THE COURT OF APPEAL
CIVIL

[Unapproved]
Court of Appeal Record Number: 2023/183
High Court Record Number: 2023/680 JR
Neutral Citation Number [2023] IECA 229

Costello J.
Noonan J.
Faherty J.

IN THE MATTER OF COUNCIL DIRECTIVE 2014/24/EU

- AND –

IN THE MATTER OF THE EUROPEAN COMMUNITIES (AWARD OF PUBLIC AUTHORITY CONTRACTS) REGULATIONS 2016 (S.I. 284 OF 2016)

- AND –

IN THE MATTER OF COUNCIL DIRECTIVE 89/665/EEC (AS AMENDED)

- AND –

IN THE MATTER OF THE EUROPEAN COMMUNITIES (PUBLIC AUTHORITIES' CONTRACTS) (REVIEW PROCEDURES) REGULATIONS 2010 (S.I. 130 OF 2010) (AS AMENDED)

BETWEEN/

CHC IRELAND DAC

APPLICANT/
APPELLANT

- AND –

MINISTER FOR TRANSPORT

RESPONDENT/
RESPONDENT

- AND -

BRISTOW IRELAND LIMITED

NOTICE PARTY/
RESPONDENT

JUDGMENT of Ms. Justice Costello delivered on the 2nd day of October 2023

Introduction

1. These proceedings concern the decision of the respondent ("the Minister") at the conclusion of a tender competition to award the contract at issue in these proceedings to the successful tenderer in the competition, Bristow Ireland Ltd. ("Bristow"). The contract in question concerns the provision of the Irish Coast Guard ("IRCG") aviation service. The decision was communicated by the Minister to the unsuccessful tenderer and the current provider of the service, CHC Ireland DAC ("CHC"), on 31 May 2023. The new contract is due to replace the existing contract on 1 July 2025.

2. CHC commenced proceedings by originating Notice of Motion dated 14 June 2023, challenging the decision of the Minister. The effect of the issuance of the proceedings was to automatically suspend the Minister's entitlement to conclude the contract with the successful tenderer, by virtue of the operation of Regulation 8(2) of the European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010 (as amended).

3. The Minister applied for an order pursuant to Regulation 8(A) of the European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010 (S.I. No. 130 of 2010) (the "*2010 Regulations*"), as inserted by the European Communities (Public Authorities' Contracts) (Review Procedures) (Amendment) Regulations 2015 (S.I. No. 192 of 2015) (the "*2015 Regulations*") and as amended by the European Communities (Public Authorities' Contracts) (Review Procedures) (Amendment) Regulations 2017 (S.I. No. 327 of 2017) (the "*2017 Regulations*") (together the "*Remedies Regulations*"), permitting the Minister to sign the contract, the subject of the proceedings, with Bristow. By a judgment delivered on 25 July 2023, the High Court (Twomey J.) granted the relief sought,

lifted the automatic suspension of the right of the Minister to conclude the contract and ordered that the Minister be permitted to conclude the contract, the subject of the proceedings, with Bristow. The High Court stayed the operation of its order until the hearing of any appeal by the Court of Appeal. CHC appealed the decision of the High Court. The court heard the appeal on 27 July 2023 and extended the stay until 10 a.m. on 28 July 2023. At 9.30 a.m. on 28 July 2023, the court indicated that it would dismiss the appeal and lift the automatic suspension, and indicated that it would give its reasons for its decision at a later date.

4. This judgment sets out my reasons for that decision.

Background

5. The contract to provide the IRGC aviation service involves both search and rescue and helicopter emergency medical services. The contract is of immense importance to the State and is vital for preventing loss of life, serious injury and prolonged hospitalisation. Between 800 and 850 missions are undertaken per year by the IRCG. IRCG saved 563 lives in 2022 and 277 lives up to 21 June 2023. The estimated value of the contract is €800m. The contract is due to commence on 1 July 2025 and is for a period of ten years with the possibility of extending the contract for a maximum of three years thereafter.

6. CHC, the appellant, is the incumbent provider of the IRGC service under a contract concluded for that purpose in 2010 ("the existing contract"). That contract was also for a period of ten years and was extended for the maximum permissible three years. It will expire on the 30 June 2025. It tendered for the new contract but was unsuccessful.

7. CHC is part of the CHC helicopter group of companies, which is a global commercial helicopter service company, headquartered in the United States. While CHC has previously conducted other business in Ireland, and tenders for additional work in Ireland, the existing contract is currently CHC's sole business in Ireland. The CHC Group has a significant

operational presence in Canada, the United Kingdom, Norway, Brazil, the Netherlands and Australia as well as Ireland. As of 1 June 2023, CHC employed 141 people in Ireland directly related to the existing contract.

8. Bristow is part of a U.S. based group of companies which provides helicopter services throughout the world. It provides vertical flight solutions offering helicopter, offshore energy, transportation, and search and rescue services to civil and government organisations worldwide. The Bristow Group is currently the largest operator of S-92 and AW189 and AW139 aircraft globally (the aircraft at issue in these proceedings) and to date, the group has conducted more than 31,000 search and rescue missions. Bristow was incorporated as part of the Bristow Group for the purpose of tendering for the new contract.

9. Between December 2021 and May 2023, the Minister undertook a public procurement process in connection with the award of the contract. Bristow was identified as the successful tenderer by letter on 31 May 2023. CHC commenced these proceedings on 14 June 2023, by originating notice of motion. The Statement of Grounds runs to 58 pages.

10. In its High Court written submissions, CHC summarised its challenge to the decision as follows:-

> *"(i) The Respondent failed to provide sufficient reasons for the Decision including the characteristics and relative advantages of the Successful Tenderer's Final Tender;*
>
> *(ii) The Respondent commenced the standstill period provided for in Regulation 5 of the Remedies Regulations (the "Standstill Letter") notwithstanding that the Respondent had failed to provide CHC with the characteristics and relative advantages of Bristow's Final Tender and/or failed to re-commence the Standstill Period having provided information in this regard to CHC in the Respondent's 9 June Letter;*

(iii) The Respondent provided the Successful Tenderer with information which was proprietary and confidential to CHC during the course of the Competition including during the Negotiation Stage and in so doing, has breached various Regulations and acted in breach of confidence;

(iv) The Respondent's evaluation of the final tenders submitted by CHC and the Successful Tender was unlawful in multiple respects;

(v) The pricing aspect of the Successful Tenderer's Final Tender were based on an abnormally low tender;

(vi) Aspects of the Competition were conducted by the Respondent (vis-a-vis CHC) in a manner which breached the General Principles of EU law, and in particular, the principle of transparency and/or CHC's legitimate expectations;

(vii) The Respondent afforded the Successful Tenderer more favourable treatment than it did CHC in the manner in which it conducted the Competition in breach of the principles of equal treatment and non-discrimination;

(viii) The Respondent took into account irrelevant considerations in making the Decision, and in particular CHC has pleaded that the Respondent inappropriately took into account political influence which was brought to bear on it in respect of the Competition. There is direct evidence to support this plea in a statement made by Senator Gerard Craughwell in the Seanad on 31 May 2023 (i.e. the day that CHC was informed of the Decision) in which he stated inter alia that:

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

(ix) Certain of evaluators appointed by the Respondent to assess tender submissions had a conflict of interest. Indeed, it has been acknowledged by the Respondent on affidavit that two of the evaluators are former employees of the Successful Tenderer."

11. The proceedings were entered into the Commercial List of the High Court on 26 June 2023 and the application to lift the suspension of the award of the contract was heard the following week on 4 July 2023. The parties mentioned the matter further to the trial judge on 12 July 2023. The High Court judge delivered an extremely comprehensive judgment, within a remarkably short period of time, on 25 July 2023. He did so because, as will be discussed further, the time afforded to Bristow to implement and complete its transition plan to enable it to commence provision of the service on 1 July 2025 is very tight, and any delay in the commencement of the transition plan would jeopardise its ability to meet all the required milestones in the plan and thus to be in a position to *"go live"* on 1 July 2025. The judgment of the High Court will be considered in greater detail later in this judgment.

12. Reflecting the urgency involved in these proceedings, on 24 July 2023, the day before the High Court delivered judgment, the parties mentioned the case to the Court of Appeal seeking an extremely urgent hearing of the anticipated appeal. The court felt it was inevitable, given the interests at stake for the parties, that an appeal would be brought by the losing party and so the court acceded to the application. The appeal was heard on 27 July 2023, two days after the High Court delivered its judgment. All parties are to be commended

for their extraordinary efforts in co-operating and ensuring that the appeal could be heard in such a short time.

The test on an application to lift automatic suspension

13. Before considering in detail the facts and issues specific to this appeal, it is necessary to consider the legal test applicable to applications to lift the automatic suspension on the power of a contracting authority to enter into a contract once proceedings challenging the process have commenced. By reason of the provisions of Regulation 8(2) of the Remedies Regulations, the Minister's entitlement to award the new contract was automatically suspended by the commencement of the proceedings challenging the decision to award the contract to Bristow. Under Regulation 8A(1) of the Remedies Regulations, the contracting entity may apply to the High Court for an order permitting the contracting entity to conclude the contract. Regulation 8A(2) provides:

> *"(2) When deciding whether to make an order under this Regulation—*
>
> *(a) the Court shall consider whether, if Regulation 8(2)(a) were not applicable, it would be appropriate to grant an injunction restraining the contracting authority from entering into the contract, and*
>
> *(b) only if the Court considers that it would not be appropriate to grant such an injunction may it make an order under this Regulation."*

14. Thus, while the Minister is the moving party on the application to lift the automatic supervision, the court treats the application as though it were an application by the applicant in the proceedings, in this case CHC, for an interlocutory injunction restraining the contracting entity from entering into the contract.

15. The correct approach of the court to an application to lift the automatic suspension was most recently considered by this court in *Wordperfect Translation Services Ltd. v. The Minister for Public Expenditure and Reform* [2021] IECA 305 ("*Wordperfect 2021*").

