THE HIGH COURT
COMMERICAL

[2016 No. 43 JR]
[2016 No. 7 COM]

BETWEEN

POWERTEAM ELECTRICAL SERVICES LIMITED TRADING AS OMEXOM

APPLICANT

AND
THE ELECTRICITY SUPPLY BOARD

RESPONDENT

JUDGMENT of Ms. Justice Costello delivered on 12th day of February, 2016.

Introduction
1. In these proceedings the applicant seeks various orders pursuant to the provisions of the European Communities (Award of Contracts by Utility Undertakings) (Review Procedures) Regulations 2010 (the "2010 Regulations") as amended by the European Communities (Award of Contracts by Utility Undertakings) (Review Procedures) (Amendment) Regulations 2015 (the "2015 Regulations")("the Remedies Regulations"). The Remedies Regulations give effect to Council Directive 92/13/EEC coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunication sectors, as amended by Directive 2007/66/EC amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (the "Remedies Directive").

2. The proceedings arise out of a tender competition run by the respondent for admission to a multi operator framework agreement for overhead lines works (the "Framework Agreement"). The intention underlying the Framework Agreement was to put in place a panel of contractors who would be available to undertake building, repair, maintenance and upgrade work on the respondent's extensive network of overhead lines for both transmission and distribution of electricity throughout the state. The applicant was an unsuccessful participant in the competition and it alleges that the competition was run and contracts awarded in breach of procurement law.

Background
3. The Electricity Supply Board, the respondent, is the owner of the power and distribution systems for the supply of electricity within the state. It has huge network of overhead cables: 440kV, 220kV and 110 kV for transmission and 110kV, 38kV and 20kV distribution lines. There are approximately 7,000 kilometres of overhead transmission lines and 150,000 overhead distribution lines. Electric power is delivered over long distances from power plants to substations via the transmission lines. The distribution lines distribute the electricity typically from substations to residential and commercial customers. Each system requires installation, maintenance and upgrading. The licensed transmission system operator is EirGrid and the licensed distribution system operator is ESB Networks.

4. The respondent employs approximately 850 staff to work on the transmission and distribution networks. This is insufficient to meet all of the obligations of the respondent in relation to ongoing maintenance, repair, instillation and upgrading works and dealing with emergencies. For more than a decade, the respondent has relied upon contractors to supplement the work carried out by its own employees. Most recently the work was allocated on the basis of a Framework Agreement which was entered into in March, 2013. The applicant was one of the contractors in respect of the 2013 Framework Agreement. It and its predecessor have been a contractor for the respondent for 13 years.

5. The respondent engaged in a tendering process for a new Framework Agreement in 2014 but the respondent was obliged to abandon that process and thus no contractors were appointed pursuant to a new framework agreement in 2014. In order to fill the *lacuna* the respondent, with the consent of all existing contractors, extended the 2013 Framework Agreement up until 31st December, 2015.

6. In April, 2015 the respondent commenced a new public procurement procedure. On 21st April, 2015, it published a notice in the Official Journal of the European Union detailing the proposed procurement procedure for the award. The works were described as the building, upgrading and refurbishment of the transmission and distribution lines. While the detail of the procedure as advertised and followed by the respondent is the subject matter of these proceedings, it is not necessary to outline the facts and detail in this judgment, save to note that the applicant tendered for the award of the contract but on 21st December, 2015, was notified that it was unsuccessful.

7. In accordance with the requirements of the Remedies Directive and the Remedies Regulations, following the notification of a decision of the contracting entity on an award there is a standstill period before the contract may be awarded to the successful tenderer(s). In addition, unsuccessful tenderers are entitled to be informed of the reasons they were not selected. This is to ensure, *inter alia*, that any unsuccessful tenderer, referred to as an eligible person in the Remedies Regulations, may seek review of the contract award decision prior to the award of the contract.

8. The Remedies Regulations provide that the institution of proceedings pursuant to the Remedies Regulations seeking a review of a decision either in respect of the process or a contract award decision results in the immediate and automatic suspension of either the contract award process or the award of the contract, depending on the point in time in the process at which the proceedings are instituted. Pursuant to the 2015 Regulations, Regulation 8A, a respondent may bring an application to lift the automatic suspension and ask the court to make an order permitting it to conclude the contract. The respondent in this case has brought an application to lift the automatic suspension on the awarding of the contracts the subject of the procurement process to establish the Framework Agreement in order that it may proceed to place the contract with the successful tenderers.

The Remedies Regulations
9. Regulation 8 provides as follows:-

"8. (1) An eligible person may apply to the Court—

> *(a) for interlocutory orders with the aim of correcting an alleged infringement or preventing further damage to an eligible person's interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of the contract concerned or the implementation of any decision taken by the contracting entity,*
>
> *(b) for review of the contracting entity's decision to award the contract to a particular tenderer or candidate.*

(2) If a person applies to the Court under paragraph (1), the contracting entity shall not conclude the contract until—

(a) the Court has determined the matter, or

(b) the Court gives leave to lift any suspension of a procedure, or

(c) the proceedings are discontinued or otherwise disposed of".

10. In this case it is accepted that the applicant is an eligible person for the purposes of the Remedies Regulations and its proceedings are pursuant to Regulation 8(1)(b) of the Remedies Regulations.

