INDIGO v COLCHESTER INSTITUTE

INDIGO SERVICES (UK) LIMITED v THE COLCHESTER INSTITUTE CORPORATION [NEUTRAL CITATION STILL AWAITED; JUDGMENT, 30 NOVEMBER 2010]

ELISA HOLMES
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In Indigo v Colchester Institute, David Donaldson QC sitting as a Deputy High Court Judge in the QBD, considered an application by the Defendant under Regulation 47H(1) of the Public Contracts Regulations 2006 (as amended by the Public Contracts (Amendment) Regulations 2009) to lift the automatic suspension imposed by Regulation 47G. The automatic suspension provisions were introduced by the 2009 amendments effectively preventing the award of a contract to which the Regulations apply where such an award has not been made at the time proceedings are issued. The amendments therefore place the burden on the contracting authority defendant to any such claim to apply to the High Court to have the automatic suspension lifted.

APPLICATION OF AMERICAN CYANAMID PRINCIPLES TO APPLICATIONS TO LIFT AN AUTOMATIC SUSPENSION

The decision in *Indigo* confirmed the application of *American Cyanamid* principles to applications to lift an automatic suspension. According to the Court, the fact that *American Cyanamid* principles should be applied is "fairly clear" from Regulation 47H(2) of the Regulations which provides, inter alia, that in considering an application under Regulation 47H(1) the Court "must consider whether, if regulation 47G(1) were not applicable, it would be appropriate to make an interim order requiring the contracting authority to refrain from entering into the contract". In so deciding, David Donaldson QC rejected the submission made by the Claimant that the fact that the amended Regulations placed the burden on the contracting authority to apply to lift an automatic suspension meant that there was a "bias not amounting to a presumption" in favour of leaving the suspension in place.

The Court considered the merits of the substantive claims made against the contracting

authority and it seems clear from the judgment that in most respects it did not consider the substantive merits of Indigo's claim to be strong. David Donaldson QC though did not find "it possible to conclude that the lack of any causative effect is plain beyond realistic counter-argument, and accept[ed] that there is a serious issue to be tried as to whether Indigo has suffered, or is threatened by, loss of a more than fanciful a chance of obtaining the contract". He nevertheless did conclude that the contracting authority's position on the merits was stronger than that of the Claimant and that the contracting authority's "case on causation would be more likely than not to be accepted at trial" and even if this argument failed, "there is only a low likelihood that the court would assess that chance of loss as much more than the minimum threshold level of non-fanciful".

As appears often to be the case, although not considering the substantive legal merits to be pivotal to the test to be applied, the Court decided the application in favour of the contracting authority whom it clearly considered had the considerably stronger prospects of success at trial. Ultimately, the Judge applied the "underlying principle" propounded by Lord Hoffman in *National Commercial Bank Jamaica Limited* [2009] UKPC 16 "that the court should take which ever course seems likely to cause the least irremediable prejudice to one party or the other". David Donaldson QC was particularly concerned in this respect with the fact that he considered the contracting authority could not continue with its current arrangements for the relevant cleaning services and if the automatic suspension remained in place, the College could not, as a result of health and safety concerns, continue to operate in the event the College complied with applicable procurement law.

EXTENDING EXISTING ARRANGEMENTS IN THE FACE OF A CHALLENGE

The Court's findings in this respect are also particularly noteworthy. The Court held that contracting authorities could not extend existing contractual arrangements (in the absence of a contractual ability to extend) without conducting a fresh procurement process since any such extension would be a contractual change as contemplated by the ECJ in Case C-454/06 *Pressetext Nachrichtenagentur GmbH v Austria*. Although Regulations 14 and 17 allowed for the application of a contracted negotiated procedure in cases of urgency, reliance on these provisions for ad hoc extensions still required compliance with Regulations 16(9) and (10), thereby importing Regulations 23, 24, 25, 26 and 30. This meant that contracting authorities the subject of challenge under the Regulations could not simply extend current arrangements for the duration of any such challenge without the contractual arrangements

providing for any such extension or complying with the provisions of the Regulations which apply even when Regulations 14 or 17 are relied upon.

The Court's approach in this respect stands to have a significant impact upon applications for lifting automatic suspensions (and any injunction applications which may still be made in relation to procurement processes the subject of the Regulations before the 2009 amendments became operative). In particular, the balance of convenience is considerably more likely to fall in favour of contracting authorities, at least in circumstances in which the contractual provisions do not allow for an extension and there is insufficient time before the expiry of the current contract to conduct a compliant procedure.

APPLICATION OF THE TIME LIMITATION PROVISION

In addition, the decision in Indigo continues the trend in recent decisions to apply strictly the time limitation period contained in the Public Contracts Regulations 2006 (as effectively modified by the decision of the Court of Justice in Case C-406/08 *Uniplex (UK) Ltd v NHS Business Services Authority* [2010] 2 CMLR 47). David Donaldson QC was clearly unimpressed by challenges made by Indigo which related to matters which were evident on the face of the tender documents and in relation to which no clarification was sought or challenge made before Indigo was informed that it was unsuccessful. The Court was equally dismissive of the argument (considered by Mann J in *Sita UK Limited v Greater Manchester Waste Disposal Authority* [2010] EWHC 680) that time could not run until the award decision since it was not until that point that the Claimant had a completed cause of action. This was said to arise from the fact that Regulation 47C provided that a cause of action only arose when a claimant had suffered or risked suffering loss or damage. According to David Donaldson QC, the fact that Regulation 47C included the phrase "risks suffering … loss or damage" together with the fact that "English law would not require that a claimant must show realised loss, even of a chance, in so far as it seeks *quia timet* relief to prevent the conclusion of the contract which is the subject of the challenged award decision".

It should be noted that the appeal of the decision in *Sita* is due to be heard by the Court of Appeal next week. The Court of Appeal is likely to consider issues arising particularly out of the General Court's decision in *Uniplex*, such as what "knowledge of an infringement" involves, as well as the question of whether an economic operator can be expected to bring proceedings unless it knew or ought to have known that it had suffered or risked suffering loss or damage. Further, the OGC is currently consulting on the proposed amendment of

the domestic Regulations in light of the General Court's decision in *Uniplex*. The deadline for responses to the consultation paper is 19 January 2011 following which the OGC will propose amendments.

CONSEQUENTIAL ORDERS

Also of interest to practitioners will be the consequential orders made in *Indigo*: the High Court awarded the costs of the application to the successful contracting authority; further, it refused permission to appeal but suspended the effect of its judgment for four days, to allow the Claimant the opportunity to appeal. The Court of Appeal (Stanley Burnton LJ) declined to extend the stay however, citing delay in the application and the chances of success.

Philip Moser represented the successful contracting authority.

Monckton Chambers
1 & 2 Raymond Buildings
Grays Inn
London, WC1R 5NR

Tel: +44 (0)20 7405 7211
Fax: +44 (0)20 7405 2084
Email: chambers@monckton.com
www.monckton.com