

Automatic suspensions

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26th September, 2019

Context

Reg. 95 Public Contracts Regulations 2015/102

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)
- (b) the proceedings at first instance are determined, discontinued or otherwise disposed of and no order has been made continuing the requirement (for example in connection with an appeal or the possibility of an appeal).

Context

Reg 96(1) Public Contracts Regulations 2015/102

96.— Interim orders

- (1) In proceedings, the Court may, where relevant, make an interim order—
- (a) bringing to an end the requirement imposed by regulation 95(1);
 - (b) restoring or modifying that requirement;
 - (c) suspending the procedure leading to—
 - (i) the award of the contract, or
 - (ii) the determination of the design contest, in relation to which the breach of the duty owed in accordance with regulation 89 or 90 is alleged;
 - (d) suspending the implementation of any decision or action taken by the contracting authority in the course of following such a procedure.

Context

Reg 96(2) Public Contracts Regs 2015/102

(2) When deciding whether to make an order under paragraph (1)(a)—

(a) the Court must consider whether, if regulation 95(1) were not applicable, it would be appropriate to make an interim order requiring the contracting authority to refrain from entering into the contract; and

(b) 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).

The *American Cyanamid* principles apply (see, e.g. ***Circle Nottingham Ltd v NHS Rushcliffe Clinical Commissioning Group*** [2019] EWHC 1315 (TCC), [15]), so:

1. Does C's case raise a serious issue to be tried?
2. If so, would damages be an adequate remedy for either party?
3. If not, which course carries the least risk of injustice?

Serious issue to be tried

- A very low threshold: ***Counted4 Community Interest Company v Sunderland City Council*** [2015] EWHC 3898 (TCC), [26]-[27].
- In practice, very rarely contested. See, e.g.:
 - ***Alstom Transport UK Ltd v London Underground Ltd*** [2017] EWHC 1521 (TCC), [4]
 - ***Sysmex (UK) Ltd v Imperial College Healthcare NHS Trust*** [2017] EWHC 1824 (TCC), [30]
 - ***Lancashire Care NHS Foundation Trust v Lancashire CC*** [2018] EWHC 200 (TCC), [38]
 - ***DHL Supply Chain Ltd v Secretary of State for Health and Social Care*** [2018] EWHC 2213 (TCC), [37]-[38]
 - ***Eircom UK Ltd v Dept for Finance*** [2018] NIQB 75, [18]

Adequacy of damages: the test

- Is it just, in all the circumstances, that a party should be confined to its remedy in damages? ***Sysmex (UK) Ltd***, [22].
- ***Circle Nottingham Ltd***, [18]:
 “if the court is satisfied that it would not be unjust to confine the claimant to its remedy in damages, that is usually the end of the inquiry. Lifting the suspension will then almost invariably follow as a matter of course.”

Adequacy of damages

Effect of UKSC decision in *Nuclear Decommissioning Agency v Energy Solutions* [2017] UKSC 34:

- Claimant no longer has automatic right to damages for breach of the PCR, breach must be “sufficiently serious”
- *Lancashire Care NHS Trust* [19]-[23]: whether breach would be “sufficiently serious” to result in a damages award is an additional requirement to take into account at “adequacy of damages” stage
- In practice, “sufficiently serious” usually conceded: see e.g. *DHL* [45], *Circle Nottingham Ltd* [20]

Adequacy of damages

Loss of C's reputation – accepted in principle as an issue ***Sysmex*** [23]-[24], ***DHL*** [45]. Recent discussion in ***Circle Nottingham*** [41]-[51]. Three principles at [49]:

- (1) Unlikely to be of consequence unless court left with reasonable degree of confidence that a failure to impose interim relief will lead to financial losses that would be significant and irrecoverable as damages
- (2) Standard of proof: a real prospect of loss that would be retrospectively identifiable as being attributable to the loss of the contract. (“Cogent evidence” required: ***DHL*** [45])
- (3) Relevant person to be shown to be affected is generally a future provider of profitable work

Adequacy of damages

Loss of C's personnel - In principle, loss of uniquely qualified workforce could show damages inadequate remedy: ***Alstom*** [36]. Issues of, e.g. redundancy payments can be quantified as damages (***Circle Nottingham Ltd*** [53]).

- Successful argument in:
 - ***Counted4 Community Interest Company*** [40] (community interest company would lose team that took years to develop)
 - ***DHL*** [47] (large company would lose valuable workforce, at short term disadvantage in bidding for other work)
- Unsuccessful in
 - ***Alstom*** [35] (large corporate group unlikely to make team redundant as would bid for other tenders, and in any case loss of individuals did not mean loss of expertise – experience recorded, Alstom a large group).

