THIS JUDGMENT CONTAINS REDACTIONS FOR REASONS OF CONFIDENTIALITY
THE REDACTED SECTIONS ARE SHOWN BY SQUARE BRACKETS

Neutral Citation Number: [2025] EWHC 2964 (TCC)

Claim Nos: HT-2024-000442
HT-2025-000250
HT-2025-000331

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (KBD)

Date: 13 November 2025

B e f o r e :
MR JUSTICE WAKSMAN

SRCL LIMITED t/a STERICYCLE

Claimant

and

(1)-(22) NHS SOUTH YORKSHIRE INTEGRATED CARE BOARD AND 21 OTHER INTEGRATED CARE BOARDS

(23) TENWELL INNOVATIONS LIMITED (T/A ECOVATE GROUP)

Defendants

and

SHARPSMART LIMITED

Interested Party

EWAN WEST KC (instructed by Addleshaw Goddard LLP, Solicitors) for the Claimant
JASON COPPEL K.C. and **RUPERT PAINES** (instructed by Capsticks LLP) for the 1st to 22nd Defendants
RHODRI WILLIAMS K.C. and **TOM WALKER** (instructed by Knights, Solicitors) for the Interested Party
JONATHAN LEWIS (instructed by DWF Law LLP, Solicitors) for the 23rd Defendant

JUDGMENT

Hearing dates: 28 and 29 October 2025

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INTRODUCTION

1. This is a public procurement case. I have three applications before me. The first and second, dated 31 July and 28 August 2025 respectively, were made by the 1st to 22nd Defendants, all being NHS Integrated Care Boards from around England ("the ICBs") to lift the automatic suspension of the contracts to be awarded by each of them to the Interested Party, Sharpsmart Limited ("Sharpsmart") in the case of 13 contracts, and to Personnel Hygiene Services Limited ("PHS"), in the case of 9 contracts ("the Applications to Lift"). The unsuccessful bidder in all of those cases was the Claimant, SRCL Limited, trading as Stericycle ("SRCL"). The third application is to expedite the trial or to have a trial of one particular issue and was made on 21 October 2025 ("the Expedition Application").

2. The procurements made by the ICBs were all for the provision of clinical waste services in different parts of England ("the Procurements"). All 22 ICBs advertised the Procurements on 11 September 2024, with Tenders to be submitted by 18 October 2024. Each individual contract to be awarded was referred to as a "Lot". The Procurements were conducted on behalf of the ICBs, by the 23rd Defendant, a consultancy called Tenwell Innovations Limited (T/A EcoVate Group) ("EcoVate"), engaged as their procurement adviser. It attended by Counsel at this hearing but made no oral submissions, although it had filed a note beforehand. It made an application to strike out the claims against it on the basis that it is not a contracting authority, which has now been resolved by consent so that it is no longer a party.

3. On 13 December 2024, SRCL received notifications in respect of the contract awards for Lots 1, 2 and 9. The successful tenderer for those Lots was Sharpsmart. On 18 December 2024, SRCL received notifications in respect of the contract awards for Lots 11, 16, 18 and 21. The successful tenderer for three of those Lots was PHS and for one was Sharpsmart. On 19 December 2024, SRCL received notifications in respect of the contract awards for Lots 7, 19 and 15. The successful tender for one Lot was PHS and for another was Sharpsmart. No award was made in respect of Lot 15. By this point, therefore, contract awards had been made by 9 ICBs.

4. The details of SRCL's scores, and where they placed it in respect of those of the Procurements, where Sharpsmart also bid, is set out at page 10 of the exhibit to the second witness statement ("WS") of Mr Dennis. […..]

5. On 23 December 2024, SRCL issued its first claim ("Claim 1"), which included Particulars of Claim. This was made against all 22 ICBs for whom it had tendered, even though at this stage,

only 9 of them had made awards. SRCL says that the reason it did so was because it considered that the awards of the remaining 13 ICBs might well have contained the same defects as SRCL was alleging against the original 9 and there was a concern that if Claim 1 was not made against all 22, a limitation point might be taken later, in respect of the claim against the remaining 13, that SRCL had possessed the relevant knowledge from the outset.

6. On 21 February 2025, the ICBs filed their Defence and on 14 March, SRCL filed its Reply. On 31 July 2025, Amended Particulars of Claim in Claim 1 were issued to amplify the claim in certain respects. On 11 September, the ICBs filed an Amended Defence, with SRCL's Amended Reply being filed on 9 October.

7. On 4 August 2025, the remaining 13 ICBs issued their award decisions where, once more, SRCL was unsuccessful.

8. On 14 August 2025, SRCL filed a second claim, with Particulars of Claim following on 19 August ("Claim 2"). This took account of the fact that there were now the further 13 contract award decisions. In addition, it alleged that Sharpsmart should have been excluded as tenderer by the relevant ICBs because it had in fact failed what is known as the Economic and Financial Standing ("EFS") test which formed part of the tendering process. This claim was made by SRCL following disclosure to it by the ICBs of issues which had arisen in connection with their treatment of Sharpsmart in connection with the EFS test. On 28 August, the ICBs made their second Application to Lift, consequent upon the further automatic suspension being occasioned by the issue of Claim 2. The ICBs' Defence to Claim 2 was issued on 22 September 2025. SRCL filed its Reply on 13 October.

9. On 14 October, SRCL issued a third claim, a result, its says of further disclosure made by the ICBs ("Claim 3"). No Particulars of Claim have yet been served.

10. There is no separate application to lift the suspension created by the issue of Claim 3, but it is agreed that this can be taken as covered by the Applications to Lift in respect of Claims 1 and 2.

11. The Applications to Lift and the proceedings generally are governed by the Public Contracts Regulations 2015 ("the PCR"), not by the Procurement Act 2023. While the latter is now in force, it only governs procurements which commenced on or after its commencement date, being 24 February 2025.

12. In the narrative sections which follow, I have, where appropriate, quoted from parts of the various skeleton arguments produced by the parties, where they are clearly uncontroversial.

THE SUBJECT-MATTER OF THE PROCUREMENT

13. The Procurements concern the provision of healthcare waste collection and disposal services for primary care settings in each of the ICBs' areas ("Waste Services"). Primary care settings include GPs' surgeries, dental practices and pharmacies, and are to be distinguished from hospitals. The former produce relatively low volumes of waste compared with the latter, which is why the subject of the Procurements represents only a small part of the overall NHS market for clinical waste collection.

14. SRCL is the incumbent provider for 18 of the 22 ICBs for whom it provided tenders in the Procurements. Most of the existing contracts are managed by Anenta Limited ("Anenta"). It was engaged by the ICBs to support the forthcoming Procurements and it, in turn, contracted with EcoVate. Each of the contracts to be awarded pursuant to the Procurements would have a term of five years with an option to extend twice, in each case for up to two years. Thus the contracts had the potential to run for 9 years. The total value of the contracts to be awarded (being 24 in number although only 23 were in fact awarded, of which SRCL bid for 22) is said by SRCL to be £168m although the ICBs say that the correct figure is significantly less, discussed below.

15. For some parts of the Tender Response, tenderers had to provide a single submission which would cover all Lots bid for. This included responses to questions about the tenderer's own technical quality and any assumptions or exclusions it would apply. For other parts, tenderers were required to provide Lot-specific responses, in particular for environmental benefit and emissions monitoring, social value and the commercial section. Tenderers were also required to confirm that none of the mandatory or discretionary grounds for exclusion applied and to respond to a number of questions demonstrating their EFS and technical and professional ability.

16. The existing contracts with the ICBs frequently had more than one supplier for the Waste Services. Thus, where SRCL was an incumbent supplier it was usually not the only one. Often, local primary care providers would contract directly with a Waste Services supplier, and would then be reimbursed by the relevant ICB. One of the aims of the Procurements was to eliminate the use of such multiple suppliers. Instead, the contracts awarded would be for Waste Services to be provided directly to all the primary care sites within the area of any given ICBs. There are 42 ICBs in England, so there were 18 ICBs which were not part of the Procurements.

17. The existing contracts all expired on 31 March 2025. Thus far they have been extended on an *ad hoc* basis, including by SRCL.

18. Further details about the subject-matter of the Procurements and otherwise will be addressed below.

THE CLAIMS

19. The allegations against all 22 of the ICBs, as set out in the Particulars of Claim under Claim 2 are as follows (as summarised in paragraph 5 (2) of the ICBs' Skeleton Argument):

    (1) breaches of transparency and failures to provide information (paragraphs 52-53);

    (2) failure to determine that Sharpsmart did not meet the EFS threshold and so exclude Sharpsmart (paragraph 54-57);

    (3) failure to provide reasons (paragraphs 58-60);

    (4) failure to verify the tenders submitted (paragraphs 60-62);

    (5) failure to conduct a lawful process of clarification (paragraphs 63-64);

    (6) failure to conduct a lawful evaluation/moderation process (paragraphs 65-115), including breaches of PCR obligations in relation to multiple sections of the tenders, in respect of SRCL's bid, Sharpsmart's bid, and PHS's bid, namely:

        (a) Environmental Benefits and Emissions Monitoring (paragraphs 66-69);

        (b) The Commercial section (paragraphs 70-71);

        (c) In the technical evaluation:

            (i) Question 1.2: Methodology (paragraphs 72-76);

            (ii) Question 1.3: Route planning and optimisation (paragraphs 77-81);

            (iii) Question 1.4: Consistency of Performance (paragraphs 82-89);

            (iv) Question 1.5: Training of staff (paragraphs 90-95);

            (v) Question 1.6: Workforce planning and retention (paragraphs 96-100);

            (vi) Question 1.7: Mobilisation and implementation (paragraphs 101-105);

            (vii) Question 1.8: Education to primary care settings (paragraphs 106-110); and

(viii) Question 1.9: Business continuity (111-115).

20. As already noted, further claims will be made under Claim 3, said to result from the ICBs' disclosure.

21. The ICBs contend that this amounts to a "root and branch" challenge to almost every aspect of the ICBs' decision-making in respect of all 22 contract awards, and should also be regarded as a complex claim. This has significant implications for the question of the nature and length of any trial which needs to be considered under the issue of Balance of Convenience, if reached (see below). For its part, SRCL says that this characterisation is overstated and in reality this is a fairly typical procurement challenge, notwithstanding the present number of itemised breaches currently pleaded against the ICBs.

22. I will discuss these points further, below, but in my view there are certainly some particular aspects of the claims which can be said to involve some complexity. First, and notwithstanding the commonality of some of the evaluators across all 22 Procurements, the fact remains that each award involves a separate decision of each ICB. The claims do not, however, distinguish between any of the 22 ICBs.

23. Second, the rankings achieved by SRCL as set out in paragraph 4 above mean that the question of causation in the sense of what would have happened in any counterfactual (ie absent the alleged unlawfulness) is far from straightforward. This is in the light of the fact that SRCL's primary claim is that, in the counterfactual, it would have come first. The Court's consideration of that will involve detailed calculations which will depend on the number of the allegations of breach which are established and their impact on the overall score. Furthermore, in the case of the EFS issue, even if SRCL establishes that what the ICBs should have done was to exclude Sharpsmart immediately after they discovered the errors in the information supplied by Sharpsmart (see below), it would not follow that SRCL would have won. This is so even though the marking system is itself affected by the number of bidders.

24. As to this, SRCL says first, that it has an alternative claim for loss of the chance to win the bids. That is true but it does not affect the complexity of the exercise, this time in deciding whether the chance lost was "real and substantial" and if so, what the lost chance was, in percentage terms.

25. SRCL also says that in any event, it seeks an order that the contract awards be set aside, as they would have to be, if Sharpsmart was putatively to be excluded. This would itself be a useful

outcome for it, although of course it would not assist it on damages. In fact, however, Regulation 91 (1) of the PCR provides that:

> "A breach of the duty owed in accordance with regulation 89 or 90 is actionable by any economic operator which, in consequence, suffers, or risks suffering, loss or damage."

26. What this means is that SRCL will not be able to claim any relief from the Court unless it has suffered some loss or risks suffering that loss; but in order to establish this, it will have to show how it could have come first, or had a real chance of coming first, in the counterfactual. So the latter exercise cannot be avoided. I discuss this further in paragraphs 226 and 227 below.

THE EVIDENCE

27. In support of the Applications to Lift (and responding to the Expedition Application), the ICBs filed WSs from Graham Flynn, the Managing Director of Anenta, dated 30 July, 26 August and 14 October 2025 ("GF1", "GF2" and "GF3" respectively"), Rachel Leng, in-house solicitor at Humber and North Yorkshire ICB ("HNY ICB"), dated 31 July and 27 August ("RL1" and "RL2" respectively") and Timothy Dennis, a Partner at Capsticks LLP ("Capsticks"), the ICBs' solicitors, dated 14 and 27 October 2025 ("TD1" and "TD2" respectively").

28. In opposition to the Applications to lift (and in support of the Expedition Application), SRCL filed WSs from their solicitor, Louise Dobson, a Partner at Addleshaw Goddard LLP ("AG"), dated 3 and 29 September and 21 October 2025 ("LD1", "LD2" and "LD3" respectively), Toby Black, SRCL's Senior Vice-President, dated 29 September 2025 ("TB1"), David Williams, SRCL's Environmental, Health and Safety Director, dated 29 September and 21 October 2025 ("DW1" and "DW2" respectively), and Natalie Gee, SRCL's Commercial Director, dated 29 September 2025 ("NG1").

29. Sharpsmart filed WSs from Neil Robinson, a consultant who works part-time for it, dated 17 September, 21 October and 27 October 2025 ("NR1", "NR2" and "NR3" respectively).

30. It follows from the above that there is a plethora of evidence in this case, all of which I have read and considered. However, I have confined myself in this judgment to what I consider to be the key points arising from it. It is not necessary or proportionate for me to deal with every aspect of it.

THE LAW

Generally

31. It is common ground that *American Cyanamid* principles govern the Applications to Lift generally. As O'Farrell J put it at paragraph 48 of her judgment in *Camelot UK Lotteries v Gambling Commission* [2022] EWHC 1664 (TCC):

> "48. The relevant questions for the court, when determining an application to lift the automatic suspension in a procurement challenge case, are 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 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?"

32. In this case, and for the purpose of the Applications to Lift, the ICBs agree that there is a serious issue to be tried.

