Neutral Citation No: [2020] NIQB 51 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **COL11257** *Delivered:* **26/06/2020**

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEENS BENCH DIVISION (COMMERCIAL DIVISION)

2010 No. 41557

BETWEEN:

F P McCANN LIMITED

Plaintiff;

-and-

DEPARTMENT FOR REGIONAL DEVELOPMENT

Defendant.

COLTON J

[1] The court gave judgment in this matter in favour of the plaintiff on 21 June 2016.

[2] The court gave a further judgment in relation to the plaintiff's entitlement to damages on 12 December 2019.

[3] There was a delay in delivering the final judgment because of an issue raised by the defendant. That issue was the subject matter of a judgment on 1 June 2020. The defendant no longer wishes to pursue the issue raised and discussed in that judgment.

[4] A full understanding of this judgment requires that it should be read in conjunction with the previous judgments of 21 June 2016 and 12 December 2019.

Assessment of Quantum

[5] The court has had great difficulty in coming to a determination on damages. It is often said that a court should not intervene by way of injunctive relief in circumstances where an award of damages is an appropriate alternative remedy. This case demonstrates the potential difficulty with such an approach. Ideally this is a case in which the plaintiff's joint tender (BBMC) should have been reconsidered by

the defendant in light of the breaches identified by the court, but that is simply not an option. The court is compelled to determine the issue of damages.

[6] The matter is of course further compounded by the fact that the court has come to the conclusion that what the plaintiff has lost is an opportunity to be awarded the contract rather than a loss of the contract itself, contrary to the plaintiff's submissions.

[7] The court's determination is based on the well-known principles established in **Chaplin v Hicks** [1911] 2 KB 786. In that case the defendant, by a breach of contract in conducting a contest, deprived the plaintiff, one of fifty finalists, of the opportunity to compete for one of the 12 prizes. Although there could be no precision in calculating the value of her lost chance she was entitled to substantial damages. As Vaughan Williams LJ said at page 792 of the judgment:

> "*But the fact that damages cannot be assessed with certainty does not relieve the wrongdoer of the necessity of paying damages for his breach of contract.*"

[8] That this remains the law is not in dispute. In **Yam Seng Pte Limited v International Trade Corporation Limited** [2013] 1 Lloyds Rep 526 at [188] Leggatt J says:

> "*On the one hand, the general rule that the burden lies on the claimant to prove its case applies to proof of loss just as it does to the other elements of the claimant's cause of action. But on the other hand the attempt to estimate what benefit the claimant has lost as a result of the defendant's breach of contract or other wrong can sometimes involve considerable uncertainty; and courts will do the best they can not to allow difficulty in estimation to deprive the claimant of a remedy, particularly where that difficulty is itself the result of the defendant's wrongdoing.*"

Leggatt J quoted with approval the passage from the judgment of Vaughan Williams LJ in **Chaplin** cited above. He went on to say:

> "*Accordingly, the court will attempt so far as it reasonably can to assess the claimant's loss even when precise calculation is impossible. The court is aided in this task by what may be called the principle of reasonable assumptions – namely that it is fair to resolve uncertainties about what would have happened but for the defendant's wrongdoing by making reasonable assumptions which err if anything on the side of generosity to the claimant where it is the*

defendant's wrongdoing that has created those uncertainties."

[9] The court considers this is the proper approach to the assessment of damages in a case such as this. In coming to a conclusion on damages the court also bears in mind that procurement law requires the award of effective damages where a sufficiently serious breach has been established.

[10] The history of the quantum dispute in this case is somewhat unusual. The plaintiff initially pleaded the alleged loss on the basis of a loss of profit based on previous experience of contracts in which it has engaged. The defendant was the first to submit an expert report from Harbinson Mulholland (HM) forensic accountants, arguing that there was in effect no loss in this case. The plaintiffs then responded with an expert report from Price Waterhouse Coopers (PWC) ultimately claiming the figure of £12,316,070.32.

[11] In closing submissions the parties remained wedded to these figures. In short the defendant argues that such were the rates tendered by BBMC that it was highly improbable that the parties would have agreed a contract to proceed to Phase 2. Alternatively if they had agreed to proceed to Phase 2 such were BBMC's figures that it would not have made any profit. The plaintiff continued to argue that but for the breaches it would have been awarded the contract, it would have proceeded to Phase 2 on favourable terms, there would have been no issues or difficulties with disallowed costs, the contract would have been completed successfully, a profit would have been made and further profits would have been made from collateral matters.

