Neutral Citation Number: [2025] EWHC 744 (TCC)

Case No: HT-2025-000023

**IN THE HIGH COURT OF JUSTICE**
**KING'S BENCH DIVISION**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**COMMERCIAL COURT**

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 28 March 2025

**Before** :

**ANNELI HOWARD K.C. (sitting as a Deputy High Court Judge)**

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**Between :**

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| **MILLBROOK HEALTHCARE LIMITED** | **Claimant** |
| **- and -** | |
| **DEVON COUNTY COUNCIL** | **Defendant** |
| **- and -** | |
| **NOTTINGHAM REHAB LIMITED (T/A NRS HEALTHCARE)** | **Interested Party** |

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Patrick Halliday (instructed by Gowling WLG (UK) LLP ) for the Claimant
Joseph Barrett K.C. (instructed by DAC Beachcroft LLP) for the Defendant
Simon Taylor (instructed by Anthony Collins Solicitors LLP) for the Interested Party

Hearing date: 12 March 2025

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# JUDGMENT

## Non-confidential (redacted version)

**This judgment was handed down by the court remotely by circulation to the parties' representatives by email and released to the National Archives. The date and time for hand-down is deemed to be 28 March 2025 at 10:30am.**

**ANNELI HOWARD K.C:**

## Introduction

1. There are two applications for determination by the Court:

   i) **ATL**: An application by the Defendant, Devon County Council ("**DCC**"), pursuant to Regulation 96(1) of the Public Contracts Regulations 2015 (as amended) ("**PCR 2015**"), to lift the automatic suspension restraining the Defendant from entering into a contract with the successful tenderer, Nottingham Rehab Limited ("**NRS**") for the supply of community healthcare equipment and related services.

   ii) **Expedition:** An application by the Claimant, Millbrook Healthcare Limited ("**Millbrook**"), for an expedited trial instead of lifting the suspension as part of its challenge to the award of the new contract to NRS, the Interested Party.

## Background to the Procurement and Procedural History

2. Millbrook has been the incumbent supplier of Community Equipment Services ("**CES**") and Technology Enabled Care & Support services ("**TECS**") in the local authority area for the last 7 years. CES and TECS services are provided on behalf of the local authority to enable residents (both adults and children) with eligible health, social care or educational needs to be cared for in their own homes rather than in hospital or residential care settings. The procurement of the new contract valued at approx. £46 million (excl. VAT), for an initial 5 year term plus an optional 2 year extension from 1 April 2025, was advertised by contract notice dated 23 April 2023. The open procurement was conducted by NHS South, Central and West Commissioning Support Unit on behalf of the Defendant. Bids were evaluated on the

basis of pass/fail selection criteria in a Selection Questionnaire and answers to weighted scored quality and finance questions.

3. The Defendant first notified the Claimant on 9 October 2024 of its decision to award the new contract to NRS, and confirmed that decision in a contract award letter dated 24 October 2024. Both Millbrook and NRS had passed all the selection criteria and there was a narrow gap between their scores, with NRS' total score reaching 75% and Millbrook's score at 72.5%. The Claimant contends that a difference of one point in any one answer to the scored questions (at least for questions with a weighting of 10% of more) would alter the outcome of the procurement.

4. On 25 October 2024, the Claimant raised concerns regarding NRS' information security and financial standing, which were included as part of the pass/fail selection criteria. Millbrook contended that NRS' financial outlook and profitability as well as its operations and service levels had been severely affected by a cyber security incident that took place in March 2024. In response, DCC undertook to carry out due diligence and entered into successive standstill agreements with the Claimant on 22 November 2024 and 20 December 2024, whereby it agreed not to raise any limitation defence in relation to a claim issued while they remained in force. On 16 January 2025, the Defendant served notice and the standstill agreements were terminated on 23 January 2025.

5. On the same date, 16 January 2025, the Defendant notified the Claimant that, following completion of its due diligence exercise, there was no reason to conclude that the cyber security incident had affected NRS' information security or financial standing and there was no reason why it should not continue to award the new contract to NRS.

6. The claim was issued on 23 January 2025 and seeks the following remedies:

   i) A declaration that the Defendant breached its obligations in the PCR 2015;

   ii) An order to set aside the new contract;

   iii) An order for the Claimant to be awarded the new contract or for the procurement to be re-run;

   iv) Damages; and

   v) Interest.

