Limitation – Mediterranean Hospital of Cyprus (MHOC) Ltd v Secretary of State for Defence

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Mediterranean Hospital of Cyprus (MHOC) Ltd v The Secretary of State for Defence [2018] EWHC 3289 (TCC)

- MOD conducting a procurement for secondary healthcare services to be provided to the British Forces Cyprus
- Caspe Healthcare Knowledge Systems ("CHKS") is the only European medical assurance organisation which provides an external assurance framework similar to that provided by the Care and Quality Commission (the "CQC").
- MOD decided to make it a requirement for tenderers to be "CHKS" accredited

Timeline

- 29 November 2017 – OJEU published which said CHKS accreditation was required
- 23 January 2018 – MHOC submitted its response to the PQQ and said it challenged the inclusion of the CHKS requirement
- 14 March 2018 – MOD letter sent to MHOC informing it that had would be invited to tender and CHKS accreditation was required prior to the contract award date
- 11 April 2018 - ITT and SoR issued which included CHKS requirement
- 16 April 2018 – MHOC asked MOD to remove the CHKS requirement
- 11 May 2018 - MOD refused to issue a tender amendment removing CHKS requirement
- 8 June 2018 – MHOC issued claim challenging the inclusion of the CHKS requirement and the refusal to issue the tender amendment removing the CHKS requirement
- The award decision had not been made at the time of challenge

High Court – Mr Williamson QC

- MHOC knew or ought to have known of the CHKS requirement no later than 23 January 2018 (Regulation 92(2) of PCR 2015)
- The MOD's refusal to remove the CHKS requirement did not restart the time running for limitation purposes
- He had no power to extend time because the 8 June 2018 (when the claim was served) was more than 3 months from when time started to run (Regulation 92(5) of PCR 2015)
- There was no good reason to extend time as there was nothing to show that MHOC was "*in any way disabled from issuing proceedings at any particular time*".
- MHOC could not rely on Regulation 92(3) of PCR 2015 as there was no relevant decision in this case.

Court of Appeal – Coulson LJ

- Seven grounds of appeal
- Permission to appeal was refused on 16 January 2019

1. Refusal to Amend

- MHOC argued that the judge should have found that the MOD's refusal to amend the ITT amounted to a separate decision for the purposes of Regulation 92(2) of the PCR 2015.
- Coulson LJ said: "*This argument is misconceived, although it is regrettably not uncommon in public law cases when an applicant has to try and extend the relevant 'trigger' far beyond the original date*."

- He explicitly agreed with the following reasoning of the judge:

  "…the claimant had grounds to proceed by no later than January 2018. The claimant cannot, so to speak, evade the requirements of Regulation 92(2) by inviting the MOD subsequently to amend the tender documents…I have considerable doubt as to whether a complaint that a contracting authority will not amend tender documents comes within the Regulations in any event…."

- He said he considered that an *"alternative analysis is not arguable"*.

2. A “decision”

- MHOC contended that the MOD’s refusal to amend the ITT was a “decision” for the purposes of Regulation 92(3) of PCR 2015
- Coulson LJ said that the refusal to amend was not “a decision” for the purposes of Regulation 92(3) and the argument was *“hopeless”* for the reasons set out in the MOD’s respondent's statement.

- A “decision” under the Regulations refers to award decisions. That this is the case under Reg. 92(3) is clear both from the ordinary meaning of the words of the provision and its context (decisions sent by electronic means; accompanied by a summary of reasons, etc.). Further, this is consistent with the definition of “decision” in Reg. 86(1) (“*decision to award the contract or conclude a framework agreement*”), and the presumption that where the same words are used more than once in a statute they have the same meaning. A “decision” for Reg. 92(3) purposes also cannot include a (manufactured) refusal to amend…

3. Extension of Time

- MHOC complained that the judge only considered whether there was a factor impacting upon the applicant's ability to issue proceedings in deciding whether there was a "good reason" to extend time for the purposes of Regulation 92(4)
- Coulson LJ said there was *"nothing wrong with that approach in principle: indeed it is in accordance with SRCL."* ([2018] EWHC 1985 (TCC))

Thank you for listening

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Disclosure then and now

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Disclosure in procurement claims

- Centrality of disclosure to procurement disputes well established. Some key factors:
  - Short limitation periods
  - "Asymmetry of information"
  - Automatic suspension and applications to lift
  - Expedited trials
- Approach of Court has developed over recent years
- Impact of Covid-19?

Three recent cases

- *Construcciones Y Auxiliar De Ferrocarriles, S.A. v High Speed Two (HS2) Limited* [2018] EWHC 311 (TCC)
- *Serco Ltd v Secretary of State for Defence* [2018] EWHC 549 (TCC) and [2018] 519 EWHC (TCC)
- *Marine Specialised Technology Ltd v Secretary of State for Defence* [2019] EWHC 2727 (TCC)

CAF v HS2

- Challenge to exclusion at PQQ stage
- Relevant dates:
  - Award decision: 1/11/17
  - Claim issued: 30/11/17
  - PoC served: 7/12/17
  - First directions hearing: 20/12/17
- Fraser J:

"…it must have been obvious…that certain highly relevant and obvious documents connected with the procurement evaluation, such as the full rationale document including all the moderations to scoring of the claimant's EOI, were properly discloseable documents…" [4]… I ordered an expedited trial. In those circumstances it seemed to me when I came in to court that day that it was, frankly, astonishing that the full rationale document had not already been disclosed to the claimant showing how its EOI had been scored by HS2." [6]

