THE HIGH COURT

[2018 No. 46 J.R.]

BETWEEN

HOMECARE MEDICAL SUPPLIES UNLIMITED COMPANY

APPLICANT

AND

HEALTH SERVICE EXECUTIVE

RESPONDENT

AND

FREIGHTSPEED FOR PHARMACY LIMITED

NOTICE PARTY

EX TEMPORE JUDGMENT of Mr. Justice David Barniville delivered on the 29th day of January, 2018

Introduction

1. This is my ex tempore judgment on an application heard by me on Friday, 26th January, 2018. The application was the HSE's application for an order pursuant to Regulation 8A of the European Communities (Award of Contracts by Utility Undertakings) (Review Procedures) Regulations 2010 (as amended) (the "Remedies Regulations"), permitting the HSE to conclude a particular contract, namely a bridging contract, for the provision of storage and distribution services for disposable continence products (the "bridging contract"), with Freightspeed for Pharmacy Ltd. ("Freightspeed"). Freightspeed had successfully tendered for the bridging contract in a procurement process undertaken by the HSE.

Background

2. The applicant in these proceedings, Homecare Medical Supplies ("Homecare"), was unsuccessful in that procurement process and, on 19th January, 2018, brought proceedings seeking several reliefs pursuant to the Remedies Regulations seeking, amongst other things, to set aside the cost criterion set out in the tender documents for the competition and the competition itself, together with the decision to award the bridging contract to Freightspeed. This is the third set of proceedings brought by Homecare against the HSE in connection with the distribution of continence products. Time permits only a relatively brief summary of the background to the commencement of this, the third set of proceedings between the parties.

3. The HSE had originally entered into three contracts for the provision of continence products and for distribution services for those products with a company called Ontex Healthcare UK Ltd. ("Ontex") in respect of three HSE regions on the island of Ireland in 2012 and 2013. The duration of those original contracts was to be 36 months but they were extended or rolled over on four occasions, in 2015, 2016, and 2017, with the last of those extensions being made on 24th July, 2017, in respect of the period from 1st November, 2017, to 31st January, 2018. Homecare provided these services under those contracts on the ground under the terms of a contract with Ontex.

4. In 2016 the HSE decided to amalgamate the geographical regions and to divide up the services to be provided into a contract for the supply of products (this is the "products contract") and a separate storage and distribution contract (that is the "distribution contract"). The HSE conducted two procurement process for these two new contracts. Ontex was successful in the procurement process for the products contract. Freightspeed was successful in the tender process for the distribution contract. Homecare was unsuccessful in the tender process for the distribution contract. The HSE reached its decision in those processes in July 2017 and duly informed the successful and unsuccessful tenderers.

5. Homecare commenced two sets of proceedings arising out of that procurement process. The first set of proceedings was commenced on 10th August, 2017, (the "review proceedings"). In those proceedings Homecare seeks various orders and reliefs under the Remedies Regulations, including orders setting aside or permanently suspending the decision by the HSE to award the distribution contract to Freightspeed, various declarations and damages by reason of the alleged infringement of public procurement law by the HSE in operating the tender process for the distribution contract.

6. The review proceedings were made returnable before the High Court on 23rd October, 2017. An important consequence of the commencement of the review proceedings under the Remedies Regulations, and, in particular under Regulation 8(2) thereof, was that the HSE's ability to proceed to conclude the distribution contract with Freightspeed was suspended and it was unable to conclude that contract without obtaining an order from the High Court under Regulation 8A of the Remedies Regulations.

7. Having brought an application to enter the review proceedings into the commercial list, and such an order having been made on 23rd October, 2017, the HSE then brought an application under Regulation 8A of the Remedies Regulations the lift the automatic suspension to enable it to conclude the distribution contract with Freightspeed. Various affidavits were directed to be exchanged and were then exchanged in respect of that application.

8. In the meantime, Homecare commenced a second set of proceedings on 26th October, 2015, (the "plenary proceedings"), in which it sought various declarations to the effect that Regulation 8A is invalid having regard to Article 15 of the Constitution of Ireland and/or to the Remedies Directive, that is, Council Directive 89/665/EEC as amended by Directive 2007/66/EC and that Regulation 8A is *ultra vires* the provisions of s. 3 of the European Communities Act 1972 as well as damages.

9. The defendants in the plenary proceedings are the HSE and the Minister for Public Expenditure and Reform, Ireland and the Attorney General (the "State"). Directions were given to enable both the application to lift the automatic suspension in the review proceedings and the plenary proceedings themselves to be heard together by me in December 2017.

10. They were heard over the course of three days from the 13th to 15th December, 2017. In addition to the HSE and Homecare, the State was also represented as a party to those proceedings and, in particular, the plenary proceedings, as was Freightspeed. In the course of that hearing the parties relied on an extensive range of legislative provisions, both Irish and EU, and case law from the Courts of Ireland, Northern Ireland, England and Wales and from the Court of Justice of the European Union. Not surprisingly, I reserved my judgment and indicated that I would endeavour to give that judgment as early as possible this term.