Barniville J. (as he then was) considered the relevant authorities and the provisions of the Remedies Regulations and it was agreed by all of the parties that this judgment correctly sets out the legal test applicable which should be followed by this court.

16. At paras. 54-56 of the judgment he held as follows:

"54. Under Regulation 8(2A), the contracting authority may conclude a contract which is subject to the automatic suspension where the court so orders on an application by the contracting authority to the court under Regulation 8A.

55. The court has the power to make an order permitting the contracting authority to conclude the relevant contract under Regulation 8A(1). Regulation 8A was inserted by the 2015 Regulations. The test to be applied by the court in deciding whether to make an order under Regulation 8A(1) is set out in Regulation 8A(2) which provides as follows:

"(2) When deciding whether to make an order under this Regulation—

(a) the Court shall consider whether, if Regulation 8(2) (a) were not applicable, it would be appropriate to grant an injunction restraining the contracting authority from entering into the contract, and

(b) only if the Court considers that it would not be appropriate to grant such an injunction may it make an order under this Regulation."

56. ....[T]he test is the same as would be applicable on an application for an interlocutory injunction to restrain the awarding of the relevant contract in which the applicant in the proceedings notionally has to be treated as the moving party who bears the onus of proof on the application, notwithstanding that the respondent is actually the party who is seeking the lifting of the suspension. In this case, therefore, although the respondent

brought the application to lift the automatic suspension, the onus of proof rested on the appellant to demonstrate that an interlocutory injunction should be granted to restrain the respondent from entering into the Framework Agreements with the successful tenderers."

17. He observed that previously, the relevant test for the granting of interlocutory injunctions was that set out in *Campus Oil Ltd. v. The Minister for Industry and Energy (No. 2)* [1983] IR88 and in relation to the question of the balance of convenience, *Okunade v. Minister for Justice* [2003] 3 IR 153 ("*Okunade*"). He noted that the Supreme Court in *Merck Sharp & Dohme Corporation v. Clonmel Healthcare Ltd.* [2020] 2 IR 1 ("*Merck*") refined the test. At para. 57 of his judgment Barniville J. observed:

> *"... For present purposes, however, it is sufficient to record that the Supreme Court in Merck made it clear that the elements of the test for the grant of an interlocutory injunction are:*
>
> *(1) whether there is a fair question or serious issue to be tried; and*
>
> *(2) whether the balance of convenience, or the balance of justice, as it is now often termed, is in favour of or against the grant of the interlocutory injunction sought, with the adequacy of damages being considered as part of that balance rather than as a separate component of the test."*

18. Barniville J. concluded this aspect of his judgment by observing that once the respondent brought its application to lift the automatic suspension, the onus of proof was therefore on the applicant in the proceedings to demonstrate that it would be appropriate for the court to grant an interlocutory injunction to restrain the respondent from entering into the [impugned contract] with the successful tenderer.

19. It is agreed that this is the test which should be applied by this court.

20. A decision of the High Court on an application to lift the automatic suspension is a discretionary decision. As Barniville J. reiterated in *Wordperfect 2021*, the approach to be

taken by the Court of Appeal when considering such an appeal has long been settled. He instanced the cases of *Betty Martin Financial Services Ltd. v. EBS DAC* [2019] IECA 327; *Lawless v. Aer Lingus* [2016] IECA 235, *Collins v. Minister for Justice, Equality and Law Reform* [2015] IECA 27 and *Clare County Council v. Bernard McDonagh and Helen McDonagh* [2020] IECA 307. Barniville J. quoted from the judgment of Whelan J. in *Clare County Council v. McDonagh*, where she summarised the approach to be followed by the court in the case of an appeal from a discovery order of the High Court where no error in principle was involved, as follows:

> *"In summary therefore, a party seeking to set aside an interlocutory order of the High Court made in the exercise of its discretion must establish that an injustice will be done unless the order is set aside. In making its assessment, this court will place great weight on the views of the trial judge but is untrammelled by any a priori rule restricting the scope of that appeal…."*

21. Barniville J. confirmed that this was the approach he was required to take, and he said:

> *"It is clear that "great weight" must be given to the views of the High Court judge, but ultimately it is for this Court to determine the appeal. If the appellant establishes an error in principle, it should be entitled to succeed in its appeal. However, in the absence of an error of principle, it should also be entitled to succeed on its appeal if it can establish that a real injustice will be done to it if the decision of the Judge is left undisturbed."*

22. It was accepted by all the parties that this too correctly stated the applicable law and the approach to be adopted by this court on this appeal.

Issues not in contention

23. Certain matters, which normally CHC would be required to establish in order to succeed in its notional application for an interlocutory injunction, were conceded and not

disputed for the purposes of the appeal. Solely for the purposes of the application to lift the automatic suspension, Bristow and the Minister have conceded that CHC has raised a fair issue to be tried.

24. In *Wordperfect Translation Services Ltd. v. Minister for Public Expenditure & Reform* [2018] IECA 35 ("*Wordperfect 2018*") Hogan J. concluded that the damages provided for in Regulation 9(6) of the Remedies Regulations, which gave effect to Article 2(1)(d) of Directive 89/665/EEC (as amended) (the "Remedies Directive"), were *Francovich* damages as they were provided for by Article 9(6) of the Remedies Regulations, a statutory instrument made under s.3 of the European Communities Act, 1992, and not conferred by an Act of the Oireachtas. This meant that the injured party was required to demonstrate that the breach of European law was *"sufficiently serious"* and that there was a *"direct causal link between the breach and the loss or damage sustained by the individuals (Case C-568/08 Combinatie Spijker Infrabouw-De Jonge Konstruktie [2010] ECR I-12655)"* (para. 92). For this reason, Hogan J. characterised the ability of the applicant in that case to recover damages as *"highly restrained"* and this finding contributed to his conclusion in that case that it could not be said that damages had been shown to be an adequate remedy for the applicant in that case. Therefore, as has become something of a practice in applications to lift the automatic suspension in public procurement proceedings, solely for the purposes of this application, the Minister has conceded that CHC has raised serious issues to be tried in relation to European law and thus that the *Francovich* limitations under recoverability of damages do not apply.

25. This concession means that damages would be available as remedy to compensate the appellant in the event that the stay were lifted, and it subsequently succeeded in its judicial review challenge to the award of the contract.

Common case

26. It is common case that the IRCG service at issue here is a vital, life-saving service and it is critical that it is available at all times in the State and that there should be no gap in the service. The protection of life is front and centre in the case. It is accepted that the transition plan of the notice party is complex. CHC described it as a *"gargantuan task"* and Bristow says that more than 8,000 interconnected steps require to be undertaken between now and 30 June 2025. It is accepted that the transition period is very tight and that any delay threatens the possibility of Bristow being in a position to provide the service on 1 July 2025. It is also accepted that if the suspension is not lifted that Bristow will not be able to meet the deadline and the critical life-saving service in the State could only be provided by extending the existing contract. It is also accepted that the delay in implementing the transition plan occasioned by the existence of the suspension is not linear: it will not be possible for Bristow to immediately restart the transition plan at some unknown future date when, on this hypothesis, the proceedings are dismissed, and the contract is awarded to Bristow. The implications of these matters are discussed fully later in this judgment.

The balance of justice

27. The parties agree that the decision of this court in *Wordperfect 2021,* and the Supreme Court in *Merck* correctly set out the test to be applied in an application to lift the suspension. It is accepted that CHC, the respondent to that motion, is notionally treated as though it were applying for an interlocutory injunction to restrain the award of the contract. For the purposes of this application, the respondents accept that CHC has established a fair question to be tried. The issue for the High Court, and this Court on appeal, is where does the balance of justice lie? When answering this question, the adequacy of damages as a remedy for CHC forms part of the overall assessment of where the balance of justice lies.

Decision of the High Court

28. The High Court judge set out the background to the application, much of which has been set out in this judgment, and the law applicable to the lifting of the automatic suspension in public procurement cases as set out in *Wordperfect 2021*. He noted that it is CHC which must establish whether there is a fair question or a serious issue to be tried and whether the balance of justice favours the grant of an interlocutory injunction pending the trial of the action. The balance of justice in this case includes an assessment of whether damages would be an adequate remedy for either or both parties. He noted that it had been conceded by the Minister for the purposes of the application only that there is a fair question to be tried. He held that accordingly the case came down to the question of whether the Court believes that the balance of justice favours CHC, the losing tenderer, being granted an injunction preventing the Minister signing a contract with the winning tenderer. *"To put it another way, does the balance of justice favour the lifting of the automatic suspension that came into effect by the mere issuing of proceedings by CHC challenging the award of the New Contract to Bristow?"* (at para. 33).

29. He then considered the balance of justice under eleven different headings, reflecting the arguments advanced by the parties. The first issue was the essential need to avoid any gap in the delivery of the service. There was no dispute between the parties of the importance of this consideration. In ensuring that there is no gap, the trial judge noted that a key issue in the case is the fact that there is a two-year lead in period from the expected signing of the contract by the Minister and the successful tenderer, Bristow, which was due to take place on 3 July 2023 and the commencement of the service on 1 July 2025. Likewise, there was no dispute between the parties that this is a very tight transition period in view of the complexity of the services being provided under the new contract and ensuring that there is

no slippage and thus no gap in the service provided is crucial. The trial judge noted that Bristow and the Minister claim that the transition period is very tight but there will be no gap in the service if the stay is lifted now. On the other hand, CHC claims that the time allowed to implement all of the steps required in the transition plan is simply too short and there will be a gap in the service even if the suspension is lifted. Faced with these conflicting positions, Twomey J. concluded that at this interlocutory stage in the proceedings he could not determine whether the length of the transition period is correct (in the sense of affording the successful tenderer sufficient time to implement its transition plan) or not and therefore he could not conclude, as CHC claims, that the transition period is too short and that there will be a gap in the service, even if the suspension is lifted.