Whether damages are an adequate remedy for SRCL

33. For its part, SRCL contends that damages would not be an adequate remedy for it. It says that this is so for the following reasons, in summary:

(1) the contracts here represent an unusually long-term commitment by the ICBs in what is, for SRCL and other Waste Services suppliers, a challenging and fragile market;

(2) the contracts in total represent the largest single procurement for Waste Services and for many years the supply of Wast Services in this respect have not been procured;

(3) the loss of the contracts means that SRCL will have to find costs savings of £6-8m, which will entail the closure of facilities and in turn a reduction in its workforce;

(4) all of this will affect SRCL's market presence and competitiveness especially because of the reduction in its customer density;

(5) the likelihood of SRCL obtaining further investment will be negatively affected;

(6) its reputation will suffer, as perceived by its employees, customers, competitors and suppliers;

(7) elements of the harm suffered by SRCL are incapable of quantification; and

(8) if damages were awarded against ICBs, they would not or might not be able to pay them.

34. In the light of this, I refer to some of the case-law in this area. I have taken part of the summary below from my judgment in the recent case of *Involve v DWP* [2025] EWHC 2664 (TCC), where the claimant also contended that damages would be inadequate and made references to loss of reputation and matters of that kind.

35. As to the general approach, I begin with the observation made by Joanna Smith J in *Kellogg Brown & Root Ltd v Mayor's Office for Policing and Crime* [2021] EWHC 3321 (TCC) that the application of the principles will involve consideration of the circumstances of the particular case and every case will turn on its own facts. There is an obvious need for careful analysis of the reasons for the outcome in other cases and the extent to which the court in the instant case is concerned with a similar factual scenario - see paragraph 25 of her judgment.

36. This is reflected in the observation made by O'Farrell J in *Bombardier Transportation v London Underground* [2018] EWHC 2926 (TCC) at paragraph 58 of her judgment:

> "Each case must be considered on its own facts. 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 the loss of reputation alleged would lead to financial losses that would be significant and irrecoverable as or very difficult to quantify fairly".

37. On the question of loss of reputation, I refer first to *Openview Security Solutions v London Borough of Merton* [2015] EWHC 2694, the whole topic of loss of reputation in this context was given detailed consideration by Stuart-Smith J (as he then was). In particular:

> "37. I am not persuaded that loss of reputation as such affects the question of adequacy of damages as a remedy. If damages were otherwise an adequate remedy, I can see no reason why the 'reputation' of a tendering party as such should affect the giving or withholding of interim relief. With commercial parties, what ultimately matters is whether the loss of the contract in question will reduce their profitability in a way which is not recognised by the normal principles on which damages are awarded. This in turn suggests that what is generally of concern is whether the aggrieved tenderer will lose out on other contracts that it might have obtained if it had added lustre to its reputation by getting the contract at issue. In other words, the real subject of the 'loss of reputation' argument is financial losses which the law of damages does not normally recognise…
>
> 38. This points to the answer to the second question: the constituency of interest is future prospective contracting authorities (or other contracting parties) who might be influenced to give work to a party which has the contract at issue rather than to a party who has not. The answers to the two questions explain in many cases why the 'loss of reputation' does not normally sound in damages in the first place: the loss is speculative and legally too remote. They also provide good reason for restraint on the part of a court which is urged to adopt 'loss of reputation' as a reason for holding that the damages that would be awarded are not adequate compensation.

> 39. What then are the criteria to be applied before a court accepts that 'loss of reputation' is a good reason for holding that damages which would otherwise be adequate are an inadequate remedy for *American Cyanamid* purposes? In the absence of prior authority directly in point (none having been cited by the parties) but with an eye to the approach adopted by the court [in previous cases] I suggest the following:
>
> (i) Loss of reputation is unlikely to be of consequence when considering the adequacy of damages unless the court is left with a reasonable degree of confidence that a failure to impose interim relief will lead to financial losses that would be significant and irrecoverable as damages;
> (ii) It follows that the burden of proof lies upon the party supporting the continuance of the automatic suspension and the standard of proof is that there is (at least) a real prospect that would retrospectively be identifiable as being attributable to the loss of contract at issue but not recoverable in damages;
> (iii) The relevant person who must generally be shown to be affected by the loss of reputation is the future provider of work."
>
> 40. These are general criteria, which need to be reviewed and considered in the light of the facts of each case. I readily accept that there is more to be said on the subject and the principles such as those I have suggested are not be applied by rote."

38. In *Alstom v Eurostar and Siemens Plc* [2010] EWHC 2747 (Ch) Vos J (as he then was) said that damages could not compensate Alstom for the loss of the contract to provide or the design, supply and maintenance of 10 high speed train sets for the Eurostar service, with an option for a further 13 train sets, worth €600-€700 million. This was a highly prestigious contract which would undoubtedly enhance Alstom's reputation. He also accepted that the assessment of its loss would be a complex process requiring the valuation of a lost chance which is always a somewhat difficult process. The evaluation of its reputational and market position losses would be very difficult indeed.

39. In a similar vein, the contracts at issue in *Bombardier v Hitachi, London Underground and others* [2018] EWHC 2926 (TCC) were for the manufacture and supply of 94 new trains and equipment for the Piccadilly Line, the provision of technical support and provision of spares for the new trains, together with options for the manufacture and supply of additional trains for the Bakerloo, Central and Waterloo & City Lines. The contracts had a duration of 40 years and a value of up to £2.5 billion. In respect of the loss of reputation claim (though not other elements of the claimants' losses), O'Farrell J held that damages would not be an adequate remedy:

> "This procurement is distinctively prestigious because of its size, location and value. Success in such a competition would enhance the reputation of the winning bidder in the global rolling stock industry. It would provide evidence of competence and expertise that could be used to increase its chances of securing other high-value commercial opportunities. Conversely, failure in such a competition through unlawful procurement procedures would deprive the unsuccessful bidder of those advantages and place it at a disadvantage in competing for other commercial opportunities. Mr Coppel argues that the claimants were successful in pre-qualifying for this procurement exercise. That argument ignores the fact that such success was no doubt founded, at least in part,

> on the technical and commercial expertise of the claimants evidenced by their other successful projects. In future competitions, they will be able to rely on other projects carried out but they will be deprived of the opportunity to rely on the scale and innovative design of this project as demonstration of their capabilities. It would be very difficult to prove a causal link between the loss of reputation and loss of subsequent business; for that reason, it would be very difficult to quantify."

40. In *Draeger Safety v London Fire Commissioner* [2021] EWHC 2221 (TCC), O'Farrell J held, in relation to a contract for the supply of respiratory protective equipment for the London Fire Brigade, that:

> "41. The evidence before the Court does not indicate that this procurement is unique or high value. However, it is being closely watched by a number of other fire and rescue services and is likely to be perceived as setting the standard for improved protective equipment in this sector. On that basis, it is arguable that, if the automatic suspension is lifted and Draeger is ousted from its position as the incumbent provider of breathing apparatus for LFB, it will suffer a loss for which damages are not an adequate remedy."

41. In *Vodafone v Secretary of State for Foreign Commonwealth and Development Affairs* [2021] EWHC 2793 (TCC), Kerr J held that the claimant could not be adequately compensated by an award of damages. The loss of the contract in issue was significant because it would lead to a loss of opportunities to bid for and win other contracts "on the back of this one". The contract was a very large and important one and in that case, the claimant's submission was actually supported by what the successful bidder, Fujitsu, had said in a letter dealing with the effects on it of any delay in the award of the contract. It explained how developing the system for the contract to be awarded would help it to obtain similar contracts for other public sector clients such as the National Crime Agency, the Ministry of Defence, HMRC and NHS.

42. Kerr J said this:

> "84. Here, the immediate value of the contract is relatively low, though it is fair to hold the defendants to their own estimate of £184 million overall, taking account of opportunities to obtain call off contracts. I accept that the contract is highly prestigious. ..
>
> 85. I am prepared to accept Vodafone's assessment, not directly contradicted by the defendants, that in the field of international global communications this contract is second only in prestige to an equivalent contract to supply those services to the government of the USA. Such opportunities do not arise frequently; the last one was 11 years ago.
>
> 87. In the end, what helps to persuade me that it would not be just to confine Vodafone to its remedy in damages is the unquantifiable loss of opportunities to bid for and win other contracts on the back of this one. I do not accept that the evidence of this was vague and speculative, as the defendants suggested.
>
> 88. The disparity between the relatively modest value of the services immediately to be provided and the overall estimated value of £184 million shows the difficulty of quantifying losses that are, in my judgment, likely to prove irrecoverable as damages in future. While Vodafone can bid for

other government and public sector contracts without having won this one, it would not be able to secure call off contracts and build its standing by that means.

89. I also find persuasive Vodafone's point that Fujitsu has heavily relied in its letter on threats to its future business opportunities and relationships with suppliers arising from any risk that it might, after all, not hold onto this contract. I see no reason why the same logic should not hold good for both companies."

43. On the other hand, in *Alstom Transport v London Underground Ltd* [2017] EWHC 1521 (TCC), Stuart-Smith J (as he then was) held that the evidence submitted by Alstom in support of its submission that damages would not be an adequate remedy was surprisingly lacking in detail and that the picture painted by it was partial and that both scrutiny and scepticism were justified. On analysis, its evidence that if it did not get the contract in question, it was highly unlikely that it would be able to maintain the centre of expertise for traction technology, was barely credible. He therefore rejected the submission that damages would be inadequate.

44. I then refer to the Northern Island case of *TES Group Ltd v Northern Island Water Ltd* [2020] NIQB 62. At paragraphs 32 and 33 of his judgment Horner J said this:

"[32] But no company can expect to be successful in every tendering competition it enters. If an unsuccessful tenderer is intending to make the case that the loss of a competition will spell financial ruin, then it should provide convincing evidence as to why this is likely. There has been a complete failure to provide such evidence…Indeed, it is difficult not to conclude that there has been a deliberate attempt to keep the court in the dark as to how TES will perform should it lose this tender by starving it of up to date financial information as to how TES is currently performing. If TES had wanted to make such a case, namely that winning Lot 2 was essential for its long-term survival, I would have expected the following evidence to be provided at a bare minimum:

(a) Up-to-date management accounts and detailed financial information as to turnover etc.
(b) A breakdown of how TES's turnover was made up and what was attributable to Water Services.
(c) What contracts TES had in the Water Services sphere apart from those with the defendant.
(d) What alternative work sources there were in the Water Services sphere available to it.
(e) What plan TES had if it was unsuccessful in this tender to seek other work. If it had no plan how and why had it become so dependent on winning this particular contract.
(g) The effect of a successful claim on its finances and its ability to retain its employees.

[33] In the circumstances I remain deeply unimpressed by the claim made by TES of financial ruin if it fails to win this contract and by its failure to provide any cogent financial evidence to support it."

45. *TES* was not included in the parties' lists of authorities, but it was referred to in *Involve*, which was, and the argument made by the ICBs here, that SRCL should have produced underlying records to back up its points on inadequacy, reflects what was said in *TES*.

46. In *Millbrook v Devon County Council* [2025] EWHC 744 (TCC), the Court rejected the submission that damages were inadequate for the claimant. The Deputy Judge considered that most of the

points raised by the claimant to establish prejudice were made by mere general assertions, without supporting evidence. Further, the main immediate harm was the hit to anticipated financial revenues from the loss of the new contract. Those losses would 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. The Judge did 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. Furthermore in terms of loss of staff, many of them would transfer to the new provider, along with premises. Finally, and importantly, in paragraph 20, she said:

> "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…"

47. Then, in *Involve* itself, I accepted the claimant's evidence that the new contract was prestigious and to be regarded as a flagship project which would immediately open interest and opportunities in other public and private organisations which might not be currently available to Involve. The successful award of the new contract to it would give major public and private sector organisations confidence in engaging with it, represented the first opportunity for it to offer proprietary, bespoke software solutions, and the prestige attached to the new contract would enable it to exploit bigger and more lucrative market opportunities with major system integrators as a result. There was in fact no specific evidence from the Defendant in response to these points.

48. I said that this unique level of interest likely to flow from the new contract, and the resulting opportunities would enable the claimant to develop its business model so that it has far greater direct product control, differentiating it from other similar providers in the market. This would in turn boost shareholder value and change the perception of Involve away from a business leveraging third-party intellectual property towards a business with important and valuable proprietary solutions of its own. The contract here was, therefore, a "reference" contract for the claimant. While it already had an excellent reputation in respect of its existing "reseller" services, it now had the opportunity to enhance its reputation much further, by now taking on the role of a direct supplier of its own video-conferencing product in relation to a contract which is one of the largest of its kind. I did not consider here that a lack of specific financial information as to the value of these opportunities was fatal to the points being made. Overall, I considered that being deprived

of the New Contract would indeed expose it to serious losses of opportunity to develop its business in specific ways which could not be compensated by an award of damages.

49. The above cases show that on the question of reputation, a key question is whether there is cogent evidence of a loss of opportunity to enhance reputation along with other benefits. A claim that the bidder's existing reputation will be damaged if it is unable (because the suspension is lifted) to obtain the contract in question is much more difficult. As Coulson J (as he then was) put it in *Sysmex v Imperial College NHS Trust* [2017] EWHC 1824 (TCC)

> "49. Behind this point was, I think, the suggestion that their reputation would not be restored by an award of damages at the end of the case, and that their reputation would only be restored by the award of the MSC. To the extent that that is Sysmex's case, I emphatically reject it. There is no evidence put forward by Mr Howes (or anyone else) to support it.
>
> 50. Moreover, it is fundamentally wrong in principle to say that an award of damages would not restore a reputation lost because of the rejection of a tender, but the award of the contract itself would. What would matter in those circumstances would be the public acknowledgement that their bid had been wrongly rejected, not the precise remedy which the court provides in consequence of that finding. By way of example, if an individual claimant is wrongly deprived of a contract under which he or she would have provided personal services, the court would be most unlikely to order specific performance of such a contract even if the claimant is successful, so damages are inevitably the claimant's remedy. It could not be suggested in those cases that damages are not, in principle, proper compensation."

50. In relation to other types of loss which a claimant might say are significant but unquantifiable, Eyre J considered some of these in *Medequip v Kensington and Chelsea* [2022] EWHC 3293 (TCC). In respect of the relocation of the claimant's head office, he accepted at paragraph 91 that this would involve expenditure and it might well be that any replacement premises would be more expensive than the current head office. However, those were matters which could readily be quantified and could form the basis of a damages claim.

