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Procurement Update (1)

Break Out Session (B)

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Procurement Law Update (1)

Andrew Sharland

Structure

- *Energy Solutions v NDA*
- Abnormally Low Tenders: *FP McCann*
- PSED and Procurement: *JHRW*
- Automatic suspensions and specific disclosure: *Kent Community Health Foundation NHS Trust, Perinatal Institute and Alstrom Transport*
- The New TCC Guidance Note on Procedures for Procurement cases

- Claim under PCR 2006.
- Arose out of competitive dialogue procurement for decommissioning of 12 nuclear power stations.
- Issued after standstill period expired & contract concluded – only claim was damages.
- Application of *Factortame* tried as a preliminary issue.
- Case settled after SC hearing – SC handed down judgment nonetheless.

1. Does the Remedies Directive only require an award of damages when breach is “sufficiently serious” (and is this *acte clair*)?
2. Do the PCRs confer a power to award damages in respect of any breach, or only a sufficiently serious breach?
3. Can a failure to trigger the auto suspension break the chain of causation?

1. Does the Remedies Directive only require an award of damages when breach is “sufficiently serious” (and is this *acte clair*)? – **Yes – Spijker.**
2. Do the PCRs confer a power to award damages in respect of any breach, or only a sufficiently serious breach? – **The latter.**
3. Can a failure to trigger the auto suspension break the chain of causation? – **No – free election.**

The SC held:

1. ES's arguments on the case-law were incorrect: *Combinatie Spijker* was a clear and authoritative statement that damages under the Directive were *Factortame* damages.
2. ES's argument that the application of *Factortame* would breach the WTO GPA was "very weak" – GPA damages could be (a) an alternative to set-aside (b) limited to tender costs.

Second issue: Did the regulations goes further?

CA: no intention to gold-plate, but ordinary English tort. Cf. *Matra*. So reg. 47J(2)(c) conferred a right to damages.

SC:

1. 'Breach of statutory duty' not the point. *Matra* wrong.
2. Clearly no legislative intention to gold-plate.
3. The Regulations do not confer a discretion, but a power.
4. If sometimes damages are not awarded, one needs a principle to say when they are awarded.
5. Lord Sumption in argument: "*where is this principle to come from, if not from a well-established doctrine ... such as Francovich?*"

- *FPMcCann Ltd v Department for Regional Development* [2016] NICh 12
- Cheapest tender significantly cheaper than both average of other tenders and DRD's benchmark
- DRD asked McCann for ALT clarification on various aspects of its bid (held to be lawful) ...
- ... but rejected bid for mixture of those aspects and other aspects, not put to McCann for clarification/response (unlawful)
- Court recognised that DRD could have lawfully rejected bid on ALT grounds; but said it may not have done, had it verified/"engaged" with McCann; so damages to be awarded on "loss of a chance" basis

- *R (Jewish Rights Watch) v Leicester City Council, Swansea Council and Gwynedd Council* [2016] EWHC 1512
 - Motions to boycott goods from the Occupied Palestinian Territories
 - Resolutions non-binding- political statements
 - PSED limited impact
 - Due regard
 - S 17 Local Government Act 1988: Non-commercial considerations
 - Appeal to Court of Appeal pending

Automatic suspensions and specific disclosure:

- *Kent Community Health NHS Foundation Trust v NHS Swale Clinical Commissioning Group* [2016] EWHC 1393 and *Perinatal Institute v Healthcare Quality Improvement Partnership* [2016] EWHC 2626
 - Adequacy of damages and non-profit organisations
 - Balance of convenience
 - Automatic suspension lifted
- *Alstrom Transport UK Ltd v London Underground Ltd and Transport for London* [2017] EWHC 1406 (TCC)
 - Specific disclosure and automatic suspension: timing
 - Specific disclosure hearing first

- Protocol providing guidance on the management of public procurement claims
- Pre-action Process and ADR
- Related judicial review claims
- Confidentiality and Confidentiality rings
- Expedition

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Procurement Update (2)

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Procurement Update (2) (1) Variations and (2) JR/standing

Patrick Halliday

Variations: frequent issues in practice

Change of parties:

- Contractor selling/restructuring business
- Contractor insolvency
- Change/addition of contracting authority
- Step-in rights
- Change of sub-contractor

Extension of contract:

- In exchange for better deal for authority
- In response to reprocurement problems

Redesign of project:

- Planning failure
- Changing needs in long contract

Variations: the leading cases before PCR 2015

- Leading cases are now familiar:
 - C-454/06 *Pressetext* [2008] ECR I-4401
 - C-91/08 *Wall AG*

Also:

- C-496/99P *Succhi di Frutta* [2004] ECR I-3801
- C-160/08 *Commission v Germany*
- C-337/98 *Commission v France* [2000] ECR I-8377
- N264/2002 *London Underground*

Domestically:

- *R (Law Society) v LSC* [2008] QB 737
- *R (Redwood Health Ltd) v NHSPSA* [2009] EWHC 2511 (Admin)
- Note also: *Copymoore Ltd v Public Works Commissioner* [2013] IEHC 230

- Basic test: new procurement required if but only if modification is substantial
- 4 cases where modification deemed substantial; 1 where in effect deemed insubstantial
- Otherwise, test is whether contract rendered “materially different in character” from that initially concluded
- 4 cases where modifications permitted without fresh procurement (even if substantial)

Regulation 72: the four cases where change deemed substantial

- 1) Conditions which “would have allowed for” admission of other candidates/acceptance of another offer or “would have attracted” additional participants
- 2) Economic balance changed in favour of contractor (in manner not provided for)
- 3) Considerably extended scope
- 4) New contractor (except as permitted)

