff's turnover or profits this Belfast City Council contract accounts for.

(d) Fourthly, the plaintiff may be able to negotiate or renegotiate with the bank or obtain credit from another bank or creditor if it could not service the loan.

(e) Fifthly, the plaintiff has recently had the benefit of investment by two large firms and I consider it unlikely that they would allow their investments to be wiped out in circumstances where under due diligence they must have known when they were investing that this contract was out to tender and there was a risk the plaintiff would be unsuccessful as that is an inherent risk in all businesses that a company will not win every contract it tenders for. I consider that these are factors the investors will have taken into account before investing and, accordingly, I consider this points to the situation where it is unlikely that the plaintiff would be allowed to go into liquidation due to the loss of this contract.

I therefore do not consider it is likely in all the circumstances that the bank will call in the loan facility. Accordingly, I am not persuaded by Mr Ross' prediction of doom for the plaintiff company.

(vi) Strategy plan

[93] The plaintiff also asserts that it will have difficulty in attracting investment to enable it to go forward with its projects. These projects rely on the contract tonnage provided by Belfast City Council and in turn so does the value of the company. The investments that have already been made were made on the basis that there would be a reasonable opportunity to challenge award decisions before contracts were formed. Failure to grant an injunction would therefore risk bringing about a loss of confidence and in turn risks investment.

[94] I find this scenario ignores the fact that all investors must be aware that under the statutory scheme when a DPS is used there is no standstill period and therefore contracts can be awarded without notification to the unsuccessful bidder. Further on the facts of this case the clarification document made clear that there would be no voluntary standstill period and I have no doubt that investors are aware that these are matters that have to be factored into their decision to invest. I therefore do not accept the plaintiff has sustained incompensatable loss in respect of the loss of confidence they allege in respect of future investors, arising out of the loss of this contract and the manner in which the contract was awarded.

(vii) Reputational damage

[95] When referring to the loss of the feedstock agreement Mr Ross avers that there is a potential for significant loss of reputation to the plaintiff as a reliable supplier and if the injunction is not granted, he submits this loss is one which cannot be compensated in damages.

[96] In *Openview Security Solutions Ltd v The London Borough of Merton Council* [2015] EWHC 2694 Stuart-Smith J said at para [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 with the normal principles in 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."

[97] 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 likely 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 parties supporting the continuance of the automatic suspension, the standard of proof is that there is (at least) a real prospect of loss that would retrospectively be identifiable as being attributed 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 a future provider of profitable work."

[98] As Horner LJ noted in *Lagan Construction Ltd t/a Charles Brand v NI Water Ltd* [2020] NIQB 61 a company taking part in the tendering process never has an absolute guarantee it will be awarded the contract but must always keep in mind the possibility the contract could be awarded to another tenderer. In 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.

[99] In this case the plaintiff knew its contract with Belfast City Council was of a rolling nature and I therefore consider the plaintiff would or should have made its customers aware of this and of the fact that the new contract was to go live in the very near future and in circumstances where they may not be successful that they would not be in a position to supply their suppliers beyond that date. Accordingly, I consider any reputational loss which may flow from not being able to deliver the tonnage to these customers flows from the plaintiff's own conduct in entering into binding arrangements with them when they knew that the contract could end in a number of months and that thereafter they would not be in a position to meet their contractual obligations. Further in the absence of evidence showing that the plaintiff would be unable to meet their contractual obligations either by diverting the waste that they presently collect from other suppliers to these contracts or by obtaining new suppliers of waste, the court is not left with a reasonable degree of confidence that a failure to impose interim relief will lead to financial losses that would be significant and not recoverable in damages.

[100] Given that the plaintiff has never suggested it would be difficult to quantify its losses at trial and given that the role of the court at that stage is to assess retrospective loss I agree with the defendant's stated position that damages are not difficult to quantify in this case. I therefore consider in all the circumstances that

damages would constitute an adequate remedy for any losses the plaintiff may sustain in this case.

[101] Part of the question however whether damages are an adequate remedy for the plaintiff is whether Arc 21 would be able to meet any award the court may ultimately make.

[102] To determine this question it is necessary in the first place to consider the statutory provisions.

