THE HIGH COURT

COMMERCIAL

[2023] IEHC 457

Record No. 2023/680JR

BETWEEN

CHC IRELAND DAC

APPLICANT

AND

THE MINISTER FOR TRANSPORT

RESPONDENT

AND

BRISTOW IRELAND LTD.

NOTICE PARTY

JUDGMENT OF Mr. Justice Twomey delivered on the 25th day of July, 2023

INTRODUCTION

1. The law applying to State bodies which put public contracts out to tender is the only area of law where a court injunction is effectively there 'for the asking'. This is because the *mere filing of proceedings* by a losing tenderer, in which it challenges the tender for a public contract, triggers an automatic injunction (known as an "automatic suspension"). This automatic suspension prevents the State agency from signing the public contract with the winning tenderer. The injunction/automatic suspension is there 'for the asking' in the sense

that it arises regardless of the merits of a losing tenderer's challenge to the tender and without any judicial oversight whatsoever – the only condition to be satisfied is that proceedings are filed within a specified time frame of the decision to award the tender.

2. Not only is it an exceptionally powerful weapon in the hands of any individual or any business that has lost a tender, but it also arises irrespective of the importance or value of the public contract which is being injuncted, *e.g* the building of public housing, hospitals, schools, vital transport infrastructure or, as in this case, the delivery of the provision of life-saving search and rescue aviation services worth *circa* €800 million.

3. Furthermore, where the losing tenderer is also the incumbent provider of services to a State agency, this means that the incumbent has, 'for the asking', a means of automatically preventing the signing of a contract with its competitor, while the incumbent remains in place. As the incumbent, it will then be in prime position to financially benefit from the automatic suspension of the tender process, *i.e.* with the prospect of having its contract continued by the State agency, after its intended expiry date, for the months/years that it takes for its legal challenge to the tender process to be resolved.

4. The fact that this can give rise to '*unsatisfactory'* situations was noted in the English High Court case of *Metropolitan Resources v. Secretary of State for the Home Department* [2011] EWHC 1186 (Ch) at para. 25. There, Newey J. noted that it is *'inherently unsatisfactory'* that a State agency *'should, in effect, be compelled to conclude a contract'* with the incumbent provider of services, who might have lost the tender, simply by virtue of the incumbent provider issuing proceedings against it.

5. Another way to look at this situation is that the fact that an 'automatic suspension' of a tender process is there 'for the asking' for losing tenderers, particularly for those who are the incumbent provider of services to a State agency, could in some cases act almost as an incentive to litigate for the losing incumbent.

6. Where the public contract is one of high value, the incentive for the losing incumbent to litigate may be even greater. This is because the legal costs of losing the challenge to the public contract (if the 'automatic suspension' is found to be without merit) may be dwarfed by the financial benefits of any extension of the incumbent's contract beyond its expiry date for the time it takes to resolve the legal challenge and any appeals.

7. It is perhaps not surprising therefore that, at a time of scarce court resources, a lot of court time is taken up with applications to lift 'automatic suspensions'. This is because the State agency, if it wishes, which it usually does, to sign the contract for crucial State services with the winning tenderer, is forced to come to court, at considerable expense, to seek the lifting of the automatic suspension. This is such a case.

8. However, it is important to note that it is not being suggested that the foregoing observations represent the motivation of the applicant and losing tenderer in this case ("**CHC**") to issue proceedings and thereby obtain an automatic suspension preventing the respondent ("**Minister"**) from signing a contract ("**New Contract**") with the winning tenderer and third party ("**Bristow**") for the provision of life-saving search and rescue aviation services.

9. Firstly, similar observations were made by this Court in *Glenman Corporation Ltd. v. Galway City Council* [2023] IEHC 336 (at para. 35) regarding the fact that the 'automatic suspension' constitutes a powerful weapon in the hands of a disappointed losing tenderer.

10. Secondly, Mr. Robert Tatten ("**Mr Tatten**") on behalf of CHC swore that it did not take lightly its decision to issue the proceedings and thereby claim its automatic suspension (at para. 98 of his affidavit dated 29th June, 2023).

11. Thirdly, the foregoing observations are of a general nature regarding the legal landscape for State bodies seeking to provide critical services and infrastructure by means of public contracts. Such general observations can never be a determinative factor in these cases, as each case must be determined on its own facts. It is nonetheless important to bear these observations

in mind. This is because O'Malley J. has pointed out in the Supreme Court case of ***Krikke v. Barranafaddock Sustainability Electricity Ltd*** [2020] IESC 42 at para. 90 that the legal principles which apply to the grant of injunctions (and thus to the continuation/lifting of automatic suspensions of a tender process) '*need to be applied in different ways in different cases'*. Automatic suspension cases are different in many ways from other cases. Accordingly, where a court is applying the legal test for lifting the automatic suspension, it is relevant to bear this legal backdrop in mind. It is particularly relevant when this Court has to consider what will preserve the *status quo* pending the trial of the substantive case. Is the *status quo* preserved by (i) continuing the automatic suspension (which, it must be remembered, CHC got 'for the asking'), which prevents the Minster signing the contract with the winning tenderer or is the *status quo* preserved by (ii) lifting the automatic suspension to allow the Minister to sign the contract after a *prima facie* valid tender process?

"Critically urgent" application

12. Another important part of the background to this case is the fact that the Minister has claimed that it is '*critically urgent'* that a decision be given regarding the lifting of the automatic suspension as soon as possible as it relates to a contract for life-saving services with a value of €800 million over 10 years.

13. The urgency of the case is illustrated by the fact that it was entered into the Commercial Court on the 26th June, 2023 and the application to lift the suspension of a public procurement process was heard the following week on 4th July, 2023. The hearing lasted a day and this Court was provided with several detailed affidavits and exhibits for its consideration along with case law and legislation, running to *circa* 2,500 pages, with the last affidavit dated Sunday 2nd July, 2023.

14. Then on 11th July, 2025, this Court reviewed a letter that was sent on behalf of CHC seeking to mention a matter to this Court regarding a meeting of the Joint Committee of the

Oireachtas on Transport and Communications concerning the tender process in this case, which meeting was scheduled for the 19th July, 2023. Although the hearing before this Court had finished, this Court agreed to a further hearing on the 12th July, 2023. At that hearing, this Court heard further submissions from CHC as to why, in light of this proposed meeting of that Oireachtas Committee, the automatic suspension should not be lifted. Replying submissions were heard from the Minister and Bristow as to why the evidence of the calling of that meeting did not support the continuation of the automatic suspension.

Lives at risk if the automatic suspension is lifted or if it is not lifted

15. CHC claims that lives are at risk if the Court lifts the automatic suspension, while the Minister and Bristow claim that lives are at risk if the Court does not lift the automatic suspension. All parties relied on the statement of Akenhead J. that *'I do not think that the Court should take risks with people's lives and health'* (*Solent NHS Trust v. Hampshire County Council* [2015] EWHC 457 (TCC) at para. 38) to support their claims that the automatic suspension should be lifted/should not be lifted.

16. The background to the claims that lives will be lost is the fact that the New Contract that was subject to tender, which is being challenged by CHC, relates to the provision of aviation services ("**Service**") for the life-saving search and rescue work of the Irish Coast Guard – i.e. the search for and the provision of aid to persons who are, or are believed to be, in imminent danger of loss of life. The fact that this service is a life-saving service is illustrated by the fact that in 2022, the most recent completed year in which the service was provided, there were 563 lives saved by the Irish Coast Guard.

17. Bristow and the Minister claim that any significant delay in the signing of the New Contract (and the commencement of the two year-transition period, at the end of which Bristow takes over from CHC, the incumbent provider of the Service), could have a negative effect on life-saving services provided by the Irish Coast Guard. This is because they say that if there

was any gap between the end of the existing contract ("**Existing Contract**") between the Minister and CHC, which ends on 30th June, 2025, and the start of the New Contract with Bristow on 1st July, 2025, this will have a negative effect on life-saving services. This arises because they claim that the transition period of two years is very tight and so there is no room for any delay which would be caused if the automatic suspension is allowed to continue. They point out that if it were not for the automatic suspension obtained by CHC, Bristow would have signed the New Contract with the Minister on 3rd July, 2023 and the transition period would have begun. However, they claim that any further delay, caused by the automatic suspension, could mean that Bristow will not be able to provide the life-saving Services on 1st July, 2025 when CHC's Existing Contract will have come to an end. For this reason, they say the matter is critically urgent. As noted below, they also say that the enhancements in the Service to be provided by Bristow, over and above those currently provided by CHC, will improve life-saving.