[12] Before considering any apportionment issues arising from loss of chance the court proposes to consider the plaintiff's claim on the basis that BBMC would have been awarded the contract.

Loss of main contract contributions through fee and gain share

[13] There are three key variables in this assessment namely:

(i) The amount of the target cost that would have been agreed by the defendant and BBMC;

(ii) The outrun cost of a BBMC contract;

(iii) The extent to which any overspend on the target cost would be reflected in increased target costs (because, for instance, it relates to compensation events) or will be reflected in some degree of pain for BBMC.

[14] As will be clear from the previous judgments in this case the difficulty in assessing any potential loss for the plaintiff is inherent in the nature of this type of procurement process. It is not possible to agree a target cost for the contract until Phase 1 is completed. The agreed target cost must have some direct functional link to the tender prices of the successful tenderer. However, it is equally clear that the negotiations between the parties concerning costs for the entire contract will involve very substantial matters in respect of which there was no tender. By definition therefore an assessment of any potential target cost agreement between the parties is difficult.

Potential target cost

[15] How then does the court estimate a potential target cost between the parties?

[16] In order to prepare a best estimate of BBMCs hypothetical target cost HM adapted the three scenarios proposed by Ian Morris at the request of John White in December 2009 immediately prior to the procurement decision. At that stage Mr Morris attempted to provide estimates for "information purposes".

[17] In December 2009 Chandler KBS had provided benchmark figures for the project. Scenario one involved applying the plaintiff's tendered amounts for the 28% of the cost plan with all the other costs remaining unamended.

[18] In scenario two the percentage difference between the tender benchmark and the tender prices submitted was applied to the full value of drainage, earthworks, pavements and structures in the cost template – which according to the defendant were items comparable to those specified within the tender.

[19] Scenario three was a development of scenario two with the addition that the percentage differences were also applied to kerbs and footways and accommodation works which again, according to the defendant, were further items broadly comparable to those specified within the tender.

[20] By the time of the hearing the court was aware of the target cost agreed with the successful tenderer LFC and for the purposes of this exercise these figures replaced the Chandler KBS benchmark figures applicable in December 2009.

[21] Harbinson Mulholland rejected scenario one as a viable approach on the grounds that it "*represents an illogical amalgam whereby the same item (say manhole covers) was costed at the tender price at one place and pre-tender benchmark price of Chandler KBS at another.*"

[22] The essence of the "scenario one" approach is that in assessing the target cost price the figures agreed with LFC should be applied to the non-tendered items.

[23] Scenario two involved reducing the prices for the non-tendered rates in accordance with the percentage differences between BBMC and LFC for the full costs of drainage, earthworks, pavements and structures.

[24] Scenario three developed this approach further by applying the tendered percentages to kerbs, footways and accommodation works. In other words in scenarios two and three tendered rates were extrapolated across the non-tendered elements of the contract costs. As indicated the figures were adjusted when the LFC figures became known. A fundamental issue between the parties is which of the three scenarios is the most appropriate for the purposes of assessing a potential target cost for BBMC in the event that it had been awarded the contract.

[25] The plaintiff argues that scenario one is the appropriate approach. The defendants say that an approach between scenarios two and three is the appropriate one.

[26] In determining this issue it is important to remember the nature of the procurement process, to which the court has briefly referred. As set out in the main judgment the project was to be carried out in two phases. In Phase 1 the contractor is required to provide input into the project design development, to share its experience and expertise with the contracting authority and provide advice on construction issues. Phase 2 follows the completion of Phase 1. At this stage a target cost is agreed between the contracting parties which represents the best estimate of what the job should actually cost to complete. The target cost is the yardstick by which the financial performance of a contract is measured. The actual cost or financial outturn of the contract is measured against the target cost with financial consequences for both the employer and the contractor. As the contract progresses the contractor receives regular staged payments equal to the actual costs incurred in delivering the works. When the contract works are complete there is a totalling up exercise and any difference between the total actual cost (termed "*defined cost*") of the project and the "*target cost*" would then be shared between the employer and contractor on an agreed basis. This means both parties share the financial gain of any cost deficiencies or share in the financial pain of any cost overrun. The contract documents define the sharing proportions for "*gain*" and for "*pain*".