30. At para. 42 he set out Bristow's claims that the potential delay if the suspension is not lifted is not simply a question of a delay of say six to nine months until the legal challenge is resolved *"at one end"*, leading to a knock-on delay of a similar period at *"the other end"* i.e., after 1 July 2025, so that Bristow would be able to commence the service in early 2026. Rather, because of the complexity and interdependency of the 8,000 plus tasks which are required to be completed as part of the transition plan, Bristow claims that any significant delay is likely to lead to a much longer delay after 1 July 2025. Depending on how long the delay proves to be, certain sub-contractor prices may no longer be valid. Thus, depending on the length of the delay, Bristow may not be able to provide the service *at all*, in which case there may have to be a new tender process (even if the Minister were to be successful in establishing the legality of the tender process at the trial).

31. Twomey J. recorded that CHC's response to the argument that a failure to lift the automatic suspension would lead to a gap in the service was to say that its existing contract can lawfully be extended and thus avoid any gap in the service. The Minister and Bristow say that this is not the answer to the problem, because they say that an extension of the

existing contract would be an unlawful extension under Regulation 72 of the Remedies Regulations. Such a contract should be the subject of a new public procurement process and not simply automatically awarded to the incumbent.

32. The trial judge held that he could not resolve this conflict in an interlocutory application and at para. 53 he held as follows:

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

33. The court next considered whether there were enhancements under the new contract which were not available in the existing contract. Twomey J. noted that CHC said that it will provide a fixed wing aircraft service if its existing contract is extended. It also argued that its helicopters are superior to those to be provided by Bristow and that therefore there is, in fact, a deterioration, not an enhancement, in the service under the new contract. Therefore, the public are better served by leaving in place the existing contract according to

CHC. These averments were hotly disputed by the Minister and Bristow who argued that CHC was seeking to engage in the merits of the challenge to the decision to award the contract as part of the application to lift the automatic suspension, which was impermissible. The trial judge held that the court was not in a position to prefer one version of the *"facts"* regarding the helicopters over the other as at para. 51 he held:

> *"...However, the fact that CHC's helicopters are larger, have more cabin space and can fly longer without refuelling does not deflect from the fact that enhancements under the New Contract will not be available under the extended Existing Contract (which will have to be put in place if the automatic suspension is continued). While it is not determinative of the balance of justice, it is nonetheless a factor in favour of the lifting of the suspension that if the automatic suspension is continued, Bristow will not be able to provide the Service on the 1st July, 2025 with the enhancements (which do not exist under the Existing Contract)."*

34. He then addressed the offer by CHC to extend the existing contract and the arguments as to whether this could lawfully occur. He noted that Regulation 72(1) and (7) permit a contract to be modified without a procurement process in only very limited circumstances, the relevant issue for the purposes of the dispute in this case being whether "*the modification extends the scope of the contract or framework agreement considerably*" (Regulation 72(7)(c)). He held that there was no basis for assuming that the extension of the existing contract will be for only a year or a proportionate part of the year. He considered the likely time to obtain judgment in the proceedings, and the problem of the fact that the delay was not linear by reason of the fact that it was not simply possible to move the transition plan *"to the right"*.

35. At para. 78 of his judgment he concluded:

"All of this means, this Court cannot say that on the balance of probability this dispute over the tender will reach a final resolution by February, 2025, (sic) as suggested by CHC. Rather it seems to this Court that if the suspension of the tender process is continued by this Court, leading to the inevitable extension of CHC's Existing Contract, that extension will not be for a defined period of time, but will be for an unknown length of time for many months (and possibly years, if the decision of the trial court is appealed). It follows that at this juncture the value of any such extension of the Existing Contract is an unknown one. It is therefore not possible for this Court to determine whether or not that extension of the Existing Contract would be 'substantial' or whether it extends the scope of the Existing Contract 'considerably' and so whether it is lawful under Regulation 72 (1) (e) of the 2016 Regulations."

36. He considered the decision of Barniville J. in *Homecare Medical Supplies Unlimited Company v. HSE* [2018] IEHC 55, and he concluded that the doubts over the legality of the extension of the existing contract weigh in the balance of justice in favour of lifting the suspension, since, as stated in *Homecare*, why should the Minister have to risk a challenge to the legality of the extension of the existing contract? After all, the status quo (as noted below) is that the Minister should be entitled to sign the new contract with Bristow and so not incur that risk.

37. He then considered the probable period of delay more generally in the balance of justice and whether this supports the continuation/lifting of the suspension and concluded that it favoured the lifting of the automatic suspension.

38. The fifth matter he considered, which had to some extent already been considered, was the quality of Bristow's services compared to CHC's service. Both Bristow and CHC each maintained that their respective services were superior and therefore their respective services

were each more likely to save lives. At paras. 99 and 100 of his judgment, he concluded as follows:

> *"99. At this interlocutory stage, in deciding where the balance of justice lies, this Court will not give due deference to the decision of the decision-maker. However, the fact that, after a prima facie valid tender process, expert evaluators considered the merits of the respective helicopters and opted for Bristow's tender, is a fact which will be treated as any other fact, which weighs in the balance of justice, when deciding whether to lift the suspension or not. It is entitled to be treated as a fact to be weighed in the balance of justice, just as much as the fact that CHC has made uncontroverted averments that its helicopters are bigger etc than Bristow's.*
>
> *100. In other words, this Court will not do, as seems to be implied by CHC, namely ignore the fact that there has been a decision by the expert evaluators and instead focus on certain uncontroverted averments to the effect that, for example, the S92A helicopter carries more passengers than the AW189 helicopter. Rather, this Court will consider those averments, which are those of a losing tenderer pointing out why its tender should have won, in conjunction with all the other facts, including the fact that the expert evaluators reached the contrary view. When it does so, this Court cannot conclude that the averments of CHC should be given greater weight than the other facts, so as to tip the balance of justice in favour of continuing the suspension."*

39. The sixth argument he addressed was CHC's submission that the proposal of the Joint Committee on Transport and Communication to meet on 19 July 2023 to discuss, inter alia, why the AV189 helicopter was now deemed suitable for use in Ireland when it was previously excluded as unsuitable would be rendered moot if the court were to lift the suspension. CHC advocated this as a factor in favour of not lifting the suspension. The trial judge dismissed this argument as irrelevant based on the doctrine of the separation of powers.

Furthermore, he considered CHC's argument that the fact that the Oireachtas was enquiring into why AV189 helicopters were "now deemed suitable" when previously that was not the case not determinative of the balance of justice as it was just another fact to be weighed in the overall balance of justice.

40. The seventh matter he considers was the *status quo* when an automatic suspension is sought to be lifted. He concluded at para. 113 of his judgment as follows:

> *"113. In summary therefore, this Court agrees with CHC that, when weighing up the balance of justice, in determining whether to lift/continue the suspension, a factor to be considered is which court order will preserve the status quo until the substantive hearing (by which stage all the facts can be established). However, in this instance, this factor is in favour of the lifting of the suspension. This is because the status quo in these automatic suspension cases is the position before the applicant obtained a suspension 'for the asking', i.e. the status quo is that the Minister was entitled to sign a contract with the winning tenderer. Furthermore, it seems in this case, where both parties claim that lives are at risk and this Court is not in a position to determine which one of the parties is correct, preserving the status quo is of particular importance."*

41. The eighth argument addressed was that public law measures should be given appropriate deference. In discussing this issue, he referred to the decisions of the Supreme Court in *Okunade v. Minister for Justice & Ors.* [2012] 3 IR 152 and *Krikke v. Barranafaddock Sustainability Electricity Ltd* [2020] IESC 42. In the latter case O'Donnell J. held that:

> *"The temporary disapplication of a measure which is ostensibly valid is a serious matter, and the fact that there is no remedy should it transpire that the challenge was not justified is a matter that must be weighed in the balance on any application for an interlocutory injunction or stay pending trial".*

42. The trial judge also quoted from O'Malley J.'s judgment in the same case that:

> *"[I]f an order or measure is prima facie valid, even where arguable grounds are put forward for suggesting invalidity, it should command respect such that appropriate weight is given to its 'immediate and regular' implementation in assessing the balance of convenience…or the balance of justice."*

43. The trial judge held that he should give appropriate weight to the fact that the Minister had conducted an extensive and complex procurement process which had resulted in the award of the contract to Bristow to deliver life-saving public services. This must be treated as the Minister wishing to implement a *prima facie* valid measure, notwithstanding CHC's claims that the tender process was flawed. Disapplying that public law measure by continuing the suspension is therefore a *"serious matter"* and not to be undertaken lightly. Accordingly, he held that while this was not determinative, it was a further factor which weighed in the balance of justice in favour of lifting the suspension.

44. The ninth matter addressed was that the Minister would be forced to contract with CHC rather than its chosen party, Bristow, if the suspension was not lifted. This was because if the suspension was not lifted Bristow would not be in a position to provide the service on 1 July 2025 and that accordingly the Minister would be forced to enter into a contract with CHC to provide the service thereafter if he wished to ensure that there was no gap in the service. He concluded at para. 120 as follows:

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

with few other providers, nonetheless it is a matter for this Court to take into account since that will be the effect of an order by this Court to continue the suspension."

45. The tenth matter addressed was the allegation of political interference in the process. At para. 121, the trial judge held that:

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

46. The final matter considered by the trial judge was whether damages were an adequate remedy. He did so, first of all, from the perspective of CHC. He observed that while the adequacy of damages is an important factor in the balance of justice, in cases such as this one, where a public law measure is being challenged, the adequacy of damages is of less importance than in private law litigation. He referred to *Okunade*. He noted that CHC argued that its only contract is the existing contract, and it argued that if the automatic suspension is not continued this will most likely result in it going out of business. CHC relied upon the dictum in *Powerteam* that:

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

47. The High Court held that in light of the *"automatic injunction"* which is granted in these public procurement cases, too much weight ought not to be given to a losing incumbent tenderer with only one existing public contract on its books and the fact that it is likely to go

out of business if the suspension is not continued. He referred to the observations in O'Malley J. in *Krikke* to the effect that certain features of public law litigation may mean that the general principle to minimise the risk of injustice may need to be applied in different ways in different cases.

