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Procurement and State Aid
James Goudie QC

INTRODUCTION

1. The most important recent development is of course the outcome of the EU Referendum. Brexit has prevailed as a project. (It especially will have implications for Wales (and Northern Ireland) as net recipients of EU funding.) That is far however from meaning that Brexit applies immediately. On the contrary, under Article 50 of the Lisbon Treaty at least two years' notice is required. EU procurement and State Aid will therefore remain highly relevant for quite some time yet. However, once, in due course, the European Communities Act 1972 is repealed, the statutory instruments made under it, and the EU Treaty, will fall away. The question is what, if anything, will eventually be put in their places (and what will be the effect on devolved powers). Exit from the EU does not mean escape from constraints on the ability of public authorities to provide subsidies at Port Talbot or elsewhere. The EEA/EFTA Agreement (Norway, Iceland and Lichtenstein) and Swiss Agreements contain equivalent provisions on State Aid. Access to the Single Market would no doubt entail compliance with EU State Aid Rules. Moreover, the WTO has provisions prohibiting subsidies. Likewise, there will have to be procurement law which complies with WTO requirements, etc.

2. Other recent developments include that:-

(1) As from 26 January 2016, "contracting authorities" in Wales and England were required to accept the European "Single Procurement Document" from tendering "economic operators" wishing to self-certify that they meet the relevant selection criteria and do not fall within the grounds for mandatory or discretionary exclusion; and

(2) In February 2016, Procurement Policy Note 01/16 was issued, which states:-

> "Public procurement should never be used as a tool to boycott tenders from suppliers based in other countries, except where formal legal sanctions, embargoes and restrictions have been put in place by the UK Government. There are wider national and

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> international consequences from imposing such local level boycotts. They can damage integration and community cohesion within the United Kingdom, hinder Britain's export trade, and harm foreign relations to the detriment of Britain's economic and international security. As highlighted earlier, it can also be unlawful and lead to severe penalties against the contracting authority and the Government."

3. On boycotting tenderers, judgment has been reserved by a Divisional Court (Simon LJ and Flaux J), and is expected imminently, in cases brought by Jewish Homan Rights Watch against Swansea, Gwynedd and Leicester Councils.

4. Other recent developments are that:-

(1) On 5 April 2016 the Welsh Government commenced a Consultation, which closed on 28 June 2016, on plans for the introduction of legislation on public procurement activity undertaken by the Welsh public sector, that is contracting authorities whose functions are wholly or mainly Welsh devolved functions, the areas being considered being (i) Annual Procurement Returns, (ii) Community Benefits, (iii) Reserved Contracts, (iv) Breaking down Barriers, (v) Collaboration, (vi) Social and other specific services, and (vii) Ethical supplier conduct in delivery of public contracts;

(2) On 18 April 2016, there came into effect the Concession Contracts Regulations 2016, S.I. 2016/273 ("the Concession Regulations") and the Utilities Contracts Regulations 2016, S.I. 2016/274; and

(3) On 19 May 2016 the EU Commission published its Notice on the Notion of State Aid.

THE CONCESSION REGULATIONS

5. The Concession Regulations implemented (in Wales, England and Northern Ireland) the 2014 Directive, 2014/23/EU, on concession contracts ("the Concessions Directive"). The Concession Regulations impose obligations on contracting authorities (and utilities) concerning the award of "concession contracts". Contracting authorities include local authorities. "Concession

contracts" embrace both works and services concessions. They are contracts for "pecuniary interest" concluded in writing under which the consideration consists either solely in the "right to exploit" the works/services or in that right together with payment, and that meet a risk requirement. That is that the award of the contract shall involve the transfer to the concessionaire of an "operating risk" and that the risk transferred shall involve "real exposure to the vagaries of the market".

6. There is a high threshold: £4,104,394. However, below the threshold general EU Treaty principles will apply if the low threshold of a cross-border interest is applicable.