7. NRS applied to become an Interested Party on 5 February 2025, which was granted by order of Waksman J dated 10 February 2025. The Defendant issued the ATL on 6 February 2025 and the Claimant sought expedition on 5 March 2025. The following witness statements have been served by the parties and have been considered by the Court:

   i) On behalf of the Defendant, a first and second statement from its solicitor, Mr. John Williams and from its Commissioning and Market Development Manager, Mr. Malcolm Sillars (Sillars 1 and 2 respectively).

   ii) On behalf of the Claimant, a statement from its solicitor, Mr Patrick Arben and a first statement from its Chief Executive, Mr Andrew Crawshaw (Crawshaw 1).

   iii) On behalf of the Interested Party, a first and second statement from its Director and Community Services Officer, Mr Graeme Fotheringham (Fotheringham 1 and 2 respectively).

**Legal Test for the ATL**

8. The relevant questions for the court in determining an application to lift the automatic suspension are not in dispute and have been pithily summarised by O'Farrell J in *Camelot UK Lotteries Ltd v Gambling Commission* [2022] EWHC 1664 (TCC) as follows:

   i) Is there a serious issue to be tried?

   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?

**Serious issue**

9. It is common ground between the parties that there is a serious issue to be tried for the purposes of the ATL.

**Adequacy of Damages for the Claimant**

10. The criteria for assessing adequacy of damages in procurement cases have been established in a long line of case law, from *American Cyanamid* [1975] AC 396; *Alstom Transport Ltd v Eurostar International Limited* [2010] EWHC 2747 (Ch) ("Alstom"); *Openview Security Solutions Ltd v The London Borough of Merton*

*Council* [2015] EWHC 2694 (TCC) ("Openview"); *Bombardier Transportation UK Limited v London Underground Limited* [2018] EWHC 2926 TCC ("Bombardier"); and, more recently, *Camelot UK Lotteries Limited v Gambling Commission* [2022] EWHC 1664 (TCC) ("Camelot").

11. The Claimant must provide "cogent" or "compelling" evidence that it will suffer significant financial losses that are irrecoverable as damages: *Openview* at §39(i) per Stuart Smith J (as he then was); *Bombardier* §58 and *Camelot* §98.

12. The evidence of Mr Crawshaw, for the Claimant, is that, if the suspension is lifted and the new contract is awarded to NRS:

    i) Millbrook would suffer a very large loss of profits, running to millions of pounds, which would be difficult to quantify (Crawshaw 1, §29-31);

    ii) A rushed transition would likely lead to a staff exodus and increase the risk of poor performance by Millbrook with the current contract as well as other contracts (Crawshaw 1, §§41-42);

    iii) In turn, any degradation in service quality would damage Millbrook's reputation (Crawshaw 1, §§42-46);

    iv) Millbrook would lose approximately [TEXT REDACTED] market share, whereas NRS' share would increase commensurately and reinforce the duopolistic features of the CES market and strengthen the dominant positions of NRS and the other main supplier Medequip Assistive Technology Limited ("Medequip") (Crawshaw 1, §§47-78);

v) Millbrook would consequently lose economies of scale and the ability to negotiate lower equipment prices and/or rebates based on volume targets which would adversely affect its ability to compete with its main rivals NRS and Medequip in bidding and winning new CES contracts (Crawshaw 1, §§48-49).

vi) The impact on Millbrook's financial performance is such that it will reduce its capacity to invest in technology and further service improvements and develop its business (Crawshaw 1, §51).

13. As a starting point, most of the points raised by the Claimant to establish prejudice are made by mere general assertions, without supporting evidence. Where the claimant makes significant claims about its future prospects and ability to win contracts, as a result of losing one particular contract, the Court will be cautious in accepting such claims without detailed evidence, such as management accounts, detailed financial information, details of other contracts that Millbrook has in place and other potential bids that it might apply for in future: *Alstom Transport Uk Ltd v London Underground Ltd* [2017] EWHC 1521 (TCC) ("Alstom v LUL") §§29-30 and 37 and *TES Group v Northern Ireland Water Limited* [2020] NIQB 62 at [32]. In this case, there are no concerns raised by the directors or auditors in Millbrook's accounts about risks from material uncertainties or events that would cast doubt on it continuing as a going concern; there is no mention or provision to reflect the risks of losing the new contract.

