Neutral Citation Number: [2025] EWHC 63 (TCC)

Case No: HT-2024-000023

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

Rolls Building
Fetter Lane
London, EC4A 1NL

Date:17th January 2025

**Before** :

**MRS JUSTICE JEFFORD**

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**Between :**

ONE MEDICARE T/A ONE PRIMARY CARE LLP

**Claimant**

**- and -**

NHS NORTHAMPTONSHIRE INTEGRATED CARE BOARD

**Defendant**

**-and-**

**DHU HEALTH CARE CIC**

**Interested Party**

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Simon Taylor (instructed by Veale Wasbrough Vizards LLP) for the Claimant
Jen Coyne (instructed by Mills & Reeve LLP) for the Defendant
Patrick Halliday (instructed by Anthony Collins Solicitors LLP) for the Interested Party

Hearing date: 25 June 2024

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# JUDGMENT

**MRS JUSTICE JEFFORD:**

1. This is an application by the defendant, NHS Northamptonshire Integrated Care Board ("the ICB"), under regulation 96(1)(a) of the Public Contracts Regulations 2015 to lift the automatic suspension imposed by regulation 95 of the Public Contracts Regulations 2015 together with an application by the claimant for expedition.

2. For these applications, the court had the evidence of:

   (i) For the defendant/applicant, three statements of Sarah Stansfield, Chief Finance Officer and three statements of James Barry of the defendant's solicitors.
   (ii) For the claimant/respondent, two statements of Michael Beverley, Vice Chairman and non-executive director; two statements of Rachel Beverley-Stevenson, Executive Chairman; and two statements of James Piper of the claimant's solicitors.
   (iii) For the interested party, two statements of Elizabeth Amias, Deputy Director of Service Development.

***Background Facts***

3. On 23 June 2023, the ICB issued an invitation to tender ("ITT") for the contract to provide the Urgent Care Centre at Corby. As described by the ICB, an Urgent Care Centre ("UCC") is a treatment centre providing treatment for illness and injury requiring immediate care but less serious than that provided at an Accident and Emergency Department in a hospital. The incumbent provider of these services was the claimant, referred to as One Primary Care or OPC.

4. The ITT provided for an assessment to identify the most economically advantageous tender by reference to (i) a price analysis (scored on a pass or fail basis); (ii) a quality evaluation against defined criteria weighted 90% of the total score and with a requirement that the tenderer must score a minimum of 60%; and (iii) a social value evaluation, weighted 10% of the total score.

5. OPC and 4 other tenderers submitted tenders within the deadline of 27 June 2023. Following the evaluators' evaluation of the quality and social value criteria, the ICB held a moderation meeting at which the final scores were reached. On 2 January 2024, the ICB sent standstill letters to the tenderers notifying them that the tender of DHU Healthcare CIC ("DHU"), the Interested Party, which is a not for profit community interest company, had been identified as the most economically advantageous and that the ICB intended to award the contract to DHU. DHU had scored 64.55% and OPC, which had ranked fourth, had scored 55.2%.

6. On 25 January 2024, OPC issued its Claim Form. In the Particulars of Claim, OPC made what can be summarised as transparency challenges, scoring challenges, and conflict of interest challenges. For the purposes of this application, the ICB accepts that the claim discloses a serious issue to be tried. The ICB filed its Defence on 21 March 2024.

7. The existing or old contract was due to terminate on 31 March 2024. Following negotiations with OPC, the ICB signed a contract variation with the claimant on identical terms to the existing contract ("the interim contract") pursuant to which OPC has continued to provide services for the UCC. That interim contract is terminable on 3 months' notice.

***The test***

8. A clear and helpful summary of the issues and the relevant test on this application is set out by O'Farrell J in *Camelot UK Lotteries Ltd. v Gambling Commission* [2022] EWHC 1664 (TCC) at [48]:

> *"(i) Is there a serious issue to be tried*
> *(ii) If so, would damages be an adequate remedy for the claimant(s) if the suspension were lifted and they succeeded at trial; is it just in all the circumstances that the claimant(s) should be confined to a remedy of damages?*
> *(iii) If not, would damages be an adequate remedy for the defendant if the suspension remained in place and it succeeded at trial.*
> *(iv) Where there is doubt as to the adequacy of damages for either of the parties, which course of action is likely to carry the least risk of injustice if it transpires that it was wrong; that is where does the balance of convenience lie?"*

***The ICB's case***

9. As I have said, the ICB accepts that there is a serious issue to be tried.

10. The ICB contends that this is an unexceptional contract for urgent care services in the health care market. The same types of contracts are regularly advertised. The claimant has and will continue to compete for such contracts and in all probability win contracts:

    (i) Damages are an adequate remedy for OPC because, if the claim is successful, the loss it will have suffered is a loss of profit which is readily calculable.
    (ii) In contrast, the ICB submits that it will suffer unquantifiable loss should the suspension be maintained and the ICB succeed at trial. The service benefits from the new contract will be delayed. The interim contract is failing to reach performance targets in relation to triage times, with an increased risk to patients, and that is likely to continue. The loss is one of quality of service and quality of patient care, with an increased risk to patients and a risk of loss of public confidence.
    (iii) Accordingly, the ICB says that, if the court even reaches the point of considering the balance of convenience, the balance of convenience very much falls in favour of lifting the suspension.

11. DHU supports the ICB's position. The evidence of Ms Amias is largely directed to the benefits which DHU says it will bring to the ICB. A key aspect of DHU's submissions, however, was that OPC had failed to offer any cross-undertaking in damages at all to the ICB and only a limited cross-undertaking has been offered to DHU.

***OPC's case***

12. The key issue on OPC's case is that damages would not be an adequate remedy. Mr Taylor set out the legal framework as follows:
    (i) The relevant test is whether it is arguable that damages would not be an adequate remedy (*Draeger Safety UK Ltd v London Fire Commissioner* [2021] EWHC 2221 (TCC) at [41]).
    (ii) The court may take account of the difficulty in assessing damages based on the loss of a chance and the speculative nature of the ascertainment.
    (iii) If the refusal of an injunction would put a party out of business, it is likely that no damages would adequately compensate for that (*Camelot* at [87]). It will be relevant to consider the extent to which lifting the automatic suspension would have a real and disruptive effect on the claimant's remaining business and finances which is difficult to quantify – see *Central Surrey Health Ltd. v NHS Surrey Downs CCG* [2018] EWHC 3499 (TCC) at [56]-[57].
    (iv) The loss of a highly skilled workforce with skills not widely available may result in damages not being adequate.
    (v) The court may consider the effect on the wider community and healthcare areas served by the claimant if there is a knock on effect to other contracts that it delivers.
    (vi) Loss of reputation and market position may be relied on to establish that damages are not an adequate remedy where loss of an uniquely prestigious contract is likely to impact on prospects of success in future tenders but cogent evidence is needed.