Statutory provisions governing Arc 21

[103] Section 9 of the Local Government Act (Northern Ireland) 2014 provides:

> "two or more councils may discharge any of their functions jointly and in accordance with section 9(2) the councils may also arrange for the discharge of those functions by a joint committee of the councils."

In accordance with section 14(2) when councils appoint a joint committee the Department upon application of the councils may by order make provision for the purpose of constituting the joint committee a body corporate by the name specified in the order and it may fix the functions of the body corporate so constituted.

[104] Under section 16 every member of a committee appointed under the Act who at the time of the appointment was a member of the appointing council or one of the appointing councils upon ceasing to be a member of that council also ceases to be a member of the committee.

[105] Section 14 further provides that:

> "The councils which appoint a joint committee must pay its expenses:
>
> (a) in such proportion as they may agree upon;
>
> (b) if they fail to agree, as may be determined by the department."

[106] As appears from the affidavit evidence Arc 21 is a joint committee of six councils and is constituted as a body corporate. Given the recent local government elections any members who are no longer members of one of the appointing councils, cease to be members of the joint committee and in due course according to Ms Boal new members now need to be appointed.

[107] Mr Banner submitted that although Ms Boal, an employee of Arc 21, has averred Arc 21 is not in a position to offer an undertaking in damages to the plaintiff because it is a public body with limited resources and could only do so if there was due diligence and governance approval, this does not mean it is not a good mark for damages in the event the court makes an award in favour of the plaintiff. He submits that under section 14 of the Local Government Act the councils which have appointed the joint committee, now constituted as a body corporate known as Arc 21, must pay its expenses and expenses include legal costs including any award a court might make. He further submits that such a liability flows from the fact the joint committee is discharging a function of the councils and accordingly the councils must indemnify them in respect of liabilities which arise from the discharge of such a function.

[108] Under the Act, the councils agree the proportion of costs or in default of agreement the Department determines this and thereafter the judgment will ultimately be paid by Arc 21 to the plaintiff and that is why Ms Boal expresses such confidence as to payment of an award in her second affidavit.

[109] In her second affidavit Ms Boal also refers to the Terms of Agreement between the various councils. Under this Agreement the participating councils delegate certain functions to the joint committee. Under Clause 4, when the joint committee is involved in the acquisition of assets or incurring of liabilities there is a threshold of £250,000 over which unanimous agreement is required of the joint committee and the participant councils. Clause 5 then provides for the costs of establishing and operating the joint committee.

[110] There was a wealth of affidavit evidence, correspondence and submissions on the meaning to be attached to the various clauses in the Terms of Agreement and this led to delay in the court's ability to deliver a ruling on the application.

[111] Having considered the terms of agreement I am satisfied that it sets out the functions which have been delegated to the joint committee. It further sets out the arrangements agreed by the participating councils for payment of the costs of establishing and operating the joint committee. At clause 4 it sets a threshold for the liabilities the joint committee can incur in relation to the acquisition of assets without unanimous agreement of the joint committee and participating councils, but I consider it is entirely silent in relation to the question whether the participating councils are liable to pay legal costs and or an award of damages made by a court against Arc 21 arising out of the exercise of functions delegated to Arc 21 by the participating councils.

[112] Nonetheless I am satisfied that if the court made an order for costs and damages against Arc 21, it would be able to satisfy that judgment. I do so for the following reasons. Under clause 3.1.3 of the Terms of Agreement the functions of the joint committee are fixed by reference to the Terms of Agreement including the Statements of Principles. One of the Statements of Principles is the Principle of

Functional Responsibility. It states that "the joint committee shall obtain the approval of participant councils to the specification and award criteria… invite tenders for and award contracts…" By inviting tenders for and awarding contracts Arc 21 is thereby discharging a function of the participating councils. Under section 14 of the Local Government Act the participating councils are liable to pay the "expenses" of the joint committee. Although the word expenses is not defined in section 14 I consider it must extend to cover all liabilities flowing from the discharge of a function delegated to the joint committee by the participating councils. This would include not only expenses incurred by reason of the operation of the joint committee but also legal costs and a court award for damages as these liabilities flow from the discharge of a function delegated by the councils. Any alternative interpretation of section 14 would mean a participating council could avoid meeting a court judgment arising from an incorrect procurement process just because the participating councils appointed a joint committee to discharge that function on their behalf. I do not consider this was the intention of Parliament. Rather I find Parliament when it said the participating councils had a duty to pay the joint committees' "expenses" the word "expenses" was intended to be interpreted widely to include not just operational costs but also liabilities incurred arising from the discharge of functions delegated to the joint committee. An award of damages by the court arising out of an incorrect procurement process I consider is one such liability for which the participating councils are responsible, and they must therefore indemnify Arc 21 in respect thereof. Section 14 sets out the councils are to agree the proportions of expenses each is to pay or in default as determined by the Department. Accordingly, although it may take a little time, I consider Arc 21 will be in a position to satisfy any judgment of the court.

