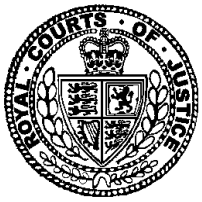

Neutral Citation Number: [2023] EWHC 2481 (TCC)

Case No: HT-2023-000241

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

TECHNOLOGY AND CONSTRUCTION COURT (KBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 6 October 2023

Before :

MR JUSTICE CONSTABLE

- -

Between :

TELEPERFORMANCE CONTACT LIMITED. **Claimants**

- and -

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT **Defendants**

-and-

VF WORLDWIDE HOLDING LIMITED **Interested Party**

- -
- -

Sarah Hannaford KC and Ben Graff (instructed by Bird & Bird LLP) for the Claimants
Michael Bowsher KC and Ewan West (instructed by TLT LLP) for the Defendants
Joseph Barrett (instructed by DAC Beachcroft LLP) for the Interested Party

Hearing date: 22 September 2023

- -

Approved Judgment

This judgment was handed down by release to The National Archives on 6 October 2023 at 2pm.

Mr Justice Constable:

Introduction

1. This is an application brought by the Defendant, the Secretary of State for the Home Department ('SSHD') to lift the automatic suspension which, pursuant to regulation 95(1) of The Public Contracts Regulations 2015 (as amended) ('PCR 2015'), precludes SSHD from entering into the contracts whose award has been challenged by the Claimant, Teleperformance Contact Limited '(TCL').

2. TCL's claim concerns a challenge to the conduct by SSHD of a procurement for five contracts for the provision of visa and citizenship application services ('the Procurement'). The services are to include the provision of the infrastructure and people for the required Visa and Application Centres ('VACs'), appointment booking, priority / added-value services, fees, identity check and document verification, document upload, biometric capture, digital interviewing, vignette services, HMPO specific requirements, and complaints and customer insight. The provision of services is required across a global network of locations and SSHD therefore sought to procure five individual contracts, each covering one of the following five geographical lots:

   Lot 1: Africa and Middle East

   Lot 2: Americas, Canada, Australasia and Europe

   Lot 3: China and Taiwan

   Lot 4: Asia and Asia Pacific

   Lot 5: The UK.

3. The Procurement was advertised by way of a Contract Notice published on 8 December 2021. The estimated total value of the contract was £1.2 billion with the estimated value of the individual lots being: Lot 1 (£316 million), Lot 2 (£303 million), Lot 3 (£147 million), Lot 4 (£271 million) and Lot 5 (£163 million). TCL submitted an initial tender for all five Lots on 30 May 2022. On 9 August 2022, TCL was provided with its scores and feedback and was notified that it had proceeded to the negotiations stage (which took place between 15 August 2022 and 7 October 2022). On 25 October 2022, the Claimant was invited to submit a best and final offer ('BAFO'). It submitted its BAFO on 5 December 2022. On 15 June 2023, TCL was notified (a) that it had been awarded the contract for Lot 5 but (b) had been unsuccessful in its bids for Lots 1 to 4 and that each of these contracts had been awarded to VF Worldwide Holdings Ltd ('VFW'), who was joined to the proceedings as an Interested Party by the Order of Eyre J dated 10 August 2023.

4. TCL commenced proceedings on 12 July 2023**,** challenging SSHD's decisions to award the contracts for Lots 1, 2 and 3 ('the Proposed Contracts') to VFW and in particular, to the Authority's evaluation of these Lots at the BAFO stage.

5. The witness evidence served in support of each parties' positions, and considered by the Court, comprises:

(1) On behalf of SSHD, the applicant, two statements from Keren Locke, the Deputy Director of Transformation Delivery and two statements from Jonathan Hainey, Partner at TLT LLP (solicitors for SSHD);

(2) On behalf of TCL, two statements from Simon Peachey, Chief Sales Officer at TLScontact (the trading name used for all TLS Group S.A. entities, including TCL, as set out further below), and one statement from Jeremy Sharman, Partner at Bird & Bird LLP (solicitors for TCL).

(3) On behalf of VFW, one statement from Chris Dix, Head of Business Development for the VFS Global Group and one statement from John Edward Williams, Legal Director at DAC Beachcroft LLP (solicitors for VFW).

Principles to be applied

6. Given that they are now well established, there was no dispute before me as to the legal principles to be applied when determining an application to lift the automatic suspension. The Court has to apply the test set out in *American Cyanamid v Ethicon* [1975] AC 396 per Lord Diplock at pp.407G-408H. As summarised by O'Farrell J in *Camelot UK Lotteries Ltd v Gambling Commission* [2022] EWHC 1664 (TCC), the questions for the Court are as follows:

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

(2) If so, would damages be an adequate remedy for the claimant if the suspension were lifted and they succeeded at trial; is it just in all the circumstances that the claimant should be confined to a remedy of damages?

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

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

Serious Issue to be tried

7. There is no dispute on the application before me that there is a serious issue to be tried. Neither party seeks to persuade me to reach any view on the relative strength of the claim or take any such view into account, and I do not do so.

Adequacy of Damages for TCL

8. The basis of TCL's claim that damages would be an inadequate remedy should TCL succeed at trial is based upon irremediable losses it says will be suffered by it and, more particularly, by the wider visa and consular services business in the Teleperformance group .

9. Ms Hannaford KC, for TCL, does not contend that TCL's financial loss by way of loss of profit that would have been earned on the contracts had TCL's tender been successful would be excessively difficult to quantify in itself.

10. The reasons advanced succinctly by Ms Hannaford, based principally upon the evidence of Mr Peachey, are:

    (1) Closure of at least 64, and up to 67, of the 156 VACs operated by TLScontact around the world;

    (2) A resulting reduction in TLScontact's presence and cessation of operation;

    (3) A resulting reduction in TLScontact's prospects of securing future business in upcoming procurements;

    (4) Redundancies in excess of 750 employees;

    (5) A 71% reduction in TLScontact's revenue, inhibiting its ability to compete in upcoming procurements; and

    (6) Loss of reputation.

11. There lies, at the heart of the submissions, an important point of principle relating to the extent to which TCL can pray in aid losses to 'TLScontact'. As explained by Mr Peachey in his first witness statement, the Teleperformance group is a global digital services business which provides a range of services split between business services and specialised services. Business services include back office processing, advanced analytics and artificial intelligence while specialised services include collection services and healthcare support. The visa and consular services provided to governments are part of Teleperformance's specialised services. These services include the provision of physical and digital infrastructure necessary to run visa application systems.