48. He referred to two matters which affected the weight to be afforded to the inadequacy of damages as a remedy in this case. Firstly, regard should be had to the fact that in public procurement cases an incumbent unsuccessful tenderer may have obtained an injunction without court approval, of a *prima facie* valid public measure, where the continuation of the *"injunction"* would place the incumbent in the enviable financial position of being virtually guaranteed, or in a very strong position, to continue with its public contract after its expiry.

49. Secondly, the corporate structure of a group of companies is relevant when determining how much weight to attach to the fact that damages may not be an adequate remedy to an incumbent tenderer with only one public contract on his books. He emphasised that it was not suggested that the motivation for the CHC Group to incorporate CHC Ireland DAC was to place itself in a better position to resist an application to lift the automatic suspension should it lose a future tender competition, where it would have only the existing contract on its books.

50. The point made by the trial judge is that the weight to be attributed to the fact that damages are not an adequate remedy for an unsuccessful tenderer needs to be considered in the particular circumstances of automatic suspension cases as distinct from an injunction case between two private parties. The trial judge did not definitively conclude whether or not damages would be an adequate remedy for CHC. However, he continued in his judgment *"assuming that damages are <u>not an adequate remedy for CHC</u> because it will cease business if the suspension is not continued, then regard must be had to whether damages <u>are an adequate remedy</u> for the Minister."* (Emphasis in original)

51. The trial judge concluded that damages could not be an adequate remedy for the Minister because lives are alleged to be at risk. It was not possible for the court to decide at the interlocutory application whether the risk is greater depending on whether the suspension is lifted or retained. On that basis, Twomey J. concluded at para. 137:

> *"137…this means that if it transpires at the trial that the suspension was wrongly continued, then damages will not adequately compensate the Minister. This is because if even one life is lost as a result of the wrongful continuation of the suspension, then clearly damages are not an adequate remedy for the Minister, since damages are never adequate to compensate for the loss of life.*
>
> *138. For this reason, even if damages are an inadequate remedy for CHC, this does not swing the balance of justice in favour of continuing the suspension. This is because this Court cannot conclude that damages are an adequate remedy for the Minister, where he, unlike CHC acts in the public interest, and it is claimed that lives are at risk if the suspension is not lifted."*

52. He accordingly concluded that the balance of justice favoured the lifting of the automatic suspension in this case, and he so ordered, subject to a stay as I have discussed above.

Was there an error in principle?

53. CHC's counsel submitted that there was both an error in principle in the decision of the High Court, and that the order lifting the automatic suspension perpetrated an injustice on CHC in all the circumstances of the case such that this court can and should form its own view on the application and is not required to give great weight to the decision of the High Court. Counsel highlighted numerous passages in the judgment which, it was said, displayed the trial judge's antipathy for the advantage accruing to the incumbent provider of services

to the State who loses a tender competition and who institutes proceedings challenging the decision. At para. 3 of the judgment, the trial judge considered that the import of the automatic suspension was that it was available to an unsuccessful tender incumbent *"for the asking",* pointing out that the incumbent would be in the prime position to benefit financially from the automatic suspension of the tender process. In para. 5 he referred to the fact that the provision *"could in some cases act almost as an incentive to litigate for the losing incumbent."* At para. 6 he observed that where the public contract is of high value, "*the incentive for the losing incumbent to litigate may be even greater*."

54. At para. 7, he referred to the State agency who wishes to sign the contract "*for crucial State services with the winning tenderer"* as being forced "*to come to court, at considerable expense, to seek the lifting of the automatic suspension.*" Similar sentiments were repeated in paras. 54 and 55 of the judgment. In para. 110, he described the automatic suspension as being "*the <u>unsupervised</u> use of the 'legal weapon' of automatic suspension.*" (Emphasis in original).

55. He described the question for determination by the court as follows in para. 33:

> *"Does the balance of justice favour the lifting of the automatic suspension that came into effect by the <u>mere issuing of proceedings</u> by CHC challenging the award of the New Contract to Bristow?"* (Emphasis added)

Finally, in para. 126, when discussing the weight to be attached to damages being an inadequate remedy for CHC he observed:

> *"…regard should be had to the fact that in public procurement cases, an incumbent unsuccessful tenderer may have obtained an injunction <u>without court approval</u> of a prima facie valid public measure, where the continuation of the 'injunction' will place the incumbent in the enviable financial position of being virtually guaranteed, or in a*

very strong position, to continue with its public contract after its expiry." (Emphasis added)

Discussion

56. Directive 2007/66/EC of the European Parliament and the Council of 11 December 2007 (the Remedies Directive) amended Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public work contracts (as amended by Council Directive 92/13/EEC of 25 February 1992). It has been transposed into Irish law *inter alia* by the Remedies Regulations. Fundamental to the regime is the possibility of a challenger winning the contract at issue and not merely being compensated by an award of damages for a breach of the public procurement process. In *OCS One Complete Solutions Ltd. v. Dublin Airport Authority* [2015] IESC 6, Clarke J. (as he then was) held that one of the predominant purposes of Directive 2007/66 which amends the Remedies Directive, as transposed into Irish law by the Remedies Regulations (as amended), is to strengthen pre-contractual remedies for breach of procurement law. Automatic suspension of the power to award the contract is integral to the availability of pre-contractual remedies. The possibility of lifting the automatic suspension, as set out in Regulation 8A of the Remedies Regulations, is intended to mitigate the impact of the automatic suspension on the power to award the contract in appropriate cases. It was introduced by the 2015 Regulations, following the decision of the Supreme Court in *One Complete Solutions*, that the High Court had no jurisdiction to lift the automatic suspension provided for under the 2010 Regulations. The Remedies Regulations authorise the court to lift the automatic suspension and the test to be applied is whether the applicant in the proceedings would be

entitled to an interlocutory injunction restraining the award of the contract. This involves applying the test set out in *Merck*:-

(1) whether there is a fair question or serious issue to be tried; and

(2) where the balance of convenience, or the balance of justice, is in favour of or against the grant of the interlocutory injunction sought, with the adequacy of damages being considered as part of that balance, rather than as a separate component of the test."

57. In *Powerteam,* I held that in deciding whether to lift the automatic suspension, *"The Court may take into account the probable consequences of lifting the suspension for all interests likely to be harmed, as well as the public interest."* Thus, the interests of the applicant, the contracting party, the successful tenderer, the public interest and any other relevant interest may all be considered and weighed by the court in assessing where the balance of justice lies in the particular circumstances. There is no implication that an applicant who enjoys the benefit of automatic suspension by virtue of the commencement of the litigation is thereby obtaining or exploiting an unjustified advantage. The judgment of the High Court suggests that the trial judge believed that an unjust advantage could accrue to the incumbent challenger by reason of the mere existence of the automatic suspension.

58. He highlighted the possibility that the process could encourage an incumbent who was an unsuccessful tenderer to challenge the award, not for the valid purpose of seeking a remedy pursuant to the Remedies Regulations for alleged breaches of procurement law, but for the benefit accruing from the mere institution of such proceedings, regardless of their merit, specifically, the automatic suspension with the resultant possibility, or indeed, probability (depending on the facts) of an extension of the existing contract beyond the expiry date. He regarded this latter motive as improper and, in effect, regarded the automatic suspension with suspicion.

59. In my judgment, this is not an appropriate approach to take either to the regime which provides for the automatic suspension or to an application to lift the suspension. In the first place, automatic suspension is provided for in the Remedies Regulations and the court is bound therefore to apply it. In the second place, it is part of an intricate regime balancing competing interests, and one cannot isolate one aspect of it and deprecate it. The automatic suspension is necessary to ensure the possibility of the availability of pre-contract remedy which, in turn, is an important aspect of EU public procurement law. Third, simply because the suspension arises automatically, the court cannot, in the absence of any evidence to the contrary, attribute any improper motives to an applicant in bringing proceedings. Certainly, the fact that an applicant benefits from the automatic imposition of the suspension of the power to award the contract cannot be weighed *against* an applicant and in favour of a moving party on an application to lift the automatic suspension. In fairness to the trial judge, he expressly denied that any such inference should be drawn in respect of CHC and in para. 11 of his judgment, he held that *"Such general observations can never be a determinative factor in these cases, as each case must be determined on its own facts"*, although he did observe that it was nonetheless important to bear the observations in mind.

60. Finally, the test to be applied is that set out by the Supreme Court in *Merck*. The court is approaching the matter as though the applicant notionally were applying for an interlocutory injunction to restrain the award of the contract. This means that the court starts its consideration of the matter as though no automatic suspension had occurred, and it is not a factor to be weighed *at all* in the court's determination of whether or not to lift the automatic suspension.

61. Having said this, I am not satisfied that the distaste and suspicion expressed by the trial judge in relation to the availability of the automatic suspension in any way improperly influenced his weighing of the evidence and the arguments advanced by the parties. In my

judgment, he weighed each of the arguments advanced and proceeded to assess where the balance of justice lay in the case irrespective of the views he had expressed as regards the availability of an automatic suspension in all procurement cases. In my view, he has approached the matter fairly and weighed the facts and arguments appropriately. The fact that another judge might have placed greater or lesser weight on certain evidence does not alter this or detract from the conclusion that his judgment demonstrated a proper exercise of his discretion. Specifically, I am not satisfied that the judgment is vitiated by any error in principle by reason of the views the trial judge expressed regarding the advantage accruing to an incumbent applicant from the automatic suspension provided for in the Remedies Regulations.

