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IN THE HIGH COURT OF JUSTICE Claim No. HT-2022-000163

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

TECHNOLOGY AND CONSTRUCTION COURT (QBD)

Rolls Building, Fetter Lane
London, EC4A 1NL

20 July 2022

Before:

HIS HONOUR JUDGE KEYSER QC
sitting as a Judge of the High Court

Between:

PRACTICE PLUS GROUP HEALTH AND REHABILITATION SERVICES LIMITED	**Claimant**
- and -	
NHS COMMISSIONING BOARD	**Defendant**

Sarah Hannaford Q.C. and **James Frampton** (instructed by **McDermott Will & Emery UK LLP**) for **the Claimant**

Patrick Halliday (instructed by **DAC Beachcroft LLP**) for **the Defendant**

J U D G M E N T

JUDGE KEYSER QC:

1 This is the defendant's application dated 27 June 2022 for an order pursuant to regulation 96(1) of the Public Contracts Regulations 2015 ("the Regulations"), lifting the automatic suspension on contract making imposed by the regulation 95(1).

2 The following evidence has been filed on the application: a statement for the defendant from Thomas Rhodes, at the time Senior Commissioning Manager of the defendant, dated 27 June 2022; a statement in response for the claimant from Ross Dowsett, Chief Operating Officer of the claimant, dated 13 July 2022; a statement in reply for the defendant from Laura Darrie, the Clinical Quality and Commissioning lead for the Health and Justice Team of the defendant, dated 16 July 2022; and a second statement in response for the claimant from Mr Dowsett dated 18 July 2022.

3 The claim arises out of a procurement advertised by the defendant in July 2021 in four lots for contracts for the provision of integrated healthcare services to prisons in the South-West of England. The services are more fully described in paragraph 6 of Mr Rhodes' statement. Lot 1 was for prisons in Bristol, South Gloucestershire and Wiltshire; lot 2 was for female closed prisons; lot 3 was for Dorset prisons; and lot 4 was for Devon prisons. Procurement was carried out using the Light Touch Regime in regulations 74 to 76.

4 The claimant is a company specialising in the supply of healthcare services in prisons and immigration removal centres and was the incumbent provider for the services within the scope of lots 3 and 4. It took part in the procurement and submitted its final tender on 6 December 2021. By letters dated 14 April 2022 it was informed that it had been successful in relation to lot 2 but unsuccessful in relation to lots 1, 3 and 4, and that the defendant intended to award the contracts for those lots to Oxleas NHS Foundation Trust ("Oxleas"). Oxleas scored 1.25 per cent more than the claimant for lot 1, and 2.5 per cent more than the claimant for each of lots 3 and 4.

5 The existing contracts were procured in 2016 and signed in 2017. They were due to expire on 31 March 2022 but, owing to the Covid situation in particular, extensions were agreed so that they now expire on 30 September 2022. Services under the new contracts are due to commence on 1 October 2022, after what has been called a "planned mobilisation period" of five months. It is said that the absolute minimum period for mobilisation is three months: see paragraph 54 of Mr Rhodes's statement. The contracts are to be for a term of seven years.

6 The present claim was commenced on 9 May 2022. The claimant seeks a declaration that the defendant acted in breach of the Regulations and/or EU retained law, in manifest error and/or irrationally in respect of lots 1, 3 and 4. It seeks an order that the defendant's contract award decisions in relation to those lots be set aside; further or in the alternative, an order that the contracts for those lots be awarded to it. It also seeks, further or in the alternative, an award of damages.

7 The suspension is provided for by regulation 95(1), which in the circumstances that obtain requires that the defendant, as contracting authority, refrain from entering into the contract. Regulation 95(2), so far as material, provides that the requirement – that is, to refrain from entering into the new contract – continues until, among other things, "(a) the Court brings the requirement to an end by interim order under regulation 96(1)(a)". Regulation 96(2) provides

> "When deciding whether to make an order under paragraph (1)(a)—
>
> (a) the Court must consider whether, if regulation 95(1) were not applicable, it would be appropriate to make an interim order requiring the contracting authority to refrain from entering into the contract; and
>
> (b) only if the Court considers that it would not be appropriate to make such an interim order may it make an order under paragraph (1)(a)."