[27] This provides an in-built incentive for the contractor to come within the target cost. The contractor is incentivised to ensure that waste and time on site is reduced so that outturn cost is diminished, that defective work and materials are not done or installed respectively and disallowed cost is kept to a minimum.

[28] Obviously the tendered rates in the commercial assessment will be a factor in the agreement of the target cost. The tender document states that:

> "*The productivity and unit rates provided for drainage, earthworks, pavements and structures will be used as the basis for agreeing the target costs.*"

[29] The defendant's evidence is that the commercial schedules were developed to focus on the key activities which generally had the greatest variance in price and are influenced by methods of working and resourcing allocation. Thus tenderers were sought in respect of core management team, drainage, earthworks, pavement and structures. These represented only 28% of the overall contract. The defendant's evidence was that the cost of highway elements including fencing, safety barriers, kerbs and footways and traffic signs are generally more consistent between tenderers.

[30] The plaintiff therefore says that this means it is likely that the non-tendered items involved in the target cost price would be broadly similar between any contractor awarded the contract. It is therefore argued that whilst by no means perfect, scenario one is the best approach to assessing a target cost for BBMC.

[31] The plaintiff argues that scenarios two and three are fundamentally flawed. In respect of scenario two it is misconceived to apply the broad percentage differences between BBMC's rates for tendered activities and the client's benchmark (or ultimately LFC) to non-tendered activities as they are fundamentally different in nature. The non-tendered items that constitute the majority of what was further identified in the cost plan are not the same or similar to those tendered. They include for instance capping layer, high friction surfacing and planning and inlay. Similar arguments are made in relation to earthworks and structures.

[32] It is argued that scenario three is even more fundamentally flawed in that it has sought to apply tendered percentage differences to kerbs, footways and accommodation works which is based on a wholly unsupported assumption that kerbs and footways resemble works carried out on the main highway. In respect of accommodation works broad assumptions are applied in respect of the percentage differences of drainage, earthworks, pavements and structures, although the very nature of accommodation works is significantly different to items tendered under these main headings. The evidence was that only 11% of the accommodation works relate to pavements, little of which may even be expected to be bituminous in nature, similar to the tendered pavement rates.

[33] In the court's view the best approach is indeed scenario one. Undoubtedly, BBMC would be held to its tender prices for the tendered items. Clearly, they would be used as the basis for agreeing the target costs in respect of such works. These account for only 28% of what was tendered. In respect of the remaining items there is no reason to believe that BBMC would not be in a position to have agreed rates broadly similar to those agreed with LFC or any other contractor who would be awarded the contract. The process is set up in such a way that the outgoing cost is based on the best available value for money in the market. The best prices likely to be available in the market are likely to be largely the same for all contractors. Whilst the court acknowledges that there would be some differences it is, in the court's

view, a reasonable assumption that the non-tendered items would be broadly consistent across the board.

[34] The nature of the process is such that the expected target costs would be built out of costs that are likely to vary (for which specific prices were sought in the commercial schedule) and all other activities with a likely price which would be common to all bidders (and these commonly expected price levels would apply rather than costs derived from the tender). The court is not satisfied on the evidence it heard that the extrapolation process undertaken by HM is a fair method of attempting to assess a potential target cost between BBMC and the defendant. On this issue it is important to note that it is not clear the extent to which the LFC price was actually based on the tendered prices in any event.

[35] The court therefore has come to the conclusion that the most straightforward and fairest method of assessing a potential target cost for BBMC is to start with the actual target cost agreed with the successful contractor and make adjustments for the identifiable differences that properly apply from the difference between the respective tenderers. Realistically the adjustments should be confined to the portion of the contract in respect of the tendered prices. On balance on the evidence the court heard it has come to the conclusion that BBMC would have been likely to agree prices in relation to the remaining matters close to or similar to those agreed by LFC. The court acknowledges that this may be somewhat generous to the plaintiff and because of the lower tendered prices it may be the case that this would also have resulted in lower prices for the non-tendered items. Nonetheless, the court considers that this approach is in keeping with the passage approved by Leggatt J referred to in paragraph [8] above.

[36] The court accepts that there are flaws in this approach given the inevitable uncertainties in making such an assessment. The court considers this is the best and most reasonable approach available to the court.

[37] Adopting the scenario one approach based on LFC target cost figures, rather than the Chandler KBS benchmark figures the plaintiff initially put forward an estimated target cost for BBMC of £92,288,783. Subsequent to comments made by me in the course of the hearing the plaintiff's expert amended the figures for the tendered areas and for preliminaries which had the effect of reducing the estimated target cost for BBMC to £91,674,732.

