

Remedies:

*How potent are remedies under the new Bill?
How will the Courts interpret the revision to the
American Cyanamid test and apply the automatic
suspension?*

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The current state of remedies: a snapshot in 3 cases from 2022



Case 1: *Camelot UK Lotteries Ltd v The Gambling Commission* [2022] EWHC 1664 (TCC)

An almost impossible test?

- Loss of business built up over 28 years
- Unique and highly prestigious contract
- No significant damage to public interest from suspension
- Availability of expedited trial just a few months later



Scales weigh heavily in favour of contracting authority

Adequacy of damages for economic operator

Despite...

- Irreversible destruction of Camelot UK's business built up over 28 years, leading it to cease to trade
- Unique and prestigious licence

Inadequacy of damages for contracting authority

Despite...

- No damage to Gambling Commission itself
- Public benefits of 4th licence delayed rather than lost

Balance of convenience

Maintaining suspension

- X Irrelevant that there is public interest in lawful procurement
- X Irrelevant that procurement process had been delayed so that time for challenge had been eroded
- X Availability of expedited trial not an answer because there could be an appeal
- X Innovative interim solutions rejected

Lifting suspension

- Strong factor was public interest in timely intro of 4th licence – *“introduction of the enhanced game portfolio and new technologies”*

The problem of the unlimited cross-undertaking

- *Camelot UK Lotteries Ltd & Anor v Gambling Commission & Ors* [2022] EWCA Civ 1020
- Undertaking to cover unlimited losses of Commission and winning bidder BUT complaints that:
 - Did not cover third party losses (good causes)
 - Unlimited on its face but only £100m available and might not be enough
 - Court of Appeal did not dismiss those arguments in principle

Other cases on lifting the automatic suspension

- *Neology UK Ltd v The Council of the City of Newcastle Upon Tyne & Ors* [2020] EWHC 2958 (TCC)
- *Draeger Safety UK Ltd v The London Fire Commissioner* [2021] EWHC 2221 (TCC)
- *Vodafone Ltd v Secretary of State for Foreign, Commonwealth And Development Affairs & Anor* [2021] EWHC 2793 (TCC)

Case 2: *Consultant Connect Ltd v NHS* [2022] EWHC 2037 (TCC)

“The behaviour of the contracting authorities has been, in varying degrees, poor. The obligations of objectivity and fairness owed by the CCGs has, in varying degrees, been treated with disdain and cynicism. CC was misled into thinking that it would be and was being treated on an equal footing with Cinapsis, as the law requires”

Contract shortening order (CSO)

- Grounds for ineffectiveness were made out: reg 99(6)
- No DOI; court accepted “overriding reasons” due to disruption caused by abrupt stop
- CSO should leave enough time for fresh procurement to be carried out (6 months)
- Contract shortened by 14 months

Civil penalties

- Penalties must be “effective, proportionate and dissuasive”: reg 102(4)
- Rejected argument that they would deplete resources
- Looked at individual conduct and imposed penalties of £10k, £8k and £4k

Francovich damages

- Loss of a chance assessed at 50%
- Breach of serious and clear principle
- Deliberate decision to undertake a secret selection exercise
- Some believed that conduct was lawful
- Privileged advice not disclosed so had to decide on available facts
- Persistent defence of conduct despite trenchant criticism from some colleagues

Case 3: *Braceurself Ltd v NHS England* [2022] EWHC 2348 (TCC)

- Established that it should have won
- No damages because not sufficiently serious
- Breach was of clear and fundamental rule
- Procurement was well run
- Single, inadvertent mistake, good faith
- No “existential” damage to claimant
- No impact on public

Current remedies system

- Unpredictable: high degree of variation on similar fact patterns
- Expensive: legal costs and cross-undertaking requirements
- Potentially pointless: even if breach is established, could lead to no remedy as in *Braceurself*

What the Procurement Bill promises

- “Having an effective and well functioning remedies regime is essential to the successful operation of any public procurement regime”
- “We will introduce a new test for the court to consider when hearing applications for the automatic suspension to be lifted better suited to procurement than the one currently applied”

What the Bill proposes

1. New standstill timing (8 working days) and effect (no suspension once standstill has ended)
2. A new test for lifting the automatic suspension
3. Set aside remedy
4. Damages
5. Procurement investigations

How different is the new test?

- Replaces the *American Cyanamid* test. Court MUST have regard to:
 - (1) Public interest in:
 - a. upholding the principle that contracts should be awarded lawfully
 - b. avoiding delay in the supply of goods or services
 - (2) Interests of suppliers, incl. whether damages are an adequate remedy for the claimant
 - (3) Any other matters that the court considers appropriate

Is this an opportunity to revisit the cross-undertaking in damages?

- Reg 91(4): an order under subsection (1) may provide for undertakings or conditions
- Discretionary
- No presumption in Bill that undertakings be required

What is the test for damages?

- Old “sufficiently serious” test was due to procurement law being EU law: *Energy Solutions*, Supreme Court, para 37
- Briefing paper: creates potential for damages for breach of statutory duty
- Reg 93(2) – court may award damages
- Discretionary
- What will govern discretion?

Set aside remedy

- Set aside or shortening (of contract duration or scope)
- Set aside conditions include:
 - Require contract notice not published / inaccurate
 - Breach became apparent only upon contract award notice or contract change notice
 - Breach became apparent only after contract was entered into or modified

Procurement investigations

- An appropriate authority may investigate compliance
- Contracting authority has 30 day minimum period to provide docs / information
- Authority may publish report
- May issue recommendation
- Contracting authority must report on whether it has implemented recommendation and if not, why not

Does the Bill deliver on its promises?



Look out for procedural changes

- Briefing paper:

“The [remedies] regime is broadly similar to the existing regime, though it is anticipated that combined with a degree of procedural rules reform (not addressed in this bill) and greater upfront transparency, that this will have the effect of reducing the time taken to resolve legal challenges”

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