

# SWALA – Public Procurement

## 1. Automatic Suspension

14 March 2019



# **Keeping us in suspense: Recent case law on applications to lift**

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- Test to lift an Automatic Suspension
- Trends in cases since late 2016
- Merits of the claim / balance of convenience

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# Test for lifting the Automatic Suspension

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- Automatic Suspension in place where claim form issued in the High Court before the contract is signed
- Applicable test on an application by the contracting authority to lift the AS is the test as enunciated by Lord Diplock in *American Cyanamid Co v Ethicon Ltd* (No.1) [1975] A.C 39
- As confirmed by the court in various cases, starting with *DWF LLP v Secretary of State for Business Innovation and Skills* [2014] EWCA Civ 900
- Summary usually set out in judgments comes from Browne LJ in *Fellowes & Son v Fisher* [1976] 1 QB 122

# Summary of the American Cyanamid test

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- Is there a serious issue to be tried?
- Is so, would damages be an adequate remedy for the claimant if the suspension were lifted and it succeeded at trial?
- If not, would damages be an adequate remedy for the defendant if the suspension remained in place and it succeeded at trial?
- Where there is doubt as to the adequacy of damages for any or all of the parties, which course of action is likely to carry the least risk of injustice if it transpires that it was wrong, that is, where does the balance of convenience lie?
- Browne LJ: *"It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case."*

# Judge dependent?

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# Perinatal Institute v Healthcare Quality Improvement Partnership [2016] EWHC 2626 TCC

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- Mrs Justice Jefford
- Suspension lifted
- Damages were an adequate remedy for the claimant
- In any event on the balance of convenience any delay would be against the public interest since the procurement concerned reducing perinatal mortality rates.



# Alstom Transport UK Ltd v London Underground Ltd [2017] EWHC 1521 (TCC)

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- Mr Justice Stuart-Smith
- Suspension lifted
- Damages were an adequate remedy for the claimant
- In looking at the balance of convenience the fact that a public body might have to pay damages as well as the cost of the contract did not, by itself, mean the suspension should remain in place. Difficult to predict how long the litigation might take, might be significant and material delay in implementing the works.



# Sysmex (UK) Ltd v Imperial College Healthcare NHS Trust [2017] EWHC 1824 (TCC)

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- Mr Justice Coulson
- Suspension lifted
- Damages were an adequate remedy for the claimant
- In looking at the balance of convenience, overwhelming evidence in favour of lifting the suspension as continuation would adversely impact patient care and the new contract would save the defendant £250,000 per month on pathology tests alone.



# Lancashire Care NHS Foundation Trust, Blackpool Teaching Hospitals NHS Foundation Trust v Lancashire County Council [2018] EWHC 200 (TCC)

- Mr Justice Fraser
- Suspension remained in place
- Damages were an inadequate remedy for the claimant – incumbent service providers reorganisation, redundancies, cost and disruption, impact on other services delivered by the claimant.
- In looking at the balance of convenience, overwhelming evidence in favour of maintaining the suspension: least risk of injustice; court could offer the parties an expedited trial.



# DHL Supply Chain Ltd v Secretary of State for Health and Social Care [2018] EWHC 2213 (TCC)

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- Mrs Justice O'Farrell
- Suspension lifted
- Damages were an inadequate remedy for the claimant – loss of the contract likely to have a substantial adverse effect on the claimant's reputation – prestigious, high value, loss of a unique selling point, loss of staff from TUPE, affect ability to win other contracts; and defendant – disruption to the Future Operating Model.
- Balance of convenience – how long in force? Trial not before November 2018; FOM deadlines would be missed; impact on logistics services and demands of Brexit; FOM could not function without the logistics contract.



# Eircom UK Ltd v Department for Finance v British Telecommunications Plc [2018] NIQB 75

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- Horner J
- Suspension lifted
- Damages were an adequate remedy for the claimant
- Balance of convenience – the general public would suffer to some extent if the contract was delayed; the greater injustice would come from delay than the public interest in 'ensuring there was no ALT or breach of competition law', which was prejudging the issues.