CAF v HS2

- Disclosure promised at first directions hearing – 3 weeks after claim issued and 10 weeks before expedited trial
- Court critical that disclosure not done at the very outset of the claim
- Does not define precisely what has to be disclosed at an early stage
- Key point – if defendant wants an expedited trial it must co-operate on disclosure
- Award of indemnity costs

Serco v SoS for Defence

- Claim to award of contract for fire and rescue services under DSPCR 2012
- Relevant dates:
  - Award decision: 18/6/18
  - Pre-action request for disclosure: 22/6/18
  - Disclosure of individual and consensus scores from AWARD: 4/7/18
  - Claim issued: 17/7/18
  - Disclosure application: 15/11/18
  - Application for strike out/summary judgment
- If so/sj application had succeeded, some parts of the claim involving challenges against scoring of particular requirements would have been struck out

Serco v SoS for Defence

- Fraser J – does not criticise bringing of so/sj application (detailed review of case-law on notice provisions)
- But critical of approach adopted in relation to disclosure:
  - Refers to approach to disclosure taken in *Roche* (in particular [20(a)])
  - Disclosure sought described as *"essential information and documentation"*
  - Says that such disclosure should have taken place *"months ago"*
  - Conclusion ([11]); *"it seems to me that a party…which is bringing what on the face of it…is at least a prima facie credible challenge in a very sizeable, expensive procurement of enormous detail, was entitled, and is entitled, to seek these documents."*
- Costs awarded on an indemnity basis

MST v SoS for Defence

- Application made prior to hearing of an application to lift: heard on 9/7/19
- Unusual in two respects:
  - Admitted breach by D of C's confidential pricing information relating to a previous procurement
  - That breach to be considered in context of ongoing procurement
- Common interest between C and D to know whether publication *"actually had any real consequences"* [2]
- Application by C was for inspection by experts of data from websites upon which D had published the confidential information. Was it accessed by third parties, if so by whom, and when?

MST v SoS for Defence

- Court comments on *"surprising lack of explanation"* from D and says that *"C was on the outside and not able to fully understand what has happened"* [4]
- Court says that if this were a paper disclosure "*there would be no question but that the Claimant should be entitled to inspect documents"* – by reference to ATL to be heard on 30/7/19
- Costs awarded to C – but not on an indemnity basis. *Serco* distinguished. D did not recognise the need for urgency in responding to C but there was *"no deliberate obstruction or obfuscation"*

Emerging Principles

- Caution – cases turn on facts and decisions are taken in real time. But some general principles clear
- Hard to resist *Roche* disclosure at a very early stage, certainly once claim is issued
- But there may well be disagreement as to what falls within *"the essential information and documentation relating to the evaluation process actually carried out"*
- cf. TCC Guide Appendix H: refers to *"key decision making materials"* which *"may include"* the documentation referred to in Regulation 84 PCR 2015. That documentation is *"sufficient documentation to justify decisions taken"*

Emerging Principles

- ATL – even if serious issue/sufficiently serious breach conceded, C still entitled to appropriate level of disclosure cf. *Pearson Driving Assessments v Minister for the Cabinet Office* [2013]EWHC 2080 (TCC)
- Implications of seeking expedition – need to co-operate and avoid disputes over disclosure
- Confidentiality – still an area which provides difficulties

Disclosure under Covid-19

- Two obvious issues:
  - Access to documents – especially hard copy and in different locations or on e.g. mobile devices
  - Uncertainty as to lockdown and implications for timetable – whether application or trial
- But not an insuperable problem:
  - Most disclosure likely to be electronic
  - Proper planning on easing of lockdown – see also Reg. 6(2)(h) Health Protection (Coronavirus Restrictions) Regulations 2020
- Going forward – importance of electronic record keeping. Does not preclude use of hard copies but how they are captured and stored

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Mitie v Secretary of State for Justice [2020] EWHC 63 (TCC)

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Overview

- Procurement for facilities management services across the court estate
- Competition won by Engie + challenged by Mitie
- One head of challenge concerned the winning bidder's ALT and contract sustainability
- Suspension lifted

Mitie's arguments on difficulty of assessing damages

Argued damages would be 'virtually impossible' to assess justly:

1. Difficulty of establishing the counterfactual
2. Difficulty of predicting amount of work required + profit margins on that work

Court's conclusion: *"a fair assessment of Mitie's damages … may be difficult, but no more so than many other claims for loss of profits in a commercial dispute".*

Part of a wider trend?

- *McLaughlin and Harvey v Department of Finance and Personnel (No.1)* [2008] NIQB 25
- *European Dynamics SA v HM Treasury* [2009] EWHC 3419 (TCC)
- *Exel Europe v University Hospitals Coventry and Warwickshire NHS Trust* [2010] EWHC 3332 (TCC)

Reduced prevalence of setting aside

Legal issues:

- Prioritisation of damages over remedy of setting aside
- Contrary to Remedies Directive (2007/66) and Case C-81/98 *Alcatel Austria?*
- See Commission criticism of damages actions (COM(2006) 195)
- Are standstill period and automatic suspension mechanism having intended effect?

Broader public policy concerns?

Possible solutions?

- Remedies Directive arguments
- *Merck Sharp & Dohme Corp v Clonmel Healthcare Ltd* [2019] IESC 65

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