[38] This figure is particularised in the tablet set out below:

		Estimated BBMC Target Cost £
Tendered areas (amended)	Structures	8,639,148
	Drainages	9,181,735

	Earthworks	11,837,597
	Pavements	10,596,722
Non-tendered areas (but amended)	Preliminaries	14,201,974
Non-tendered areas (not amended)		21,127,189
Total (before design, risk & fees)		75,584,365
Design		3,762,919
Risk		3,232,000
Total before fees		82,579,284
Fees (4.98% of total before fees)		4,112,448
Contract inflation		4,983,000
Estimated Target Cost for BBMC		£91,674,732

[39] The court proposes to make one amendment to the estimated target costs set out in this table.

[40] The court accepts the submission from the defendants that the plaintiff's table makes the error of including risk in its calculation – the 4.98% is applied (and was paid to LFC) on the target excluding risk.

[41] **Therefore, the 4.98% should be applied to a figure of £79,347,284 equals £3,951,495 before the risk figure of £3,232,000 is added to the fees and contract inflation. This has the effect of reducing the estimated target cost for BBMC to £91,513,779. If the court has made an error in calculation this can be corrected by the experts retained in the case.**

[42] The court considers this figure to be a reasonable assumption of a notional target cost between the parties had BBMC been awarded the contract.

The outrun cost of a BBMC contract

[43] In assessing the likely outrun cost the best information available to the court is the LFC actual cost, insofar as this was available. The court's view is that this is the best and most reasonable starting point. There was no real dispute between the parties in relation to this proposition. The real dispute relates to the extent to which BBMC would have been entitled to the same compensation events as LFC and whether it would have incurred the same overspends/disallowed costs as incurred

by LFC. These are substantial sums and materially affect the outcome of quantum in this case.

[44] Compensation events relate to works which were over and above what was anticipated at the time the target cost was set. On the basis of the nature of the compensation events claimed the court considers it reasonable to conclude that similar compensation events would have occurred if BBMC had performed the contract. The plaintiff argues that the costs of the activities involved would be the same as those for LFC and has therefore included the full amount paid to LFC in its calculation of loss. In this respect similar arguments in relation to extrapolation arise as when considering scenarios one, two and three in relation to potential target costs for BBMC. However, the potential target cost did reflect the cheaper rates for items that were tendered and the court takes the view that it is reasonable to conclude that any compensation events would have been performed at a lower cost by BBMC. The court does not say that this would be the full difference between the tendered rates for the contract. Doing the best it can the court considers that the compensation events before fees of £4,103,203 should be reduced to £4m. This represents a reduction of approximately 2.5% which seems to me to be reasonable having regard to the various rates quoted by BBMC and LFC at tender stage. The court therefore directs that the experts retained by the parties provide a calculation of the loss, based on the findings in this judgment on the basis BBMC would have incurred compensation events of £4m.

[45] The court now turns to the issue of disallowed costs.

[46] There was much debate and evidence in the trial on this point. Much of the disagreement between the experts focused on whether or not in fact the disallowed costs were properly disallowed and whether they could be properly calculated from the information which was made available by way of discovery. The issue of discovery was a running sore between the parties throughout this litigation. The plaintiff contended that in order to properly carry out the quantum exercise full details of all the documentations relating to the contract between the defendant and LFC were required. The defendants argued that such disclosure would be entirely disproportionate and would raise significant issues of financial confidentiality. In any event they argued that appropriate targeted disclosure was provided in relation to the issues that arose in the course of the trial.

[47] Having reflected on the matter it seems to me that as a matter of principle there is no evidential basis for burdening the plaintiff with the disallowed costs and overspend, whatever that be, attributable to LFC.

[48] The court could not assume on the balance of probabilities that BBMC would overspend or waste as much expenditure as LFC has done. As far as the court is concerned LFC problems have been of their own making. There is nothing in the evidence that the court heard which points to support for the proposition that the overspends made by LFC would also have been made by BBMC had they been

awarded the contract. Indeed, it appears that it is the fact of the overspend/disallowed costs incurred by LFC which is the main basis for the defendant's argument that LFC may not make a profit at all on this contract.

