Case No: HT-14-281

Neutral Citation Number: [2014] EWHC 3133 (TCC)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 2 October 2014

Before:

Mr Justice Ramsey

- -

Between:

NATS (SERVICES) LIMITED	**Cla**
- and -	
GATWICK AIRPORT LIMITED	**Defe**
- and -	
DFS DEUTSCHE FLUGSICHERUNG GMBH	**Interested**

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Ms Sarah Hannaford QC and Mr Simon Taylor (instructed by **Hogan Lovells International LLP**) for the **Claimant**

Mr Michael Bowsher QC and Mr Rob Williams (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **Defendant**

Mr Philip Moser QC (instructed by **Simmons & Simmons LLP**) for the **Interested Party**

Hearing dates: 10 and 12 September 2014

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Judgment

Mr Justice Ramsey:

Introduction

1.
These proceedings relate to a procurement carried out by the Defendant ("GAL") for the provision of air traffic control services at Gatwick Airport ("the Procurement"). GAL is the operator of Gatwick Airport and provides airport and other terminal facilities to airlines. The Claimant ("NATS") is a company, which specialises in air traffic management services.

2.
NATS was an unsuccessful tenderer in the Procurement. It contends that the Procurement was subject to or was carried out under the Utilities Contracts Regulations 2006 as amended ("the Regulations") and therefore that, by commencing these proceedings in relation to the Procurement,

GAL is prevented by the operation of the automatic suspension provision in Regulation 45G of the Regulations from entering into contracts with the successful bidder.

3.
GAL contends that the Regulations do not apply to the Procurement but that, if they do, it seeks to lift that automatic suspension. If the Regulations do not apply then, in the alternative, NATS seeks an interim injunction to prevent GAL from entering into contracts with the successful tenderer on the basis that there have been breaches of an implied tender contract.

4.
On the applications by NATS and GAL, I have been provided with witness statements from Ms Catherine Mason, the managing director of NATS, Mr Robert Herga, general counsel and company secretary of GAL and Mr Dirk Mahns, managing director of a wholly owned subsidiary of DFS Deutsche Flugsicherung GmbH ("DFS"), the successful tenderer.

Background

5.
GAL published its intention to carry out the Procurement in the Official Journal of the European Union ("OJEU") on 2 October 2013. The tender was divided into two lots. Lot 1 related to air navigation services, including provision of staff for those services and Lot 2 related to maintenance and repair of equipment. The Procurement proceeded by way of Invitation to Tender ("ITT"), a negotiation phase and then the submission of best and final offers ("BAFO").

6.
NATS submitted its BAFO for Lots 1 and 2 on 2 June 2014. By letter dated 18 July 2014 GAL notified NATS that its tender had been unsuccessful and that DFS had been successful. In the correspondence that followed NATS sought further information and GAL contended that it did not come within the Regulations.

7.
On 18 August 2014 GAL wrote to NATS to give them 7 days' notice that GAL intended to enter into the contract with DFS. NATS therefore issued proceedings and an application for a declaration that there was an automatic suspension under Regulation 45G of the Regulations, alternatively an interim injunction. Particulars of Claim were served on 28 August 2014. On 3 September 2014 NATS issued an application for disclosure. Also on 3 September 2014 GAL issued an Application seeking to lift any automatic suspension, alternatively if the suspension remained in place, an undertaking in damages by NATS.

8.
After a hearing relating to disclosure on 5 September 2014 the application for disclosure was adjourned until early October 2014. The other applications were then heard on 10 and 12 September 2014.

The principles to be applied to the applications

9.
There is an issue between the parties as to the legal test to be applied if the relevant application is an application to lift the automatic suspension under the Regulations. Ms Sarah Hannaford QC, who appears with Mr. Simon Taylor on behalf of NATS, submits that the appropriate test should be a "balance of interests" test rather than the traditional test derived from the House of Lords decision in

American Cyanamid Co v Ethicon Limited [1975] AC 396. Mr Michael Bowsher QC, who appears with Mr. Rob Williams, on behalf of GAL submits that the American Cyanamid test applies whether this is the case dealing with the lifting an automatic suspension or seeking an interim injunction. Mr. Philip Moser QC, who appears on behalf of DFS, made short submissions in support of GAL's position.

10.
Ms. Hannaford submits that the essential difference between a balance of interests test and the American Cyanamid approach is that a balance of interests test does not include a separate hurdle of whether damages are an adequate remedy nor does it permit member states to require the provision of an excessive or disproportionate undertaking in damages in return for the continuance of an automatic suspension.

11.
In this case NATS has offered an undertaking in damages to both GAL and to DFS so that the second aspect of difference does not, in fact, arise.

12.
Ms Hannaford points out that Regulations 45G and 45H of the Regulations seek to implement into UK law the provisions of European Directive 2007/66 which amended Directive 89/665/EEC and 92/13/EEC ("the Remedies Directive"). Article 2(4) of the Remedies Directive, as amended, provides as follows:

"Member States may provide that the body responsible for review procedures may take into account the probable consequences of interim measures for all interests likely to be harmed, as well as the public interest, and may decide not to grant such measures when their negative consequences could exceed their benefits."

13.
Ms Hannaford submits that, although the Regulations do not include the wording of the Remedies Directive, they must be construed in accordance with the wording and purpose of that Directive and she relies on the decisions of the European Court in Marleasing SA v La Comercial Internacional de Alimentacion SA [1992] 1 CMLR 305 at [8] and Von Colson v Land Nordrhein-Westfalen [1986] 2 CMLR 430 at [15] and the first instance decision of Roth J in Alstom v Eurostar [2012] EWHC 28 (Ch) at [35]

14.
In Marleasing at [8] it was stated:

"The obligation to interpret a provision of national law in conformity with a directive arises whenever the provision in question is to any extent open to interpretation. In those circumstances the national court must, having regard to the usual methods of interpretation in its legal system, give precedence to the method which enables it to construe the national provision concerned in a manner consistent with the directive."

15.
In Von Colson at [15] it was stated that:

"According to Article 189(3): 'A directive shall be binding, as to the result to be achieved, upon each member-State to which it is addressed, but shall leave to the national authorities the choice of form and methods'. Although that provision leaves Member States to choose the ways and means of ensuring that the directive is implemented, that freedom does not affect the obligation imposed on all

Member States to which the directive is addressed, to adopt, in their national legal systems, all the measures necessary to ensure that the directive is fully effective, in accordance with the objective which it pursues."