14. Secondly, to the extent that Millbrook faces loss of profits as a result of losing its incumbent position, that is very much part of life. As the TCC stated in *Bombardier* at [58]:

> "In most cases, unsuccessful bids are part of the normal commercial risks taken by a business and will not have any adverse impact apart from potential wasted costs of the tender and lost profits. Not every failed bid will result in damage to reputation causing uncompensatable loss. There must be cogent evidence showing that the loss of reputation alleged would lead to financial losses that would be significant and irrecoverable as damages or very difficult to quantify fairly."

15. In this case, the main immediate harm is the hit to anticipated financial revenues from the loss of the new contract. Those losses will be quantifiable, based on the projections in Millbrook's bid and their internal documents setting out their anticipated profits from the new contract alongside expert evidence on the lost opportunity: *Exel Europe Limited v University Hospitals Coventry and Warwickshire NHS Trust* [2010] EWHC 3332 (TCC) §48; *Alstom v LUL*, §24. Although there may be uncertainties and complexities with quantification, such difficulties are a common feature of damages claims and do not mean any losses are irrecoverable or impossible to quantity fairly.

16. As to the ability of Millbrook to compete, invest and benefit from economies of scale, in this case, the evidence of Mr Crawshaw is that the new contract represented a relatively small share (approx. [TEXT REDACTED]) of the Claimant's overall business turnover. In contrast with other cases, such as *Rail Franchising* and *Camelot,* the new CES/TECS contract was not unique, prestigious or the sole source of the Claimant's workstreams. The Claimant is part of a private equity financed group with its latest accounts recording a turnover of approx. £118 million and growing profitability of [TEXT REDACTED] per annum. I do not find it compelling that the loss of one single public sector contract, for a fixed term of 7 years maximum, and of modest value and profitability, would undermine the Claimant's entire business model or its ability to win new work from other local authorities. In particular, the

evidence of Mr Fotheringham, for NRS, suggests that the Claimant holds numerous CES and TECS contracts with at least 10 other local authorities and, in many instances, has won contracts away from NRS: Fotheringham 1, §15. Mr Fotheringham also explains that there are numerous other CES contracts that are due to be procured in the next 12 months, where Millbrook is not the incumbent and could win new work: Fotheringham 1, §15.

17. Many of the broader arguments regarding the impact on Millbrook's staff and reputation are predicated on the assumption that there will be a "*rushed transition*" for the new contract and its transfer from Millbrook to NRS. In that event, I agree with Mr Barrett KC's argument that, contrary to the requirements of the *American Cyanamid* test, the alleged prejudice does not result directly from the claimed breach of the PCR 2015 but from extraneous events such as transition. In any event, I do not accept that there necessarily will be a "rushed transition" - this allegation seems speculative, if not tendentious. The evidence provided by DCC and NRS is that they will, as a conservative estimate, need a 3-4 months' transition process although this may be reduced further if, as now appears to have been agreed as part of an agreed timetable for transition, Millbrook transfers its premises to NRS. Millbrook has agreed a 6 month extension to the old contract so there will be no hiatus in provision nor a rushed transition for the new contract to be in place. There will be sufficient headroom within that 6 months extension period to carry out the transition with a buffer for any unexpected difficulties. Mr Halliday sought to argue that anything less than a 16-week transition would be insufficient yet conceded that the Claimant had itself accepted in its bid that a 3 month (12 week) transition would be necessary. So, there is no concrete basis for the premise that any transition would be rushed.

18. Similarly, there is no credible evidence that there will be a staff exodus as a result of the "rushed transition", let alone the loss of a "*highly and uniquely trained workforce*" (*Counted4Community Interest Co v Sunderland Country Council* [2015] EWHC 3898 at §40 per Carr J (as she then was)). In any event, as Mr Halliday conceded at the hearing, many relevant staff members will be transferred to NRS along with the premises as part of TUPE protection, which is a common and unavoidable feature of transition to a new provider: see *Vodafone* §86 per Kerr J.

19. In so far as potential harm to Millbook's reputation, I am not persuaded that any negative consequences from a "rushed transition" would be likely to be perceived by customers, other local authorities or the public more generally as being attributable to Millbrook. It is unlikely that the Defendant, a responsible local authority dealing with vulnerable service users, would permit a chaotic transition in the interests of speed. If there is any reduction in service quality during transition, it is more likely that any blame would be put on the Defendant than Millbrook. Similarly, I cannot see that the loss of a single contract out of many others would undermine Millbrook's reputation, in a sector where it is evident that contracts are put out to tender at regular intervals and often move between service providers. Mr Crawshaw refers to an inadequate transition from NRS to Millbrook in the past (Crashaw 1, §27) but there is no suggestion that it caused Millbrook or its predecessor, NRS, reputational harm.