8 The claimant no longer resists the application to lift the automatic suspension in respect of lot 1. However, it contends that the automatic suspension ought not to be lifted in respect of lots 2 and 3, because (i) the defendant accepts for present purposes that there is a serious issue to be tried in respect of those lots and (ii) damages would, it is said, be an adequate remedy for the defendant but not for the claimant, and (iii) in any event the balance of convenience lies with maintaining the automatic suspension.

9 The central facts are set out in the primary witness statements, namely, that of Mr Rhodes and the first statement of Mr Dowsett. I shall summarise the main points as I see them before going on to the analysis. Mr Rhodes states (paragraph 8) that the procurement was conducted, "primarily because current contracts for similar services were coming to an end." Accordingly, it was not the result of dissatisfaction with the existing services or providers. However, the tenor of his evidence is that the defendant wished to take the opportunity to ensure improvements in services by updating the ways in which they were provided and making them conform to current best practice. The following particular points are made in Mr Rhodes' statement. An ageing prison population means that there have been significant increases in healthcare and general care needs on account of multiple lifelong conditions, lifelong disabilities, and end of life care needs since the current contracts were commissioned. The risk to mental health in prisons has been increased by the measures taken to protect the people from Covid-19. The increased nature of these concerns is reflected in reports such as *Coming out of Covid* by UserVoice, and the House of Commons Justice Committee report on *Mental Health in Prison*, respectively from August and September 2021. At paragraph 25 of his statement Mr Rhodes states:

> "Very few of the recommendations from the reports can be provided under the current contracts due to the way in which the old contracts were commissioned and the way in which the services are set up to be provided under the current contracts. However, these improvements will be seen under the new contracts which have been commissioned specifically in light of these reports and recommendations and the need to ensure these improvements and changes are realised are embedded into the new contracts."

10 Mr Rhodes says that, although the provision for services will, in general terms, be in accordance with national specifications, the new contracts under the procurement exercise will be based on seven "delivery principles" that he sets out and I shall not recite. All proposals in the bids were to be framed by reference to the tender specifications that included those delivery principles. Mr Rhodes says that recruitment and retention of staff is a major problem, as is the consequent level of staff vacancies. He gives examples of problems faced by the claimant in that regard. In paragraph 35 he remarks that changes under the new contracts, including (as is clear enough from a heavily redacted passage) enhanced rates of pay, will improve recruitment and retention. (A specific example of this is given in the redacted evidence of Ms Darrie: see paragraph 42.) Mr Rhodes also states that the lack of

certainty about the long-term future of the contracts and who the provider will be is leading to staffing problems in terms of anxiety and is likely to exacerbate the retention and recruitment problems. He does not accept that the benefits under the new contracts can be substantially achieved under rolling extensions to the existing contracts; he deals with this, in particular, at paragraph 59 of his statement.

11 The main evidential points of the claimant's response seem to me to be, in summary, as follows. Recognition of the problems faced by prisons and prisoners is nothing new; it has been well understood and documented for the last quarter of a century. The reports mentioned by Mr Rhodes were actually produced after the procurement had commenced, so the procurement was not a response to them, and the substantive matters that they set out had anyway long been common knowledge. The increase in percentage of prisoners who are over 50 years old and over 70 years old is acknowledged but is not considered sufficient to impact significantly on the provision of services. The defendant misrepresents the position in so far as it makes out that the existing contracts are inflexible and incapable of accommodating changing circumstances. The contracts enable the claimant to respond to need and to make changes in the services provided, as is shown by clinical outcome measures in independent assessment reports. Indeed, the current contracts expressly refer to flexibility, changes over time, and the obligation on the claimant and the defendant to respond to changes in the prison population. As for staffing issues, these are a nationwide issue; they are not confined to the claimant and Oxleas is not exempt from them. Indeed, Oxleas' supposed advantage in this respect is not reflected in the scoring or the feedback given on the tender, and Oxleas labours under the disadvantage that its sphere of operation and centre of activity is in the South-East of England, 150 to 200 miles or so away from the area to which the new contracts relate. Regarding the delivery principles, Mr Dowsett rejects the suggestion that these are new as regards as their substance. He says that they are "already in place and reflect the current service provision." He also observes that if, as Mr Rhodes says, the procurement reflected "a complete redesign", there would have had to be a statutory consultation.

