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Shifting performance and contract modification

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The question

“What is the position if the parties do not formally `modify’ the contract, but their actual performance nevertheless shifts to accommodate the unforeseen?”

Some real-life examples

- **A contract specification stipulates use of vehicle type A – the contractor finds it more convenient to use vehicle type B instead – the authority is aware and does not object.**

- **The fixed term of the contract expires – the contractor carries on performing as before.**

- **The staffing levels set out in the tender are not achieved. The authority does not have any useful monitoring procedures and is unaware of this.**

Questions to be asked

- **Do such scenarios amount to a modification governed by PCR reg 72?**
- **If not, does procurement law have anything to say about them?**
- **Will the Procurement Bill make any difference?**
- **Are there other legal constraints?**

Public Contracts Regulations 2015 reg 72

- **Reg 72(9):**

"A new procurement procedure . . . shall be required for modifications of the provisions of a public contract or a framework agreement during its term other than those provided for in this regulation."

- **"Modification" is not defined – recitals 107 to 111 of Directive 2014/24/EU do not cast any further light on what counts as a modification**

Is there a “modification” when there is an informal change in performance?

- **“Modification” should (still) be construed in line with the Directive, as an autonomous EU law concept**
- **But the caselaw says that the existence of a public contract depends upon enforceable legal obligations**
- **Logically, this should mean that there is a modification where there is a legally binding change to what the contractor has to do, or what it gets for doing it – if the contract is governed by domestic (English) law, this requires consideration of whether, under that domestic law, the contractor’s legally binding obligations and entitlements have changed**

When does *de facto* performance change *de jure* obligations?

- **Variation of a contract requires agreement of the parties, supported by consideration (but that may be easy to find where both parties have something potentially to gain, as opposed to mere forbearance)**

- **The right to insist upon strict performance may also be lost or suspended through election (waiver) or estoppel**

- **All these legal half-siblings should be capable of amounting to "modifications" for PCR purposes**

Variation, waiver and estoppel

- **Variation can be by conduct rather than express agreement, but the conduct must be only reasonably capable of being understood as agreement to vary: *Abrahall v Nottingham CC* [2018] ICR 1425**

- **Waiver by election requires knowledge both of the relevant facts and of the relevant right, and an unequivocally communicated intention to affirm: *SK Shipping Europe PLC* [2022] EWCA Civ 231 (CA) and [2021] 2 Ll Rep 109 (Foxton J)**

- **Estoppel requires unequivocal representation that strict legal rights will not be insisted upon, coupled with reliance upon that representation: *Garside v Black Horse Ltd* [2010] EWHC 190 (QB)**

J Varney & Sons Waste Management Ltd v Hertfordshire CC [2010] LGR 801

- **The first instance decision of Flaux J (the case went to appeal but on a different point) is one of the few judgments to have addressed such issues**

- **The discussion is both brief at the end of a long judgment, and mainly fact-based, and the case is pre-PCR reg 72, but what is said at [204-231] is broadly consistent with the analysis above**

- **At [210], the judge accepted the submission that the correct approach to alleged non-enforcement of the contract was to be found in the pre-reg 72 *Pressetext* caselaw – since the authority had continued to press for full contractual performance, "teething problems" early in the contract could not amount to a material amendment – authority's pragmatic non-prioritising of formal enforcement where shortfalls in performance caused no practical problem also fell well short of contractual amendment**

Performance shift and the reg 72 gateways

- **If there is a modification through variation, waiver or estoppel, there is no reason in principle why that change should not be lawful, if it is one permitted by a reg 72(1) gateway**

- **Some "informal" modifications may well be of a kind which are not substantial within reg 72(8) [gateway (e)], or have a value below the reg 72(5) threshold [gateway (f)]**

- **But there are possible problems with gateways (b) [additional requirements] and (c) [unforeseeable circumstances] –**
  - **An authority which has not modified the contract formally may well also fail to submit the notice required by regs 72(3) and (4) – what effect does that have?**
  - **If the authority has not consciously turned its mind to those gateways, it may not benefit from any margin of discretion in assessing whether the use made of them is proportionate**

Reg 72(1)(a) – informal modification and review clauses

- **Gateway (a) permits modifications provided for by clear, precise and unequivocal review clauses**
- **But at least in large-scale contracts, change control provisions are typically drafted in a way which stipulates not only *what* changes can be made but also *how* they are to be made, often requiring a number of procedural steps (e.g. notices of a particular kind, or particular steps to establish any price adjustment)**
- **Again, where modifications are made informally or through performance, the parties may neglect to take such steps**
- **A forthcoming reg 72 case (*James Waste Management LLP v Essex CC*) may cast light upon whether and when a departure from the terms of a review clause is fatal to use of gateway (a)**

Any procurement law constraints outside reg 72?