11. In *OCS One Complete Solutions Ltd. v. Dublin Airport Authority plc* [2015] IESC 6 ("*OCS v. DAA*") the Supreme Court held that the 2010 Regulations did not confer on the court a jurisdiction to lift the automatic suspension and to permit a contract to be concluded when the challenge to the award of the contract itself has not been determined or otherwise disposed of (see para. 10.2). The Oireachtas accordingly amended the 2010 Regulations by the 2015 Regulations by substituting paragraph (2) of Regulation 8 as follows:-

"(2) If a person applies to the Court under paragraph (1), the contracting entity shall not conclude the contract until—

(a) the Court has determined the matter, or

(b) the Court gives leave to lift any suspension of a procedure, or

(c) the proceedings are discontinued or otherwise disposed of,

but this is subject to paragraph (2A).

(2A) Notwithstanding that—

(a) an application has been made under paragraph (1), and

(b) the matter concerned has not been determined by the Court,

the contracting entity may conclude the contract if, on application to the Court under Regulation 8A, the Court so orders."

12. Thereafter the 2015 Regulations inserted a new Regulation 8A in the 2010 Regulations which provides as follows:-

"8A. (1) On application made to it under this Regulation by the contracting entity, the Court may, notwithstanding the matters referred to in Regulation 8 (2A)(a) and (b), make an order permitting the contracting entity to conclude the contract referred to in Regulation 8(1).

(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 entity 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.

(3) The Court may, if it considers just to do so, specify in the order it makes under this Regulation that the order shall operate subject to there being satisfied one, or more than one, condition that it determines to be appropriate and specifies in the order."

13. The 2015 Regulations did not amend Regulation 9 of the 2010 Regulations which provides as follows:-

"9. (1) The Court—

(a) may set aside, vary or affirm a decision to which these Regulations apply,

(b) may declare a reviewable contract ineffective, and

(c) may impose alternative penalties on a contracting entity, and may make any necessary consequential order.

(2) The Court may make interlocutory orders with the aim of correcting an

alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a contract or the implementation of a decision of the contracting entity.

(3) The Court may set aside any discriminatory technical, economic or financial specification in an invitation to tender, contract document or other document relating to a contract award procedure

(4) When considering whether to make an interim or interlocutory order, the Court may take into account the probable consequences of interim measures for all interests likely to be harmed, as well as the public interest, and may decide

not to make such an order when its negative consequences could exceed its benefits.

(5) The Court may by order suspend the operation of a decision or a contract.

(6) The Court may award damages as compensation for loss resulting from a decision that is an infringement of Community law, or of a law of the State transposing Community law."

14. As a result of the amendments to the Remedies Regulations the position, insofar as it is relevant to this application, is as follows. Proceedings have been brought under Regulation 8(1)(b) of the Remedies Regulations seeking a review of the contracting entity's decision to award the contract to six successful tenderers. By virtue of the provisions of Regulation 8(2) the contracting entity, the respondent, may not conclude the contract until either the court has determined the matter or the court gives leave to lift any suspension of a procedure, or the proceedings are discontinued or otherwise disposed of, but this is subject to Regulation 8(2A). Regulation 8(2A) permits the court to lift the suspension of the decision to award the contract so that the contracting entity may proceed to award the contract notwithstanding the existence of the proceedings which have not yet been determined. The contracting entity must apply to the court under Regulation 8A and if the court so orders, then the contracting entity may proceed to conclude the contract.

15. Regulation 8A(1) confers the jurisdiction of the court to lift the suspension which was previously absent. Regulation 8A(2) sets out the basis upon which the jurisdiction conferred is to be exercised. The Regulation is phrased in mandatory language: "*the Court shall consider*". The court is enjoined to proceed on the basis that there is no automatic suspension of the power of the contracting entity to conclude the contract as set out in Regulation 8(2)(a). On that basis it is asked to:-

"consider whether…it would be appropriate to grant an injunction restraining the contracting entity from entering into the contract".

In other words, it is asked to approach the application on the basis that the applicant for review of the procurement procedure is applying for an injunction though in fact the moving party will be the respondent in the proceedings.

16. Sub-paragraph (b) provides that:-

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

Thus, the court must first determine an applicant's notional application for an injunction to restrain the awarding of the contract in question. Once the court has determined that it would refuse to grant such an injunction, then, and only then, may the court consider whether or not to lift the suspension provided by Regulation 8(2)(a), though, as was pointed out by Barrett J. in *BAM PPP PGGM Infrastructure Cooperatie U.A. v. National Treasury Management Agency & Anor.* [2015] IEHC 756 ("*BAM v. NTMA*") at para. 10:-

"…it is difficult to conceive of circumstances in which the court would conclude that they were not circumstances in which it would be appropriate to grant an injunction but they were nonetheless circumstances in which it would be appropriate to maintain a suspension in place".

The onus of proof in an application under Regulation 8A(2)

17. The applicant argued that the respondent is the moving party and that therefore the onus of proof rests on the moving party in the normal way to persuade the court that the *status quo* should be altered and the automatic suspension should be lifted. It submits that Regulations 8A(2) makes clear that it is "*only*" where the respondent establishes that "*it would not be appropriate to grant such an injunction*" that the possibility of acceeding to the application arises. It submits that there is no obligation on the applicant in the proceedings to establish that "*it would not be appropriate to grant such an injunction*".

18. The respondent argues that is apparent that the critical consideration for the court is whether, if there was no suspension, it would be appropriate for it to grant an injunction to prevent the conclusion of the contract. Thus, it argues, that, notwithstanding it is a contracting entity which brings the application seeking to lift the suspension, the onus is clearly placed upon the eligible person who brought the proceedings to show why an injunction restraining the contracting entity from entering into the contract ought in fact to be imposed.