12 With that summary of the main points made on either side as regards the facts, I now turn to analyse the application.

13 In *Camelot UK Lotteries Limited v The Gambling Commission* [2022] EWHC 1664 (TCC), O'Farrell J said at [48]:

> "The relevant questions for the court, when determining an application to lift the automatic suspension in a procurement challenge case, are as follows:
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> (i) Is there a serious issue to be tried?
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> (ii) If so, would damages be an adequate remedy for the claimant(s) if the suspension were lifted and they succeeded at trial; is it just in all the circumstances that the claimant(s) should be confined to a remedy of damages?
>
> (iii) If not, would damages be an adequate remedy for the defendant if the suspension remained in place and it succeeded at trial?
>
> (iv) Where there is doubt as to the adequacy of damages for either 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?"

Although I am told that there is an appeal pending in the *Camelot* case, it has not been suggested to me that the structural analysis set out in this passage is incorrect and, with respect, it seems to me that it is right.

14 The first question, accordingly, is whether there is a serious issue to be tried. As I have already indicated, it is common ground for the purpose of this application that there is a serious issue to be tried in respect of lots 3 and 4.

15 The second question, therefore concerns the adequacy of an award of damages to the claimant. In *Covanta Energy Limited v Merseyside Waste Disposal Authority* [2013] EWHC 2922 (TCC), Coulson J reviewed the authorities and continued at [48]:

> "Accordingly, I would summarise the relevant principles concerning the adequacy of damages as follows:
>
> (a) If damages are an adequate remedy, that will normally be sufficient to defeat an application for an interim injunction, but that will not always be so (*American Cyanamid*, *Fellowes*, *National Bank*);
>
> (b) In more recent times, the simple concept of the adequacy of damages has been modified at least to an extent, so that the court must assess whether it is just, in all the circumstances, that the claimant be confined to his remedy of damages (as in *Evans Marshall* and the passage from *Chitty*);
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> (c) If damages are difficult to assess, or if they involve a speculative ascertainment of the value of a loss of a chance, then that may not be sufficient to prevent an interim injunction (*Araci*);
>
> (d) In procurement cases, the availability of a remedy of review before the contract was entered into, is not relevant to the issue as to the adequacy of damages, although it is relevant to the balance of convenience (*Morrisons*).
>
> (e) There are a number of procurement cases in which the difficulty of assessing damages based on the loss of a chance and the speculative or 'discounted' nature of the ascertainment, has been a factor which the court has taken into account in concluding that damages would not be an adequate remedy (*Letting International*, *Morrisons*, *Alstom*, *Indigo Services*, and *Metropolitan Resources*). There are also cases where, on the facts, damages have been held to be an adequate remedy and the injunction therefore refused (*European Dynamics*, *Exel*)."

I would, for my part, emphasise sub-paragraph (a) in that summary. An injunction is an equitable remedy. A court administering an equitable jurisdiction (which is analogous to the exercise undertaken by the court under the Regulations) will not generally give an equitable remedy when a legal remedy is adequate.

16 In paragraphs 36ff of his skeleton argument and in his oral submissions for the defendant, Mr Halliday submits that this is a straightforward case. The claimant is a private company that exists to make profit for its members. The profits from the contracts can be calculated easily; indeed, they have already been forecast in the tender itself. The loss of the contracts

would not be existential for the claimant, in the sense of threatening the very subsistence or viability of the claimant, as they account for only a small proportion of its turnover.

17 For the claimant, Ms Hannaford QC with Mr Frampton submits that, if the suspension were lifted and the claimant were subsequently successful at trial, damages would not be an adequate remedy for the claimant, in the sense that it would not be just to confine the claimant to a remedy in damages. She advances two main reasons for this:

1) There is a likelihood, amounting to a strong probability, that the current procurement procedures, which include but are not limited to the Regulations, will be replaced by a new and more flexible NHS procurement regime, which in the words of a document published by NHS England and NHS Improvement in September 2019:

> "... would increase the ability of NHS Commissioners to integrate services by providing them with more discretion in when to use procurement processes to arrange services. Our proposals are intended to ensure that tendering does not take place where it adds no value. By giving Commissioners the discretion to choose either to award a contract directly to a provider or to undertake a procurement process, in either case with the clear aim of ensuring good quality care, good patient outcomes and value for money when designing local healthcare services."