13. OPC's case against that background is that damages would not be an adequate remedy because of the cumulative effect of various business impacts. The ICB has identified no relevant or quantifiable loss and damage that it may suffer and/ or no loss that is sufficiently tangible to weigh in the balance. Alternatively, any damage is limited to the ICB's being unable to fulfil its desire to contract with DHU on the basis of a disputed bid assessment. So the balance of convenience lies with leaving the automatic suspension in place.

***Adequacy of damages as a remedy for the claimant***

14. The starting point for the ICB's submissions is that damages are an adequate remedy for OPC. The estimated revenue, as pleaded, over the 5 year term of the contract is approximately £40 million excluding VAT. The "normal outcome" would be that the suspension is lifted and the claimant held to this remedy: *Braceurself Ltd v NHS England* [2022] EWHC 1532 (TCC) at [21]; *Openview Security Solutions Ltd. v The London Borough of Merton Council* [2015] EWHC 2694 (TCC) at [70]; *Circle Nottingham v NHS Rushcliffe Clinical Commissioning Group* [2019] EWHC 1315 (TCC) at [18].

15. There is a tension between this "normal outcome" and Mr Taylor's submission that it need be only arguable that damages are not an adequate remedy which would seem to

open the door to many instances in which the court would have found that it was arguable that damages were not an adequate remedy. The starting point for his submission is the reference to the decision of O'Farrell J in *Draeger*. In that case, the judge concluded that the procurement was not of high or unique value but that it was being closely watched by a number of other fire and rescue services and was likely to be seen as setting a standard for improved protective equipment in the sector. On that basis, she said, *"it is arguable that if the automatic suspension is lifted and Draeger is ousted from its position as the incumbent provider of breathing apparatus for LFB, it will suffer a loss for which damages are not an adequate remedy"*. This is, therefore, a statement of her conclusion as to what was arguable on the facts of that case. It illustrates that the court could and should make an assessment of whether there is a realistic risk that damages will not be an adequate remedy. That is why in other cases on which OPC relied the court has said that it will make an assessment of whether the lifting of the suspension will have a real and disruptive effect on the respondent's business or require cogent evidence of the impact of loss of reputation.

***Business disruption***

16. Ms Coyne points out that nowhere in any of the copious witness evidence is it said in terms by OPC that the lifting of the suspension will lead to the destruction of the business. As a matter of fact that is right but it is not necessary for OPC to go that far. In the *Central Surrey Heath* case, for example, Waksman J was satisfied that there could be a real disruptive effect on the claimant's remaining businesses and operating finances which would be difficult, if not impossible, to quantify, and that was sufficient for him to find that damages were not an adequate remedy. What the court will consider is serious financial difficulties that cannot be compensated in damages and which will be all the more serious if they may lead to the result that the business is destroyed.

17. Although not accepting its factual accuracy, the ICB encapsulates OPC's position as follows:
    (i) OPC has made profits from the existing UCC contract and large payments have been made to shareholders.
    (ii) OPC has structured its business so that the old contract (and now the interim contract) subsidises other loss-making contracts which would otherwise be financially unsustainable.
    (iii) OPC was aware that the existing contract would come to an end on 31 March 2024 and that there was no guarantee that it would be re-awarded this (or any other) contract.
    (iv) Nonetheless it made 4 significant loans to a shareholder property company, OMPH, to enable that business to expand.
    (v) There was no financial "backup plan" in the event that OPC was not awarded the contract.
    (vi) As a result there is a risk that OPC will cease to exist by the time of trial.

18. The ICB does not accept that that risk exists and maintains that there are numerous ways OPC's financial position can be improved including by the injection of funds from shareholders.

***The evidence as to impact on and destruction of the claimant's business***
***Cost cutting***

19. OPC submits that there would be immediate and severe disruption to its finances if the current interim contract, terminable on 3 months' notice, were terminated following a lifting of the suspension.

20. In his statement, Mr Beverley describes OPC as operating a lean and relatively low margin business. For example, to year ending 30 September 2023, on a turnover of £28.9 million, the operating profit is £714,511. The confidential figures shown in his statement evidence that the Corby UCC contract was by some margin OPC's most profitable UCC contract. EBITDA on the Corby UCC contract was [REDACTED]; for the next most profitable contract the figure was [REDACTED]. He states that most of the profits from profitable contracts were invested back into the business to support the delivery of services and support a number of unprofitable contracts. In effect, he says, the Corby UCC contract has cross-subsidised other loss making NHS contracts for 5 years. The loss of the Corby UCC contract will require immediate cost cutting and the termination of unprofitable contracts. The loss of the Corby contract will result in a negative EBITDA [REDACTED] in year ending September 2025 [REDACTED].

21. Mr Beverley's evidence is that a core finance team would need to be retained with the result that central cuts would fall disproportionately on the Workforce Management Team, the Operational Team and the Business Development and Growth Team. To break even, he argues that central team costs would need to be cut by a very high percentage [REDACTED]. The knock-on effects would include the termination of unprofitable contracts resulting in loss of service; the need for local contract managers to take on work that is currently supported centrally; and a detrimental effect on the ability to bid for new work.

22. The ICB to an extent does not dispute that OPC may have to undertake cost cutting. On the contrary, it is submitted that the claimant's high costs under its contracts can and should be reduced. OPC relies on agency staff for 20% for primary care staffing and 52% for urgent care staffing. That, Ms Coyne submits, could be reduced by attracting more full time staff, even at increased salaries, and working with local commissioning boards to improve recruitment. As other contracts have also recently terminated, there is a likelihood that overhead costs in the centralised staff team could be reduced.