51. In respect of loss of specialist staff, he said this:

> "92. … The loss of specialist staff can be a matter which means that damages are not an adequate remedy for a contractor harmed by deficiencies in a procurement process. The Claimant says that is the position here. However, careful analysis of the degree of specialism and of the effect of the loss of the staff in the particular case is required before that analysis can be accepted…
>
> 99. [There are] …cases in which the court has held that the loss of specialist staff means that damages are not an adequate remedy for the particular claimant. In both those cases there was a high degree of specialism; the transfer would have been of all or almost all of the claimant's staff; and the loss of the staff would have affected the claimant's continued capacity to perform other contracts or to function at all. It will immediately be noted that those are very different indeed from the circumstances here. Although the Claimant will lose some of its specialist staff the degree of specialism in question is rather less than in those cases. More important the Claimant will retain a number of such specialists and its very existence will not be threatened by the loss of the staff who will transfer to the Interested Party. It cannot credibly be suggested that the loss of the staff who will transfer to the Interested Party will mean that the Claimant will be unable to continue to perform the contracts it has for the provision of CES to local authorities in widely disparate parts

> of the United Kingdom. Accordingly, this is not a case where the Claimant's loss of specialist staff means that damages will not provide it with an adequate remedy."

52. The cases to which Eyre J had referred in this context were *Lancashire Care NHS Foundation Trust v Lancashire CC* [2015] EWHC 3898 (TCC) and *Counted4 Community Interest Company v Sunderland CC* [2015] EWHC 3898 (TCC).

53. Save in one respect, Eyre J was of the clear view that the claimant's case that damages would not be an adequate remedy for it was misconceived or overstated. That one respect was where he accepted that because the claim in part was that the Defendant had proceeded on the basis of unpublished criteria, damages would not be an adequate remedy because of the extent of the speculation which would be involved in their quantification should the claim succeed in that respect. He reached the view, with some reluctance, that the claimant had narrowly raised a sufficiently arguable contention as to the adequacy of damages in this regard.

54. These cases illustrate how the outcome of a consideration of the inadequacy or otherwise of damages in the context of loss of reputation and other losses for the claimant is indeed highly fact-sensitive.

The relevance in this context of a submission by the ICBs that any breach established by SRCL would not be sufficiently serious

55. SRCL contends that another reason why damages would not be an adequate remedy is because the ICBs have taken the point that even if breaches were established, they would not be sufficiently serious. There are cases dealing with this in the context of applications to lift, but I will deal with them when I come to consider the "sufficiently serious" question itself, below.

Whether damages are an adequate remedy for the Defendant contracting authority

56. A useful statement of principle here is to be found in paragraph 47 of the judgment of Eyre J in *Medequip*:

> "47. Particular considerations arise when addressing this question in the context of procurement cases where the defendant will be a public body. There will be cases where damages will demonstrably be an adequate remedy even for such a body if the suspension is kept in place and it is precluded from placing the contract in accordance with its procurement process. This will be the position where awarding the contract would mean that the authority was able to obtain particular goods or services at a particular price and where the restraint on awarding the contract means that it has to obtain identical goods or services for a higher price. There, an award in due course of the difference between the two amounts would adequately compensate the authority in question for the inability to place the contract at the lower sum at the earlier time. In such a case the same goods or services will have been obtained during the period of the suspension but at a higher price than would have been the position in the absence of the suspension. There will, however, be circumstances where damages will not be an adequate remedy for a public body. This will potentially be the position where the contract is to provide particular services for the public or to provide those services in a particular way and where the maintenance of the suspension means that

> for a period of time the services will not be provided or will not be provided in the way desired by the authority. Such an impact on the provision of services by the public body in question will not be measurable in financial terms and damages would not normally be an adequate remedy for a defendant authority in those circumstances (see per Lord Goff in R v Secretary of State for Transport ex p Factortame [1991] 1 AC 601 at 673 A-B)."

57. As to the approach to be taken when the contracting authority relies on its inability to provide what is says would be improved services if the suspension was maintained, he said this:

> "109. There is no challenge to the evidence from Mr Hughes that the terms of the Agreement are the result of reflection and consideration by the members of the Consortium after a period of consultation. The local councils are the bodies with responsibility for the provision of these services to their citizens. They are best placed to know both whether the services are being delivered in a particular way under the existing framework agreement and whether the changes which have been made from that agreement leading to the terms of the Agreement are likely to be an improvement or not. Certainly it is for the local authorities to decide the way in which they want the services delivered.
>
> 110. Almost inevitably there will be scope for debate as to the extent to which the changes which it is said are being made are in truth changes from the current arrangements and also as to the extent to which the changes are an improvement. It may well be that the differences in terms of the practical operation of the system are not as great as the Defendant perceives them to be and also that different persons will have different views as to whether the new arrangements are an improvement. However, I come back to the point that the Consortium has decided that it is beneficial for the CES to be delivered in a particular way and on particular terms. If the suspension is maintained the Consortium will not be able to implement that decision for the period of the suspension and for such time thereafter as is necessary to enable the new arrangements to be put into effect. Provision of services will continue in the interim. The Claimant is willing to continue to supply the services and this is not a case where there will be a gap in provision. Nonetheless the fact remains that the Defendant will not be able to provide the services in the form and on the terms it wishes. That is a loss which cannot adequately be compensated in damages."

58. Eyre J returned to that theme in *International SOS Assistance UK Limited v Secretary of State for Defence* [2025] EWHC 2634 (TCC):

> "35. There is a public interest in the award of public contracts being made in a lawful and transparent manner but there is also a public interest in public authorities being able to obtain the benefits which they believe flow from the contract in question (see Draeger at [49]). There will often be differing views as to the extent to which new arrangements are in fact different from those already existing and as to the extent of any benefit flowing from the changes. A mere assertion of benefit by a public body cannot close down consideration of the point but the court must proceed on the basis that the public bodies are better placed than the court to determine whether changes will be beneficial (see Medequip at [109] – [110])…
>
> 65. The assessment of what is required by the public interest is ultimately a matter for the court. Mr Barrett was right in his submission that the Defendant does not have carte blanche and cannot simply assert that the public interest requires the lifting of the suspension. In that regard it is to be remembered that there is a public interest in ensuring that procurement exercises are conducted in accordance with the Regulations and that the automatic suspension is part of the arrangements put in place to protect that interest. Nonetheless, the court's assessment of what is required in the public interest must take into account the Defendant's position and, as I explained in Medequip Assertive Technology at [109] and [110] the relevant public body will be better-placed than the court to assess whether and to what extent proposed new arrangements are beneficial."

59. I gratefully adopt those general observations here. In the course of argument, Mr West KC acknowledged their content but said that I could depart from them if I thought that they were clearly wrong. Indeed I can, but I consider that they were right.

ANALYSIS (1): DAMAGES AS AN ADEQUATE REMEDY FOR SRCL

60. The first question is whether damages would be an adequate remedy for SRCL if deprived of the automatic suspension. If they are, then the suspension should be lifted without more, unless there is some exceptional reason for not doing so.

The Clinical Waste Market

61. There is evidence on this subject, principally from Mr Black and Mr Flynn. There are aspects of the market where they disagree but for the purpose of this introductory section I did not understand the following to be controversial.

62. Clinical waste is waste from medical facilities of all kinds which is hazardous in some way. This can be because the waste contains toxins or other materials which can cause disease, or medicines with a biologically active pharmaceutical ingredient, or sharp waste (for example needles) or other material which contain dangerous substances. Waste emanating from medical facilities which is not hazardous is known as "offensive waste".

63. The medical facilities producing hazardous (and offensive) waste include hospitals, GP surgeries, dental practices, pharmacies and care providers. So far as medical facilities within the NHS are concerned, they currently produce 156,000 tonnes of clinical waste. This is treated either by high-temperature incineration ("HTI") or by an alternative treatment ("AT") which is a form of sterilisation. Offensive waste is processed at a lower temperature and this produces Energy from Waste ("EfW"). If hazardous waste is processed by AT, it can then be used to produce EfW.

64. The clinical waste at issue here is that produced by primary care providers operating within each of the relevant ICBs. As already noted, such providers may have their clinical waste treated pursuant to a contract made between a clinical waste operator (such as SRCL, Sharpsmart or PHS) and the ICB, or they may contract directly with a clinical waste operator and will then be reimbursed by the ICB. For this reason, there is usually more than one operator serving the clinical waste needs of private care providers within any given ICB.

65. As one might expect, given that the contracts in issue here do not deal with clinical waste emanating from NHS hospitals, the amount of clinical waste covered by the Procurements represents only a small part of the NHS market for clinical waste. The NHS overall is the largest producer of clinical waste.

66. There are other aspects of the clinical waste market to which I shall return below.

The position of SRCL

67. The principal evidence here is provided by Mr Black. He says that SRCL is widely considered to be the market leader in clinical waste disposal and agrees with Mr Robinson of Sharpsmart who said that SRCL is the largest player in the UK by size and reach. It presently has a strong record of winning tenders; it succeeded in 90% of concluded procurements in 2025. According to Mr Robinson, SRCL has over 1,700 employees and 19 fully licensed specialist waste sites and other bases in 28 different locations in the UK. It also has 50% of the NHS clinical waste market. I did not understand this to be in dispute.

68. That said, SRCL reported an operational loss before exceptional items in 2023, and will report an operational loss of £3.3 million out of revenues of £112 million for 2024. Its overall profit margin from its incumbent operations at the ICBs which are the subject of the Procurements and which are currently processed by it, is 4%. The waste produced by the ICBs the subject of the Procurements and which is currently processed by SRCL is presently 4652 tons out of a total of 104,759 tons on an annual basis.

69. SRCL itself is a wholly-owned subsidiary of Stericycle Inc. which is itself owned by Waste Management Inc. ("WM"). According to AG, WM reported revenues of $22 billion, and a profit of $6.5 billion in 2024 with a projected cash flow for 2025 of $2.7 billion.

Analysis of the reasons why damages are said not to be an adequate remedy for SRCL

70. Those reasons have been summarised at paragraph 33 above.

71. As already noted, there are some disagreements between Mr Black and Mr Flynn. As to that, SRCL contends that in general, I should prefer the evidence of Mr Black who is a specialist in the field and of course works directly in the clinical waste industry. I see that, but on the other hand, Mr Flynn did work for 6 years within the NHS on the waste management practices and contracts across London in addition to his work on other environmental matters. Moreover, his company, Anenta,

was established in order to improve waste management services across the healthcare sector. It has also managed the existing contracts of the 22 ICBs in issue here, in some cases for over 10 years. So I am not prepared simply to disregard his evidence when in conflict with that of Mr Black. Where there are particular differences between them I discuss them in context below.

72. In some respects, SRCL prays in aid the fact that for its part, Sharpsmart also contends that damages would not be an adequate remedy for it, should the suspension not be lifted. I will deal with this once I have considered the evidence about SRCL's own position.

The significance of the long term nature of the New Contracts

73. SRCL points to the fact that if extended to the maximum, these contracts could last as long as 9 years and cannot be terminated "without cause" by ICBs within their first 3 years. This is the first such large-scale procurement, taking the 22 ICBs as a whole, for many years, what Mr Black describes as a fragile and challenging market. The Procurements therefore represent a very important opportunity. Mr Black says that the total value of the contracts would be some £168 million, although that figure is not broken down and for their part, the ICBs say that the average annual value of the contracts would be about £10 million, therefore making about £90 million if they ran for 9 years.

74. Mr Black goes into detail as to what he says are the challenging aspects of the clinical waste market at paragraph 14 of TB1. In summary, it is highly regulated, some of the incinerators have been sold and others are ageing and it takes time to build and commission new plant. The failure of a single supplier could prejudice the ability of the NHS to provide effective health care within a matter of days and in one case a company called Healthcare Environmental Services Limited ("HES"), a competitor of SRCL, collapsed causing widespread NHS disruption and political disquiet. He later suggests that this was because it sought to acquire new business which outstripped its capacity. He adds that none of the large suppliers are making significant profits from clinical waste products.

75. As to all of this, Mr Flynn says at paragraph 9 of GF2 that this is not fully accurate. While much of the existing infrastructure, such as incinerators, is ageing this has already been recognised by the ICBs and the wider NHS and this is why the latter is changing its approach to the disposal of its hazardous waste which should reduce the need for incinerators. While the NHS's production of clinical waste exceeds that of private producers there are many different organisations within it which vary in terms of their size and the waste they produce and their store collection facilities.

Also, the fact of the Covid pandemic has meant that the NHS now has contingency measures. All of this goes to the resilience on the part of the different NHS organisations to cope if there was a sudden failure of a clinical waste operator. In fact, Mr Flynn says that the only example of a failure of which he is aware was HES. Further, the New Contracts have commitments for proactive management to ensure the prompt discovery of major issues and the sudden and unexpected collapse of a supplier is all the more unlikely.

76. Mr Williams in turn takes issue with some of that in DW3. He disagrees that acute hospitals have ample storage given the amount of waste they produce. This would go to what the consequences would be if there was a sudden failure of a supplier. He also says that there was another supplier failure, being Eurocare Environmental Services ("Eurocare"), and as with HES, this was because the operators expanded too quickly and could not manage the scale of operations required under the contract. However, Mr Robinson then says at NR3 that Eurocare was a fledgling operator with little financial support and HES was a family run business. The present NHS procurement and evaluation processes were substantially strengthened to prevent a recurrence of this. Also, insofar as the suggestion is made that Sharpsmart would fall into the same category as these two companies this is wrong because of its infrastructure, depth of management and corporate resources which are far greater, and its own investments, for example the plant at Rainham. Given that reply, I do not think that what Mr Williams says adds very much.

77. In the light of that, and to the extent that it is being suggested by SRCL, I do not accept that even where the market is challenging in some respects, that SRCL is in the best position, compared with other suppliers, to fulfil the clinical waste requirements of the ICBs here or that if it is not fulfilling those requirements, then that itself would have adverse consequences on the NHS. Indeed, this suggestion is (at the moment) contradicted by the very result of the Procurements.

78. I do quite see that this is an important opportunity for clinical waste operators, but this is not a case where the essential services to be provided under the New Contracts would be any different from what the operators have been providing so far (cf the new model of service provision which would be undertaken as an essential part of its growth by the unsuccessful bidder in *Involve* - see paragraphs 47 and 48 above). Nor do I see these contracts as prestigious in any real way; there is simply a large number of them, and it has to be remembered that this is not a single procurement covering 22 ICBs; there are 22 separate Procurements even if elements of them are the same.