62. It follows, therefore, that there was no error of principle in this case which influenced the outcome of the application and accordingly, if CHC is to succeed on this appeal, it must therefore establish that an injustice will be done if the order of the High Court is not set aside. In making its assessment, this court will place great weight on the views of the trial judge but is, as has frequently been stated, untrammelled by any *a priori* rule regarding the appeal.

The balance of justice

63. By far and away the most important factor in this case is the public interest in ensuring that there is no gap in the provision of the service. It outweighs all other factors, given the nature of the service. It is literally lifesaving. As has been set out above, 277 lives have been saved to date in 2023 and 563 lives were saved in 2022.

64. There was no dispute between the parties that this was so. The primary issue for the court is whether the High Court erred in weighing the risks of a gap in the service occurring after 30 June 2025 and, so far as is possible, guarding against it. All other arguments, while relevant and possibly decisive in other circumstances, cannot outweigh the essential duty of

the court to ensure the least possible risk to life as a consequence of either lifting or retaining the automatic suspension.

65. The court's options in this regard are binary: it may either lift the suspension or continue the suspension until trial. This is not a situation where the court can craft an order with a view to minimising the risks of injustice pending the trial of the action.

66. If the court lifts the suspension and the contract is awarded, Bristow will endeavour to complete its transition plan and have all of the 8,000+ tasks concluded in time for a seamless transition of the service on 30 June / 1 July 2025. CHC says that this involves the State entrusting the service to a party which, at present, has no aircraft, infrastructure, personnel or authorisations to enable it to do so. It is, in effect, putting all its eggs in one basket, and, according to CHC, there is, on Bristow's own evidence, a very high risk that it will not be able to complete its transition plan. The result, according to CHC, would very likely lead to a gap in the service. In contrast to the situation if its existing contract was extended beyond the expiry date, CHC submits that there is real legal difficulty with, in effect, granting a bridging contract once the existing contract has been replaced by the award of the new contract. Therefore, it cannot be presumed that CHC will be able to continue to provide some or all of the service while Bristow completes its transition plan. This means that if Bristow is not ready to provide the service and CHC is not permitted to extend its contract, there will, in effect, be no service until Bristow is ready to provide the service.

67. Counsel for CHC submitted that based on the evidence of its own deponent, Bristow has a *"gargantuan task"* to undertake in preparing to commence the provision of the service on 1 July 2025 and that there is a *"real risk"* that it will not be able to meet the deadline. He referred to the many instances in Mr. Simon Tye's affidavit of 27 June 2023 where he stated that the achievement of all milestone dates in the transition plan is predicated on the contract

commencing in July 2023 and that *"[a]ny delay to commencement threatens to make those commitments unachievable"* (para. 20).

68. As of para. 24 of his affidavit Mr. Tye avers:

> *"The transition to the new IRCG Service is hugely complex and multi-faceted requiring services and infrastructure to be established over a wide geographic area; the complete replacement of existing aircraft; the manufacture of new aircraft; the modification and customisation of aircraft to IRCG service requirements; the establishment of a new airfield location at one site ; the establishment of an entirely new base location at another site; the refurbishment of existing accommodation and the complex operational implications of two operators (i.e. the incumbent and the new Contractor) working in parallel during the transition period. The delivery of a the IRCG service is heavily dependent on the engagement of the Notice Party's internal teams with numerous suppliers, including Original Equipment Manufacturers ("OEMS"), stakeholders, regulatory agencies and innovation partners – many of those involved being highly inter-dependent."*

69. Mr. Tye emphasises that the transition plan involves 8,000 plus line items of activity and at para. 26 he says:

> *"All of this extensive planning and organisation is predicated on the commencement of the transition services in July 2023."*

70. Counsel for CHC referred to further averments to the same effect throughout Mr. Tye's affidavit. In some instances, Mr. Tye refers to a specific start date for specific work streams as being variously 3 July, 8 July and 17 July 2023, while at para. 57 of his affidavit, Mr. Tye avers:

> *"As agreed with Leonardo* [the manufacturer of the helicopters intended to be used] *prior to the Notice Party's (sic) tender submission, Leonardo has 'pre-launched'*

certain activities ahead of the Contract award. Leonardo cannot commence production until the Contract is signed and the associated purchase contract for the helicopters is signed between the Notice Party and Leonardo. The configuration of the helicopters is bespoke to the IRCG requirement and therefore production cannot start until the Contract is confirmed. Leonardo has recently stated that the current Transition Plan already represents a very compressed lead-time compared with the standard delivery terms for such a heavily customised AW189 helicopter which are in excess of 20 months from order."

71. He further confirms that a delay in executing the contract will impact production slots and they may be significantly changed to a later slot beyond Bristow's control. He describes the resulting impact of any such delay as *"significant"*. At para. 63 he avers:

"[T]he consequences of any delay in Contract signature on the Notice Party's complex supply chain and for the Transition Plan are likely to be significant but cannot yet be determined."

72. At paras. 88 and 89 Mr. Tye avers:

"88. If all of the Notice Party's SAR bases are to be operational by the tendered dates then it is imperative that there is no delay to the Contract being entered into in July 2023.

89. The implications, both legal and commercial, of a delay in the conclusion of the Contract with the Notice Party are very significant. Any delay will disrupt the complex nexus of inter-dependent contractual and operational arrangements that the Notice Party has developed and agreed with third parties throughout the tender process and which are reflected in its tender response."

73. And then in para. 92:

"The Notice Party and its extensive supply chain are ready to mobilise from July 2023. There is no guarantee that the numerous suppliers that the Notice Party intends to contract and place orders with would be able to deliver at all in the event of a delay."

(Emphasis added)

74. While counsel for CHC accepts that the court cannot conclude at an interlocutory application that Bristow will not be able to complete the transition plan, he urged, based on Bristow's own evidence, that there was a very high risk that it would not be able to do so. He argued that Mr. Tye's evidence effectively admitted that was a risk that Bristow *"might very well be incapable of commencing the service on time."* He said it appeared from Mr. Tye's evidence that a delay of even a number of days or weeks could make the difference between meeting the deadline and failing to do so. This, he submitted, was a significant and weighty factor which weighed against the lifting of the automatic suspension.

75. In response, Bristow says that it can meet the deadline in time. It pointed to the letter from Leonardo Helicopters dated 21 June 2023, the manufacturers of the AW189 helicopters. The letter states:-

"Given the very tight project timeline set out in the tender…Leonardo has pre-launched engineering, procurement and production activities well ahead of the project award and set lead-time which, for the first two units (May 2024), are shorter than 12 months from the Contract Commencement Date of 1st June 2023 (as stated in the tender). As you can certainly appreciate, this is already a very compressed lead-time compared with standard delivery terms that, for such a heavily customised AW189 helicopter, are in excess of 20 months from order.

In light of the above it is critical that the associated helicopter purchase contracts are effective at the soonest (sic) and no later than September 2023 to avoid any material

impact on our ability to deliver the proposed build schedule. Any delay beyond this date would result in a not linear postponement of the delivery dates with consequential major impact to the entry into service date, the crew training activities as well the overall commercial conditions of our offer." (Emphasis added)

76. This letter, according to Bristow, shows that it is still possible to meet the tight milestones in its transition plan, but this will not be the case if the contract is delayed beyond September 2023. Further, the delay is likely to have a *"major"* impact on the entry into service date and the previously agreed commercial agreements may be impacted also.

77. Counsel also referred to the letter of 26 June 2025 from 2EXCEL. The author confirmed that it had commenced various activities ahead of contract signature. He requested to be informed of any delays to the signing of the contract *"which may have a material impact on our ability to commit to the tendered schedule and price"*. He confirmed:

"…It is imperative that the contract between 2EXCEL and Bristow Ireland is concluded in July 2023 to avoid any major issues and any material impact to our ability to deliver the primary aircraft as per the timelines indicated in the bid submission. Any delay signing after July 2023 may result in some delays in some of the equipment…

Should we not sign in July 2023, we believe we face highly probable and significant delays in securing a completely compliant aircraft, completion of modifications and training elements to support the operation of the service. However, we would attempt to provide an interim solution against an alleviation of Key Performance Indicators."

78. Bristow says that it spent eighteen months putting the plan together. A viable transition plan capable of being implemented within two years was an essential part of the

tender. This was assessed by the technical assessors. They deemed it capable of satisfying this critical aspect of the tender. The court ought not to conclude, it was said, that Bristow will not be ready to commence the provision of the service on 1 July 2025.

79. It was accepted by counsel for CHC that the court cannot determine this issue at the interlocutory stage. The height of its argument is that there is evidence that Bristow may not be able to commence the service on 1 July 2025 and this must be weighed, and weighted heavily, in the balance against lifting the suspension.

80. I accept that the evidence establishes that there is a risk that this is so as of the date of the hearing of the appeal on 27 July 2023 and that this court cannot resolve this issue one way or the other. The issue for this court is whether this risk is outweighed by the risk to the continuation of the service if the suspension is not lifted.

81. CHC submitted that the alternative risks were not symmetrical. If Bristow does not commence operations on 1 July 2025, the suspension having been lifted, then lives will be at risk. On the other hand, according to CHC, there is no suggestion that lives will be put at risk if the existing contract is extended and CHC continues to provide the service with the addition of a fixed wing element. However, this submission begs the question whether it would be lawful for the existing contract to be extended, a matter to which I shall turn to in due course.