20. As regards potential harm to Millbrook's competitive situation, it is not clear why the loss of this particular contract would undermine the Claimant's ability to win other CES/TECS contracts in future. The new contract is not a prestigious contract nor a "reference contract" that would drive Millbrook's future tenders. Millbrook currently hold 10 other CES/TECS contracts that it can use to establish its level of expertise in

future bids. As regards the alleged impact on equipment prices, the Claimant presents no convincing evidence to demonstrate that the reduction of [TEXT REDACTED] in its market share, represented by the loss of the new contract, would undermine its ability to negotiate lower prices. I accept the evidence of Mr Sillars and Mr Fotheringham, that (i) Millbrook will have already negotiated prices in its existing contracts with equipment suppliers so the loss of this contract will not disturb those prices; (ii) equipment prices no longer feature as part of the evaluation methodology in more recent CES procurements, which focus on total modelled activity costs only and in others procurements, bidders are evaluated on a relatively small basket of limited stock items (Fotheringham 2, §§14-17) and (iii) in most CES procurements, quality has a higher weighting than price. In recent CES procurements, the ratio of quality to price has been between 75:25 and 90:10 (Fotheringham 2, §21). So, even if there were differences in price between bidders, that would not have the greatest impact on their chances of success.

21. As regards the claimed impact on the structure of competition in the market, I am not persuaded that there is any cogent causal evidence that the loss of this contract would place Millbrook at a competitive disadvantage or substantially reinforce the market position of the other two main players in the CES market. The Claimant refers to the other two players, NRS and Medequip, as being "dominant" or forming a duopoly but, even if NRS gained an additional [TEXT REDACTED] market share from the award of the new contract, it would not take NRS above the 50% threshold for an *Akso* presumption of dominance to arise under competition law. As mentioned above, there is recurring evidence of public sector contracts being won and lost with market share shifting between the various market players at different times, which suggests dynamic competition on the merits rather than static or "skewed" distortion. Further,

Millbrook's arguments focus solely on the CES sector and ignore the fact that it is one of the leading providers of TECS in the TECS sector (Fotheringham 2, §19).

22. Both DCC and NRS drew my attention to, and put great store by, a chain of correspondence between the parties dated 13 February 2025, where the Claimant offered not to resist the ATL provided DCC agreed to concede the sufficiently serious criterion. I do not place primacy on such tactical considerations but, at the very least, it suggests that the Claimant was willing to confine its remedies to damages as a matter of principle and its offer undermines its case that damages were unquantifiable and/or that harm caused was irreparable in monetary terms. It appears that the Claimant was willing to forego any wider losses to its reputation or competitive situation provided it could pursue a damages claim at the end.

23. Overall, in light of all of the above considerations and subject to the sufficiently serious issue discussed below, I would conclude that damages were an adequate remedy for the Claimant.

**Sufficiently serious breach**

24. The Claimant contends that, applying the *American Cyanamid* test, the adequacy test runs broader than a mere quantifiable harm analysis since there remains a realistic risk that damages will still not be an adequate remedy for the Claimant. It is concerned that, if the suspension is lifted, there is a real risk of Millbrook being awarded *no damages at all*. That is particularly so, in the present circumstances, where, unlike in other cases, the Defendant has refused to concede that any breach would be sufficiently serious.

25. In summary, in light of the ruling of the Court of Appeal in *Braceurself Limited v National Health Service* [2024] KB 914 ("Braceurself"), the Claimant contends that, even if it established a breach of the PCR 2015, it may be left without an adequate remedy as it may still be unable to meet the "sufficiently serious breach" which is a precondition for *Francovich* damages: see *R v Secretary of State for Transport ex p. Factortame (No 5) [2000] 1 AC 524* and *Energy Solutions EU Limited v Nuclear Decommissioning Authority* [2017] 1 WLR 1373.

26. The facts in *Braceurself* involved an application to lift the suspension of a public contract for nationwide orthodontic services that had been awarded to a competitor. The claimant had not included a claim for damages but sought to introduce a late amendment. At first instance, Mr. Justice Bird, applying the conventional *Cyanamid* approach in *Openview* and *Covanta*, concluded that damages, albeit not perfect, would be an adequate remedy and that it was just to confine the claimant to a remedy in damages. He also granted permission to amend the claim to include a claim for damages but ultimately, after full substantive trial, that claim was dismissed by Mr Alexander Nissen KC (sitting as a deputy High Court judge) on the basis that, even though the contracting authority had made two manifest evaluation errors, those breaches were not sufficiently serious to warrant an award of damages since they were minor, inadvertent and excusable.