7. Parts 1 and 2 of the Concession Regulations set out their scope and principles. Part 3 contains rules on the award of concession contracts. Chapter 1 contains obligations relating to the publication of concession notices and concession award notices (Regulations 31 to 33), the electronic availability of concession documents (Regulation 34) and the prevention of corruption and conflicts of interest (Regulation 35). Chapter 2 of Part 3 contains provisions relating to technical and functional requirements of concession contracts (Regulation 36), the selection and qualitative assessment of candidates (Regulation 38) and award criteria (Regulation 41).

8. Part 4 contains rules on the performance of concession contracts, including provisions relating to subcontracting (Regulation 42), the modification and termination of concession contracts (Regulations 43 and 44) and reporting requirements (Regulation 45). Part 5 contains provisions about remedies.

EXCLUSION OF TENDERERS

9. Boycotting of tenderers is a perilous area, but EU law does enable, and indeed sometimes mandates, the exclusion of tenderers in particular circumstances. For example, EU law allows the exclusion of a tenderer who refuses to pay the minimum wage from the procedure for the award of a public services contract. So ruled the ECJ on 17 November 2015 in Case C-115/14, Regis Post GmbH v Stadt Landau, a case concerned with postal services in the German municipality of Landau.

10. The public sector procurement Directive, 2004/18, did not prevent legislation that required tenderers and their subcontractors to undertake, by means of a written declaration enclosed with their tender, to pay staff called upon to perform the services a predetermined minimum wage.

That obligation constitutes a special condition in principle acceptable under Article 26 of that Directive, since it related to the performance of the contract and concerned social considerations.

11. That special condition was set out in the contract notice and in the specifications. The procedural condition as to transparency was thereby satisfied.

12. The Stadt Landau case no doubt continues to apply under Directive2014/24 and the Public Contracts Regulations 2015, S.I. 2015/102. Moreover, the special condition was neither directly, nor indirectly, discriminatory. The minimum wage in question was part of the level of protection that must be guaranteed by undertakings established in other Member States to workers "posted" for the purposes of performing the public contract. The Court distinguished the case of Rüffert (C-346/06).

REDUCING THE RISK OF CONTRACTUAL NON-PERFORMANCE

13. A contracting authority must verify the suitability of its potential service providers. That verification is intended, in particular, to enable the authority to ensure that a tenderer, if successful, will have the means necessary to perform the contract, and to enable the authority to be confident that, throughout the period of the contract, the successful tenderer will be able to use whatever resources it relies upon, including the capacities of other entities.

14. That gives rise to two questions: first, as to what proof the authority can call for that these resources will be at the economic operator's disposal; and, second, as to the nature of the links between that operator and those other entities. EU policy is that the tenderer is free to choose the legal nature of the links it intends to establish with those other entities.

15. In a case from Latvia, C-234/14, Ostas Celtnieks, the ECJ on 14 January 2016 held that Directive 2004/18/EC precluded a Latvian local authority from requiring a tenderer, which relied on the capacities of other entities for the performance of the contract concerned, to establish links of a precise legal nature with those entities, so that only those particular links were capable, in the eyes of the authority, of proving that the contractor does in fact have the resources necessary to perform that contract. The municipality required the tenderer, before the award of the public contract, to conclude a cooperation agreement with those entities or to set up a partnership with them. That requirement was ruled impermissible.

16. This decision is no doubt equally relevant under the 2014 Directives. However, the question has been raised whether the conclusion is correct: (2016) P.P.L.R, 3, NA 77-NA 80.

TERMINATION OF CONTRACT FOR BREACH

17. In BT Cornwall Ltd v Cornwall Council [2015] EWHC 3755 (Comm), a services provider brought a claim against the local authority and other public sector bodies for an injunction to prevent the termination of a potentially long duration £160 million agreement between them. The claim failed. The agreement covered services such as health, transport, communications and public safety. It also provided for the creation of new jobs for local residents.