12. The structure of the relevant entities within the Teleperformance group is summarised by Mr Peachey as follows:

    (1) Teleperformance SE is the ultimate holding company (registered in France) of the entities within the Teleperformance group;
    (2) Teleperformance Holdings Limited ('THL') is a wholly owned subsidiary of Teleperformance SE;
    (3) Teleperformance Limited is a wholly owned subsidiary of THL;
    (4) TLS Group S.A, a holding company registered in France, is a subsidiary of Teleperformance SE; and
    (5) TCL, the Claimant, is a wholly owned subsidiary of TLS Group S.A.

13. He explains further that the visa and consular services business is delivered through TLS Group S.A. and its subsidiaries (including TCL). These companies are also referred to collectively by the trading name, TLScontact (or TLS). The delivery of services by TLScontact to the Authority and other governments is through the use of special purpose vehicles incorporated across the key trading regions: Central and Western Europe; North and West Africa; sub-Saharan Africa; the Middle East and Turkey; Russia and the CIS Region; and Asia Pacific. The local TLScontact entities are

engaged to manage the on-the-ground aspects of visa and consular operations, for example, hiring staff, entering into lease agreements and complying with any requirements of local law.

14. Mr Peachey's evidence is that it is primarily the *other* trading entities within what is called TLScontact which will between them sustain the claimed financial losses and redundancies caused by the closure of VACs as a result of failing to win the bid, and such reduction in TLScontact's prospects of securing future business in upcoming procurements is, again, a loss to other SPVs within the group and, ultimately, the parent company. The claimed 71% reduction in revenue is not TCL's revenue, but the aggregate revenue of the TLScontact groups. Ms Hannaford readily accepts that these losses, irrespective of whether they are tangible and quantifiable, will not be recoverable against SSHD by TCL. They are not TCL's losses. However, Ms Hannaford contends that the position of the group may nevertheless be taken into account by this Court when considering whether damages are an adequate remedy. Put at its highest, Ms Hannaford contends that if an SPV in the position of the Claimant cannot pray in aid the irrecoverable impact upon the wider group to which it belongs, it will never be able to identify an inadequacy in damages sufficient to resist a call to lift the suspension. Where many large procurement exercises are tendered for by groups who arrange their affairs through a series of SPVs, this 'absurd' outcome would be impactful.

15. Mr West, on behalf of SSHD, and Mr Barrett , on behalf of VFW, both contend that it is not open to this Court, as a matter of principle, to do so. They rely upon *Circle Nottingham Limited v NHS Rushcliffe Clinical Commissioning Group* [2019] EWHC 1315 (TCC) in which the Court had to consider whether to take account of the losses which may have been suffered by the group within which the unsuccessful tenderer company (an SVP) sat. Sir Anthony Edwards-Stuart said this:

> *'It seems to me that these observations are pertinent to the present application and they reinforce my view that if a commercial undertaking chooses to carry out its operations through a series of special purpose vehicles, it cannot really complain if that carries disadvantages as well as advantages. Further, to answer Mr Coppel's threshold question, in my judgment it is the position of the Claimant that must be considered on this application, and not the position of the Circle Group or the Circle brand. No other Circle Group company is a party to this litigation. Ms McCredie did not really have a direct answer to this point: what she said was that "the world doesn't just look at the Claimant - it associates it with the group as a whole". I am prepared to accept in principle that this may be so, but it still requires the court to assess how this might affect the Claimant in the circumstances of this case and whether it will do so in a manner that cannot be compensated by damages.'*

16. This is a case I came to consider in *Boxxe Limited v Secretary of State for Justice* [2023] EWHC 533 TCC where I came to a view consistent with *Circle.* At [37] I said:

> *'Whilst Mr Tankel urges upon me that the impact upon the interests of third parties, who do not have a reliable remedy in damages in their own right, is a materially relevant factor that the Court both can and should take into account in its overall*

> *assessment, that is not a submission which assists him on the question of the adequacy of damages. On that question, it is clear that the position of Involve is irrelevant and should not be taken into account regarding the adequacy of damages….'*

17. In relation to *Circle,* Ms Hannaford contends that the case should not be read as stating any point of principle, and suggests that the case was an example of nothing more than a determination on the facts of that case that damages would, in that case, be adequate. The fact that the judge declined to consider the losses caused to the wider group was, moreover, a result in part of the judge's conclusion that the outcome was merely a reflection of the manner in which the business in that case chose to carry out the operations, which carried advantages and disadvantages. It is said that this a distinguishing feature from the present case, a point to which I will return.

18. Ms Hannaford draws the Court's attention to the case of *AB v CD* [2014] EWCA Civ 229. This case involved the consideration of the adequacy of damages in circumstances where the contract contains a provision limiting the recoverable damages to below what might otherwise have been awarded as a matter of general law. The Court of Appeal in that case considered in some detail the decision in *Bath and North East Somerset Council v Mowlem Plc* [2004] BLR 153, in which BANES was granted an injunction, upheld by the Court of Appeal, on the basis that it would, in addition to direct financial loss, suffer unidentifiable, intangible and unquantifiable damage such as loss of visitors, impacting the local economy, and loss of public confidence; and on the second basis that in any event its quantifiable losses would substantially exceed the agreed rate of liquidated damages.

19. Although Ms Hannaford did not take me directly to *Bath v Mowlem*, it is important nevertheless to consider some aspects emphasised in Mance LJ's judgment. The first is to be reminded that the foundation for the jurisdiction relating to the provision of injunctive relief is section 37(1) of the Supreme Court Act 1971. This states that:

> '*The High Court may by order (whether interlocutory or final) grant an injunction ….. in all cases in which it appears to the court to be just and convenient to do so*.'

20. The second is to be reminded of words of the '*locus classicus*' on the application of this section in *American Cyanamid* which, in the context of the point of principle in debate, the first sections of which bear reflection:

> '*(A) [Page 406E-F] "The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial. The court must weigh one need against another and determine where "the balance of convenience" lies."*
>
> *(B) [Page 408B-H] "….. the governing principle is that the court should first consider whether, if the plaintiff were to succeed at the trial in establishing his*

right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. …

21. It can be noted that, in both sections [A] and [B], the Court is concerned with the violation of the claiming party's rights and the adequacy of damages to compensate the claiming party for injury sustained by that party by the violation. The relevant injury is expressed to be that suffered or prospectively suffered by the party with the cause of action arising from the violation of rights.