16.
In Alstom Roth J said at [35]:

"As mentioned above, it is common ground that an implementing regulation is to be interpreted in the light of the directive which it is intended to implement. Moreover, it is well established that such national legislation should receive a purposive rather than a literal construction in order to achieve the result pursued by the related directive. That has been repeatedly emphasised by the ECJ, notably in case C-106/89 Marleasing [1990] ECR 1-415, para 8."

17.
Ms Hannaford submitted that the wording of the Directive indicated that the court might take into account the probable consequences of interim measures for all interests likely to be harmed as well as the public interest and might decide not to grant such measures when their negative consequences could exceed their benefit. She submitted that both the hurdle of damages being an adequate remedy based on the principles in American Cyanamid and the need for a party to give an undertaking in damages were inconsistent with a purposive interpretation of the Regulations.

18.
Ms Hannaford pointed out that there had been no Court of Appeal decision which had dealt with the appropriate test to be applied in the case of an application to lift the automatic suspension pursuant to Regulations 45H. However she acknowledged that in his decision in Exel Europe Limited v University Hospitals Coventry and Warwickshire NHS Trust [2010] EWHC 3332 (TCC) Akenhead J had considered that question in the context of the equivalent provisions in Regulations 47G and 47H of the Public Contracts Regulations 2006, as amended. At [26] to [29] he said this:

"26. For many years, the Courts of England and Wales have, with regard to interlocutory or interim injunctions, applied the principles and practice laid down in the well-known case of American Cyanamid Co v Ethicon [1975] AC 396. The first question which must be answered is whether there is a serious question to be tried and the second step involves considering "whether the balance of convenience lies in favour of granting or refusing interlocutory relief that is sought" (page 408B). The "governing principle" in relation to the balance of convenience is whether or not the claimant "would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial."

27. It is quite clear that, prior to the amendments to Regulation 47 made by the 2009 Regulations (see above), Cyanamid principles were applied in considering whether or not an injunction should be granted to an unsuccessful or discontented tenderer preventing the placing of the relevant contract or agreement by the contracting authority. A good example is the recent case of Alstom Transport v Eurostar International Ltd and another [2010] EWHC 2747 (Ch), a decision of Mr Justice Vos. The Court of Appeal had upheld this approach in Letting International v London Borough of Newham [2007] EWCA Civ 1522.

28. The issue arises whether these principles apply following the imposition of the amendments to the Regulations. Regulation 47H addresses interim orders which the Court may make in circumstances, where, pursuant to Regulation 47G, the commencement of proceedings, as in this case, has meant

that the contracting authority (the Defendant in this case) is statutorily required to refrain from entering into the framework agreement (in this case). In my judgment this is primarily simply a question of interpretation of Regulation 47H. Regulation 47H(1) gives the Court the widest powers in terms of what it may do with regard to entering into contracts. It is in Regulation 47H(2) that one finds what exercise the Court "must" do: it must consider whether, if regulation 47G(1) was not applicable, "it would be appropriate to make an interim order requiring the contracting authority to refrain from entering into the contract"; it then goes on to say that it is "only if the Court considers that it would not be appropriate to make such an interim order may it make an order under paragraph (1)(a)". This is saying in the clearest terms that the Court approaches the exercise of interim relief as if the statutory suspension in Regulation 47G(1) was not applicable. That means that one does not as such weight the exercise in some way in favour of maintaining the prohibition on the contracting authority against entering into the contract in question. What in practice it means is that the Court should go about the Cyanamid exercise in the way in which courts in this country have done for many years.

29. It is said that the Court should interpret national legislation, including Regulation 47, in the light of the wording and purpose of the Remedies Directive, 2007/66/EC, which in part at least, led to the 2009 Regulations. This Directive amended earlier Council Directives and was much concerned with establishing an effective standstill period between the submission of tenders and the entering into the relevant contract. That is not the problem here. The 2009 regulations extend the standstill period simply by the claiming tenderer issuing and serving proceedings; that has the advantage of involving the court which can then review what has happened to determine whether there is an actionable complaint and, if so, to do about it. The revised Article 1 requires measures to be taken "to ensure that...decisions taken by contracting authorities may be reviewed effectively and, in particular, as rapidly as possible..." Article 2(1) says that measures should be taken in connection with the review procedures to provide powers to

"(a) take at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority.

(b) either set aside or ensure the setting aside of decisions taken unlawfully...

(c) award damages to persons harmed by an infringement."

Article 5 goes on to say that, in effect 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 grant such measures when their negative consequences could exceed their benefits." I see nothing in Regulation 47H or in the application of the Cyanamid principles which offends or is not consistent with the Remedies Directive. These principles are positively consistent with it. Even if the suspension is not maintained, the claimant is not without a remedy. Obviously, if damages were not an effective remedy, and there was clearly an arguable and serious issue on liability raised, it may well be that the suspension or other directive orders should be continued or made."

19.
In DWF LLP v Secretary of State for Business, Innovation and Skills [2014] EWCA Civ 900 at [47] Sir Robin Jacob, giving the judgment of the Court of Appeal with which the other members agreed, decided not to deal with an argument that modified principles should apply in the case where the

court was considering whether to lift an automatic suspension and proceeded to apply the American Cyanamid principles.

20.
Ms Hannaford relied on the decision of the High Court in Ireland in OCS One Complete Solutions Limited v Dublin Airport Authority PLC [30 May 2014] where Barrett J had to consider whether the Irish Supreme Court decision in Campus Oil v Minister for Energy (No 2) [1983] IR 88, which adopted the American Cyanamid principles, was to be applied in the case of an application to lift an automatic suspension. He said this at [34]:

"The court finds that it would be inconsistent with European Union law and, more specifically, with the court's obligations as regards harmonious interpretation, as considered above, were the Court to apply what might be styled the Campus Oil guidelines in the context of the Remedies Regulations. There are at least five reasons why this is so.