79. I would accept that if SRCL succeeded on liability and recovered damages for loss of profits the amount could be significant, although not as substantial as in many procurement cases. I say that because if the correct revenue flow was £10 million annually, then, with SRCL's existing profit margin of 4%, this would yield £400,000 per year and so a maximum of £3.6 million if the assumption was that the contracts would last for 9 years, or £2 million if they would last a minimum of 5 years. SRCL says that with the New Contracts it might be able to improve its profit margin beyond 4% but even if so, damages would be of the same sort of order, and SRCL (because of its scoring position in the actual Procurements) may have to rely on its alternative claim for loss of chance which would reduce in the ultimate figure awarded. If the true total revenue was £168 million, obviously those figures would be higher, with a maximum at 4% of £6.7 million.

80. However, whatever the realistic size of any award of damages for loss of profits the key point is that this is of course a perfectly quantifiable claim. So I do not think that this first reason assists on any supposed inadequacy of damages.

The Size of the Procurement Opportunity

81. This point is related to the first. SRCL says that there is an opportunity to address, in other words increase, the existing 4% profit margin. However, that is not explained in detail, nor is it said what the new putative profit margin might be. All that SRCL relies upon here is the fact that at paragraph 57 of RL2, Ms Leng stated that the new contracts with the 9 ICBs then in issue would be more expensive for ICBs than the current ones, recognising that the market suggests that current pricing was unsustainable for the operators.

82. However, if the point is that the economies of scale engendered by the putative 22 New Contracts for SRCL (to the extent that they represent a greater amount of work than currently given to SRCL by these ICBs) will indeed yield a higher profit margin, then, again, that is a calculable part of the normal loss of profits claim. The same is true for any argument that with the New Contracts, SRCL will be able better to recoup its costs.

The Need for an immediate cost saving of 6-£8 million which entail the closure of facilities and in turn a reduction in its workforce;

83. SRCL says that the effect of losing the New Contracts would be that a saving of £6-£8 million of costs would have to be found. There is a short summary of how the figure of around £6 million is reached at page 153 of the exhibit to Black 1.

84. The necessary costs reductions are said to flow from the following:

(1) closure of 3 facilities;

(2) reduced transport fleet; and

(3) reduced staff.

85. I consider each in turn.

Closure of 3 Facilities

86. The 3 facilities are the AT facility at Larkfield in Kent, an incinerator in the South of England, probably either Bournemouth or Sidcup, and the Newcastle Transfer Station.

87. As regards Larkfield, unlike SRCL's other processing facilities, a significant percentage of its throughput comes from ICBs, namely 33%. Accordingly, it is said that it would be rational to close it, because of the likely drop-off in work.

88. However, there are a number of counter-arguments to this. First, Mr Flynn points out at paragraph 25 (a) of RF2 that Larkfield is in fact both a processing facility and transfer station and it is not clear if the 33% refers only to its processing capacity or to its processing and transfer capacity. If the former, it is unclear why 65% capacity would be unviable.

89. Next, Mr Flynn says that there would be opportunities for others to use Larkfield, while Mr Black says that there would be no opportunities to replace the lost incoming volumes. In that regard, Mr Flynn has pointed to the fact […]. This suggests that the facility could indeed be used by others. Because this information is within the confidentiality ring, it is said that Mr Black could not have known about it, but SRCL's legal team did. In any event, that is the state of the evidence. Otherwise, all that SRCL says here is that it would be very odd for one bidder to base elements of its tender on hiring facilities from the putative losing bidder. I do not follow that. It would seem a rational approach if success by the first would entail failure by the second.

90. Third, it needs to be emphasised again that there are 22 separate ICBs, in different areas of the country, at issue here. Thus the question arises why the proposed loss of Larkfield in Kent flows from the loss of a New Contract in, for example, the North of England. The fact that the Procurements were conducted jointly at the same time does not relieve SRCL from showing the

losses (calculable or otherwise) emerging from each particular alleged unlawful Procurement. In fact, the Court has the power not simply to lift (or not lift) any suspension. It could modify it - see Regulation 96 (1) (b) of the PCR. In other words it could have been invited by SRCL to maintain the suspension in respect of the Procurements of some, but not all the ICBs. But this was not the approach taken here.

91. As to the closure of one of the incinerators, again the point is made that there is likely to be demand from others for it. In this regard, Mr Black says that at the moment, Sharpsmart has no incinerator facility, operating only 3 AT /Transfer stations and one further Transfer station, while PHS has no processing facility at all. At paragraph 11 of NR2, Mr Robinson says that only about 3.5% of the total volume of waste to be managed under the Lots awarded to Sharpsmart would require HTI and this could be accommodated under the existing sub-contracts made by Sharpsmart with third party operators (not SRCL). At paragraph 11 of NR3, however, Mr Robinson disagrees with the proposition that it would be difficult for SRCL to divest itself of incineration or other treatment assets. He identifies a number of capable operators who use incinerators and new entrants who are actively procuring land for new incinerator investments. Indeed, Sharpsmart itself would be interested in and capable of acquiring and operating incineration capacity if a sustainable and well maintained facility were to become available.

92. As to that, Mr Black says that SRCL would be under no obligation to make its facilities available to others (including PHS and Sharpsmart) for hire and it could still simply close them. That is no doubt true, but if there is a ready market to take up the slack, as it were, then to take the step of closing such facilities would seem to make little or no commercial sense.

93. Mr Black also says that if it was necessary to close a facility, it would be difficult later to re-open it if demand then came along. He gave an example of an incinerator at Hillingdon which was formerly operated by SRCL but then closed. He said that Hillingdon Hospital NHS Trust undertook, but then later abandoned, a project to re-open it itself. However, Mr Flynn comments at paragraph 26 of GF2 that in fact, SRCL closed the facility in 2019 following leakage of emissions into the plant, and it requested that the NHS Trust invest heavily to improve the facility, but the NHS Trust refused. SRCL later relinquished the site and signed over the permit to Medisort Ltd, another operator, on 28 May 2021. The closure of this plant did not affect the NHS more widely. He also referred to the potential of the incinerator being sold or leased to another clinical waste operator.

94. All of the above suggests that either there is no real need to close the incinerator plant or it could be sold or leased to others.

95. I would make two further general observations at this stage. First, it needs still to be borne in mind that all of this supposed need for cost-savings is in respect of only 4% of SRCL's total throughput at a low profit margin of 4%. Second, it seems to me that if there are indeed the sorts of consequences suggested by Mr Black, they are very much part and parcel of the sort of consequences which any large volume-based supply might expect in losing a significant bid.

96. Thus far, I fail to see that SRCL has produced cogent evidence that damages would not be an adequate remedy so far as closure of facilities is concerned.

97. I then turned to the question of reduced transport operation. This is said to result from the effect of the lost contracts on SRCL's "route density". See the table and comparative "footprint" maps at pp 155 and 156 respectively of the exhibit to TB1. The Newcastle transfer station would have the greatest reduction in the number of stops namely 63%, followed by Ipswich at 47% and then going down to the last of the 10 transport stations, being Knowsley at 11%. This is the basis for choosing Newcastle as the site to close.

98. Mr Black says that in total, SRCL will lose one third of its "route density". This will mean that it's waste collection services would be less efficient, by which I take to mean that economies of scale will be reduced, since the remaining customers would still require their collections as before, and customer costs may rise. This may in turn lead to the loss of further customers.

99. It is then said that this will also lead to a reduction in the number of SQ (ie small quantity) vehicles presently being used by SRCL on these routes (as distinct from LQ - large quantity-vehicles used to collect waste from larger sites like hospitals).

100. It is then said that there will be a cost if the relevant vehicle leases are terminated earlier. However, if that is so, then this could potentially be claimed as damages and is on any view readily quantifiable. However, Mr Black goes on to say that if there are less vehicles, then it can only cover a reduced area and this will affect its ability to serve non-NHS customers. I do not follow this. There is obviously a calculation to be made between reducing the fleet to cut costs and keeping it, in order to service existing customers. It may indeed be better to keep the existing fleet so as not to lose other customers. Either way, again, this is no more than the sort of change that may be

brought about in any nationwide business as a result of losing a bid. That is no reason why it should lead to the conclusion that damages are not an adequate remedy.

101. In fact, there is another point here because according to paragraph 27 of GF2, […].

102. Further, as SRCL's footprint maps make clear, the reduction in customer density is only in respect of its total ICB footprint, not its footprint for all of its SQ customers. So it is not clear what the overall loss of customer density is. Nor is it clear why the re-routing which SRCL says it will undertake would not deal with this.

103. A further point made by Mr Flynn is that any SQ vehicle which was now not needed could surely be "repurposed" for LQ loads. However, Mr Black says that this would be impractical because of the different features of each type of vehicle and for present purposes, I am content to accept that.

104. I consider that all these points about a reduced fleet are highly speculative and uncertain, as is the notion that SRCL will become less resilient. I do not consider that there is cogent evidence here.

Reduction in Staff

105. Finally, Mr Black points to a loss of staff. At paragraph 49 of TB1, he refers to staff who either work on the facilities or drive. It takes up to 2 years to train a facilities manager and 3 months to train a driver. He does not predict how many process facility workers would no longer be required, but says that 55 drivers would be lost. He then says that this would mean that the money invested in the employees no longer working for SRCL would be lost and moreover the loss would create a "hole" in its business. As to the former, all of that depends on the age of the employees which affects when they might leave anyway and as to the latter, if there is a "hole" needing to be filled one would have thought that SRCL would wish to retain some of those employees anyway. Yet further, if the facility said to require closure does not in fact need to be closed then there would not be such consequential employee losses.

106. In this regard, I refer to what Eyre J said at paragraphs 92 and 93 of his judgment in *Medequip*, quoted at paragraph 51 above. I agree that he does not say that the loss of staff can never be a reason to say that damages are not an adequate remedy. It is all a question of fact and degree. Here, just as in *Medequip*, I consider that SRCL cannot begin to say that there would be a loss of almost all of the specialist staff in a specialist industry. Nor is it an existential question for it. That is especially so since the larger number of staff who may be lost are drivers and it is not suggested

that staff departing threaten its ability to perform its other existing contracts. That conclusion is rendered all the more stark by the fact that all of this affects only 4% of its workflow.

107. I therefore do not accept that the possible departure of some staff here renders damages inadequate.

Loss of Competitiveness

108. This is a follow-on point from the last one and is set out at paragraphs 53-58 of TB1. I have dealt with part of this already insofar as it relates to the reduction in customer density and the question of SRCL's vehicle fleet.

109. In my judgment, these paragraphs are really saying no more than that it may be that overall, SRCL will lose some economies of scale in relation to the 4% of its business with which we are concerned, and that overall it may lose a competitive edge. That may be so although given the very limited size of this particular workload and SRCL's general position as market leader I think that Mr Black has overstated the risks. In any event, and yet again, this is simply a conventional possible consequence of a losing a significant bid.

110. Moreover, it is in the context of SRCL's present procurement success rate of 90%. I understand the argument that this success rate may go down if there are anything like the consequences of losing the bid which Mr Black has articulated. Nonetheless, a starting point of 90% is very high and there is no indication of what any decrease in its success rate may be. I suspect it will not be very much, looking at its clinical waste business as a whole.

111. There also remains the point that none of these consequences are tied to any particular Procurement.

Loss of Future Investment

112. Mr Black suggests that a further consequence of the loss of these Procurements is that WM "will lose faith" in SRCL and decide not to invest further in it. However, there is no actual evidence (in particular from WM) to support this assertion. The absence of such evidence is all the more surprising since at one of the same time, and for the purpose of dealing with the question of security for costs, AG suggested on behalf of SRCL in its letter dated 21 February 2025, that there was no case for concern precisely because WM was its owner.

113. As to that, SRCL sought to draw a distinction between the short and long-term position of WM which might differ. I do not accept this. One might ask, rhetorically, whether WM will lose faith in SRCL if it has indeed lost costs at this or any later stage if the suspension is lifted.

114. Finally, the question of continued support from a parent company may often arise in the context of procurements lost by a subsidiary.

115. There is therefore nothing in this point on the question of adequacy of damages.

Loss of Reputation

116. This is not a case of a small or medium player which now has the opportunity to enhance significantly its reputation and move on to a greater stage, as it were. This could arise where there is an opportunity significantly to change the business model which in turn propels it into obtaining different kinds of, or much larger, contracts. Here, SRCL is already the largest player and there is nothing in the New Contracts which is new from its point of view. This is not, therefore, a case of a prestigious or "reference" contract as in, for example, *Alstom* or *Bombardier*. Of course, I accept that the putative contract need not necessarily be unique or of high value as pointed out by O'Farrell J in *Draeger* (see paragraph 40 above). However, there, the position was being closely watched by a number of other fire and rescue services and was likely to be perceived as setting the standard for improved protective equipment in that sector, and was distinguished by Eyre J at paragraph 77 of his judgment in *Medequip*. Equally, I do not consider that there is a parallel with *Draeger* here.

117. All one is left with is Mr Black's statement that SRCL will somehow lose its reputation, at least to some extent, in the eyes of suppliers, customers and its own employees, and that NHS bodies may be concerned that its lack of resilience. See paragraphs 71 and 72 of TB1. I regard this as no more than general assertion, and in any event for the reasons given above, I consider that the effect of losing the Procurements on SRCL's infrastructure is likely to be less than Mr Black has predicted.

118. It is noteworthy that in paragraph 72, Mr Black says that he has explained the current situation to NHS England. He does not suggest that when doing so, NHS England reacted adversely at all. Moreover, of course, SRCL continues to supply its services to ICBs other than those at issue here. I also agree that it is in any event highly unlikely that the NHS or other government agencies which deal with SRCL would think less of it simply because it has failed to succeed on these

Procurements, given their knowledge of the procurement processes where there are always winners and losers.

119. An additional point made by the ICBs is that any loss to the reputation of SRCL will be short lived if it succeeds on liability at trial, even if confined to damages. See here the judgment of Coulson J (as he then was), *Sysmex* cited at paragraph 49 above. SRCL's only riposte to this is that this will not remedy the position pre-trial. I doubt there is such a risk anyway but in any event I do not think there is anything in the loss of reputation point to begin with.