It is said that, if this change occurs, contracts for the provision of the services in question may never, or at least not within the foreseeable future, be subject to competitive procurement. This is said to present a difficulty in assessing damages based on the loss of chance and would fall within the scope of what Coulson J said at point (e) at [48] in the *Covanta* case.

2) Ms Hannaford says that various specific losses can be identified in respect of which it would be unjust to restrict the claimant to a remedy in damages.

I shall deal with these two points in turn.

18 Regarding the NHS procurement issue, I shall take the background fairly shortly. The NHS has for some time been pressing for reform that will free it from the bureaucracy and cost perceived to be attendant upon the procurement regulation system. The White Paper "Integration and Innovation: working together to improve health and social care for all", dated February 2021, deals with this matter at paragraphs 5.45 to 5.48. It is unnecessary to read those paragraphs out and for brevity's sake I shall not do so. In the same month the NHS launched a consultation on the "NHS Provider Selection Regime". Some passages from the document explain the proposal sufficiently for present purposes. Paragraph 5.1 states:

> "The way in which decision-makers reach decisions about who provides services would depend on the type of service under consideration, and the kind of decision being made. Broadly there are three decision circumstances in scope of this regime for decision-making bodies, which are:
>
> (1) *Continuation of existing arrangements.* There will be many situations where the incumbent provider is the only viable provider due to the nature of the service in question, and a change of provider is not feasible or necessary – many NHS services are already arranged in this way. There will be other situations where the incumbent provider/group of providers is doing a good

job and the service is not changing, and there is no value in seeking another provider. In these situations, it needs to be straightforward to continue with the existing arrangements.

(2) *Identifying the most suitable provider for new/substantially changed arrangements.* There will be situations where existing arrangements need to change – for example, when a service is changing considerably; when a new service is being established; when the incumbent is no longer able/no longer wants to provide the service; or when the decision-making body wants to use a different provider. In these situations, the decision-making body should consider a set of key criteria. If after having done so they have reasonable grounds for believing that one provider/group of providers is the most suitable provider (which may or may not be the incumbent), they may award the contract to that provider without conducting a tendering process. This must be done in a way that is fully transparent as outlined in Section 8: Transparency and scrutiny.

(3) *Competitive procurement* – for situations where the decision-making body cannot identify a single provider/group of providers that is most suitable without running a competitive process, or the decision-making body wants to use a competitive process to test the market."

I can pass over paragraphs 5.2, 5.3 and 5.4. Paragraph 5.5 deals with the continuation of existing arrangements:

"If a decision-maker wants to continue with existing arrangements, they may do so where:

A) The type of service means there is no alternative provision. …

B) The alternative provision is already available to patients through other means such as the exercise of patient choice ...

C) The incumbent provider / group of providers is judged to be doing a sufficiently good job (i.e. delivering against the key criteria in this regime) and the service is not changing, so there is no overall value in seeking another provider."

Paragraph 5.9, which I shall not read, elaborates on competitive procurement.

19 The basic case put forward by the claimant is this. Whoever wins the contract this time will be the incumbent provider in seven years' time. At that stage there will be no obligation on the defendant to run a new procurement exercise, other than in the limited circumstances set out in what I have just read. If the claimant's case turns out to be correct but the defendant has already been permitted to enter into a new contract with Oxleas, the claimant will have lost the opportunity to be in pole position to take the next contract by virtue of being a satisfactory provider of services under the contract awarded in the present procurement; or, to put the matter rather differently, if the new contract is awarded "wrongly" (so to speak) to Oxleas, the claimant will have a diminished chance of obtaining the contract next time. one must, I think, be clear: the case cannot be that the claimant would have a diminished chance of entering a procurement competition in seven years' time, because that is a function of legislative reform, not the outcome of these proceedings. The harm complained of is the loss

of a chance for the claimant, rather than Oxleas, to be in the running for a new contract in seven years' time without having to go through a procurement exercise.