[113] Mr Coghlin KC submitted that Arc 21 did not have the prior authorisation of the councils to run the procurement competition in the manner in which it ran it namely without a standstill period. Accordingly, Arc 21 did not have authorisation to incur the liabilities which flowed from that decision which includes an award of damages and legal costs. This is because under the Terms of Agreement at clause 4.2 there is a threshold of £250,000 in respect of incurring liabilities without the unanimous agreement of the joint committee members and the approval of all the participant councils. He submits that no such approval has been acquired or could have been acquired as the new committee has not yet been established due to the recent local government elections and therefore Arc 21 has acted without authority and accordingly the participating councils could refuse to indemnify it regarding any court award made.

[114] I reject this submission. Under the Terms of Agreement certain functions were delegated to the joint committee. In particular it was given authority to "invite tender for and award contracts." Unlike the "specification and award criteria" where the joint committee had to "obtain the approval of the participant councils" there was no such limitation on its power to invite for and award contracts. Arc 21 was therefore given a delegated function to invite tenders for and to award contracts and this is what it did in this case. I therefore consider that in awarding the contract

it did not need prior approval. This core function was already delegated to it under the Terms of the Agreement and this authority predated the local council elections. Accordingly as Arc 21 did not need prior authority to award contracts it similarly did not need prior authority to potentially incur losses flowing from the exercise of this function namely potential court award for damages and legal costs.

[115] Accordingly, I consider Arc 21 is a mark for any award of damages the court may ultimately make in the favour of the plaintiff.

Is it "just" in all the circumstances that the plaintiff is confined to its remedy in damages?

[116] Under the traditional formulation of *American Cyanamid,* the court sequentially asked and answered a number of questions and if it determined that damages were an adequate remedy for the plaintiff it refused injunctive relief and did not proceed to answer the remaining questions. It is questionable whether such an approach was a correct interpretation of *American Cyanamid* as it did not set out watertight compartments to determine whether injunctive relief should be granted. More significantly in following such a rigid approach the court was arguably fettering its discretion to grant injunctive relief when it was "just and convenient" to do so.

[117] In more recent times the courts have added an additional element to the traditional question whether damages are an adequate remedy namely whether it is just in all the circumstances to confine the plaintiff to its remedy in damages. To determine this question, I consider the court must take into account all the circumstances of the case and determine which course of action is likely to carry the least risk of injustice to either party if it is ultimately established to be wrong. In other words, the court must determine where the balance of convenience lies. Accordingly, I consider that even where damages are an adequate remedy for the plaintiff the court must nonetheless go on to consider the balance of convenience to determine whether it should or should not grant injunctive relief.

The Balance of Convenience

[118] In deciding where the balance lies it is necessary to consider the impact on the plaintiff and the public if an injunction is not granted and the plaintiff is successful at trial. This is then to be balanced against the impact on the defendant and the public and other third parties if an injunction is granted and the plaintiff is not successful at a subsequent trial. As stated in *American Cyanamid* it would be unwise to attempt even to list all the various factors which may need to be taken into consideration in deciding where the balance lies, let alone suggest the relative weight to be attached to them. These will vary from case to case.

[119] One factor the court must take into account in the balance of convenience is the extent to which the disadvantages to each party are not capable of being

compensated in damages in the event of it succeeding at trial. This is always a significant factor in assessing where the balance of convenience lies.