19. Normally the onus of proof rests on a moving party. However, there are many circumstances when the onus of proof may shift to the other side. I am satisfied that this is one of those occasions if the court is to give effect to the terms of Regulation 8A(2). The Regulation expressly requires the court to assess whether it would be appropriate to grant an injunction restraining the contracting entity from entering into the contract. This can only be done by approaching the matter on the basis that the applicant is applying for an interlocutory injunction. Thus the applicant notionally has to be treated as the moving party who carries the onus of proof in respect of an application for an interlocutory injunction. It is only if the court concludes that it would refuse the hypothetical application for an interlocutory injunction that the onus of proof then shifts to the respondent as the moving party pursuant to Regulation 8A(2)(b). Thus in the first instance the onus of proof rests with the applicant in this Motion.

The principles applicable to an application under Regulation 8A(2)

20. The respondent submits that the court should apply the well established principles from *Campus Oil Ltd. v. Minister for Industry and Energy (No. 2)* [1983] I.R. 88. These can be summarised as follows:-

(1) Is there a fair or *bona fide* issue to be tried?

(2) If so, the court should consider the adequacy of damages initially from the view of the applicant and, if damages would not adequately compensate the applicant, then from the perspective of the respondent;

(3) If damages would not adequately compensate either party, the court then ought to consider the balance of convenience;

(4) Finally if all matters are equally balanced the court may seek to preserve the *status quo*.

21. The applicant argues that the test be applied to an application under Regulation 8A(2) is that set out in Regulation 9(4) of the

Remedies Regulations, cited above. It emphasises that there is no scope for a test assessing the adequacy of damages as a remedy as this would be contrary to the policy of the Remedies Directive to strengthen pre-contract remedies.

22. In my opinion the correct approach is to employ the *Campus Oil* principles for the following reasons. Regulation 8A(2)(a) enjoins the court to frame its considerations by reference to the granting of an injunction. On the other hand, no reference is made to having regard to the matters set out in Regulation 9(4). In my opinion this leads to the conclusion that the Oireachtas requires the court to consider those matters which are habitually balanced by the courts when deciding whether or not to grant injunctions when dealing with an application to lift the automatic suspension of the right of a contracting entity to award a contract. The Oireachtas did not refer the courts specifically to the provisions set out in Regulations 9(4) when it was clearly open to the Oireachtas to do so. It is therefore to be inferred that this was not its intention.

23. In *BAM v. NTMA*, Barrett J. construed Regulation 8A(2)(a) in the context of a review of a decision under Regulation 8(1)(a). He held that the Remedies Directive did not require that there be an automatic suspension of the power of the contracting entity to award a contract where a challenge was brought to a decision in relation to the procurement process (under Regulation 8(1)(a)) rather than to the contract award decision (under Regulation 8(1)(b)). At para. 11 of the judgment he held:-

> *"[b]ecause one is dealing in these proceedings with an exclusively Irish-law matter, i.e. whether or not to lift an automatic suspension that was not required to arise as a matter of European Union law, there is no reason to consider anything other than the usual Campus Oil criteria ought to apply when determining whether the circumstances presenting or circumstances in which, absent reg.8(2)(a) it would be appropriate to grant an injunction."*

He was satisfied that as a matter of Irish law the correct construction of Regulation 8A(2)(a) did not involve the application of the matters set out in Regulation 9(4).

24. Regulation 8A(2)(a) applies to reviews of decisions pursuant to both Regulation 8(1)(a) and 8(1)(b) without distinction. It follows that there should be no differentiation in the construction of Regulation 8A(2)(a) and the same test ought to be applied whether the proceedings involve a review under Regulation 8(1)(a) or (b) unless the Remedies Directive requires that the national law be disapplied.

25. It is of course the case that one of the primary aims of the Remedies Directive was to strengthen pre-contractual remedies for breaches of procurement law. To this end, the Remedies Directive provided for a standstill period between the notification of an award decision and the signing of the contract to afford eligible persons an opportunity to seek a review of the decision. It is for the individual member states to establish the particular review procedures applicable. Article 2(4) of the Remedies Directive was amended to strengthen the pre-contract remedies available to eligible persons. It provides:-

> *"[m]ember states **may** provide that the body responsible for review procedures **may** take into account the probable consequences of interim measures for all interests likely to be harmed, as well as the public interest, and **may** decide not to grant such measures when their negative consequences could exceed to their benefits." (Emphasis added)*

26. This Article is expressed in permissive language. It is clear that the Remedies Directive (as amended) does not purport to harmonise procedures across member states in the European Union. The question therefore is whether this permissive Article requires that the *Campus Oil* assessment be disapplied.

27. In the United Kingdom, the courts have had to consider whether or not Regulation 47H(1)(a) (the Regulation establishing the power to lift the automatic suspension in respect of a contract award decision) is to be exercised in accordance with the *American Cyanamid* principles applicable to ordinary applications for an interlocutory injunction, or not. In *Exel Europe Ltd. v. University Hospitals Coventry and Warwickshire NHS Trust* [2010] EWHC 3332 (TCC) Akenhead J. concluded that the *American Cyanamid* principles were "*positively consistent*" with the Remedies Directive and applied those principles to the application under Regulation 47H(1)(a). In *NATS (Services) Ltd. v. Gatwick Airport Ltd.* [2014] EWHC 3133 (TCC) Ramsey J. found that the *American Cyanamid* test was wholly consistent with the equivalent of Article 2(4) of the Remedies Directive stating at para. 29:-

> *"[t]he review procedures would take into account the probable consequences of interim measures for all interests likely to be harmed, looking first at the adequacy of damages as part of the balance of convenience. There is nothing in the Directive which seeks to limit or define the way in which the national courts exercise their discretion in balancing the interests of the parties."*

In *Group M UK Ltd. v. Cabinet Office* [2014] EWHC 3659 (TCC), Akenhead J. held that *American Cyanamid* was "*clearly consistent*" with the wording of the Remedies Directive.