22. Third is the emphasis placed on the fact that, ultimately, the statutory jurisdiction imparts a broad discretion. As set out in paragraph 12:

> '*Lord Diplock's speech in American Cyanamid is not itself a statute. Mr Elliott QC for the Council pointed out that this court has recently reminded itself in Smithkline Beecham plc v. Apotex Europe Ltd. [2003] EWCA Civ 137 that the statutory jurisdiction is not formally limited by considerations such as whether damages are recoverable or the extent of any such damage: cf para. 14 in the judgment of Aldous LJ with which Carnwath LJ specifically agreed. The point has been made on previous occasions and at higher level: see Reg. v. Secretary of State for Transport, ex p. Factortame Ltd.[1991] 1 AC 603, 671E-674A per Lord Goff, with whose speech Lords Brandon and Oliver agreed. Lord Goff referred to Lord Diplock's speech as laying down guidelines for the exercise of the court's discretion and went on:*
>
> *I use the word "guidelines" advisedly, because I do not read Lord Diplock's speech as intended to fetter the broad discretion conferred on the courts by section 37 of the Supreme Court Act 1981; ....."*
>
> *Whether or not by coincidence, the day before Lord Goff handed down this speech, Butler-Sloss LJ had also described Lord Diplock's speech as containing "guidelines which could not and, as subsequent decisions of the House of Lords and of this court have shown, did not cover every eventuality": Lansing Linde Ltd. v. Kerr [1991] 1 WLR 251, 269A-D. She referred inter alia to N. W. L. Woods Ltd. v. Woods [1979] 1 WLR 1294 (HL). She went on to say that: "The question arises in each application for an interlocutory injunction as to the point on a broad spectrum at which the particular circumstances of the case in question may fit in, and what additional factors there may be to place into the balance of convenience*'.

23. As highlighted in Underhill LJ's review of the case in *AB*, at paragraph 17 Mance LJ recorded the submissions made in the course of argument on two patent cases, *Polaroid Corp v Eastman Kodak Co* [1977] RPC 379 and *Peaudouce SA v Kimberley-Clark Ltd* [1996] FSR 680. In the latter case, Robert Walker LJ had said:

> *'in general…injunctions are granted in order to protect a plaintiff from loss which would sound in damages, not from loss which would not sound in damages. As Goff L.J. said in Polaroid Corporation v. Eastman Kodak Co. [1977] R.P.C. 379 , 397 : ". . . one is not entitled to an injunction to avoid damages which, if suffered, would be too remote" . Buckley L.J. had expressed similar views at pages 394–395. These views were, as the Lords Justices*

> *themselves acknowledged, not necessary for determining the appeal, but they are entitled to a good deal of respect.'.*

24. In *Commercial Injunctions* (7th Edn) at 2-029, when considering the adequacy of damages, the editors identify *Peaudouce* as authority for the proposition that, at least in the context of patent infringement, the losses to be considered are the losses of the claimant patentee and not those of other companies albeit part of the same group of companies, because the purpose of the patent is to secure the monopoly for the patentee.

25. I note, however, Mance LJ identified that Walker LJ's statement might be too narrowly stated, citing the judgments of Aldous LJ and Carnwath LJ in *Smithkline Beecham.* In that case Aldous LJ observed:

> '*…If a claimant has a cause of action to protect a property right recognised by the law, there is no reason in principle why the court should not grant an interlocutory injunction to protect that right, even if damages are not recoverable.*'

26. Carnwath LJ similarly said,

> '*The purpose of an interlocutory injunction is protection, not just against 'loss which would sound in damages', but against violation of any right where damages would not be adequate compensation*'.

27. Finally, from *Bath v Mowlem,* it is important to note Mance LJ's conclusion relating to the wider public damage which may be caused if the injunction were not granted. Independent from his conclusion relating to the liquidated damages point, Mance LJ said:

> '*I also consider that it is open to the Council on the facts of this case to rely on the likelihood that delay would cause further loss which would be felt by the general public, through the negative effect of delay on economic regeneration (loss of extra visitors, loss of additional trade for local hotels and restaurants, loss of additional car parking revenue and general loss of "spend" in the local economy) and through general loss of public confidence in the Council (with consequential negative implications for further Council projects). These items represent the type of unquantifiable, and in substantial measure, irrecoverable damage to public interests that may well be suffered if a Millennium project undertaken by a public authority moves (as Mr Cavanagh puts it) from the status of "Eden" to "Dome"'.*

28. In *AB,* the analysis moves on from these cases to consider *Lauritzencool AB v Lady Navigation Inc* [2005] 1 Ll Rep 260. Ms Hannaford places weight on the passage from Cooke J taken from this judgment where at [39] he said:

> '*The decisions in Regent International and Bath v Mowlem both show that in assessing the inadequacy of damages so as to justify an injunction, the Court can take into account not only the unquantifiability of damages to be suffered and, the difficulty of assessment, but the irrecoverability of damages at law because of a liquidated damages or exception clause or because loss is suffered not by the applicant himself but by others or in some intangible way. The purpose of an interlocutory injunction is protection not just against loss which would sound in damages but against violation of any right where damages would not be adequate*

> *compensation. Loss of goodwill, loss of reputation and, in the context of a reefer pool, loss of competitiveness or marketability are all matters which can be taken into account.*'

29. Reference by Cooke J to '*loss … not suffered by the applicant himself but by others*' must, it seems to me, be a reference to paragraph 21 of *Bath v Mowlem*. Losses suffered by others was not relevant in *Re Regent International Hotels (UK) Limited v Pageguide Limited* [1985] 1 WLUK 577, a case concerning an injunction restraining hotel owners from taking any steps to prevent or hinder hotel managers from performing management functions and the operation of the Dorchester Hotel in accordance with contracts concluded between them. Whilst it is right that in *Bath v Mowlem*, the court took account of the effect on the public of the delayed opening of the public service, it is clear that these impacts were, whilst suffered by the public, ones which were plainly relevant because they would indirectly, unquantifiably and intangibly also affect BANES, the claimant, through loss of local revenue, car parking revenue, reputational losses and negative implications for future council projects. The principal distinction sought to be made by Cooke J is, it appears to me, between losses which sound in damages and those other losses, arising from a violation of a right, caused to the claiming party even though they may not give rises to recoverable damages. By their very definition, losses that do not sound in damages could not give rise, ultimately, to a monetary award, but they remain relevant to the right to injunctive relief.