18. For its part, CHC agrees that the two-year time period is very tight. However, it goes further and claims that it is too tight and that Bristow will not be ready to take over the Service on the 30th July, 2025, even if there is no automatic suspension preventing Bristow from signing the New Contract. Indeed, as part of the tender process, CHC made this clear, since it claimed that there was a risk to the continuity of the Service and so a risk to life if CHC, rather than Bristow, was awarded the New Contract, as CHC stated that the '*23 months available is considered below the minimum for a standard sequenced transition'* (at para. 4.4 of CHC's transition plan).

19. A helicopter manufacturer engaged by Bristow provided evidence that the transition period amounts to a '*very compressed lead-time'* and that standard delivery terms for such helicopters would allow a period of '*in excess of 20 months from order'* before the delivery of the helicopters.

20. In light of this evidence from both parties, it seems clear to this Court that there is a need for this Court's judgment to be delivered within weeks, rather than months, of the hearings on 4th July, 2023 and the 12th July, 2023.

BACKGROUND

21. CHC is the incumbent provider of the Service under the terms of the Existing Contract, which was signed between CHC and the Minister on 22nd July, 2010. The Existing Contract provided for an initial term of 10 years from 1st July, 2012 to 30th June, 2022, with three optional years of extension, allowing the contract to run until 30th June, 2025. The three option years were taken up by the Minister and therefore the Existing Contract is due to expire on 30th June, 2025.

22. CHC is part of the CHC helicopter group of companies which is a global commercial helicopter service company, headquartered in the United States. While CHC has previously conducted other business in Ireland and tenders for additional work in Ireland, the Existing Contract is currently CHC's sole business in Ireland. Like CHC, Bristow is part of a US based provider of helicopter services.

23. On 31st May, 2023 the Minister communicated to CHC its decision that he had selected Bristow as the successful tenderer in the competition for the award of the contract pursuant to the Competitive Procedure with Negotiation as provided for in s. 29 of the European Union (Award of Public Authority Contracts) Regulations 2016 (S.I. No. 284 of 2016) ("**2016 Regulations**").

24. On 14th June, 2023, CHC issued these proceedings. As a result of Regulation 8(1) of the European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010 (S.I. No. 130 of 2010) ("**2010 Regulations**") the very fact that these proceedings had

issued led to the automatic suspension of the tender process and so prevented the Minister signing the Contract with Bristow. These proceedings were then admitted to the Commercial Court on 26th June, 2023, on the application of the Minister.

25. CHC challenges the tender process on a multitude of grounds (set out in 128 paragraphs in the Statement of Grounds from paras. 36 to 164, with the very extensive Statement of Grounds running to 58 pages in length).

26. One of the many grounds upon which CHC challenges the legality of the tender process and the award of the contract to Bristow is its claim that Bristow's winning tender was based on an *'abnormally low tender'*.

27. CHC also claims that the Minister, in reaching his decision, was subject to *'unlawful political influence'* (at para. 14 of its written submissions). This political influence, CHC claims, is evidenced by the statement of Senator Craughwell in the Seanad on the 31st May, 2023, that:

> "The Department of Transport has set out its preferred tenderer for the search and rescue contract and that is Bristow Ireland, which I congratulate on the job. I am not one bit sorry to see that CHC has not gotten over the line. From our point of view, **this House and committee** [*i.e.* the Joint Oireachtas Committee on Transport and Communications] **did much work that influenced the way this contract went.** It was a good day for Ireland that we did what we did." (Emphasis added)

It is important to observe that, in view of the nature of these proceedings, as a preliminary application to lift an automatic suspension and not the substantive case, Senator Craughwell was not given an opportunity to answer this serious allegation which has been made against him.

ANALYSIS

28. There was no dispute between the parties regarding the applicable law in this case, which is well-settled.

The law applicable to lifting automatic suspensions in public tender cases

29. Based on the Court of Appeal judgment of Barniville J., as he then was, in *Word Perfect Translation Services Ltd. v. The Minister for Public Expenditure and Reform* [2021] IECA 305, it is clear that even though this is an *application by the Minister* to lift the automatic suspension, the *onus is not on the Minister* to convince the Court that the automatic suspension should be lifted.

30. This is because, as previously noted, the automatic suspension in procurement challenges is obtained merely by the issuing of proceedings challenging the award of the public contract, regardless of the merits of the challenge. Accordingly, the onus is on CHC, which, in effect, obtained an 'injunction' by merely issuing proceedings, to convince the Court that this 'injunction', which was not granted by any court, restraining the awarding of the contract to Bristow, should be continued.

31. It is clear from *Word Perfect*, that this means that, even though the Minister is applying for the automatic suspension to be lifted, CHC is treated as if it is coming to court looking for such an 'injunction', *i.e.* as the moving party in this application.

32. Accordingly, it is CHC which must establish, in accordance with the well-settled law regarding the grant of interlocutory injunctions, that:

(i) there is a fair question or serious issue to be tried and

(ii) that the balance of justice favours the grant of an interlocutory injunction pending the trial of the action. The balance of justices includes an assessment of whether damages would be an adequate remedy for either or both parties.

> Thus, for the party seeking the injunction, if the injunction is refused by this Court, but at the trial it transpires *it should have been* granted, would damages be adequate? Alternatively, for the party resisting the injunction, if the injunction is granted by this Court, but at the trial it transpires it *should not have been* granted, would damages be adequate?

33. In this case, it has been conceded by the Minister (for the purposes of this application only) that there is a fair question to be tried. Accordingly, this case comes down to the question of whether this Court believes that the balance of justice favours CHC, the losing tenderer, being granted an injunction preventing the Minister signing a contract with the winning tender. To put it another way, does the balance of justice favour the lifting of the automatic suspension that came into effect by the mere issuing of proceedings by CHC challenging the award of the New Contract to Bristow?

Does the balance of justice require injunction preventing Minister signing the Contract?

34. There are a number of issues to be considered in determining whether the balance of justice favours the grant of an injunction against the Minister *i.e.* the continuation of the automatic suspension.

(i) The avoidance of any gap in the delivery of the Service

35. As stated by CHC in its written submissions, there is '*no dispute between the parties of the importance of ensuring that no gap arises in the Service'* (at para. 34) such that the provider of the Service is ready to assume the provision of the Service on 1st July, 2025.

36. In ensuring that there is no gap, a key issue in this case is the fact that there is a two-year lead-in period from the expected signing of the contract between the Minister and Bristow, which was due to take place on 3rd July, 2023 (but for the automatic suspension obtained by CHC) and the commencement of the Service on 1st July, 2025.

37. There is no dispute between the parties that this is a very tight transition period in view of the complexity of the services being provided under the New Contract. Ensuring that there is no slippage and thus no gap is crucial. In fact, both parties, for different reasons, are at pains to emphasise the very tight timeframe provided by this two-year transition period. While Bristow and the Minister claim that the transition period is very tight, CHC claims that it is too short. For their part, Bristow and the Minister point out that as part of the tender process, the expert evaluators approved the transition period. While this Court, at an interlocutory stage, cannot give the usual deference that is given to such expert evaluation at a trial when judicially reviewing such administrative decisions, it is nonetheless a fact to be weighed in the balance of justice. However, this Court cannot at this interlocutory stage determine whether the length of the transition period is correct or not. Thus, this Court cannot conclude, as CHC claims, that the transition period is too short and so there will be a gap in the Service, even if the suspension is lifted. CHC's claim in this regard is but one of the facts that must be weighed in the balance with other facts, such as Bristow's denial that it is too short as well as the fact that the length of the transition period was approved by the expert evaluators who conducted the tender process (*albeit* without giving deference to that fact).

38. In support of Bristow's claim that the transition period is tight (and so should not be delayed by the continuation of the suspension) Mr. Simon Tye ("**Mr. Tye**") gave sworn evidence on behalf of Bristow that Bristow is procuring five new helicopters and that it has to acquire and modify one fixed wing aircraft during the transition period. He also stressed that some 8,000 tasks have to be undertaken by Bristow during the two-year transition period between the signing of the Contract and the commencement of the Service. He points out that the importance of a seamless and orderly transition between the Existing Contract and the New Contract was reflected in the terms of the initial Request for Tender and the final Request for Tender in this case. This was because under those tender documents each tenderer was required

to submit a transition plan which was required to meet certain minimum requirements and which had to be approved as part of the tender process.

39. Evidence was also provided from the helicopter manufacturer engaged by Bristow to the effect that the transition period amounts to a '*very compressed lead-time'* and that standard delivery terms for such helicopters would allow a period of '*in excess of 20 months from order'* before the delivery of the helicopters.