The Position of Sharpsmart in relation to the question of adequacy of damages for SRCL

120. I need finally, in this context, to note that, of course, Sharpsmart contends that damages would not be an adequate remedy for it in the event that the suspension was not lifted. While the ICBs indicated in their skeleton argument that damages would not be an adequate remedy, either for them or for Sharpsmart, their detailed argument concentrated on their position alone, save in respect of what was then a lack of a cross-undertaking in damages from SRCL to Sharpsmart. Subject to that, and as clarified in oral argument, ICBs are neutral as to the damages position in relation to Sharpsmart.

121. For its part, SRCL takes issue with a number of the claims made in the context of the adequacy of damages by Sharpsmart. However, it also contends that all of the harms which Sharpsmart identifies are ones that will also be felt by SRCL in greater measure, and thus Sharpsmart's position makes the point that the New Contracts could be regarded as flagships and represent a substantial opportunity. This rather echoes paragraph 89 of the judgment of Kerr J in *Vodafone* referred to at paragraph 42 above.

122. Finally, Sharpsmart itself is at pains to point out the key differences between its position and that of SRCL, such that damages should not be regarded as inadequate for the latter.

123. At this stage, all I am concerned with is whether the position advanced by Sharpsmart can be relied upon by SRCL as additional support for its position on damages.

124. In my judgment, it cannot. There is, first, a clear difference between the position of the 2 operators. Sharpsmart has only an 18% share of the NHS clinical waste market (as opposed to the 50% share of SRCL, the market leader) and a turnover of £35 million compared to SRCL's £112 million.

125. Second, whether as asserted by SRCL or Sharpsmart, I do not accept that the Procurements represent flagship or prestigious contracts for the reasons already given.

126. Third, Sharpsmart contends that the Procurements represent a valuable opportunity to use the New Contracts so as to establish a platform or foothold from which it could gain further contracts in other areas. To the extent that this is correct, SRCL in any event needs no such platform because of its position. That remains the case even if its present 90% procurement rate may reduce somewhat, going forwards.

127. Next, Sharpsmart, like SRCL, relies on the fact that absent the New Contracts (for so long as the suspension persists) it will have to make redundancies. On the face of it this is likely to be more serious for it than for SRCL. It does not add support for the latter's case.

128. A final clear distinction between these two operators is that the New Contracts would only represent about 4% of SRCL's input.

129. For all those reasons, and regardless of whether I find that damages would or would not be an adequate remedy for Sharpsmart, I do not consider that its position on the application to lift and the evidence it has submitted affords any additional support to SRCL in respect of the latter's position on the adequacy of damages.

Elements of the harm suffered by SRCL which are incapable of quantification

130. By way of example, SRCL points to paragraph 39 of Black 1, suggesting that the consequences of a necessary closure of an incinerator were not capable of quantification in damages. I do not accept this. First, I consider that the consequences (including for the NHS in terms of loss of heating provision from that source) have been overstated or are unclear for the reasons given above. Second, at best, these amount to a conventional consequence that may follow from the loss of the bid for which the unsuccessful bidder should not be compensated anyway. The same point can be made about loss of staff.

131. SRCL also points to its alternative claim for loss of chance and that the counterfactual here may be difficult to work out. I agree that such tasks may not be straightforward, in particular because this is not a case where it is at all clear that without some or all of the unlawfulness alleged, SRCL would have won the bid. However, these sorts of questions are not about quantifying loss. They are about establishing causation: absent the unlawfulness, would SRCL have won the bid or is

there at least a real and substantial chance that it would have done so and if so, what is the percentage of that chance? This is a different exercise from quantifying the underlying loss and in any event the courts routinely decide such questions of causation, difficult though they may be.

132. I should also here raise a separate point which emerged in oral argument in relation to the quantification of loss for SRCL. Although not presaged in his skeleton argument, Mr West KC pointed me to paragraph 76 of the Amended Particulars of Claim under Claim 1. This said that the ICBs felt that SRCL's answer could have been strengthened with specific examples to support risk management and communications strategy and market leadership. While the response met the requirements it could have been strengthened with clear evidence and more detailed examples. Paragraph 77 then submitted that this was an unlawful penalisation because there was no requirement to deal with communication strategies or mobilisation, and further or alternatively, SRCL was penalised for not providing clear evidence or examples without indicating what that should be, and finally that within a 1500 word limit, its response did provide full details and evidence. Paragraph 78 says that if lawfully evaluated, it should have received a score of 5 for this response.

133. In introducing those paragraphs, Mr West KC suggested that this was an example of something akin to an "undisclosed criteria" challenge where it is difficult to quantify loss where one cannot work out what would have happened in the counterfactual situation. In fact, he did not then go on to develop that point when addressing the question of adequacy of damages itself. In any event, I do not think that there is anything in it. This was a case where SRCL positively contended what the proper outcome in the counterfactual would be, namely a score of 5. Furthermore, I agree with Mr Coppel KC who said that this was not on its face a claim for failure to disclose evaluation criteria. It is a claim that the tender was erroneously marked because the tenderer was erroneously penalised for not providing information which it had not been told to provide.

Inability of the ICBs to pay any damages awarded in favour of SRCL

134. The first point is, as already mentioned, on the face of it, this claim is relatively modest, albeit not insignificant, on an overall basis. If one then apportions it, as it were, across the ICBs, the damages award likely to face each individual ICB, really will be modest especially if SRCL only succeeds on a loss of chance basis.

135. Nonetheless, Ms Dobson pointed out at paragraphs 62 and 63 of LD2 that, like many public bodies, the financial position of the ICBs is difficult. Each ICB spends several million pounds each year

and there is a range of liabilities in the hundreds of million pounds. Such liabilities are funded by the taxpayer. She then says that in order for the ICBs to discharge any judgment, there would have to be a special payment authorised by HM Treasury. She adds that there have been rare examples of public bodies not paying damages in full or on time although no details are given.

136. However, paragraph A4.13.6 of the relevant Guidance says that the special payments regime does not apply to payments ordered by a Court. Further, at paragraph 42 of RL2, Ms Leng says that she understands from conversations with a finance colleague at HNY ICB that if ICBs were ordered to pay damages they would be obliged to do so "within their own financial constraints" and Treasury approval would not be necessary. SRCL has questioned what the reference to "constraints" is about. I am satisfied that it is referring to their own resources, as opposed to requiring a payment from the Treasury.

137. Mr Dennis states at paragraph 100 of TD2 that it would be extremely far-fetched to consider that public bodies such as the ICBs would not pay the sum ordered by the court. This is in the light of the following:

> "ICBs are subject to a duty to act with a view to ensuring that they deliver financial balance (section 223GC of the 2006 Act). I understand that NHS England is able to provide financial support to ICBs where it appears they will not meet this duty. Therefore, if the ICBs are subject to a damages award they will be expected to manage their overall finances in such a way as to be able to pay that award (with or without support from NHS England)."

138. SRCL points out that NHS England is to be abolished and instead absorbed into the Department of Health and Social Care. The transition date appears now to be April 2027 but in any event, I fail to see why this affects the question of financial support for the NHS.

Conclusions at this stage

139. On the basis of the above, I reject the proposition that whether considered separately or together, the reasons advanced for saying that damages would be inadequate for SRCL are sound. This is subject to one remaining point which I shall refer to as "the Sufficiently Serious Point".

The Sufficiently Serious Point

140. Paragraph 71 (c) of ICBs Amended Defence in Claim 1 pleads that:

> "The breaches were not sufficiently serious such as to provide SRCL with a remedy in damages. Insofar as the Defendants breached their obligations (which is denied), any such breach was unintentional and/or immaterial and/or involuntary."

141. This is adopted at paragraph 45 (b) of their Defence to Claim 2.

142. SRCL's Amended Reply takes issue with this and says that such a plea is a bare and unevidenced assertion. SRCL contends that, whatever else is said about the question of the adequacy of damages for it, any damages award would end up being inadequate if the Court determines that the breaches proved were not sufficiently serious. Indeed, SRCL would receive no damages at all.

143. This argument, made in the context of applications to lift, has now featured in a number of recent cases. In some, but not all of them, the debate over the Sufficiently Serious Point has been rendered academic because the defendant has either agreed that if the claimant proves its case on breach, it would be sufficiently serous, or has agreed now not to take the point. In this case, ICBs have not adopted either course, so the point remains live. Mr Coppel KC did, however, accept in argument that if SRCL makes out the extensive breaches alleged against the ICBs, they may have real difficulty in showing that the breaches were nonetheless not sufficiently serious.

144. To various extents, the previous cases have grappled with the question whether (in the absence of a concession or undertaking) it is open to a claimant invoke the Sufficiently Serious Point as a reason why damages could not be adequate. One observation is that if there were an untrammelled right on the part of a claimant to run this argument, it would mean that damages would always have to be viewed as inadequate for the claimant if the Sufficiently Serious Point had been raised, regardless of the circumstances.

145. It is not necessary to explore the various cases in any detail. This is because of the very helpful summary of such cases given by Anneli Howard KC, sitting as a Deputy High Court Judge at paragraphs 29-30 and 33-35 of her judgment in *Millbrook v Devon County Council [2025] EWHC 744 (TCC)*:

> "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…

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.

146. 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."

147. That said, it is worth setting out separately the reasons why, in most cases, the Sufficiently Serious Point is unlikely to assist the claimant resisting the lifting of the suspension:

(1) The Court may be in a position to reach a view as to the likelihood or otherwise of the requirement that the breaches are sufficiently serious ("the Sufficiently Serious Condition") being met if the claim were to succeed on liability; see paragraph 37 of the judgment of O'Farrell J in *Alstom v Network Rail* [2019] EWHC 3585 (TCC); in my view, in this regard, the Court is entitled to proceed on the basis of the claim as framed;

(2) Here, given the wholesale challenge to the Procurements and their outcome, if SRCL were able to establish this litany of breaches and show, as a matter of causation, that in their absence it would have won, or at least would have had a real and substantial chance of doing so, it is highly likely that a Court would find the Sufficiently Serious Condition was met;

(3) Conversely, if a Court were to find that the breaches were not sufficiently serious, it would be unlikely to exercise its power to set aside the contract award. But if that were so, the unavailability of both of those remedies would make it very difficult to justify the maintenance of the suspension from the perspective of balance of convenience;

(4) As a separate point, I consider there is also force in the observation made by O'Farrell J at paragraph 63 of her judgment in in *Bombardier v London Underground* [2018] EWHC 2926 (TCC) that there is a significant substantive distinction between claim for damages based on breach of an EU-based duty and a private law claim for breach of a domestically-based statutory duty, and this should be borne in mind when considering whether damages would be an adequate remedy. In this context, given that it is a claim of the former kind which is at issue, it is just in all the circumstances for claimant to be confined to such damages as would satisfy the *Francovich* conditions. As I see it, this explains why it could not otherwise be the case that the mere existence of the Sufficiently Serious Condition would mean that in all cases damages could never be an adequate remedy for a claimant in the context of an application to lift the suspension.

148. In the very recent case of *International SOS v Secretary of State for Defence* [2025] EWHC 2634 (TCC), and on the question of the Sufficiently Serious Point, Eyre J considered at paragraph 46 of his judgment that there was no real prospect in the case before him that the court would ultimately uphold the claim but then find that the Sufficiently Serious Condition was not met. Indeed, he observed that it would only be in rare cases (for example *Braceurself*) that this would happen. He added at paragraph 47 that the approach to the question of whether a defendant should be required to abandon a potential line of defence will necessarily be highly fact-specific and, having been referred to the decision of Constable J in *Unipart*, he referred to the "litany of claims" made by the claimant in that case.

149. He then went on to say this:

> "The circumstances here are very different from those which Constable J was addressing in Unipart. Here, instead of multiple claims there are four alleged breaches which resolve into two core groups of allegations. I have to remember that at the heart of and underpinning the American Cyanamid guidelines is the need for the court to take the course which creates the least risk of an injustice which cannot be remedied. In addition, the question of the adequacy of damages for the Claimant is to be approached on the footing that the court is considering whether it is just to confine the Claimant to its remedy in damages. The prospect of the "not sufficiently serious" defence succeeding is small but if it were to remain a live part of the Defence the Claimant would have to prepare to address that line of defence and could not guarantee that the argument would not succeed. It would not be appropriate for the Claimant to be required to prepare to confront that argument and to face that risk if the Defendant were to succeed in having the automatic suspension

> lifted. Moreover, the Defendant will suffer no real prejudice if it is required to give up that potential line of defence. Not only have I concluded that the circumstances in which that approach will be applied are unlikely to arise but that was the assessment urged upon me by the Defendant. In the particular circumstances of this case the just balance between the parties requires that if the suspension is lifted the Defendant be required to accept that it cannot pursue this argument."

150. That was a conclusion which Eyre J said he reached in the particular circumstances of the case before him, which did not involve "multiple claims" and in a context where, as a fallback position the defendant had already offered not to take the Sufficiently Serious Point. Moreover, having found that damages would not be an adequate remedy for the claimant, Eyre J then went on to find that damages would, equally, not be an adequate remedy for the defendant and that the balance of convenience favoured lifting the suspension.

151. I do not consider that *International SOS* assists in the context of the case before me, (which is more akin to *Unipart*), and I certainly do not read it as suggesting that in every case where the Sufficiently Serious Point is raised, either a defendant must undertake not now to rely upon it or, without more, damages must be assumed not to be an adequate remedy for the claimant.

152. For all of those reasons, I consider that the Sufficiently Serious Point does not here render any award of damages to SRCL as inadequate.

Overall Conclusion

153. In the light of the above, it follows that damages will be an adequate remedy for SRCL. On that basis, and without more, the application to lift the suspension must succeed. No exceptional circumstances were advanced to suggest that this usual consequence should not occur here.

154. However, given that all the further points were argued, I will still deal with the further issues raised.

ANALYSIS (2): DAMAGES AS AN ADEQUATE REMEDY FOR THE ICBS

Introduction

155. The ICBs submit that damages would not be an adequate remedy for them if the suspension is (wrongly) maintained. There are three points:

(1) delay in the introduction of significant benefits to be provided under the New Contracts;

(2) the risk of services not being maintained in the interim; and

(3) questions over SRCL's ability to honour its cross-undertaking in damages.

Delay in the introduction of significant benefits to be provided under the New Contracts

Single Suppliers

156. The first such benefit is that there will for each separate ICB now be only one supplier at present, for most of the ICBs, there are more than one supplier (in some cases very many more than one) who either have a contract direct with the ICB or contract with an individual primary care provider, like a GP surgery, whose fees are then reimbursed by the ICB.