Adequacy of damages for the plaintiff

[120] I have already found damages are an adequate remedy for the plaintiff. This is obviously a weighty factor to be taken into account in the balancing exercise. Any doubts about the defendant being a mark for damages however will also need to be weighed in the balance. For the reasons I have fully set out I consider that the defendant is liable to pay and if they are not a mark for damages, I consider the Department in those circumstances would likely step in to provide a solution given the importance of ensuring the entire scheme for procurement by local authorities

[121] Mr Coghlin submitted that it would not be just in all the circumstances to confine the plaintiff to its remedy in damages as damages are not an effective remedy in all the circumstances. As a DPS was used the plaintiff had no remedy before review of the decision to award the contract. The plaintiff did not know and could not stop the contract being entered into and therefore is now left in a position where it cannot unwind the consequences of the contract being entered into and, in particular, the creation of binding legal relationships. As the contract has already been entered into, under Regulation 98 the Court can only order a declaration of ineffectiveness which is prospective in nature together with damages for retrospective losses. In contrast under Regulation 97 where the contract is not entered into the court can set aside the award decision. Consequently, even if the plaintiff can show this contract should not have been awarded it will have to participate in a new competition. Mr Coghlin submits that under the Remedies Directive the plaintiff is entitled to an effective remedy and failure to grant injunctive relief would leave the plaintiff without effective relief as it would make irreversible the consequences of disputed award decisions as the parties proceed quickly to enter into binding arrangements.

[122] Secondly, the plaintiff submits that having regard to the size of this particular contract (which on its evidence is worth in excess of £50M) and its nature (which contains bespoke features as it is unique for each of the participating councils) the use of a DPS was a misuse of its powers.

[123] Thirdly, the plaintiff submits that, notwithstanding the use of a DPS it had a reasonable expectation that there would be a voluntary standstill period. There is guidance that a voluntary standstill period should be observed even when a DPS is used where the contract is large. In this case the plaintiff submits the defendant has given no good reasons why a voluntary standstill period has not been observed as Ms Boal only referred to the wish to award the contract as quickly as possible. He further submits that the rationale for not having a standstill period does not apply in this case. As Arrowsmith observes at para 13.56 a standstill period does not operate within a DPS as it is "excessively burdensome to require standstill for numerous small contracts" Mr Coghlin submits such efficiency gains do not apply in the

present context as the award is for upwards of seven years and is worth in excess of £50M. Accordingly, Mr Coghlin submits that prima facie the power has been misused to prevent the plaintiff having an opportunity of review before the award of the contract.

[124] The plaintiff submits that all these factors mean there was a lack of a remedy of review before the contract was entered. Mr Coghlin submits that the lack of remedy of review means damages are not an effective remedy and further submits that the lack of review before contract is a factor which should weigh heavily in the balance of convenience.

[125] I accept, as Coulson J noted in *Covanta* at paragraph [48] (d);

> "In procurement cases, the availability of a remedy of review, before the contact was entered into, is not relevant to the issue of the adequacy of damages, although it is relevant to the balance of convenience."

I consider however that the availability of a remedy before review and all the factors set out by Mr Coghlin must be viewed within the factual context. The plaintiff accepted that this contract would be awarded under a DPS scheme. The plaintiff did not challenge the appropriateness of the scheme even though it could have done so by way of judicial review proceedings. Further, the plaintiff at all times participated in the DPS scheme. Therefore, I do not consider the plaintiff can now challenge the use of the DPS as a misuse of power by the defendant.

[126] Secondly, I consider the plaintiff had a reasonable expectation the defendant would grant a voluntary standstill period. Notwithstanding the fact it had used a DPS and notwithstanding the fact there were some efficiency gains in not observing a standstill period given there were numerous contracts to be awarded under the DPS; nonetheless I consider in light of the size and nature of this contract the plaintiff had a reasonable expectation the defendant would observe a voluntary standstill period. This view is further supported by the fact Regen sought clarification on this basis. I am satisfied however that the plaintiff had no right to retain such an expectation beyond the date when they became aware of the clarification given by the defendant to Regen that it was not going to provide a voluntary standstill period. The plaintiff failed to take any action at that stage, and I therefore consider its failure to do so amounts to acquiescence in the state of affairs that no standstill period would operate. No doubt such a course was adopted as it was content in the circumstances that if it were successful in the tender, it would be able to enter into a binding contract without any voluntary standstill period operating.