40. Bristow also claims that if the automatic suspension is not lifted, this will lead to a significant slippage to the start date of the Service of 1st July, 2025 under the New Contract, which is a risk to lives (because of certain enhancements of the Service under the New Contract, which are not available under the Existing Contract). On this basis, the Minister and Bristow claim that this weighs in the balance of justice in favour of the suspension being lifted. They also claim that there is a risk to lives because any further delay caused by not lifting the suspension is likely to mean that Bristow will not be in a position to provide the enhanced Service on 1st July, 2025.

41. In particular, Bristow points out that because of the interdependency of the 8,000 tasks involved in acquiring helicopters, modifying a fixed wing aircraft, preparing bases and training staff, *etc*, this means that if the automatic suspension is not lifted and there is a delay of say six to nine months, one cannot simply '*shift to the right'* the timeframes for these 8,000 tasks. For example, Bristow claims, and it is not disputed by CHC, that manufacturing slots for helicopters will not and cannot be held in abeyance ready to go until the minute that CHC's challenge to the tender process is resolved, whenever that will be.

42. For this reason, Bristow claims that it is not simply a question of a delay of say six to nine months until the legal challenge is resolved 'at one end', leading to a knock-on delay of a similar period at 'the other end' *i.e.* after 1st July, 2025, so that Bristow would be able to commence the Service in early 2026. Rather, because of the complexity and interdependency

of the 8,000 tasks, Bristow claims that any significant delay (which this Court understood to mean of more than the few weeks for which it might take to deliver this judgment), is likely to lead to a much longer delay after 1st July, 2025. In addition, it points out that depending on how many months of delay are involved, certain sub-contractor prices that it obtained in order to tender are likely to no longer be valid. Thus, depending on the length of the delay, it may not be able to provide the Service at all, in which case there may have to be a new tender process (even if the Minister were to be successful in establishing the legality of the tender process at the trial).

43. For these reasons, Bristow claims that there is a risk to lives if the automatic suspension is not lifted, since any 'gap' in the provision of the Service would mean that there is a risk that there would be no Irish Coast Guard services for those in need of rescuing or that such services would not have the enhancements contained in the New Contract, which are not contained in the Existing Contract.

44. Since CHC was unsuccessful in obtaining the New Contract, that Bristow has won, and as CHC is the current provider of the Service (presumably at a rate which is not '*abnormally low'* as alleged by CHC about Bristow's winning tender), it is perhaps no great surprise that CHC has offered to deal with the risk of there being any gap in the Service, by saying that it would be happy to continue to provide the Service after its Existing Contract is due to expire, until the legal challenge is finalised.

45. However, for their part, Bristow and the Minister state that it is not an answer to the possible 'gap' in the Service to say that CHC can extend the Existing Contract. This is because, as noted further below, they say that an extension of the Existing Contract would be an unlawful extension of a contract under Regulation 72 of the 2016 Regulations, as such a contract should be the subject of a public procurement process and not awarded to an incumbent.

(ii) Enhancements under New Contract not available in Existing Contact

46. In addition to the Minister's and Bristow's claim that there would be a risk to lives if there is any gap in the Service from 1st July, 2025 arising from the continuation of the automatic suspension, they also point out that the New Contract involves enhancements to the Existing Contract (i.e. the use of a fixed wing aircraft for the first time and the use of six, instead of five, helicopters as well as new airframes, new technology, new bases and improved maintenance).

47. On this basis, they claim that if the automatic suspension were to be continued and CHC was to extend the Existing Contract (which Bristow says would be unlawful), in order to deal with the resulting delay in any handover of the Service from CHC to Bristow after 30th June, 2025, there would *still* be a risk to lives. This is because, the Existing Contract, as extended, does not provide the enhanced Services which are available under the New Contract.

48. In particular, they rely on the fact that in its final report dated 5th November, 2021 into the tragic loss of lives on 14th March, 2017 in Rescue 116 helicopter, the Air Accident Investigations Unit referred to the need for a 'fixed wing aircraft' being available to the Irish Coast Guard Service. In this regard, the New Contract, unlike the Existing Contract, provides for a fixed wing aircraft.

49. However, as noted below, CHC points out that if the automatic suspension is continued and this necessitates an extension of the Existing Contract, to avoid any gap in the Service after 30th June, 2025, the provision of a fixed wing aircraft can be provided by CHC.

50. However, it is to be noted that this is but one of the enhancements to which the Minister and Bristow refer. Thus, it seems that certain of the other enhancements under the New Contract would not be available if the Existing Contract had to be extended as a result of the automatic suspension being continued, *e.g.* the provision of an extra helicopter and the provision of improved sleeping accommodation for crew members.

Conclusions regarding the 'gap' in the Service and enhancements of the Service

51. While there is disagreement between the parties as to whether Bristow will be ready to operate with effect from 1st July, 2025, whether the automatic suspension is lifted or not (which cannot be resolved at this stage in the proceedings), the fact that there are enhanced services which Bristow is to provide under the New Contract is not disputed. CHC's only reply in relation to these additional enhancements is that its helicopters are larger, have more cabin space and can fly a longer range without refuelling, than Bristow's helicopters. While not according undue deference, at this interlocutory stage, to the 'fact' that Bristow's helicopters have been approved by the expert evaluators who conducted the tender process, this is nonetheless a fact as much as what CHC says about its own helicopters is a 'fact' (in the sense that it is not controverted by Bristow). At this interlocutory stage therefore, this Court is not in a position to prefer one of these 'facts' regarding the helicopters, over the other. However, the fact that CHC's helicopters are larger, have more cabin space and can fly longer without refuelling does not deflect from the fact that enhancements under the New Contract will not be available under the extended Existing Contract (which will have to be put in place if the automatic suspension is continued). While it is not determinative of the balance of justice, it is nonetheless a factor in favour of the lifting of the suspension that if the automatic suspension is continued, Bristow will not be able to provide the Service on the 1st July, 2025 with the enhancements (which do not exist under the Existing Contract).

52. This is a factor that can be taken into account because the case law is clear that this Court may take into account the public interest as a factor in considering whether to lift an automatic suspension, see for example *Powerteam Electrical Services Ltd. v. ESB* [2016] IEHC 87 at para. 58 where Costello J. stated that

> "the court may take into account the probable consequences of lifting the suspension for all interests likely to be harmed, as well as the public interest."

53. In addition what is not disputed between the parties is that a gap in the Service must be avoided, whether that is by the extension of the Existing Contract (which is alleged by Bristow to be unlawful) or by lifting the automatic suspension, so that the 'risk' of there being a gap in the Service is avoided (which CHC says is not a risk, but a certainty, even if the automatic suspension is lifted). At this stage in the proceedings, this Court cannot decide if CHC or Bristow is correct that, *whether or not* the suspension is lifted, it is a risk or a certainty that there will be a gap in the Service. However, there is agreement that the *failure* to lift the suspension will *definitively* mean that Bristow will not be able to provide the Service on 1st July, 2025. While not a determinative factor (since CHC claim that it can fill this gap by extending the Existing Contract, which the Minister/Bristow say would be unlawful), this is nonetheless a factor in the balance of justice in favour of lifting the suspension, i.e. the fact that continuing the automatic suspension will definitively cause Bristow to miss the commencement date of 1st July, 2025 for the new Service.

(iii) <u>The offer by CHC to extend the Existing Contract</u>

54. As already noted, one of the advantages to a losing tenderer, who is the incumbent service provider, challenging the award of a public contract to the winning tenderer, is that irrespective of the merits of the claim, the incumbent 'automatically' prevents the State from signing a contract with the winning tenderer, until the litigation comes to an end (which could be years later).

55. In some cases, this will lead to a financial windfall for the incumbent, since it may be the only realistic provider of the Service until the litigation is resolved and so is the provider most likely to fill the 'gap' created by the litigation that it has instituted.

56. In this case, *in support* of its claim that the balance of justice favours the automatic suspension being continued, CHC has pointed out that it has offered to continue to provide the

Service after the expiry, on 30th June, 2025, of its Existing Contract. In this way, CHC claims that the fear of there being a 'gap' in the Service, if the automatic suspension is not lifted, is allayed. It is relevant to step back and consider in some detail this factor (*i.e.* the extension of the incumbent's Existing Contract), which CHC says is a factor in its favour and so which it says weighs in the balance in favour of continuing the suspension.

57. The extension of the Existing Contract for a year is estimated by CHC to be worth 9% of the Existing Contract. If 9% of the value of the Existing Contract (which was for 10 years and was extended for three years) were to roughly equate to 9% of the value of the New Contract (which is for 10 years and it is valued at *circa* €800 million, *albeit* that CHC claims that Bristow's winning tender was too low), one would be talking about a value of *circa* €72 million. This guesstimate of the value of the extension of the Existing Contract to CHC is clearly far from scientific but simply illustrates that one is dealing with an extension to the Existing Contract for the benefit of CHC, which contract is likely to be worth many tens of millions of euro. One can therefore see the potential financial benefit to CHC of its decision to obtain the automatic suspension (by merely issuing proceedings) and the financial benefit to it of a decision of this Court to continue the suspension in reliance on CHC's offer to extend the Existing Contract (to avoid a 'gap' in the Service).