Adequacy of damages

Disruption of wider service provision

- ***Lancashire NHS Trust*** [39]-[41]: Contract for children's public health and nursing services. C (NHS Trust) would have to go through significant (and expensive) reorganisation, losing key staff, making it difficult to maintain other contracts for children's health services in addition to the impugned contract. Could not be compensated for in damages.
- ***DHL*** [51]-[54]: Contract for NHS supply chain services. Suspension would lead to significant delay in D's NHS supply chain model reorganisation, affecting preparations for winter and Brexit, requiring two different operating models running side by side, and affecting patients. Cannot quantify or compensate in damages.

Adequacy of damages

“Existential Threat”

- In large corporate group context, courts generally unsympathetic, as:
 - Point of a company is to make a profit – that can be quantified and provided for by damages (***Circle Nottingham Ltd*** [40]) (cf the approach to not-for profit companies in ***Bristol Missing Link Ltd v Bristol City Council*** [2015] EWHC 876 (TCC) [50]-[55])
 - If a commercial undertaking chooses to carry out operations through SPVs, must have foreseen failure to secure contract would lead to loss (***Eircom*** [33]) and cannot complain of disadvantages (***Circle Nottingham Ltd*** [40])
 - Large corporate groups can continue an enterprise (***Eircom*** [29])
 - Otherwise, large corporate groups could “game the system” (***Eircom*** [29])

Adequacy of damage

Evidence in support

- See e.g. ***Eircom UK Ltd*** [25]-[26]:

...the central thrust of the plaintiff's argument was that the plaintiff's Northern Ireland business would be eviscerated leaving an uneconomical rump and that damages could not provide adequate compensation when such an outcome was inevitable. Given that such a claim lay at the heart of the case which the plaintiff made for a continuing suspension of the award of the contract, it is disappointing that the court was not supplied, chapter and verse, with the various figures to demonstrate why this outcome was likely, never mind inevitable.

Balance of convenience

General principles: ***Circle Nottingham Ltd*** [16](4)-(7):

(4) If the relevant factors do not point in favour of one side or the other, the prudent course will usually be to preserve the *status quo*, and lift the suspension

(5) If the extent of losses which cannot be compensated for in damages is not easily balanced, that is a significant factor in assessing the balance of convenience

(6) Where such loss does not differ widely, it may be legitimate to take into account the strength of each party's case but only if there's no credible dispute one case is disproportionate to another

(7) There may be other special factors to be taken into account

Balance of convenience

Timing:

- The court must ask how long a period of suspension will be required, and to what extent it should be in force: ***Circle Nottingham Ltd*** [59].
- One consideration is whether it is possible to have an expedited trial, though that shouldn't be considered an easy way out: ***Lancashire NHS Trust*** [44]
- Alternatively, whether a trial based on representative samples may be appropriate (***Joseph Gleave and Son Ltd v Secretary of State for Defence*** [2017] EWHC 238 (TCC), [58]-[63]), or a trial of preliminary issues (***Circle Nottingham Ltd*** [64]).

Balance of convenience

Public interest: effect on services being provided

- Requirement to begin transition period may auger in favour of lifting stay (***DHL*** [59]). Judge may not be able to resolve disputed evidence as to whether interim arrangements can be put in place: ***Circle Nottingham Ltd*** [66]-[88].
- May be in public interest to move ahead with new contract if it will lead to substantial benefit in services provided, and/or in savings (***Sysmex*** [64]).
- May be in public interest to implement impugned contract if wider contracts and strategies depend on it (***DHL*** [58]).
- See, too, ***Eircom*** [43] (public should benefit from increased efficiencies and service provision of network services)

Balance of convenience

Public interest: paying twice

- Initially, fact that public may have to pay twice for services seemed of significant concern: see ***Covanta Energy v Merseyside Waste Disposal Authority*** [2013] EWHC 2922 (TCC), [59]-[60].
- But indications of rolling back from that. See ***Circle Nottingham Ltd*** [90], accepting that public paying twice is, to an extent, built into the normal operation of the PCR so
 - “I consider that it must have been considered to be a price worth paying in order to achieve proper compliance with procurement legislation”

Balance of convenience

Public interest: compliance with the law

- Arguments that there is a public interest in authorities observing other areas of law (e.g. competition) presuppose a breach thereof: ***Eircom*** [43].
- Recognised public interest in proper procurement (***Sysmex*** [25]). However:
 - Some recognition that this factor is becoming minor: ***DHL*** [62] stating that the issue of compliance with EU procurement law is the very issue to be determined at trial
 - In any case, weight varies depending on other considerations: see e.g. ***Sysmex*** [98], noting that interest in proper procurement techniques, in the NHS context, “butts up against another obvious public interest, namely that the NHS should provide the best possible service to the public without disruption and with minimal risk”

Thank you for listening

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