20 I reject this attempt to rely on statutory change to show that damages would be an inadequate remedy for the claimant. The argument rests on the notion that, by reason of wrongly being denied the new contract, the claimant has lost the chance of the defendant giving it a further contract in seven years' time as a satisfactory incumbent. However, it goes further by alleging that the claimant has a diminished chance of getting the next contract because Oxleas will be in with a chance of getting a new contract as a satisfactory incumbent. The law of loss of chance, in the context of a third-party decision-maker, is summarised in *Chitty on Contracts* at paragraph 29-086:

> "Where the claimant claims that in the absence of a breach of contract by the defendant a third party would have acted in a particular way so as to benefit the claimant, he need not prove the hypothetical on the balance of probabilities provided that the claimant can prove that in the absence of a breach there was a real or substantial not a speculative chance of a third party's action and the loss of chance is not too remote, the court must assess the chance of that action resulting, usually as a percentage, and then discount the claimant's damages for his loss by reference to that percentage."

21 The claimant's argument faces several difficulties.

1) The legislative change is uncertain. However, I accept that on the information before me it appears highly probable that the change will come about.

2) This does not seem to me to be properly characterised as a "loss of a chance" case at all; rather it is at most a worsening of prospects. A loss of chance occurs where one is excluded from the possibility that a third party will make a decision in one's favour. The classic case is *Chaplin v Hicks* [1911] 2 KB 786, where a prospective contestant was excluded from the chance of competing in what amounted to a form of beauty contest. She may or may not have won if she had competed. She was not required to show that she would have won, merely that she had a real chance. The same applies where, for example, a solicitor's breach of contract causes the client to be excluded from litigation in which the outcome was uncertain: the client does not have to show that success in the litigation was probable, only that there was a real or substantial prospect of success. Here, however, the claimant has not been excluded from anything, not even from a future procurement. There is at most simply a diminution of the likelihood that the claimant will get the next contract. However that is dressed up, it is not, in my judgment, a recoverable head of damage.

3) It is true that, where there is no recoverable head of damage, damages might still be an inadequate remedy. This was discussed by Stuart-Smith J in *OpenView Securities Solutions Limited v The Merton London Borough Council* [2015] EWHC 2694 (TCC). Ms Hannaford submitted that the judgment in that case was not in point, because the judge there was concerned with reputational damage. However, in agreement with Mr Halliday, I think this is rather to miss the point. Although Stuart-Smith J was considering a specific case of reputational damage, his actual analysis was directed to the circumstance of damage which did not sound in damages. At [33], the first paragraph under the heading "*Loss of reputation*", Stuart-Smith J:

> "The Courts have on occasions referred to 'loss of reputation' as a possible basis for holding that damages are not an adequate remedy. In principle, the underlying assumption appears to be that a 'loss of reputation' may be a real commercial disadvantage but one that is not capable of being included in any assessment of damages. This would be most likely to apply because of the application of principles of remoteness. For example, it might not in general be open to an aggrieved tenderer to recover damages for the chance of securing other contracts on the back of the contract at issue because the law would regard those losses as legally too remote. The outcome might in principle be different if both the tenderer and the contracting authority knew and intended that participation in the contract at issue was a necessary and sufficient qualification for participating in another contract as well. It is not self-evident that the exclusion of a particular head of damages on grounds of remoteness automatically renders damages an inadequate remedy, not least because the principles of remoteness are intended to be a principled response to the assertion of losses that are too speculative to justify recovery under a just and adequate system of law."

After considering relevant authorities, Stuart-Smith J continued:

> "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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> 38. This points to the answer to the second question: the constituency of interest is future prospective contracting authorities (or other contracting parties) who might be influenced to give work to a party which has the contract at issue rather than to a party which has not. The answers to the two questions explain in many cases why the 'loss of reputation' does not normally sound in damages in the first place: the loss is speculative and legally too remote. They also provide good reason for restraint on the part of a Court which is urged to adopt 'loss of reputation' as a reason for holding that the damages that would be awarded are not adequate compensation.
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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? 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:
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> (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."