…

Third, to apply the Campus Oil guidelines would be to superimpose requirements and conditions that are not envisaged by Directive 92/13/EEC, as amended, or the Remedies Regulations and would in fact render it more difficult for an applicant to obtain relief than would be the case if the scheme specified in the Directives were applied. Two elements of the Campus Oil guidelines, in particular, appear to add conditions that are not contemplated by Directive 92/13/EEC, as amended, vis. (1) the requirement to demonstrate the impossibility of calculating damages; and (2) the requirement for an applicant to provide an undertaking in damages in order to benefit from the continuation of the suspension. Both conditions would constitute additional pre-conditions to the granting of relief not contemplated by European Union law and would be inconsistent with the same."

21.
At [37] Barrett J set out his conclusions as follows:

"Pursuant to regulation 9(4) of the Remedies Regulations, DAA has to satisfy the court that the negative consequences of making any interim interlocutory order as is sought do not exceed the benefits of such order. No other requirement arises and the test is untrammelled by the considerations that would arise from an, unwarranted and inappropriate, application of the Campus Oil guidelines. This being so, the usual requirement as to an undertaking in damages that would arise were the Campus Oil guidelines to be followed does not arise. However, this does not mean that that a court could not, when undertaking its analysis under Regulation 9(4) of the remedies Regulations, factor into its considerations any offer of an undertaking as to damages as might be made."

22.
However, as Ms Hannaford noted, the decision of Barrett J was the subject of an appeal to the Irish Supreme Court which, in a short decision on 31 July 2014, with later reasons, dismissed the appeal and came to the conclusion that the question of the criteria which would apply on an application to lift a suspension did not arise.

23.
Mr. Bowsher submitted that the decision in the OCS case is no longer of even persuasive effect and, in any event, Barrett J was careful to distinguish his view based on Irish legislation from that derived from decisions in the English and Northern Ireland courts. Mr Bowsher therefore submitted that the

American Cyanamid approach should be followed for the reasons given by Akenhead J in Exel Europe in the absence of any other guidance.

24.
Mr. Moser submitted that discretion was given to Member States to implement directives and within that discretion Member States could choose how to do so, subject to the principles of effectiveness and equivalence. He submitted that under those principles the Member State had to give effect in a way which did not make it excessively difficult for a party to enforce its EU rights and the remedy had to be equivalent to a remedy available in a similar domestic case. He therefore submitted that there was nothing that required the courts, based upon Article 2(4) of the Remedies Directive, to approach the question of whether damages were an adequate remedy in a way different to that in the American Cyanamid approach.

25.
I now turn to consider those submissions. The American Cyanamid approach, as pointed out by Akenhead J in Exel Europe is in fact a two stage test. The first question is whether there is a serious issue to be tried and the second is whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought: see Lord Diplock's speech in American Cyanamid at 408B.

26.
Lord Diplock then explained that the governing principle in relation to the balance of convenience starts by a consideration of whether an award of damages would be an adequate remedy. If damages are an adequate remedy for a claimant then Lord Diplock said that no interlocutory injunctions should normally be granted. If damages to the Claimant would not be an adequate remedy but would be an adequate remedy for the Defendant then he said "there would be no reason upon this ground to refuse an interlocutory injunction."

27.
Lord Diplock then continued at 408F:

"It is where there is a doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises. It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. This will vary from case to case.

Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo."

28.
Subsequent decisions have shown that there is flexibility in the application of the American Cyanamid principles: see Cayne v Global Natural Resources PLC [1984] 1 All ER 225 at 234 and NWL Limited v Woods [1979] 1 WLR 1294 at 1307. More recently the test has been considered by the Privy Council in National Commercial Bank Jamaica Ltd v Olint Corpn Ltd [2009] UKPC 16 where Lord Hoffmann delivering the opinion of the Board said in relation to interlocutory injunctions at [16] and [17]:

"16. …The purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result.

As the House of Lords pointed out in American Cyanamid Co v Ethicon Ltd [1975] AC 396, that means that if damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the defendant's freedom of action by the grant of an injunction. Likewise, if there is a serious issue to be tried and the plaintiff could be prejudiced by the acts or omissions of the defendant pending trial and the cross-undertaking in damages would provide the defendant with an adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted.

17. In practice, however, it is often hard to tell whether either damages or the cross-undertaking will be an adequate remedy and the court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irremediable prejudice (and to what extent) if it turns out that the injunction should not have been granted or withheld, as the case may be. The basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other. This is an assessment in which, as Lord Diplock said in the American Cyanamid case [1975] AC 396 , 408: “It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them.” ”

29.
On that basis and considering the purpose of the Directive and applying the principles of effectiveness and equivalence, I see no difficulty in the American Cyanamid principles being consistent with Article 2(4) of the Remedies Directive. The review procedures would take into account the probable consequences of interim measure for all interests likely to be harmed, looking first at the adequacy of damages as part of the balance of convenience. There is nothing in the Directive which seeks to limit or define the way in which the national courts exercise their discretion in balancing the interests of the parties.

30.
I am therefore not persuaded that in determining whether or not to lift any automatic suspension under the Regulations there is a different test to be applied to that laid down by Lord Diplock in the American Cyanamid case.

31.
I now turn to consider the application of that test and, first, whether there is a serious issue to be tried.

Serious issue to be tried

32.
GAL accepts, for the purposes of the application, that there is a serious issue to be tried as to the breaches pleaded in paragraph 16 of the Particulars of Claim. It follows that the main issue on this aspect is whether or not there is a serious issue as to whether the Regulations apply or, alternatively that there is a serious issue as to the implied contract.

33.
Before dealing with the parties’ contentions, it is necessary to consider the background to the Regulations. The Regulations implement into UK Law Directive 2004/17/EC co-ordinating the procurement procedures of entities operating in the water, energy, transport and postal services sector (“the Directive”).

34.
In October 1998 the European Commission issued a communication on a community regime for procurement in the excluded sectors. It was accompanied by two proposals for Council Directives relating to Water, Energy, Transport and Telecommunications. That communication dealt with air transport and in particular airports at paragraphs 271 to 275 and 285 to 286. In particular it stated as follows:

“273. Airports form a natural oligopoly. Moreover, in all the Member States except the Netherlands and the United Kingdom, the State or local government has full control of the principal airports. Even in the Netherlands, the state owns the majority of the capital in the principal airports. In the United Kingdom, seven major airports are owned and operated by BAA PLC, a private company established in 1987. Elsewhere although there is variation in the system of ownership, all but a few small airfields are publicly owned and controlled. Further, in Spain, Portugal and Greece airports are administered centrally.