28. In view of the fact that the terms of Regulation 47H(1)(a) are virtually identical to those in Regulation 8A(2)(a) and the *American Cyanamid* principles do not differ from the *Campus Oil* principles, I find these authorities strongly persuasive of the argument that the application of the *Campus Oil* principles at the discretion of the court under Regulation 8A(2)(a) is not inconsistent with the requirements of the Remedies Directives.

29. I conclude that there is no requirement on a national court to disapply, in the case of Ireland, the principles in *Campus Oil*. The Remedies Directive is permissive in relation to the procedures of the national courts of member states in relation to Article 2(4). In *BAM v. NTMA*, Barrett J. held that the *Campus Oil* principles should be applied by the court in exercising its jurisdiction under Regulation 8A(1) and (2) in proceedings brought under Regulation 8(1)(a). I conclude that they likewise should apply to proceedings brought under Regulation 8(1)(b).

30. The decision of the High Court in *OCS v. DAA* on this point was taken prior to the amendment of the Remedies Regulations and thus, in my opinion, no longer reflects the law in this jurisdiction. In *OCS v. DAA*, in the High Court, Barrett J. held that there was a power to lift the suspension of the contract award decision and held that the application of the *Campus Oil* principles in the circumstances would be incompatible with the requirement of European Union Law. In so doing, he contrasted the position under the Remedies Regulations and those in the United Kingdom. At para. 34 of his judgment he stated that the English and Northern Irish decisions:-

> *"…relate to and are concerned with the quite different legislative wording utilised by the United Kingdom…[These Regulations] effectively enjoin the application of the American Cyanamid principles by the UK courts…This is a position that is quite contrary to that which pertains under the Remedies Regulations…"*

31. On appeal, the Supreme Court noted that the United Kingdom Regulations effectively enjoined the application of the *American Cyanamid* principles. At para. 4.12 Clarke J. stated:-

> *"there is no equivalent provision [to the English Regulation 47H(2)] in the Regulation which requires the Irish courts, in terms, to apply principles equivalent to those utilised in interlocutory injunction proceedings in the public procurement field."*

Subsequent to this judgment the 2015 Regulations and in particular Regulation 8A were promulgated. They are in virtually identical terms to the English Regulation 47H(2) and (3) referred to in *OCS v. DAA*. The Oireachtas therefore reversed the situation referred to in the judgments in both the High Court and Supreme Court where reliance was placed on the absence of an equivalent provision to Regulation 47H(2) in the Remedies Regulations. In those circumstances it seems clear that the Oireachtas intends or, in words of Barrett J., enjoins the courts to employ the *Campus Oil* principles to applications under Regulation 8A(2)(a).

32. Further, it is of some relevance that no challenge appears to have been brought to the United Kingdom Regulations or to the application of *American Cyanamid* principles in determining whether or not to lift the automatic suspension of the power to award a contract on the basis that this is in conflict with the requirements of the Remedies Directive. While I accept that the absence of any challenge is not decisive, the unanimity of the decisions in the United Kingdom provides powerful support for the argument that the provisions of the Remedies Directive do not require a national court to disapply the principles in *American Cyanamid* when considering whether or not to grant an application to lift the automatic stay on the power of the contracting entity to award the contract.

Applying the Campus Oil criteria
33. For the purposes of this application the respondent conceded that the applicant has raised a fair question to be tried in the proceedings. It is therefore not necessary to review the arguments in relation to the applicant's case and the respondent's submissions.

Are damages an adequate remedy?
34. The next question to be considered is whether or not damages are an adequate remedy for the applicant. If the automatic suspension is lifted and the respondent enters into the Framework Agreement prior to the determination of the proceedings the applicant says that it will suffer damage which cannot be compensated by an award of damages. The damage it would suffer cannot be quantified and therefore damages would not be adequate remedy in this case:-

> (1) The applicant will not be able to continue to maintain its highly experienced workforce (due to its having little or no work in the state) in the intervening period and therefore it will be forced to cease its operations in Ireland.
>
> (2) It will suffer a loss of reputation and market position if it is not on the Framework Agreement. It relied heavily on its reputation as a contractor for the respondent in order to tender for work in the United Kingdom. Thus it says it will affect its ability to tender for other projects in the future.
>
> (3) As a result of the loss of the contract it would be obliged to let go its very experienced highly skilled staff in Ireland. Related to this, it says that if the automatic suspension is lifted, its staff may be concerned about their future job security and seek employment elsewhere rather then waiting for a resolution of these proceedings.
>
> (4) The demobilisation of staff will have a detrimental effect on the applicant's ability to resource any works it may receive under the Framework Agreement in the event that it succeeds in its challenge to the tender award.

