KEATING CHAMBERS

Automatic suspensions - trends

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Automatic suspensions – where, what and how?

- Automatic suspension (Reg. 95)
- CA applies to bring it to an end (Reg. 96)
- *American Cyanamid*
  - Is there a serious issue?
  - Are damages an adequate remedy (for Claimant and Defendant)
  - Where does the balance of convenience lie?

Issues to be decided

- Early disclosure
- Concession on serious issue
- Making a concession on sufficiently serious breach
- Cross undertaking
- Involvement of winning bidder

Early disclosure

- Principles in *Roche Diagnostics Ltd v Mid Yorkshire Hospitals* (2013)

  - subject to issues of proportionality and confidentiality, the claimant ought to be provided promptly with the essential information and documentation relating to the evaluation process carried out, so that an informed view can be taken of its fairness and legality

  - applications must be considered on their individual merits and a clear distinction will often be made between cases where a *prima facie* case has been made out by the claimant (but further information or documentation is required) and cases where the unsuccessful tenderer is aggrieved at the result but appears to have little or no grounds for disputing it

- applications must be tightly drawn and properly focused: information likely to be disclosable on an application for early disclosure is that which demonstrates how the evaluation was actually performed and, therefore, why the claiming party lost and

- the court needs to balance the claimant's lack of knowledge with the need to guard against an application being used as a fishing exercise, designed to shore up a weak claim which will put the defendant to needless and unnecessary cost

- Will early disclosure be ordered before the application?

- How much to disclose in advance?

Relevance of the merits

- *Bombardier/Alstom v London Underground* [2018]
- *Kent v NHS Swale* [2016]
- *Sysmex v Imperial College NHS Health Trust* [2017]

- *Alstom v London Underground Ltd* (2017)
  - *"On the face of it, therefore, it would be inappropriate for the court to decide whether or not there is a serious issue to be tried without a sight of at least some of the documents that Alstom have sought, particularly those going to the heart of LUL's consideration of Bombardier's successful tender. ….. LUL may be seeking to gain a potentially unfair advantage by arguing that there is no serious issue to be tried without disclosing any of the documents that may either support or contradict their factual assertions."*

- *Kent Community Health NHS Foundation Trust v NHS Swale CCG* (2016)
  - *"Unless the Court can form the view, without conducting any form of mini-trial, that the claimant is virtually bound to succeed, the case remains classified as one where there is a serious issue to be tried. It is both unsafe and wrong (in principle and on authority) to attempt to calibrate the exercise of the Court's discretion by reference to an assessment of the strength of the Claimant's case as lying somewhere between the two points of there being a serious issue to be tried and being virtually certain of the Claimant's ultimate success."* (para 28)

- *Sysmex (UK) Ltd v Imperial College Healthcare NHS Trust* (2017)
  - *"I do not consider, on an application to lift the suspension in a typical procurement case, that [the merits] is an appropriate matter for the court to investigate. Such cases are a long way from a straightforward claim for an interlocutory injunction, where a particularly good point on the substantive dispute (an admission, say, or an unequivocal contractual term in one side's favour) might well be of assistance to the court's consideration of the application overall. It is not appropriate to have a mini-trial in a complex procurement dispute like this. Where, as here, it is accepted that there is a serious issue to be tried, then (save in exceptional circumstances) both sides should resist any further temptation to argue about the merits."*

Adequacy of damages

- Damages are an adequate remedy for C (e.g. : *Openview v Merton* (2015)*, Kent NHS Trust v NHS Swale CCG* (2016), *Alstom v LUL* (2017), *Sysmex v Imperial* (2017))

- C is a not for profit business (e.g. *Bristol Missing Link v Bristol CC* (2015) but cf *Kent v NHS Swale* (2016))

- C's damages are difficult or impossible to calculate (see e.g. *Covanta v Merseyside* (2013))

- C will lose staff to TUPE and/or have to close business (see e.g. *Counted4 v Sunderland CC* (2015), *Bristol Missing Link v Bristol CC* (2015))

The prospects of success

- Before 2013, very few suspensions were maintained

- Since 2013, there have been some victories for claimants:
  - *Covanta v Merseyside* (2013)
  - *DWF v Secretary of State for Business Innovation and Skills* (2014)
  - *NATS v Gatwick Airport* (2014)
  - *R (Edenred) v HM Treasury* (2014)
  - *Bristol Missing Link v Bristol CC* (2015)
  - *Counted4 v Sunderland* (2015)

Automatic suspensions - overview

- Is it a satisfactory remedy?
- It remains much easier for a D to win than for a C
- Where are we on damages?