11. During the course of the hearing it was repeatedly stressed to me on behalf of the HSE that it was critical that the new contract, namely the distribution contract, could commence immediately on the expiry of the original contracts on 31st January, 2018, and that Freightspeed, as the successful tenderer for the distribution contract, needed approximately one month to ready itself to start with effect from then, so that the HSE would, therefore, need to be in a position to conclude the distribution contract with Freightspeed before 31st December, 2017, in order to ensure that the needs of patients and other end users of the products would not be compromised.

12. In response Homecare made the case that the original contract could simply be rolled over or extended until the review proceedings were determined and that, if they were, no patient welfare issues would arise. The HSE countered that it was precluded from further rolling over or extending the original contracts on public procurement grounds, that the so called "*safe harbour*" provisions in Regulation 72 of the European Communities (Award of Public Authorities Contracts) Regulations 2016 (the "2016 Regulations") did not apply and that, in any event, it should not have to take the risk of infringing public procurement rules by extending the contracts. Homecare, on the other hand, disputed the contention that rolling over the original contracts would breach public procurement law, that they had already been rolled over on four occasions and that, in any event, the "*safe harbour*" provisions in Regulation 72 of the 2016 Regulations would apply. These are issues that I will have to consider and decide in my judgment in the review proceedings. However, they are also relevant to the issues I have to consider in this judgment.

13. In the course of its submissions at the hearing in December 2017 the HSE did raise the possibility that if the stay on the conclusion of the distribution contract was not lifted by 31st December, 2017, it might be necessary for the HSE to go through an emergency procurement process to award the contract on a *pro tem* basis for the distribution of continence products. In circumstances where it was apparent by the time I finished the hearing on 15th December, 2017, that it would not be possible for me to give immediate judgment, or indeed judgment by 31st December, 2017, it appears that on 21st December, 2017, the HSE decided to initiate a process for the award of an interim contract to distribute continence products, this is the so-called bridging contract, and informed solicitors for Homecare of this development by letter dated 22nd December, 2017. The Registrar of the Commercial Court was also informed and was given a copy of the correspondence, together with correspondence from Homecare's solicitors in reply. On sight of that correspondence I directed that the matter be listed for mention before me on 12th January, 2018. On that date I was updated on the position. I was at hearing in another complex and urgent Commercial Court matter at the time.

14. The HSE received tender submissions for the bridging contract from Homecare and from Freightspeed in advance of the deadline of 9th January, 2018. The HSE decided to award the bridging contract to Freightspeed. The contract is for a term of three months with an option to extend for a further period of nine months at three monthly intervals and can be terminated on one month's notice.

15. The invitation to tender published in relation to the bridging contract process states that the purpose of the bridging contract is to maintain a delivery service pending the outcome of the review proceedings and that should the court decide that the HSE can proceed with the distribution contract with Freightspeed, the HSE will terminate the bridging contract at the next expiry date.

16. The HSE informed Homecare of the decision to award the bridging contract to Freightspeed on 15th January, 2018. The award of the bridging contract was and still is subject to a standstill period for a period of 14 days from the date of that letter, namely, up to midnight on today's date, 29th January, 2018, pursuant to the Remedies Directive and the Remedies Regulations. On 19th January, 2018, Homecare commenced these proceedings, the third set of proceedings, which I will call the "2018 proceedings", seeking to challenge the process under which the bridging contract was awarded to Freightspeed and the decision to award that contract on several grounds which are set out in considerable detail in the statement required to ground the application for the review of the award of a public contract filed by Homecare on 19th January, 2018, and in a grounding affidavit comprising some 151 paragraphs sworn by Peter McGuinness on behalf of Homecare on the same date.

17. The fact of the commencement of these proceedings, that is the 2018 proceedings, was brought to the attention of the Registrar of the Commercial Court after 5:30pm on Friday, 19th January, 2018, and it was immediately brought to my attention. I directed that the original proceedings, that is the review proceedings and the plenary proceedings, be listed for mention before me on Monday, 22nd January, 2018. On that date I was furnished with a further affidavit sworn that day by Martin Quinlivan on behalf of the HSE which set out these recent developments. I ascertained from the parties that an automatic suspension on the HSE's ability to proceed with the bridging contract with Freightspeed arose on the commencement of the 2018 proceedings. In light of the concerns which had previously been expressed by the HSE about the need to ensure continuity in the supply of continence products to patients and other end users with effect from 1st February, 2018, and its decision not to extend the original contracts to enable those products to continue to be distributed by Homecare, and the fact that an automatic suspension now arose on the conclusion of the bridging contract with Freightspeed, it appeared to me that a potentially very serious situation could arise with regard to the continuity of supply of the products from 1st February, 2018. This was particularly so as I was, and still am, considering how I will decide the application to lift the suspension in the review proceedings and the plenary proceedings themselves.

18. In those circumstances I raised the possibility that the Court could facilitate an urgent hearing of an application by the HSE to lift the automatic suspension on the award of the bridging contract by virtue of the commencement of the 2018 proceedings. Having obtained instructions, the HSE indicated that it wished to pursue such an application. Homecare was not in agreement and sought to persuade me not to entertain such an application on an expedited basis.