35. The applicant relied upon *Baínne Aláinn Ltd. v. Glanbia plc* [2014] IEHC 482 where Barrett J. held that damages would be an inadequate remedy in circumstances where the company might go out of business. The applicant also relied upon *Alstom Transport v. Eurostar International Ltd.* [2010] EWHC 2747 (Ch) where Vos J. held that damages could not properly compensate the plaintiff for the loss of the contract in question as it was "*a highly prestigious contract which would undoubtedly enhance [the plaintiff's] international reputation*." In *NATS (Services) Ltd. v. Gatwick Airport Ltd*. it was held that damages would be an inadequate remedy where the loss of the contract to provide air and navigation services at Gatwick Airport would have *"a substantial effect on the good will and trade reputation of [the plaintiff] which it would be impossible properly to calculate in terms of damages."* In *DWF LLP v. Secretary of State for Business Innovation and Skills* [2014] EWCA Civ 900, the Court of Appeal found that it would be quite impossible to quantify fairly the loss or damage to an established insolvency team and also the loss of reputation.

36. In reply, the respondent argued that the courts generally take the view that damages will be an adequate remedy for challengers in procurement proceedings. It pointed to Article 2(d) of the Remedies Directives which requires that member states make provision for the power to award damages to persons injured by the infringement and Regulation 9(6) of the Remedies Regulations expressly provides that:-

> *"[t]he Court may award damages as compensation for loss resulting from a decision that is an infringement of Community law, or of a law of the State transposing Community law."*

37. I do not accept that reputational damage arising from the loss of a tender competition *per se* will warrant the conclusion that damages are an inadequate remedy for an applicant. This would clearly be inconsistent with the existence of damages as a remedy in procurement cases. No doubt success in any particular procurement process enhances the ability of the successful party to tender in subsequent competitions. On the other hand, parties frequently unsuccessfully participate in tender procedures. It is inevitable that parties will not be successful in every tender competition. It does not unduly inhibit them in subsequent competitions. It is in those circumstances that the allegation of reputational loss arising out of a failure to win this contract requires to be assessed.

38. Further, it was held by Bermingham J. in *O'Kelly Brothers Civil Engineering Company Ltd. v. Cork City Council* [2013] IEHC 159 that damages were an adequate remedy and appropriate remedy in a procurement case. The applicant in this case has not established that the contract at issue is of such an exceptional and prestigious character as in *Eurostar* or *Gatwick Airport* as to warrant the conclusion that the loss of the contract would cause such significant reputational damage as to be incapable of compensation.

39. I am not satisfied that the applicant has made out a case that damages would be inadequate to compensate the applicant for any loss of reputation or market position arising out of its failure to win the contract the subject of these proceedings.

40. The courts have frequently held that loss of profit and staffing issues that arise where an economic operator is unsuccessful in a tendering process will not be sufficient to establish the damages provided an inadequate remedy. In *European Dynamics SA v. HM Treasuries* [2009] EWHC 3419 (TCC), Akenhead J. held that there was no obviously insuperable difficulty in assessing damages and in

fact set out a possible method of evaluation of damages in the case of a framework agreement. In *Lowry Brothers Ltd. v. Northern Ireland Water Ltd*. [2013] NIQB B23, McCloskey J. was concerned with a framework agreement and held as follows at para. 38:-

> *"[i]n commercial cases generally, expert forensic accountants, duly aided by discovered documents, rarely display any inhibitions in constructing and advocating a claim for financial loss. I accept that, from the Court's perspective, there would be several shades of grey in the exercise. However, Courts are well used to grappling with all kinds of claims for damages. Moreover, the standard of proof to be applied is that of the balance of probability. I find much common sense and wisdom in the approach of Aikenhead J (supra), with which I concur [European Dynamics]. While damages may not be easily assessed, this does not give rise to the proposition that damages would be inadequate. There is a logical gulf between the two... Finally, the prospect of sharp differences of calculation and opinion on the part of competing forensic accountants has no bearing on the adequacy of damages as a remedy."*

41. Irish courts have quantified damages in respect of "*loss of chance*" claims in *Vavasour v. O'Reilly* [2005] IEHC 16 and indicated that they could be assessed in *Minister for Communications v. Figary Watersports Development company Ltd*. [2010] IEHC 541. It is well settled law that a difficulty of quantifying damages will not warrant the conclusion that damages are an inadequate remedy. In *Curust Financial Services Ltd. v. Loewe-Lack-Werk* [1994] I I.R. 450 at p. 469 Finlay C.J. held that the "*difficulty, as distinct from complete impossibility, of assessment was not a ground for characterising the award of damages as an inadequate remedy*." This accords with the English cases *Indigo Services (UK) Ltd. v. The Colchester Institute Corporate* [2010] EWHC 3237 (QB) at para. 33 were the Court concluded that:-

> *"…quantification of the profits which would be earned by Indigo over the period of the contract would be inherently difficult, and necessarily very imprecise, though of course an operation which the court can, if required, carry out."*

In *Halo Trust v. Secretary of State for International Development* [2011] EWHC 87 (TCC), it was held that the plaintiff's likely losses including redundancies, redundancy costs management and overhead losses were eminently quantifiable and it was probable that such damages would provide an adequate remedy. For these reasons, I do not accept the applicant's second, third and fourth arguments, set out above, that damages would be an inadequate remedy in this case.

42. Finally, there is the applicant's argument that if the automatic suspension is lifted the company will cease to carry on business in the state. *Prima facie* if a business will probably cease to trade if an injunction is withheld, damages are not an adequate remedy. The applicant says it "*will lose most, if not all, of its highly trained resources and management to competitors, such that its' position in the overhead line market will be damaged irretrievably, and probably, terminally.*" While it has other work, this is miniscule compared with the volume of work previously performed for the respondent. It will be forced to cease operations in Ireland.