58. In addition, in order to deal with Bristow's claim that if CHC were to provide the Service after 30th June, 2025, it would not be as good as the enhanced Service available under the New Contract, CHC has provided sworn evidence that it would be in a position to provide a fixed wing aircraft for however long an extension is required (i.e. until its challenge to the tender process is finalised) for the same cost as was set out in CHC's tender in the competition that it lost.

59. In response to CHC's offer to extend the Existing Contract, the Minister/Bristow point out that the Existing Contract has already been extended to its maximum. Accordingly, they

point out that any extension of the Existing Contract will be considered under Regulation 72 of the 2016 Regulations, which deals with modification of public contracts during their term.

60. Before considering that regulation, it is relevant to note that the Minister, to support his claim that the balance of justice supports the lifting of the automatic suspension, relies on para. 4.2 of the Transition Plan, which CHC submitted as part of the tender process. In the Transition Plan provided by CHC, it dealt with the *possibility of it not winning* the tender by stating that if anyone other than CHC was selected, there was a severe risk to *'service continuity'*, which clearly implies a risk to lives, since the service in question was saving lives. In that document under the heading "Transition Risk" CHC states:

> **"Should CHC not be selected for the future contract, the risk to service continuity is severe**. Should a replacement contractor fail to deliver by 30 June 2025, **CHC Ireland will be legally obliged to suspend the Service at midnight on that date, and the Service will cease to be delivered**." (Emphasis added)

61. It is relevant to note therefore that CHC, when it was looking to ensure that *it would win* the tender, was stating that it was under a legal obligation to suspend the service at midnight on 30th June, 2025, and so that if it were not awarded the New Contract there was a 'severe' risk that there would be a 'gap' in the Service, which all parties agree must be avoided at all costs.

62. Yet, now that CHC *has lost* the tender, it is saying to this Court the exact contrary to what it said when it was hoping to *win* the tender, i.e. that it is in fact *not legally* obliged to suspend the Service, but rather that it is perfectly legal for it to provide the Service after midnight on 30th June, 2025.

63. On this basis, CHC now claims that the balance of justice favours the continuation of the suspension, in circumstances where all parties agree that the continuation of the automatic suspension would mean that Bristow will not be able to provide the Service on 1st July, 2025.

64. However, the fact that CHC can at one stage say that it is *legally obliged to suspend* the Service after 30th June, 2025 and so easily say that it is *lawful for it to extend* the Existing Contract after the 30th June, 2025, undermines the strength of its claim that it is lawful to extend the Existing Contract, when this Court is weighing up the balance of justice.

65. For its part Bristow and the Minister claim that CHC was correct when it *first* said that it was legally obliged to suspend the Service on 30th June, 2025. This is because they claim that a further extension of the Existing Contract will contravene Regulation 72 of the 2016 Regulations.

66. This is because Regulation 72(1)(a) and (7) permit a contract to be modified without a procurement process in only very limited circumstances:

> "(1) Contracts and framework agreements, including contracts awarded in accordance with Regulation 74, may be modified **without a new procurement procedure** in accordance with these Regulations in any of the following cases:
>
> (e) where the modifications, irrespective of their value, **are not substantial** within the meaning of paragraph (7) [….]
>
> (7) A modification of a contract or framework agreement during its term shall be considered substantial for the purposes of paragraph (1)(e) where the modification renders the contract or framework agreement, as the case may be, **materially different in character** from the contract or framework agreement initially concluded, and, in any event, without prejudice to paragraphs (1) to (5) a modification shall be considered to be substantial where one or more of the following conditions is met:
>
> (a) the modification introduces conditions which, had they been part of the initial procurement procedure, would have—
>
> (i) allowed for the admission of other candidates than those initially selected,

(ii) allowed for the acceptance of a tender other than that originally accepted, or

(iii) attracted additional participants in the procurement procedure;

(b) the modification changes the economic balance of the contract or framework agreement in favour of the contractor in a manner which was not provided for in the initial contract or framework agreement;

(c) the **modification extends the scope of the contract or framework agreement considerably**;

(d) a new contractor replaces the one to which the contracting authority had initially awarded the contract in cases other than those specified in paragraph (1)(d).” (Emphasis added)

67. As already noted, CHC claims that if the Existing Contract were to be extended this would result in an increase of approximately 9% per annum in the total value of the contract and, to the extent that any extension was for less than a year, the increase in value would reduce proportionately. On this basis, it claims that the extension of the contract is not substantial and would not contravene Regulation 72.

68. However, there is no basis for assuming that the extension of the Existing Contract will be for only a year or a proportionate part of a year.

69. Firstly, even if the legal challenge to the tender process was to be resolved within six to nine months, Bristow has provided uncontroverted evidence of the very complex and interdependent nature of the 8,000 tasks which have to be completed in the two-year transition plan. Accordingly, it is not a case of these 8,000 tasks being simply ‘shifted to the right’ as regards dates in an excel sheet. This is not disputed by CHC. Indeed, it claims in its written submissions that the scale of the work which has to be done by Bristow during the two-year transition period is ‘*staggering’* (at para. 39).

70. It follows that if the automatic suspension is continued and after say nine months from now a judgment is delivered permitting the Minister to sign the New Contract with Bristow, this does not mean that Bristow will be able to begin the Service on a date nine months from 1st July, 2025. This is because the delay which will be caused by the continuation of the suspension is not linear. The sworn evidence is that it will be greater than nine months because of the complexity and interdependency of the tasks to be undertaken in the transition plan and indeed that it may not be possible to provide the Service under the terms of the New Contract, because of the expiry of price quotes from sub-contractors.

71. Secondly, quite apart from the fact that any delay is not linear, there is also the length of any litigation delay arising from this challenge to the tender in this case. In this regard, CHC relies on *Gas Wise v. Dublin City Council* [2014] IEHC 56 as evidence of the fact that this matter could be resolved by February of 2024. In that case, the proceedings commenced on 8th August, 2013, and there was a hearing on 19th, 20th and 21st November, 2013 and judgment was delivered on 14th February, 2014.

72. However, the length of just one particular public procurement case that was heard in the last ten years is not compelling evidence of the likely length of time this case might take. It has already been observed that the grounds of challenge are very extensive - they run to 25 pages, thus giving an indication of the complexity and length of the trial. After the hearing, there could be *several thousand pages of documents* for the trial judge to consider (when one considers that for this preliminary application alone there was *circa* 2,500 pages provided to the Court). For this reason, and bearing in mind that sometimes the more valuable the dispute, the more time parties tend to take to litigate that dispute, it seems to this Court that a three-day hearing (as occurred in *Gas Wise*) is optimistic for a dispute regarding an €800 million contract with grounds of challenge running to 25 pages.

73. For his part, the Minister has estimated that a trial could take up to 18 days, if cross examination is necessary, and in this regard, it is to be noted that one of the claims made is against a politician, who has not had the opportunity to respond to the claims made against him.

74. Once the hearing is finished, whether a three-day hearing or an 18-day hearing, it can take a considerable amount of court time to prepare a reserved judgment. In the case of *Compagnie de Bauxite et D'Alumine de Dian-Dain S.A. v. GTLK Europe Designated Activity Company* [2023] IEHC 324 at para. 76, this Court estimated that it can take 2 to 5 times the length of a hearing to prepare a judgment, depending on the length and complexity of the matter. Thus for a one hour hearing, the ratio might be five, and it so it might take five hours to prepare a reserved judgment, while for a longer trial the ratio is more likely to be closer to the two, so that for a 4 week trial, it might take 8 weeks to finalise a reserved judgment in such a case.

75. The hearing, for this reserved judgment, took *circa* 1.25 days of hearing time and it took at least five times the length of the hearing time to prepare this judgment (as public procurement is one of the more complex areas of law, as evidenced by the *circa* 2,500 pages of documents provided).

76. Looking at the substantive trial, and not taking either CHC's suggestion that it might take three days or the Minister's suggestion that it might take 18 days, it seems to this Court that, based on its own experience, that it could take two weeks (8 days) and so the time for the judgment to be prepared is likely to be a minimum of 4 weeks. However, because of other court commitments, this amount of time is not available in one go and so it is likely to be some months, after the hearing, before a judgment is delivered. In these circumstances, the reliance on *Gas Wise* as a precedent for a judgment being delivered in the trial of this action by next February seems very optimistic.