23. As to Mr Beverley's evidence as to the impact on the centralised staff, the ICB accepts that they may be affected but argues that there is very little evidence as to how and why. It is submitted that the reality is that, if staff reductions are required to address the financial dependence of other contracts on the Corby UCC contract, that is a matter of the financial management of OPC and not the unsuccessful bid. That does not seem to me to be an issue that can be determined on this application and there is at least some evidence that the lifting of the suspension would be causative of these changes and their knock-on effects.

24. It also, Ms Coyne submits, does not follow that unprofitable contracts that have been supported by the profits from the Corby contract will fail. The claimant, it is submitted, can negotiate with commissioning authorities disclosing that their contracts are financially unsustainable and agreeing new terms. This is something the ICB and DHU have experience of doing.

25. Mr Beverley regards the prospect of renegotiation as unrealistic. He points firstly to the fact that the examples given by Ms Stansfield are of Outpatients contracts which are not comparable and that insufficient detail is given for the examples to be meaningful. More importantly, he gives evidence of two instances in which OPC has sought to negotiate contracts on more favourable terms without success. On this application, it would not be right to make any assumption that OPC could improve its financial position in this way.

26. More particularly, Ms Coyne submits that there is no realistic prospect of disruption or destruction of the OPC's business because it has or can be inferred to have other sources of funding which will support it until trial, after which, if it is successful, it will be compensated in damages for loss of profit.

27. The ICB points out that, in its tender in the procurement, the claimant gave an unqualified commitment that it could access *"In addition to the cash balance of* [REDACTED] *One Medicare LLP owns investments to the value of* [REDACTED] *which are realisable should the need arise."* The sums are redacted for reasons of commercial confidentiality but are significant and material. The evidence of Mr Beverley is that this latter figure represents a debtor balance. The ICB submits that that is not credible or consistent with the meaning of "investments" but, in any event, it was identified as a sum that OPC could realise if the need arose.

28. Loans in very substantial sums[REDACTED] were made by OPC to One Medical Property Holdings Ltd. ("OMPH") which are not repayable until dates from February to December 2026. Mr Beverley's evidence is that these loans have been used to fund the purchase and development of medical centres. OPC has no right to call in the loans. To realise the loans would require OMPH to seek to sell one completed development and two medical centres bought because they had development potential. His evidence is that they were long term investments and that their sale now would generate a very limited capital gain which could be contributed to OPC. OMPH has a development portfolio which is currently consuming rather than generating cash. There is a possibility of selling one site in London on which development has not started. That would realise funds for both OMPH and the shareholders but Mr Beverley says:

*"OMPH and OPC would both be reluctant to agree to early repayment of these loans because a loss will be realised which is likely to be avoided if time is available to fully examine each of the alternatives …."*

Mr Beverley further identified two developments on sites where bank funding is in place. Shareholder capital together with OMPH funds is required for these developments which might not be able to progress if the loan is called in early.

29. In summary, Mr Beverley says that *"some capital could potentially be raised by realising three of the loans made by OPC to OMPH. OPC would not be repaid in full. ... Commercially, the damage to OMPH's ability to progress developments and generate profit will be significant, which undermines OMPH's ability to repay the balance of the loans provided to OPC in 2026 and means that it is likely that OMPH will not agree to early repayment."*

30. Even if the investment funds or loans are not available to OPC, the ICB submits that it is highly likely that shareholders would inject funding to enable OPC to continue in existence.

31. The evidence of Mr Beverley is that the claimant is owned by One Medical Property Holdings (OMPH as referred to above) and One Medical Group ("OMG"). Mr Beverley and Mrs Beverley-Stevenson (his daughter) are shareholders of OMPH. They, Jennifer Beverley, the Michael Beverley 2014 Discretionary Trust and Sir Vernon Ellis are shareholders in OMG.

32. It appears, therefore, that the group is highly interconnected in terms of personnel and shareholding and operates to the benefit of the group. That can be seen from the OMPH loans and the manner in which OPC's profits have been deployed to generate business and income in OMPH. The shareholders have benefitted from OPC's profits both in terms of dividends (albeit Mr Beverley's evidence is in small percentages since 2018) and the loans to OMPH where there is common shareholding. As Ms Coyne put it, it is reasonable to expect this funding to be reciprocated in circumstances where the claimant requires temporary assistance by way of capital injection.

33. OPC's evidence is not that the shareholders cannot or will not support the claimant but Mr Beverley says that it would not be commercially rational for the shareholders to do so when the future of the OPC business is uncertain. In his first statement, Mr Beverley said that the shareholders would need to be confident that there is a profitable future for OPC which is primarily focused on NHS primary care contracts. The shareholders will need to consider OPC projections for 2024 and 2025 and the impact of cost saving measures, and their decision would depend on the prospects of OPC returning to profitability. In his second statement, Mr Beverley went further and suggested that if the suspension were lifted, serious consideration would be given to winding down the healthcare business with OPC becoming a shell company because *"its ability to operate as a healthcare business would be fatally undermined through cost cutting and the inability to win new work"*. These are very much self-fulfilling prophecies. The issue is whether the shareholders would support OPC so that it was not in that position. Shareholders' funds are intended to be made available to OMPH for its developments which are themselves in part funded by a loan from OPC which the shareholders know will be repaid over the course of 2026. In those circumstances, despite the protests of OPC, in my view, there is every reason to consider it rational for the shareholders to support OPC.

***ICB's fall back position***

34. Even if there is a risk that OPC will cease to exist before trial, the ICB submits that that risk exists because of OPC's own financial management – OPC has chosen to use this existing Corby UCC contract to subsidise other less profitable or loss making contracts; at the same time it has paid out substantial sums to shareholders and made significant loans but not made provision for the risk that it would not be re-awarded the profitable Corby UCC contract. Damages may not then be an adequate remedy but the justice of the case dictates that OPC cannot take advantage of the situation they have themselves created. Otherwise, there would be an incentive for bidders who form part of a group of companies to run down the financial security of the bidding company in order to be able to advance the argument that OPC relies on in this case. The argument is well made. In this case, however, I make it clear that there is no suggestion that this is a position that OPC has engineered for the purposes of opposing the application to lift the stay and merely reflects how OPC has run its businesses for some years.