- **Usual assumption is that, once the contract is concluded, procurement law bows out, and contract law takes over**
- **But note that the definition of "procurement" in the Directive/PCR is the "acquisition by means of a public contract of works, supplies or services" – that process of acquisition arguably continues during the lifetime of the contract**
- **Under the heading to PCR reg 18(1), transparency and equality are described as "principles of procurement" (contrast the reg 56 heading – "general principles in *awarding* contracts)**
- **Recital 1 to the Directive does refer to the award of contracts, but that might be consistent with continuing post-contract transparency and equality obligations to the extent relevant to the integrity of the award process**

Caselaw support for continuing obligations?

- **Some consideration in *Easycoach Ltd v Department for Regional Development* [2012] NIQB 10 at [93-103], but only to extent of holding that PCR continued to apply during post-award, pre-execution due diligence process (cf. also *McConnell Archive Storage Ltd v Belfast CC* [2008] NI Ch 3, and *Ryanair Ltd v Minister for Transport* [2009] IEHC 171)**

- ***Varney* at [208] and [214] assumes some sort of continuing equality obligation, although the discussion is unclear**

- **The best example may be C-91/08 *Wall AG* [2010] ECR I-2815, where a post-contract change of sub-contractor was, in exceptional circumstances, treated as an impermissible modification (under general TFEU transparency and equality principles, the contract being a concession then outside the Directives) despite being provided for by the contract**

An analogous issue: change of contractor status

- **There have been cases in which the CJEU has suggested that a lawfully awarded contract might later have to be brought to an end when a relevant exception ceases to apply, such as:**

  - **C-454/06 *Pressetext [*2008] ECR I-4401 at [51], recognising that a change in shareholders in a contracting company is not normally a material amendment, but may be treated as such in exceptional circumstances**

  - **C-573/07 *Sea Srl* [2009] ECR I-8127 dealing with the bar on private participation in *Teckal* companies, and referring not just at [48] to post-contract share transfers as an artificial device invalidating the original award, but also at [53] to the introduction of private equity at any time during the contract lifespan as calling for a new procurement (see also C-196/08 *Acoset SpA* [2010] 1 CMLR 35 at [62] re PPPs)**

Risks and remedies

- **In *Varney* at [230-231] the court said that the remedy for an impermissible amendment would have been judicial review to quash that amendment, not a reprocurement**
- **But this (even if correct at the time) predated PCR 2015 reg 72 – the general view now is that an impermissible amendment should be treated as an unadvertised new contract attracting the ineffectiveness remedy – whether the whole contract is ineffective may depend on how the amendment has been drafted (so informal amendments may be especially at risk)**
- **How to identify the appropriate counterfactual remains a difficult issue in damages claims**
- **There is also the difficult and still untested reg 73(1)(a) termination provision**

The Procurement Bill - generally

- **Currently at Lords (first House) report stage, so further amendments are possible**

- **The clause 10(2)(a) definition of "procurement" expressly includes both the award and the management of the contract – so clause 11(1) procurement objectives apply to contract management as well as award, alongside any relevant provisions in the national procurement policy statement under clause 12 – but note that these are "have regard" duties of the kind already familiar in public law – current remedies regime is not well-suited to enforcing such duties, although Part 10 of the Bill on procurement oversight may have relevance here**

- **Clause 11 objectives include value for money, public benefit, sharing information to allow procurement policies/objectives to be understood, and acting/being seen to act with integrity**

The Procurement Bill - modifications

- **Clauses 69 to 72 and Schedule 8 deal with modifications - the substantive provisions on permissible modification differ slightly but not fundamentally from the current regime (arguably the most interesting change is Schedule 8 paragraph 5 on materialisation of known risk)**

- **Of greater significance for this paper are clause 70, generally requiring a contract change notice before a contract is modified, and clause 72 on publication of actual modifications for contracts of value £2m+ - this links to the new references to modification in the remedies provisions including clause 93 (automatic suspension) and clauses 95 to 97 (remedies) – and also the clause 73(2)(a) termination ground**

- **The effect is that significant informal or *de facto* modifications are at serious risk of being set aside under the new regime**

Other legal constraints?

- **Arrowsmith *Law of Public and Utilities Procurement* suggests (3rd edition, vol 1, para 4-89) that state aid, shortly to be subsidy under the Subsidy Control Act 2022 "could in principle arise from a procuring entity's decision not to enforce aspects of the contract"**

- **This must be correct, given the great breadth of the concept of aid (SCA 2022 s 2(2) on forms of financial assistance less clearly covers such cases, but it is not an exclusive definition)**

- **However, hard-headed commercial decisions not to stand on strict rights will take the benefit of the market economy operator principle (and now of SCA 2022 s 3(2)) – cf. *R (Sky Blue Sports & Leisure Ltd) v Coventry CC* [2016] EWCA Civ 453**