30. There are three other passages from *AB* which are of potential importance in the present context. First, at [26], the Court dealt with a distinction between a clause affecting liability and a cap on damages (arising out of a liability). Underhill LJ said:

> '*Mr Bergin appeared at one point in his oral submissions to be saying that the effect of cl. 11.4 was to limit the Respondent's primary obligations under the contract: he emphasised that the operative language of the exclusion was that neither party would be "liable" for the losses in question. If that were indeed the effect of the clause, we would be in quite different territory, but the submission is unsustainable.*'

31. Thus, if the effect of the contract clause had been so as to negate liability itself, rather than render certain losses irrecoverable, the Court '*would be in quite different territory*'. In the language used consistently in *AB*, this is no doubt because there is no commercial expectation of compliance with an obligation the parties have accepted does not give rise to any liability, as opposed to one for which a party may remain liable, but in respect of which losses are capped or excluded. In the latter situation, an injunction may be considered necessary to protect the parties' commercial expectations, and in the former it is not.

32. Second, in considering the potential wider implications of the judgment, Underhill LJ said:

> '*Mr Bergin argued that it could not be right that in every case where the victim of a threatened breach of contract sought an interim injunction he could rely on the existence of an exclusion or limitation clause to claim that damages would not be an adequate remedy. I think that that overstates the consequences of the case which I have accepted. A claimant will still have to show that if the threatened breach occurs there is (at least) a substantial risk that he will suffer loss that would*

> *otherwise be recoverable but for which he will (or at least may) be prevented from recovering in full, or at all, by the provision in question.*'

33. The Court appears to emphasise the continuing need for the claiming party to show the risk of loss caused to them ('*he will suffer loss*') by the prospective breach, albeit one which may not be recoverable because of the clause. This is plainly not the same situation where no loss or likely loss to the claiming party can be shown.

34. Third, echoing the language used by Underhill LJ as set out above, the concurring judgment of Ryder LJ underlines the availability of injunctive relief in order to give effect to the parties' expectations. At [32], he said:

> '*Injunctive relief is a remedy available to the court to give effect to commercial expectations where it is in the interests of justice that agreed obligations should continue to be binding on the parties, whether that be for an interim period or the term of the contract. The construction of the contract clause in the context of the description of legal principle set out by my Lord has the effect of tending to support rather than undermine parties who have entered or seek to enter into a contract which contains their commercial expectations. There are different reasons on the facts of individual cases why this may be so and although it would be unwise to categorise them, it is surely the policy of the law to help to give effect to the parties' intentions and in particular their acceptance of commercial risk by performance. For that reason, I favour re-casting the question to be asked on an application for injunctive relief, which is: "Is it just in all the circumstances that a [claimant] be confined to his remedy in damages?" per Sachs LJ in Evans Marshall & Co Ltd v Bertola SA [1973] 1 WLR 349 @ 379H*'

35. *Bath v Mowlem* and *AB* both related to injunctive relief in the context of a contractual relationship. In the present case, the relationship is governed by regulation. However, a key part of the regulation is, as emphasised by Coulson LJ in the recent first instance judgment of *IGT Game Technology PLC and others v The Gambling Commission* [2023] EWHC 1961 (TCC) to provide remedies to a specific and identifiable group, namely those '*having or having had an interest in obtaining a particular contract….*' (taken from Article 1(3) of the Remedies Directive) which Coulson LJ concluded was restricted to those who had tendered unsuccessfully for the particular contract in question. It did not extend to sub-contractors or parent companies. Pending any potential appeal, for which, I am informed, permission has been sought, this is the present state of the law. Following from the reasoning in *AB*, therefore, it will be necessary when considering the question of whose losses are relevant to the question of adequacy of damages to consider the purpose of the regulatory regime and the justifiable expectations of the parties affected (either by the imposition of an obligation or the entitlement to a remedy) by the regime.

36. Ms Hannaford accepted that there is no authority of which she was aware in which the existence of a direct financial loss caused to a third party, which loss would be irrecoverable by the claimant, was the basis of a determination that damages were an inadequate remedy for the claimant. As identified above, the closest one might come to this on the authorities is the conclusion in *Bath v Mowlem*, although in reality the third party potential losses were, or were also, the cause of the claiming party's own intangible losses. She does, however, point to Coulson LJ's observation at paragraph 180 of his judgment in *IGT* where he is dealing with the standing of the Fourth

Claimant, a special purpose entity which was created for the purpose of making a separate bid, which bid in the end was never made. Having decided that the Fourth Claimant , having never made a bid, would not have had standing, Coulson LJ continued:

> '*Two other arguments relating specifically to C4 need to be addressed. First, Mr Moser said that, because the ITA expressly required the bidder to be an SPE, it would be unfair and illogical if the SPE created for the purposes of this bid (namely C4) could not challenge the result of the procurement. He asked rhetorically who, if not C4, could raise such a challenge? But his question is based on a false premise. C4 would have had standing if they had made a bid to run the Fourth National Lottery. But they chose not to. I accept that companies setting up an SPE in these circumstances may have separate standing to challenge the result of the procurement (because it might otherwise prevent those who have actually suffered the loss from making a claim), but I cannot reach any sort of a concluded view about that: it is a complex topic and far beyond the scope of this Preliminary Issue.*'

37. This is relied upon by Ms Hannaford to demonstrate that the door has been left ajar to an argument that companies setting up an SPE**(**/SPV**)** may have separate standing to challenge the result of the procurement, because otherwise it may prevent those who have actually suffered the loss from making a claim. It is not necessary for me to determine this question in circumstances where the company setting up the SPV has not, in fact, made a claim. The question before me is a different one, which is whether – in the context of a claim brought by the SPV (not the parent) - the losses of other SPVs within the group and/or the parent are relevant to the question of adequacy of damages. If anything, it seems to me that the fact that the door has been left open to companies who set up the unsuccessfully bidding SPV to bring a claim in their own right under the regulations makes it less, rather than more, likely that in a claim brought by the SPV itself that the Court should look to the losses caused to those others.