[49] There was no evidence before the court about what the average overspends might be for this type of contract. Nor was there any evidence about previous performances by the plaintiff in terms of its performance of contracts which would point to a probability of overspends in this contract. It scored highly in the technical submissions which related to identifying and managing the risk assessments with delivery of Phase 2 to budget scoring 8 out of 10. Given that BBMC had submitted a lower fee it plainly was looking to the gain percentage to recover under the contract which would have been an extra incentive to avoid any disallowed costs.

[50] The court has come to the conclusion that the dispute between the accountants in this case is not actually germane to the assessment by the court.

[51] The court has come to the conclusion that the potential cost outrun should be assessed without taking into account the overspend attributable to LFC.

[52] **Therefore, in relation to the estimated outturn for BBMC the court adopts the figures set out in the plaintiff's Summary of Claim (see paragraph 3.119 of the plaintiff's closing note dated 16/1/2016). The final calculation of the plaintiff's fee and gain share is to be based on the same Summary of Claim but is to be adjusted to take account of the issues at paragraph [41] (the point at which risk is included in the calculation) and the issue raised at paragraph [44] (reduction of compensation events £4m).**

[53] **If there is any issue between the experts as to the calculation based on these findings the matter can be referred back to the court.**

Loss of contributions from McCann's inputs into project

[54] A key element of the competitive advantage claimed by BBMC was access to F P McCann's Loughside Quarry. The plaintiff contends that had it been awarded the contract its proximity to the McCann quarry not only resulted in a competitive advantage but meant that the plaintiff has lost the opportunity to provide aggregates to the joint venture which would have earned a margin going to the bottom line of McCann's accounts.

[55] Whist it cannot be established with certainty that F P McCann would have been the sole supplier to BBMC one can see that in principle this was a lost opportunity for the plaintiff.

[56] However, the evidence on this point was most unsatisfactory.

[57] Firstly, the plaintiff did have the opportunity to sell aggregates to the successful contractor LFC. Indeed, the evidence was that it did supply aggregates to some of the sub-contractors. On the face of it the price quoted in the tender rate of £4.39 per tonne would be to quote Mr Harbinson "*practicably irresistible*" for LFC. The matter of course is complicated by the fact that the quote from BBMC in the tender was "*free of overhead*". What this meant was an issue of contention in the trial. The court was not impressed by Mr Crawley's explanation on behalf of the plaintiff who indicated that there would be an element of variable overhead that would need to be charged in any internal sales if the plaintiff had obtained the contract.

[58] It is clear from the evidence of Mr McCann, on behalf of the plaintiff, that there was ongoing discussions between the plaintiff and LFC in relation to the sale of aggregates. As already indicated it appears that since September 2012 F P McCann supplied over 20,000 tonnes of aggregate to sub-contractors on the A8 project. Mr McCann did not really give any explanation as to why there was a failure to provide aggregates to LFC. On 2 May 2013 LFC made a specific query about the purchase of aggregates from the plaintiff. From that point onwards it appears that McCann effectively declined to submit further quotations for sales to LFC. Mr McCann's explanation was that they were simply fed up with LFC at that point. However, the only document that has been disclosed in relation to the point produced by the plaintiff indicates that the plaintiff declined to tender for aggregates as it did not have the capacity. This suggests to the court that the real answer for the failure to supply to LFC was that the plaintiff was in fact running at full capacity.

[59] The court has been unable to ascertain the reason why the plaintiff did not successfully provide aggregates to LFC under this contract. It may well be that any relations between the parties broke down but on a commercial basis the court can see no reason why the plaintiff did not respond positively to the enquiry in May 2013. The only objective contemporaneous explanation suggests that the reason was simply that the plaintiff was working at full capacity in any event and it was not financially beneficial for it to supply LFC.

[60] In short, the court is not satisfied with the evidence from the plaintiff on this issue. It is not satisfied in relation to what the actual cost would have been because of the confusion in respect to what is meant by "*free of overhead*". More importantly it seems to the court that the opportunity to provide the aggregate was there in any event and the failure to supply to LFC represents a failure to mitigate any loss.

[61] The court has come to the conclusion therefore that the plaintiff has failed to establish that it has any loss under this heading.

Pre-cast concrete

[62] **The parties are agreed that the potential loss under this heading is £299,883.**

Underutilisation of plant and equipment

[63] The plaintiff brings a substantial claim for what it describes as underutilisation of plant and labour totalling in excess of £1.5m.

