

Welcome to Landmark Chambers'

**Introduction to Public Procurement 2: Challenging and
defending public procurement decisions**

The recording may be accessed [here](#).

Your speakers today are...



James Neill (Chair)

Topic:
Overview of the
remedies regime



Nick Grant

Topic:
Automatic
suspensions



Alex Shattock

Topic:
The TCC guide to
public
procurement
claims:
confidentiality
rings/disclosure

Overview of the remedies regime governing public procurement challenges



James Neill

Who can bring a procurement challenge?

- Only economic operators are able to bring a claim for breach of the PCRs:

91.— Enforcement of duties through the Court

(1) A breach of the duty owed in accordance with regulation 89 or 90 is actionable by any economic operator which, in consequence, suffers, or risks suffering, loss or damage.

(2) Proceedings for that purpose must be started in the High Court, and regulations 92 to 104 apply to such proceedings.

- NB – separate remedies available for health services contracts for breach of NHS (Procurement, Patient Choice, and Competition) (No.2) Regulations
- Hardly any scope at all left for third party JRs after Wylde v Waverley BC [2017] EWHC 466 (Admin):
“It is...entirely consistent with the purpose of the Regulations to confine standing in any judicial review claim brought outside the extensive range of remedies available to economic operators, and by a person who is not an economic operator, to only those who "can show that performance of the competitive tendering procedure... might have led to a different outcome that would have had a direct impact on him“.

What remedies are available to an aggrieved bidders under the PCRs and how do they differ to JR?

- Interim remedy of the automatic suspension (if filed before contract entered into)
- Pre-contractual and post-contractual remedies
- **Contract not entered into (Reg 97):**
 - Order setting aside contract award decision
 - Order to amend any document
 - Damages
- **Contract entered into (Reg 98):**
 - Declaration of Ineffectiveness
 - Penalties
 - Damages

The Declaration of Ineffectiveness

- Very powerful remedy introduced by the Remedies Directive. Contract is considered prospectively ineffective.
- Grounds for a Dol:
 - Failure to advertise via a contract notice (unless Voluntary Transparency Notice issued)
 - Breach of standstill or automatic suspension
 - Framework agreement: failure to carry out call-off competition in accordance with terms of framework
- Court must make a Dol, but not if general interest grounds under Reg 100 apply: “overriding reasons relating to a general interest”.
- Some protection afforded by **Voluntary Transparency Notices/VEAT notices** under Reg 99(3), but limited utility if mistake made: see *Fastweb* Case C-19/13. The test is whether CA acted diligently and could legitimately hold that no requirement to advertise.
- First Dol in England & Wales granted in 2018 by Court of Appeal in *Faraday v West Berkshire* [2018] EWCA Civ 2532. See also *AEW Europe LLP v Basingstoke BC* [2020] PTSR 21
- NB: some doubt as to whether Dols available for Light Touch Regime contracts (eg health services contracts)

Damages...

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Contract worth £6.1bn to decommission power stations will end 9 years early



Damages: what are the relevant tests?

- Threshold *Francovich* test of “sufficiently serious breach” now applies: *NDA v EnergySolutions EU Limited* [2017] UKSC 34 at [39]
- Direct causal link between breach and damage sustained: *NDA*
- Measure: equivalent to tort of breach of statutory duty, so economic operator to be put into position as if breach had not occurred: *Harmon CFEM (Facades) UK) Ltd v Corporate Officer of the House of Commons* (1999) 67 Con LR 1.
- A contracting authority’s lawful withdrawal of a procurement competition will not deprive an economic operator of its cause of action in damages for breach of statutory duty, if that has accrued (i.e. there was a breach of duty causing loss or damage) before the withdrawal: *Amey Highways Ltd v West Sussex CC* [2019] EWHC 1291 (TCC)