38. Ms Hannaford also points to the decision of O'Farrell J in *Camelot UK Lotteries Limited v The Gambling Commission* [2022] EWHC 1664 as an example of a case where, although the suspension was not lifted, the Court appeared to take potential account of the wider group interests as part of the consideration of the adequacy of damages. The claims were brought by Camelot UK and Camelot Global. At paragraph 2 of the judgment, O'Farrell J identified these two parties, and the fact that they would, if referred to collectively, be referred to as 'Camelot'. Camelot Group is not identified or defined; it appears to have been referred to in the evidence before the Court considered at paragraph 96 of the Judgment in the context of reputational damage (and at paragraph 98 the judge concluded that there was no compelling evidence that Camelot Group would suffer harm as a result of the loss of the Fourth Licence). The judgment does not consider whether it was, or was not, appropriate in principle to consider this evidence and, ultimately, O'Farrell J concluded that damages would be an adequate remedy for Camelot notwithstanding reference to the wider group.

39. Both parties have referred me to the Northern Irish case of *Eircom UK Ltd v Department for Finance*. At [29] Horner J considered the nature of the group structure in the context of the question of adequacy of damages in the following way:

> '*However, even if, contrary to my finding above the loss of the NIPSSN*

contract was to result in the winding up of the Northern Ireland business, I still remain of the view that damages, which should be capable of ready calculation on the basis of the plaintiff's loss of profits, will constitute an adequate remedy for the plaintiff for a number of reasons:

…

(ii) In any event as I have recorded the plaintiff is part of a group of companies with a turnover of well in excess of €1bn. If those in control of the group want to compete with BT they have adequate resources at their disposal to do so either now or in the future. The concentration on the turnover of the plaintiff is both artificial and contrived. The plaintiff is not a small fish swimming through hostile and uncharted waters. It is a member of a Group with access to very substantial assets. If the Group wants the plaintiff, or indeed any of its companies, to compete with BT or one of its subsidiaries in Northern Ireland, then it has the assets and the expertise to do so. I reject the submission that the plaintiff must be viewed in splendid isolation. That would be to ignore reality.

(iii) If a large, successful commercial organisation was able to claim successfully that because one of its off shoots might go out of business if it failed to win a tender, and that therefore the award of that contract should be suspended, it would allow such an organisation to game the system. All such organisations would place their bids through small companies, which they could then claim would be "wiped out" if was proposed at the next procurement exercise to award the tender to another competitor and thus sabotage the prompt award of these types of contracts.'

40. Mr West and Mr Barrett rely upon similar reasoning in the present case, identifying TCL's standing within the wider group as evidence that, contrary to the evidence of Mr Peachey, TCL is not in fact in existential peril. Ms Hannaford argues that it is not possible for the Defendant (and the Interested Party) to have their cake and eat it: to rely upon the fact of the wider group to undermine TCL's case on adequacy of damages, whilst at the same time saying that losses caused to the wider group are irrelevant as a matter of principle. Ms Hannaford's argument in this respect appears to elide two things. The first is what loss the claiming party has, or may, suffer. In the context of this question, the dividing line between legal entities is relevant and rigid. The second is whether, as a matter of evidence, allegations of potential loss suffered by the claiming party are made out. In this context the fact that a party sits within a wider group may be relevant, as a matter of evidence: as Horner J points out, whether the claiming party is a small fish swimming through hostile waters or part of a large group may be relevant to whether the loss it alleges (inability to compete in future competitions) is, or is not, credible. But the relevance of the group structure to the second question does not in itself mean that a court will not restrict a party to claiming the losses it, as claimant, has suffered and will not generally permit a party to claim losses on behalf of a third party, be that a parent or a subsidiary otherwise.

41. I distil from the foregoing the following principles:

(1) at the most fundamental level, the jurisdiction to grant injunctive relief is subject to a broad discretion which permits the Court to grant it where it is just and convenient to do so;

(2) in most cases, the injury or prospective injury to consider, when asking in accordance with *American Cyanamid* whether damages would be an adequate remedy if an injunction is not granted and the right is or continues to be violated,

is the injury suffered or to be suffered by the party whose is entitled to claim for the violation of the right;

(3) given the broad discretion, however, there may exceptionally be circumstances in which injury to third parties caused the violation of rights may be considered relevant, particularly where there is a nexus between such injury and intangible and reputational losses suffered by the claiming party, for which damages would be inadequate, as happened in *Bath v Mowlem*;

(4) when considering whether it is just in all the circumstances to confine the claiming party to their remedy in damages, the Court may look to the objective expectations created within the relevant relationship between the parties (whether by a contract, or by the regulatory regime giving rise to the obligations and available remedies, or otherwise).

42. In the circumstances of the present case, I do not consider it appropriate to consider losses suffered by TLScontact or the wider Teleperformance group as relevant to the question of adequacy of damages for the following reasons:

(1) TLS Group S.A. organises its business through a network of SPVs. As pointed out by Sir Anthony Edwards-Stuart in *Circle*, such arrangements come with advantages and disadvantages. No other Teleperformance entity is a party to this litigation. One disadvantage may be that losses which otherwise would have been sustained within the claiming business are sustained by a third party entity with no right of action and to whom no duty is owed. Ms Hannaford is no doubt correct that this is an entirely normal way in which large commercial entities that provide services to governments around the world are structured, but in my judgment the characterisation that the structure of the broader Teleperformance group is ultimately a matter of choice is, to the extent relevant, correct. Whilst it was suggested that in some circumstances such a structure is required by the procuring authority, there is no evidence that that is the case in the present case. In this sense, the position is not materially different to that considered by Sir Anthony Edwards-Stuart in *Circle*, and I come to the same conclusion as he did. I would add that it is far from obvious to me that the absence of full 'freedom' as to how the claiming party and its wider group is structured (for example, because of a requirement of the procuring authority) would make any difference to the analysis.

(2) I do not accept, as Ms Hannaford contends, that a restriction to consideration of the adequacy of damages to the claiming party's losses is absurd merely because it would, she contends, have the consequence that SPVs will never be able to lift a suspension because damages will always be adequate. The primary loss of a commercial contract will be the loss of profits sustained by the losing bidder, irrespective of whether it is an SPV, and the loss of profits will generally be capable of assessment by way of damages. It is the case, therefore, that more often than not damages will be an adequate remedy irrespective of the structure of the organisation. However, notwithstanding this there may still be particular circumstances in which an SPV can show other, unquantifiable losses such that damages would be inadequate and each case will turn on its own analysis. I certainly do not regard this decision as determining otherwise.