[64] In tendering for the contract BBMC states that:

> "*The plant and equipment for earthworks, drainage and black top activities are available from McCann's own fleet … The rates quoted are free of margin and overhead.*"

[65] The plaintiff suggests that by reason of its failure to be awarded the contract it has had to maintain equipment and retain labour which it would otherwise have used in the A8 contract. In particular it is suggested that in negotiating the contract for Phase 2 it would have organised the works so that the equipment and staff would have been active during the periods which are normally less busy, particularly between July and September. Generally speaking F P McCann's busy season is between January and March.

[66] On this issue there was no real engagement between the experts on the figures but rather on the principles. The defendant says that there is simply insufficient evidence to establish any loss under this heading.

[67] In assessing this matter the court is influenced by a number of factors. Firstly, it is clear that in this business there are inevitably periods of underutilisation. It is accepted that F P McCann historically experienced pockets of underutilisation. Furthermore, it is clear that after its failure to be awarded the contract F P McCann continued to replace and invest in new plant and machinery, continued to rely on subcontractors and increase its labour force. By way of example the plaintiff purchased eight items of surfacing laying equipment (pavers and rollers) which were to replace seven items disposed of in the years 2010/2011 and 2011/2012.

[68] There is also evidence that shows that F P McCann utilised sub-contracted haulage during the period in which the A8 was being completed. The number of items of ancillary equipment owned by F P McCann has remained similar (445, 434 and 416 in 2009/2010, 2012/2013 and 2014/2015 respectively. Hiring of ancillary equipment between 2009 and 2015 amounted to £1,141,977. F P McCann significantly increased its workforce during the period it claims to have suffered from underutilisation (from 514 in January 2013 to 901 in January 2015).

[69] In general terms the court notes that the plaintiff maintains a healthy and growing profitability. Had it been awarded this contract this may have limited its ability to take on additional work but in any event the evidence does not point to any compensatable underutilisation.

[70] The court does not consider that there is sufficient evidence to support the claim under this heading. To make an award involves moving into areas of

impermissible speculation as opposed to reasonable assumptions. It is simply not supported by the evidence or sustainable in the court's view. Therefore, the claim under this heading is rejected.

Lost rent at location for offices and compounds for A8 project

[71] A key element of the BBMC tender was its reliance on the use of McCann's internal supply chain, materials, resources and equipment, and that its existing Loughside Quarry would contribute significant benefits to successful project delivery. Amongst those benefits was the potential for the extensive lands available at Loughside Quarry to provide offices and compounds which it says it had undertaken to make available to BBMC. The successful contractor, LFC has been compelled to use an area elsewhere which must involve an element of cost.

[72] The plaintiff claims £30,000 under this heading as representing a reasonable estimate of the rental charges that the plaintiff would have expected to recover through the project.

[73] There has been no real engagement between the experts in terms of the actual figure but rather the defendants suggest that this claim should be rejected as "*no agreement or correspondence between the plaintiff and BB in relation to the matter can be provided*".

[74] On this point the court considers that it is unrealistic to expect that such correspondence would have been exchanged prior to the contract being awarded. The court considers that it is probable that the plaintiff would have sought recovery of rental as the defendant can be presumed to have been willing to pay rent to another landowner through the appointed contractor.

[75] **The court therefore allows £30,000 in relation to loss of rent.**

Tender costs

[76] The only circumstances in which this could be recoverable would be if all the other parts of the plaintiff's claim fail. The court is assessing the plaintiff's loss firstly on the basis that it would have been awarded the contract before considering any reductions arising from causation issues. The tender documents expressly say that tender costs would not be recoverable. Tender costs are the costs of doing business. In those circumstances the court does not consider that the tender costs would be part of the loss that the plaintiff would have sustained had it been awarded the contract.

Future opportunities

[77] This head of claim relates to the alleged disadvantage the plaintiff has experienced in relation to other opportunities due to not working on the A8 with BBMC. It is argued that had BBMC been successful, F P McCann by working on the A8 would have enhanced both its profile and relevant experience of large scale road construction projects. As a consequence it would have had the opportunity to pursue new construction opportunities in its own right without the need to form joint ventures.

[78] In particular it argues that it would not have had to form joint ventures with BAM to successfully tender for the A26 and A31 projects.

[79] The claim is quantified on the basis that it would have been able to pre-qualify and tender for these projects successfully on its own. The plaintiff claims a loss of £2m as a result in respect of the A26 project and £1m in respect of the A31 project.