77. More generally, the only thing that can be said with any certainty about litigation is that its duration is always uncertain and it is often this Court's experience that litigation is more involved and takes longer than is anticipated when it is commenced. In this regard, *Gas Wise* is but one of the many public procurement cases which have been heard over the years. The courts are filled with cases which develop a life of their own and last for many years, with appeals to the Court of Appeal and the Supreme Court. Indeed, where one is dealing with a contract, as in this case, with a value of *circa* €800 million, such appeals are all the more likely, since the cost of an appeal, relative to the value of the dispute, is less than in other cases.

78. All of this means, this Court cannot say that on the balance of probability this dispute over the tender will reach a final resolution by February, 2024, as suggested by CHC. Rather it seems to this Court that if the suspension of the tender process is continued by this Court, leading to the inevitable extension of CHC's Existing Contract, that extension will not be for a defined period of time, but will be for an unknown length of time for many months (and possibly years, if the decision of the trial court is appealed). It follows that at this juncture the value of any such extension of the Existing Contract is an unknown one. It is therefore not possible for this Court to determine whether or not that extension of the Existing Contract would be *'substantial'* or whether it extends the scope of the Existing Contract '*considerably*' and so whether it is lawful under Regulation 72 (1) (e) of the 2016 Regulations.

79. CHC relied on the English High Court decision of *Lancashire Care NHS Foundation Trust v. Lancashire County Council* [2018] EWHC 200 (TCC) at para. 33(1) where continuing an existing contract '*for a short time'* was held not to be a beach of the English equivalent of the 2016 Regulations. CHC submitted (at para. 54 of its written submissions) that a '*short extension'* of the Existing Contract would not be unlawful. The *Lancashire* case is distinguishable from the current case, as in *Lancashire* there had not been any procurement process for the existing contract, which was to be extended in that case. More significantly, the

problem with CHC's submission, in this Court's view, is that there is no certainty that the extension will be short for the reasons set out above.

Conclusion regarding the legality of the extension of the Existing Contract

80. In these circumstances, this Court cannot resolve the dispute between the parties as to whether the extension of the Existing Contract, as proposed by CHC, will extend the scope of the New Contract *'considerably'*. This is because the duration and value of the extension is uncertain, and so this Court cannot say that it will not contravene Regulation 72 (1) (e) of the 2016 Regulations.

81. This was also the position in *Homecare Medical Supplies Unlimited Company v. HSE* [2018] IEHC 55. As in this case, the parties in that case were in dispute as to whether the HSE could lawfully extend the pre-existing contract so as to avoid any gap in the service. Barniville J. held that he could not resolve that issue at the interlocutory stage. As in this case, the State agency there queried *'why it should have to take the risk of any challenge to a rollover or extension of the existing contracts'* (at para. 70).

82. From the perspective of the balance of justice, Barniville J. held in that case that any doubts about the legality of the extension of the contract in that case should:

> '*weigh and must weigh very heavily in the balance of convenience issue and clearly favours the lifting of the automatic suspension'* (at para. 74).

This Court takes a similar view in this situation. Accordingly, it seems to this Court that the doubts over the legality of the extension of the Existing Contract weigh in the balance of justice in favour of lifting the suspension, since as stated in *Homecare*, why should the Minister have to risk a challenge to the legality of the extension of the Existing Contract – after all, the *status quo* (as noted below) is that the Minister should be entitled to sign the New Contract with Bristow and so not have to take that risk.

83. This is particularly so when, in an attempt to procure the financial advantage of winning the New Contract, CHC claimed that it was obliged by law to suspend the Service on 30th June, 2025 and so it claimed that the risk to the Service was severe if CHC was not chosen. However, now that it has not won the Contract, it is using the contrary argument to ensure that the suspension is continued (which it seems will inevitably give it the financial advantage of remaining as the incumbent providing the Service after 30th June, 2025, even though it lost the tender).

(iv) <u>The period of delay</u>

84. The likely period of time before CHC's legal challenge is resolved is relevant not just to the legality of an extension of the Existing Contract, but also more generally as to whether the balance of justice supports the continuation/lifting of the suspension. This is because the longer that period of suspension, the more it weighs against the continuation of the suspension. For this reason, the '*starting point'* in the balance of justice test in automatic suspension cases is determining what the likely period is, during which the automatic suspension will remain in force (see *Word Perfect* at para. 147).

85. The most optimistic forecast which has been provided by CHC is an end to the automatic suspension by February, 2024 (assuming a very prompt three day hearing followed by a prompt reserved judgment and no appeal). On this basis, at para. 69 of its legal submissions, it submits that '*it would appear to be highly likely that the Proceedings will be resolved by [23 February 2024]'.* However, it does seem to this Court, for the reasons just set out, that while such an outcome is possible, it is probable, that the automatic suspension will remain in force for longer than this period and possibly much longer. This therefore is a further factor in favour of the lifting of the suspension.

(v) <u>The quality of Bristow's service compared to CHC's service</u>

86. In claiming that the balance of justice favours the continuation of the suspension, CHC puts particular emphasis on the fact that the helicopters which CHC use (the Sikorsky S-92A – "**S92A**") are larger, have more cabin space and can fly a longer range without refuelling than the helicopters which Bristow will be using to provide the Service (the Leonardo AW189 – "**AW189**").

87. On this basis, CHC says that the balance of justice favours the continuation of the suspension since it is, in effect, claiming that CHC's service is likely to save more lives than Bristow's service.

88. In this regard, all the parties rely on the judgment of Akenhead J. in the English High Court decision in *Solent* at para. 38 that:

> "It would be unfortunate not to say tragic if even one person died or suffered unavoidable serious physical or mental deterioration as a result of unavoidable delays in the provision of the improvements planned by the new contract [….] **I do not think that the Court should take risks with people's lives and health**". (Emphasis added)

CHC says lives are at risk because, if this Court does not continue the suspension and allows the New Contract to be signed with Bristow, risks will be taken with lives since, amongst other things, the quality of Bristow's helicopters are inferior to those of CHC's, even though Bristow's helicopters were approved by specialist evaluators who evaluated the tender for the Minister and even though they satisfy the requirements of the tender.

89. In this regard, in its letter dated 31st May, 2023 to CHC, the Minister summarised the evaluators' decision, at p, 5, as follows:

> "In summary, [Bristow] **provided a more comprehensive response that gave greater confidence that their chosen helicopter configuration (including system**

integration, layout and associated equipment fit) was suitable for IRCG taskings […]

The [CHC] Submission did not pro**vide enough assurance that 95% helicopter availability would be maintained** throughout the life of the contract.

While more maintenance personnel are to be employed, **the total number may not be sufficient for an ageing fleet** […]

In contrast, the **Evaluation Team scored [Bristow's] responses as Good, observing that [Bristow's] fleet …. gives a high confidence in fleet resilience** and thus achieving the availability target, although [Bristow] could have probably made more sophisticated use of the in-service data it has accumulated." (Emphasis added)

90. For its part, Bristow says that lives are at risk if the suspension is not lifted. This is because it will not have the full two years it requires in order to implement the transition plan and so it will not be able to provide the Service when the Existing Contract expires (which it claims cannot be lawfully extended) or because it is very unlikely to be able to provide the Service at all under the terms of the tender (depending on the length of the delay). For this reason, it says that there will be a gap in the Service which will lead to a risk to lives, which gap cannot be fixed by an 'unlawful' (in its view) extension of the Existing Contract. In addition, even if the Existing Contract were to be extended, it claims that because of the enhancements under the New Contract which are not available under the Existing Contract (apart from the enhancement of the addition of a fixed wing aircraft, which CHC has offered to provide under the extended Existing Contract), Bristow says risks will be taken with lives if the suspension is not lifted. These enhancements include the addition of one new helicopter and new airframes, new technology, new bases and improved maintenance.

91. In relation to the enhancements, Mr. Tye outlines, on behalf of Bristow, why the continuation with the automatic suspension involves taking risks with people's lives. At para. 26 of his affidavit of 30th June, 2023, he states:

> "Paragraphs 50 – 74 [of Mr. Tatten's affidavit of 29th June, 2023] dispute that the new Contract would involve service enhancements. However, the evaluation panel concluded – and correctly I believe – that the service offered by the Notice Party will enhance the [Irish Coast Guard] service in significant respects, including new airframes, new technology, new bases and improved maintenance, and **such factors enhance the capacity of the service to safeguard life**." (Emphasis added)

92. In reply, CHC claims that the transition period of two years, although approved by the expert evaluators as part of the tender process, is too short and so it claims that the '*staggering*' task of completing the 8,000 tasks will not be completed in the two-year period allotted for it (see para. 39 of its written submissions), which it says will lead to a 'gap' in the Service. CHC also claims that its helicopters have a capacity to fly over the seas for longer and have a greater capacity and so have a greater ability to save more lives than Bristow's helicopters.