(3) In considering the wider purposes of injunctive relief in accordance with the analysis above, the other SPVs within TLScontact are not economic operators with any standing to make their own claim(s), irrespective of any losses sustained by them (or, indeed, of the adequacy of damages in respect of any such losses). In the context of the PCR 2015, they are parties to whom SSHD owes no duty. It is not unjust in these circumstances to ignore their losses, which could never be claimed by them against the authority, when considering injunctive relief, given the absence of duty owed. The present position is far removed from those situations where the justice of injunctive relief, notwithstanding the irrecoverability of losses (because of, for example, an exclusion clause) is borne from the desired policy of holding one party to the obligation it owes to the other.

(4) There is insufficient nexus between the losses caused to the various TLScontact SPVs and TCL's own losses. This is not a case like *Bath v Mowlem* where real but intangible losses caused to others themselves reflect back to create reputational or other intangible losses to the claiming party. TCL itself is under no existential threat, whether by reason of losses to TLScontact SPVs or otherwise. It will continue in existence not least in order to operate Lot 5. There is no suggestion in the evidence before me that it (i.e. TCL itself) will fare worse in any forthcoming procurement processes by reason of the loss of this bid. Its only losses will be those which Ms Hannaford fairly accepts can be quantified, and in respect of which damages would be adequate.

43. If, contrary to the foregoing, it is necessary in order to do justice in the present case to consider the wider losses caused to TLScontact when considering the adequacy of damages, I do not consider that the evidence before the Court adequately substantiates the claims of far-reaching harm and prejudice to the wider corporate group which Mr Peachey suggests. A common theme running through the following consideration of this is the absence of any internal analyses, assessments or papers evidencing the contents of Mr Peachey's statement, the absence of which would be most surprising if they were fears which were held with conviction within the corporate structure. Moreover, the evidence is imprecise and vague. I consider the various limbs of asserted losses in turn.

The Closure of VACS and the consequences thereof

44. In his first witness statement, Mr Peachey explains that TLScontact operates a total of 156 VACs both in the UK and overseas. He contends that the direct impact of failing to win Lots 1 and 2 is the forced closure of 74 VACs solely operated on behalf of the Authority as TLScontact.

45. The first succinct point is that, even taking this at face value, the argument does not extend to Lot 3. TLScontact had no previous presence in the geographic regions relevant for Lot 3 and, as such, the central ground of concern which radiates from VAC closures and the consequent effect on future procurement, reputation or redundancies cannot amount to a reason why damages would not be adequate for the loss of Lot 3.

46. Second, the numbers advanced by Mr Peachey were overstated. He failed, somewhat surprisingly, in his evidence to take any account of the fact that the Australian Government has recently awarded the contract to TLScontact to provide visa application services in Europe and Sub-Saharan Africa. This was pointed out by Mr

Dix, Head of Business Development at VFW (the interested party) in his witness evidence, noting in addition that VFW were the incumbent provider for the Australian provision until the Award to TSLcontact. Mr Peachey did not, equally surprisingly, acknowledge or explain the inaccuracy when serving a second statement on the eve of the hearing, but Ms Hannaford's written submissions accepted that TLScontact will have future business at 10 of the locations following its success in the Australian procurement competition (so that the VACs in these locations will presumably not now close).

47. More fundamentally, I accept the evidence of Mr Dix that the opening and closing of VACs is a routine part of winning and losing contracts for the major global players in the sector. Ms Hannaford is entirely fair to point out that the primary player in the market is VFW, the interested party, who (according to Mr Dix) account for approximately 60% of the global outsourced visa services market share. TLScontact is the second largest share with approximately 8% of the global market share. Notwithstanding the difference in market share, it is clear that the two companies regularly compete against each other, and the Australian procurement competition is an example of one where TLScontact won the procurement from the incumbent, VFW. I accept the thrust of Mr Dix's evidence, which is that many Governments award contracts for periods of 3 to 5 years such that there is a regular stream of re-procurements. This is not disputed by Mr Peachey in his Second Statement. This allows all of the main players frequent opportunities to bid to retain existing contracts or acquire new ones.

48. This is reflected in the exhibit appended to Mr Peachey's statement, which shows other upcoming major opportunities relating to the Governments of Canada, Netherlands, Denmark, Norway and Switzerland. There is no credible evidence to suggest how these might be prejudiced, nor indeed how, if successful, the complaints that certain VACs will be required to close is rendered obsolete (in a similar way to the consequence of success in the Australian procurement).

49. Mr Peachey gives the example of an upcoming procurement opportunity that the German Government will be running. By reason of the lack of location presence caused by the loss of Lots 1 and 2, he asserts that TLScontact's prospects will be significantly harmed. However, there is no documented or other analysis by which the assertion is substantiated. Indeed, as Mr Dix points out, the evidence does not take account of the success of the Australian procurement (which means that TLScontact will continue to have a presence in all of the Europe region of the bid). Whilst Mr Peachey complains that VACs in each of the relevant regions will be 'forced to close', this does not seem likely in relation to existing shared locations (such as Turkey and Ukraine) within the list of examples; and, in light of the impending procurement, there is also no explanation of why TLScontact could or would not maintain their infrastructure until the conclusion of the relevant procurement processes. On the basis of the evidence before me, I do not accept as credible the suggestion that the absence of pre-existing VACs (caused by their closure following the loss of the bid) means that TLScontact may well be disqualified or seriously disadvantaged in the procurement process.

50. In my judgment, there is no sound evidence to justify the suggested correlation between pre-existing presence in a region by way of VACs or otherwise and success or failure in any particular procurement process which is central to Mr Peachey's evidence.

51. I note, in this context, two specific examples of the lack of correlation between pre-existing presence and success in the procurement process in the context of contracts moving between VFW andTLScontact :

    (1) in 2013, TLScontact won the UK's contract for Africa and EuroMed regions, the incumbent having been VFW. TLScontact did not have any operational presence in the Africa region at the time, and also had no prior experience of providing visa outsourcing services to the UK; and

    (2) in 2021, VFW lost, and TLScontact won, the contract to provide services for the German Government in the North Africa region, including Saudi Arabia in which TLScontact had no pre-existing presence.