[80] The court considers this is a highly speculative claim. It is not satisfied on any showing that in fact the plaintiff would have successfully tendered on its own without a joint venture for either A26 or A31. Any award under this heading would traverse into areas of impermissible speculation rather than reasonable assumptions and therefore no award is made in respect of this claim.

New batching plant

[81] The BBMC bid was prepared and submitted on the basis that a new asphalt mixing plant (also referred to as black top batch or batching plant) would be erected at McCann's Loughside Quarry, which then would be available for dedicated use on the project and subsequently provide tangible legacy benefits. Planning approval for the plant was obtained on 23 September 2009 approximately one month before the tender submission date.

[82] It was the plaintiff's case that the plant would have been erected at Loughside Quarry if BBMC had been awarded the project. In the course of the tender clarification process the defendant sought confirmation that the plant would be available to the project and it is accepted that the presence of a plant at Loughside Quarry would provide competitive advantages to BBMC.

[83] Had BBMC been awarded the contract it was the plaintiff's evidence that the mixing plant would have been erected at Loughside Quarry. The plaintiff would have received a significant contribution to the establishment costs through the project and would have benefited from the product demand that A8 would have provided. The plaintiff has valued this element of the claim at £350,000 as a contribution towards construction costs and £564,800 by way of lost profit on expected private sales.

[84] The defendant strongly refutes any suggestion that this is a compensatable loss. It relies on the fact that the plaintiff has not in fact constructed the mixing plant. If it has customers available at present as is alleged then why not construct the plant now or before now? If the plaintiff is awarded damages under this heading can the court be satisfied that in fact it will build the plant? Again the defendant argues that this is simply a claim which is far too speculative to justify an award. The defendant also points out that the plaintiff has two other similar plants, one within 20 miles of the location. Any new black top plant at Loughside would in all probability impact on sales from the existing plants.

[85] Again, as with other collateral issues other than the main contract the court has considerable reservations about the state of the evidence under this heading and the degree of speculation involved in justifying an award. As was the case with regard to the claim for loss of opportunity to supply aggregates to the contract the court was unconvinced by the purported profit of £13.67 per tonne.

[86] **Having heard the evidence the court is satisfied that some allowance should be made for this lost opportunity. The court proposes to value it on the basis that the plaintiff should have received £50,000 per year for a three year period for depreciation and maintenance totalling £150,000.**

[87] The effect of this is that the court assesses the loss the plaintiff would have sustained had BBMC been awarded and completed the contract for the A8 as follows:

(a) The figure to be calculated at paragraph [52] above, plus

(b) £299,883, plus [paragraph 62]

(c) £30,000, plus [paragraph 75]

(d) £150,000 [paragraph 86].

If there is any issue between the experts as to the calculation the matter can be referred back to the court.

Final assessment of damages

[88] As indicated in paragraph [6] of this judgment the complexity in assessing any financial detriment suffered by the plaintiff is compounded by the court's finding on the impact of the failings of the defendant. In this regard the court returns to the original judgment:

> "***Decision***

[112] The defendant was in breach of Regulation 30 of the Public Contracts Regulations 2006 and is guilty of a breach of duty to the plaintiff.

[113] I have come to the conclusion that there was a significant chance that the defendant may have taken a different decision were it not for those breaches.

[114] I do not conclude that BBMC would necessarily have been awarded the contract if the concerns I have raised had been dealt with properly, as I take the view that many of the concerns raised by the CEP in relation to the tender could have supported a conclusion that the bid was abnormally low.

[115] In the event, for example, that it had been open for me to set aside the award of the contract to the putative successful tenderer under Regulation 47, I would have referred the matter back to the defendant for further consideration.

[116] That option is not available to me and I hold that the plaintiff is entitled to an award for damages.

[117] The difficulty that arises is how one assesses the loss or damage that the plaintiff has suffered as a consequence of the breaches which I have found.

[118] In the course of the hearing I heard detailed evidence from forensic accountants which were essentially based on the argument on behalf of the plaintiff that BBMC should have been awarded the contract. Whilst self-evidently the calculation of any such loss was fraught with difficulties given the high degree of speculation that was involved, I do not consider that this is an appropriate approach to damages in light of my findings."

[89] In the original judgment the court went on to quote from the Court of Appeal judgment in **Energy Solutions Limited v Nuclear Decommissioning Authority** [2015] EWCA Civ 1262.