19. However, I was satisfied that the situation was serious enough to warrant an urgent hearing and gave directions to enable the application to be heard by me early on Friday, 26th January, 2018. Through the great industry of both sides, and indeed that of Freightspeed who I joined as a notice party to the 2018 proceedings on 22nd January, 2018, it was possible to hear the application last Friday.

20. The HSE's application is grounded on affidavits sworn by Mr. Quinlivan and Dr. Suzanne O'Sullivan on 23rd January, 2018. A very detailed replying affidavit, comprising some 135 paragraphs, was sworn by Mr. Cosgrove on behalf of Homecare in response on 25th January, 2018. An affidavit was sworn by John Flynn on behalf of Freightspeed on 25th January, 2018, essentially supporting the position taken by the HSE.

21. A second affidavit was sworn by Mr. Quinlivan on behalf of the HSE and two further affidavits were sworn on behalf of Homecare on 26th January, 2018, one by Ms. Curran, a solicitor in A&L Goodbody, and the other by Mr. McGuinness.

22. In addition, I received very helpful written submissions from the HSE and from Homecare and short submissions from Freightspeed supporting the HSE's application. Counsel greatly assisted me with concise oral submissions at the hearing in the relatively short time available last Friday. I have read and considered all of this material. In addition, I have read the papers grounding Homecare's 2018 proceedings and have re-read some of the materials and case law from the review proceedings and the plenary proceedings.

23. Having set out the somewhat tortuous history to the present application, it will be clear that the 2018 proceedings and this application by the HSE arise in very unusual circumstances indeed :-

> (a) where, in the limited time available between the date on which judgment was reserved on the application in the review proceedings and in the plenary proceedings themselves and the date by which the HSE stated it would have to conclude the distribution contract with Freightspeed, if permitted to do so, and indeed up to now, it has simply not been possible to reach a final view on the numerous complex legal and factual issues which arise in those proceedings and to prepare a judgment; and
>
> (b) where there is a real urgency to clarify the legal position as regard the HSE's entitlement or otherwise the conclude the bridging contract with Freightspeed.

The Approach to be Taken on this Application

24. In adjudicating on the HSE's application to lift the suspension in relation to the bridging contract, I must first address the question as to what test I should apply in deciding the HSE's application to lift the suspension. The HSE says that I should apply the test in *Campus Oil v. Minister for Industry and Commerce (No. 2)* [1983] 1 I.R. 88 that is the "*Campus Oil* test", as this has been done on a number of previous Irish cases in similar territory. Alternatively, it says I can apply the test contained in Regulation 9(4) of the Remedies Regulations.

25. Homecare disputes the application of the *Campus Oil* test and reminds me that it has challenged the application of the *Campus Oil* test in the plenary proceedings and has argued in those proceedings that Regulation 8A of the Remedies Regulations, insofar as it may enjoin the application of the *Campus Oil* test, is invalid on various EU and constitutional grounds. If *Campus Oil* is to be applied, it contends that it should only be done in a way which respects and conforms as far as is possible with the requirements of EU law, relying in this regard on some eminent academic commentary on this issue. It also contends that the *Campus Oil* test is malleable and can be appropriately modified to reduce its divergence from EU law. It further says that if the Court applies the test in Regulation 9(4) of the Remedies Regulations it should refuse the HSE's application.

26. I am acutely conscious that Homecare has challenged the legality of the *Campus Oil* test in the plenary proceedings in which I have reserved judgment. It has launched a full frontal attack on the application of the *Campus Oil* principles. Nothing which I say in this ex tempore judgment should be taken as indicating a view on my part on the merits of the case which Homecare has mounted against the application of the *Campus Oil* test to applications such as the present one brought by the HSE to lift the suspension. I have not reached a concluded view on the merits of that challenge or indeed on any of the other points raised by Homecare in the review proceedings or in the plenary proceedings.

27. For the purposes of this interlocutory application, however, I am going to adopt the approach taken by Costello J. in *Powerteam Electrical Services Ltd. v. ESB* [2016] IEHC 87, ("*Powerteam*"); by Barrett J. in the earlier case of *BAM PPP PGGM Infrastructure Cooperatie U.A. v. NTMA* [2015] IEHC 756; and by Twomey and Noonan J.J. in the subsequent cases of *Beckman Coulter Diagnostics Ltd. v. Beaumont Hospital* [2017] IEHC 537 and *Word Perfect Translation Services v. Minister for Public Expenditure and Reform* [2018] IEHC 1. In *Powerteam*, Costello J. noted that Regulation 8A confers jurisdiction on the court to lift the suspension which it previously did not have. She then stated, and I quote from her judgment:-

> *"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."* (at para.15)

A little later, Costello J. says:-

> *"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)."* (at para. 16)

28. Although, as pointed out by Barrett J. in *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."*

29. Costello J. then addressed the onus of proof in an application such as this brought by the contracting authority, in this case the HSE, but in which the applicant for the review is to be notionally treated as the applicant for an interlocutory injunction to restrain the conclusion of the contract. She held that the applicant, in this case Homecare, bears the onus of proof of establishing in the first place the entitlement to an interlocutory injunction. It is only then, if the court concludes that it would refuse an interlocutory injunction, that the onus of proof then shifts to the respondent under Regulation 8A(2)(b).

