

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])

Thank you for listening

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