Limitation periods

- General time limit where DoI not sought (Reg 92 PCR): within **30 days** of the time the economic operator “knew or ought to have known” that grounds for starting the claim have arisen. This time period may be extended where there is a “good reason” for doing so, but always within three months
- Where DOI sought (Reg 93 PCR) –
 - where award notice published in OJEU or contracting authority informs economic operator of conclusion of contract and summary of reasons, **within 30 days.**
 - Otherwise, within ***6 months of date on which contract entered into.***
- If Judicial review is sought for claims “governed” by the PCRs, within 30 days of time economic operator knew or ought to have known of decision: CPR 54.5(6).
- Note longer limitation period for a claim under s.76(5) Health and Social Care Act for breach of NHS Regs – s.9 Limitation Act applies: **6 years!**
- NB: limitation period triggered by filing of claim form in the TCC, but particulars have to be served within 7 days of issue, and therefore physically sent no later than 5 days after issue to achieve deemed service (see Reg 94, and CPR7.4/CPR 6.14).

Automatic suspensions



Nick Grant

- Public Contracts Regulations 2015/102 Regs. 95, 96, 98
- ***Covanta Energy v Merseyside Waste Disposal Authority*** [2013] EWHC 2922 (TCC)
- ***Bristol Missing Link Ltd v Bristol City Council*** [2015] EWHC 876 (TCC)
- ***OpenView Security Solutions Ltd v Merton LBC*** [2015] EWHC 2694 (TCC)
- ***Counted4 Community Interest Company v Sunderland City Council*** [2015] EWHC 3898 (TCC)
- ***Joseph Gleave and Son Ltd v Secretary of State for Defence*** [2017] EWHC 238 (TCC)
- ***Alstom Transport UK Ltd v London Underground Ltd*** [2017] EWHC 1521 (TCC)
- ***Sysmex (UK) Ltd v Imperial College Healthcare NHS Trust*** [2017] EWHC 1824 (TCC)
- ***Lancashire Care NHS Foundation Trust v Lancashire CC*** [2018] EWHC 200 (TCC)
- ***DHL Supply Chain Ltd v Secretary of State for Health and Social Care*** [2018] EWHC 2213 (TCC)
- ***Eircom UK Ltd v Dept for Finance*** [2018] NIQB 75
- ***Circle Nottingham Ltd v NHS Rushcliffe Clinical Commissioning Group*** [2019] EWHC 1315 (TCC)
- ***Braceurself Ltd v NHS England*** [2019] EWHC 3873 (TCC)
- ***Mitie Ltd v SSJ*** [2020] EWHC 63 (TCC)

PCRs Framework

Reg. 95 – Suspension of Contract Making

- Automatic suspension of CA's ability to enter into contract if Claim Form issued
- Suspension continues until (1) Court makes interim order under Reg. 96 or (2) Court proceedings determined or disposed of

Reg. 96 – Power to make interim orders

- Court may end suspension, restore or modify it, suspend procedure leading to award of contract, or suspend implementation of any decision
- Test: would it be appropriate to make interim order requiring CA to refrain from entering contract?

Reg. 98 – Remedies where contract entered into

- Once contract entered into, only damages available
- If suspension lifted, C loses right to be awarded contract – ***Braceurself*** [20]

The Test

- The *American Cyanamid* principles apply (see, e.g. *Circle Notts* [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?

- Potential differences in application in PCR context:
 1. Public interest to be taken into account (*Braceurself* [41])
 2. Court has powers under PCRs not available in private disputes (*Braceurself* [41])
 3. Interest of successful applicant to be considered (*Braceurself* [41])
 4. No consideration of merits (*Braceurself* [41] *cf* *Circle Notts* [16] *Mitie* [107])
 5. Damages at stage (2) part of overall balance at stage (3)? (*Mitie* [36]-[38])
 6. No cross undertaking in damages required (*Braceurself* [41])

Serious issue to be tried

- A very low threshold (***Counted4 Community Interest Company*** [26]-[27])
- In practice, very rarely contested (see e.g. ***Alston*** [4], ***Sysmex*** [30], ***Lancashire*** [38], ***DHL*** [37]-[38], ***Eircom*** [18], ***Braceurself*** [32])