30. Costello J. further held that the court should apply the *Campus Oil* test in considering the applicant's notional or hypothetical application for reasons set out at paras. 22 to 32 of her judgment, which I adopt for present purposes and indeed for the purposes of this interlocutory injunction application. A similar approach was taken by Twomey J. in Beckman and by Noonan J. in *Word Perfect* very recently.

31. I am, therefore, going to take a similar approach in ruling on this interlocutory application, although I fully accept that Homecare has advanced at least arguable grounds in the plenary proceedings for impugning the application of the *Campus Oil* test in its classic sense in applications such as the present one. I will apply *Campus Oil* in this application and I will also consider the application in the light of Regulation 9(4) of the Remedies Regulations.

32. In adopting this approach, I will first consider whether, on its notional application of interlocutory relief, Homecare has established that there is a serious issue or fair question to be tried as to the legality of the emergency procurement procedure undertaken by the HSE for the bridging contract. If I find that there is, I will then move to consider whether damages will be an adequate remedy at trial for Homecare. If it would be, then that would be the end of the matter and I would proceed to consider Regulation 8A(2)(b) of the

Remedies Regulations. If it would not be, then I will have to consider whether damages would be an adequate remedy at trial for the HSE were I to refuse to lift the suspension. If damages would not be an adequate remedy for Homecare and the HSE, I will move to consider the question of the balance of convenience.

(1) Serious Issue to be Tried
33. First, I will deal with whether there is a serious issue to be tried. Homecare has challenged the recent procurement process undertaken by the HSE for the bridging contract on several grounds including:-

> (1) the alleged breach by the HSE of the principles of equal treatment and transparency and manifest error in the HSE's evaluation of the cost criterion adopted in the process, namely, the ultimately cost criterion;
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> (2) the alleged unlawful evaluation of tenders by the HSE;
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> (3) the alleged material amendment to the products contract and alleged consequential illegal direct award of that contract;
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> (4) the alleged misinterpretation by the HSE of the circumstances in which the negotiated procedure without prior publication is justified; and,
>
> (5) the alleged circumvention of the automatic suspension applicable as a result of the review proceedings.

34. The HSE does not dispute for the purpose of this application that these grounds of challenge raise serious issues to be tried. This is the correct approach for it to adopt bearing in mind the low threshold to be surmounted. The HSE does, however, contend that I should find that no serious issue to be tried has been raised by Homecare on the basis of a lack of *bona fides* on the part of Homecare. This allegation is made on the basis of an averment in para. 140 of the affidavit sworn by Peter McGuinness on 19th January, 2018, grounding Homecare's application for a review of the procurement process and decision in the 2018 proceedings.

35. The HSE submits that based on a reading of this paragraph Homecare only participated in the recent tender process in order that it may be able to challenge it. This is disputed by Homecare and a number of further affidavits have been sworn on behalf of Homecare on this point in the course of this application, in particular, by Mr. Cosgrove on 25th January, 2018, and by Mr. McGuinness on 26th January, 2018.

36. As I observed during the course of the hearing on Friday, in light of the dispute on affidavit between the parties on this issue and in the absence of any cross-examination of deponents, I am not in a position to and do not propose to determine this application on the basis of any alleged lack of *bona fides* on the part of Homecare in relation to its participation in the recent procurement process. This may, however, be an issue at the trial of these proceedings in due course.

37. I should add that contrary to the submission advanced by the HSE, I also include as a serious issue or issues to be tried the issues raised by Homecare in relation to the validity of Regulation 8A of the Remedies Regulations and, in this context, the legality of the application of the *Campus Oil* test. While time clearly did not permit Homecare to commence further plenary proceedings, and such proceedings would have been unnecessary in light of the existing plenary proceedings, I am fully conscious that Homecare has raised these issues in the plenary proceedings in which I have reserved judgment. They are also likely to arise in the present proceedings should they ever proceed to trial.

(2) Adequacy of Damages
38. Being satisfied that Homecare *has* established that there are several serious issues or fair questions to be tried in the proceedings, I now proceed to consider the question of the adequacy of damage.s

(a) Adequacy of damages for Homecare

39. I first consider the question from the point of view of Homecare. Homecare sets out various grounds on which it says damages would not be an adequate remedy for it should the automatic suspension be lifted but should it then go on to win at trial. These are outlined principally in Mr. Cosgrove's affidavit of 25th January, 2018, at paras. 77 to 103 and are summarised helpfully at paras. 67 to 75 of Homecare's written submissions. Mr. Cosgrove says that lifting the suspension will result in "*drastic, concrete and specific loss*" to Homecare, (at para. 77 of his affidavit). He says that it will have "*immediate and drastic consequences*" for Homecare itself and for its staff (at para. 78).