27. An appeal was brought against the final judgment but not the application to lift ruling. The claimant challenged the final conclusion that the breach was not sufficiently serious in circumstances where, but for the breach, the contract would have been awarded to the claimant. It also contended that it was incoherent to find the breach was not sufficiently serious when, at the interlocutory stage, the court had held that

damages would be an adequate remedy. The Court of Appeal, per Coulson LJ, dismissed the appeal, holding that the assessment of sufficiently serious had to be determined by reference to the nature and quality of the breach itself, having regard to all the facts and circumstances. No one factor was decisive. The fact that the breach led to the contract being awarded to the wrong bidder did not automatically mean that the breach was "sufficiently serious" for *Francovich* purposes.

28. As regards the interaction between adequacy of damages at the interlocutory stage and the final determination of any award after trial, Coulson LJ held at §§114-116:

> "*I accept that, in a public procurement challenge, there is a potential conflict between the result at the interim stage of the litigation (when the respondent sought to remove the stay) and the final stage (when the judge came to consider whether the breach that he had found was sufficiently serious to warrant damages). But that is not unusual. Take for example, an application summarily to enforce a decision worth £2m in favour of X by an adjudicator, because he found that Y had wrongfully repudiated the contract. The Technology and Construction Court will almost certainly enforce that decision by way of CPR Pt 24. The payer Y will therefore have to pay the sum found due. But Y may then issue court proceedings in which, following a full trial, it becomes apparent that it was X who repudiated, and it is X who owes Y £500,000. That is not incoherent; it is the consequence of there being two different exercises (one interlocutory and one final), involving two different sets of evidence and two different sets of governing principles. They may produce differing results. In my judgment, that is what has happened here.*
>
> *…*
>
> *Judge Bird said damages would be an adequate remedy in principle. So they were. The judge said that damages were not recoverable in fact because the breach was not sufficiently serious. He was right about that too. In all the circumstances, I consider that this is a relatively straightforward case where the court has exercised its discretion by reference to different criteria at two different stages of the litigation. That does not make either of the answers "wrong" or give rise to a novel method of recovery."*

29. Mr Halliday for the Claimant eloquently explained that there was a real chance that the Claimant in this case would find itself in the same position as Braceurself, namely successfully establishing a breach in a closely run competition, where one point's

difference in the scoring would have changed the outcome of the award, yet be left with no substantive remedy. If the ATL is granted, Millbrook would lose its preferred remedy of setting aside the contract and having the competition re-run and/or the contract awarded to Millbrook instead. Further, in the absence of any concession from the Defendant on the sufficiently serious criterion, there was a real risk that Millbrook could be left without any remedy in damages at all. This risk, he argued, should be factored into the assessment of adequacy of damages.

30. In support, he relied on the ruling of the High Court of Northern Ireland in *CGI IT UK Ltd. v Department of Finance* [2024] NIKB 49, where Humphreys J at §§43-44 held that the facts of the case were similar to *Braceurself* and, in circumstances where the bids were very close and the Defendant had not made a concession or given an undertaking on the sufficiently serious issue, there was a risk that if the contract had been awarded to the wrong bidder, the claimant would be left with a Pyrrhic victory. Humphreys J held that, in such circumstances, the suspension should be maintained as it would not be just to confine the claimant to a remedy in damages. Aside from the *Braceurself* point, he would have found that damages were adequate.

31. Mr Halliday also took me to a patent case - *SmithKline PLC v Apotex* [2003] EWCA Civ 137, where the Court of Appeal, Carnwath LJ, (as he then was) observed at §42-43 that "*the purpose of an interlocutory injunction ..is protection, not just against "loss which would sound in damages", but against violation of any right where damages would not be adequate compensation".* Relying on that purpose, Mr Halliday argued that the automatic suspension should be maintained to prevent the violation of Millbrook's right to participate in a fair procurement process. It was

necessary, he contended, to "hold the ring" to preserve Millbrook's opportunity to set aside the award of the contract.