18. The agreement contained a clause entitling the local authority to waive key performance indicator scores resulting from service failures if it was satisfied that a remedial plan was in place. There were substantial problems with performance. A number of key performance indicators fell consistently below target level. A backlog of work accrued.

19. The parties established an executive forum aimed at resolving the issues. Later, however, the local authority stated its intention to terminate the agreement for material breach. It also claimed that the service provider's failure to meet its annual jobs guarantee gave rise to an obligation to provide a remediation plan, which it had failed to do. The service provider claimed that a large number of faults had been caused by the local authority. It also claimed that a separate agreement had been entered into for the backlog to be cleared, with the implication that the key performance indicator results which fell below breach level would not be used to justify termination, and that the local authority was in any event estopped from relying on breaches in terminating for material breach.

20. Knowles J held that the failure to create new jobs resulted at least in part from the local authority's failure to secure a health contract, which would have accounted for 70 new jobs. There was no contractual requirement for a remediation plan. Accordingly, the service provider was not in breach of the agreement in that respect. Moreover, there was no evidence that the waiver clause in the agreement had been exercised nor was there any reason to imply a waiver. The service provider was contractually obliged to resolve the backlog and was not entitled to protection from the consequences of its failure to do so.

21. Knowles J further held that there was no basis for a case on estoppel or affirmation. The fact that the local authority was prepared to engage with the executive forum and to work collaboratively with the service provider was not to be held against it and did not signal that it would refrain from taking action under the agreement. There had been no material delay on the local authority's part, and neither its actions nor the passage of time were to be taken as an election not to terminate for material breach.

22. In conclusion, the service provider had failed to provide the service it had promised to the required standard. There was no capriciousness or bad faith on the local authority's part in expecting it to clear the backlog or take the contractual consequences if doing so resulted in further breaches of the key performance indicators. Accordingly, the service provider was in breach of the agreement such as to justify termination.

LAND SALES

23. In Case C39/14, BVVG v Erbs, the ECJ again considered when land disposals by public bodies amount to State Aid within TFEU Article 107(1), in accordance with which save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources, in any form whatsoever, which distorts or threatens to distort competition by favouring certain undertakings is, in so far as it affects trade between Member States, incompatible with the internal market. The ECJ reiterated that in order for a measure to be categorised as 'aid' for the purposes of Article 107(1) TFEU, all the conditions set out in that provision must be fulfilled.

24. For a measure to be classified as State Aid for the purposes of Article 107(1) TFEU, first, there must be an intervention by the State or through State resources; second, the intervention must be liable to affect trade between Member States; third, it must confer an advantage on the recipient; and fourth, it must distort or threaten to distort competition.

25. The concept of aid may include not only positive benefits, such as subsidies, loans or direct investment in the capital of undertakings, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking, and which therefore, without being subsidies in the strict sense of the word, are of the same character and have the same effect. To that end, for the purposes of establishing the existence of State Aid, a sufficiently direct link must be established between, on the one hand, the advantage given to the recipient

and, on the other, a reduction of the State budget or a sufficiently concrete economic risk of burdens on that budget.

26. It cannot therefore, as a rule, be precluded that a sale of public land at a price lower than the market value might constitute State Aid. Such a sale may confer on the purchaser, as a recipient, an advantage which, in essence, leads to a reduction of the State budget consisting in the State forgoing the difference between the market value of the land and the lower price paid by that purchaser. In particular, in relation to the sale by public authorities of land or buildings to an undertaking or to an individual involved in an economic activity, such a sale may include elements of State Aid, in particular where it is not made at market value, that is to say, where it is not sold at the price which a private investor, operating in normal competitive conditions, would have been able to fix.

27. It follows that the application of rules must, in order to comply with Article 107 TFEU, result in all cases in a price as close as possible to the market value. A number of methods are capable of providing prices corresponding to the market value. Those methods include sales to the highest bidder or on the basis of an expert report. Likewise, it cannot be ruled out that other methods may also achieve the same result.