40. As regards its staff, Homecare says that, if the suspension is lifted:-

> (1) it will have no meaningful work for 45 of its 84 full-time employees with effect from 1st February, 2018;
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> (2) it is likely that these employees will be made redundant and lose their employment, some of them having been with Homecare for more than 20 years;
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> (3) 21 drivers working on a self-employed basis on this part of Homecare's business would no longer be required;
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> (4) Homecare would have to close its Help Centre which it says takes between 10 and 20 calls a day and that this and the loss of its employees will have a prejudicial impact on patients using the products at issue;
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> (5) Homecare would have to vacate the lease of premises in Ballyhaunis and the impact of the lifting of the automatic suspension would be devastating for the remainder of its 84 employees and for its business, and it notes that (on its care) some 60% of Homecare's annual revenue is attributed or is generated from the service it provides under the existing expiry contracts; and

(6) the lifting of the automatic suspension would render moot the judgment which I have reserved on the application to lift the automatic suspension in the review proceedings and would effectively determine these proceedings as the impact of doing so would make the likelihood of the substantive proceedings being maintained remote.

41. In response, the HSE disputes these averments. It places considerable stress on the fact that the bridging contract is for a term of three months with possible further extensions up to a maximum of 12 months, terminable on one month's notice, and that the contract is required purely to address the emergency situation which has arisen due to the fact that the existing contracts for the

supply, storage and distribution of continence products will expire on 31st January, 2018, in circumstances where it has not been possible for judgment to be given on the application to lift the suspension in the review proceedings or in the plenary proceedings. It is not a substitute for the three year contract at issue in those proceedings. It further says that whatever happens in this application the bridging contract will not be awarded to Homecare, nor will Homecare or its supplier Ontex be awarded the distribution contract. Whatever happens in respect of that contract will have to await the determination of the review proceedings and the plenary proceedings. The HSE further says that if the suspension is lifted in respect of the distribution contract, it will enter into that contract and will give notice terminating the bridging contract as soon as it lawfully can.

42. The HSE points to the averment made by Mr. Cosgrove on behalf of Homecare that the losses it will suffer if the automatic suspension is lifted are "*drastic, concrete and specific*" and highlights the short-term nature of the bridging contract. This, it submits, is a case where the losses alleged are classically capable of being compensated in damages. It criticises some of the losses which it is claimed by Homecare will arise as being fanciful and overblown and rejects Homecare's description of the bridging contract as being a commercially critical contract. It further distinguishes the case made here in relation to the potential loss of employees from other cases such as *Powerteam* where the loss of specially skilled staff was a crucial feature in supporting a finding that damages would not be an adequate remedy where it was unlikely that those employees could be re-engaged. That is not case here, according to the HSE. Moreover, it says, in light of the fact that the area involved is an area of high unemployment, the risk of not being able to re-employ or re-engage the staff or of staff not being available is not a significant factor here.

43. Before setting out my conclusions on this part of the test, I will refer briefly to the applicable legal principles. Time does not permit an exhaustive or even a very detailed analysis of these principles. I start with the comments made by Finlay C.J. in *Curust Financial Services Ltd. v. Loewe-Lack-Werk* [1994] 1 I.R. 450. He stated at p. 471 that:-

> *"An applicant for an interlocutory injunction must establish by affidavit evidence that as a matter of probability damages would not be an adequate remedy."*

He further stated at p. 469 that in the case of commercial loss "*(d)ifficulty, as distinct from complete impossibility*" in the assessment of damages should not be a basis for characterising damages as being an inadequate remedy. These comments have been frequently applied in subsequent cases.

44. Homecare has in this application and in the previous application before me relied on some English case law where a slightly different approach has been taken on this issue. Those cases include *Covanta Energy Ltd. v. Merseyside Waste Disposal Authority (No. 2)* 151 Con L.R. 146, *NATS (Services) Ltd. v. Gatwick Airport* [2015] P.T.S.R. 566 and also *Counted4 Community Interest Co. v. Sunderland City Council* 164 Con L.R. 230.

45. It has also relied on the potential difficulty in obtaining damages in these cases, referring, inter alia, to the decision of the Supreme Court in *Glencar Exploration plc. v. Mayo County Council (No. 2)* [2002] 1 I.R. 84 and a recent UK Supreme Court decision, *Energy Solutions v. Nuclear Decommissioning Authority* [2017] 1 WLR 1373 where it was held that in order to obtain damages in procurement cases, the procurement law infringement had to be "*sufficiently serious*". I note, however, that Homecare has sought damages in these and in the earlier review proceedings. I am also bound by the approach mandated by the Supreme Court in *Curust*. I note that this was also the approach taken by the High Court in *Powerteam*, *Beckman* and *Word Perfect*, among other cases, on this issue in this general field.

46. Both Homecare and the HSE have relied on *Powerteam* in which Costello J. held that, while most of the alleged losses were capable of being compensated in damages, there was uncontroverted evidence that the applicant in that case would lose highly trained skilled staff to competitors and that it would be very difficult to start again from scratch. A similar argument failed on the facts in *Word Perfect*.