52. Mr Peachey's evidence in his first statement was that it is often a mandatory requirement under procurement processes for a bidder to have a location presence, the existence of a corporate entity or a business/operating licence in the countries it would be providing the relevant services. An example given related to the German procurement process covering the regional lots of North America and North Africa. There was, he pointed out, a qualification requirement for bidders to provide proof of existing operating licences to operate visa application centres for countries including Saudi Arabia. Mr Peachey's statement did not go on to point out, as Mr Dix explains, that TSLcontact in fact won the competition despite not having any pre-existing physical operations or VACs in Saudi Arabia at the time. Mr Peachey did not dispute this in his second statement, but in what seems fair to describe as a shift in emphasis, Mr Peachey stated that the need to set up a business/operating licence (even if no VACs are physically implemented) can, by reason of time and cost involved, nevertheless leave a competitive disadvantage where no physical presence exists. The difficulty with this, its vague nature aside, is that there is no evidence explaining why – if, as seems to be clear, there is no necessary link between the existence of a business/operating licence within a country and the existence of a physical presence - the closure of a VAC (caused by a loss in one procurement process) means it is necessary also to close the relevant TLScontact SPV in that country, rather than keep it in place for one of the many and fairly frequent future opportunities.

53. Whilst I accept that there may be inevitable disruption and some additional expenditure (which itself may be capable of quantification) caused by ending a physical presence in a country, I consider the evidence of Mr Peachey, not supported by any internal documented analysis or assessment, that TLScontact will be severely harmed in its ability to compete effectively in future procurements because of the closure of VACs to be considerably overstated. TLScontact continue to have a presence in 53 countries, with contracts with at least 12 different governments, and, most importantly, it is clear that pre-existing physical presence in a country is not of itself a pre-requisite to tendering successfully in procurements and not of itself something which would be likely to legitimately count against TLScontact in properly conducted procurement processes.

Redundancies

54. As an adjunct to its argument that the closure of VACs will cause a significantly harmful competitive disadvantage in future procurements, which I have rejected, Mr Peachey also states that the loss of the proposed contracts will result in significant redundancies

for employees, staff and personnel. For the same reason as above, there is no evidence which suggests that this can relate in any way to the loss of Lot 3, and the argument is in effect confined to the impact of losing Lots 1 and 2. Mr Peachey says that although the Transfer of Undertakings (protection of Employment) Regulations 2006 (TUPE), or equivalent, will apply for some operational staff who are dedicated to a particular government client or contract, the current estimate is that 750 employees /personnel will face redundancies, including approximately 120 employees in corporate roles with, it is said, extensive experience of supporting the visa service. It is contended that their loss of expertise would represent a reduction in the quality of the UK visa service in many locations and therefore a disbenefit to SSHD. It is also contended that those lost would include many with rare and highly valuable professional skills. In this context, Ms Hannaford draws the Court's attention to the judgment of Carr J as she then was in *Counted4 Community Interest Co v Sunderland County Council* [2015] EWHC 3989, in which it was determined that the loss of a '*highly and uniquely trained workforce*' can give rise to irremediable harm. In that case, the claimant was a non-for-profit community interest company which provided substance misuse services to facilitate the recovery of those suffering from substance misuse in and around Sunderland.

55. The evidence relied upon by TLScontact is, at best, extremely vague. There is no analysis, for example, by job description and location which might allow any sort of interrogation of the assertions of the number and type of job losses potentially impending. It is inconceivable if this were a credible internal concern that there would not be a more granular analysis of the implications of the loss of the procurement bid. By way of small example, it is plain that in light of the Australian procurement success which was not referred to in Mr Peachey's first statement, the numbers are necessarily overstated, but is not clear by how much or which type of personnel are affected.

56. There is no dispute that TCL itself has 32 personnel, and there is no clear evidence that any of these individuals are impacted (each of the specific examples given by Mr Peachey relate to TLScontact employees rather than TCLs).

57. There is no focussed evidence on what is said to be the impact onTLScontact . Mr Peachey does not point to some form of existential threat, to particular SPVs or the broader group, or some inability to service ongoing obligations. Although Mr Peachey asserts that the loss of skills will adversely affect the Defendant, this is not an assessment the Court could possibly make not least because it would involve some form of qualitative assessment of the incoming services to be provided following the procurement process by the new provider. It would, in any event, be a matter (if true) causing detriment to SSHD rather than any factor that should be taken account of in establishing whether damages are an adequate remedy forTLScontact .

58. Mr Peachey, in his second statement, provides the example of 5 employees' whose loss of employment (toTLScontact) will give rise to the loss of experience. This evidence is wholly inadequate to demonstrate an irremediable prejudice toTLScontact , in the context of the global commercial market in which TLScontact competes. It is very far removed from the facts of *Counted4*. In circumstances where on any view TLScontact will continue to have a presence in a significant number of countries, there is no credible basis to consider that (a) the individuals will not be able to be redeployed and/or brought in remotely or in person within TCL as particular circumstances in the future arise (b) the individuals' experience, however useful, is irreplaceable, particularly in circumstances where, as set out above, there are cycles of procurement during which

the main players in the global market for visa services regularly win and lose contracts to each other.

59. Finally, in relation to redundancies, as pointed out by Smith J in *Kellogg Brown & Root Limited v (1) Mayor's Office for Policing and Crime and Ors* [2021] EWHC 3321 at [54] while redundancy is a potential detriment for an individual employee, it is irrelevant to the adequacy of damages. It is also a normal incident of losing a tender of this kind, and unavoidable, as observed by Kerr J in *Vodaphone Ltd v Secretary of State for Foreign, Commonwealth and Development Affairs* [2012] EWHC 2793 at [86]. In any event, to the extent relevant I note that VFW's own operations will require the establishment of 112 new VACs, and it is likely that some, and probably a significant proportion of employees, would find new employment in the equivalent operations to be run by VFW.

Loss of Revenue

60. Mr Peachey claims that in addition to the loss of future business opportunities, the loss of the contracts will cause a significant revenue loss. In making this submission, however, Mr Peachey seeks to draw a line between the broader Teleperformance group and the arm of the business which deals with the visa/consular services business. The revenue of the Teleperformance group as a whole in the six month period ending 30 June 2023 was 3,960,000,000 euros; of this the 'specialised services' which includes TLScontact contributed about 17%. There is, in my judgment, a contradiction in the claimant's argument in seeking on one hand to persuade the Court that it must look to the impact on TLScontact – the wider group of SPVs performing the visa/consular services – rather than confining itself to TCL, the claiming party, but, on the other hand, saying it is impermissible to look to the overall group structure when considering the impact of lost revenue. This demonstrates the difficulties in any assessment in which the Court looks at losses beyond the immediate corporate structure bringing the claim, and itself is a reason for exercising considerable caution before doing so at all.