157. At paragraphs 56-71 of RL1, Ms Leng sets out detailed evidence obtained from each of the original 9 ICBs, as to the positive benefits of the New Contracts. Five of them currently have more than one supplier. In particular, HNY ICB has two direct contracts and there are then 40 separate sites each with their own contracts. North East and North Cumbria ICB has 3 suppliers and then 36 sites again with their own contracts. Bedfordshire, Luton and Milton Keynes ICB has 7 different providers, while Frimley and Surrey Heartlands ICBs each have 2. Paragraphs 18-49 of RL2 deal with the position of the other 13 ICBs. Of these, 10 have more than one supplier and in some cases many more, again, because of individual contracts between each of the primary care providers and the waste operators.

158. There are obvious benefits for the ICBs in being able to deal with just a single supplier, rather than a multiplicity and in any event these are stated explicitly in RL1 and RL2 and at paragraph 57 (e) of GF1. The benefits include much greater visibility and control of the waste services by the ICBs, the single supplier being able to deal with all issues arising (at present, GP surgeries will sometimes contact the ICB direct), consistency of contract management and delivery of services.

159. For its part, SRCL does not really challenge the detail of that evidence. Rather it makes two general points.

160. First, it says that as this is a highly regulated environment, there is no scope for wide variations in terms of equipment or the provision of services. There is nothing in that point. Ms Leng and Mr Flynn have given detailed evidence as to how the benefits of a single supplier arise. Mr Flynn made the point that each supplier has its own method for the collection of waste and while differences may be small or nuanced they can impact upon daily operations for practice staff and he gives examples. The fact of common regulatory standards does not affect this or similar considerations.

161. Second, it is said that the position may change going forwards since it is intended that there will be a reorganisation of the ICBs. Some of them may merge and others may be grouped into clusters. It is not in dispute that this will happen although it is not clear how many will ultimately be affected. SRCL makes the point that if two ICBs merge they may have two suppliers anyway. I can see that although, if each of them had the same supplier to begin with, that would not happen. I can also see that if there was a cluster of ICBs then each of them may still have their own supplier. However, I fail to see why that negates the advantage of having a single supplier rather than the numerous suppliers under the present system.

Social Value Provision

162. It is not in dispute that the New Contracts contain certain obligations upon the operator to deliver social value. The evidence from the ICBs given through Ms Leng is that social value obligations will ensure investment in the local community including for local jobs, education including engagement of young people through schools and colleges, apprenticeships and environmental initiatives.

163. As to that Ms Gee makes the point that any initiative in local jobs is unlikely to succeed where the actual waste facility may be some distance from the nearest town. However, that sort of point is in my view comprehensively addressed at paragraphs 44-46 of RL2. Not all employment will be at the recycling centres because there is office work as well which need not be located at the same place, and some centres are close to the local community in any event.

164. Moreover, all of the bidders in these Procurements (including SRCL) had to give social value commitments in their tenders which were then evaluated by the ICBs. So it is hardly realistic for SRCL now to diminish their significance.

New Contract Terms

165. Apart from the introduction of social value obligations, there are also provisions requiring suppliers to identify new or potential improvements to services or their quality or efficiency (see paragraph 32 of GF1). While both the existing and New Contracts contain the same NHS Standard Terms, other elements dealing with service specifications and performance management differ significantly. At paragraphs 45-49 of GF2, Mr Flynn gives concrete examples of the improvements to the Service Specification and Commercial Schedules, Quality Reporting and Escalation Sections (the latter including improved and far more comprehensive KPIs, management special measures and responses to breaches) Contract Change Process and Service Requirements. There

is also a new specific duty on the part of the supplier to demonstrate reduced carbon emissions during the life of the contract (dealt with specifically below).

166. SRCL says that some of these improvements could be or could have been generated by amendments to the existing contracts, so there is not so much of a difference. However, any such amendments would have to be the subject of commercial negotiation; that is not the same as having terms already in the contracts.

167. In my judgment, the evidence does show that the New Contracts represent a significant improvement over the existing contracts, in terms of the services to be provided and their management.

Carbon Emissions

168. Here, there is a substantial difference in the evidence provided by Mr Flynn, on the one hand and by Mr Williams, on the other. By reference to detailed existing and expected emissions, Mr Flynn says that the overall expected in reduction in carbon emissions is around 89% (see paragraph 57 (c) (v)).

169. For his part, Mr Williams says that there could not possibly be a difference of this magnitude because, for the same amount of waste of the same kind, there will always be around the same amount of carbon emissions. The only area which can change the emissions concerns the precise means of disposal of the waste and its efficiency. While there would be some improvement here under the New Contracts it would only be of the order of 6%. That would reduce to 4% to take account of the fact that 60% of NHS waste is offensive rather than hazardous.

170. Mr Flynn disagrees with this, saying that moving the disposal of waste from incineration to AT and then to EfW would yield higher carbon emission savings and he continues to rely on his own analysis. See paragraphs 62-67 of GF 2. He says that the suggestion that 1 tonne of waste produces 1 tonne of CO_2e is not correct. Moreover, that would not be consistent with SRCL's own bid in respect of carbon emissions savings. […].

171. It is not necessary for me to attempt to resolve the differences between Mr Williams and Mr Flynn's evidence here. I accept that there are likely to be at least some significant carbon emissions savings […].

Conclusion

172. On that basis, the New Contracts are not simply "more of the same", as SRCL contends. Unless the automatic suspension is lifted, there will be a period of time during which all of these improvements cannot be implemented. That is not likely to be a short period of time given when a fair trial, dealing with all of the issues, could be held (see below). In my judgment, damages would not be an adequate remedy for the ICBs in this respect.

The risk of services not being maintained in the interim

173. Some of the current contracts expired on 31 March 2025 and it appears that four of them will expire on 30 November 2025. Where contracts have already expired, they have, thus far, been extended on the same terms.

174. However, the ICBs fear that if the suspension is not lifted, then the current providers may not continue the extensions on the same terms for the period of the suspension; they may cease to provide their services altogether or use their commercial leverage to raise prices, for example. The maintenance of the existing position is not, by any means, in SRCL's sole gift, because of the number of different providers operating at the moment. So there would remain uncertainty about the position going forward even if SRCL itself were to agree to a continuation of its own services on the same terms, until trial.

175. For its part, SRCL says that it would be rational for the other suppliers to maintain the extension to their services. That is not necessarily the case, if they are suppliers who are likely to be taken over by a large single supplier in any event and much may depend on the economics of their particular deal.

176. Nonetheless, I consider that overall there is at least some uncertainty as to whether extensions on the same terms could be made available for all of the contracts affecting all of the ICBs, if the suspension were maintained for any significant period.

Questions over SRCL's ability to honour its cross-undertaking in damages

177. As with Sharpsmart, the ICBs have expressed concern as to whether SRCL would honour its cross undertaking in damages. However, for the reasons given at paragraphs 181-182 below, I do not think that this is likely to happen.

Conclusion on adequacy of damages for the ICBs

178. In my judgment, and for the reasons given in relation to the delay in the implementation of the improvements inherent in the New Contracts, I consider that damages would be an inadequate remedy for the ICBs, if the suspension were wrongly maintained. I come to that view based on the evidence referred to above even without giving appropriate deference to the ICBs' own views as to the putative benefits, which I am entitled to give (see paragraphs 56-59 above).

179. An additional factor pointing in the same direction is the uncertainty over the provision of extensions on the same terms going forwards, but my decision would have been the same even without it.

ANALYSIS (3): DAMAGES AS AN ADEQUATE REMEDY FOR SHARPSMART

180. The question of damages in this context relates to losses suffered by Sharpsmart if the suspension is maintained and, following trial, it turns out to have been wrongly maintained because SRCL does not succeed in its claim.

Cross-undertaking in damages

181. Until the night before the hearing, SRCL had not agreed to provide a cross-undertaking in damages to Sharpsmart. Although it has now done so, Sharpsmart questions whether that undertaking would in fact be honoured should SRCL lose at trial. If there is a doubt about this, then it would mean that damages would not be an adequate remedy for Sharpsmart, quite apart from any other consideration.

182. I am not persuaded that there is any real risk that the cross-undertaking will not be honoured. I suspect that very careful consideration was given to it by SRCL (and no doubt WM) and although late, it has now been proffered. I think that the overwhelming likelihood is that, notwithstanding SRCL's own operating losses, it would be able to, and would discharge any liability on this cross undertaking if it arose. The cross-undertaking, after all, is one which is given to the Court. I reach that view, notwithstanding that the damages here could be around £6 million according to Mr Robinson (see paragraph 186 below). This exercise shows that such losses are quantifiable. They would not cover loss of reputation but I have rejected that anyway.

Other matters going to adequacy of damages for Sharpsmart

183. Sharpsmart's evidence here comes principally from Mr Robinson. He says that the New Contracts constitute a key part of its growth strategy. They were projected to realise £5.7 million out of a

total £46 million annual revenue which represent 12% of its annual turnover. Mr Robinson's view is that these contracts would lead to other businesses at least seriously considering using Sharpsmart as a supplier. There could be other contracts with the private primary care sector, even if not on the same scale as the New Contracts themselves. All of this would operate across the country because of the number and location of the ICBs which Sharpsmart would now service.

184. Mr Robinson points to the fact of substantial investment having been made by Sharpsmart in the last 12 months in infrastructure expansion and staff recruitment and in particular the acquisition of a new vehicle and product storage building in Rainham, adjacent to its existing facility. He says that all of this was done in anticipation of winning the bid. Had it known that it would not be entering into the New Contracts, it would not have acquired the building. However, it appears that the building was acquired before the outcomes of the Procurements were known (and of course, in some cases, the outcome was not known until 4 August 2025). Sharpsmart was therefore taking a risk as to the outcome. That might of course support the notion that the New Contracts, or the prospect of them, was so significant that it was worth taking such a risk.

185. At paragraph 33 and 34 of NR1 Mr Robinson expresses the view that Sharpsmart's reputation may have been damaged in the eyes of employees who may have been recruited but were not, when the recruitment process was temporarily stalled, or financial institutions where discussions were equally paused. The same could occur with third-party suppliers. However, all of this is speculation and there is no actual evidence that this has occurred. I do not consider that there is a real argument about loss of reputation here.

186. Mr Robinson also points to losses occurring as a result of the present inability to enter into the New Contracts at paragraph 42 of NR1. However, insofar as these costs are consequential upon the automatic suspension, they can be compensated pursuant to the cross-undertaking. In this regard, at pages 3-6 of the exhibit to NR1, he has set out a detailed calculation of losses in this regard covering the period from now up to 1 October 2026. These are not merely lost profits but also lost infill revenue (i.e. from other new customers), cost savings, economies of scale in 3 respects, vehicle volume discounts, staff redundancies and duplicated project management costs. The total comes to £5.887 million. That exercise shows that such losses are quantifiable, and they cover most of the items referred to above. They would not cover loss of reputation but I have rejected that above, anyway.

187. Mr Robinson also says that Sharpsmart may not be able to attract employees of the same calibre in the future, as it was hoping to recruit now, but cannot, while the suspension is in place. However, again this seems to be speculation in the absence of any real evidence to that effect.

188. What one is then essentially left with, in my view, is the argument about the New Contracts representing a platform for Sharpsmart to gain and which is a key element of its growth. I am not persuaded that even for Sharpsmart (which is in a substantially different position from SRCL) this would be a sufficiently clear lost opportunity to account for the purposes of adequacy of damages. However, in any event, such losses are temporary. This is because it pertains only to the period of the automatic suspension if maintained and (as it turns out) wrongly. It does not seem to me that any such loss of opportunity would be permanent.

Conclusion

189. Overall, I do not consider that damages for a wrongfully maintained suspension would be inadequate for Sharpsmart, if this was a live issue.

BALANCE OF CONVENIENCE

190. With that, I turn to balance of convenience. It is in this context that I need to consider when a trial is likely to take place, and the Expedition Application, among other things.

The Nature and Scope of SRCL's Claims

191. I have set out the core elements of the claims made by SRCL at paragraphs 19 - 26 above as they appear in the 50-page Particulars of Claim under Claim 2. It is to be noted that every one of the Technical Quality questions, as answered by SRCL, is challenged. Further, in relation to the allegation that there was no or no proper verification process, paragraph 61 (h) of the Particulars of Claim says that to the extent there was a verification exercise, the ICBs are "put to strict proof as to the sufficiency of that exercise" and from the further information provided by the ICBs at that point, they had still not discharged this burden, which obviously has the potential to broaden that allegation.

192. In addition, and as noted at paragraph 19(6) above, the claim that the tender responses were unlawfully evaluated is not limited to a "scoring challenge" in respect of SRCL's own scores, but in some cases, claims that Sharpsmart should have received a lower score, and comparisons are made with PHS's score.

193. While the technical quality scores applied across the board i.e. for all of the ICBs, the answers to questions raised under section B5 (Environmental including Emissions) and B7 (Commercial) were bespoke to each individual ICBs.

194. There is also, the particular claim that Sharpsmart should have been excluded because it failed the EFS test. See paragraphs 8 and 19(2) above. I mention this here because Mr West KC pointed out in argument that in some cases, the scoring involved a weighting based on the number of bidders. This was in the context of suggesting that if indeed the scoring generally should have been carried out on the basis that Sharpsmart was not a bidder, this would have to be taking into account when working out what SRCL's putative ranking would have been in the counterfactual. In other words, it might not be so difficult for SRCL to show that it would have won a Procurement in the counterfactual even though its actual position was third or fourth etc. I did not entirely follow the logic of this because it seemed to me that if the weighting changed because of the absence of Sharpsmart, this would affect all the other bidders equally. However, more importantly, what this does show is that there would be an added element of complexity to the claims made.

195. SRCL's position is that this was in fact a typical or "normal" procurement challenge. Paragraph 109 of its Skeleton Argument says that in fact it is simpler than other claims. It relies on what it had said at paragraphs 45-50 in support of this. However those paragraphs simply explain why there are three claims not one, which is a different point. Moreover, notwithstanding what Ms Dobson said to the same effect in LD3, at paragraph 21 of LD1, she said, in the context of an adjournment application, that:

> "It is however relevant to briefly say that by virtue of the Second Claim, the scope of this litigation has significantly increased. The parties now dispute the lawfulness of the proposed award of 22 contracts, as opposed to 9. The result of this is that the Claimant pleads further numerous breaches of the PCR including the introduction of a significant point with regard to the Defendants' consideration of the economic and financial standing test as detailed in the invitation to tender for the Procurement, relating to the successful bidder, Sharpsmart, for Lots 1, 2, 9, 18 and 19 in the First Claim, and Lots 3, 4, 5, 6, 12, 13, 20 and 22 in the Second Claim."