47. I am not persuaded by the case made by Homecare that, on the very particular facts of this application, damages would not be an adequate remedy for it if the automatic suspension is lifted to allow HSE to conclude the bridging contract with Freightspeed. Homecare has not persuaded me that, as a matter of probability, damages will not be an adequate remedy for it at trial.

48. The term of the bridging contract is for a very limited duration indeed. Any loss which Homecare may suffer will be primarily of a commercial nature which ought to be readily capable of being calculated with the assistance of a forensic accountant. I believe that the case made by Homecare in this regard is somewhat overstated bearing in mind the short duration of the contract and the nature of the bridging contract at issue. I am also not persuaded that Homecare will have to take all of the steps it says it will have to take if the suspension is lifted, such as immediately letting go 45 employees and 21 self-employed drivers or, if it does, that this is due to the award of the bridging contract itself.

49. I am also not persuaded that even if it does have to let these employees go that it will not be possible to re-engage them, or others, should Homecare succeed at trial in these proceedings. I distinguish the facts of this case from those of *Powerteam*. I am not satisfied that the employees involved here, while undoubtedly extremely good at their jobs and undoubtedly very loyal to Homecare, fall into the same category as the highly specialised and skilled staff which were at issue in *Powerteam*.

50. I also believe that the uncontested risk of staff migrating to competitors, which was a strong factor in Costello J.'s conclusion in *Powerteam*, does not arise here, or at least is not advanced in as persuasive a way on the affidavit evidence before me. I must also take into account that the staff involved appear to reside in an area of high employment and there is no reason to believe that it will not be possible to re-engage them or others should Homecare succeed at trial.

51. In addition, I have also taken into account that success in this application on the part of Homecare does not mean that it will get the main distribution contract or indeed the bridging contract itself and it is not clear, therefore, how the particular losses on which Homecare relies can be avoided, even if the automatic suspension is not lifted other than by the HSE agreeing to further roll over or extend the existing contracts, which it has said it will not do. Nor do I accept that if the suspension is lifted Homecare will not proceed with its case or with the review proceedings themselves. I do not believe that to be a credible contention.

52. In conclusion, therefore, Homecare has not persuaded me, and I am not satisfied, that damages would be an inadequate remedy for it should the automatic suspension be lifted should it ultimately succeed at trial. However, in case I am wrong in my conclusion on that issue I go on to consider whether damages will be an adequate remedy for the HSE.

(b) Adequate Remedy for HSE

53. The HSE says damages would not adequately compensate it if the suspension is lifted but it goes on to win at trial. It relies on a

number of factors in support of this contention:-

> (1) If, as it maintains, it cannot further extend the existing contracts for public procurement reasons and in any event will not do so, if failure to lift the suspension will seriously impact on the needs of patients and end users of these continence products.
>
> (2) Even if a roll over or further extension of these existing contracts were possible, or if it were minded to do so, the HSE says there is uncertainty about the position of Ontex and whether, assuming it will continue to supply product to Homecare, the prices at which it will do so. It points to evidence available in the application in the review proceedings in December 2017 about increases in price proposed by Ontex for a short extension of the existing contracts.
>
> (3) The HSE relies on the absence of a full unqualified undertaking as to damages from Homecare. It says that it should not be expected to take the risk of possible challenge from others, including Freightspeed, in the absence of a full undertaking as to damages.

54. Homecare disputes these assertions. It points to the short period of time involved in the bridging contract and says that the HSE's argument "*cuts both ways*". It also says that Ontex's position was made clear in correspondence from its solicitors, Lemans, which was before the court in December 2017. It relies in particular on a letter from Lemans to A&L Goodbody, Homecare's solicitors, dated 12th December, 2017, where Lemans stated that, without prejudice to a termination notice which had been served on Homecare by Ontex, the current contractual relations between Ontex and Homecare would continue to be valid for so long as the separate current contractual relations between Ontex and the HSE existed. Homecare also disputes the contention that patient welfare will suffer if the suspension is lifted.

55. Finally, on the question of the undertaking as to damages, it reiterates submissions it made to me at the hearing in December 2017 to the effect that a full blown undertaking as to damages is not always required and that the requirement for such an undertaking breaches EU procurement law. Without prejudice to that contention it submits that the modified form of undertaking offered by Mr. Cosgrove at para. 128 of his affidavit of 25th January, 2018, is adequate.

56. I am not satisfied than on the particular facts of this application that damages will be an adequate remedy for the HSE. I accept the submissions made on this issue by the HSE. It is my view that there is a real risk of damage to patients' welfare if the suspension is not lifted in circumstances where the HSE has said, for better or for worse, that it cannot, or in any event will not, roll over or extend the existing contracts and that it is not a loss which is capable of being compensated by an award of damages in favour of the HSE.

57. I am also struck by the absence of any updated material evidencing the position of Ontex. The only information available in relation to its position since the Lemans letter of 12th December, 2017, is an e-mail from Ontex to the HSE dated 22nd January, 2018, concerning its arrangements for the products contract which is to commence on 1st February, 2018. The position which might be adopted by Ontex both with regard to the continued supply to Homecare and with regard to the prices which it would charge in a short-term bridging contract scenario remain uncertain.