It seems to me that on the basis that the loss is, in fact, not reflective of a recoverable head of damage, the alleged loss clearly does not fall within the principles enunciated by Stuart-Smith J in that the court has no reasonable degree of confidence that a failure to impose interim relief will lead to financial losses that would be significant and irrecoverable as damages.

4) The loss in question is, in my judgment, extremely speculative. It relies, first, on legislative change that has not taken place, albeit that it seems probable that it will. But it relies, second, on the concurrence of a host of circumstances: that the defendant judged Oxleas competent to continue to provide services; that Oxleas was willing and able to continue providing services; that no change of service was deemed necessary; and that the defendant did not wish to test the market by a procurement exercise because it considered that the public benefit of not testing the market was obvious. If I were wrong in my view that the correct analysis of the case is that the claimant advances an irrecoverable head of damage, and if instead the case fell to be considered as at least analogous to a situation where damages could be recovered for loss of chance, I should nevertheless consider that in the circumstances the matter relied on was so speculative and indirect as not to be such as to make it unjust for the claimant to be restricted to a damages claim anyway.

22 The second way the claimant puts its case (see paragraph 17 above) is by reference to a number of specific matters.

a) The claimant says that there is a risk that it will have to make a number of specialist staff redundant, who will be lost to it and indeed perhaps to the sector. I am unimpressed by that argument. In general terms, the loss through redundancy of staff who are not required is a normal incident of losing a competitive tender. If the staff are not required, they are not required. If losses are suffered by reason of redundancy payments, that is capable of quantification and of remedy by an award of damages. The notion that staff who were made redundant would be lost to the sector by reason of the claimant's failure to get contracts is both speculative and unconvincing, given the need for the new contracts to be serviced and the evidence of vacancies in the sector. (If staff have other reasons for leaving the sector that is not a matter that can be laid at the defendant's door.) Further, the evidence is at such a level of generality and has such a lack of specificity that it does not establish that there is likely to be a loss of specialist skills that are not able to be reacquired on the market.

b) The claimant relies on the lost investment in innovation. The argument, as I understand it, is that because of the loss of these contracts the defendant's investment in initiatives to improve service for patients will significantly reduce, with consequent

loss of benefits over time. The evidence in support of the argument, part of which is redacted, is in paragraph 131 of Mr Dowsett's first statement. I have to say that I regard this as wholly irrelevant to the grant or withholding of an injunction under the *American Cyanamid* test, as all of it has to do with what a company does with its profits, and loss of profits can be compensated in damages. That I think was the view of Joanna Smith J at [60] in the *Kellogg Brown* case. Anyway, the evidence fails to show how any specific loss of investment initiatives would be caused. There is nothing in that argument.

c) The claimant relies on what it says in reputational damage that will be occasioned to it by the loss of contracts for lots 3 and 4. That is put on a twofold basis.

i. The claimant says it will suffer a loss of general commercial reputation by reason of having lost the contracts. There is no doubt that such loss is capable in principle of making it unjust to restrict a claimant for a remedy in damages. That was discussed in the passages set out above in the judgment of Stuart-Smith J in the *OpenView* case. In the present case, the defendant's evidence comes nowhere near satisfying those requirements and does not rise above the level of assertion.

ii. The claimant says that a specific loss of reputation with public bodies will be occasioned on account of the claimant having taken money in compensation from the NHS and thereby made it, in effect, pay twice for the contract services. It is said that this will harm the claimant in seeking further public work of this sort. However, the risks of paying damages for an unlawful procurement exercise is integral to the system and does not seem to me to be any reason for saying that that very remedy is inadequate. Further, I am distinctly unimpressed by an argument that rests on the supposition that a public body will exercise its powers in an improper manner.

23 My conclusion is that damages are an adequate remedy for the claimant. In my judgment, that is sufficient to dispose of this application in favour of the defendant. However, I will go on to consider my views on the third and fourth questions.