93. It follows that this Court is therefore in the unenviable position of being provided with claims that it is taking risks with people's lives whether it lifts the suspension or it continues the suspension.

94. In relation to the claims by CHC that its helicopters are better than Bristow's, CHC points out that, in this interlocutory application, it is not asking the Court to second guess the expert evaluators' decision as part of the tender process, since the manner, in which the decision to award Bristow the New Contract was taken, is a matter for the substantive hearing.

95. However, it says that this Court is entitled to rely on the sworn evidence of CHC that its helicopters are larger, have more cabin space and can fly a longer range without refuelling, than Bristow's helicopters. This is because it points out that these claims have not been disputed

by Bristow, as Bristow has replied by saying that these are matters for the substantive hearing, while pointing out that this equipment was passed by the expert evaluators and meets the criteria for the New Contract.

96. However, CHC says the *uncontroverted* averment that CHC's helicopters are larger, have more cabin space and can fly a longer range without refuelling, is a fact which weighs in the balance of justice in favour of the continuation of the suspension.

Deference cannot be shown to expert administrative decision at interlocutory stage?

97. In particular, CHC claims that the interlocutory stage is not the stage at which this Court can show deference to the specialist decision makers (the evaluators) whose job it was to assess the respective merits of the tenders and who made the decision to award the New Contract to Bristow in the first place. This is because CHC says that an analysis of the decision which was made during the tender process (e.g. whether the Minister's decision is vitiated by an error of fact or law) and so any deference to those expert decision markers, only arises when the substantive challenge to the decision is being heard and that deference does not apply when considering the question of whether the balance of justice supports the lifting/continuation of the suspension.

98. However, it seems to this Court that there is a difference between, on the one hand, showing deference to the decision of an expert decision-maker at an interlocutory stage, which CHC is objecting to, and, on the other hand, completely ignoring as one of the facts, when considering the balance of justice, the decision of that decision-maker, and instead relying solely on the averments of a losing tenderer, which CHC is, it seems, urging this Court to do.

99. At this interlocutory stage, in deciding where the balance of justice lies, this Court will not give due deference to the decision of the decision-maker. However, the fact that, after a *prima facie* valid tender process, expert evaluators considered the merits of the respective helicopters and opted for Bristow's tender, is a fact which will be treated as any other fact,

which weighs in the balance of justice, when deciding whether to lift the suspension or not. It is entitled to be treated as a fact to be weighed in the balance of justice, just as much as the fact that CHC has made uncontroverted averments that its helicopters are bigger *etc* than Bristow's.

100. In other words, this Court will not do, as seems to be implied by CHC, namely ignore the fact that there has been a decision by the expert evaluators and instead focus on certain uncontroverted averments to the effect that, for example, the S92A helicopter carries more passengers than the AW189 helicopter. Rather, this Court will consider those averments, which are those of a losing tenderer pointing out why its tender should have won, *in conjunction* with all the other facts, including the fact that the expert evaluators reached the contrary view. When it does so, this Court cannot conclude that the averments of CHC should be given greater weight than the other facts, so as to tip the balance of justice in favour of continuing the suspension.

(vi) <u>The meeting of the Joint Committee on Transport and Communications</u>

101. Although the case had finished on 4th July, 2023, CHC contacted the Court Registrar by email on the afternoon of 10th July, 2023 (which email was read by this Court on 11th July, 2023) seeking a date for further submissions. CHC did so on the basis that it had come to its attention that a meeting of the Oireachtas Joint Committee on Transport and Communications was due to take place on 19th July, 2023 at which certain topics relevant to the tender in this case (and set out in the invitation below) would be discussed and to which meeting, the secretary general of the Department of Transport was invited. Insofar as relevant, the invitation reads:

> "The Joint Committee on Transport and Communications invites you and the relevant Principal Officer overseeing the tender process to a meeting of the Joint Committee to discuss the Department of Transport's administration of the tendering process of the

Irish Coast Guard (IRCG) search and rescue aviation (SAR) contract, including but not limited to the following topics:

- The reasons that Ireland's Air Corps were excluded from the tendering process for SAR

- **What changes have occurred whereby the AV189 helicopter is now deemed suitable for use in Ireland whereas it was previously excluded as unsuitable**

- The reason for changes made to Annex 1 soon after the tender issued, and,

- The reasons for the change to the tender to include virtual simulation training, the computations for calculation value of a simulation hour and its origination" (Emphasis added).

This Court acceded to the application for further submissions and a further hearing took place on 12th July, 2023. At that hearing, CHC submitted that if this Court lifts the suspension, this will render the Oireachtas Committee meeting to discuss these matters moot and so this is a factor in favour of not lifting the suspension.

102. This Court does not agree with this submission. This is because there is a clear separation of powers between the legislature and the judiciary and this Court cannot see that it should decide a justiciable issue between two parties in one way (*i.e.* by continuing the suspension) because if it did not do so, it would render the purpose behind a meeting of an Oireachtas Committee moot. The principle of the separation of powers is that the judiciary decides justiciable issues *independently* and without having regard to the views of the legislature or its agenda and in particular, whether or not, a particular judgment might render a meeting of an Oireachtas Committee moot.

103. CHC also submitted that the fact that the Oireachtas was enquiring into the reason the AV189 helicopter is '*now deemed suitable*' for this tender, when it previously was not, is a

further factor in the balance of justice against lifting the suspension. In essence, CHC is saying that because another person/body *appears* to agree with the claim that CHC is making about the S92A helicopters *being better* than the AV189 helicopters, this tilts the balance of justice in favour of the continuation of the suspension. However, this new fact is of limited evidential value, since firstly it makes no comparison between the two helicopters and so it could not be said to support a finding that the S92A helicopter is better than the AV189 helicopter for the purposes of the Irish Coast Guard. Secondly it is not *a determination* by the Oireachtas Committee of anything (and certainly it is not a determination that one tender was better than another tender). It is simply '*a meeting to discuss'* the changes which led to the AV189 being deemed suitable for the tender process.

104. The fact that an Oireachtas Committee, has d*ecided to meet to discuss* how the AV189 helicopter was deemed suitable for the tender, is just another fact, which weighs in the balance of justice in deciding whether to continue or to lift the suspension. It must be weighed against all the other facts, such as the fact that the expert evaluators *determined* that Bristow's tender, with its AV189 helicopters, was the better tender. For the reasons set out, this evidence is not determinative of the balance of justice, as it is of limited evidential value.

(vii) <u>The *status quo* when an automatic suspension is sought to be lifted</u>

105. CHC has argued that the Court should have regard to the *status quo* and in particular that it should preserve the *status quo* in the context of any order that it makes (at para. 99 of Mr Tatten's affidavit of 29th June, 2023).

106. This Court agrees that the *status quo* is an important factor, particularly in this case where both parties to the dispute are, in effect, claiming that if they do not win, lives will be put at risk, and even more so where this Court is not in a position to determine which, if any, of the parties is correct in relation to these claims.

107. However, where it disagrees with CHC is in relation to its suggestion that the *status quo* means preventing the Minister from signing the Contract with the winning tenderer and so leaving the incumbent, CHC, in place, with the near certainty of an open-ended extension of its contract for months, if not years.

108. It seems to this Court that the peculiar circumstances of this area of public procurement law have to be taken into account, when determining where the *status quo* lies. In particular, one is concerned in this case with a public law measure (the award of a contract by a Minister after an extensive and complex procurement process) which has been halted by the simple expedient of the losing tenderer, who is understandably disappointed at not winning the tender, *merely issuing proceedings*.

109. This halting of a Minister in his tracks occurs without any judicial oversight, and so even if the claims are completely without merit and also without regard to the value or importance of the public law measure which the Minister wishes to take. All of this means that CHC is in effect arguing that the *status quo*, to which it says the Court should have regard, is the *continued halting of a public law measure* by the losing tenderer, which came into being by the mere issuing of proceedings. This Court does not agree with this position.

110. Firstly, it seems to this Court that, in view of the *unsupervised* use of the 'legal weapon' of automatic suspension (in the sense of an injunction being granted without being overseen or supervised by a court), the *status quo* must be that the Minister is allowed to sign the contract, particularly in light of the deference which is given to public law measures, when interlocutory injunctions are being sought to stop those measures (referenced below).