28. In a case concerning the sale by a public authority of an undertaking belonging to it, where that authority undertakes an open, transparent and unconditional bidding procedure, it can be presumed that the market price corresponds to the highest credible offer. In such circumstances, it is not necessary to resort to other methods in order to check the market price, such as independent expert reports.

PFI CONTRACT

29. In Portsmouth City Council v Ensign Highways Ltd [2015] EWHC 1969 (TCC) the Court interpreted a PFI Contract between a local authority and a service provider and considered whether it is to be implied that the authority as a best value authority must act in good faith when dealing with breaches by the service provider. In the action the Council sought declarations in relation to the performance of certain of its obligations under a long term PFI Contract made with Ensign. The dispute was about the manner of awarding Service Points by PCC for breaches by Ensign of its obligations under the Contract, which concerns the long term rehabilitation, maintenance and operation of the Council's highway network.

30. The Contract incorporated a regime for awarding Service Points for breaches by Ensign of its obligations under the Contract. Schedule 17 to the Agreement contained a table which set out a large number of Default Events for which Service Points could be awarded and, against each Default Event, a "Maximum Event Value". The Maximum Event Value for each Default Event originally consisted of a single figure between 1 and 10. It was common ground that, until about December 2013, the Council treated the figures for the Maximum Event Value as the upper limit of a range. Accordingly, where the Maximum Event Value was greater than 1, the number of Service Points awarded would depend on the Council's view of the gravity of the breach.

31. The Council assessed and awarded Service Points on a monthly basis and, initially, the system was operated in a manner that seemed to be regarded as satisfactory by both parties. However, after a few years cuts in central government funding to local authorities began to take their toll. In 2012 the Council began to form the view that if the Contract continued to be operated in the same manner for the remainder of its term it would become unaffordable. The Council embarked on a strategy of awarding Ensign large amounts of Service Points in order to force it to accede to the Council's commercial demands in a renegotiation of the Contract. This involved, amongst other things, awarding the maximum amount of Service Points for every default, refusing to communicate with Ensign in relation to breaches, finding breaches in areas which Ensign might find hard to remedy and storing up Service Points over several months so that Ensign could be "ambushed" with a large award of Service Points at one fell swoop.

32. Ensign notified the Council that it intended to refer the dispute about the award of Service Points to Expert Determination in accordance with the terms of the Contract. The Expert issued a detailed and careful Determination in which she concluded, in fairly trenchant terms, that the Council had acted in bad faith, without mutual co-operation and unfairly. However, she did not conclude that Ensign's performance was always as it should have been: her conclusion was that in general it was delivering the required service but that the Contract did not really provide any means of achieving long-term improvements. In addition, it seems that there was a view within the Council that the performance standards required under the Contract were unnecessarily high, and that it was therefore an unnecessary luxury.

33. The Council was under the “best value” duty imposed upon it in England by Section 3 in Part I of the Local Government Act 1999: compare in Wales the duties imposed upon “Welsh improvement authorities” by Part 1 of the Local Government (Wales) Measure 2009. Clause 44 of the Contract was concerned with best value and best value reviews. The Council relied strongly

on the decision of the Court of Appeal in Mid Essex Hospital Services NHS Trust v Compass Group [2013] BLR 265.

34. Edwards-Stuart J in the Portsmouth case observed that failure of highway maintenance can take many forms. He concluded on the Service Points issue as follows:-

> "70. … It does not in my view make commercial sense to have a system which requires the authority to impose the same number of points irrespective of the gravity or duration of the breach. In the absence of any specific indications to the contrary, one would expect the parties to have agreed a system that provided or permitted some flexibility in relation to the number of points to be awarded for any particular breach. …
>
> 71. I agree that the word "maximum" is a word with a clear meaning - namely, the upper limit of a range. It is therefore an inappropriate word to include in the heading of a column containing numbers if those numbers were intended to be single values, rather than the upper limit of a range. On PCC's approach, the word simply has to be ignored.
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> 72. In my view, the use of the word "Maximum" in the heading to the column showing the number of points was not the result of a drafting error but was there for a purpose. That purpose was to permit the PCC Representative, within the range provided for in the schedule, to award an appropriate number of points having regard to the gravity of the breach."
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> "76. I therefore conclude that the Service Point values set out in Schedule 17 are maximum values that can be awarded for a particular breach and are not fixed "tariffs" that are to be applied irrespective of the gravity of the breach in question."