196. Furthermore, there are, of course, 22 separate claims, in respect of 22 Procurements. Of course, I fully accept that this was a jointly conducted procurement exercise and the technical questions raised responses which would be going to the same matters in each case. However, there still had to be 22 individual decisions made, and as already noted, the environmental and commercial questions had to be answered differently with regard to each particular ICB. This is reflected by the number of evaluators, being 23. One of them was Mr Flynn who dealt himself with the environmental and commercial questions, and the others were from individual ICBs (though one was not from any of the 22 ICBs, and had been brought in to assist). Within that group, 11 out of

the 22 ICBs were represented, in other words 11 ICBs did not supply any evaluators themselves. Also, within that group, some evaluators dealt with one question, others dealt with another question and so on. All this means is that in theory, there could have been yet more evaluators. But it does not diminish the nature and scope of the claims being made.

197. In addition, there were then 16 decision-makers involved in the question of the EFS qualification. There were also eight moderator chairs, one for each of the technical questions, supplied by EcoVate.

198. One has also to bear in mind that the precise scope of the present challenges is not yet fully determined. That is because there has not yet been a Particulars of Claim under Claim 3, which itself is said to have been issued because of matters arising from disclosure.

199. On a careful reading of the Particulars of Claim and the implications in terms of who might address it, I have no doubt at all that in terms of scope, this is a very wide and complex claim with added difficulties of causation because of the ultimate ranking of SRCL, and the EFS point taken against Sharpsmart. It has, as is submitted by the ICBs, features of what might be described as a full audit of the Procurements. It is against that background that I now consider when, and in what way this case could and should be tried.

Trial length and directions to trial

Introduction

200. As part of considering this aspect of the balance of convenience, I take into account SRCL's Expedition Application. It says that there should be an expedited trial of all issues other than quantum, and that this should be listed on the first available date after 4 May 2026 with an estimated length of two weeks to include two days of judicial pre-reading which therefore leaves six days for evidence. There would then be written closing submissions within seven days and oral closing submissions to follow. Costs budgeting would be dispensed with, as would a CMC. Standard disclosure would be completed by 27 February 2026. Witness statements would be served by 27 March with reply statements by 10 April. There would be no PTR.

201. As an alternative, there should be a "staged trial" with a length of three days, dealing only with the EFS test issue ("the Staged Trial Alternative"). I will deal with this alternative after having first considered and determined the parties' positions on the basis that there should be a full trial other than quantum.

202. The IBCs resist both an expedited and a staged trial. Sharpsmart is neutral on these questions.

Law on Expedition

203. Lord Neuberger in *W.L. Gore & Associates GmbH v Geox Spa* [2008] EWCA Civ 622 said this at paragraph 25:

> "[W]hen considering such an application there are four factors to take into account. The first is whether the applicants … have shown good reason for expedition; the second is whether expedition would interfere with the good administration of justice; the third is whether expedition would cause prejudice to the other party; and the fourth is whether there are any other special factors."

Witnesses

204. It follows from what I have said above that there will be up to 39 witnesses called by the ICBs. Although EcoVate is no longer a party, there may be witnesses from it, too. It is then expected that there will be between three and five witnesses from SRCL. It is possible that some of the ICBs' witnesses' evidence may be relatively short, but given the comprehensive nature of the claims being made and the number of the ICBs involved one has to assume at this stage that a substantial amount of time has to be allocated to witness evidence.

205. Ms Dobson states at paragraph 64 of LD3 that the ICBs should take a pragmatic approach and only serve evidence from those actually involved or whose evidence is wholly necessary. Even if there are many witness statements, they may not be long. It was further suggested in oral argument that once seen, SRCL might choose not to cross-examine certain witnesses. It is also said that it would be disproportionate to call all of the evaluators and decision makers. However, I cannot possibly say at this stage that it would be fair for the ICBs to be limited to calling only certain of its evaluators or decision-makers in the light of the challenges being made.

206. On that basis alone, a fair trial of no more than six (or even eight) days for witness evidence is completely unrealistic. It also means that a significant amount of time would have to be put aside for the preparation of witness statements which, if the conventional procedure is followed, would only be served after a reasonable time from disclosure. Mr Dennis suggests that, given the number of witnesses, it would take four months from disclosure to prepare witness statements. That is how he gets to a trial date of not before March 2027 if disclosure would not be complete before November 2026 (see below). A time period of four months is probably pessimistic given that the preparation of witness statements could certainly begin before disclosure is given by the parties, especially as the brunt of disclosure would be coming from the ICBs, not SRCL. Nonetheless, it would not in my view be practical or fair in the case of this magnitude to suggest that witness statements were to be exchanged before completion of disclosure. Witness statements would have

to come afterwards, and in a case of this kind, one could expect a period of around two months after.

Disclosure

207. Mr Dennis has suggested that the ICBs would have 600 potential custodians, but this would be narrowed down to around 130 in total, that is to say around six per ICB. Of course, not all ICBs provided evaluators, but each ICB was involved in the clarifications exercise which itself forms part of SRCL's challenge, the finance leader at each ICB had to provide the (bespoke) commercial evaluation in each case, and there are then the 16 ICBs who provided individuals in relation to the EFS issue. I do not consider that a total of 130 custodians is at all unreasonable.

208. Next, there is a real prospect that a substantial amount of disclosure may be required from the ICBs by SRCL. See, for example, the classes of document already sought by SRCL as referred to in paragraph 38 of TD1. At paragraph 59 of LD3, Ms Dobson says that disclosure has been a particular point of contention in these proceedings. Nonetheless she says that it should be feasible to conduct disclosure in a short timeframe.

209. This short timeframe involves EDQs being lodged three days after pleadings have closed and then standard disclosure six weeks thereafter. Ms Dobson says that the court can take a "proactive" approach to disclosure, but it is difficult to see how the court of its own motion could be proactive in the absence of any particular application and a hearing, neither of which are built into the existing timetable. She also suggests that EcoVate can give much of the disclosure but this cannot be assumed, not least because EcoVate may not remain a party to this litigation. In any event, according to Mr Dennis, it was the ICBs who took all the relevant decisions and who supplied almost all of the evaluators, and EcoVate was involved in the process of the Procurements but not the decisions and so there would be many classes of documents which it never had. If EcoVate is no longer a party, it has indicated that it will consider document requests made by SRCL via the ICBs but any such documents would have then to be reviewed by the ICBs. In other words, on any view, by far the greatest disclosure burden will fall upon the ICBs. There would then in any event be the usual complication and further time taken, due to the operation of a Confidentiality Ring.

210. At paragraphs 38-64 of TD1, Mr Dennis has conducted a very detailed exercise of estimating when, realistically, each necessary stage of the disclosure process could be undertaken, commencing with the appointment of an E-disclosure provider. Discussions have already started with three potential such providers. Here, the fact that there are 22 ICBs with whom the solicitors

must liaise, comes into sharp focus again, and at paragraph 45, Mr Dennis points to the amount of time which it can take for sign off from NHS institutions which typically need a high degree of due diligence to be undertaken before sharing data because of their own data protection obligations. On his analysis, it would be unlikely to harvest all of the data before the end of January 2026. Following processing, it could then start to be interrogated by the solicitors but there will then need to be search terms sampling etc. to be agreed between the parties. On the date range of about 17 months for each custodian he says that each of them could be expected to hold around 28,000 documents which would yield a total which could be reduced to approximately 3 million documents but after keyword searches and the use of predictive coding (if agreed by SRCL) there might be an ultimate total of 300,000 documents to be manually reviewed. A first level review could take 17 weeks with a second level review taking 13 weeks, but with some running in parallel, around 23 weeks. Allowing time then for confidentiality and redactions and liaison with other bidders on those issues (because SRCL has indicated that disclosure would be required from all bidders not merely the successful bidders), would add another eight weeks. The upshot is that disclosure would not be completed until November 2026.

211. I do not intend at this stage to conduct a detailed examination of each of the time periods adverted to by Mr Dennis. It is possible that some of them could be truncated, for example because the relevant keyword search periods could be reduced, in the light of the tender process periods, or for other reasons. What I am, however, quite clear about is that disclosure could not conceivably be completed on anything like a fair or proper basis by the end of February next year.

212. In this context I should add that the parties agree that statements of case will not close until 13 January 2026. While of course that does not mean that some preparatory work on witness statements and indeed disclosure cannot be done before then, issues from those statements of case are likely to affect both disclosure and witness statements and of course, at the moment, the nature and scope of Claim 3 is uncertain.

Trial Length

213. In the light of the issues arising in these claims, the fact that there are 22 separate defendants (apart from EcoVate), the number of likely witnesses and the amount of disclosure, I cannot see that a trial of less than four weeks would be practical or fair.

214. As it so happens, at the moment, there is availability for a four-week trial to be heard in October 2026, and without any order for expedition. In the light of that, SRCL submitted that if I considered

(as I do) that even on an expedited trial basis, a trial from May 2026 onwards was not appropriate, the trial should take place in October 2026 with a length of up to 4 weeks if necessary.

215. However, I do not consider that this would work, having regard to the time needed for both disclosure and witness statements. It also ignores the fact that there will need to be preparation for the trial. In my judgment, a period of two months is what would be needed here which would also include the hearing of a PTR which would certainly be necessary. Indeed, I also consider that a CMC would be necessary here, not least because I am far from persuaded that costs budgeting should simply be removed (contrary to the usual position) given that this appears on any view to be a claim worth less than £10 million. That will add some further time to the timetable.

216. What all of this means is that I do not consider that a trial could fairly and properly be held in October 2026, which is less than 11 months away. As with the public authority defendants in *Kellogg*, the sort of truncated timetable contemplated by SRCL would prejudice the ICBs at all stages in the lead up to trial with there being huge demands on the relevant employees who are likely to face significant demand in their day jobs especially where, in this case, there are likely to be very substantial redundancies in the relevant period.

217. In my judgment, there could not be a trial until (at least) the beginning of 2027, in the light of the time disclosure would require, the service of witness statements (including reply statements) after it, and the time needed to prepare for trial. There would then need to be time allowed for judgment. One would expect that a judgment would be handed down no later than about May 2027.

Conclusions on Expedition of a full trial

218. Since I have found that damages would be an adequate remedy for SRCL, the actual result here will be that the suspension must be lifted. On that basis, there would be no good reason for an expedited trial at all, and the case should take its course in the usual way. There is, in truth, nothing special in the position of SRCL, as against any other disappointed tenderer, which would require an expedited trial in the circumstances.

219. On the hypothesis that I did have to consider the balance of convenience, equally, an expedited trial would be inappropriate because, for the reasons already given I do not think it could be fairly and practically undertaken in the sort of time periods advanced by SRCL. There would be prejudice to the good administration of justice and to the ICBs.

The Staged Trial Alternative

220. Although called a staged trial, this is, in reality, a trial of a preliminary issue, namely whether the ICBs acted unlawfully in eventually qualifying SRCL under the EFS Test, when instead, they should have excluded it.

221. I do not consider that this is a realistic, sensible or indeed fair way forward on the basis of a proposal that it could be dealt with in three days by the end of January 2026.

222. First, it assumes that the automatic suspension will remain in place even for those the ICBs not involved in the EFS issue (because Sharpsmart was not the successful bidder there anyway). That would be unfair to them.

223. Second, there would still have to be a substantial amount of disclosure and witness evidence which would include from the decision-makers in each of the 16 ICBs which were affected. This is in the context of a challenge which has itself 5 strands to it, namely:

> "1. That the Sharpsmart ICBs' discretion to take into account other factors on the scored elements of the analysis could not be exercised where a tenderer had "clearly failed" the ratio element.
> 2. That the Sharpsmart ICBs were not permitted to seek clarification/correction of an incomplete or erroneous tender.
> 3. That Sharpsmart was unlawfully permitted to amend its tender response.
> 4. That Sharpsmart was unlawfully permitted to rely upon its parent company, Daniels.
> 5. That Sharpsmart was unlawfully permitted to offer a Parent Company Guarantee from Daniels."

224. Third, it would not follow, if Sharpsmart were excluded, that SRCL would have ended up as the successful tenderer. Indeed, on the analysis conducted by Mr Dennis at paragraphs 34-39 of TD2, it is unlikely that SRCL would end up in first position in any of these cases, if the scores were reassessed on the footing that Sharpsmart was excluded. However, that reassessment would have to be conducted. Yet it would make no sense for that reassessment to be conducted without taking into account all of the other challenges made by SRCL. Those challenges, however, are not meant to be part of the Staged Trial. In other words, a Staged Trial with these consequences would be pointless.

225. As a riposte to this, Mr West KC said that if the court were to find that Sharpsmart should have been excluded, then it would be likely, without more to set aside the relevant awards. It would then be up to the ICBs to decide what to do. They might start again with a fresh procurement exercise which would take time and would still have an uncertain outcome for SRCL. An alternative might be that they would re-mark the existing tenders but simply on the basis that Sharpsmart was not a bidder. It is said that the option of setting aside the awards is a real one because the ICBs themselves have given evidence that this is what they would do voluntarily if they concluded that

it would be wrong to pass Sharpsmart on the EFS issue (see paragraph 251 below). This would be a useful outcome for SRCL, even if it did not represent "the end of the road".

226. As against that, Mr Coppel KC said first that even if there was a finding that Sharpsmart should have been excluded, a Court would not grant any relief if at that trial, SRCL could not show that it suffered any loss or even had a real and substantial chance of suffering any loss. But it would not be in a position to show this because of where it ranked in relation to all the Procurements. See paragraphs 25 and 26 above. It would need to run the whole gamut of its challenges in order to do this, but they would not be the subject of the Staged Trial.

227. Furthermore, even if the court set aside the relevant awards, the ICBs would then have to decide what to do, as I have already indicated. If there was to be a re-marking exercise based simply on the exclusion of Sharpsmart, then SRCL is unlikely to be placed first. If that is so, then SRCL would still need to litigate all of its other challenges.

228. Finally, on any view, this is not a matter which could be fairly or practically tried by the end of January 2026 over a period of only three days.

229. For all those reasons, this alternative limb of the Expedition Application must be rejected.

The Need for swift mobilisation to the New Contracts

230. If the suspension is lifted so that the ICBs are free to award the New Contracts, there will then be a necessary transition from the incumbents to the new suppliers.