274. Landing charges, passenger charges and commercial activities (such as concessions for shops, restaurants, offices, etc.) provide the main sources of revenue for airport companies. The level and structure of airport revenues varies substantially between and within the various Member States. Landing and passenger charges are normally determined by State authorities, or with their approval. Even the private BAA is subject to strict limits on the charges it can levy.

…

285. Airports are under the control of the public authorities and depend on them for their ability to operate. This applies whatever the formal ownership of the airport. The case for their inclusion seems evident. Application of the existing Directives to airports has not been free of problems of interpretation. It has therefore seemed appropriate to include them in a very explicit manner in the new proposals.”

35.
Later in the communication three categories of relevant sector were considered. The third category was explained at [397] as follows:

“The third category of cases concerns those cases in which an entity exploits a geographical area for a given purpose, subject to some form of State concession or authorization. Once again the entities find themselves in a situation in which the impact of market forces is often significantly reduced and they are exposed to the influence of the State through a variety of means, not least their need to have their concession or authorization renewed or to secure other similar concessions or authorizations. Even when competitive forces are still present to a degree though qualified, the exposure to State Influence through the need to retain the concession or obtain new ones is frequently sufficient to influence their procurement behaviour.”

36.
Under the subsequent Directive, Recitals 2 and 3 explain the purpose for subjecting Utilities to procurement law as follows:

“(2) One major reason for the introduction of rules coordinating procedures for the award of contracts in these sectors is the variety of ways in which national authorities can influence the behaviour of these entities, including participation in their capital and representation in the entities’ administrative, managerial or supervisory bodies.

(3) Another main reason why it is necessary to coordinate procurement procedures applied by the entities in these sectors is the close nature of the markets in which they operate, due to the existence of special or exclusive rights granted by the Member States concerning the supply to, provision or operation of networks for providing the service concerned."

37.
Article 7 defines the relevant activities so far as the present case is concerned. It has a heading: "Exploration for, or extraction of, oil gas, coal, or other solid fuels, as well as ports and airports." It then states:

"This Directive shall apply to activities relating to the exploitation of a geographical area for the purpose of:

(a) exploring or for extracting oil, gas, coal, or other solid fuels or

(b) the provision of airports and maritime or inland ports or other terminal facilities to carriers by air, sea or inland waterway."

38.
In implementing the Directive, the Regulations referred to Utilities and at Regulation 3(1) defined a utility as a "relevant person specified in one of the Parts of Schedule 1 carrying out an activity in that Part."

39.
In this case the "relevant person" is a reference to the following definition in Regulation 3(2):

"not a contracting authority or a public undertaking, but whose activities include an activity specified in the second column of Schedule 1 and who carries out that activity on the basis of a special or exclusive right;"

40.
Given that one of the activities specified in the second column of Schedule 1 is "The exploitation of a geographical area for the purposes of providing transport or other terminal facilities to carriers by air", the relevant activity is covered and the issue in this case is whether GAL carries out that activity on the basis of "a special or exclusive right".

41.
The definitions in Regulation 3(2) state that:

"special or exclusive rights" means rights granted by a competent authority by way of any legislative, regulatory or administrative provision, the effect of which is to limit the exercise of activities specified in the second column of Schedule 1 to one more entities, and which substantially affects the ability of other entities to carry out such activities."

42.
The dispute between the parties is whether rights were granted by a competent authority by way of any legislative, regulatory or administrative provision and, if so, whether the effect of those rights is to limit the exercise of activities specified in the second column of Schedule 1 to one or more entities and whether that substantially effects the ability of other entities to carry out such activities.

43.

Ms Hannaford referred to the background to the status of GAL. Originally the British Airports Authority (BAA) owned and operated a number of airports in the UK, including Gatwick, as a result of the Airports Authority Act 1965. The Airports Act 1986 then provided for the dissolution of BAA and the transfer of its property, rights and liabilities to a company called BAA plc. In fact BAA's assets, rights and liabilities were transferred to seven subsidiary companies, including GAL, by a Transfer Scheme pursuant to the Airports Act 1986.

44.
On 1 August 1986 BAA's shareholding in the subsidiary companies was then transferred to BAA plc under the Transfer Scheme and BAA was dissolved. In 1987 BAA plc was privatised and GAL became a private company.

45.
Under the Airports Act 1986 a regulatory regime was introduced for airports so that operators of certain airports were required to hold permissions to levy airport charges. That Act has now been replaced by the Civil Aviation Act 2012 under which the operators of dominant airports, which include Gatwick, are required to hold permissions to levy airport charges.

46.
Ms Hannaford therefore submitted that the rights granted to GAL by a competent authority include the original rights granted to GAL to carry on the airport business at Gatwick pursuant to the Transfer Scheme under the Airports Act 1986. They also include the rights granted to GAL by the Civil Aviation Act ("CAA") on 13 February 2014 under the Civil Aviation Act 2012 authorizing GAL to charge for airport operation services that it provides subject to the conditions of the licence. Under the Civil Aviation Act 2012 the CAA designated GAL as having market power in relation to the core area of Gatwick Airport, comprising the land, buildings and other structures used for landing, takeoff, manoeuvring, parking and servicing of aircraft at the airport. This meant that as a dominant airport the CAA had to licence the operators of Gatwick Airport before they were entitled to levy charges.

47.
Another right given to GAL arises because aircraft above a certain weight are not permitted by section 208 of the Air Navigation Order 2009 ("ANO") to take off or land at a UK Airport unless an Aerodrome Licence has been granted. On 18 June 2013 an Aerodrome Licence was granted by the Secretary of State to GAL under Section 211(1) of the ANO. In addition GAL has rights granted under the relevant planning permission for its airport operations.

48.
As a result Ms Hannaford submitted that GAL operates Gatwick airport on the basis of the grant of a number of rights by competent authorities in the form of the Secretary of State and Regulatory Bodies. She submitted that the effect of those rights is to limit the exercise of airport operations at Gatwick to GAL and thus substantially to affect the ability of other entities to carry out such activities. She said that no other entity can conduct the relevant Schedule 1 activities at Gatwick Airport because no other operator is licensed to do so. Nor, she said, could any other operator obtain a licence to carry out those activities at Gatwick Airport because GAL owns and controls the core areas of Gatwick Airport and has obtained the licence to levy charges and the Aerodrome Licence.

