Automatic suspensions

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The question

- To what extent will the new section 102 test for the automatic suspension produce substantially different outcomes to those based on American Cyanamid?

- What will count and sway the court?

Background

Green Paper (Dec 2020)

- *"We propose amending the test….so that it is no longer based on the test applied when granting an injunction, but is a more appropriate, procurement-specific test….The introduction of a fast track procedure where required should reduce the need to rely on this test as the reduction in Court timescales will allow more contracts to remain suspended while the case is heard…."*

Consultation Response:

- *"We ….envisage that the new test will be a simple, single limb test which provides for suspensions to be lifted where there are overriding consequences for the various interest concerned. This will include the impact on public service delivery."*

Old law

- Automatic suspension when proceedings are started (Reg 95)
- Authority applies to bring an end to the requirement (Reg 96)
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- Test is *American Cyanamid* (Reg 96(2) and (3))
- Authorities usually win

2025 – who won and why?

Defendant:

- *One Medicare v NHS Northamptonshire ICB* [2025] EWHC 63
- *Unipart Group Ltd v Supply Chain Coordination Ltd* [2025] EWHC 354
- *Millbrook Healthcare Ltd v Devon County Council* [2025] EWHC 744
- *International SOS Assistance UK Ltd v Secretary of State for Defence* [2025] EWHC 2634

Claimant :

- *Involve Visual Collaboration Ltd v Secretary of State for Work and Pensions* [2025] EWHC 2664

Section 101

- Automatic suspension (section 101)

"A contracting authority may not enter into a public contract, or modify a public contract or a convertible contract, if during any applicable standstill period –

(a) Proceedings under this Part are commenced in relation to the contract, and

(b) The contracting authority is notified of that fact"

- Standstill period on award of contracts (section 51):

  - CA may not enter into a public contract before:
    - The end of the mandatory standstill period or
    - If later, the end of another standstill period provided for in the contract award notice
    - The end of any voluntary standstill period provided for in the contract notice

  - Mandatory standstill period – 8 working days beginning with day on which contract award notice is published

  - Voluntary standstill period – not less than 8 working days beginning with day on which contract award notice is published

- Standstill period on modification of contracts (section 76):

    - CA may not modify a public contract or convertible contract before the end of any voluntary standstill period provided for in a contract change notice

    - Voluntary standstill period – not less than 8 working days beginning with day on which the contract change notice is published

Section 102

- *"….the court must have regard to:*

  (a) the public interest in, among other things-

  (i) upholding the principle that public contracts should be awarded, and contracts should be modified, in accordance with the law

  (ii) avoiding delay in the supply of the goods, services or works provided for in the contract or modification (for example, in respect of defence or security interests or the continuing provision of public services)

  (b) the interests of suppliers including whether damages are an adequate remedy for the claimant

  (c) any other matters that the court considers appropriate"

The factors

Public interest in lawfulness:

- *Edenred (UK Group) Ltd v HMT* [2014] EWHC 3555, para 31 (strong public interest in compliance with the law outweighed public interest in avoidance of delay)

- Stuart-Smith J in *Openview*, *Kent* and *Alstom* (undoubted public interest in procurement being carried out properly does not tend of itself to support the maintenance of the automatic suspension)

- *Sysmex (UK) Ltd v Imperial College Healthcare NHS Trust* [2017] EWHC 1824, para 19 and 25 (if accepted there is a serious issue, parties should, except in exceptional circumstances, resist any further temptation to argue the merits; *Edenred* didn't mean PI in lawfulness trumped everything else, not automatically point in C's favour)

- *Camelot UK Lotteries Ltd v Gambling Commission* [2022] EWHC 1664, para 128 (no dispute that public interest in awarding licence lawfully but question of lawfulness is the very issue court will be required to determine at trial, parties agree serious issue, dispute can only be resolved at trial and therefore does not assist in determining where the balance of convenience lies)

Avoiding delay:

- Procurements usually urgent (despite/because of earlier delays)
- D’s evidence usually accepted
- Courts often accept that “we are where we are” (e.g. *Sysmex,* paras 18, 76 – 84),
- But cf significant delays (e.g. *Covanta Energy Ltd v Merseyside WDA* [2013] EWHC 2922), availability of an extension on the same terms (*Involve*, paras 67 – 69) and delay in making application *(Involve*, paras 82 – 85)

Adequacy of damages :

- Potential arguments:
  - Difficult/impossible to calculate
  - Would put claimant out of business
  - Real/disruptive effect or loss of highly skilled workforce
  - Unique/highly prestigious contracts
  - Loss of reputation

- But – usually adequate in large procurements: e.g. *Teleperformance Contact Ltd v Secretary of State for Home Department* [2023] EWHC 2481, para 42 (primary loss of a commercial contract will be the loss of profits sustained by the losing bidder and the loss of profits will generally be capable of assessment by way of damages; therefore, more often than not damages will be an adequate remedy)

- Unique/highly prestigious contracts (*Unipart* paras 25 – 28)
    - cf *One Medicare* paras 46 – 48 (not anything like a sufficient basis to conclude market leading contract with potential for irremediable damage to reputation)

- Reputational harm

    - High bar: *Camelot UK Lotteries Ltd v Gambling Commission* [2022] EWHC 1664 – para 98, no compelling evidence that reputation or business would suffer harm so as to reduce prospects of obtaining future contracts

    - Need for caution/considerable caution: *Unipart* – paras 28, 32, 35; *International SOS* – para 42

- Redundancies (*Unipart* – paras 34, 42, need for practical detail/cogent evidence)

- Impact on global companies/group companies (*Teleperformance*, para 42)

Other factors:

- Expedition

- Preliminary issue (*Vodafone Ltd v Secretary of State for Justic* [2021] EWHC 2793 but cf *Unipart* paras 85 – 86)

- The advantages of the new contract

Differences and similarities

Differences:

- No 3-stage test
- No requirement for serious issue to be tried? – but see GCF Guidance on Remedies, para 25 (the test in section 102(2) requires the court to consider the merits of the case to ensure the interests of suppliers are considered alongside the public interest)
- The adequacy of damages for the C is no longer a gateway
- The Court "must have regard to" the factors (Regs "must consider")

Similarities:

- The adequacy of damages is still a factor (if not a gateway)
- All the same factors will be considered (are there any others?)

What will the courts do?

- *Camelot* [2022] EWCA Civ 1020, paras 6 and 7:

"there is a dearth of appellate guidance on the correct approach to applications to lift……There are often two conflicting interests: the need to do justice, and the need for speed… the arguments….demonstrated the potential importance of such guidance.

We acknowledge …that the Procurement Bill sets out provisions on this issue which use different words and terminology from those currently used by the courts, but ….it by no means follows that….the test that will be applied by the courts will be very different to that which is currently applied…."

Final thoughts

Is there now an opportunity for the courts to:

- Downgrade the importance of the adequacy of damages?
- Give more weight to other factors?
- Treat the new law as a more appropriate, procurement-specific test?