[127] Thirdly, I consider the remedies set out in Regulation 98 are effective remedies. The Remedies Directive requires that the parties have an effective remedy but it specifically allowed a derogation from the need to put in place a statutory

suspension in respect of DPSs. Accordingly, I find there is no breach of the Remedies Directive as under Regulation 98 the plaintiff can obtain damages for retrospective losses and a declaration of ineffectiveness which is prospective. Accordingly, I am satisfied that failure to grant an injunction does not cause damage which cannot be compensated.

[128] In a different factual scenario the lack of remedy before review may weigh more heavily in the balance. Each case, however, turns on its own unique facts. On the basis of the facts of this case I consider the defendant was entitled to act as it did in using a DPS and in not observing a voluntary standstill period and I find that notwithstanding the lack of remedy before review that it is just to confine the plaintiff to its remedy in damages.

Adequacy of damages for the defendant

[129] In assessing where the balance of convenience lies it is also necessary to take into account whether the losses the defendant would sustain if an injunction is granted and the plaintiff is not successful at trial can be compensated in damages. The defendant submits that notwithstanding the undertakings given by the plaintiff it would not be adequately compensated in damages. It submits that if the injunction is granted this will lead to more waste ending up in landfill with damaging environmental impacts. This is because under the current contract 3,000 tonnes per month goes directly to landfill sites and therefore over a six month period of delay to date of trial there will be 18,000 more tonnes of waste in landfill. In contrast if the new contract were to commence Regen would collect all the waste and manage it. The defendant further states that if the new contract is not implemented there is a risk that Biffa may not have capacity to continue to take the tonnes of waste that Belfast City Council at present sends directly to landfill. Ms Boal in her affidavit states that Biffa has been contacted about this and they have not yet replied.

[130] The plaintiff disputes that Biffa does not have the capacity to take the waste and submits that it has sufficient landfill capacity to continue with the current contract. Further, the plaintiff submits that under the current contract it can be asked to and it is able to collect all of Belfast City Council's waste. Mr Ross avers in his affidavit that Belfast City Council has during the Covid period, for example, asked it to deal with larger percentages of its waste. Secondly, Mr Ross avers that when regard is had to the past performance of the plaintiff in treating the waste that was provided to it by Belfast City Council that it achieved at least the minimum standards of recycling and diversion from landfill which are required under the new contract.

[131] On the basis of the evidence produced to the court including the minimum requirements set out in the new contract and table 3.3 in that documentation which shows the plaintiff's past performance in respect of recycling and diversion of waste from landfill I am satisfied that the plaintiff could and does dispose of the Belfast

City Council waste in a way which would be as environmentally friendly as that required under the new contract.

[132] Further, I accept the evidence of Mr Ross, who has more intimate knowledge of the working of the contract than the deponent on behalf of the defendant, that the plaintiff can under the current contract be asked for and does have capacity to take all of Belfast City Council's waste and therefore can deal with all of the waste without a new procurement process being put in place in the event that Biffa does not have capacity to take the 3,000 tonnes of waste per month which is currently sent to it.

[133] If I am wrong about this, I am satisfied that Biffa could continue to take the 3,000 tonnes of waste per month under the current arrangements. It has not said it is unable to take such waste and I consider that it is likely to give a positive response to Belfast City Council given its substantial landfill capacity.

[134] Accordingly, I am satisfied that Art 21 would not suffer and, in particular, the public would not suffer any environmental loss which cannot be compensated in damages. Any financial loss I also consider can be met by the plaintiff's undertaking having regard to the accounts which have been filed.

The public interest

[135] In this case I consider the public interest is a neutral factor. There is clearly a public interest that public contracts are lawfully awarded but given each party challenges its lawfulness and this can only be resolved at trial this does not assist in determining where the balance of convenience lies.

[136] Secondly, there is a public interest in services being continued without interruption and in a way which complies with environmental law. For the reasons already set out I consider the grant of the injunction or the refusal of the grant of the injunction does not affect the continuation of the service. I consider that the plaintiff is in a position to provide the service to the public and can provide that service in a way which complies with current environmental law. I am satisfied that either the plaintiff or Regen can collect and manage all of Belfast City Council's waste and that this waste can then be processed in a way which complies with the minimum requirements for landfill diversion and recyclates set out in the new contract.