49.
Ms Hannaford rejected GAL's submissions that it is not a utility because what limited other entities from carrying out the activities was GAL's ownership of the site and not the licence to levy charges or the Aerodrome Licence. She submitted that GAL is an entity to which an airport business and

property was transferred by the Transfer Scheme approved by the Secretary of State and it cannot properly be argued that such an entity is not a utility whereas one which does not own the property would be a utility under the Regulations. She submitted that GAL had exclusive rights to operate the airport at the site both as a result of the transfer of the business and property to it under the Transfer Scheme and as a result of the licences.

50.
Ms Hannaford also refers to an email communication of 31 July 2013 from the European Commission who were sent an opinion by GAL setting out the view that it was GAL's ownership of the site rather than the rights granted to it which had the effect of limiting the exercise of the relevant activities. The Commission said that while it was for the UK authorities to determine whether the rights conferred on GAL should be considered as exclusive or special right it expressed doubts as to the conclusion reached in the legal opinion that GAL should not be considered as a utility.

51.
Ms Hannaford also refers to the European Commission's Explanatory Note on Special or Exclusive Rights published in 2006 and, in particular, the following passage in Paragraph 7:

"Of course it is still possible for private entities to continue to have exclusive or special rights - even after the new definition applies. Firstly private undertakings may have received their rights without any opening up to competition or public undertakings which were simply created to carry on one of the activities referred to by the Directive may change their status from that of public undertaking to that of private undertaking."

52.
Ms Hannaford submitted that GAL fits within this category as it is a private undertaking which has taken over the utility activity and privileged status of a public undertaking. She submitted that, overall, GAL is a classic airport utility for the reasons explained in the 1988 explanatory memorandum as it conducts a utility activity which is insulated from competition and is reliant on the state for its rights and authorization to operate.

53.
Mr. Bowsher submitted that the recitals to the Directive show that the reason for subjecting Utilities to the Regulations is the degree of dependence on the state and, in this case, dependence on the state for the grant of a right which enables them to carry out the relevant activities. He emphasised that the relevant activity is not merely the operation of an airport but the exploitation of a geographic area for that purpose.

54.
He submitted that for there to be special or exclusive rights what is needed is not merely some form of administrative permission to carry out the relevant activity but rather the grant of some permission which is bound up with the grant of physical rights to the land in question. He also refers to Recital 25 of the Directive which provides that rights granted by a Member State to a limited number of undertakings on the basis of objective, proportionate and non-discriminatory criteria that allows any interested party fulfilling those criteria to enjoy those rights should not be considered special or exclusive rights.

55.
He submitted that it cannot be said that GAL uses or exploits Gatwick airport on the basis of a special or exclusive right. Rather, GAL owns the airport after its parent company purchased it on a

commercial basis in 2009 for a substantial sum of money. It is therefore as a result of that ownership, he submitted, that GAL is able to exploit the airport not that it has the benefit of some continuing right to do so which has been granted by the State. Whilst he accepts that GAL operates the airport on the basis of the Aerodrome Licence granted by the CAA under the ANO and a licence granted by the CAA as part of its economic regulation of Gatwick as an airport identified as having market power under the Civil Aviation Act 2012, he submitted that neither of those licences are special or exclusive rights.

56.
First he said that both licences are permissions to operate Gatwick and neither of them can sensibly be seen as a right to exploit Gatwick. That, he submitted, arises from GAL's ownership of the airport not from the licences. He submitted, secondly, that the licences do not limit the exploitation of the site to GAL but simply grant GAL permission to operate an airport at a site which it owns. He pointed out that more than one operator might hold a licence granted under the Civil Aviation Act 2012 and other operators do in fact provide facilities at Gatwick. He submitted that neither licence substantially affects the ability of third parties to exploit the site. Further he submitted that the licence granted under the Civil Aviation Act 2012 imposing regulatory conditions because of the finding that Gatwick was in the position of market power was hardly a right which affected the ability of others to carry out the activities.

57.
Finally he submitted that the Aerodrome Licence was granted on the basis of objective proportionate non-discriminatory criteria set out in Article 103 of the ANO and so, by reason of Recital 25 to the Directive, it falls outside the definition of special or exclusive rights for that additional reason.

58.
He submitted that GAL's ownership of Gatwick Airport cannot, itself, be a special or exclusive right based on the fact that in 1986 the airport was vested in GAL as part of the process of privatisation of BAA. He submitted that, in fact, this was a process under which the state relinquished control over the exploitation of Gatwick. He submitted that the right granted was simply title in land and it cannot be said that GAL carries out airport activities or operates on the basis of that right. He further submitted that the right to ownership does not limit the carrying out of the relevant activities to certain entities and GAL could sublet the whole of the airport to another operator so that the right does not have any limiting effect.

59.
Nor, he submitted, can it be said that GAL exploits the airport on the basis of its ownership of the airport. He said that exploitation may be appropriate where rights are granted by the state in respect of land over which the state has continuing control but is not apt to cover an unconditional transfer of site. He submitted that there is no reason why looking at the matter broadly, GAL should be subject to the constraints of procurement law and that such would only arise by their ownership of the land.

60.
Having considered those submissions, I have come to the conclusion that the issue of whether GAL is a "relevant person" so as to come within the Regulations raises a serious issue to be tried.

61.
There are, I consider, for present purposes sufficient arguments as to the nature of the rights which were devolved from the statutory body, BAA, and which are now vested in GAL to raise a serious issue to be tried as to whether GAL carries out the exploitation of Gatwick Airport on the basis of a special

or exclusive right. The Transfer Scheme under the Airports Act 1986 transferred from BAA to GAL all the property rights and liabilities comprised in “the Authority’s business at Gatwick Airport”. Whilst there are arguments as to what has happened under subsequent legislation and subsequent transactions, there is a serious issue to be tried as to whether the rights granted under the Transfer Scheme, together with the rights granted under the licensing arrangements, mean that GAL carries out its exploitation of Gatwick Airport on the basis of rights granted by a competent authority by way of any legislative, regulatory or administrative provision. I accept, though, that the Aerodrome Licence under the ANO would not appear to be sufficient in itself to amount to an exclusive or special right given, in particular, Recital 25 of the Directive.