43. This evidence was not contested by the responded. It argued that the loss, if the applicant's evidence was correct, was inevitable, whether or not the suspension was lifted, as the applicant would have no work from the respondent unless and until it succeeded in these proceedings and it succeeded in winning a place on the Framework. Therefore this was not an answer to its argument that damages would provide an adequate remedy.

44. I do not accept the respondent's submission. The applicant has placed evidence before the Court, which is not controverted, that there is likely to be a real issue retaining staff in the absence of work. In fact the respondent and the notice party actually agree with the applicant on this point and the fact that it will be very difficult to start again from scratch, so to speak, at the end of these proceedings. That being so, on the basis of the evidence before the Court, I accept that damages would not be an adequate remedy for the applicant were the suspension lifted.

45. At the hearing of this application the applicant gave an undertaking as to damages. The question therefore arose as to whether or not damages would provide an adequate remedy for the respondent if the automatic suspension was not lifted until the determination of these proceedings. For the reasons more fully discussed under the heading of "*Balance of convenience*" below, I conclude that damages could not compensate the respondent adequately or at all for the losses which would flow if the suspension were not lifted by the Court.

Balance of convenience

46. As damages would not adequately compensate either party, it is necessary to consider the balance of convenience. The respondent identified five particular issues of critical public importance which it says means that the balance of convenience clearly lies in favour of lifting the automatic suspension.

47. For as long as the award is suspended the respondent has no independent contractors capable of assisting its staff in the event of a significant damage to the transmission or distribution system. It says it is essential that it enters into these contracts so it can deal with urgent events such as storms. In the case of all but small category storms, which might create limited damage, it cannot deal with the repairs required to overhead power lines caused by storms without procuring services from external sources. At para. 12 of his second affidavit Mr. Mulvaney states:-

> *"[i]n a significant storm, having contractors available to ESB could easily be the difference between people being without power for a week as opposed to a day. Loss of electricity often leads to loss of water and heat and in lower-temperature storms, the lack of heat can be particularly serious for the safety and well-being of individuals. Further, the longer it takes to deal with fallen lines the longer there is a risk to public safety."*

The applicant contests this point and says that the respondent has greatly exaggerated the situation. The Framework Agreement requires a minimum of two teams of 12 from each of the six successful bidders *i.e.* 144 technicians, whereas the respondent has a staff of 850 available to do it. It is in a position to rely upon its own staff or to access assistance from Northern Ireland or England and Wales to meet emergency situations. In reply, Mr. Mulvaney acknowledges a very severe storm may be a once in twenty years event but points out that such a storm may of course occur at any time and the respondent must be prepared to deal with severe weather events. In responding to Storm Darwin in February, 2014, the respondent relied upon 246 workers from seven framework contractors in addition to approximately of 100 staff from Northern Ireland, Wales, an Irish company working in England and an English power company. He points out that the respondent cannot rely on other utilities to release staff and that such staff do not have the necessary safety approvals to work on the ESB Network and thus must work alongside ESB staff.

48. Notwithstanding the applicant's submissions that the respondent has grossly exaggerated the risks and difficulties that might arise in the event of major extreme weather events, it cannot say that such an event will not happen during the period of the automatic suspension. It acknowledged that there were occasions during the last 13 years when it helped the respondent deal with "*smaller emergencies*". I am satisfied that the absence of a framework agreement creates a very serious issue in relation to the security of

supply and the safety of supply of electricity throughout the state. This is sufficient to determine that the balance of convenience lies in favour of lifting the suspension.

49. The second issue relates to the ongoing and critically important programme of works to upgrade and maintain the distribution and transmission systems which cannot proceed in the absence of contractors. As the owner of the transmission network, the respondent is responsible for carrying out the construction and maintenance of the high voltage 400kV, 220kV and 110kV transmission system. EirGrid as the transmission system operator plans the maintenance and development of the transmission system and issues a programme of work to the respondent. The programmes in place for 2016 cover the refurbishment programme of medium voltage networks (10kV and 20kV over 2,750 kilometres), national medium and low voltage pole inspection and replacement programme, rural low voltage refurbishment programme (400 groups) and urban low voltage refurbishment programme (3,500 network spans). In order to fulfil its obligations the respondent plans for investment in new connections, network reinforcement and connection of distribution renewal energy generators. Mr. Mulvaney says the contractors are required for the delivery of all works streams across the entire network. Its ability to deliver the 2016 programme of works is seriously compromised by the suspension of the Framework Agreement. He states that delays have knock on effects and increase safety risks. Works on the distribution network predominantly require to be carried out during the period of March to October in order to allow for planned outages. In order to set up an outage, significant planning and coordination is required by EirGrid. Mr. Mulvaney stated that it was typically necessary to provide contractors with at least eight weeks notice of works on the transmission system to allow time for engagement with land owners and other preparations. He detailed upcoming outages on the transmission system and works on the distribution system which had been cancelled to date and those which might be at risk of cancellation in the future if the suspension on the award of the contract is not lifted. Particular reference was made to the Ballyvouskill-Tarbert 220kV outage planned from 29th March to 8th July, 2016. Work on this line is part of a bigger project involving the connection of four new 220kV substations to facilitate wind farm connections in the south-west. If the work is not done on time there is the potential for serious implications for the wind farm developers and for the ESB and EirGrid as discussed below.