Impact on Successful Bidder

[137] Although Regen has made an application to be joined as a party, at this stage Regen is only a notice party. Nonetheless, I consider their interests must be taken into account in the balance of convenience as the grant of an injunction would have implications for them. This principle has been accepted in *Alstom Transport (UK) Ltd v Network Rail Infrastructure Ltd* [2019] EWHC 3585 when the court said at para [51] when determining where the balance of convenience lies:

> "The court should consider the interest of the successful bidder."

This view has been indorsed by Horner J in *TES Group Ltd v Northern Ireland Water* [2020] NIJB 62 at para 52:

> "There are the interests of the other parties who successfully tendered for lot 2 to be taken into account. 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 Tess. It is not suggested that they have done anything untoward."

[138] Mr Murphy on behalf of Regen avers that it will suffer loss in the following way:

(i) There will be a real risk the new contract will be frustrated as Regen will be unable to renegotiate with its off-takers and even if this were possible it would have to agree different commercial terms that would change the basis on which it submitted its original bid.

(ii) It would be placed in a position where it would be in breach of binding contractual agreements that it has entered into in reliance on the new contract namely off-takers to whom Regen will supply waste which they will use to create energy.

(iii) Regen would be liable for losses sustained by its off-takers by reason of its breach of contractual obligations and would be liable to be sued by them.

(iv) It will affect its reputation and the damage caused will impact on its ability to compete in future off take contracts.

(v) It has incurred extensive expenditure to date in reliance on the contract that it has signed with Arc 21.

(vi) If the injunction is granted it will have to make staff redundant.

(vii) The plaintiff has refused to give an adequate cross undertaking in damages.

(viii) Other third parties in the supply chain will have entered into other binding agreements which will then be breached.

[139] Whilst there is a real dispute about whether the new contract would in fact be frustrated given the high demand for waste in Scandinavian countries; and there is also a dispute about the fact that some of Regen's losses could be recouped and/or represent investment in infrastructure; and there is a live dispute about whether some of its losses could be compensated in damages and a dispute about whether it would suffer reputational loss in circumstances where its failure to supply was as a result of court order, I nonetheless am satisfied that the grant of an injunction in this case would cause irredeemable damage to the notice party as I consider the losses it would sustain are not compensatable in damages.

[140] Firstly, the grant of an injunction would lead to a breach of a binding contract which has already been entered into by Regen and the defendant. Further, the grant of an injunction would lead to further breaches of binding contractual relations entered into between Regen and its off-takers. This would most likely lead to Regen being sued and this may adversely impact on its ability to enter into future relations with these parties. Further, other parties in the supply chain would also be put in a position where they would have to break contractual relationships they had entered into with other third parties.

[141] Secondly, Regen would be denied the opportunity to earn profits due to this action in circumstances where they have done nothing wrong and where the use of the DPS was not unlawful and every party was aware that there was no standstill period, and a contract would be entered into once the award was made to the successful bidder.

[142] Thirdly, Regen have sustained some losses which can be compensated in damages, but the plaintiff has refused to give a full undertaking in damages. Whilst there are some cases where, depending on all the facts, such an undertaking would not be required, the fact the plaintiff in this case has refused to give such an undertaking is something which has some weight in the balance as it means that Regen, a non-party to the proceedings at the moment, would be left without a remedy in damages in the event that an injunction was granted, and the plaintiff was ultimately unsuccessful at trial.

[143] I therefore consider that the disadvantages to Regen are significant, and that irredeemable disadvantage would accrue to the successful bidder if an injunction was granted.

[144] Weighing all the factors in the balance I consider that it tips decisively in favour of not granting injunctive relief.

Status Quo

[145] If the factors had been evenly balanced in the balance of convenience, I would have considered that the plaintiff was the incumbent provider in light of the evidence of Mr Ross about the nature of the contract the plaintiff had with Belfast

City Council and also because in the tender documentation the plaintiff was described as the incumbent provider. I would also have considered that the application of the status quo would have led to the grant of an injunction on the basis that I prefer the meaning of status quo applied by Sir Declan Morgan in *World Wide Environmental Products v Driver and Vehicle Agency* [2022] NIQB to that adopted in *Camelot* but I do not have to decide these points given the findings I have made about the adequacy of damages; the fact it is just to confine the plaintiff to a remedy in damages and my view that the balance of convenience tips in favour of not granting an injunction.

Conclusion

[146] I therefore dismiss the application. By the consent of the parties, I make an order reserving the costs of this application to the trial Judge.