82. If the suspension is not lifted, the alternative scenario, the Minister will not be able to award the contract (to anyone) until after the (final) determination of the proceedings. In that event, Bristow will not be able to commence providing the service on 1 July 2025. It cannot implement most of the 8,000 tasks in the transition plan until the contract is concluded. Furthermore, it is improbable that it could implement its transition plan in two years commencing at some unknown date in the future. This is because it has pre-booked production slots with Leonardo and other crucial suppliers. Such slots are not there for the

asking whenever Bristow requires them. It has pre-positioned itself with all its contractors and suppliers so that it can, on its evidence, make the deadline. Once this carefully coordinated prepositioning is lost, it is at the mercy of the individual suppliers and contractors who, necessarily, have their own commercial priorities and other customers to satisfy. In short, it is unknown when any further slots may become available to manufacture both the five bespoke helicopters and the bespoke equipment and fitout. Thus, as was expressed by Mr. Tye, the schedule for the works necessary to implement the transition plan do not simply involve a *"shift to the right"*. It is highly likely that the transition plan will be longer than the two years presently provided for, but it is impossible to say how much longer. In Mr. Tye's estimate, the impact of the delay arising from the automatic suspension is likely to be significant. Leonardo said the delay is likely to have a major impact on the delivery dates.

83. All of this means that the delay to the commencement of the service by Bristow involves (a) the time to judgment in the proceedings (leaving aside the question of an appeal) and (b) the additional time required to implement the transition plan.

84. As regards the first period of delay, the proceedings have not yet been given a provisional hearing date. The judge in charge of the Commercial List has ordered the Minister to make discovery, though the time for same had not yet been fixed when the hearing of this appeal occurred. It may be assumed that it will be at least a few weeks, though how many remains uncertain. It is probable that, in light of the discovery, there will be further affidavits filed by CHC and probably an application to amend the Statement of Grounds. This in turn will require amended grounds of opposition and further replying affidavits in all likelihood. All of this makes it most unlikely that a trial could take place within the next four or five months. It means that, most likely, it could not take place until 2024.

85. The parties disagree as to the estimated duration of the trial, which is not surprising given that the claim is likely to be expanded once discovery has been made.[1] As it stands, the Statement of Grounds runs to fifty-eight pages and includes a wide range of issues as set out in para. 9 above. The existing evidence runs to thousands of pages and no doubt will be expanded further by the time the case comes to trial. The issues raised are complex and technical, both factually and legally. In my estimation, based on the papers furnished to date, it is most likely that the case will run for at least eight sitting days (two weeks) and, quite possibly, significantly longer. Judgement will be reserved by the trial judge. It is highly probable, given the number and complexity of the issues to be resolved, combined with the fact that the trial judge will not be able to give the case his or her undivided attention but must continue to deal with her or his other commitments, that the trial judge will require several months before she or he can deliver judgment. The most optimistic estimate as of the date of this judgment - and it is very much an estimate which will change as the proceedings progress - is for a judgment to be delivered nine months from now, though it is far more likely to be closer to a year.

86. As regards the second period of delay arising from the automatic suspension, there is simply no information as to a possible delay in delivering the transition plan. If it cannot be commenced as of July/August 2023 but rather must commence at some further date, as yet unknown, this is simply an imponderable. However, there is evidence that it took eighteen months to devise the plan and line up all the constituent parts. There is also evidence that there are likely to be considerable difficulties in procuring slots to manufacture the five new Leonardo helicopters at short notice and there are likely to be other delays associated with the complex streams of interconnected works and tasks which make up the transition plan. It is difficult to avoid the conclusion that there will not be delay of, at the very least, a few

[1] It was accepted that it was not probable that the claim would be narrowed or focused by the discovery process.

months and possibly longer. All that can definitely be stated is that the delay will be of indefinite duration and that it will not be short. Most probably, it will exceed a year.[2]

87. Furthermore, Mr. Tye has given evidence that any significant period of delay and, in particular, delay after February 2024, may result in Bristow being unable to take up and perform the contract for which it has successfully tendered. This is because tenderers were required to confirm that all prices quoted in their tenders would remain valid for a minimum of twelve months commencing from the tender deadline. Therefore, as he says in para. 85 of his affidavit, beyond one year from 23 February 2023 Bristow cannot guarantee that the pricing will hold. He continues at para. 86:

> *"Furthermore, pricing is predicated on there been no changes to the supply chain that the Notice Party has based its tendered submissions on. Changes to logistical or operational arrangements brought about by a delay, could impact on the pricing submissions of the Notice Party."*

88. And, in paras 91 and 93 he avers:

> *"91. Once there is delay in the execution of the contract, we move outside of the transition Plan which was prepared to ensure transition by 30 June 2023; the longer the delay, the more the departure from the Transition Plan and the greater the risk.*
>
> *…*
>
> *93. Delays would also give rise to additional costs, significant re-arrangement of logistics and organisational plans with personnel, suppliers and stakeholders."*

[2] The assessment of the likely delay has been made without considering the impact of an appeal from either the substantive decision or any interlocutory decisions of the High Court. While the automatic suspension lasts only until the determination of the challenge to the process at first instance, given the value of the contract, there is a very strong probability that either CHC or Bristow, depending upon the outcome of the trial, may appeal the decision. If it goes in favour of the Minister and Bristow, almost inevitably CHC will seek a stay on the award of the contract pending the appeal based *inter alia* on the importance of a pre-contract remedies and not confining an unsuccessful tenderer to the remedy of damages. If granted, this will add considerably to the existing delays.

89. At para. 92, referred to above, he stated that there was no guarantee that the numerous suppliers with whom Bristow intended to contract with *"would be able to deliver <u>at all</u> in the event of a delay."* (Emphasis added)

90. There is therefore a real risk that a delay, other than a delay of short duration, puts at risk Bristow's ability to perform the contract at all. And, in my view, whatever the delay may be if the suspension is not lifted, it will not be short.

91. The probable extent of the delay in awarding the contract if the suspension is not lifted and the challenge to the award of the contract fails is relevant both as a factor to be assessed in its own right as an element of the risk to the continuous provision of the service after 30 June 2025. I shall consider the question of the delay simpliciter below. Now I am concerned with its impact on the risk to the continued provision of the service after the expiry of the existing contract. CHC says that there is no risk of a gap in the provision of the service because it will be possible to extend the existing contract for as long as is required. The Minister argues that it is not certain that it will be legally permissible simply to extend the existing contract as CHC proposes. The matter is governed by Regulation 72 of the Remedies Regulations. Regulation 72, insofar as is relevant, provides as follows:

> *"(1) Contracts…including contracts awarded in accordance with Regulation 74, may be modified without a new procurement procedure in accordance with these Regulations in any of the following cases:*
>
> *….*
>
> *(e) where the modifications, irrespective of their value, are not substantial within the meaning of paragraph (7).*
>
> *…*
>
> *(7) A modification of a contract or framework agreement during its term shall be considered substantial for the purposes of paragraph (1)(e) where the modification*

renders the contract or framework agreement, as the case may be, materially different in character from the contract or framework agreement initially concluded, and, in any event, without prejudice to paragraphs (1) to (5) a modification shall be considered to be substantial where one or more of the following conditions is met:

(a) the modification introduces conditions which, had they been part of the initial procurement procedure, would have -

(i) allowed for the admission of other candidates than those initially selected,

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

(iii) attracted additional participants in the procurement procedure;

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

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

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

(8) A new procurement procedure in accordance with these Regulations shall be required for other modifications of the provisions of a public contract or a framework agreement during its term in circumstances other than those provided for in paragraphs (1) to (5).''

92. It is thus clear that a new procurement procedure in accordance with the regulation is required where it is proposed to modify an existing contract unless the modifications come within those set out in Regulation 72(1) to (5). The key question in this case is whether the

extension of the contract for other than a short period and the addition of a fixed wing aircraft to the service for the duration of the contract extension amounts to a substantial modification within the meaning of Regulation 72(7).

93. It is not possible to determine this issue definitely on this appeal from an interlocutory application. It is possible to form a preliminary view for the purposes of evaluating the risk that such an extension may not be legally permissible based upon the evidence adduced by the parties.

94. The contract is worth €800 million and is for a period of ten years, with the possibility of up to three one-year extensions bringing it to a total of thirteen years. Mr. Robert Tatten, on behalf of CHC averred that:

> *"Were the existing contract to be extended on the existing terms, this would result in an increase of approximately 9% per annum in the total value of the contract (inclusive of VAT) over its entire lifetime (including the extensions to date). To the extent that any increase in the existing contract was for less than a year, then the increase in value would be reduced proportionately."*

95. Mr. Tatten does not state what this equates to in euro for understandable commercial reasons. Furthermore, he makes no reference to the offer by CHC to provide a fixed winged service if the existing contract is extended. Mr. Tatten merely states that service will be provided at the cost quoted for in CHC's tender.

96. It seems to me that there is a real risk that the extension of the existing contract for a period of a year or more – a distinct possibility as I have outlined – in addition to the provision of an additional new service, the fixed winged service, would be a modification *"which extends the scope of the contract…considerably"* within the meaning of Regulation 72(7)(e). It would follow that such an extension would not be permitted under Regulation

72 and that rolling over the existing contract without a new procurement procedure in accordance with the Remedies Regulations would be unlawful.

97. A similar argument was raised in *Homecare Medical Supplies v. HSE* [2018] IEHC 55 where Barniville J. concluded in para. 74(5):

> *"In my view it is critical that there is absolute clarity that these essential products are distributed to patients after [the expiry of the existing contract]. Like Costello J. in Powerteam, albeit on different facts, I conclude that any doubt or question over this issue should weigh and must weigh very heavily in the balance of convenience issue and clearly favours the lifting of the automatic suspension on the facts of this case;"*

98. That case concerned the supply of essential medical products (continence products). This case is concerned with life-saving services of search and rescue and medical transfer. So, the observation applies with even more force, in my judgment, to the facts in this case.

99. If the suspension is not lifted, it is clear that Bristow will not be able to fill the gap in the service from 30 June 2025. If the extension of the existing contract is for more than a year and also involves the addition of a new service, a fixed wing aircraft, there is, at the very least, a risk, and possibly a serious risk that CHC could only do so by an unlawful extension of the existing contract. As Barnville J. says, even the uncertainty weighs heavily against continuing the suspension in these circumstances. Further, it is difficult for a court to predicate its assessment of the balance of justice on the possibility of extending an existing contract in the future when the extension would possibly, at best, or even probably at worst, breach the provisions of Regulation 72 and therefore amount to an illegal contract by the State contracting authority. The court would thereby implicitly be condoning an unlawful contract in this assessment of the balance of justice.