61. The point about loss of revenue, however, can be simply dealt with. There can be no suggestion that the loss of revenue to TLScontact is incapable of quantification: indeed, Mr Peachey purports to quantify it. If it were a loss sustained by TCL (as opposed to TLScontact), it would not justify injunctive relief as damages would be adequate. I do not consider it generally appropriate that a party can pray in aid third party losses which are entirely quantifiable (but not recoverable as no claim exists) in order to demonstrate an inadequacy of damages.

62. I also reject the suggestion that, even if relevant, that there is any credible evidence that loss of revenue to TLScontact presents some existential threat to it, not least in light of the wider group within which it sits.

Loss of Reputation

63. Before turning to the claimed loss of reputation, I remind myself of the guidance given by Stuart-Smith LJ in *OpenView Security Solutions Limited v The London Borough of Merton Council* [2015] EWHC 2694 at [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? In the absence of prior authority directly in point (none having been cited by the parties) but with an eye to the approach adopted by the Court in Alstom, DWF and NATS 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.'*

64. For the reasons set out above, I do not regard it is likely that a failure to impose interim relief will lead to significant financial losses which will be irrecoverable by TCL, insofar as sustained by TCL. Insofar as sustained by TLScontact , it may sustain a drop in revenue but I am not persuaded that this would create any significant risk of loss of reputation. As amply demonstrated by the evidence, the global players in the visa/consular services business regularly compete against each other in procurement processes around the world, winning some and losing some. The loss of one particular bid is not remotely likely to cause of itself a loss of reputation in the context of another bid. Indeed, this can be demonstrated amply by the fact that, in the procurement process with which the Court is presently concerned, the loss of Lots 1 to 4 plainly in no way affected, by way of reputation, TCL in its bid for Lot 5 in which it succeeded.

65. In conclusion, therefore, I am unpersuaded on the evidence before me that, even if contrary to my conclusions above, it was appropriate to consider the question of the adequacy of damages through a wider lens which includes the impact upon TLScontact , it would be unjust in all the circumstances that TCL be confined to its remedy in damages.

Adequacy of Damages for the Authority

66. In circumstances where I consider that damages would be adequate for TCL, this question does not normally arise. Notwithstanding, I do consider on the evidence

provided by SSHD that it is clear they will suffer losses which cannot be compensated for in damages. This is for the following reasons:

(1) I accept the evidence of Ms Locke that a further delay in the award of the proposed contracts will result in, or create a very significant risk of, having a gap in services. This is obviously extremely undesirable and contrary to the public interest;

(2) I do not consider a satisfactory answer to this is, as advanced by the Claimant, that they (the Claimant) will agree terms to extend the services. It is inevitable that this would in fact require a negotiated extension of services, the outcome of which is uncertain;

(3) whilst Mr Peachey states that Teleperformance Ltd would be willing to extend the present agreement on the same terms until judgment was handed down, this ignores the fact that the new procurement was intended to bring benefits which could not be introduced by TCL other than pursuant to a commercial agreement. Mr Peachey accepted in terms that the proposed contracts would deliver benefits. A willingness to 'enter into discussions' in relation to providing some of these benefits during any period of extension can plainly not be considered an appropriate basis upon which to conclude that SSHD will be in the same position (but for any losses which could be compensated for by damages). It is entirely uncertain whether any such discussions would deliver the benefits;

(4) whilst Mr Peachey seeks to downplay the benefits sought to be realised by the new contracts, they are in my judgment real. These include enhanced physical and digital security measures to standards higher than presently required; improved technology, modernisation of delivery of the services improvement to customer experience, and to contract management procedures. Undoubtedly these are all somewhat 'soft-edged' concepts, but delay to their implementation is, undoubtedly, a detriment to the wider public which reflects back to the Defendant in a way which cannot be adequately compensated for in damages.

67. Given that the losses which cannot be compensated for by damages arise in circumstances where planned implementation is delayed, it is necessary to consider at this stage the question of an expedited trial. Ms Hannaford contends that an expedited trial can avoid (or, alternatively, minimise) any loss.

68. In my judgment, some delay in the implementation of these benefits is likely to occur irrespective of whether an expedited trial were possible. There was a debate between Counsel as to whether it was realistic that (if the Court was able and prepared to grant it) an expedited could be heard by the end of the year. Ms Hannaford suggests that matters could be resolved in a two week hearing within 2-3 months of now; Mr West considers a 3 week hearing is more realistic and, given in particular disclosure, and the possibility of amendment, a hearing date in Spring-early summer 2024 is a more realistic expedited trial date. Mr Barrett contended a 4 week hearing would be required. There was also a debate about the correct lead time between the end of any period of suspension and the successful implementation of services: Ms Hannaford suggested the evidence supported a period of about 9 months; Mr West contended that the new contracts would need to be signed in or around mid-October 2023 if planned implementation in September 2024 is to be achieved (i.e 11-12 months).

69. I consider that Ms Hannaford's suggested timetable is probably a little optimistic and even with the best will unlikely to be achieved. It might be that a judgment following an expedited trial could be achieved in the second or third month of 2024 if an aggressive but fair timetable was both set and met. However, it is not necessary for me to determine the timetable with precision in order to conclude, as I do, that whichever is the case, there is likely to be at least some real delay to the implementation of the benefits referred to above if matters await the outcome of the most efficient expedited trial.

Balance of Convenience

70. I have decided that damages are an adequate remedy for TCL. I have also decided that there is likely to be some damage to SSHD which would not be adequately compensated for in damages (the extent of which would depend upon whether and to what extent a trial could be expedited, but would likely exist to some degree even on the most optimistic scenario). Inevitably, the public interest in implementation of the Proposed Contract can be set against the public interest in good administration of procurement and the outcome of any procurement process resulting in the best bidder receiving the contract. There are, in addition, the interests of the successful bidder, which are for obvious reasons aligned with the procurement proceeding. Ultimately, however, there is nothing exceptional about this case and, in circumstances where I have concluded that damages will be adequate for TCL should it succeed to establish liability at trial, the normal outcome in which pursuant to *American Cyanimid* the injunction is not granted pertains. In the circumstances, the SSHD's application to lift the stay succeeds.