Public Procurement—The relationship between lifting the automatic suspension and an expedited trial (Kellogg Brown & Root Ltd v Mayor's Office for Policing and Crime and another)

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Public Law analysis: These proceedings arose out of a procurement conducted by the Mayor's Office for Policing and Crime ('MOPAC') for a framework agreement and call-off contract for the provision of services designed to support the efficient running of MOPAC's estate of properties. It was governed by the Public Contracts Regulations 2015 (the 'PCR'). MOPAC applied to lift the automatic suspension. The claimant, Kellogg Brown & Root Limited ('KBR') applied for an expedited trial. Mrs Justice Joanna Smith decided to lift the automatic suspension. She held that damages would be an adequate remedy for KBR and that the balance of convenience favoured the lifting of the suspension. She refused the application for expedition as, on the facts of the case, it would be contrary to the overriding objective. Written by Jonathan Lewis, barrister at Henderson Chambers.

Kellogg Brown & Root Ltd v Mayor's Office for Policing and Crime and another [2021] EWHC 3321 (TCC).

What are the practical implications of this case?

Recently, contracting authorities have occasionally found their applications to lift the automatic suspension being arguably undermined (at least somewhat) by the possibility of an expedited trial (for example, *Draeger Safety UK Ltd v London Fire Commissioner* [2021] EWHC 2221 (TCC) and *Vodafone Limited v Secretary of State for Foreign Commonwealth and Development Affairs* [2021] EWHC 2793 (TCC)).

This is a useful decision in that Joanna Smith J reviewed the recent authorities on this point and reached the conclusion that the availability of an expedited trial is not a factor relevant to the assessment of the adequacy of damages. However, it might feature somewhat in the balance of convenience analysis, which must proceed on the assumption that, absent an expedited trial, in the event the suspension is not lifted, there will be a delay of (in this case) at least 18 months until procured contract is implemented (at para [114]).

Practitioners should pay careful attention to her analysis of the authorities so as to work out, in the particular circumstances of a case, how the availability of an expedited trial might feature in a Court's decision on an application to lift the automatic suspension. The position is far from clear and guidance from the Court of Appeal would be welcome on this point.

This decision also provides a useful reminder as to the quality of evidence that the court expects from a claimant which asserts that damages would be an inadequate remedy for it.

What was the background?

KBR, which provides solutions and systems for projects and programmes in various sectors, was the incumbent provider of support services to MOPAC. MOPAC maintained that the current contract was a legacy one with outdated systems and architecture such that significant, wide-ranging improvements were required.

KBR participated in this procurement for a single supplier framework for the provision of a property services integrator for the management of property related services readily accessible by GLA bodies, the Offices of the Police and Crime Commissioner and Central Government Departments (the

'Framework'). The estimated total value of the Framework was £400m and its timescale was 60 months. KBR maintained that the Framework would represent a substantial contract in its Facilities Management Integrator ('FMI') portfolio.

KBR was beaten by Sodexo Limited by a narrow margin of 1.16%. In its claim, it maintained, amongst other things, that MOPAC was in breach of its obligations and had committed manifest errors in the scores which it awarded for six of the quality questions. MOPAC denied the claim in its entirety.

What did the court decide?

Joanna Smith J began by noting that the principles to be applied in applications to lift the automatic suspension are generally settled and well known and provided a helpful summary of them (see paras [22]–[25]). MOPAC had conceded that there was a serious issue to be tried (at para [26]). The judge rejected MOPAC's attempts to rely on arguments that KBR's case was 'weak', relying on authorities to the effect that the court is not in a position to assess the merits of a case at an early interlocutory application (paras [27]–[34]).

Prior to the hearing, the judge had made enquiries of listing to determine when an expedited trial could be conducted. KBR maintained that the availability of a swift trial was effectively a pragmatic solution which should be brought into account in considering the justice of the case in the context of adequacy of damages (at para [38]). It relied upon Mr Justice Kerrs statement in *Vodafone Limited v Secretary of State for Foreign Commonwealth and Development Affairs* [2021] EWHC 2793 (TCC) at [para 90] that he had found it impossible 'to ignore, in the real world, the availability of a preliminary issue trial window'. Joanna Smith J rejected that submission for the following reasons (at para [39]):