100. In this regard, it is to be borne in mind that CHC's posited claim that it will be lawful to extend the existing contract is predicated on the extension being of a short duration. In

my judgment, the court is not concerned with a short extension of the existing contract should the automatic suspension not be lifted. While much is unclear in this case, it is clear that it would be lengthy, and the debate is how lengthy.

101. In addition, there is a significant risk that if the suspension is not lifted and there is a delay other than a short delay that Bristow could never perform the contract for the reasons set out above.

102. For all of these reasons, in my judgment, not lifting the suspension poses a far greater risk to the continued provision of the service than the risk posed by the possibility that Bristow may not be able to complete its transition plan in time to assume responsibility for the service on the 1 July 2025, and therefore that the balance of justice is firmly tilted in favour of lifting the automatic suspension in this case.

Delay

103. In *Wordperfect 2021*, Barniville J. stated at para. 147 that:

> *"In considering where the overall balance lay, it was critical, in my view, to bear in mind the period for which it might be necessary to keep the suspension in place."*

104. He described it as a crucial piece of information in terms of assessing the balance of justice. The appeal in that case was heard on 27 October 2021 and on 11 November 2021 the court was informed that the trial had been listed for hearing on 11 January 2022. In light of that information, Barniville J. thought it was *"realistic to think that it should be possible for the trial to take place and for judgment to be delivered by the end of the Hillary Term in 2022 [8 April]"*. The court was therefore considering a further period of extension of between four and six months in circumstances where the proceedings had been commenced in early June 2021 (then almost five months prior to his judgment) and where the existing framework had expired on 3 July 2021 with no framework being in place since then. He

was of the view that this was a significant factor in assessing where the balance should lie between lifting the suspension or leaving it in place until after the trial.

105. The contrast to the position of this case is quite pronounced. The suspension has been in place for a period of six weeks and one day. If the suspension is not lifted, it is likely to remain in place for up to or in excess of a year, as I have explained above. The timeline is far less certain than in *WordPerfect 2021*. In that case, the only remaining imponderable was the time that would be taken to deliver judgment. Furthermore, there was no suggestion that the delay could place the very contract to be awarded under the tender process in jeopardy.

106. In my judgment, it is inescapable that the delays occasioned by the automatic suspension (if not lifted) in proceedings of this complexity challenging an award of a contract of this scale which involves, of necessity, a transition plan which CHC itself has described as *"gargantuan"*, will almost invariably mean that the balance of justice will lie in favour of lifting the automatic suspension on that ground alone. In my judgment the inevitable and very considerable delays in this case weigh very heavily in favour of lifting the suspension.

A prima facie valid public measure

107. In *Okunade* at para. 104 Clarke J. (as he then was) summarised the principles regarding the grant of an injunction or a stay in a public law context as follows:

> *"[104] As to the overall test I am of the view, therefore, that in considering whether to grant a stay or an interlocutory injunction in the context of judicial review proceedings the court should apply the following considerations:-*
>
> *(a) the court should first determine whether the applicant has established an arguable case; if not the application must be refused, but if so then;*

(b) the court should consider where the greatest risk of injustice would lie. But in doing so the court should:-

(i) give all appropriate weight to the orderly implementation of measures which are prima facie valid;

(ii) give such weight as may be appropriate (if any) to any public interest in the orderly operation of the particular scheme in which the measure under challenge was made; and,

(iii) give appropriate weight (if any) to any additional factors arising on the facts of the individual case which would heighten the risk to the public interest of the specific measure under challenge not being implemented pending resolution of the proceedings;

but also,

(iv) give all due weight to the consequences for the applicant of being required to comply with the measure under challenge in circumstances where that measure may be found to be unlawful.

(c) in addition the court should, in those limited cases where it may be relevant, have regard to whether damages are available and would be an adequate remedy and also whether damages could be an adequate remedy arising from an undertaking as to damages; and,

(d) in addition, and subject to the issues arising on the judicial review not involving detailed investigation of fact or complex questions of law, the court can place all due weight on the strength or weakness of the applicant's case."

108. For the purposes of this case, it is important to note that the court should consider where the greatest risk of injustice would lie and in doing so *"give all appropriate weight to the orderly implementation of measures which are prima facie valid"* and *"give appropriate*

weight (if any) to any additional factors arising on the facts of the individual case which would heighten the risk to the public interest of the specific measure under challenge not been implemented pending resolution of the proceedings."

109. The principles were considered again by the Supreme Court in *Krikke v. Barranafaddock Sustainability Electricity Limited* [2020] IESC 42 by O'Donnell J. and O'Malley J. The issue concerned a stay on an order of the High Court pending appeal which would allow turbines in a windfarm which had been constructed in breach of EU planning laws to continue operating pending the determination of the appeal. At para. 90 of her judgment O'Malley J. said:

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

110. She affirmed the principle in *Okunade* that significant weight should be given to the need to permit measures which are *prima facie* valid to be carried out in a regular and ordinary way in the following terms in para. 99:

> *"The judgment in Okunade continues therefore, by holding that if an order or measure is prima facie valid, even where arguable grounds are put forward for suggesting invalidity, it should command respect such that appropriate weight is given to its "immediate and regular" implementation in assessing the balance of convenience (or, as Clarke J. suggested in C.C., "the balance of justice"). It is also appropriate to take into account the importance to be attached to the particular scheme concerned. However, it is of course also necessary to assess the extent to which the party*

challenging the validity of the decision or measure may be subjected to real injustice if forced to comply with something that is ultimately found to be unlawful."

111. Applying these principles to this case, the procurement process which resulted in the decision of the Minister to award the contract to Bristow is a measure of public law which is *prima facie* valid, as was recognised by the trial judge. Furthermore, there are many significant and weighty additional factors which heightened the risk to the public interest in the circumstances of this case. It is a vital life-saving service. It is imperative that there be no gap or intermission in the provision of that service. It is clearly a service which requires immense resources and preparation by any party who wishes to replace an incumbent service provider. These factors all weigh heavily in favour of lifting the suspension in the circumstances of this case. This analysis holds true even where arguable grounds are put forward for suggesting invalidity, notwithstanding the public interest in ensuring that the requirements of public procurement law are validly followed, and decisions properly adopted.

112. As against this, I am not persuaded that CHC may be subject to real injustice as described by O'Malley J. in *Krikke* if the automatic suspension is lifted and CHC ultimately succeeds at trial. Therefore, in my judgment, the public interest in affording *"appropriate weight"* to a prima facie lawful decision is a further reason to conclude that the balance of justice in this case lies in lifting the automatic suspension.

The status quo

113. Where the court is of the view that the issues in favour of or against lifting the automatic suspension are finely balanced, the most appropriate approach may be to uphold the status quo. The status quo in this case is that there is no suspension and that the lifting of the suspension will maintain the status quo (see *Homecare Medical Supplies* and *Powerteam*). In this case, if the court were to accept that the risk to the provision of the

service is finally balanced (contrary to what I have held above) then, in my judgment, it would be appropriate to uphold the status quo and therefore to lift the suspension. The continuance of the suspension amounts to an alteration of the status quo and would, in effect, afford an applicant for judicial review in public procurement cases an advantage which is inconsistent with the finely balanced architecture of the entire procurement law regime and be inconsistent with the application of the principles applicable to the grant of an interlocutory injunction.

Are damages an adequate remedy for CHC?

114. Somewhat surprisingly, there is remarkably little evidence on this point adduced by CHC. Mr. Tatten swore two affidavits on behalf of CHC. The first is twenty-two single spaced type pages of one hundred and one paragraphs of which one page, comprising four paragraphs, is devoted to damages. He avers as follows:

> *"81. First, as I explained in paragraph 7 of my First Affidavit, the Existing Contract is CHC's sole business in Ireland. As such, the loss of the Contract will effectively bring to an end CHC's ongoing business in Ireland, likely resulting in the loss of all of its employees and the infrastructure which it has developed in Ireland. As of 1 June 2023, CHC employed 141 employees in Ireland directly related to the current IRCG contract. 100% of management and 86% of CHC's employees are Irish citizens, and all employees reside in Ireland. The majority of CHC's employees are highly qualified and specialised pilots, engineers and winchcrew/paramedics. While most of the longest-serving winchcrew were drawn from the Irish Air Corps, further developing their medical skills within CHC, more recently recruited paramedic staff are primarily recruited from external paramedical agencies such as the ambulance service and undergo highly demanding selection and training to become helicopter winchcrew.*

CHC offers continuous professional development for these specialists, including study leave for master's degrees in paramedicine.

82. This will have significant knock-on effects on CHC's ability to develop further business in Ireland and would likely lead to CHC exiting Ireland altogether. It is highly likely that the loss of the Contract would result in the CHC Ireland DAC (the Applicant in these proceedings) going out of business.

83. Second, the loss of the Contract will do significant damage to CHC Group's reputation worldwide in particular insofar as the Existing Contract has significantly reinforced CHC Group's international reputation as a provider of SAR services. CHC is one of the leading specialist aviation companies providing SAR services globally. CHC currently provides these services to customers in Norway, Ireland and Australia and is actively pursuing additional opportunities in other countries. The loss of this contract will cause reputational damage to CHC as it pursues other SAR contracts with commercial and governmental entities world-wide.

84. Furthermore, I say and am advised that it will likely be very difficult for CHC to prove damages in respect of many aspects of its claim. For example, as has been addressed in paragraphs 157-159 of the Statement of Claim, CHC contends that inappropriate political influence was brought to bear on the Respondent in making the Decision evidenced by the remarks of Senator Gerard P. Craughwell in the Seanad Éireann on 31 May 2023 as follows:

> *"From our point of view, this House and committee did much work that influenced the way this contract went. It was a good day for Ireland that we did what we did. As we go on now, Bristow needs to know that we will be*

watching from this House I say and am advised that if such influence is found to have arisen it may be very difficult for CHC to identify and prove its precise loss in that regard."