32. This clever argument, although logical and superficially attractive, does not work for several reasons:

i) First, it is an impermissible invitation to enquire into the merits of the case at an interlocutory stage, in advance of disclosure and evidence. Other than a preliminary conclusion on the adequacy of damages and the effectiveness of that remedy, I am not in any position to conduct a 'crystal ball gaze' of the respective merits of two rival bidders nor review the evaluation conducted by DCC to anticipate whether there was in fact any breach of the PCR 2015 in its assessment of any one of the pass/fail criteria or other scores or, if so, whether any such breach was (im)material, culpable or excusable. At this early stage, I cannot even assess whether there is a real risk of any breach not being found to be sufficiently serious. The Defendant has not conceded the point on sufficiently serious and this is, and can only be, a matter for substantive trial.

ii) Secondly, whilst the Claimant is entitled to effective remedy and fair process, those principles are not absolute. The principle of effective relief does not function as a guarantee or create any entitlement to a particular preferred remedy where there is none.

iii) Thirdly, there is a system of remedies for breaches of procurement law but that does not mean that all remedies are universally available at all times. The Claimant may well prefer to have a set-aside remedy at the end of trial but that does not mean it can insist on its recourse or that such remedy should prevail over all other considerations. That would entail the tail wagging the dog and

upturns the long-established *Cyanamid* provisional threshold of whether or not damages are adequate. That threshold is the "gateway" for access to any final set-aside remedy. The availability of the final set aside remedy is necessarily determined at the interlocutory stage, when determining whether the automatic suspension should continue or be lifted. Although trite:

a) If the suspension is continued, because damages are considered an inadequate remedy, then the claimant may proceed to claim a discretionary final remedy of set aside.

b) However, if damages are found to be an adequate remedy at the interlocutory stage and the suspension is lifted, then the claimant cannot then seek to unravel the contract after the event.

c) It would be inappropriate to build in a further circular consideration into the adequacy of damages assessment, requiring the judge to project forwards and consider the nature and quality of any eventual relief at the end of the proceedings: see *Lancashire Care NHS Foundation Trust v Lancashire County Council (2018) 177 Con LR 246,* per Fraser J (as then was) at §23. There are many cases where there may be a difference between the preliminary conclusion at the interlocutory stage and the final merits. That does not mean the system is incoherent or unfair. After hearing full evidence and argument, a judge may find that a claimant has established breach but an award of damages is thwarted by some defence or counter-argument, which reduces the damages award to a nominal or nil amount. Other considerations may negate the grant of discretionary relief altogether. The prospect of such

eventuality, save in the most extreme of exceptional cases, cannot be grafted as a matter of course onto the *American Cyanamid* test to keep the door to set-aside relief open.

33. I recognise that the High Court of Northern Ireland in *CGI* did take account of the likely seriousness of the breach in the assessment of adequacy but that authority is merely persuasive and non-binding. I take comfort in my conclusion to the opposite from a consistent host of eminent High Court judges endorsing the exclusion of the sufficiently serious criterion as part of the adequacy assessment, including in cases where the Defendant has not conceded the *Francovich* criterion. The tension between the adequacy of damages assessment at the interlocutory stage and the sufficient seriousness at the time of the final award has long been recognised in procurement cases: see *Bombardier*, per O'Farrell J at §64; *Boxxe Ltd v Secretary of State for Justice* [2023] EWHC 533 (TCC), per Constable J at §§39-43; and more recently in *Unipart Group Ltd a.o. v SCCL* [2025] EWHC 354 at §§50-54. It is true that in most cases, the Defendant has made a concession or offered an undertaking to square the circle between the two but I do not see that as decisive. In *Alstom*, O'Farrell J observed if a breach was not sufficiently serious enough to satisfy the Francovich conditions, it was unlikely to be sufficiently serious to justify setting aside the contract under challenge. In *Boxxe*, Constable J agreed and held that this should not be a factor that should weigh (or weigh heavily) in preventing the letting of the contract in the context of an application to lift. Both judgments were cited with approval on this point by Coulson LJ at §§41-44 of *Braceurself* itself; although that comment was obiter, I regard it (and the preceding TCC precedent chain) as more persuasive.

34. In the present case, as Mr Barrett KC observed, if the Claimant is entitled to maintain the suspension in place, purely on the *Francovich* risk when all other considerations point towards damages being an adequate remedy, it means that the previous operator can artificially extend its incumbency and the life of the old contract and the local authority will be forced to invest resources and mobilise with the bidder that it considers to be the losing party, even though its losses can be fairly and adequately compensated at the end of trial.