58. I also believe that on the particular circumstances of this application the modified undertaking as to damages is not adequate. I take into account in particular the risk that Freightspeed might challenge the actions of HSE were it to roll over or extend the existing contracts or frustrate what Freightspeed says are its entitlements. While this is not said on affidavit on behalf of Freightspeed, it was stated in submissions on its behalf at the hearing as a possibility, although Freightspeed was hopeful that it would not come to that. I do not believe that the HSE should have to take that risk, however real that risk may be, by accepting a lesser form of undertaking as to damages.

59. I want to make clear, however, that I am not determining the arguments made by Homecare in the earlier proceedings in December 2017 against it and I will fully consider them in my judgment in those proceedings.

60. In these circumstances, I conclude that damages would not adequately compensate the HSE should the automatic suspension not be lifted but should the HSE ultimately succeed at the trial.

61. Again notwithstanding my conclusion that damages would adequately compensate Homecare if the automatic suspension is lifted and would not adequately compensate the HSE, I will go on to consider whether the balance of convenience lies in favour of or against lifting the suspension.

(3) Balance of Convenience

62. The case made by Homecare to support its contention that the balance of convenience favours the refusal to lift the automatic suspension is set out in Mr. Cosgrove's affidavit of 25th January, 2018, in particular in paragraphs 104 to 132 of that affidavit, and they are helpfully summarised, at paras. 76 to 111 of Homecare's written submissions. A useful summary of the points relied on by Homecare is contained in para. 78 of its written submissions.

63. I do not propose to repeat what is said there. However, to summarise briefly, Homecare says that the bridging contract is not necessary to secure the continuity of supply or to avoid the interruption of supply. Homecare has sufficient stock and resources to continue to supply the product.

64. It says that lifting the suspension creates concerns regarding the continuity of supply. There is uncertainty about the mobilisation period for the bridging contract. There will be negative consequences for patients in a rushed transition period. There will be a reduction in the quality of services for patients and end users.

65. It further says that patient welfare will be better served by continuing or extending the existing contracts to enable Homecare to continue distributing the products. Homecare will have to lay off staff.

66. It further contends that there is a public interest in refusing to lift the suspension on the conclusion of the bridging contract which Homecare says was tendered to defeat the protection arising from the automatic suspension in the review proceedings. The execution of the bridging contract will result in HSE entering into an unlawful illegal direct award in respect of the products contract and the public interest favours the maintenance of the automatic suspension. These are some of the arguments advanced by Homecare in support of its contentions in this regard.

67. Homecare also contends that the *status quo* favours the maintenance of the existing contracts and that it is open to the HSE to

extend or roll over those contracts without breaking public procurement law. It relies in particular on Regulation 72(1)(b) and (e) of the 2016 Regulations, namely the *"safe harbour"* provisions, and the decision of the Court of Justice of the European Union in *Pressetext Case C-454/06* [2008] ECR I-04401. Homecare touched on some of these points in its oral submissions before me on this application.

68. Homecare also relies in this regard on an affidavit sworn by Ms. Curran on the issue that a rollover is open to the HSE and that it was done before by the HSE in the context of a different product, in a case involving *Baxter* in 2013. It is fair to say that Homecare has also sought to stress patient welfare in support of its case that the balance of convenience lies strongly in its favour.

69. The HSE submits that the balance of convenience clearly favours the lifting of the automatic suspension. Mr. Quinlivan addresses this issue in his affidavit of 23rd January, 2018, in particular, at paras. 35 to 44. It is also addressed in Dr. O'Sullivan's affidavit of the same date. It is further addressed and elaborated on in paras. 69 to 82 of its written submissions and in oral submissions before me. It stresses the urgency of being in a position to enter into the bridging contract to deal with what it says is an emergency situation which has arisen. Dr. O'Sullivan's affidavit is strongly relied on.

70. The HSE disputes the contention that it can lawfully roll over or extend the existing contracts. It maintains that Regulation 72(1)(b) and (e) of the 2016 Regulations have no application and are of no assistance to it. Nor does *Pressetext* give it any comfort. In any event, it queries why it should have to take the risk of any challenge to a rollover or extension of the existing contracts, particularly in circumstances where Homecare has not offered an unqualified undertaking as to damages.

71. The HSE also relies on the absence of any contemporary confirmation from Ontex as to whether it will continue to supply Homecare in the event of an extension of the existing contracts or, if it were prepared to do so, the prices which it would charge for such a period of extension. It contends that the balance of convenience is overwhelmingly in its favour.

72. Freightspeed supports the contention of the HSE and made that position clear to the Court in a short and pithy intervention from its counsel.

73. In terms of the legal principles applicable, while some assistance can be derived from cases such as *BAM, Powerteam, Beckman and Word Perfect*, it is undoubtedly the case that the outcome of each case on the balance of convenience issue will turn very much on the specific facts of that case.