35. As to the extent of the duty of good faith, the Judge began by observing as follows:-

> "81. … It is clear to me that, in the context of this Agreement, PCC could not discharge its Best Value Duty unless it was in a position to negotiate

> improvements to the Service that might operate to Ensign's financial detriment in circumstances where Ensign was obliged to discuss such changes in good faith - in other words, by giving proper and careful consideration to PCC's needs and statutory obligations and balancing those against its own commercial interests. That, it seems to me, is the reason why, at least for the purposes of clause 44, Ensign is required by clause 44.4.1 to deal fairly, in good faith and in mutual co-operation with PCC. Since a duty of good faith is not usually implied into commercial contracts under English law, save in certain particular types of contract, it is necessary to provide for an express duty in appropriate terms. That is what clause 44.4.1 does."

36. The Judge, however, rejected Ensign's submission that the clause 44.4.1 duty applied to the Contract as a whole. Nonetheless, he concluded, at paragraph 112, that when awarding Service Points (under clause 24) the Council was subject to an implied term, as follows:-

> "When assessing the number of Service Points to be awarded under clause 24.2.1(c) of the Agreement, PCC's Representative is to act honestly and on proper grounds and not in a manner that is arbitrary, irrational or capricious."

LESSONS FROM THE NHS

37. Cases involving NHS bodies continue to be instructive for local authorities. See R (QSRC Ltd) v NHS Commissioning Board [2015] EWHC 3752 (Admin) on the ability to enter into an interim contract pending the completion of a procurement exercise, even if (paragraph 107) the procurement exercise has been considerably delayed, provided (paragraph 103) that there is no preference of an existing provider over other potential providers; Keep Wythenshawe Special Ltd v NHS Central Manchester CCG [2016] EWHC 17 (Admin), at paragraphs 62-79 inclusive, on how a consultation exercise should be structured, the manner in which it should be carried out, when there should be a re-consultation, and influences on the requirements of fairness; and Kent Community Health NHS Foundation Trust v NHS Swale Clinical Commissioning Group [2016] EWHC 1393 (TCC), on the application of the American Cyanamid test and whether damages are an adequate remedy when the claimant is a Not-for-Profit Organisation.

38. In Lightways (Contractors) Limited v Inverclyde Council [2015] CSOH 169 the Outer House of the Court of Session made a declaration of ineffectiveness in respect of the award of a street lighting call-off contract to an economic operator which was not a party to the relevant framework agreement, albeit it was a company in the same group as a party to that agreement.

39. The approach to applications to lift the automatic suspension has been revisited yet again, by Stuart-Smith J, in OpenView Security Systems Ltd v Merton LBC (2015) EWHC 2694 (TCC). His starting point (paragraph 4) was that the American Cyanamid principles (paragraphs 9-13 inclusive) apply. However, the Judge continued (emphasis added):-

> "14. There are features of the present case which are likely to be common in public procurement disputes and which were not present in American Cyanamid. First, American Cyanamid was a private dispute between two commercial parties. The reason why the present application is brought under the regulations is because of the wider public interest in public procurement, which caused the regulations to be enacted into English law. In principle, the public interest should be a feature to be taken into account when dealing with applications for interim suspensions under the regulations. Second, and for similar reasons, the regulations provide a context for the application that was lacking in American Cyanamid. In particular, by enacting the regulations, Parliament has adjusted the remedies that are available in the event that a breach is subsequently established. Not only is there the quasi-private remedy that would be available in damages to OpenView, but the Court has the power to set aside Merton's decision to award the contract to Tyco and to order Merton to amend any document. If Merton had already entered into a contract, the draconian powers of making a declaration of ineffectiveness and imposing a financial penalty could come into play. These are consequences that go well beyond those available either in Tort or on an application for Judicial Review. Third, this is not a bi-partite dispute since the commercial interests of Merton's chosen contractor are affected to an equal and opposite extent to the effect on those of OpenView. Tyco is not a party to this application, but that does not mean that its interests are irrelevant. This multi-partite