35. In all of these circumstances I find that it is just and appropriate to confine the Claimant to a remedy in damages, which will be adequate to remedy any breach. As such, that is the end of the enquiry and there is no need to go on and consider adequacy of damages for DCC or the balance of convenience: *OpenView*, §70; *Circle Nottingham v NHS Rushcliffe CCG* [2019] EWHC 1315, §18.

36. That said, in deference to the evidence submitted by the parties and the extensive written and oral arguments made, I will briefly set out my views on the other limbs of the *American Cyanamid* test.

**Adequacy of damages for DCC**

37. Millbrook has offered a cross-undertaking in damages to meet any monetary losses suffered by DCC and NRS. The issue is whether DCC, as a public authority, will suffer losses that are not measurable in financial terms, for instance if it is unable to provide particular services for the public or be able to provide those services in a particular way for an extended period of time: *Medequip*, §47.

38. Mr Barrett KC, in written and oral argument, emphasised the aims of the new contract to introduce enhanced CES and TECS services and significant cost- savings since the

last renewal of the contract 7 years ago. In particular, the contract specifications incorporate best practices in terms of data security and cyber security, revised KPIs, a new credit model moving from a 85% credit model to a 100% credit model; new technology enabled services and introduces a new strategic partnership to resolve issues and deliver best value service as well as improved monitoring : Sillars 1, §§45-47 and Sillars 2, §§69-73.

39. DCC also claims that suspension of the contract would defer additional significant annual costs savings which have already been factored into Defendant's budget forecasts: Sillars 1 , §47. The Claimant has not addressed this point in evidence. These losses do not appear to be compensable in damages. If DCC is unable to realise those savings this year, it will have to recover them from reductions to the Defendant's NHS health and social care budget for this financial year (as well as other NHS organisations in Devon), which will translate into service cut-backs for vulnerable users this year that would not be remedied in damages at the end of trial.

40. I am not persuaded by Millbrook's response that it has agreed an extension to its existing contract and, in essence, is already replicating the new standards introduced by the new contract or will do so for the term of any extension. Offers to extend the existing contract and change the specification to offer some of the benefits of the new contract (even if that were lawful under procurement law) have been regarded as unsatisfactory: see *Teleperformance Contact Limited v SSHD* [2023] EWHC 2481 (TCC) §66 and *One Medicare v NHS Northamptonshire ICB* [2025] EWHC 63 (TCC), §54-55.

41. Mr Halliday appeared to suggest that Millbrook could start to offer upgraded CES and TECS services immediately after 1 April 2025 but that is inconsistent with its own

bid, which indicated that it would need a 3-4 month transitional period and would need to implement a new IT system. Mr Sillars' evidence for DCC is that it is not as straightforward as simply changing the contractual specifications. The new strategic partnership relationship introduces a move away from a fixed catalogue model towards the provider using its industry expertise to survey the market and making proactive proposals for equipment adjustments to ensure that users have the most appropriate equipment and best value for money. That new operating model and IT system will require time to implement and train staff; time will also be needed to ensure compliance with the latest data security requirements and for introducing transparency and monitoring for DCC: Sillars 2, §45-61.

42. The Claimant's arguments ignore the fact that the new contract was intended to deliver significant benefits for vulnerable users, in terms of technology-enabled services and appropriate equipment at the best possible prices as well as deliver significant cost savings for the local authority, meaning that its health and care budgets would stretch further for more users to be cared for in their homes and reduce pressure on NHS beds and other scarce resources. It also denies the local authority's agency to decide how best to provide public services which is not measurable in financial terms: *Medequip*, §§47 and 108-110; *One Medicare*, §68.

43. There is therefore a realistic risk that damages will not be an adequate remedy for the Defendant.

**Expedition**

44. The likely timeframe for the suspension is also relevant. The Claimant has applied for expedition in lieu of lifting the suspension but has not really explained why there is real urgency that necessitates expedition nor why this case should take priority over

all other cases currently pending before the TCC: *WL Gore & Associates GMBH v Geox SpA* [2008] EWCA Civ 662, per Lord Neuberger §28; *Petter v EMC Europe Ltd* [2015] EWCA Civ 480, per Vos LJ at §17. In this regard, I also take into account the correspondence between the parties where the Claimant was willing to agree to lift the suspension in exchange for a concession from the Defendant on the sufficiently serious issue. If the Claimant was prepared to accept at that point that its remedy should be limited to damages, then there is no strong reason why this claim should be given priority above all others before the TCC.