74. I am satisfied that on the very particular and unusual facts of this case the balance of convenience clearly favours the lifting of the automatic suspension. I have reached this conclusion having carefully considered and reviewed all of the evidence and submissions advanced in this case and have reviewed relevant aspects of the arguments made by the parties in the proceedings in December 2017. I have reached this conclusion for several reasons including:-

> (1) The highly unusual circumstances in which the HSE has had to provide for a bridging contract where, due to time and resource constraints, it has not been possible for judgment to be given in the application in the review proceedings and in the plenary proceedings before the end of the existing contractual arrangements through no fault of any of the parties;
>
> (2) The potentially very short duration of the bridging contract, initially three months with provision for a further extension of three months, further extensions of three months up to a total duration of 12 months with provision for termination on one month's notice. I note the HSE's stated intention to terminate the bridging contract at the earliest opportunity on which it is lawfully possible for it to do so in the event that it is permitted to enter into the distribution contract with Freightspeed;
>
> (3) The decision by the HSE that it will not roll over or extend the existing contracts beyond 31st January, 2018 for public procurement reasons. While there is a serious dispute between the parties as to whether the HSE can lawfully do so, and I have touched on the parties' respective contentions in that regard earlier in this judgment, I cannot resolve that issue on this interlocutory application. There are arguments either way. However, the fact of the matter is that the HSE will not roll over or extend the existing contracts. If it does not do so, and if it cannot enter into the bridging contract for the short duration required, then there will be very serious implications for patients and end users of these very important medical products;
>
> (4) I am persuaded by Dr. O'Sullivan's evidence that it is critical that there be continuity in the supply of these products from 31st January, 2018, and I refer in paragraph to paras. 5, 6 and 7 of her affidavit in that regard, which I do not propose to repeat in this judgment but I refer to those three paragraphs in particular;
>
> (5) The interests of patients and end users afford a very strong argument to my mind in favour of lifting the automatic suspension where the HSE has made it clear that it cannot or will not roll over or extend the existing contracts. The correctness or otherwise of the parties' respective legal contentions on Regulation 72 of the 2016 Regulations and on *Pressetext* may ultimately have to be decided at trial but I cannot conclusively do so at this stage in the proceedings. In my view it is critical that there is absolute clarity that these essential products are distributed to patients after 31st January, 2018. Like Costello J. in *Powerteam*, albeit on different facts, I conclude that any doubt or question over this issue should weigh and must weigh very heavily in the balance of convenience issue and clearly favours the lifting of the automatic suspension on the facts of this case;
>
> (6) The absence of an unqualified undertaking as to damages is also a factor which I take into account and which favours the lifting of the automatic suspension;
>
> (7) While there is undoubtedly a public interest in ensuring that public procurement law is fully complied with, I am not in a position at this stage of the proceedings to conclude that there is anything unlawful in what the HSE intends to do in relation to the bridging contract. This is a matter which will have to await determination at the trial;
>
> (8) Finally, as far as the maintenance of the *status quo* is concerned, while I do not place enormous weight on this factor, it is the case that having regard to the approach which the court has to take on applications such as this, as explained by Costello J. in Powerteam, the status quo is that there is no suspension and so the lifting of the suspension will maintain the status quo. I do not have to fall back, however, on the maintenance of the status quo in view of my conclusions earlier and in light of the other factors which I have considered.

75. In light of these factors, and in my judgment the balance of convenience clearly favours the lifting of the automatic suspension.

In light of these conclusions Homecare would not succeed in obtaining an interlocutory injunction to restrain the conclusion of the bridging contract and so, subject to Regulation 8A(2)(b), the automatic suspension should be lifted. In that regard, I am satisfied that for the purposes of that provision I should make an order under Regulation 8A(1) permitting the HSE to conclude the bridging contract with Freightspeed for all the reason outlined above.

Article 9(4)

76. In case I am wrong about the application of the *Campus Oil* test in the context of this particular interlocutory application, or indeed in case I conclude in the plenary proceedings that it is inapplicable or inappropriate, or in case I conclude that Regulation 8A itself is invalid on the various grounds advanced by Homecare, I now turn briefly to consider the provisions of Article 9(4) of the Remedies Regulations.

77. Article 9(4) provides that:-

> *"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."*

78. Applying this provision, I have considered the probable consequences of an order lifting the automatic suspension for all interests likely to be harmed, in this case, Homecare, the HSE, Freightspeed and patients and other end users of the products as well as the public interest in general. The potential or likely harm to those interests have been outlined and summarised earlier in my judgment.

79. I am completely satisfied that the negative consequences could not and will not exceed the benefits of making the order. Insofar as there is any difference in substance between the application of the test in Regulation 9(4) of the Remedies Regulations and the application of the *Campus Oil* test, and in particular the balance of convenience aspect of that test, and I am not convinced that there is necessarily any significant difference in substance between them, the application of both tests leads in my judgment to the same conclusion.

80. The HSE should be permitted to conclude the bridging contract with Freightspeed. In those circumstances I will grant the relief sought at para. (a) of the Notice of Motion issued by the HSE on 24th January, 2018.