context is itself a reason why the Court should be slow to interrupt the status quo by maintaining the suspension of the contracting process.

15. Drawing these strands together, when considering an application for removal of the automatic suspension the Court must take into account the fact that these are not merely private law disputes and that there is an ever-present element of public interest in the outcome of public procurements. That said, there is no reason why (and no binding authority to suggest that) the American Cyanamid principles themselves are changed by the public interest element. The real question, which I turn to below, is how the public interest element should be taken into account when applying American Cyanamid principles."

40. The Judge in the Merton case then observed that the influence of the public interest had been considered in a number of previous decisions, which he reviewed at paragraphs 16-25 inclusive, concluding, at paragraph 26, that:

41. He stated, at paragraph 27:-

"… the Regulations have established a procedure which does not in any way suggest that suspending the contracting authority's right to contract should be regarded as the norm or general approach to be adopted. The Regulations have established the proper balance between private and public interests by defining and circumscribing the remedies that will be available at trial and endorsing the application of American Cyanamid principles in the meantime. If proper application of American Cyanamid principles leads to the conclusion that damages would be an adequate remedy for the aggrieved tenderer, I see no justification in binding authority or in the framework created by the regulations for treating the prospect of a prompt final decision as being of itself a justification for maintaining the automatic suspension. To my mind there is a real danger that the Court may arrogate unwarranted powers of interference in matters of local or national politics if it treats the nature of the remedy that might be available in certain circumstances at a final trial as a justification for imposing (or

> maintaining) highly disruptive interim suspension of a contracting authority's intended contracting processes. The suggestion that compliance with the law and the benefits of implementing the public procurement scheme are compromised by setting aside the automatic suspension where proper application of American Cyanamid does not justify its continuation seems to me to be very questionable. …"

42. Stuart-Smith J next, at paragraphs 28-32, considered when damages will be an adequate remedy, concluding, at paragraph 32 (emphasis added):-

> "… the mere fact that the damages will be for loss of a chance and will be assessed as such is not of itself evidence that the damages are an inadequate remedy. The reverse is likely to be true in many or most cases because the principles that have been developed have been designed to reflect the true commercial value of the chance that has been lost."

43. From paragraph 33, the Judge considered "loss of reputation" as a possible basis for holding that damages are not an adequate remedy, concluding, as follows:

> "37. I am not persuaded that loss of reputation as such affects the question of adequacy of damages as a remedy. If damages were otherwise an adequate remedy, I see no reason why the "reputation" of a tendering party as such should affect the giving or withholding of interim relief. With commercial parties, what ultimately matters is whether the loss of the contract in question will reduce their profitability in a way that is not recognised by the normal principles on which damages are awarded. This in turn suggests that what is generally of concern is whether the aggrieved tenderer will lose out on other contracts which it might have obtained if it had added lustre to its reputation by getting the contract at issue. In other words, the real subject of the "loss of reputation" argument is financial losses which the law of damages does not normally recognise. …"
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> 39. What then are the criteria to be applied before a court accepts that "loss of reputation" is a good reason for holding that damages which would

otherwise be adequate are an inadequate remedy for American Cyanamid purposes? … I suggest the following:

i) Loss of reputation is unlikely to be of consequence when considering the adequacy of damages unless the Court is left with a reasonable degree of confidence that a failure to impose interim relief will lead to financial losses that would be significant and irrecoverable as damages;

ii) It follows that the burden of proof lies upon the party supporting the continuance of the automatic suspension and the standard of proof is that there is (at least) a real prospect of loss that would retrospectively be identifiable as being attributable to the loss of the contract at issue but not recoverable in damages;

iii) The relevant person who must generally be shown to be affected by the loss of reputation is the future provider of profitable work.