111. Secondly, it seems clear that the lifting, rather than the continuation of the suspension, represents the *status quo* is also implicit from the fact that, in automatic suspension cases, the party which issues the proceedings to lift the automatic suspension is not subject to the normal

rule of 'she who asserts must prove'. This is because it is clear from *Powerteam* at para. 15 *per* Costello J. that:

> "The Court is enjoined to proceed on the basis that there is no automatic suspension of the power of the contracting entity to conclude the contract as set out in Regulation 8(2)(a). On that basis it is asked to:
>
> > 'consider whether ….it would be appropriate to grant an injunction restraining the contracting entity from entering into the contract'".

Accordingly, it is the person who obtained the automatic suspension who has the onus of proving that it should be continued. To put it another way, at the hearing before this Court to lift the automatic suspension, the starting point or *status quo* is that there is no automatic suspension in place. To similar effect in *Homecare* at para. 74, Barniville J. stated that

> "the status quo is that there is no suspension and so the lifting of the suspension will maintain the status quo."

112. Undoubtedly, the reason why the usual onus of proof is reversed is because of the ease with which an automatic suspension of a public law measure can be obtained (*i.e.* by the mere issue of proceedings). It seems clear that implicit in this reversal of the usual onus of proof is the fact that the starting assumption, or the *status quo,* in these automatic suspension cases is that the Minister *should be entitled to sign a contract*, even though as a matter of procedure (and so not on the merits), a losing tenderer is entitled to an automatic suspension/injunction on the issue of proceedings, as a result of Regulation 8 of the 2010 Regulations.

113. In summary therefore, this Court agrees with CHC that, when weighing up the balance of justice, in determining whether to lift/continue the suspension, a factor to be considered is which court order will preserve the *status quo* until the substantive hearing (by which stage all the facts can be established). However, in this instance, this factor is in favour of the lifting of

the suspension. This is because the *status quo* in these automatic suspension cases is the position before the applicant obtained a suspension 'for the asking', *i.e.* the *status quo* is that the Minister was entitled to sign a contract with the winning tenderer. Furthermore, it seems in this case, where both parties claim that lives are at risk and this Court is not in a position to determine which one of the parties is correct, preserving the *status quo* is of particular importance.

(viii) Public law measures should be given appropriate deference

114. Another important factor in the balance of justice, which weighs in favour of the lifting of the suspension, is the fact that in this case, one is, in effect, dealing with an injunction to prevent a public law measure being brought into force. It is clear from the Supreme Court in *Okunade v. Minister for Justice and Others* [2012] 3 I.R 152 at p. 193 that this Court should:

> "in considering whether to grant a stay or an interlocutory injunction in the context of judicial review proceedings [….] give all appropriate weight to the orderly implementation of measures which are *prima facie* valid".

This means, as noted by O'Donnell J. in *Krikke v. Barranafaddock Sustainability Electricity Ltd* [2020] IESC 42 at para. 12 that

> "The starting point is, however, the application of a law validly enacted by the body entrusted with that task by the Constitution. Even where the challenged measure is made pursuant to statutory power and is of more limited application, the temporary **disapplication of a measure which is ostensibly valid is a serious matter**, and the fact that there is no remedy should it transpire that the challenge was not justified is a matter that must be weighed in the balance on any application for an interlocutory

injunction or stay pending trial, and perhaps even more so where a stay is sought pending appeal." (Emphasis added)

In her judgment at para. 99 in the same case, O' Malley J. stated that:

> "[I]f an order or measure is *prima facie* valid, even where arguable grounds are put forward for suggesting invalidity, **it should command respect** such that **appropriate weight is given to its 'immediate and regular' implementation** in assessing the balance of convenience (or, as Clarke J. suggested in [*CC v. Minister for Justice* [2016] 2 I.R. 680], the balance of justice." (Emphasis added)

In this context, this means that this Court, when considering whether the balance of justice supports the lifting/continuation of the suspension, should give appropriate weight to the fact that the Minister conducted an extensive and complex procurement process which has resulted in the award of the contract to Bristow to deliver life-saving public services. This must be treated as the Minister wishing to implement a *prima facie* valid measure, notwithstanding CHC's claims that the tender process was flawed. Disapplying that public law measure by continuing the suspension is therefore a *'serious matter'* and not to be undertaken lightly Accordingly, while not determinative, this is a further factor which weighs in the balance of justice in favour of the lifting of the suspension, to allow the Minister to proceed with the immediate and regular implementation of the outcome of the tender process, by signing the New Contract with Bristow.

(ix) <u>Minister forced to contract with CHC rather than its chosen party, Bristow</u>

115. There was no dispute between the parties that, *if* the suspension was not lifted, the Minister would have to enter a contract with CHC to provide the Service after 30th June, 2025, if the Minister wished to ensure that there was no gap in the Service.

116. It is relevant to note that it will not always be the case that a State agency, which is subject to an automatic suspension that was caused by an incumbent challenging a tender, will be obliged to enter a contract with the very party with whom it clearly wishes to end its contractual relationship. For example, there may be other companies which can provide the services and are only too happy to do so at short notice. Indeed, *Word Perfect Translation Services Limited v. The Minister for Public Expenditure and Reform* [2021] IECA 305 is an example of an automatic suspension case where the automatic suspension applied to a Framework Agreement for translation services. As this was a Framework Agreement, rather than a binding contract for the supply of services with a particular winning tenderer, there was no obligation on the State agency, the subject of the automatic suspension in that case, to enter a contract with any party as there were other contracts available and other means of the State agency obtaining those services.

117. However, in this case, we are dealing with a situation where the Services are so specialised, expensive and complex, requiring a two-year transition period for the new contractor to replace the incumbent, that the mere issuing of the proceedings by the incumbent means that if the automatic suspension is continued, the Minister will, it seems, be forced to enter a contract with the incumbent.

118. While the rationale for halting the tender is to provide an effective remedy to a challenger to a tender (by preventing the signing of the contract before it is too late), in certain cases, such as this one, not only is a halt being put to the New Contract being signed, but also the Minister will, it seems, be forced (against his will, since he wanted to award the contract to Bristow) to enter an extension to the Existing Contract with CHC for tens of millions of euro (if the suspension is continued). As noted by Newey J. in *Metropolitan Resources*, there is something '*inherently unsatisfactory'* about the fact that a State agency can, for this reason,

not just be stopped from entering a contract with his preferred party (Bristow), but be compelled to enter a contract with the party with whom it no longer wishes to contract (CHC).

119. In the English High Court case of *Newcastle Upon Tyne Hospital Trust v. Newcastle Primary Care* [2012] EWHC 2093(QB), Tugendhat J. held that this was a factor in the balance of justice. He decided that it weighed in the balance of justice in favour of the lifting of the automatic suspension:

> "The Claimant's proposal that it should **provide an interim service** would in effect put the Defendants in the **position of awarding to the unsuccessful bidder the contract** which it had chosen to award to MIUK. **This is not just either to the Defendants or to MIUK**. I cannot decide on this application where the best interests of the diabetic population lie. The Defendants do not have a choice whether to provide the service or not. **So it would not be just for the court to put the Defendants in the position where they had in practice no choice but to enter into a short term contract with the Claimant** when they assert that they do not consider that that would be the proper course." (at para. 43)

In this case, therefore it is relevant to bear in mind that the continued suspension means not just the halting of the signing of the New Contract with the winning tenderer, but the seemingly inevitable signing by the Minister against his will of an extension of the Existing Contract with the losing tenderer.

120. It seems to this Court that this is a factor, *albeit* not a determinative one, which is not present in every automatic suspension case, but is present in this case, which weighs in the balance of justice in favour of lifting the suspension. While this '*inherently unsatisfactory*' outcome is not something over which CHC has control, as it just happens to be the incumbent in a very specialised and valuable public contract with few other providers, nonetheless it is a

matter for this Court to take into account since that will be the effect of an order by this Court to continue the suspension.

(x) Political interference

121. CHC claims that the Minister took into account political influence by Senator Gerard Craughwell, as evidenced, it says, by the statement by Senator Craughwell in the Seanad on the 31st May, 2023 that:

> "The Department of Transport has set out its preferred tenderer for the search and rescue contract and that is Bristow Ireland, which I congratulate on the job. I am not one bit sorry to see that CHC has not gotten over the line. From our point of view, this House and committee [*i.e.* the Joint Oireachtas Committee on Transport and Communications] **did much work that influenced the way this contract went.** It was a good day for Ireland that we did what we did." (Emphasis added)

CHC raised this issue in its letter of 6th June, 2023 to the Department of Transport and called for an explanation. By letter dated 9th June, 2023, the Department replied that:

> "2.1 External factors
>
> (a) During the court of the Competition, the Secretary General of the Department of Transport and relevant Officials of the Contracting Authority were invited to appear before the Joint Committee on Transport and Communications on several occasions, to provide a briefing on the procurement process underway in respect of the provision of the new Irish Coast Guard Aviation Service.
>
> **On each occasion the Secretary General, guided by legal advice, declined these invitations in order to protect the integrity of the procurement process**, as it would not be appropriate for officials from the Department to attend a session fo the Committee while the Competition was progressing.