115. His second affidavit is even more sparse: it is nine pages of single-spaced typing comprising thirty-eight paragraphs of which only one addresses the adequacy of damages as a remedy to CHC. At para. 18 he avers:

"With regards the matter set out in paragraph 38 of Mr. Doocey's affidavit, I add that I had also noted in paragraph 7 of my First Affidavit that CHC had previously conducted other business in Ireland. In this regard, I would note that CHC actively tenders for additional work in Ireland such as in respect of the provision of helicopter services relating to offshore windfarm development but currently has no work in that regard. Accordingly, it is not just the reputation of the CHC Group internationally which will be harmed if the Suspension is lifted but also specifically the reputation of CHC in the Irish market. The highly likely outcome of CHC Ireland losing this contract will be the full cessation of Irish operations for CHC indefinitely. The current contract contributes a significant amount of revenue to the CHC Group which will require operational reorganizations and which will likely impact a number of individuals beyond the borders of Ireland. This is likely to give rise to redundancies outside of the Irish operation to take account of reduced need for centralised support from CHC's global operation. This is in addition to any job losses arising in Ireland, which would inevitable unless the Successful Tenderer commits to a comprehensive TUPE programme."

116. In *Powerteam* at para. 42 I held that *"[p]rima facie if a business will probably cease to trade if an injunction is withheld, damages are not an adequate remedy."* I am still of that view. The fact that CHC may cease business because of the loss of the existing contract is

not compensable by an award of damages even though, as discussed above, damages are available as a remedy as a result of the concession of the Minister. Whether a party may be adequately compensated by an award of damages is part of the assessment of the balance of justice. While it clearly weighs in favour of retaining the suspension, in my judgment it is not decisive in this case. This is for two reasons. First, the overwhelming importance of the public interest in the continuation of the vital lifesaving service outweighs the private interests of CHC. Second, I am of this view, given the particular market and service at issue in these proceedings. The market is for the provision of search and rescue and helicopter emergency medical services. As such, there will only ever be one such service for the entire State. This means that if an incumbent loses a tender competition, it loses its entire business. It is such a high-tech, specific service, not merely helicopter transport, that it is highly likely that such a contractor will have no other business within the State. The fact that there is a serious risk that CHC will go out of business and therefore that damages will not adequately compensate it for the loss sustained, cannot be an answer to the notional question of whether to grant an injunction restraining the award of a contract. If the inadequacy of damages as a remedy in those circumstances were decisive, it would mean that, virtually inevitably, the suspension would never be lifted because of the nature of the service offered in the particular market. This, it seems to me, is contrary to the inherent flexibility of the remedy of an interlocutory injunction which was emphasised by O'Donnell J. in *Merck*. As was pointed out by O'Malley J. in *Krikke*, the public law context may mean that the general principle – the need to minimise the risk of injustice – may need to be applied in different ways in different cases. In my judgment this means that the weight to be attributed to this factor (the inadequacy of damages where the party is likely to cease business) is less than might be attributed to it in different factual and legal circumstances.

117. I am not persuaded that the other argument advanced by Mr. Tatten established that damages would not be an adequate remedy for CHC in this case. In para. 83, he says that the loss of the contract will do significant damage to CHC *Group's* reputation worldwide as one of the leading specialist aviation companies providing SAR services globally. I agree with the trial judge that the evidence and submissions of CHC in support of this argument are unconvincing. In the first instance, they are based upon an alleged damage to the CHC Group, whereas the only party to these proceedings is the Irish company which it has said will go out of business. If the company is out of business, I cannot see how it requires compensation for the damage to its reputation over and above the damages it would seek to recover by reason of it going out of business. I would attribute little weight to the alleged reputational damage to CHC in the Irish market in circumstances where, on its own evidence, it has not provided a service to any third party in the State since 2018. Further, as was pointed out by Barrett J. in *BAM PPP PGGM v. NTMA* [2015] IEHC 756 at para. 19:

> *"When it comes to tendering for contracts, to use a colloquialism, "you win some, you lose some". Yes, a lot of time and effort may have been expended on tendering for the DIT project, but losing it is not the end of days. BAM has won in other State-sponsored procurement exercises in Ireland since these proceedings were commenced and doubtless may do so again."*

118. As with Barrett J., I too am unpersuaded as to the reality of the applicant's, in this case CHC's, claimed alleged damage to its reputation.

119. I am also of the view that damages for failing properly to award the contract are readily assessable in the circumstances of this case where detailed tender documents have been provided from which it would be possible to ascertain the precise loss of profit occasioned to CHC in the event that it succeeds at trial. The matters which it says give rise to damages other than the loss of profit on the contract, are likewise equally matters in respect of which

the courts regularly assess damages, such as wrongful use of proprietary information. Likewise, if there is a finding of wrongful political interference in the process, the court has the appropriate tools to mark its disapproval of and compensate the offended party for any such action proved at trial.

120. For all of these reasons, I do not believe that the inadequacy of damages as a remedy for CHC is of such weight in the circumstances of this case as to tilt the balance of justice in favour of retaining the automatic suspension.

Will the service under the new contract be inferior?

121. CHC placed great emphasis on its contention that the new contract would not enhance the service provided but rather would result in an inferior service. It emphasised the fact that it has used and proposes to continue to provide IRCG service with the Sikorsky S-92A helicopter, which is larger, has more cabin space and can fly a longer range without refuelling than the helicopters which Bristow propose to use to provide the service~~;~~ (the Leonardo AW189 helicopter). It was repeatedly submitted that its evidence to the size, space and range of the S-92A helicopters was not controverted. CHC asserted, contrary to the contention of the Minister and Bristow, that there are no *"service enhancements"* arising under the new contract where, from an objective perspective, the S-92As in use are objectively more capable aircraft than the AW189's which Bristow proposes to use. Much of the evidence in the affidavits exchanged between the parties addressed the question as to whether or not the new contract would or would not involve enhancements to the service in circumstances where CHC had offered to make up the major discrepancy between the existing and new contract, by the provision of a fixed wing aircraft. In his submissions to the court, counsel for CHC accepted that while there is a dispute about the extent to which there are any meaningful enhancements in the new contract (counsel simultaneously emphasising the uncontroverted evidence in relation to the capabilities of the S-92As utilised

by CHC), he accepted that on an interlocutory application, the court cannot determine that matter. The height of his submission was that it was a matter which should be weighed when the court came to determine where the balance of justice lay overall.

122. I accept that the evidence of CHC concerning the capacity and capability of its aircraft is a factor to be weighed in the balance but, overall, it is eclipsed by the fundamental requirement to ensure continuity of the service for the reasons I have outlined. Given that this is a matter which will have to be resolved at trial and which this court cannot determine, in my judgment I do not believe that any great weight can be attributed to this factor, in the assessment of the balance of justice.

Conclusion

123. The sole issue for consideration on this appeal is whether the balance of justice favours the lifting or the retention of the automatic suspension which prevented the Minister from awarding the contract at issue in these proceedings. The crucial issue is where the greatest risk to life lies: whether Bristow will not in fact be in a position to commence the service on 1 July 2025, thereby creating a gap in the provision of this vital lifesaving service or, whether there would be a gap in the provision of the service if the suspension were continued because, in those circumstances, Bristow will not be able to commence the service on 1 July 2025 and there is a risk that the Minister could not lawfully extend the existing contract with CHC. On an appeal of an interlocutory injunction, this court cannot determine either that Bristow will not be in a position to complete its transition plans and commence the provision of the service by 1 July 2025 or that an extension of the existing contract by the Minister will be permissible under the provisions of Regulation 72(1)(e) of the Remedies Regulations. There is a risk in each case. However, I am of the view that the risk that Bristow may not be ready to commence provision of the service on 1 July 2025 is far outweighed by the risk that it may not be lawful for the Minister to extend the existing contract with CHC for an indefinite

period of time (which may well exceed one year for the reasons discussed) and thus that there will be no lawful means of providing *any* service after 30 June 2025 for a very considerable period of time.

124. Secondly, the failure to lift the automatic suspension resulting in the delay for (at the very least) many months in awarding the contract may mean that Bristow will no longer be able to perform the contract in accordance with the terms of its tender. Thus, even if the Minister succeeds in the proceedings, he may be required to commence a new process with all the additional uncertainty that would entail.

125. Furthermore, in considering the provision of a crucial life-saving service such as the contract at issue in these proceedings, certainty is a vital matter which weighs, and weighs very heavily, in favour of lifting the automatic suspension in this case.

126. Further, the probable period of delay in awarding the contract if this court refuses to lift the automatic suspension at this point in time (assuming the Minister and Bristow are successful at trial), is likely to be of such duration in the circumstances of both this case and the transition plan at issue, that this weighs heavily in favour of lifting the automatic suspension.

127. In addition, if the balance of justice were finely balanced- and I do not believe this to be so in this case- then it is often appropriate for a court to preserve the status quo. In this case, the status quo would involve lifting the automatic suspension. This affords a further reason to refuse the appeal and uphold the decision of the High Court.

128. While I accept that CHC will not be adequately compensated by an award of damages if, as a result of the failure to lift the suspension, it goes out of business, this is not of sufficient weight in the overall assessment of the balance of justice to tilt the balance in favour of retaining the automatic suspension.

129. The trial judge correctly weighed the various factors in assessing the balance of justice in this case and concluded that it favoured the lifting of the automatic suspension for the reasons he gave in his judgment. For the reasons I have outlined, I would affirm the judgment of the High Court and refuse the appeal.

130. Noonan and Faherty JJ have read this judgment in draft and authorised me to indicate their agreement with same.