Adequacy of damages

General points

- Test: Is it just, in all the circumstances, that the claimant should be confined to its remedy in damages? (***Sysmex (UK) Ltd*** [22])
- Theoretical problems brushed over in practice:
 - Whether to continue if damages adequate (***Circle Notts*** [18], ***Braceurself*** [5])
 - Effect of UKSC decision in ***Nuclear Decommissioning Agency v Energy Solutions*** [2017] UKSC 34 that no automatic right to damages (see ***Lancashire Care NHS Trust*** [19]-[27], ***DHL*** [45], ***Circle Notts*** [20], ***Mitie*** [39])

Adequacy of damage

General points

- “Absolute” certainty of calculation not required, court used to making assumptions (*Braceurself* [43], *Mitie* [63])
- Losses that would be “too remote” to recover as damages cannot show damages inadequate remedy (*Mitie* [50]-[53])
- On evidence
 - Courts want “chapter and verse” with various figures (*Eircom UK Ltd* [25]-[26], *Mitie* [45]-[46])
 - Evidence should not conflict with itself (*Mitie* [60])

Adequacy of damages

Loss of C's reputation

- Accepted in principle as an issue (**Sysmex** [23]-[24], **DHL** [45]). Generally given very little weight (**Braceurself** [47])
- Recent discussion in **Circle Nottingham** [41]-[51]. Three principles at [49]:
 - (1) Must show failure to impose interim relief will lead to significant and irrecoverable financial losses
 - (2) Standard of proof: a real prospect of loss that would be retrospectively identifiable as being attributable to the loss of the contract.
 - (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

- Loss of uniquely qualified workforce could count (***Alstom*** [36])
- Redundancy payments can be quantified (***Circle Notts*** [53])
- Successful argument ***Counted4 Community Interest Company*** [40] (CIC losing workforce took years to develop), ***DHL*** [47] (lose valuable workforce, at short term disadvantage on other bids)
- Unsuccessful in ***Alstom*** [35] (no evidence of actual losses), ***Mitie*** [58] (Inability to make bids and reassign to other contract unattractive, TUPE swings and roundabouts)

Adequacy of damages

Disruption of wider service provision or disruption for end users

- **Lancashire NHS Trust** [39]-[41] (disruption of C's provision of children's public health and nursing services)
- **DHL** [51]-[54] (disruption of D's provision of NHS supply chain, affecting preparations for winter and Brexit)
- **Mitie** [74] (disruption of D's provision of court services)

Adequacy of damages

“Existential Threat”

- Courts generally unsympathetic, as:
 - Point of company is for a profit (***Circle Notts*** [40], ***Braceurself*** [32])
 - Damages can be designed to prevent collapse (***Braceurself*** [45])
 - If using SPVs – must foresee failure to secure contract lead to loss (***Eircom*** [33]) and cannot complain of disadvantages (***Circle Notts*** [40])
 - Large corporate groups can continue an enterprise (***Eircom*** [29])
 - Otherwise, large corporate groups could “game the system” (***Eircom*** [29])

- Cf approach to not for profit companies (***Bristol Missing Link Ltd*** [50]-[55])

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:

- Must consider how long period of suspension will last, and effects (***Circle Notts*** [59], ***Mitie*** [92]-[96])
- Consider
 - Expedited trial but not easy way out (***Lancashire NHS Trust*** [44])
 - Trial based on representative samples (***Gleave*** [58]-[63])
 - Trial of preliminary issues (***Circle Notts*** [64])

Balance of convenience

Public interest: effect on services being provided

- Continuing with “sub optimal” services favours lifting (***Mitie*** [97]), not ok for current supplier to supply new contract in that time (***Braceurself*** [50]-[52])
- Obtaining benefit (savings or better service) from new services favours lifting (***Sysmex*** [64], ***Eircom*** [43], ***Mitie*** [97])
- Long transition period may require lifting (***DHL*** [59]), even if judge cannot resolve disputed evidence RE arrangements (***Circle Notts*** [66]-[68])
- Wider strategies depending on impugned contract (***DHL*** [58])