50. Much of the detail was disputed by Mr. Innis on behalf of the applicant on the basis that the respondent frequently had not adhered to its schedule of works in the past. Works were often reprogrammed, withdrawn or postponed. Works initially scheduled for completion by 2015 were now scheduled to be completed in 2023. The alleged urgency in relation to the programme of works was greatly exaggerated. If it was as urgent as the respondent alleges, it would have either concluded the procurement procedure earlier or it would have extended the 2013 Framework Agreement.

51. I cannot resolve any of the conflicts of fact that emerge from the affidavits of the parties and I do not attempt to do so. Even accepting the evidence of the applicant in relation to rescheduling of works, it nowhere disputes that the extensive programme requires to be carried out, that the respondent requires to employ the contractors in order to complete the work and that the works will all be put on hold pending the outcome of the proceedings. The works are significant, systemic and the longer they are postponed the greater the likelihood of breakdown, outage, insufficient supply and other consequences for consumers of electricity.

52. There was no dispute in relation to the third issue identified by the respondent: if the contract is not awarded this poses a significant difficulty for the successful tenderers. The successful tenderers were anticipating work from the respondent from mid January. They are now faced with the prospect of delay for an unknown number of months before the contract may be awarded (or indeed a re-tendering process necessitated). In those circumstances each of the successful tenderers face the risk of demobilisation of staff identified by the applicant itself. The notice party to these proceedings indicated that it may need to start laying off staff in the short term. From the perspective of the respondent, a demobilisation of the workforces of the successful tenderers could have very serious consequences for the state if a storm hits the country and the contractors are not available to assist in carrying out urgent repairs. The workers in question are highly skilled and specialised in overhead lines. If they cannot carry out the anticipated work many of them may leave the country in search of work elsewhere. Mr. Mulvaney points out that it would take significant time for the successful tenderers to remobilise staff when ultimately the respondent would be in a position to conclude contracts. There may be a further delay in mobilisation as re-employed staff maybe required to go through a robust re-assessment and approval process prior to returning to work on the ESB Network.

53. In addition to the difficulties clearly posed to the ESB by this scenario, there is the obvious difficulty and hardship being sustained by the six successful tenderers which precisely mirrors the applicant's own case in these proceedings.

54. The fourth issue identified by the respondent is the difficulty in facilitating renewable energy connections. The respondent must facilitate the connection of generators of renewable energy to the network and this requires local network extension and reinforcement work for generators to connect to the transmission and distribution systems. Mr. Mulvaney points out that the delivery of the renewable generator connections programme is critically dependent on contractor resources. This is because the workload to build the transmission and distribution networks to connect these generators cannot be delivered by internal ESB staff alone. He says that without the Framework Agreement being in place there is considerable risk over the completion of about 500MW of transmission and distribution connections under construction in 2016. The developers are dependent on the programme commitments to secure finance for their own generator installations (wind farms, biomass, CHP plants etc) as well as their network connection projects. Many of the connections are time critical as eligible renewable generators must be connected to the transmission or distribution network and be operational by the end of 2017 in order to avail of a government support scheme for renewable energy (the Renewable Energy Feed in Tariff Support Scheme or REFIT). The failure to build the transmission and distribution networks necessary to connect these generators in time could result in claims against the respondent or EirGrid on their connection contracts and could impact on the government strategy for delivery of 40% of electricity from renewable generation. Mr. Mulvaney's evidence in this regard was not contested by the applicant.

55. The fifth issue identified by the respondent relates to recent issues. Certain important works where identified in late 2015 as part of a signalling maintenance programme including works relating to defective poles across 1,500 kilometres of network were due to be allocated to contractors in January, 2016. These include the replacement of approximately 1,000 wooden poles which "*contain substantial decay*" and require to be completed as "*a matter of urgency*". Mr. Mulvaney says that failure of these poles could result in fault on lines with serious risk to public safety. Mr. Mulvaney pointed out that the respondent had already fully deployed its own staff in other areas of work with equal or even higher importance and it was imperative that it had access to contractors without delay to enhance its ability to deal with, in particular, pole safety works. The arrival of further storms in coming weeks may further compromise the respondent's ability to deal with other safety issues as staff are redeployed to deal with the aftermath of storms.

56. I accept that on an interlocutory application such as this, the court cannot resolve conflicts of fact upon affidavit. However, I am satisfied that there are sufficient matters which are not disputed by the applicant to enable me to assess whether or not the balance of convenience in this case lies in favour of lifting the suspension. In my judgment, the respondent has made out its case that the balance of convenience lies in favour of lifting the suspension. In addition to the points which the respondent makes in respect of issues affecting it, the Court is entitled to have regard to the effect the suspension of the award of the contract has on other

parties. Firstly, there is clearly a significant detrimental effect upon the successful tenderers who are unable to work and therefore may be unable to retain *their* staff or may be forced to make some or all of *them* redundant. These staff may no longer be immediately available to the successful tenderers when the contracts are finally awarded. This will result in a delay in recruiting the staff and therefore ultimately in carrying out the contract work required. There is also the very significant problem of delays in connecting renewable energy generators to the grid. They risk losing REFIT grants and this in turn may render their projects uneconomical. They may also find that their funding is threatened. If this occurs it is likely to have a knock-on effect on the government strategy in relation to renewable energy, as well as the State's obligations to increase the supply of renewable energy (and reduce our dependence on non renewable energy). Finally, and most obviously, this is a public utility which provides essential services to the entire state. It is critical that there is security of supply and safety of supply. Any question over either of these issues weighs very heavily indeed in the balance of convenience.

