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Procurement—lifting the automatic suspension under the utility regulations (Lagan Construction Ltd v Northern Ireland Water)

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Public Law analysis: Lagan Construction (Lagan) issued a claim against Northern Ireland Water (NIW) when NIW did not award it a contract under Framework Agreement IF105. The procurement was governed by Utility Contract Regulations 2016 (UCR 2016). NIW applied under UCR 2016, reg 111(1)(a) to lift the automatic suspension imposed by operation of UCR 2016, reg 110. Mr Justice Horner lifted the stay on the basis that damages would be an adequate remedy for Lagan, but an inadequate remedy for NIW. It was not strictly necessary to consider the balance of convenience but Horner J found that it would in any event have overwhelmingly favoured lifting the suspension. Written by Jonathan Lewis, barrister, at Henderson Chambers.

Lagan Construction Ltd (t/a Charles Brand) v Northern Ireland Water Ltd [2020] NIQB 61 (9 October 2020)

What are the practical implications of this case?

This case is yet another illustration of the well-established principles which apply to lifting the automatic suspension (whether under UCR 2016, SI 2016/274 or under Public Contract Regulations 2015, SI 2015/102, regs 95 and 96. It is of course a highly fact-sensitive assessment. The judge was influenced by the clear public interest in preventing the risk of overwhelming of the water system—a matter which could not adequately be compensated in damages. He also took into the account that NIW was chronically underfunded and the suspension inhibited Northern Irish economic development.

This decision suggests that a court is likely to look more favourably upon an application to lift the suspension where a utility provider is in a precarious position such that it might be disproportionately affected by the knock on effects of an automatic suspension. Further, it demonstrates that it will be an uphill struggle for challenging tenderers to maintain the suspension where there are strong public interest reasons for lifting it (health and safety, economic development or environmental for example).

What was the background?

Lagan, a construction company, competed for a contract with NIW, the statutory undertaker for water and sewerage services in Northern Ireland, under a Framework Agreement. The contract concerned non-infrastructure major works on the Northern Ireland water system (Lot 3), which were in a 'sorry state' due to serious underinvestment (at para [8]). NIW considered Lagan's bid to be abnormally low.

The court confined itself to the application to lift the automatic suspension under UCR 2016, SI 2016/274, reg 111(1)(a) and did not consider the merits of Lagan's claim that it had unlawfully been excluded (seeking to avoid the application turning into a trial or quasi-trial, which had been discouraged by Mr Justice Stuart-Smith in *Alstom Transport v London Underground Ltd* [2017] EWHC 1521 (TCC) (cited at para [44]). The test to be applied is well established (serious issue, adequacy of damages and balance of convenience) and recently applied by Mrs Justice O'Farrell in *DHL Supply Chain Ltd v Secretary of State for Health and Social Care* [2018] EWHC 2213 (TCC).

Lagan submitted that it would suffer reputational damage and financial collapse if it was not awarded the contract and the automatic suspension was lifted. Horner J found its evidence in this regard to be 'singularly lacking' (at para [59]). NIW claimed that there was a risk of disaster if it was unable to award the contract, such as the emptying of raw sewage into Belfast Lough and risks to property from flooding.

What did the court decide?

The court noted that there was a serious issue to be tried as neither parties' case disclosed a 'knockout point' (at paras [46]–[47]) and a concession had been made in this regard. Horner J said

that the court was not equipped to carry out the assessment of whether NIW had complied with its duties in respect of abnormally low bids and held that there were potential defences to Lagan's claim.

Lagan failed to persuade the court that damages would be an inadequate remedy for it. While it argued that it would face financial collapse and would lose key staff and competitiveness if it was not awarded the contract, its evidence in this regard was lacking as it had not provided up-to-date financial information nor explained why a 10% loss of business would result in its financial collapse (at paras [55] and [57]).

Horner J also rejected Lagan's claim as to its potential reputational loss. He relied upon the decision of the EU General Court stated in *Unity OSG FZE v Council of the European Union and EUPOL Afghanistan* (T-511/08 R) in which it was noted that failure to be awarded a contract is an ordinary, commercial risk that all parties take when competing for contracts (at para [66]). Following Stuart-Smith J in *Open View Security Solutions v London Borough of Merton Council* [2015] EWHC 2694 (TCC), he held that reputational damage can only affect the adequacy of damages where a particularly high standard is met, and Lagan had failed to meet it (at para [68]).

Horner J found that damages would not be an adequate remedy for NIW because, owing to court timetables, a trial would only likely take place in summer 2021 and if the suspension remained in place until then, this might well result in an environmental disaster. Further, there would be a loss of efficiency in providing water services, which were already suffering greatly under Northern Irish funding arrangements. If raw sewage was channeled into the Belfast Lough, thereby lowering water quality, this damage would not be quantifiable in damages (at para [60]). The risk of a major catastrophe, such as a failure of sewerage syphons, was a real one and was heightened by NIW's inability to award contracts during the period of automatic suspension (at para [61]). No undertaking in damages had been offered by Lagan, though considering 'all the circumstances' Horner J did not consider damages to be an adequate remedy for NIW in any event (at para [63]).

For the sake of completeness, Horner J went on to consider balance of convenience even though he had found damages to be inadequate for NIW therefore justifying the lifting of the automatic suspension (at para [72]). He found the balance of convenience to be overwhelmingly in favour of lifting the suspension: there was a risk of a major catastrophe engulfing Northern Ireland (at paras [80] and [81]). Further, Northern Ireland's development was inhibited by NIW's inability to enter the contract.

Case details

- Court: High Court of Northern Ireland, Queen's Bench Division (Commercial Hub)
- Judge: Horner J
- Date of judgment: 9 October 2020

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