35. Drawing the threads of these submissions together, in my view, there is evidence which establishes that the lifting of the suspension is capable of causing disruption to OPC's business which cannot be adequately compensated in damages. Even if OPC undertakes the cost cutting which it and the ICB contemplate and/or re-negotiates some of its non-profitable contracts, that in itself is a disruption which is difficult or impossible to quantify and compensate. However, I am not at all satisfied that that amounts to an arguable case that there will, in fact, be such disruption because of the more realistic likelihood that OPC will be financially supported. I would certainly not accept that there is a real risk that OPC will cease to exist by the date of trial. Even if I am wrong as to whether there is an arguable case that damages would not be an adequate remedy, these are matters that weigh heavily in the balance of convenience which I will come to. Similarly, the fact that the financial position of OPC is one generated by its apparent decision not to make any provision for the possibility that it would not retain the Corby UCC contract is material.

***Loss of opportunity***

36. A further or alternative aspect of OPC's case is that if the suspension is lifted, with the consequence that the interim contract is terminated, there will be a negative impact on the future of the company in terms of loss of opportunities to develop the business.

37. As I have said, the ICB's case is that this was an unexceptional contract for UCC care and that there will be many more for which the claimant can tender. Ms Stansfield in her evidence identified 50 such opportunities since 2016. The claimant is an experienced provider and will continue to hold a number of sites even after current contracts come to an end, as some are expected to do. The ICB submits that it is realistic to envisage that it will successfully bid for more.

38. Mrs Beverley-Stevenson, however, takes issue with Ms Stansfield's figures. Of the 50 opportunities, her evidence is that 5 were withdrawn before award; 15 were Requests for Information, direct award notices or gave a broken website link; 9 were converted into OPC bids of which none was successful; 21 were not bid for by OPC. She sets out reasons why the claimant may not have bid. Since January 2022, OPC has submitted 20 bids of which four were successful but only three proceeded to

contract award. At the time of her statement, OPC was bidding for two further contracts. She says that there are no other bids in the pipeline and little coming to market.

39. In particular, and in any event, OPC relies on the fact that its capacity to bid will be reduced or wholly removed as a result of redundancies in the bid team. That flows from Mr Beverley's evidence that the Business Development and Growth Team will be cut, these being the people who engage with commissioners, source and assess opportunities, and take those bids forward. The evidence in this respect is generalised and there is no specificity as to why this team would be cut when it would appear to be central to the financial future of OPC. I do not consider the prospect of the bid team being significantly compromised as a realistic prediction. The claimant has every interest in bidding for future contracts as that is a key aspect of how it can maintain or improve its financial position. The suggestion that it would make its bid team redundant to the extent that it could not bid successfully makes no sense.

40. Mr Beverley also suggests that it is "highly likely" that OPC's ability to meet financial standing criteria would be reduced. He identifies 3 past instances where that would be the case. Otherwise this suggestion is speculative and I give it little weight.

41. OPC also advances an argument that the new Provider Section Regime ("PSR") under the Health Care Services (Provider Selection Regime) Regulations 2023 will result in sufficiently more direct awards in the urgent and primary market as to meaningfully restrict the claimant's opportunities to obtain future contracts.

42. In *Practice Plus Group Health and Rehabilitation Services Ltd. v NHS Commissioning Board* [2022] 2082 (TCC), decided prior to the coming into force of the 2023 Regulations, HHJ Keyser QC (sitting as a Deputy High Court Judge) considered and rejected such an argument as speculative. The risk that this would happen depended on "the concurrence of a host of circumstances" – that the commissioning board would decide that the incumbent provider was competent to continue to provide the services; that the incumbent was willing and able to continue; that no change of service was deemed necessary; and that the board did not wish to test the market through a procurement exercise. The court concluded at [22] that *"in the circumstances the matter relied on was so speculative and indirect as not to be such as to make it unjust for the claimant to be restricted to a damages claim anyway."*

43. Although the regulations are now in force the factors that go to the probability of their having the impact relied on by OPC remain the same. Ms Stansfield set out in her evidence the steps that an authority would go through to make a direct award, each of which was potentially subject to challenge by suppliers and in her view, as a commissioner of services, a similar number of procurements for primary and urgent care were likely to be put out for open competition. There was no countervailing evidence.

44. OPC also contended that it would no longer be able to meet financial standing requirements if it was not awarded the contract. This is a variation on the theme of its financial position and adds nothing to that argument. In any event, the ICB submits that in healthcare procurements there is commonly a range of financial standing tests

including a guarantee from a parent company. In the procurement in issue in these proceedings there were three ways to meet the test of financial standing. These considerations support my view that this point takes matters no further.

***Reputation and innovation***

45. The threshold for establishing that a company will suffer reputational damage as a result of no more than an unsuccessful bid is a high one. Firstly, for a commercial body, loss of reputation as such is unlikely to mean that damages are not an adequate remedy unless the court can conclude that it will lead to financial loss that is irrecoverable. That was the view of Stuart-Smith J in *Openview Security Solutions Ltd v The London Borough of Merton* at [39]. That is a straightforward proposition because the relevance of reputation to a commercial body is in its contribution to the success of the business. In any event, the very nature of the procurement process involves the premise that the relevant body is seeking the most economically viable tender evaluated against specified criteria. The fact that a bidder, even if an incumbent provider, is not successful does not in and of itself tarnish that company's reputation. If, in due course, the court concludes that it ought to have been awarded the contract, that judgment establishes the rightness of its position. As Coulson J said in *Sysmex (UK) Ltd. v Imperial College Healthcare NHS Trust* [2017] EWHC 1824 (TCC) at [50]: *"... it is fundamentally wrong in principle to say that an award of damages would not restore a reputation lost because of the rejection of a tender, but the award of the contract itself would"*.

46. As the ICB submitted, it is only in respect of contracts of particular prestige that such an irremediable loss may be regarded by the court as suffered. In *Medequip Assistive Technology Ltd. v The Royal Borough of Kensington* [2022] EWHC 3293 (TCC) at [70]-[75], Eyre J drew together the cases in which the court had found the contract to be so prestigious. *DHL Supply Chain Ltd. v Secretary of State for Health and Social Care* [2018] EWHC 2213 (TCC) is illustrative as a contract for the provision of all medical devices and hospital consumables to the NHS.