231. At paragraphs 73-83 of RL1, Ms Leng explains why the necessary mobilisation will be significantly more difficult by 2027, after a trial, than if it can be commenced now or very shortly, if the suspension is lifted.

232. The reason for this is because the ICBs are now facing major funding cuts and consequential redundancies. In particular, on 1 April 2025 the Chief Executive of NHS England wrote to all ICB Chief Executives and Chairs stating that the costs of the ICBs will have to be reduced by 50%. On 2 May 2025 the "Model Blueprint" document was developed by NHS England and the ICBs. It stated that the ICBs would have to use the guidance in this document to create bottom-uplands within a running cost envelope of £18.76 per head of population which translates to savings of around 50%. At that point, it was stated that this reduction target had to be delivered by the end of Q3 2025/2026 (i.e. early 2026) and recurrently into 2026/2027. This would entail staff cuts of

around 50%. At the time of RL1, Ms Leng estimated that the redundancy consultation process would begin in September 2025 with redundancies taking effect as from the latter part of 2025.

233. There is now something of an update to that position as set out in paragraphs 14-16 of RL2. A small number of the ICBs have begun redundancy consultation processes. In the case of one of them, Ms Leng was told that redundancy outcomes would be published in the week commencing 13 October with the last leaving date for affected staff being 31 December. However, she goes on to say that meeting this deadline appears unlikely because most of the ICBs have either not started or have paused the redundancy processes while the issue of funding the redundancies is addressed. Her understanding is that the cost reductions will have to be made by April 2026 at the latest.

234. The import of all of this is that reductions in staff affect the efficiency of mobilisation, because staff are required to support in particular GP practices and pharmacies in relation to the handover to new providers. With fewer people. transition will inevitably be significantly more difficult with a high risk of at least, delay and inefficiencies in the mobilisation process. It is not however simply a matter of staff reductions in terms of numbers; there is likely to be an amount of corporate knowledge about the specialist subject of clinical waste contracts which will be lost. It is therefore important to undertake mobilisation before individuals with knowledge and experience are still there as opposed to when some of them may be made redundant. In order to mitigate this uncertainty and risk it is the view of Ms Leng that the ICBs should be able to enter into the contracts now to maximise the chances of the safe and efficient mobilisation.

235. SRCL challenges this view on the basis that it is not now a good time to start a mobilisation because winter is approaching, and in any event mobilisation will take longer than the ICB's have said and it should not be rushed. Ms Gee, at paragraphs 13-26 of NG1, refers to two of her own experiences of various transition exercises which were subject to delay because of issues and complexities arising, considering therefore that a rapid mobilisation now (put at three months) would be problematic. At paragraphs 37-39, she says that this would be the largest intentional mobilisation exercise in the clinical waste sector that she personally had come across and there would be difficulties for Sharpsmart, because it is not an incumbent provider.

236. However, in RL2, Ms Leng states that the ICBs and their staff have plenty of experience in transitioning and implementing various contracts including those relating to clinical waste and so there can be a responsible transition. Moreover, the New Contracts provide for a three month

mobilisation and so all the tenderers had to commit to delivering to those mobilisation timescales. Neither PHS nor Sharpsmart expressed any concern about this period, nor has Anenta.

237. In NR2, Mr Robinson does not accept that the mobilisation would be problematic because the tender process itself provided detailed and robust information in respect of it which would enable advanced planning resource procurement and recruitment. Sharpsmart has guided NHS customers through similar transitions in the past and so is familiar with the process and it is never encountered a public safety issue in any of its previous roll-outs. He also rejects the suggestion that mobilisation would be challenging for Sharpsmart because of the number of simultaneous transitions and the lack of its present incumbency and the amount of its sites and trucks. He points out that its existing regional teams provide national coverage and contingency and it has integrated planning systems specialist fleets management framework and established relationships with subcontractors to ensure capacity control and resilience.

238. Of course, if SRCL decided not to grant any further extensions following any lifting of the suspension (as Mr Black says might occur at paragraph 70 of TB1) that could adversely affect the position. Whether this would happen is unclear as Mr Black does say that any requests for necessary extensions would be considered and any contractual obligations would have to be complied with. In any event, this is in the context of a planned three-month mobilisation which the ICBs and the successful bidders are confident can be met, in which case the issue (of repeated further extensions) would not arise. Further, the point made by Mr Black is in the context of the closure of facilities which he anticipates would have to occur; but as I have stated above, I did not accept much of this. On any view, all this suggests to me is that mobilisation should be commenced sooner rather than later and I do not consider that it affects adversely the mobilisation point being made by the ICBs.

239. In my Judgement, having considered the matters referred to above, the need to commence mobilisation now rather than leave it until after judgment following a trial at some point in 2027 is a real factor in relation to balance of convenience and points firmly to the lifting of the suspension.

Delay

240. Paragraph 49 of the Appendix H of the Technology and Construction Court Guide, states that "*if urgency in placing the contract is to form part of any balance of convenience test, the application needs to be brought on expeditiously*". As already noted, the ICBs do say that from the point of

view of mobilisation for the New Contracts, it is important that this is done now or in the near future, rather than in more than a year's time, after a trial. In considering any delay, it will be necessary to see what its consequence have been and what explanation there is for the delay. It is plainly a matter to be considered in the context of the balance of convenience.

241. The relevant timeline is this: the Particulars of Claim under Claim 1 was served on 23 December 2024. As noted above, these contained challenges against the tender processes of all 22 ICBs, even though at that stage, only 9 of them had notified the outcome of their processes to SRCL. After obtaining extensions of time, the ICBs served their Defence on 21 February 2025. By letter dated 27 February 2025, Capsticks informed AG, acting for SRCL, that the ICBs were considering applying to lift the automatic suspension and asked for SRCL's consent. By letter dated 14 March 2025, AG responded that its client was not prepared to agree to the suspension being lifted. On 19 March 2025, the ICBs serve their Reply.

242. The ICBs took no further steps in relation to applying to lift the suspension until 18 July when Capsticks wrote to AG again, to obtain its consent. This was then refused again on 29 July and on 31 July, the ICBs made their first application to lift. The second application to lift was made following the issue of Claim 2, on 28 August 2025.

243. SRCL contends that there was a serious and unjustified delay in making the application to lift. Going by when Claim 1 was made, there was a seven month delay between then and the application to lift.

244. The ICBs do not accept this, essentially for two reasons. First, they were entitled to wait until after they had served their Defence, which itself required a full assessment of the merits of the claim against them, before seeking SRCL's consent to lift the stay and awaiting its response. Second, the delay between receiving SRCL's negative response on 14 March and returning to the issue on 18 July is explained because of the emergence and then treatment of the issue over Sharpsmart and the EFS test. I consider each of these in turn.

245. As to not issuing the application until after service of the Defence, SRCL says that it should have been issued earlier and there was no need to leave it until after the Defence had been prepared. As to this, Mr Dennis points out that preparing the Defence was itself a complex exercise because the claim was large and complex, containing many different challenges and instructions had to be taken from each of the 22 ICBs. Some instructions had to be taken at senior level at the ICBs which

involved internal processes being followed. Further, each of the ICBs had different ideas about how the litigation should be conducted. All of this is set out at paragraphs 32-36 of TD1. At paragraph 97 (a) of TD2, Mr Dennis makes a fair point that the ICBs wish to understand their position in the litigation and receive legal advice on the merits of the claim made against them and the prospects of any application to lift, before actually raising it with SRCL. It must here be borne in mind that although only 9 of the ICBs had communicated their decisions at this point, Claim 1 was made against all 22, and the implications of that claim for the other 13 who had yet to communicate their decisions needed to be considered. Indeed, those 13 decided to pause their decisions in order to consider the legal position. See paragraph 100 of TD2. The process of considering the ICBs' position generally on the merits and the advisability of applying to lift, took place alongside the drafting of the Defence.

246. SRCL makes a general point here which is that the ICBs and their lawyers should have seen to it that there was some delegated or unified system of decision-making across the 22 ICBs which would have allowed for matters to progress much more quickly. After all, if there was a joint procurement exercise, they should have been able to arrange joint management of the challenges. I do not agree. The fact that the Procurements could be made jointly does not mean that when challenges were made, there was no need to deal with each individual ICB in the way that Mr Dennis has referred to.

247. In my judgment, in the circumstances of this case, the ICBs were entitled to wait until after the Defence had been served before raising the matter with SRCL. That therefore takes us to 14 March 2025 when SRCL refused to agree to lift the suspension. By that point, according to Ms Leng, preparation had started on the applications to lift. Again, instructions needed to be obtained from each ICB. See paragraph 16 of RL1.

248. What then happened, however, according to Ms Leng, was that on 28 March a potential issue was identified in connection with the decision of some ICBs to award contracts to Sharpsmart. This required detailed consideration and information gathering and obtaining legal advice to see whether Sharpsmart had passed the EFS test. If in fact it had not, the pass/fail nature of this test would mean that it would have to be excluded.

249. It transpired that what had happened was that Sharpsmart had ended a score of 2 for its Dun & Bradstreet ("D&B") Risk Indicator Score, and this then entailed a score of 5.5 on the ratio element of the EFS test which meant that it had passed; however, the information and scores relating to the

D&B Risk Indicator Score had been incorrectly recorded and when the correct information was used, it meant that Sharpsmart had failed rather than passed the EFS test which would entail its exclusion. In addition, the pass awarded to Sharpsmart included reliance upon the financial standing of its immediate parent company, Daniels. A concern arose that Daniels itself had not satisfied the relevant requirements in its own right.

250. Having considered all of this, the 16 affected ICBs then instructed EcoVate on 6 May to contact Sharpsmart so as to obtain all the necessary information from Daniels and in addition a commitment to enter into a parent company guarantee, in respect of each of them. All of that was done and after consideration by each of the relevant ICBs, Sharpsmart and Daniels, were duly passed through the EFS test, on dates between 9 and 13 June 2025. In fact, award decisions by the second group of 13 ICBs had been prepared for issue following the service of the Defence, but these then had to be delayed as a result of working through the EFS issue, which led to them only being issued on 4 August.

251. Mr Dennis says at paragraph 97 (b) of TD2 that the whole process of sorting out the EFS issue required considerable instructions and analysis from the ICBs and multiple rounds of communications with Sharpsmart and Daniels. If, in the end, any of the ICBs had decided to disqualify Sharpsmart, that would have required new award decisions, with implications for the existing litigation and the suspensions. I agree with Mr Dennis at paragraph 98 of TD2 that it would not have been appropriate for the ICBs to apply to lift the suspension where the appropriateness of awarding New Contracts to Sharpsmart was still under active consideration.

252. The seriousness of the EFS issue is reflected in the fact that it became part of SRCL's challenge to the relevant Procurements and indeed is said to be so critical to the outcome that it should form the subject of the Staged Trial, which I dealt with above.

253. SRCL says that the ICBs took too long in deciding what to do when the problem had been identified because EcoVate was only instructed on 6 May to take action. It also says that the further period until 6-13 June for the relevant the ICBs to decide whether or not to pass Sharpsmart was too long. I do not agree. On the basis of the evidence there was a considerable amount of work to be done and individual decisions had to be taken by the ICBs.

254. Notwithstanding the EFS issue, SRCL says that on any view, there was an unacceptable delay of 7 weeks between the time when the ICBs passed Sharpsmart under the EFS test (done by 13 June)

and the issue of the applications to lift on 31 July. In fact, the relevant period is somewhat shorter because I think that the ICBs were entitled to try again with SRCL to obtain their consent to lifting the suspensions which they did on 18 July. Possibly the ICBs could have moved somewhat more quickly in this respect but any period of delay would be relatively insignificant.

255. SRCL also complains that it only learnt about the EFS issue as an explanation for part of the delay in the evidence submitted on the application to lift, whereas this should have been communicated to it earlier. In this regard it relies upon the observations of Coulson J in *Bristol Missing Link v Bristol City Council [2015] EWHC 876 (TCC)* at paragraph 23 of his judgment. Here, he says that a contracting authority should not refuse requests to provide documents relating to the evaluation of the successful tenderer's bid or the bid itself but then, on the application to lift the suspension provide for the first time evidence about the process or the successful bid in support of its case either that there was no serious issue to be tried or that it would be prejudiced if the suspension was not lifted. However, that is not what has happened here. The ICBs rely on what happened with the EFS issue to explain part of the delay, not to rely upon it in respect of the underlying merits of the case or as a reason why there would be prejudiced to it if the suspension was not lifted.

256. A final point made by SRCL is that all of the above contributed to a further delay in relation to the fixing of the Applications to Lift. This was a result of the first application only being made on 31 July, just before the legal vacation. I do not think there is anything in this. As matters transpired, the first Application's listing was considered on 3 August and a hearing date was given for 23 September. It was SRCL which then sought to have the applications re-listed, by which time the second Application to Lift had been made. That is no criticism of SRCL; it just shows that there was no particular problem from a vacation point of view with the first Application being made on 31 July.

257. In the light of all the above, I do not agree that there has been a significant culpable delay on the part of the ICBs in terms of making its Applications to Lift. Nor do I consider that the position here is analogous at all to that in *Involve*. To the extent that the ICBs could have moved somewhat faster than they did, this would not amount to a significant adverse factor when considering the balance of convenience. In particular, this conclusion means that the ICBs' invocation of the need for a swift mobilisation now is not in any way diminished on the grounds that it was the ICBs' unjustifiable delay which contributed to the urgency in respect of mobilisation.

The significance of SRCL and the NHS

258. Although it is submitted that a factor going in favour of maintaining the suspension is the special position of SRCL and the fact that its absence will have adverse consequences for the NHS, I have rejected the underlying argument at paragraph 77 above.

Conclusion on balance of convenience

259. In the light of my finding that damages would be an adequate remedy for SRCL, the balance of convenience exercise is academic. However, had I reached this point because I found that damages in some respects would not have been an adequate remedy, I would have found that the balance of convenience would still be resolved in the ICBs' favour. This is because the retention of the suspension for a significant period of time and certainly for well over a year would cause a real problem for the mobilisation required for the New Contracts as well as a significant delay to the introduction of the improvements which they would bring about. This would not be outweighed by the existence of any uncompensatable damage suffered by SRCL. This would be sufficient to entail the lifting of the suspension.

CONCLUSION

260. For all those reasons, the Applications to Lift succeed and the Expedition Application must be dismissed. I am very grateful to Counsel for their very helpful and succinct submissions.