Regulation 72: the case where change deemed insubstantial

- Value of modification is both:
 - Below threshold; and
 - Below 10% of initial contract value (15% for works) after any contract indexation
- Modification does not alter overall nature of contract

Regulation 72: the four cases where substantial modification permitted

- 1) Clear, precise and unequivocal review clauses
- 2) Additional works/services/supplies where change of contractor problematical (price increase up to 50% of original value)
- 3) Unforeseeable circumstances not altering overall nature of contract (price increase up to 50% of original value)
- 4) Contractor succession/authority step-in to sub-contracts

First regulation 72 exception: clear and unequivocal review clauses

- See recital (111) to Directive 2014/24/EU: provision intended to prevent modifications under variation clauses which give contracting authorities “*unlimited discretion*”
- “*Price indexation*” as an example of a sufficiently clear review clause
- Should be read in light of ‘principle of transparency’ (e.g. *Succhi di Frutta*): essentially, bidders must know what they are bidding for
- Therefore, is variation clause sufficiently “*clear, precise and unequivocal*” to provide economic operators with the information they would need in order to assess the potential scope for variations when tendering?
- Carte blanche won’t work! (See *Redwood Health*)

Second regulation 72 exception: additional requirements

- See recital (45a) to Directive
- Change of contractor cannot be made for economic/technical reasons
- Or, change of contractor would cause authority –
 - Significant inconvenience, or
 - Substantial duplication of costs
- Any price increase not to exceed 50% of original value, contractually indexed (not to circumvent through consecutive modifications)
- OJEU modification notice required

Third regulation 72 exception: unforeseen circumstances

- See recital (46)
- Need for modification brought about by “circumstances which a diligent contracting authority could not foresee”
- Modification does not alter overall nature of contract
- Any price increase not to exceed 50% of original value, contractually indexed (not to circumvent through consecutive modifications)
- OJEU modification notice required

Fourth regulation 72 exception: change of party

- See recital (47)
- Can also be justified by review clause
- Universal/partial succession into position of original contractor, following corporate restructuring
- Includes:
 - Takeover, merger, acquisition
 - Insolvency
- New operator must fulfil original selection criteria
- Must not entail other substantial modifications/be aimed at circumventing Directive
- Change of authority not addressed; should be lawful where reflects succession to statutory functions

- The dilemma: wide clauses may fail article 72 test; narrow clauses may not cover required change
- Recital 48 not very illuminating
- Should interpret requirements in light of transparency and equality objectives (cf. *Law Society v LSC*)
- More far-reaching changes require closer definition of circumstances of use?

- Can general clauses still work? e.g. general option to extend contract for specified period
- Will want generalised change clauses for modifications not rendering contract materially different in character
- Is a “Russian dolls” approach permissible?
- Aim for maximum objectivity/minimum negotiation in relation to e.g. price adjustments

- Try to predict likely issues e.g.:
 - Assignment, novation, sub-contracting, step-in
 - Changes in technology/methodology
 - Introduction of additional services/locations
 - Extension (in event of failed procurement?)
- Limit the possible usage of the clause where that can be done
- Identify trigger events where possible
- Expressly rule out changes altering overall nature of contract?

Review clauses and tender documents

- Need to ensure consistency with OJEU notice
- Important that significant review provisions are on table during bidding process
- Will indications as to how clauses may be used in practice assist?
- Record thinking to help found future reliance on unforeseen circumstances exception?

More recent case law:

Edenred

- *Edenred (UK Group) Ltd v HM Treasury* [2015] PTSR 1088:
 - £133m new services added to existing public contract
 - Principal issue: was that a “*considerable extension*” in the scope of the contract for the purposes of regulation 72(8)(d) (such that change should be deemed “substantial”)?
 - Held: expansion to include the new services not a relevant extension, since initial contract and procurement documents “*envisaged*” the expansion, and committed the contractor to performing the expanded services, requiring it to have the resources to cover them
 - “*the services were covered by the contract resulting from the procurement ... including its provision for amendment of the contract*” (§36)
 - Surprisingly permissive?

More recent case law: *Gottlieb*

- *R (Gottlieb) v Winchester City Council* [2015] EWHC 231 (Admin)
 - Variations to development agreement to ensure its continued viability
 - Held that modification substantial, and unlawful in absence of new procurement competition, on bases that:
 - (1) amendment introduced conditions which might have attracted other tenderers
 - (2) amendment changed economic balance in favour of developer
 - (3) variation clause was so broad that it did not meet the requirement of transparency
 - Decision notable for particularly strict approach as to (1) above – no need to point to an “actual” bidder who would have participated in tender – a “hypothetical” one enough

Who has standing to challenge breaches of procurement law?

- Economic operators (i.e. would-be contractors) under PCR
- Economic operators cannot generally use JR, but may exceptionally do so if JR provides a more suitable remedy: *R (Hossack) v Legal Services Commission* [2011] EWCA Civ 788
- Non-economic operators, by JR alleging breach of PCR?
 - *R (Chandler) v Secretary of State for Children, Schools and Families* [2010] LGR 1 opened door
 - *R (Gottlieb) v Winchester CC* [2015] EWHC 231 (Admin) gave encouragement
 - *R (Wylde) v Waverley BC* [2017] EWHC 466 (Admin): expressly disagreeing with *Gottlieb* -- applying a stricter “standing” test than usually applies in JR

Any Questions?

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