47. The claimant's position is that this particular UCC is market-leading such that a failure to bid successfully for this contract will have a negative impact on OPC's reputation. Mr Beverley describes it as a flagship for OPC and Northamptonshire. He points to the fact that the price per patient of £93 is twice the price of other UCCs and at a level equivalent to an A&E service. He also relies on additions to the standard UCC specification including Wellbeing Advisers, Continuing Care, Sexual Health Liaison, a Safeguarding Team and Observation Bays. Ms Stansfield's evidence to the contrary is that these are elements of care commonly delivered in the market by UCCs, primary care providers and hospitals. That is confirmed by DHU.

48. I am not persuaded that there is anything like a sufficient basis for me to conclude that this is a market leading contract such that there would be, or is even the potential for there to be, damage to OPC's reputation that cannot be remedied in damages. As Ms

Coyne submitted, if there are unique benefits under the new contract and if there is a judgment in the claimant's favour, it can, in future tenders, rely on the fact that it provided those benefits under its contract for UCC Corby and should have been re-awarded that contract.

49. Mr Beverley further sets out various examples of innovation by OPC and suggests that OPC will be unable to continue such innovation without the UCC Corby contract which is another aspect that cannot be remedied in damages. His evidence is that nearly 40% of the profit generated by the Corby contract has been used to fund innovation and that where found to be successful after trialling it has been rolled out to other sites. Without the profits from the Corby UCC contracts, the opportunity to trial and roll out such innovations will be lost and cannot be compensated in damages. I regard this suggestion as entirely speculative. There is no identification of any proposed innovation at Corby the benefit of which might be lost. There is no consideration of whether innovations can be trialled elsewhere at no or low cost particularly where they could result in costs savings on unprofitable contracts. By the same token, OPC is not losing any benefit that it may have from such innovation which it can refer to and/or introduce to future tenders. There is no evidence of any innovation which it would wish to undertake under the new contract or cannot undertake on other contracts. If there is any loss from wasted investment or any loss of opportunity, it is something that can be compensated and quantified. If the argument is no more than that there might be something that could be done that would improve OPC's prospects of successfully bidding for other future contracts, it is utterly speculative.

***Conclusion on adequacy of damages for OPC***

50. Taking account of all of these matters, I am satisfied, with some hesitation, that to the limited extent of disruption to business there is an arguable case that damages are not an adequate remedy for OPC but I consider that the matters that give rise to that hesitation are powerful factors in the balance of convenience and point strongly to the balance of convenience being in favour of lifting the suspension. In those circumstances, the further arguments as to the adequacy of damages to the ICB are of little relevance but I summarise the position as I see it.

***Adequacy of damages for the ICB***

51. The premise of this consideration is that the ICB has succeeded at trial and that it was right in its evaluation of DHU's tender as the most economically advantageous. The ICB relied on what was said by Eyre J in the *Medequip* case as follows:

> *"47. Particular considerations arise when addressing this question in the context of procurement cases where the defendant will be a public body. ..... There will, however, be circumstances where damages will not be an adequate remedy for a public body. This will potentially be the position where the contract is to provide particular services for the public or to provide those services in a particular way and where the maintenance of the suspension means that for a period of time the services will not be provided or will not be provided in the way desired by the authority. Such an impact on the provision of services by the public body in question will not be*

*measurable in financial terms and damages would not normally be an adequate remedy for a defendant authority in those circumstances."*

The judge went on to observe at [107] to [110] that the decision of the defendant was one reached after reflection and consideration and that the councils were best placed to know how services were being delivered and whether changes would be improvements. He recognised that there would be room for debate and that improvements may not be as great as the defendants anticipated but:

*"110 ..... I come back to the point that the Consortium has decided that it is beneficial for the CES to be delivered in a particular way and on particular terms. If the suspension is maintained the Consortium will not be able to implement that decision for the period of the suspension and for such time thereafter as is necessary to enable the new arrangements to be put into effect. .... the Defendant will not be able to provide the services in the form and on the terms it wishes. That is a loss which cannot adequately be compensated in damages."*

52. The same observations can be made in this case and the ICB says principally that damages are an inadequate remedy where a public authority is unable to provide services in the way in which it wishes to do so.

53. Mr Taylor submits that ICB's case boils down to that single point that it will suffer an unquantifiable loss of ability to operate and provide services in the way it wishes. He is, in one sense, right but that ignores the reasons the ICB wishes to proceed in this way. Mr Taylor further submits that the ICB then seeks to substantiate that case by relying on the perceived benefits of the DHU bid. But, he says, that is the core of the proceedings and OPC's case is that there are no such benefits and that it ought to have scored more highly on technical and quality questions. The contract specification is essentially the same as the existing, so, it is submitted, the perceived benefits come from how DHU intends to perform the services and that reflects no more than the ICB's wish as to how the services should be provided and its wishes should not be given the same deference that the defendant's wishes were given in *Medequip.* OPC has responded fully to ICB's stance in case the court intends to make findings on these perceived benefits but submitted that the court should not engage with the disputed scoring issues on this application. The difficulty with that argument is that it divorces benefit and scoring. In circumstances where the court is considering the adequacy of damages on the assumption that the ICB has succeeded at trial, the court is asked also to make the assumption that, despite the vindication of the ICB's evaluation, there are still no benefits from the DHU bid. At the very least, and on the same argument that OPC advances on its case, the court would only have to consider whether it is arguable that the inability to enter into the contract with DHU would deprive the ICB of its benefits and, therefore, whether it is arguable that the DHU bid does offer such benefits.

54. OPC also relies on its evidence to the effect that it could copy DHU's services during the currency of the interim contract. That does not provide any answer to the ICB's case. The interim contract was entered into to secure the provision of urgent care services during the period of suspension and when it was, or must have been, anticipated by OPC, that the ICB would apply to lift the stay. There is no evidence at

that time or thereafter of any concrete proposal on the part of OPC to mirror DHU's tender or that it would deliver what DHU has offered.

55. In *Teleperformance Contact Ltd. v Secretary of State for the Home Department* [2023] EWHC 2481 (TCC), Constable J considered a similar offer to extend an existing contract and deliver (some of) the benefits of the new contract during the extension period. At [66] he said:

> *"(2) I do not consider a satisfactory answer to this, as advanced by the Claimant, that they (the Claimant) will agree terms to extend the services. It is inevitable that this would in fact require a negotiated extension of services, the outcome of which is uncertain;*
> *(3) Whilst Mr Peachey states that Teleperformance Ltd. would be willing to extend the present agreement on the same terms until judgment was handed down, this ignores the fact that the new procurement was intended to bring benefits which could not be introduced by TCL other than pursuant to a commercial agreement. Mr Peachey accepted in terms that the proposed contracts would deliver benefits. A willingness to "enter into discussions" in relation to providing some of these benefits during any period of extension can plainly not be considered an appropriate basis upon which to concluded that SSHD will be in the same position (but for any losses which could be compensated in damages). It is entirely uncertain whether any such discussion would deliver the benefits."*

In short, I take the same view in this case.

