Briefing

Procurement

BURGES SALMON

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Should I Stay or Should I Go? (Revisited) – Further Automatic Suspension Upheld

Further to our recent briefing of October 2014 *Should I Stay or Should I Go?*, the English High Court has stayed another contract award perhaps indicating an increased willingness to maintain automatic suspensions under Regulation 47(G) of the Public Contracts Regulations 2006 (the "Regulations") pending an early/ expedited trial.

The latest case is *Edenred (UK Group) Ltd v Her Majesty's Treasury, HMRC and NSI* [2014] EWHC 3555 (QB).

The case concerned the Government's new "Tax Free Childcare" ("TFC") system for working parents. TFC is due to replace, in 2015, the current "Employer Supported Childcare" ("ESC"). Edenred is one of a number of private commercial operators who administer the ESC scheme. TFC was to be administrated solely by National Savings and Investments ("NSI"), all of whose operations are contracted out to Atos - a private sector provider.

Edenred challenged the proposed TFC arrangements arguing that if HMRC and NSI conclude a memorandum of understanding and the NSI/Atos contract is varied in order to provide TFC, then that will involve:

- the conclusion of a public services contract under the Regulations without any proper tender procedure; and
- a material variation of a public services contract between NSI and Atos without a tender procedure. If this argument is correct then the arrangement would be an 'illegal direct award'.

Edenred succeeded in maintaining a stay of contract award pending a very early expedited trial scheduled for week commencing 24 November 2014. Unlike a number of the other recent authorities, *Edenred* was heard in the main Queen's Bench Division (QBD) list of the High Court rather than in the Technology & Construction Court (TCC) list.

American Cyanamid test restated

The Court re-affirmed that *American Cyanamid* is the correct test for applications to lift a Regulation 47G automatic stay and went on to consider the various limbs of the test.

Key points of the American Cyanamid test applied in Edenred:

- American Cyanamid test accepted as the correct test again.
- There was a serious issue to be tried (common ground).
- Damages held not to be an adequate remedy for Edenred due to the speculative and difficult nature of quantifying the opportunity which Edenred will have lost if there has been no tender.
- Balance of Convenience: Public interest greater in not having a potentially unlawful TFC system than a small delay to the implementation of the new scheme.
- The ability to rely upon a cross-undertaking in damages was not discussed in the judgment.

Balance of Convenience

The main argument was again around the public interest. A key factor in the decision was the time taken to date in developing the TFC scheme relative to the further time involved to an expedited trial.

The Government argued that a delay of six weeks of the introduction of TFC until trial would adversely affect millions of families who stand to benefit from TFC. Edenred countered that nearly 2 years elapsed since the decision was taken in principle to replace ESC and that six weeks in these circumstances was not prejudicial.

The Court held that the detriment to the public of six weeks was not sufficient to outweigh the strong public interest in compliance with the law and the benefits that implementing TFC in a lawful way may be expected to bring if Edenred is successful at trial. The Court therefore found in Edenred's favour and the stay was maintained.

continued overleaf

Material Variation

The material variation argument was flagged in the Judgment as the critical issue for determination at trial. The law on material variation stems mainly from the ECJ case of *Pressetext* (2008) and has been significantly clarified in the new 2014 EU Procurement Directives (Article 72 of the public procurement Directive and Article 82 for Utilities) currently being implemented into UK law. Although there have been a few reported cases on material variation/illegal direct award since *Pressetext*, the law on it is both complex and critical and so it is likely to be an interesting trial issue.

Comment

Edenred is another recent example of the English Court upholding a stay of contract award after a fairly sterile period for challengers. Challengers might therefore have increasing levels of confidence that maintaining a stay can be achieved if the factors are right.

The key factors emerging (in addition to the Court's initial, pragmatic 'take' on the merits) are the level of public interest in early implementation weighed against the time already taken and the achievability of an expedited trial. In England the pendulum is swinging back slightly toward a mid-point. However it is clear that the "price" for a bidder of that improving prospect of success is:

- A commitment to a very early trial which (whilst not as critical in cases like *Edenred* that turn on issues of principle) can potentially limit the viability of detailed disclosure and other evidence. Given the asymmetry of information between Claimant and Defendant in procurement cases that can be significant in practice.
- A commitment to provide an open ended cross-undertaking in damages. Exposure in practice will vary from procurement to procurement. In some situations the exposure will be theoretical/ hypothetical and therefore not a problem. In some very significant procurements however the cross-undertaking requirement might in practice have the effect of making an application for a stay economically unrealistic however strong a challenge might be on the factual and legal merits.

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