# Central Surrey Health Ltd v NHS Surrey Downs CCG [2018] EWHC 3499 (TCC)

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- Waksman J QC
- Suspension remained in place
- Defendant did not concede serious issue to be tried (CCG's submission that CSH's claim was "hopeless and bound to fail")
- Held that there was a serious issue to be tried – whether there was a breach by the CCG of equal treatment
- Damages were an inadequate remedy for the claimant – difficult to quantify; losing the contract would have a knock on effect on the community; other contracts might be affected because staff pooled across different contracts.
- Damages were adequate for the defendant and cross undertaking offered
- Balance of convenience – strongly favoured maintaining status quo and expedited trial (3 months).

# Bombardier, Hitachi, Alstom v LUL (Siemens interested party) [2018] EWHC 2926(TCC)

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- Mrs Justice O'Farrell
- Suspension lifted
- Damages were an inadequate remedy for the claimants – procurement distinctively prestigious; disadvantage in competing for other commercial opportunities; loss of reputation, which would cause loss difficult to quantify
- Damages were an inadequate remedy for the defendant – LUL would suffer non financial losses (e.g. benefits to public comfort) and wider economic benefits
- Balance of convenience – credible evidence that current underground stock increasingly unreliable; need to improve journey times, comfort, capacity; not possible to expedite; suspension remaining would cause years of delays.



# Serious issue to be tried vs Balance of convenience

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- LUL acknowledged that the threshold for "serious issue" was low – something more than bare arguability but not as demanding as the real prospect of success when seeking to resist summary judgment.
- For the purposes of the application to lift, LUL conceded that there was a serious issue to be tried in both claims.
- Despite this concession, LUL's counsel looked to rely on the weaknesses within the claimants' cases as part of the "balance of convenience" consideration.
- Previous cases where perceived strength of the case was taken into consideration as a relevant factor in the overall discretion as whether to grant relief and one where it expressly was not.

## Perceived strength of the case

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**LUL - "... serious issue has been conceded, but it is part of our case on the balance of convenience that these are weak claims."**

- LUL submitted that, despite having conceded "serious issue", the weak nature of the claims as pleaded should be taken into consideration on the balance of convenience.
- The weaknesses in the claimants' claims should be seen as disproportionate to the consequences (to LUL and the wider public) of maintaining the suspension.

## Resisted by Alstom's counsel

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**Alstom - "Serious issue has been conceded. The merits ... are simply therefore not relevant , either at the level of serious issue or at the stage of balance of convenience."**

- Sarah Hannaford QC submitted that the court was not justified in embarking upon a consideration of the merits of the claims at this pre-disclosure stage of proceedings (*American Cyanamid*).
- LUL's basis for submitting that the claims were weak was that they were not detailed factual claims based on detailed documents - detailed documents had not been disclosed.
- There was therefore no basis for the court to consider the merits.

## Judgment (1)

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Para 40: Despite that concession, Mr Coppel has sought to rely on perceived weaknesses in the claims pleaded by the JV and Alstom as factors that tip the balance in favour of lifting the suspension. He submits that none of the claimants has identified any cogent basis to indicate that the outcome of the procurement was incorrect or flawed.

Para 44: Mr Coppel submits that the obvious and serious flaws and weaknesses in the claims advanced in the pleadings fall to be considered in the context of the balance of convenience. It would be quite wrong, and contrary to the public interest if speculative and optimistic claims were able to significantly delay, and potentially even imperil, the delivery of projects for substantial public benefit such as arise in the current proceedings.

## Judgment (2)

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Para 45 - I consider that LUL's concession that there is a serious issue to be tried for the purpose of the applications currently before the Court is well made. The pleadings in each claim disclose an arguable cause of action.

Para 46 - Each claim will require the Court to consider in some detail the technical merits and economic advantages of each bid. That will necessitate an examination of the specification, the technical content of the proposals, the technical evaluations and the numerical models used to carry out the NPV evaluation exercise. It would be inappropriate for the Court to attempt to weigh the likely strengths and weaknesses of each party's case without the benefit of full evidence and reasoned submissions.

Para 47 - For those reasons, I decline to make any observations about the likely outcome of the trial or take such matters into consideration in determining the applications.

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