*The TCC guide to public procurement claims:
confidentiality rings/disclosure*



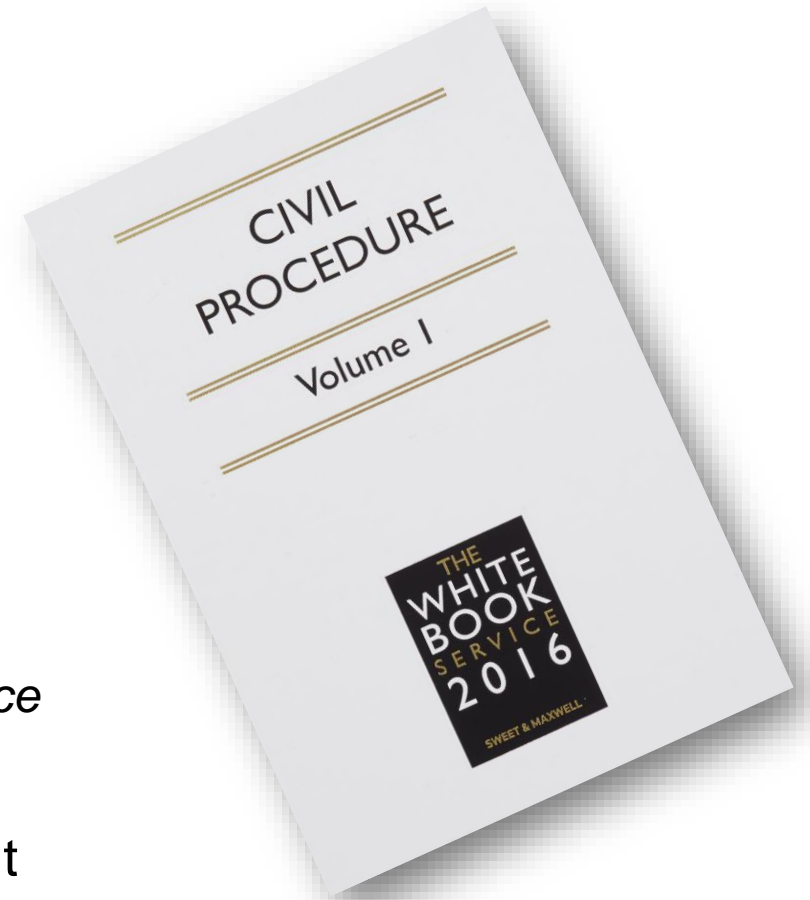
Alex Shattock

Disclosure in civil proceedings

- CPR Part 31 sets out the rules requiring disclosure in legal claims

31.6 *Standard disclosure requires a party to disclose only–*

- (a) the documents on which he relies; and*
 - (b) the documents which –*
 - (i) adversely affect his own case;*
 - (ii) adversely affect another party’s case; or*
 - (iii) support another party’s case; and*
 - (c) the documents which he is required to disclose by a relevant practice direction.*
- Slightly different test in JRs: disclosure can be applied for but shouldn’t really be necessary due to duty of candour (see *Tweed v Parades Commission*)



Disclosure in procurement challenges

- Disclosure is a very important, and very sensitive, issue in procurement challenges
- When representing an unsuccessful bidder in a procurement challenge, there will usually be only **limited information** available to you
- You will know (by definition) that your client has lost the tendering competition, and you will know the content of your client's bid
- You may not know a great deal about how the bid was evaluated, and you will know even less about your client's competitors' bids
- You may not even know the identity of the other bidders, let alone their pricing structure or other technical components



Disclosure in procurement challenges

- TTC Guidance Note (see next slide), para 2:

“Public procurement cases, particularly those involving claims which seek to set aside the decision to award the contract in question, raise singular procedural issues and difficulties.

The claimant commonly feels that it has insufficient evidence or documentation fully to particularise its case or otherwise prepare for trial, while the short limitation and mandatory standstill periods mean that proceedings are necessarily issued hastily.”