24 The third question concerns the adequacy of damages for the defendant. The defendant contends that any harm to it if the suspension is left in place cannot be compensated in damages. For it, the purpose of the new contract is to enable it to discharge its public functions and duties under section 15 of the Health and Social Care Act 2012 and to exercise its functions with a view to securing continuous improvement in the quality of healthcare services in accordance with section 13(e) of the National Health Service Act 2006. If it is wrongly prevented by the suspension from entering into the new contracts, the interference with its public functions cannot be compensated in damages. Further, any deficiency in healthcare provision to serving prisoners by reason of delay in making the new contracts is likely to result in increased burdens on the general NHS when the prisoners are released into the community, a cost incapable of calculation. In my judgment, those points are manifestly correct. If the suspension is "wrongly" kept in place (in the sense that it is now decided that it ought to remain in place but it is subsequently held that the claim fails), the harm suffered by the defendant is not such as can be compensated in damages. I will say a little more about some of the relevant matters in that regard in due course.

25 The fourth question is as to the balance of convenience. For the reasons already given, it is strictly unnecessary to consider this question. However, if I had reached a different

conclusion on the second question (adequacy of damages for the claimant), I would have considered that the balance of convenience fell strongly in favour of removing the suspension.

1) Even if one were to consider that damages were not an adequate remedy for the claimant by reason of the NHS procurement argument, they would nevertheless plainly be an even less adequate remedy for the defendant. The highly speculative nature of the matters relied on by the claimant, set against the thoroughly non-pecuniary relevant disadvantage to the defendant, indicate a very strong balance in favour of removing the suspension.

2) Regarding the practical consequences of a continuance of the suspension, it is difficult within the confines of this application to make wide ranging and firm conclusions as to the benefits to be achieved under the new contracts. However, on the basis of my consideration of the evidence, I can express some limited views. First, although some criticisms of the claimant have been made by the defendant, I am satisfied that there are no substantial grounds of objection to the claimant or regarding it as not being a suitable service provider. Second, I am sceptical of the defendant's suggestion that staffing concerns provide a significant reason for requiring urgency of in the execution of the new contracts. The evidence adduced on this application does not support the idea that Oxleas was noticeably more advantageous in respect of staffing than was the claimant. It may indeed be that Oxleas has made a proposal that will tend to alleviate the main concern, but the defendant seems to me to have somewhat overplayed in this regard on the application. (I will say a bit more about a different aspect of staffing in a moment.) Third, I think that, overall, the defendant has overstated the importance of the delivery principles. They may very well form a useful basis for the structuring of the tenders and therefore of the new contracts. However, for the most part they are at such a high level of generality that it is unconvincing to portray them as critical. Fourth, however, I do not think that the delivery principles can in their entirety be dismissed as mere verbiage or repackaging. Thus, the third principle (contributing to the developing culture in prison) does seem to me to go beyond what has been the case before, notwithstanding Mr Dowsett's attempt to show that it does not. In this regard, the statement of Ms Darrie seems to me to have merit. More importantly perhaps, the fourth principle (a "no threshold" access to psychological support services) is a significant departure from the existing contracts. I would also mention the second principle which involves the provision of "reflective practice" sessions (as explained by Mr Rhodes in paragraph 38.6 of his statement) to both healthcare staff and wider prison staff; for reasons indicated in paragraphs 43 to 47 of Ms Darrie's statement, this too appears to go beyond what is currently available under the existing contracts. When it comes to the balance of convenience, these tentative observations have a degree of relevance, which I will expand on in a minute.

3) I see considerable force in the defendant's contention that genuine corresponding benefits cannot be expected under the rolling extension of the existing contracts. The defendant does not suggest that that the existing contracts are inflexible and static and incapable of responding to changing circumstances and needs. However, it does point out, fairly I think, that changes can only be secured by negotiation and agreement, and potentially an added cost of the delay, and that achievement of any secure benefits will be potentially lengthy, expensive and uncertain. Further, the requirement for a mobilisation period of five months in respect of the new contracts, which the defendant says cannot be reduced below a three-month period (the claimant expresses doubt even as regards the feasibility of that) tends to indicate that genuine benefits are unlikely to be achieved within the scope of the rolling extension. Again, incentives for a genuine

commitment to change is aligned with the new specification are lacking for the claimant in circumstances where it has no greater security than the notice period under the rolling extension.

