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Automatic Suspensions

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Regulation 95 of the Public Contracts Regulations 2015:

95.— Contract-making suspended by challenge to award decision

(1) Where—

(a) a claim form has been issued in respect of a contracting authority's decision to award the contract,

(b) the contracting authority has become aware that the claim form has been issued and that it relates to that decision, and

(c) the contract has not been entered into,

the contracting authority is required to refrain from entering into the contract.

(2) The requirement continues until any of the following occurs—

(a) the Court brings the requirement to an end by interim order under regulation 96(1)(a)…

In deciding whether to lift the automatic suspension: ***American Cyanamid*** principles

(i) Does C's case raise a serious issue to be tried?

(ii) If so, would damages be an adequate remedy (for either party)?

(iii) If not, where does the balance of convenience lie?

The initial approach of English courts: lift the automatic suspension

- ***Indigo Services*** [2010] EWHC 3237 (QB): AS lifted
- ***Exel Europe Ltd*** [2010] EWHC 3332 (TCC): AS lifted

A change in approach in late 2014?

- ***NATS (Services) Ltd v Gatwick Airport Ltd*** [2015] PTSR 566: AS maintained
- ***R (Edenred (UK Group) Limited) v HM Treasury***[2014] EWHC 3555 (QB): AS maintained

Mixed fortunes during 2015:

- ***Solent NHS Trust v Hampshire County Council*** [2015] EWHC 457 (TCC): AS lifted
- ***Bristol Missing Link Ltd v Bristol CC*** [2015] EWHC 876 (TCC): AS maintained
- ***OpenView Security Solutions Ltd v Merton LBC*** [2015] EWHC 2694 (TCC): AS lifted
- ***Counted4 Community Interest Co v Sunderland CC*** [2015] EWHC 3898 (TCC): AS maintained

Developments since mid-2016:

(i) High Court judgments in the ***Kent*** and ***Perinatal Institute*** cases

(ii) Judgment of Supreme Court in ***Energy Solutions EU Ltd v Nuclear Decommissioning Authority***

(iii) High Court decision in ***Lancashire***

Kent Community Health NHS Foundation Trust v NHS Swale Clinical Commissioning Group [2016] EWHC 1393 (TCC) – 27 May 2016

AS lifted:

- Is common ground that proceedings raise serious issue to be tried
- C contends that damages would not be an adequate remedy for it – as a not-for-profit organisation

- Stewart-Smith J: [15] and [16]: there may be cases where the infringement of the interest that a party is trying to protect by way of an injunction may not be adequately compensated by an award of damages.
  - A person's privacy or reputation is *"the paradigm example".*
  - There may be other considerations which lead to the conclusion that the Claimant in a particular case may not be adequately compensated by an award of damages because an award of damages does not reflect the substantial justice of the case.
  - The Court must focus on the interests of the Claimant.

- Questions Coulson J's judgment in ***Bristol Missing Link*** at [55]:

  "I can see no reason why damages should be regarded as an inadequate remedy simply because the Claimant, whether as a not-for-profit organisation or for other reasons, has not suffered and will not suffer substantial financial loss"

- But: the <u>additional</u> factors in ***BML*** <u>were</u> capable of rendering damages inadequate:

  "The substantial justice of that case had to reflect the fact that, although their immediate and recoverable financial losses would be modest, the knock on effects (which, at least arguably, would not be compensated in damages) would be catastrophic"

- In ***Kent***:
  - *"In purely financial terms, the losses that would be incurred if the Trust fails to win the contract can be assessed without obvious difficulty and can be made the subject of an appropriate award of damages"*

- Counsel for C *"submits that it is not doing substantial justice to a claimant who is not engaging in the procurement process to generate money if the Court says that all the Claimant can recover is money. If, as he submits is the case here, the Claimant engages in the procurement because, in its judgment and belief as a public benefit corporation, a single provider of services across Kent is for the public benefit then simply to award damages for financial losses fails to meet that C's real concerns, because the Court is giving it a remedy that is essentially irrelevant to its wider purpose."*

- *“To my mind there is ultimately a short answer to this submission, which is that the Court is never going to rule on the question whether the public benefit is better served by having one provider of integrated services or more than one.”*

- Balance of convenience:
  - C suggests having claim heard outside of London so that it can be heard sooner. Judge notes that this would result in increased costs.
  - A "*real risk*" that the delay if AS maintained would make the difference between getting the new arrangements in place in time for the winter and being unable to do so
  - Judge concludes that factors are fairly evenly balanced and it is therefore a counsel of prudence to maintain the *status quo*:

- What is the *status quo*?
  - C contends that the *status quo* is that it is in place providing services
  - CCGs observe that C's contract has expired and the *status quo* would allow it to enter into a new contract with Virgin Care unless injuncted
  - CCGs' argument is accepted

Perinatal Institute v Healthcare Quality Improvement Partnership [2016] EWHC 2626 (TCC) – 26 October 2016

- AS lifted

- On serious issue to be tried: HQID argues that there is not one because PI is out of time to make its complaint. Jefford J: there is at least a serious issue to be tried as to whether the complaints are time-barred

- On adequacy of damages:

  "I do not read what Coulson J. said at paragraph 55 of the judgment, quoted above, as setting out an absolute rule or principle that a non-profit organisation can never be adequately compensated in damages. Rather, in my view, he identifies that this is an argument open to a non-profit organisation against which background he then considered the consequences for BMLL of the lifting of the suspension in order to answer the question of whether it would be just to confine BMLL to recovering its minimal financial loss. The fact that an organisation is non-profit may make it more likely that it cannot be adequately compensated in damages and the BMLL case itself provides an example where that was the case because the project in question was at the heart of its activities, there would be a significant knock on effect to its other activities, and it would suffer significant reputational damage"

- Jefford J: there is a financial loss that can be compensated in damages: (i) PI's tender costs and (ii) the contribution to its overheads that PI would have recovered through the contract had it been successful
- Just, in all the circumstances, to confine PI to damages:

  "PI's position is in no way similar to that of [C in ***BML***]. *There is no existing service provision which PI will be deprived of if the suspension is lifted and there is no suggestion or evidence that failure to obtain this contract will have any negative, let alone, catastrophic impact on PI's activities. PI may feel strongly that their bid was a better bid; they may have grave concerns about the NPEU bid; and these may be of far greater importance to them than any potential claim for damages, but that does not mean that it would be unjust to confine PI to its remedy in damages"*

- Balance of convenience:
  - Best case scenario still results in *“months of delay in the implementation of the project”*
  - Public interest weighs heavily in favour of avoiding that further delay: is a data collection and review project aimed at the reduction of perinatal mortality rates: *“there is a clear public interest in this project proceeding as soon as possible”*

Energy Solutions EU Ltd v Nuclear Decommissioning Authority [2017] 1 WLR 1373

Supreme Court judgment 11 April 2017

"Issue (iii)" ([40] ff.): Can an award of damages be refused because C did not issue its claim form during the standstill period (i.e. before the contracting authority entered into the contract?

- Standstill period: 10 days from receipt by C of notification that it has not been awarded the contract. Contracting authority may not enter into the contract during this period.
- Challenge period: 30 days beginning with date when C first knew or ought to have known that grounds for starting legal proceedings had arisen

- NDA argues that ATK (the unsuccessful tenderer) failed to mitigate its loss, by deliberately deciding not to issue a claim form until after the NDA had entered into the contract
  - Had ATK issued its claim form before NDA entered into the contract, automatic suspension would have taken effect
  - If ATK thereafter succeeded, it would in due course be awarded the contract and avoid the (£100m) loss claimed

- Supreme Court notes:
  - If the Court opted to maintain the automatic suspension, NDA would have had the benefit of a cross-undertaking and/or security from ATK

- [46]: *"…the actual entry into any contract appears in effect to be treated not as the relevant breach, but as the consequence of the prior breach consisting in the prior wrongful decision to award the contract…"*: failure to mitigate is in principle available as an argument; however:
- [47]: *"…We are concerned with a very unusual form of mitigation, whereby, it is suggested, ATK should have taken steps to prevent the NDA giving effect to the NDA's infringement…".*
- [52]: ATK *"may in its own interests have preferred to rest on a claim for damages if its challenge to the contract award decision succeeded, rather than give a cross-undertaking and expose itself to an indeterminate liability thereunder if its challenge failed".*

- [55]: Supreme Court notes that contracting authority could have waited until the end of the 30 day challenge period before entering into the contract

- Conclusion: ATK has not failed unreasonably to mitigate its loss: [56]:

“In summary, an economic operator is entitled, in the face of what it views as (and later proves to have been) a breach of duty by the contracting authority, to leave it to the authority to take the risk of implementing its wrongful award decision. The economic operator cannot be said to be acting unreasonably if it fails to stop the authority from perpetrating a breach of duty which the authority could itself stop perpetrating. It cannot be said to be acting unreasonably if it refuses to give an undertaking or put up security in order to maintain a stop which it has in the first instance obtained by issuing a claim form before the authority has entered into the contract to give effect to its wrongful contract award decision”.

- N.b.

  - ***NDA***: an award of damages can only be made under the PCR where the breach of the Directive is sufficiently serious

  - Therefore: claimants who decide not to trigger an automatic suspension, but opt instead to wait until the contract has been entered into before claiming damages, will now (i.e. post-***NDA***) be gambling on the Court concluding that the breach <u>was</u> sufficiently serious

Lancashire Care NHS Foundation Trust v Lancashire County Council [2018] EWHC 200 (TCC)

- Fraser J: a claimant no longer has an automatic right to damages since the decision in ***NDA***. To what extent, if at all, can and should this be addressed when considering the adequacy of damages?

“[23] …Both parties were agreed that at an interlocutory stage of a case – and in particular, at the interlocutory stage in this particular case on these particular facts – the court could not come to a decision on the question of whether the alleged breaches were or could be classified as "sufficiently serious". Both parties were agreed that the point should be taken into account when considering the question of adequacy of damages as presenting an additional requirement which any claimant had to satisfy to recover damages at all. That is therefore the approach, by agreement in this case, which I adopt. It does however form part of the consideration necessary to arrive at a preliminary conclusion of the effectiveness of the remedy, and it may arise for further and more detailed consideration in the future”.

Discussion

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