56. The ICB accepts that, save in respect of KPIs, the core specification for the new contract was materially similar to the existing specification for the old contract. That does not seem to me to alter the position and does not change my view in principle. It is the manner of provision of the services which in the ICB's view and on its evaluation (which is assumed for these purposes to be right and lawful) provides the added benefits. Ms Stansfield identifies benefits under the following headings:

(i) Managing patients back into the service
(ii) Electronic triage
(iii) Flexible staffing
(iv) Training
(v) Staff wellbeing
(vi) Integrated service
(vii) Prescribing medicine
(viii) Primary care services
(ix) Preventing A&E admission
(x) Use of technology
(xi) Data integration and reporting
(xii) Continuing and holistic care
(xiii) Local stakeholders
(xiv) Patient feedback
(xv) Environmental

57. In addition, under the new contract, the ICB will introduce three new KPIs with the purpose of encouraging higher standards and improving patient treatment and ongoing observation.

58. In light of Mr Taylor's submission as to how the court should or should not engage with these perceived benefits, the court was provided with a table headed "Summary of the DHU Proposed Benefits At Issue in the (Proposed) Amended Particulars of Claim". The parties also agreed to the amendments and filed a consent order. The document contained a note that:

*"This document is originally produced by the Defendant to address its alternative submission that even if it were correct that when deciding the AtL, the Court cannot reach findings on the Defendant's view of what it has identified as benefits in DHU's tender if these benefits are also matters which are allegedly in issue in the scoring challenge in the APOC, that even on this test the Defendant relies on some benefits that are not under challenge in the APOC."*

59. The purpose of the table was, therefore, to identify benefits which the ICB would rely on even if the court accepted that it could not take into account anything that was subject to challenge in the Amended Particulars of Claim. The table set out the category of benefit that the ICB had referred to in its submissions. By way of illustration, managing patients back into the system was agreed to be new compared with the interim system and, although disputed, said by the ICB to be a benefit. The electronic triage system was said to have equivalence in the OPC and DHU tenders. In respect of the majority of benefits there was alleged equivalence between DHU's future provision and the claimant's provision under the interim contract. The table then referenced the evidence (witness and paragraph number) and the defendant's and claimant's positions as to whether there was a challenge in the Amended Particulars of Claim to this benefit.

60. I do not intend to address each and every one of these perceived benefits. A few examples are sufficient and were highlighted by Mr Halliday on behalf of DHU.

61. DHU's planned provision for managing patients back into the service is materially different from what OPC currently does. To adopt a similar approach, OPC would be seeking to copy an aspect of DHU's bid. The evidence of Ms Amias is that this is a service which DHU is already experienced in providing. For OPC to introduce a similar service it would have to engage with the ICB and other stakeholders; carry out risk assessments; develop a new service model and safety protocols; reconfigure IT systems; and retrain staff. OPC dismisses this as a minor improvement but there is at the least an arguable case that it is a benefit.

62. The electronic triage is an optional digital system for checking in, assessing and prioritising patients on arrival at a UCC. Patients answer questions on a tablet and the system assigns them a priority. Patients may choose an in person triage instead. But Ms Amias' evidence is that most or many patients prefer the digital system which is quick, private and accurate and it frees up staff resources for treatment of urgent conditions such as stroke or sepsis. It, therefore, brings benefits in terms of patient safety, appropriate treatment and speed of treatment. DHU is experienced in providing electronic triage elsewhere and has developed Standard Operating Procedures and training in the system and could introduce it within 2 weeks of starting the new contract. Mr Beverley asserts that OPC could introduce the same or similar system in the same time. Counsel told the court on instructions that it would

take 12 weeks. Ms Amias estimates that it would take OPC at least 8 months to introduce such a system.

63. Ms Amias also sets out a range of patient testing capabilities (referred to a near patient testing capabilities) which DHU will offer to improve diagnostic scope and management of patients, including high sensitivity troponin testing for early diagnoses of heart attacks and cardiac events. The range of tests will be offered to walk in patients as well as through booking by GPs, with some tests available on a same day basis. Mr Beverley responded that OPC offers, or will offer, all but one of these testing capabilities but did not address the manner of provision on which Ms Amias relied.

64. As I indicated, I have not set out these benefits in any greater detail for a number of reasons. Substantial elements of them are regarded as confidential and some are almost impossible to articulate without reference to that confidential information. The offer by the claimant to provide the same benefits implicitly recognises that there are such benefits. At the same time, there is a legitimate concern expressed by the ICB that that would involve reliance by the claimant on confidential documents released to it only within a confidentiality ring. I would add that there is also a legitimate concern of DHU that the claimant could only provide services in a way which matches DHU by copying DHU's tender and there is, in my view, a legitimate concern that the claimant would benefit from DHU's confidential information in that it would be able to rely in future bids on its experience of providing services in the manner of DHU. OPC's answer to this concern is to assert that any healthcare innovations and improvements should be widely shared. Laudable though that view may be, it is wholly inconsistent with the concept of confidential commercial information. Further, the consideration by the court in any detail of these perceived benefits would trespass well into the substantive issues as to evaluation but there is no need to do so because they represent the way in which the ICB wishes to provide the services and have services provided and I repeat what I said above about the decision in *Medequip.*

65. Mr Taylor made reference to the decision of Fraser J in *Lancashire NHS Foundation Trust v Lancashire County Council* [2018] EWHC 200 (TCC) in which he found that damages would be an adequate remedy for the defendant council. At [5], the judge set out that the two bidders pricing was almost identical and that the difference of 4% in the quality evaluation of the bids, in fact, represented only 2 marks. He found that damages would not be an adequate remedy for the claimant Trusts who were the incumbent providers of children's services – not only would there be the inevitable re-organisation of staff but the Trusts had only recently re-organised and further re-organisation and the financial loss would make it difficult for them to maintain other contracts for similar services. Then at [42] – [43[, he said:

*"42. On the other hand, damages would be an adequate remedy for the Council. Given the very slim difference in the costs of provision of the Services by (sic) the Council compared to Virgin, the successful bidder, the financial differential would in any ever either be small or non-existent, But even if that were not the case, the actual services would remain uninterrupted up to the date of judgment in the proceedings, and there would be essentially an accountancy type exercise to compare and compute the financial loss after a trial. That is an entirely different matter, and of a different*

*nature, to the damage that would be caused to the Trusts were the suspension to be lifted and the Trusts succeed at trial.*
*43. I consider the inadequacy of damages to the Trusts to be conclusive on this application. However, in case I am wrong about that, I will also provide my short conclusions on the issue of balance of convenience. .... The only point in the Council's favour is its stated intention and preference to bring Virgin on board as soon as possible, together with the mobilisation period required by that provider. ... Given the nature of the services, their subject matter, and the sector of the population for which they are provided (the children and young people of Lancashire) and the importance to the public interest of these Services, a desire by the Council to get on with the new contract (although entirely understandable) does not weigh in the balance. ...."*

66. It seems to me, therefore, that this case was very different from the present, in which the potential damage to the ICB is not only financial and that is not the sole of primary reason for its desire to get on with the new contract. Rather, the ICB considers, albeit this is disputed, that there are qualitative benefits to be achieved from the new contract. The decision in the *Lancashire* case does not establish some principle that the ICB's wishes or its reasons for those wishes cannot weigh in the balance and, in my view, they should be given considerable weight for the reasons that were expressed by the court in *Medequip*.

67. Returning to the way in which the court should approach the argument as to benefits, I also do not accept that the court is constrained, in considering the potential loss or detriment to the ICB, to confine itself to matters that are not the subject of a challenge by the claimant. At this stage of the test, the court is considering whether, if the ICB succeeds in its case, it will suffer a loss that cannot be compensated in damages. As I have already indicated, if the answer to that is said to be that the putative new contract is no better than the contract that would result from the claimant's tender, the court would find itself in the position of having to assume that the scoring challenge has failed but that the putative new contract would have no benefit for the defendant anyway. In this case, the comparison is made against the continued interim contract and the position is made even more convoluted by the apparent acceptance by the claimant in the evidence that it could provide the services in the same way as DHU. That serves to reinforce the fact that the court is entitled to have regard to how the defendant wishes the services to be provided which in this case would be under a new contract with a new provider and not under a contract with an incumbent that is being varied on an uncertain basis.

68. The ICB further relies on the fact that the claimant has, during the period of the interim contract, failed to meet a Key Performance Indicator (KPI 8) (time to triage being 20 minutes or under for 95% of patients). That KPI was not met from October 2023 to March 2024 and again in May 2024 (by a small margin). Even allowing for winter conditions, that is some evidence that patient care is falling below standards and will continue to do so during the interim contract. Ms Amias on behalf of DHU explains in her evidence that it does not follow that a UCC will struggle during times of increased attendance. She states that DHU met even more stringent targets when the activity in one of its UCCs was over plan and the relevant local hospital was also experiencing a surge. Whatever the merits of the performance of DHU elsewhere, the management of periods of increased attendance – and the winter period is an obvious

one – must necessarily be part of the management of the services and performance of the UCC; the KPI is not differently defined or set for the winter months or other periods when the demand for services may be greater; and it seems to me that the ICB is right to express concern about failure to meet a KPI of this nature and to regard the loss that it causes as one that cannot be met in damages. It is also the case that triaging is one of the areas where the contract with DHU would bring noticeable changes in terms of the electronic triage system which has already been identified by the ICB as one of the benefits of the proposed new contract.

69. Although for the reasons I have given, I have not undertaken a mini-trial on the issue of the merits of the case as to the benefits that the new contract would bring, I bear in mind what was said by Akenhead J in *Solent NHS Trust v Hampshire County Council* [2015] EWHC 457 (TCC) at [38]:

> *"It would be unfortunate not to say tragic if even one person died or suffered unavoidable serious physical harm or metal deterioration as a result of unavoidable delays in the provision of improvements planned by the new contract …. I do not think that the Court should take risks with people's lives and health; by this I do not infer that Solent, if it continued under the existing regime would put "service users" lives at risk but I do infer that the integrated and improved service to be provided under the new contract has a better chance of better outcomes and it would be wrong to risk "service users" not having the benefit of those improvements as soon as possible."*

Taking together the regard to be had to the ICB's wish to provide services in a particular way, the apparent benefits of the DHU provision, the experience that DHU has in this respect, and the time that it would take OPC to mirror this provision (even accepting that it could do so), to maintain the suspension carries with it the risk that patients will be deprived of those benefits for an avoidable reason. That is both a loss to the ICB that cannot be compensated in damages and weighs very much in the ICB's favour in the balance of convenience in any event.

***Balance of convenience***

70. I deal with this shortly as I have already indicated my views. As I have said, I have hesitated in concluding that there is an arguable case that damages are not an adequate remedy for OPC because of the likelihood that it will continue to operate and be properly compensated in due course in damages. The probability that the ICB will suffer loss which cannot be compensated in damages is far greater as it will be unable to provide what it considers the better services during the suspension and they are services which are intended to improve patient care. The balance of convenience is firmly in favour of lifting the suspension.

71. OPC places reliance on the different decision of Fraser J in the *Lancashire* case but, as I have said, that decision reflects the particular facts of that case rather than establishing any principle of more general application. Similarly reliance is placed on the decision of Carr J in *Counted4 CIC v Sunderland City Council* [2015] EWHC 3898 (TCC). That case concerned a procurement for the provision of substance misuse treatment services and the claimant company had been established solely for that purpose and had been the incumbent provider since 2008. In addressing both the

adequacy of damages as a remedy for the claimant and the balance of convenience, the court found that the claimant had a highly and uniquely trained workforce, which it had taken years to develop, with skills not available in the wider market. This would be lost to the claimant and cause irremediable harm. Despite the evidence as to potential cost cutting, the position is very different in this case, where it is the central administrative team that may be lost to OPC and there is no significant evidence of any unique skills. Further, in *Counted4*, there was in contrast, no evidence at all that the defendant would suffer any damage is the suspension were not lifted. Again that is not the position here. In short, each decision turns on its own facts and neither of these authorities, and the approach of the court in these cases, displaces my view as to where the balance of convenience falls in the present case.