62.
Further, there are arguments as to the effect of those rights granted under the Transfer Scheme and under the licensing arrangements in terms of whether they limit the exercise of the relevant activity to one more entities and whether that substantially affects the ability of other entities to carry out that activity.

63.
Whilst Mr Bowsher puts forward strong arguments based on the fact that GAL is a mere owner of land, there are equally arguments about the lasting effects of the Transfer Scheme in terms of the rights it created which have devolved to GAL in its current incarnation. Ms Hannaford’s arguments are given strength by the communication from the Commission setting out the background to the Directive, the recitals to the Directive and the Commission’s Explanatory Note on Special or Exclusive Rights published in 2006 at paragraph 7.

64.
Whilst I have not found the reasoning easy to follow, the views of the relevant Head of Unit at the Commission in the email of 31 July 2013, when it had received the detailed opinion dated 21 May 2013 prepared by Mr Williams on the issue of whether GAL was within the Regulations, clearly provide some support for Ms Hannaford’s submissions.

65.
It is clear that GAL do not want me to determine the issue of whether the Regulations apply to GAL on this interlocutory application. As Mr Bowsher submitted, it is an important point for GAL and it would be difficult for the court to come to a clear decision in the limited time available on the applications for interim relief. That also indicates that there is a serious issue to be tried.

66.
On the basis that there is a serious issue to be tried as to whether the Regulations apply to the Procurement by GAL, as I have said, it was conceded by GAL that there was a serious issue to be tried as to the breaches pleaded in paragraph 16 of the Particulars of Claim.

67.
If I had concluded that there was not a serious issue to be tried as to the applicability of the Regulations then I should have had to consider the alternative case put forward by NATS that there was an implied tender contract under which the Regulations or equivalent provisions applied. This was a case where GAL started the Procurement by an OJEU notice, albeit on any basis referring in error to 2004/18/EC, the Public Contracts Directive. There was no statement that this was a voluntary process. That notice and the Invitation to Tender set out in clear terms the Award Criteria. There will be an argument as to the effect of the disclaimer in paragraph 2.2.5 of the Invitation to Tender and as to the effect in law of the Notice and the Invitation to Tender, together with NATS’ participation in the

tender process and its submission of a Tender but I consider that there is a serious issue to be tried, on the particular facts of this case, as to the existence of the implied tender contract pleaded in paragraph 14 of the Particulars of Claim.

68.
On that basis there is a serious issue to be tried in this case and I now turn to consider the other factors under the American Cyanamid approach.

Adequacy of Damages

69.
Ms Hannaford submitted that, as stated by Sachs LJ in Evans Marshall v Bertola SA [1973] 1WLR 349 at 379 to 380 the question whether damages are an adequate remedy might be better expressed "Is it just, in all the circumstances, that a plaintiff should be confined to his remedy in damages?" She referred to the Court of Appeal decision in Araci v Fallon [2011] EWCA Civ 668 and the decision of Coulson J in Covanta Energy Limited v Merseyside Waste Disposal Authority [2013] EWHC 2922 (TCC) at [48]. She submitted that lifting the suspension or not granting the injunction would mean that GAL was free to award the contract to DFS so that NATS would be left to its remedy only in damages which she submitted would be entirely inadequate.

70.
She submitted that NATS' claim for loss of profit would need to be assessed on a loss of a chance calculation which was a notoriously difficult and speculative exercise. She submitted that the courts have frequently decided that damages are not an adequate remedy for claimants in procurement cases and she refers to a number of decisions helpfully summarised in Covanta at [44].

71.
She submitted that, in this case, calculation of loss of profit would be very difficult because, based on the allegations in the Particulars of Claim, the claim would be based on the loss of a chance and the court would face difficulties in assessing the value of the chance lost. She submitted the court would not know the criteria, the weightings and factors which would have been taken into account in a lawful process and this would increase the difficulty of assessing a loss of a chance. In addition she said that the court would have to assess lost profits on a complex, high-value and long-term contract.

72.
She further submitted that damages would not compensate NATS for the loss of reputation, market position and competitive edge that it would suffer if it were to lose the Gatwick Airport contract. She referred to the decisions in DWF LLP v Secretary of State for Business Innovation and Skills [2014] EWCA Civ 900 at [52] and Alstom Transport v Eurostar International Limited [2010] EWHC 2747 at [126] to [129]. She referred to the evidence of Ms Mason and said that, given the global profile of Gatwick Airport as the World's largest single runway airport with a large number of annual movements and the complexity to which this gives rise in air traffic control terms, the loss of this contract would significantly impair NATS' ability to secure international air-traffic control contracts and other related consultancy contracts.

73.
Ms Hannaford said that operation of the airport carried significant prestige and NATS' experience, skills and knowledge resulting from operation of the contract at Gatwick were of great value both in its marketing and in its market profile in the UK and abroad. She submitted that the loss of the Contract would cause incalculable and un-compensable brand damage to NATS. In addition she

submitted that the loss of the contract at Gatwick would cause the loss of highly prized and experienced employees by way of TUPE transfer, as well as potential disruption to and loss of those which chose not to transfer to DFS.

74.
In relation to GAL Ms Hannaford submitted that damages would be an adequate remedy because, insofar as continuing arrangements with NATS are more expensive than the new contract envisaged with DFS that is a matter which could be compensated in damages which could be readily calculated. She said that GAL's suggestion that there is a risk in relation to NATS performance levels was not borne out by the evidence. She also submitted that the short delay caused by an expedited trial in early 2015 would not detrimentally affect the time of year at which transition could be completed. She said that it was not until recently that GAL changed its proposed handover date to October 2015 from the previously anticipated date of 31 March 2015 as the end of transition in the Tender Documents.

75.
She also submitted that this is a case where GAL's procurement had previously suffered from delay. GAL had given notice to terminate NATS' contract in June 2011 with an end date of 31 March 2013. However GAL did not advertise its procurement until 2 October 2013 envisaging a handover some two years later, on 31 March 2015. She said that the timing had slipped and GAL subsequently requested NATS to extend its contract further to October 2015 on the basis that the procurement would not be completed in time for a handover by 31 March 2015. She submitted that there already had been a 2.5 year delay from the date envisaged when GAL served notice of termination of NATS' contract.