Decision
57. In summary, I am satisfied in the circumstances that damages would not be an adequate remedy for the applicant if the suspension is lifted. For the reasons set out in the discussion of the balance of convenience, I am satisfied that damages would not be an adequate remedy for the respondent if I were to refuse to lift the suspension. Turning then to the balance of convenience, I hold that the balance of convenience clearly favours the lifting of the suspension in the circumstances of this case. Any one of the five issues advanced by the respondent would be sufficient justification for this conclusion in my opinion, but cumulatively they are unanswerable. This is particularly significant in the light of the facts which were not contested by the applicant.

58. If I am incorrect in applying the principles of *Campus Oil* in the exercise of the jurisdiction conferred under Regulation 8A(2)(a) and instead, the application should be considered in the light of the provisions of Regulation 9(4) (reflecting Article 2(4) of Remedies Directive) the result would be the same. Under Regulation 9(4) 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 Court may take into account the interests of the successful tenderers, the generators of renewable energy and the state as well as the general public interest. In so doing, the Court may decide not to make an order when its negative consequences could exceed its benefits. The benefit if the suspension is not lifted would be the protection of the procurement process and the protection of a potentially wronged eligible person (the applicant) from suffering unjustifiable damage. Without in anyway minimising the importance of either of these two matters, I have no hesitation in deciding that the negative consequences of refusing to lift the suspension in this case could not only exceed, but could significantly exceed, the benefits of refusing the application. Thus if I am required to ignore the *Campus Oil* criteria in order to give full effect to the Remedies Directive and the applicant's rights there under, and determine this application by reference to the criterion as set in Article 9(4), in the exercise of my discretion I grant the respondent the relief sought.

Conditions
59. The court is permitted by the provisions of Regulation 8A(3) if it considers just so to do to specify that the order lifting the automatic suspension shall "*operate subject to there being satisfied one, or more than one, condition that it determines to be appropriate and specifies in the order.*" In this case the applicant proposed two alternative conditions which could be attached to the order in the event that the Court decided to lift the suspension. They are:-

> *"(i) such contracts as are concluded with each of the six preferred bidders will be interim contracts only and will include an express term that they will terminate automatically upon this Court making an Order in terms of any of paragraphs (a), (b), (c), (d),(e),(f),(g),(h),(i),(j),(k),(l) and/or (m) of the Notice of Motion issued on behalf of the [the applicant] on 26 January 2016;*
>
> *(ii) pending the conclusion of these proceedings by Order of the Court or compromise between the parties, [the respondent] will admit [the applicant] to the Framework which is the subject of the proceedings on an interlocutory basis and will conclude an interim contract in identical form to that concluded with the other contractors so admitted, which contract will terminate automatically upon the conclusion of the within proceedings in the event that this Court does not make an order in favour of [the applicant] in terms of any of paragraphs (a), (b), (c), (d)),(e),(f),(g),(h),(i), (j),(k),(l)and/or (m) of the said Notice of Motion dated 26 January 2016".*

60. The respondent argued that these conditions are inconsistent with the jurisdiction being exercised by the Court in this case. The order sought in this application is an order pursuant to Regulation 8A of the Remedies Regulations "*permitting the Respondent to conclude the contract at issue in the within proceedings.*" Thus, the Court is asked to lift the automatic suspension and to permit the respondent to conclude the Framework Agreement with the six successful tenderers. It submits that the only possible contract that can be concluded is the contract that is the subject of the award. If the Court were to make an order subject to the proposed conditions the Court will in effect authorise the respondent to conclude a contract that was not the subject of the procedure.

61. I accept the submissions of the respondent. The proposed condition (i) clearly limits all contracts with each of the six preferred bidders as well as the applicant to interim contracts which will terminate automatically if the applicant is successful in these proceedings. That is not the contract for which the tenderers tendered. It may be uneconomic for the successful tenderers. Their staff may find the uncertainty sufficiently worrying that they nonetheless may face the demobilisation issues discussed above. In any event it is not at all clear to me that it would comply generally with the requirements of procurement law. I refuse to attach proposed condition (i) to the order.

62. Proposed condition (ii) likewise gives rise to unworkable difficulties. It requires that the applicant and the respondent conclude a contract in identical form to that concluded with the six successful tenderers. But this begs certain questions. Is the applicant to contract on the terms of the least expensive tenderer, or on its own terms, or on some sort of mean? How is this to be determined or policed? Presumably there are terms other than price which vary between the tenderers. Is the respondent obliged for the duration of the proceedings to contract for work on (from its perspective) less favourable terms than those offered by the six winners? Furthermore, the tenderers were successful in a competition to award work to six contractors. Presumably they calculated the value of the work they were likely to be awarded if they were placed on the Framework Agreement when preparing their tenders. If that work is now to be distributed between 7 rather than 6 contractors for the duration of these proceedings it will have an impact on their turnover at the very least. I have no evidence as to how the work is to be allocated and no information at all as to the possible impact this could have upon them. If the applicant is to be awarded sufficient work to keep its staff employed in the state for the duration of the proceedings, the impact upon the other tenderers is likely to be not insignificant at the least. In the circumstances, I decline to make an order that may have unknown, detrimental consequences for parties who are not before the Court and I refuse to attach proposed condition (ii) to the order.

63. I grant the respondent the relief sought as set out at para. 3 of the Notice of Motion dated 29th January, 2016.