***Undertaking as to damages***

72. Mr Halliday submitted that this application could be dealt with without any consideration of the matters that I have addressed for the simple reason that OPC had failed to offer any undertaking in damages at all to the ICB and only a partial and capped undertaking to DHU.

73. Mr Halliday relied on the general requirement set out in paragraphs 5.1 and 5.2 of PD25A. These paragraphs provide that, in the case of an interim injunction, unless the court orders otherwise, the order must include an undertaking in damages by the applicant in respect of the respondent's losses and the court must consider whether to require an undertaking in respect of losses of a third party. These provisions are indicative of the approach the court will take in respect of all injunctions and his analogy is with the suspension that operates to prohibit the ICB from entering into a contract with DHU.

74. More on point, it seems to me, is the observation that it is, as counsel put it, absolutely routine for cross-undertakings to be required as a condition of maintaining the automatic suspension. A slightly modified version of that submission was that it was almost invariably the case that a cross-undertaking was required. No case involving a commercial body was referred to in which the cross-undertaking had not been required. In *Camelot UK Lotteries v The Gambling Commission* [2022] EWCA Civ 1020 at [12], Coulson LJ stated that the case that the suspension should be continued had been *"fundamentally flawed as a result of the failure by the Camelot companies and by IGT to provide the usual cross-undertaking as to damages."*

75. Mr Taylor sought to rely on the decision in *Counted4* in which Carr J did not require an open-ended undertaking in damages and regarded a limited undertaking both as sensible and as striking the appropriate balance. The position of the parties was very different from the present. The claimant was a not-for-profit organisation and, as I have said, had been established specifically to provide substance misuse treatment services to the defendant. OPC, however commendable its expressed aims in the provision of healthcare services, is a trading company with shareholders to whom dividends are paid and the wherewithal to make substantial loans to associated companies.

76. The only reason given by OPC for not offering any cross-undertaking in respect of ICB was that its losses were highly speculative. However, the position has to be considered on the basis that the ICB has succeeded at trial. If it has done so then it will in some measure have established that it was right to regard the DHU bid as the one that scored highest and substantially higher than the OPC bid and was the most economically advantageous. There is then good reason to conclude that DHU would provide better services which would reduce attendance and cost less. That is not highly speculative. In any event, as Ms Coyne submitted, whether there was, in fact, any loss is an issue to be determined if the undertaking is called upon and not in advance. Save in an obvious case (and it is difficult to envisage one), the court ought not to be asked to determine on an application to lift whether there is likely to be any loss and cannot proceed on the basis that, if there might not be, no cross-undertaking should be required. Mr Beverley indicated in his statement that, if the court thought differently, further consideration might be given to the provision of an undertaking but it is the function of the court to decide the application before it and not to suggest how the claimant might approach it.

77. In any event, by the time of the hearing, OPC's position had shifted. In Mr Taylor's written submissions, he stated that OPC would provide a cross-undertaking that:

> *"if following a trial at which OPC is unsuccessful and the Contract Award is not set aside, ICB can demonstrate a direct causal connection between a performance failure by OPC during the period from the order maintaining the automatic suspension to judgment following trial and an increased cost to ICB then it will pay the cost."*

That appears to be a cross-undertaking as to damages that seeks to determine in advance any issue as to causation of loss.

78. Ms Stansfield in her evidence explains the financial loss that the ICB anticipates from the continuation of the suspension. The first element is the difference in payments to the new UCC provider and the claimant with lesser payments being driven by improved services, in particular reducing repeat attendances. The second element flows from reduced attendance at other primary and urgent care services within the ICB's areas. Whether there are such losses and whether they were caused by the maintenance of the suspension would be a matter for the court in due course and it seems to me to add a layer of complication to seek to define what that means at this stage and limit the cross-undertaking accordingly.

79. In the case of DHU, the evidence of Ms Amias sets out three heads of loss. There is the potential that, if the suspension remains in place until judgment, the ICB may then decide not to proceed with the contract, for example due to changes in policy or budget, such that DHU will suffer the loss of profit on the contract. Even if the contract is entered into with DHU, there is a delay in receipt of profits. Delay is causing DHU to incur additional staffing costs, in anticipation of signing a new contract, by holding on to the staff it will require to mobilise and deliver the new contract.

80. Prior to the hearing, OPC had offered no undertaking in respect of the second and third heads of loss but only in respect of the first. That was capped in an amount which represented, on DHU's case, approximately one fifth of its potential loss of

profit. In Mr Taylor's written submissions for the hearing, a capped offer was made in respect of the second head of damages.

81. Following the hearing, OPC's solicitors wrote to the court stating that due to time constraints, counsel had not had time to address the court on the revised offer of a cross-undertaking. In a long hearing, no additional time was sought to do so. The revised offer extended to the third head of loss but remained capped at a little more than the figure previously offered. DHU's solicitors responded the following day pointing out limitations in the manner in which the heads of loss were described. They made the points both that a cross-undertaking is not normally limited to specified heads of damage – the heads of damage had been identified to demonstrate how DHU might suffer loss not to define the scope of the cross-undertaking – and the cross-undertaking was still capped. Both those points were well-made.

82. The absence of the offer of a standard cross-undertaking in damages to either the ICB or DHU is the strongest reason, if not the sole reason, to grant the application to lift the suspension.

***Expedition***

83. The application for expedition was made on 10 June 2024, that is over 5 months from the issue of proceedings and well after the application to lift had been made. It is suggested by the ICB that it is a late tactical application. I agree.

84. In any case, there are no features of this case which point to the need for expedition. Once the decision to lift the suspension has been made, the only reason to expedite the hearing would be the risk that the claimant would fail financially and cease to exist before trial, a risk which is unrealistic. In any event, the complexity of the case and the scope of the issues raised inevitably mean that it will involve a lengthy trial with the concomitant preparation and the demand for substantial time for judgment. Even for this hearing, the bundle ran to nearly 2000 pages with lengthy witness statements and exhibits. Although the subject matter is different, it is indicative of the way in which this litigation will be conducted by all parties. The ICB's estimate of a 15 day trial is, on the face of it, reasonable and the court could not list such a trial on an expedited basis other than by prejudicing other court users who expect a trial in 2025.