[90] Since the original judgment in the case the **Energy Solutions** case was considered by the Supreme Court and this decision was considered in the judgment of 12 December 2019.

[91] Having reviewed the Supreme Court authority the court concluded that on the facts of this case the breaches identified were sufficiently serious to justify an award of damages.

[92] The court went on to conclude that it did not consider it necessary to hear further evidence on the matter or that further discovery was required. Prior to the hearing the parties had agreed that the court could determine the matter on the basis of the evidence before it and there was nothing in the Supreme Court decision which changed that in the court's view.

[93] In deciding how to quantify the loss suffered by the plaintiff in light of the court's findings the court proposes to adopt the approach set out in McGregor on Damages, 19th Edition (paragraph 10-046) as follows:

> "*It is submitted that losses of a chance appearing in the process of quantification do not fall within the loss of a chance doctrine. Loss of a chance proper, as it may be termed, has a more limited field. It comes in before we get to quantification; indeed it comes in at the causation stage. How is this? It is because there are situations where the law has recognised, and has treated, the loss of chance as a form of loss, an identifiable head of loss in itself. To take Lord Hoffmann's way of putting it in* ***Barker v Corus (UK) Limited****, 'The law treats the loss of a chance of a favourable outcome as compensatable damage in itself'. Causation is then established by showing that the claimant has lost the chance and showing this, on the balance of probabilities. This then makes for three stages in the inquiry; first, it must be ascertained whether loss of a chance is recognised as a head of damage or loss in itself; secondly, it must be shown that on the balance of probabilities the claimant has lost the particular chance; thirdly, the lost chance must be quantified by resort to percentages and proportions.*"

[94] In this case the court is satisfied that the first and second propositions have been established and it now falls on the court to quantify the lost chance by resort to percentages and proportions.

[95] In carrying out the assessment in this case a further complication arises in that the court has to consider two probabilities in this case. The first relates to whether or not the plaintiff would have been awarded the contract but for the breaches. The second relates to whether or not had it been awarded the contract it would have proceeded to Phase 2.

[96] The calculations set out above assume that the plaintiff would have been awarded the contract and would have proceeded to Phase 2.

[97] As is clear from the evidence in this case the two probabilities are not independent and are clearly linked. The reason why the defendant had a legitimate concern about the plaintiff's tender was on the basis that it would not have been able to proceed to Phase 2 which would have required the entire procurement process to commence again, resulting in significant cost and delay.

[98] In assessing this issue the court is faced with the same uncertainty as relates to the potential loss suffered by the plaintiff had BBMC been awarded the contract.

[99] The evidence the court heard in the case points to this issue being finely balanced. The court has identified significant breaches of duty in the tender process. It has equally acknowledged that the concerns which gave rise to the decision to reject the plaintiff's bid as abnormally low had substance.

[100] The plaintiff may protest that the fact that the court was able to come to an assessment of a viable potential target cost and outrun for BBMC demonstrates that the decision maker could not lawfully conclude that the bid was abnormally low or that there was any basis for a concern that a target cost would not be agreed.

[101] However, this has to be seen in the context of the court's generous approach to the plaintiff in light of the fact of the breaches which the court found. More importantly, the court had the advantage of knowing the actual figures agreed with LFC which obviously would not have been available to the decision making panel.

[102] Given the margin of appreciation available to the decision maker, having heard the disputed evidence on the BBMC rates had the defendant remedied the breaches found by the court it is possible that it may have come to the same conclusion. Because of the uncertainties it is simply not possible to conclude that it would.

[103] Because the matter is so finely balanced the court has come to the conclusion that the appropriate approach for the court is to award damages on the basis of 50% of the profit it has assessed on the balance of probabilities the plaintiff would have made had (a) its tender been accepted and (b) the contract proceeded to Phase 2.

[104] The plaintiff is therefore entitled to damages totalling 50% of the figure to be calculated as per paragraph [87] of this judgment.

[105] As per paragraph [87] in the event that the experts are unable to agree a calculation based on the court's findings the matter can be referred back for further consideration.

Interest

[106] The court considers that some allowance should be made for interest in the case and will allow the parties the opportunity to make short written submissions on how this should be approached. The plaintiff is to make written submissions on any claim for interest within 14 days of the delivery of this judgment. The defendant has 14 days to reply. In the event that any of the parties require an extension of time to make the submissions leave should be sought from the court.

[107] On receipt of the calculation referred to in paragraph [104] and submissions on interest the court can draw up a final Order.