40. These are general criteria, which need to be reviewed and considered in the light of the facts of each case. …"

44. Stuart-Smith J accepted that damages would be an adequate remedy both for OpenView (paragraph 59) and for Merton (paragraph 66), and, having considered the public interest (paragraphs 67-68) and the balance of convenience (paragraph 69) concluded:-

"70. OpenView has not shown that damages will be an inadequate remedy. In those circumstances the starting point for the application of American Cyanamid principles is that no interlocutory injunction should normally be granted, even though I am equally satisfied that damages would be an adequate remedy for Merton if OpenView ultimately fails in its challenge. I accept that this starting point is not necessarily determinative, but no other factor has been identified by OpenView that would justify departing from the normal outcome. If and to the extent that the public benefit is to be brought into account as a separate factor to be applied in a separate and

> discrete balancing of convenience, I do not consider that the matters that have been identified by the parties tilt the balance one way or the other.
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> 71. Accordingly, whether American Cyanamid principles are applied in the conventional way or as discussed in the authorities to which I have referred, the answer is the same. If I adopt the formulation endorsed by both sides in the present case, namely "Is it just, in all the circumstances, that OpenView should be confined to its remedy in damages?", my answer is that it is."

45. Contrast, however, Counted 4 Community Interest Company v Sunderland City Council [2015] EWHC 3898 (TCC), where the suspension was not lifted in relation to a contract for substance abuse services. Carr J held that damages would be an insufficient remedy, because employees would leave if the suspension was lifted, and there was no evidence that the stay would cause the City Council loss or that there would be damage to public services.

46. Following the judgment of Coulson J upholding the automatic suspension on contract-making in Bristol Missing Link Ltd v Bristol City Council [2015] EWHC 876 (TCC) the Defendant, Bristol City Council, agreed that tenders should be subject to an independent process of re-evaluation and moderation. That process has now been completed and has confirmed that Bristol Missing Link ("BML") submitted the most economically advantageous tender in the procurement. Bristol City Council has now entered into a new contract with BML. The litigation, and its outcome, underlines the importance of maintaining the automatic suspension in EU procurement challenges.

STATE AID

47. The Court of Appeal has handed down its first judgment on the private investor principle in State Aid. In R (Sky Blue Sports and Leisure Ltd) v Coventry City Council [2016] EWCA Civ 453 the Claimants, who are companies associated with Coventry City Football Club, sought judicial review of the Council's decision to make a loan of £14.4m to its (then) half-owned subsidiary, ACL, which operates the Club's stadium, the Ricoh Arena. The Claimants argued that the Council made the loan for reasons of public policy, and that it had not been made on commercial terms. On 30 June 2014, Mr Justice Hickinbottom rejected those claims. On 13 May 2016 the Court of Appeal emphatically approved of his judgment. This is comforting news for local authorities.

48. Tomlinson LJ giving the only judgment for the Court of Appeal, approved of the Judge's summary of the relevant legal principles governing the private investor test. In particular, Tomlinson LJ restated the principle that a public authority considering whether or not to make any investment has a "wide margin of judgment". On the facts, the Court of Appeal upheld the Judge's findings that there was "significant value" in ACL, that the loan charged a commercial interest rate, and that, "it was reasonable to believe that ACL could both increase revenue, particularly from its non-football related sources, and decrease costs". In conclusion, Tomlinson LJ paid tribute to the Judgment below, finding that:

> "63. The Appellants have not in my view come close to demonstrating that the judge reached an impermissible conclusion. I would dismiss the appeal. In doing so I would pay tribute to the judge's impressive judgment. My reasons are simply those which the judge developed in much greater detail with a sure eye to the principles by which his decision-making should be informed."

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