- she had not been shown any authority in which the court had identified factors which should displace the 'normal' rule. She said that the modern formulation of the American Cyanamid principle (whether it is just, in all the circumstances, that a party be confined to its remedy of damages) is intended merely to articulate the principle that if a claimant is to be confined to his remedy in damages, justice requires that those damages must be adequate for the purposes of compensating for loss
- she relied upon *Openview Security Solutions Ltd v The London Borough of Merton Council* [2015] EWHC 2694 (TCC) at [para 29] to support her view that the two formulations of the American Cyanamid principle (damages being an adequate remedy and whether it is just to confine a party to damages) are 'to be treated as two sides of the same coin'
- Kerr J in Vodafone was wrong in his characterisation of the exercise that O'Farrell J was in fact carrying out in Draeger and his approach was inconsistent with existing authority
- in *Draeger*, when O'Farrell J was expressly considering the issue of adequacy of damages for the claimant, she did not address the potential for a speedy trial or suggest that the availability of a speedy trial was a relevant consideration in assessing the adequacy of damages
- in *Openview*, (at para [25]), The Hounourable Mr Justice Stuart-Smith expressly rejected the suggestion that the availability of a speedy review by the court was a relevant factor in considering the question of adequacy of damages
- no special circumstances had been identified about this case
- she relied upon *Circle Nottingham Ltd v NHS Rushcliffe Clinical Commissioning Group* [2019] EWHC 1315 (TCC) at [para 18] where it was held that '…if the court is satisfied that it would not be unjust to confine the claimant to its remedy in damages, that is usually the end of the inquiry. Lifting the suspension will then almost invariably follow as a matter of course.'

The judge conducted a forensic analysis of KBR's evidence to support its contention that it would be unjust to confine it to a remedy of damages (at [para 40] onwards). She found that damages would be an adequate remedy. She rejected KBR's contention that the size of the proposed contract itself supported the general proposition that a failure to win it cannot be compensated for in damages (at [para 46]), observing that it would constitute only a very small part of KBR's overall commercial enterprise. She saw no issue in quantifying wasted tender costs (at [para 47]).

She found that KBR's evidence in support of its contentions relating to redundancies of staff and harm to staff morale fell 'far short' of establishing that damages would be an inadequate remedy (at para [53]), particularly because the evidence did not show that such staff had specialist skills that could not found in the wider market. She held that that while redundancy is a potential detriment for an individual employee, it is irrelevant to the adequacy of damages as a remedy for KBR (at para [54]). She was not persuaded by KBR's evidence as to the impact on its FMI portfolio, observing that if the FMI division became less profitable because overheads would be shared between fewer contracts, that would be a quantifiable loss which would be capable of calculation (at para [58]).

She found that KBR's contention that it would become less competitive in relation to other opportunities, to be 'mere speculation' (at para [59]). A potential business restructuring in the future was a matter for KBR and irrelevant to the adequacy of damages as a remedy (at para [60]). Equally irrelevant were any negative consequences on KBR's social value initiatives. Insofar as KBR had invested in the current contract, that was an investment which was necessitated by that contract (at para [61]). While the current contract may have been an 'invaluable reference contract', KBR had not established that there was a significant risk that it would lose any competitive edge if it lost the contract (at para [66]).

The judge considered that authorities on reputational harm (paras [69]–[74]) and decided that KBR had not produced sufficient evidence that there was (at least) a real prospect of loss that would be retrospectively identifiable as attributable to the loss of the proposed contract but not recoverable in damages (at [75]). And, in any event, found that the contract was not 'highly prestigious' (at para [76]). She also rejected KBR's arguments in respect of 'loss of knowledge' (at paras [80]–[81) and 'loss of efficiencies' (at paras [82]–[83]).

The judge found that damages would be an inadequate remedy for MOPAC (at paras [87]–[104]), noting that harm that MOPAC may suffer by reason of a significant delay in the introduction of enhanced services and the benefits they will bring with them would be difficult to quantify in damages.

In terms of expedition, the judge found that while there might be good reason for expedition, in the circumstances of this case, expedition would interfere with the good administration of justice and would be inconsistent with the requirements of the overriding objective (at para [112]) (noting the difficulties in preparing the claim for trial quickly). She said that the balance of convenience analysis must take place on the assumption that, in the event the suspension is not lifted, there will be a delay of at least 18 months until the proposed contract is implemented (at para [114]).

Case details

- Court: Technology and Construction Court (QBD), Business and Property Courts of England and Wales, High Court of Justice
- Judge: The Honourable Mrs Justice Joanna Smith DBE
- Date of judgment: 18 November 2021

Jonathan Lewis is a barrister at Henderson Chambers, and a member of LexisPSL's Case Analysis Expert Panel. Suitable candidates are welcome to apply to become members of the panel. Please contact caseanalysiscommissioning@lexisnexis.co.uk.

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