76.
Mr Bowsher submitted that NATS' alleged loss can clearly be compensated by damages. He submitted that the courts have found that they are able to make an appropriate assessment of damages in cases far more complex than this and he referred to the decision of Akenhead J in European Dynamics SA v HM Treasury [2009] EWHC 3419 (TCC) at [23] to [24]. He submitted that the breaches alleged essentially have only one of two outcomes and that this is a tender for which there were ultimately only two bidders, which further simplifies the analysis. He submitted that if it transpires at trial that NATS should have been awarded the Contract NATS can be compensated for whatever bid costs it may have incurred and either loss profit or the lost chance of earning profit.

77.
He submitted that NATS' suggestion that it is at risk of losing some intangible value in this particular contract is not a tenable position. He submitted that NATS has supported the importance of developing a competitive environment in the market for providing air navigation services and that as a consequence any contract might be lost or gained as part of the competitive process. He submitted that NATS remains able to point to a unique depth and breadth of experience in the UK and its extensive portfolio of UK contracts, including the contracts awarded at Stansted and Manchester. He submitted, relying on the evidence of Mr Herga, that NATS is expected to benefit from the newly opened-up market in air navigation services. On that basis he said that NATS' submission that there would be reputational loss associated with losing the Gatwick contract was not credible.

78.
In relation to the assertion by NATS that the loss of the contract would have some impact upon their staff and their skills, Mr Bowsher submitted that it was not clear how this would be a loss for NATS. Again, relying on the evidence of Mr Herga, he submitted that those adverse consequences would affect staff who would be entitled to transfer to DFS so that any delay in entering the contract would

affect them as an individual. If anything this was an argument which went the other way. He also submitted that a postponement of the conclusion of the contract would cause DFS difficulties as regards its work force and he relies on the evidence of Mr Dirk Mahns so that these consideration taken overall are at best neutral.

79.
He therefore submitted that damages would be adequate for NATS and in contrast the operational difficulties which GAL would suffer as a result of delay to the contract award could not be compensated in damages. He submitted that the period of transition is likely to have an unsettling effect upon staff but also there will be an impact of disruption and damage flowing from having the effect of transition at a time of year when that transition will place greater stress on the whole system due to higher traffic demands.

80.
I now turn to consider those submissions. So far as the law in this area is concerned I gratefully adopt the summary of the principles as summarised by Coulson J in Covanta at [48], as follows:

(a) If damages are an adequate remedy, that will normally be sufficient to defeat an application for an interim injunction, but that will not always be so. (American Cyanamid , Fellowes , National Bank);

(b) In more recent times, the simple concept of the adequacy of damages has been modified at least to an extent, so that the court must assess whether it is just, in all the circumstances, that the claimant be confined to his remedy of damages (as in Evans Marshall and the passage from Chitty);

(c) If damages are difficult to assess, or if they involve a speculative ascertainment of the value of a loss of a chance, then that may not be sufficient to prevent an interim injunction (Araci);

(d) In procurement cases, the availability of a remedy of review before the contract was entered into, is not relevant to the issue as to the adequacy of damages, although it is relevant to the balance of convenience (Morrisons).

(e) There are a number of procurement cases in which the difficulty of assessing damages based on the loss of a chance and the speculative or ‘discounted’ nature of the ascertainment, has been a factor which the court has taken into account in concluding that damages would not be an adequate remedy (Letting International , Morrisons , Alstom , Indigo Services , and Metropolitan Resources). There are also cases where, on the facts, damages have been held to be an adequate remedy and the injunction therefore refused (European Dynamics , Exel)

81.
In this case the assessment of NATS’ damages could depend, as Mr Bowsher submitted, on a simple question of whether Lot 1 and Lot 2 should have been assessed separately. However if the matter came to be decided on the basis of undisclosed, irrational and inappropriate criteria being applied in the assessment of price, as is also alleged then, as Arnold J said in Morrisons v Norwich City Council, where one of the complaints is that of undisclosed criteria, it is very difficult indeed for the Court at trial to assess damages because assessment of what chance has been lost by the claimant in those circumstances is virtually impossible.

82.
It is evident that the question of adequacy of damages does not depend solely on whether or not the court could and would do its best in difficult circumstances to assess damages. As Sachs LJ said in Evans Marshall v Bertola at 380 C to D:

“The courts have repeatedly recognised that there can be claims under contracts in which, as here, it is unjust to confine a plaintiff to his damages for their breach. Great difficulty in estimating these damages is one factor that can be and has been taken into account. Another factor is the creation of certain areas of damage which cannot be taken into monetary account in a common law action for breach of contract: loss of goodwill and trade reputation are examples…”

83.
In the present case I consider that there would be great difficulty in estimating the damages which would have to be assessed if the breach in terms of undisclosed, irrational and inappropriate criteria were to be proved. The court would have to assess what would be the impact if those criteria had been disclosed to the tenderers and what would be the impact if rational and appropriate criteria had been applied. Even with two tenderers the court will be left to speculate on a range of possibilities and, whilst it would do its best to come to a conclusion, the difficulty in estimating the damages is, as Sachs LJ said a factor to be taken into account in determining whether it would be unjust to confine a claimant to damages for breach.

84.
I am also persuaded on the evidence in this case that the contract for air navigation services at Gatwick Airport would have a particular impact on the reputation of NATS in the global marketplace. Gatwick is the world’s largest single runway airport with a very large number of annual movements. It is seen in the marketplace as a being of major importance in the increasingly competitive market for air navigation services.

85.
I am persuaded that, as Ms Mason says in her first Witness Statement at 4.12, the loss of the contract to provide air traffic control at Gatwick Airport will significantly impair NATS’ ability to secure international air traffic control contracts and other related contracts. Whilst Mr Herga correctly points out that NATS remains the supplier to 14 UK airports, including Heathrow and has worldwide operations throughout the World, I have no doubt that the particular nature and challenges of air navigation service at Gatwick Airport is an important factor in NATS’ attempts to win worldwide contracts. I have therefore no doubt that the loss of this contract in the Procurement would have a substantial effect on the good will and trade reputation of NATS which it would be impossible properly to calculate in terms of damages.