45. Even if expedition were possible, with the Court's current capacity, the earliest timeframe for an expedited 10-12 day hearing (which may be over-optimistic) would be Easter 2026 (assuming a judge were available during vacation and this case were regarded as appropriate vacation business). Judgment would take a minimum of 2 months so resolution at first instance would not be until mid 2026. More realistically, the hearing would be listed at the end of 2026 or Spring 2027 with judgment in 2027. If there were a subsequent appeal, final resolution would be unlikely before late 2027/2028. Accordingly, even on an expedited basis, DCC and vulnerable users would be deprived of the intended benefits for a minimum of 2 years. That delay is too detrimental and reinforces the conclusion that damages are not an adequate remedy for the Defendant.

**Balance of convenience**

46. In the light of the above, lifting the automatic suspension is likely to carry the least risk of injustice for the following reasons:

    i) Declaratory relief and/or damages will be an adequate remedy for Millbrook if it eventually succeeds at trial; Millbrook was content to accept that outcome

provided DCC conceded the *Francovich* criteria so there is no injustice in confining its remedy to damages at this stage.

ii) If the suspension is maintained, DCC will be prevented from offering CES and TECS services in the way that it considers best and will be unable to introduce the desired improvements and costs savings for a minimum period of 2 years and possibly longer.

iii) Maintenance of the suspension would effectively force DCC to contract and mobilise with the party that it considers to be the losing party; if the claim fails, DCC would then (assuming it was in a position to do so) have to unravel that process and restart again with NRS. There is a risk that the critical injection of fresh competition from regular tenders and the incentives for improved services and innovation from rival providers, which is a key objective of the procurement regime, would be undermined.

iv) Continued suspension also means that vulnerable service users and taxpayers in Devon will be deprived of benefits in terms of the latest data protection and cyber security standards, the most appropriate equipment for best value for money and may suffer reductions to local authority health and social care budgets with knock-on adverse consequences for other residents needing NHS services, as vulnerable users may stay longer in hospital or other care centres as they cannot be treated as effectively at home.

v) The winning bidder, NRS, will suffer adverse consequences as it will be prevented from supplying CES/TECS services pursuant to the new contracts for at least 2 years if the suspension is maintained and Millbrook's challenge is ultimately unsuccessful. That impact is not confined to its wasted bid and

mobilisation costs but mirrors the harmful impact on its costs base and other contracts that the Claimant allegedly suffers from the loss of the new contract. The interests of the Interested Party must also be weighed in the balance: *Alstom,* §72; *Medequip*, §114 and *Camelot*, §126.

vi) There are competing public interests in ensuring the procurement is conducted compliantly and awarded to the right bidder versus ensuring that the competition is implemented as planned and as soon as possible. To some extent, that tension will be resolved by the trial and if issues are evenly balanced, the Court is to preserve the status quo: *Alstom*, §73 and *Camelot*, §126.

vii) The maintenance of the suspension for a period over 2 years would, in effect, enable the existing provider to extend its incumbency for a significant period of time beyond the 7 years it originally contracted and tendered for. That is not the intended outcome of the procurement regime.

viii) I take account of the possibility that the Claimant may be right and that it has been deprived of the new contract through a non-compliant procurement process. The Claimant has raised a number of criticisms of NRS' performance which, it contends, cast doubt on its ability to deliver the contract specifications in light of the cyber security incident as well as other alleged financial and service issues. It relies on other indicators, including a comparison of its Trustpilot reviews and recent coroner's inquiries. Mr Taylor for the Interested Party provided a strong rebuttal against those allegations in written and oral argument, relying on the evidence of Mr Fotheringham. I am unable to enquire into the respective merits of the parties' competing positions

at this stage, which is a matter for trial. But I also take account of, and place weight upon, the Defendant's procurement process and its confirmation, through a separate due diligence exercise, that NRS satisfied its operational and financial standing requirements.

47. Looking at all of these considerations in the round and weighing up the potential harm to the Claimant alongside the potential harm to the Defendant, NRS, vulnerable users and the public interest, I find the balance of convenience points in favour of lifting the suspension and that outcome creates the least risk of irremediable harm and injustice if the Claimant ultimately succeeds at trial.

**Conclusion**

48. For these reasons, I grant the ATL and direct that the suspension should be lifted. I dismiss the application for expedition for the reasons set out above.

49. I express my gratitude to Counsel for their careful arguments and helpful skeletons and to the parties' solicitors for providing comprehensive bundles and witness statements which have proved of great assistance.