(b) and (c) Throughout the entire Competition, very robust oversight and governance arrangement, incorporating an approved Evaluation Guide for Evaluators, (copy attached) were in place. These arrangements were underpinned by the presence of an independent Process Auditor and a dedicated resource from the Chief State Solicitor's Office ("CSSO") throughout the process. **These arrangements also ensured that evaluators did not consider extraneous information,** nor did they consider any matters not prescribed in either the Initial or Final RFTs." (Emphasis added)

While it is a serious claim to make that the procurement process in this case was flawed because of political interference by Senator Craughwell (and it must be remembered that Senator Craughwell was not present to defend himself at this preliminary stage of the proceedings), there is a clear factual conflict between the parties on this issue. Accordingly, this is not therefore an issue that can be resolved by this Court at this stage in the proceedings and so it is not something which significantly tips the balance of justice in favour of continuing the automatic suspension.

(xi) <u>Damages an adequate remedy?</u>

122. It is well established that the adequacy of damages is an important factor in the balance of justice. However, in cases such as this one where a public law measure is being challenged, the adequacy of damages is less important. As noted in *Okunade* at p. 188:

> "the question of the adequacy or otherwise of damages is **unlikely to be a significant feature** in reaching an assessment as to how best to minimise the risk of injustice in the context of an interlocutory application pending trial of judicial review proceedings." (Emphasis added)

Nonetheless in the context of adequacy of damages, CHC points out that, as an Irish incorporated subsidiary, it is part of a multinational helicopter services group. It points out that its only contract is the Existing Contract and it claims that if it fails in having the automatic suspension continued this will most likely result in CHC, the Irish incorporated subsidiary, going out of business.

123. In this regard, it placed particular weight on the statement of Costello J. in *Powerteam Electrical Services Ltd v. Electricity Supply Board* [2016] IEHC 87 at para. 42 that

> "*Prima facie* if a business will probably cease to trade if an injunction is withheld, damages are not an adequate remedy."

124. Thus, CHC claims that a factor to be weighed in the balance of justice in favour of the continuation of the suspension is the fact that damages would not be an adequate remedy for it, since it will most likely go out of business, which it says cannot be compensated for in damages, at a later date.

125. It seems to this Court that, in light of the 'automatic injunction' which is granted in these public procurement cases, one must be careful not to give too much weight to the fact that a losing incumbent tenderer, with only one existing public contract on its books, is likely to go out of business if it does not have the suspension continued.

126. This is because in *Krikke* at para. 90, O'Malley J. observed that

> "*CC v. Minister for Justice* [2016] 2 I.R. 680 also confirms that the intention in *Okunade* was not to apply different tests to ordinary civil litigation, on the one hand, and public law claims, on the other, but to **identify certain features of public law litigation that may mean that the general principle – the need to minimise the risk of injustice – may need to be applied in different ways in different cases**." (Emphasis added)

Thus in determining how much weight should be afforded to damages being an inadequate remedy (for an incumbent tenderer with just one contract on its books), regard should be had to the fact that in public procurement cases, an incumbent unsuccessful tenderer may have obtained an injunction without court approval of a *prima facie* valid public measure, where the continuation of the 'injunction' will place the incumbent in the enviable financial position of being virtually guaranteed, or in a very strong position, to continue with its public contract after its expiry.

127. In particular, when determining how much weight to attach to the fact that damages may not be an adequate remedy to an incumbent tenderer with only one public contract on its books, it is relevant to bear in mind that this may be the result of how a corporate group decided to organise its affairs. For example, Corporate Group A, may decide to incorporate a special purpose company, Company X, for the purposes of entering a valuable public contract. By choosing to organise its business in this manner, it has created a situation whereby, if it fails to get the *renewal* of the public contract, when put out to tender, Company X can then claim that it will have to cease operations and therefore can claim that damages are not an adequate remedy and so it should have the automatic suspension continued.

128. In structuring its business in this way, Corporate Group A increases the chances of it being successful in continuing the automatic suspension of the award of the contract to the winning tenderer, which suspension it can obtain 'for the asking' and also in being successful in obtaining an extension of its existing contract, while the legal challenge is continuing.

129. Contrast this with the situation of Corporate Group B which is in the exact same position as Corporate Group A, but which, instead of forming a special purpose company, enters into the public contract as one of its many contracts. When it loses the tender for the succeeding contract, it is not in a position to make a similar claim that damages would not be

an adequate remedy, since its business would not have to shut down by virtue of the loss of the contract.

130. Corporate Group A would *prima facie* therefore be in a better position than Corporate Group B, when it comes to continuing the suspension and thereby depriving the winning tenderer of the new contract and putting itself in pole position to get an extension of its own contract to cover the gap caused by its challenge to the procurement process.

131. It is important to emphasise that it is not being suggested that this was the motivation for the CHC group to incorporate CHC Ireland DAC, which now has only one contract on its books, the Existing Contract.

132. The point being made is that the weight, which is attached, to the fact that damages are not an adequate remedy for an unsuccessful tenderer, needs to be considered in the peculiar circumstances of automatic suspension cases (as distinct from an injunction case between two private parties). In particular, it is important to bear in mind that a public law measure needs to command respect and that an automatic suspension is obtained 'for the asking'. These should be borne in mind when considering the weight which should be given to a claim that damages are not an adequate remedy for a company, particularly where it is the subsidiary of a corporate group, which has just the existing public contract on its books and which is in pole position for an extension of the Existing Contract to provide the necessary Service.

133. Against this general backdrop, it is relevant to note that CHC claims that damages would not be an adequate remedy, because the loss of the New Contract '*would likely lead to CHC exiting Ireland altogether'* and that it was '*highly likely that it would also result in CHC Ireland DAC [..] going out of business*' (at para. 82 of Mr. Tatten's affidavit of 29th June, 2023).

134. For its part, Bristow in assessing whether damages would be adequate for CHC, views the matter from a global perspective, as it, like CHC, is a global commercial helicopter service company based in the US. It makes the point that it views CHC as a credible and capable global

competitor and that CHC's *global business* will not be affected by the loss of the Contract (at para. 27 of Mr. Tye's affidavit of 29th June, 2023). Bristow points to its own experience in the reverse situation where it lost the MCA SAR contracts in 2007 and the shutdown of its Netherlands' operation, which made it more determined to win back those contracts, which it did after a gap of five years. In this regard, the point being made by Bristow appears to be that the adequacy of damages test applies to a subsidiary of a corporate group in a more nuanced way than where there is just one standalone company, with only that public contract. This Court does see merit in this point.

135. However, assuming that damages are *not an adequate remedy* for CHC because it will cease business if the suspension is not continued, then regard must be had to whether damages *are an adequate remedy* for the Minister.

Are damages an adequate remedy for the Minister?

136. One cannot say that damages are an adequate remedy for the Minister. This is because, this is one of those cases where lives are alleged to be at risk. While CHC claims that lives may be lost if the suspension is lifted, the Minster/Bristow also claim that lives will be lost if it is not lifted.

137. It is not possible for this Court to decide which of the parties is correct. Accordingly, this means that if it transpires at the trial that the suspension was wrongly continued, then damages will not adequately compensate the Minister. This is because if even one life is lost as a result of the wrongful continuation of the suspension, then clearly damages are not an adequate remedy for the Minister, since damages are never adequate to compensate for the loss of life.

138. For this reason, even if damages are an inadequate remedy for CHC, this does not swing the balance of justice in favour of continuing the suspension. This is because this Court cannot

conclude that damages are an adequate remedy for the Minister, where he, unlike CHC acts in the public interest, and it is claimed that lives are at risk if the suspension is not lifted.

CONCLUSION

139. When one weighs all of the foregoing factors in the balance of justice, it seems clear to this Court that the balance of justice favours the lifting of the automatic suspension in this case for the reasons set out above, including the fact that both parties claim that lives will be lost if the automatic suspension is lifted/continued. In such a situation, and where this Court cannot determine which party is correct, lifting the suspension preserves the *status quo* by permitting the Minister to sign the New Contract with the winning tenderer and not being forced to sign an extension of the Existing Contract with the losing tenderer.

140. In view of the urgency of this case, this judgment is being delivered in court, so as to hear immediately from the parties regarding any orders which arise as a result of the terms of the judgment.