- However, the information you need to win is likely to be commercially sensitive



Appendix H to the Technology and Construction Court Guide

- The Technology and Construction Court Guide, second edition, fourth revision, was published on 17 June 2019
- Somewhat confusingly, it is dated 9 February 2015 in the footer to each page (apart from the contents list, which is dated 30 April 2014)
- **Appendix H provides a detailed guide to public procurement litigation in the Court (“the TCC Guidance Note”)**
- Very helpful and should always be in your pocket for procurement claims!
- Provides useful pointers on one way around the disclosure problem in procurement challenges: confidentiality rings



Confidentiality rings

Confidentiality rings

- A confidentiality ring comprises persons to whom documents containing confidential information may be disclosed on the basis of their undertakings to preserve confidentiality.
- Need to determine (1) who should be admitted to the ring and (2) the terms of the undertakings
- If no agreement, the court must decide!

Confidentiality rings: overview

- TCC Guidance Note, para 2:

“The provision of pleadings and documentation on disclosure often gives rise to serious difficulties in connection with confidentiality, particularly where there is a real risk that there will have to be a re-tendering process. Confidentiality rings will often need to be set up by agreement or order.”

Para 35: “It is highly desirable that any confidentiality ring is established as early as feasible. Agreements or proposals for confidentiality rings, their scope and limitations should be put before the Court at the first CMC or application for specific disclosure, whichever is earlier, with explanations as to why they are justified”

Confidentiality rings: undertakings

- Undertakings will preclude the use of the relevant material other than for the purposes of the proceedings and prevent disclosure outside the ring
- They will also contain provisions controlling the terms on which confidential information must be stored and the making of copies, and requiring the receiving person to either return or destroy the documents in question, or render them practically inaccessible, at the conclusion of the proceedings.
- Additional undertaking may be required e.g.
 - requiring inspection of documents at a defined location (as can apply to normal disclosure),
 - limiting the involvement of a recipient of a document in any re-procurement of the contract which is the subject of the litigation,
 - limiting the role which a recipient can play in advising their party in the future and/or participating in competitions for other similar contracts

The two-tier confidentiality ring

- Confidentiality rings are potentially a minefield if a company employee wishes to be admitted to a confidentiality ring which is intended to receive sensitive competitor info
- In those circumstances a “two-tier” CR can be set up with different levels of disclosure to different participants, distinguishing between e.g. company employees and external representatives. Employee representatives may also have access to some but not all of the material disclosed into the ring (for example, technical material but not pricing information).
- Under an alternative form of two-tier ring, the external representatives of a party in the first tier may apply for an employee representative in the second tier to have access to a particular document or documents, whether in open form or partly redacted.



Case law

Key case: *SRCL Limited v The National Health Service Commissioning Board* [2018] EWHC 1985 (TCC):

- Summarises the approach to be taken re: confidentiality rings, e.g. no disclosure of other bidders' confidential info without hearing their representations first
- Particular issue in that case regarding what happens when there is a dispute of fact over material disclosed into a confidentiality ring, and only the parties' lawyers are part of the ring
- when resolving such disputes, *"It is not a solution to an objection by a contracting authority (or another bidder) to assume that a party's solicitor acting in the litigation should and can be called to give primary evidence of fact in that party's favour."* – moreover, usually undesirable due to own-interest conflict e.g. having also given legal advice on the claim
- A cautionary tale against using only your lawyers in confidentiality rings! We are not, as a rule, ideal witnesses... Perhaps the two-tier CR should be the default?

Case law

Marston Holdings Limited v Ministry of Justice (HM Courts & Tribunal Service) v Jacobs, Excel Civil Enforcement Limited [2018] EWHC 3168 (TCC)

- Endorsed the approach in *SRCL* and emphasised a two stage process- is disclosure necessary? *then* is a confidentiality ring needed? (No need to consider confidentiality rings if disclosure not actually necessary in the circumstances)

Bombardier Transportation Ltd v Merseytravel [2017] EWHC 575 (TCC)

- The TCC Guidance Note should be followed
- *“merely because the case in question is a procurement dispute is no reason for the case to be labelled as “private”, with all of the documents on the court file being kept secret and not made available to non-parties”*
- Open justice still a principle of the TCC! CRs will only be used where necessary

Thank you for listening

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