4) In light of the evidence as a whole, and despite what I regard as a measure of over-statement by the defendant, I regard it as reasonable and proper to place significant weight on the defendant's own assessment, summarised in paragraph 25 of the statement of Ms Darrie:

> "It is simply the case that we need to enter into the new contracts as soon as possible so that the benefits of the new contracts can be seen, and the impact on healthcare as discussed in Rhodes 1 will be seen sooner rather than later. That will result in a decrease of self-harm and patient deaths. These risks will not only be reduced under the new contracts due to the improvement in services, but also because entering into the contracts will remove the uncertainty arising from the suspension, and in particular the impact on staffing, which is discussed in Rhodes 1."

In taking that view, I both accord a measure of deference to the views of the public body that is charged with duties for public car and also regard it as inherently probable that new contracts designed for the present and for the next seven years will more readily be apt to bring necessary benefits than will a contract designed in 2015 for a period that has now passed.

5) Keeping the suspension in place would lead to significant delay. I have considered the question of when disposal of the claim might take place, including the possibility of an expedited trial. The position is not helped by the suspicion that I cannot shake off, with all respect to counsel, that pessimism and optimism have strategically trumped realism in the parties' submissions. My enquiries show that the court cannot accommodate a five-day trial before January 2023 or a ten-day trial before March 2023. It is very difficult for me to form a judgment between the respective assessments of counsel, but at the risk of appearing arbitrary, my sense is that seven days, including reading time, would suffice for the trial provided that the parties focus on the real issues. That leads me to the working hypothesis that the court could accommodate a trial in the latter part of February 2023. I also think that the parties ought to be able to be ready for such a trial. That would still be a further seven months from now. A judgment could not be expected before perhaps eight to nine months from now. For the claimant it is said that delay of that order is not significant, given the duration of the new contracts and the delay that has already occurred. I do not agree. The delay seems to me to be significant, having regard in particular to the health and welfare of prisoners. I have already commented on the dispute as to the benefits to be achieved under the new contracts and the extent to which they could be achieved extensions of the existing contracts and as to the weight to be accorded to the defendant's own assessment of the necessity of the new contracts for the purpose of achieving identified health and welfare benefits for prisoners. In this connection, I refer to the remarks of Akenhead J in the context of the facts before him in *Solent NHS Trust v Hampshire County Council* [2015] EWHC 457 (TCC) at [38].

6) Again, I am satisfied that the ongoing delay in awarding the new contracts is liable to have a deleterious effect on staff morale, not only with Oxleas' staff, but also (notwithstanding the contents of Mr Dowsett's first witness statement) with the claimant's own staff. This is inherently undesirable in so far as it has an adverse effect

on third parties - that is, on real people - and in the light of evidence of problems of recruitment of potential healthcare staff within the prison sector it is to be avoided if possible. This is not the weightiest of considerations in this case, but it is not negligible.

7) The claimant relies on a number of matters as showing that the balance of convenience lies in leaving the suspension in place.

    a) The claimant points to the importance of ensuring proper compliance with procurement law. That is true and good, but the very same law imports the *American Cyanamid* test at this point. There is also a proper interest in public bodies being able to discharge their public functions as they deem appropriate, because they are the bodies to which the functions have been assigned by statute.

    b) The claimant points to the delay in conducting the procurement process, with the result that the existing contracts were extended for six months. I cannot pretend to think that is of any relevance. The delay was, according to the evidence, not the result of indolence or anything of the sort but rather arose out of the Covid pandemic. So it tells us nothing about the merits of proceeding quickly to implement the new contracts in the situation in which we find ourselves, and it does not tend to count against the defendant or in favour of the claimant when considering, as it were, by analogy, the merits of exercising the equitable jurisdiction.

    c) The claimant points to what it says is the delay in the making of the present application. I do not regard that as a matter of any weight either. The application was made reasonably promptly after the filing of the defence and in the circumstances was not excessive. Further, as Mr Halliday has said, to a large extent we are where we are. The serious issues in the case are not advanced by that particular consideration.

26 For those reasons, if I had thought that the application should turn on the balance of convenience, I would have held that the balance of convenience was in favour of lifting the suspension and that the application ought to be granted.

27 However, for the reasons I have already stated, the application succeeds because damages will be an adequate remedy for the claimant if its claim ultimately succeeds.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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