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Substantial modifications after the National Lottery case

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The question

- Has the National Lottery litigation changed existing thinking on how far you can push a modification before it becomes substantial – same old, same old or important new thinking?

National Lottery litigation – TNLC's claim

- TNLC:
  - Failed 2 Pass/Fail areas on multiple (12) bases
  - Plus scores were 30% behind other bidders

- Claim started modestly (c.£17m and no opposition to ATL) as a challenge to TNLC's disqualification and the scores in the competition for the 4th National Lottery Licence (the Process Claim)

- It increased to 2 claims (Process and Modifications), a claim of £1.3bn in damages and ineffectiveness

- Trial: Oct 2025 – Jan 2026
- Judgment (280 pages): April 2026 ([2026] EWHC 891)
- Costs judgment: May 2026 ([2026] EWHC 1311)
- PTA rejected by TCC and CoA

- In the Modifications Claim, TNLC:
  - Challenged changes to Enabling Agreement and Licence
  - Argued changes were substantial and not unforeseeable
  - Claimed ineffectiveness (not pursued ultimately), contract shortening and damages

- Challenged Modifications included:
  - Revised timetable for implementation
  - Provision for discretionary extension of the Licence by up to 2 years
  - Amendments to Recoverable Implementation Costs
  - Cap on Commission's costs

Key issues:

- Whether modifications substantial or unforeseeable
- Standing / causation
- Remedy: ineffectiveness, contract shortening or damages

Whether modifications substantial

- TNLC claimed that the modifications were substantial on the basis of Reg 43(9) (equivalent of Reg 72(8) of PCR):
  - Limb (b)(ii) (would have allowed for acceptance of another tender)
  - Limb (c) (changed the economic balance)
- Reliance on Limb (b)(iii) (would have attracted other participants) abandoned in closing

- Limb (b):

the modification introduces conditions which, had they been part of the initial procurement procedure, would have—

(i) allowed for the admission of other candidates than those initially selected,

(ii) allowed for the acceptance of a tender other than that originally accepted, or

(iii) attracted additional participants in the procurement procedure

- Limb (c):

the modification changes the economic balance of the contract or the framework agreement in favour of the contractor in a manner which was not provided for in the initial contract or framework agreement

Limb (b)(ii), legal issues - common ground:

- The burden of proof is on C (para 904)
- The impact of amendments on a hypothetical procurement was to be considered at time of the original competition (para 969, see *James Waste*)

Limb (b)(ii), disputed legal issue:

- Question: whether C had to show on balance of probabilities that another tenderer would have won or only that there was a real prospect that it might have led to the acceptance of a different tender, given the wording "*would have allowed for*" (based on wording of Waksman J in *James Waste v Essex CC* (2023))

- Answer (paras 904 – 920): standard of proof was balance of probabilities, not lower test of real prospects

- Limb (b)(ii), factual issues:
  - TNLC's case (ultimately) relied on a real prospect of Camelot winning (as they could not show even a real prospect of their bid succeeding) but:
  - They failed because (para 972):
    - Test was balance of probabilities and they could not show that for Camelot
    - Even if test was real prospect, no sufficient evidence that Camelot had real, not fanciful chance

- Limb (c), common ground:
  - Court is required to compare the contract as originally entered into and contract after amendment
  - Court is required to have regard to original contract as a whole

- Limb (c), disputed issue(s):

  - Question: whether the Court is entitled to take into account wider factual circumstances including reasons for modifications and factual context at time of modifications (eg delay)

  - Answer: yes (relying on *Bechtel* and *James Waste*)

  - Contract terms must be compared (before and after) from perspective of RWIND tenderer (not on the basis of subjective factual evidence)

  - If a modification was similar to a variation that was provided for in the original contract, it would not be material (even if that contractual mechanism not used)

- Limb (c), key findings:

  - Court needed to look at the overall economic weighting, not just the advantage from one amendment (para 974, supported by approach in *Edenred* and *James Waste*)

  - Artificial and unrealistic to consider only modifications which appear to have favoured Allwyn, without the rest of the package (paras 1017 – 1018)

  - Court must have regard to all terms of existing contract, when making comparison between original and modified contract

- As TNLC had abandoned case that Allwyn was to blame for the delays, the case had to be decided on the basis that the modifications were caused by the Camelot/IGT litigation and obstruction by IGT (paras 890 and 978)

- Fact or period of extension was not guaranteed (para 984)

- The opportunity to earn additional revenue or profit was not enough to change the economic balance when Allwyn's share of surplus had not changed (para 990)

- Modifications did not distort competition

Whether modifications unforeseeable

- Key findings :
  - The date for assessment of foreseeability is date of award of the contract (para 897, based on Recital 76 of the Directive and good practical sense)
  - Risk of litigation (including of automatic suspension) was foreseen or foreseeable
  - Foreseeability does not need to be restricted to the particular type of challenger (and litigation by a non-tenderer could and should have been foreseen) or particular type of strategy
  - Commission could and should have foreseen negotiations between Allwyn and IGT would be protracted and difficult

Standing / causation

- If (contrary to Court's findings on substantial modifications), there was a breach, TNLC had no standing to bring a claim and/or could not show they had suffered / risked suffering loss (Reg 52(1))

- Common ground test was loss of chance but:

  - In a hypothetical competition for a 5th National Lottery Licence, they did not have a real or substantial chance of winning, but fanciful

  - They would have had to overcome all the deficiencies in the competition for the 4th Licence and the 30% gap in scores, but had no advanced cogent evidence that they would have been able to do so

- On permission to appeal (despite concession at trial), TNLC argued that the test was less than a real or substantial chance: argued only more than a nil or negligible chance

- Argument rejected (too late and described in CoA as “an absurdly low test”)

Limitation (damages claim)

- The claim was time-barred
- TNLC had sufficient information, in a redacted letter more than 30 days before starting the Modifications Claim, that a provision had been agreed enabling a 2 year extension (paras 1105 – 1111)
- Obiter, TNLC was not fixed with the knowledge of their lawyers (paras 1112 – 1114)

Same old or new thinking?

- Further analysis/clarification on:
  - Standard of proof (limb (b)(ii))
  - Date of assessment for foreseeability (limb (c))
  - Comparison of original and modified contracts (limb (c))
  - Limitation

- Thorough analysis of how to apply the law on substantial modifications to typical amendments to long term contracts, delayed by automatic suspension and transition issues

But the Procurement Act 2023 is different

- There are 10 grounds on which modifications can be made (section 74 and Schedule 8)
  - 8 permitted modifications in Schedule 8
  - Not a substantial modification
  - A below-threshold modification

- New definition of substantial modification (section 74(3)): one which would:
  - Increase or decrease the term by more than 10% of the maximum term provided for on award
  - Materially change the scope of the contract
  - Materially change the economic balance of the contract in favour of the supplier

- Changing the scope is a reference to a modification providing for supply of goods, services or works of a kind not already provided for (section 74(5))
- Modifications to below threshold contracts (unless they are convertible contracts) and light touch contracts can be made freely
- More transparency now required: contract change notice (section 75 and Regulation 40)
- According to the CO Guidance on *Contract Modifications*, greater flexibility is balanced by far greater transparency