86.
I am less convinced that the effect on NATS’ staff will cause a loss to NATS. Evidently the loss of staff through TUPE may mean that NATS lose some staff who are particularly well qualified in dealing with air navigation services for a single runway with a large number of aircraft movements. I have no doubt, though, that the market for qualified staff in this area would enable NATS to be able to employ personnel with the required skills and experience for their remaining operations.

87.
So far as GAL is concerned they currently have a contract for air traffic control services and, to the extent that the new contract would be cheaper, there is an easily calculable loss. Equally the benefit and efficiency which GAL seeks to achieve through the new contract will have a financial value. So far as a delay to the contract is concerned, given the importance of this contract, I do not consider there is a realistic possibility that DFS will not be able to enter into the contract if it is let at a later date.

88.

In relation to the transition plan, any delay may lead to transition being postponed. Whether the date of October is more convenient than the previously anticipated March date is debatable. Any delay would have an impact on the business but one which would be more readily ascertainable than the calculation of damages that might be awarded to NATS.

89.
Overall therefore I consider that this is a case where damages to NATS would not be an adequate remedy. For completeness I consider the other elements of balance of convenience.

Balance of convenience

90.
In considering the balance of convenience there are clearly a number of interests to be taken into account. Ms Hannaford submitted that there would be significant prejudice to NATS if GAL were permitted to enter into the contract with DFS, for the reasons set out above. She submitted that a further, short delay pending the hearing of an expedited trial would not cause undue prejudice to GAL in the context of the Procurement which has already been delayed for some two and a half years from the date envisaged when GAL gave NATS notice to terminate the existing contract. She submitted that commencement of the transition period could, in principle, commence in March 2015 or, if an October date were found to be more convenient, could commence in October 2015 ending in October 2016. She also referred to Mr Mahns' first witness statement where he indicates that the transition phase would take between 12 and 15 months.

91.
She submitted that the public interest is also a key factor in the balance of interests envisaged by the amended Remedies Directive and she refers to the decision in Alstom Transport v Eurostar International Limited [2010] EWHC 2747 (Ch) at [80]. She also submitted that there is a strong public interest in bodies subject to the Regulations being required to carry out complex and significant procurements in a proper and lawful manner and referred to Covanta at [59].

92.
In relation to the nature and strength of NATS' case she submitted that GAL has conceded that there is a serious issue to be tried and this is a case where at present the nature of any defence is unknown. She referred to the uncertainty of GAL's position as to whether NATS would have won Lot 1 if it had been separately evaluated. She submitted that, overall, the court should treat NATS' claim as a strong one.

93.
She submitted that an expedited trial in the period between December 2014 and February 2015 would be possible and that the balance of convenience favoured that approach with the suspension or an interlocutory injunction in the meantime. In relation to the status quo she submitted that the procurement had already been delayed and the Procurement was for a contract with a duration of some 10 years. She submitted that the preservation of the status quo for a further period was not disproportionate when viewed in this context.

94.
Mr Bowsher submitted that there are important practical matters that weigh in favour of permitting the contract to be entered into now and weigh heavily compared to NATS case based on the importance of the contract to NATS. He relied on the evidence of Mr Herga and Mr Mahns that delay in signing the contract would have serious implications for the operation of the airport going beyond

the actual delay period. He submitted that any delay will now prevent a handover to DFS starting in October 2015. He referred to aircraft movement data and the transition plan and submitted that handover needed to take place in October at a time when traffic is below full capacity so that reduction in traffic can be planned to allow safe handover without having an impact on the airport operations. He submitted that, if the contract is not entered into now, transition would have to be deferred from October 2015 to sometime around March 2016 or later, which would mean the transition would have to take place at one of the busiest periods of the year rather than the quietest period.

95.
Further he referred to Mr Herga's evidence that market competition of which this tender forms part is a key policy to open up competition in air navigation services. Mr Herga describes NATS' dominance of the UK market based on its historic position as the nationalised state provider. He says that the award of this contract to DFS based on a competitive tender would represent an important step-change in the UK and establish DFS as a credible and substantial UK-based provider of air navigation services.

96.
Mr Bowsher submitted that there is a wider public interest in DFS being established as a credible competitor to NATS in the market generally. Allowing the contract to proceed would, he said, realise the benefits of a competitive market whilst the injunction would put them at risk or at least delay them.

97.
Mr Bowsher also referred to a number of concerns raised by Mr Herga about agreeing an extended contract with NATS and its effect on the DFS bid. He said that any delay in delivery of service improvement for the benefit of users of Gatwick Airport is also an important factor.

98.
I have come to the conclusion that the balance of convenience falls in favour of not lifting the suspension, or in favour of granting an injunction so that the claim made by NATS can be determined in an expedited trial. I consider that NATS' interests in this 10 year contract for air navigation services in the unique circumstances of Gatwick Airport weighs heavily in the balance. There has already been a substantial delay in the procurement process of some two and a half years and a further delay of six months or at most a year has to be viewed in that context. Whilst I accept that that would mean that DFS would be in a position of uncertainty and would have to maintain its tender for that period, which is a matter which must be taken into account, I do not see that as being a determinative or major factor in the balance.

99.
Equally, whilst a delay in achieving the efficiencies at Gatwick Airport is a major factor in the balance, I bear in mind that NATS have offered cross- undertakings in damages not only for GAL but also for DFS. I consider that the public interest is also an important factor as reflected in the Remedies Directive and the strong public interest that complex and significant procurements should be carried out in a proper and lawful manner.

100.
In so far as necessary to consider the preservation of the status quo, there are existing air navigation services which are in place and which have been the subject of extension during the existing delay in

the procurement process and preserving the status quo in this way for a further short period whilst there is an expedited trial would, in any event, not be disproportionate.

Conclusion

101.
For the reasons set out above I consider this is a case where there is a serious issue to be tried, damages would not be an adequate remedy for NATS and the balance of convenience lies in favour of the contract not being entered into under the procurement until after an expedited trial. On that basis I do not lift the suspension in so far as there is an automatic suspension under the Regulations, alternatively, in so far as the Regulations do not apply, I consider that this is a case where there should be a an interlocutory injunction preventing GAL from entering into the contract with DFS until after the expedited trial or further order.

102.
I shall deal with any associated matters including a timetable for the expedited trial when I hand down this judgment or at another, mutually convenient, early date.