

Automatic suspension and procurement law

22 March 2023

Within procurement law, automatic suspension is an injunction preventing a contracting authority from entering a contract where the decision is being legally challenged. However, in the majority of cases in the Technology and Construction Court (TCC) over the last few years, contracting authorities have been successful in applications to lift this 'automatic suspension'. Out of 16 applications to lift suspensions since 2017, 11 have been successful.

Currently, the test for lifting a suspension is the test that came out of *American Cyanamid Co v Ethicom Ltd* [1975] AC 396 (although this is likely to change when the new Procurement Bill comes into force) and is as follows:

1. Is there a serious issue to be tried?
2. If so, would damages be an adequate remedy for the challenging bidder if the suspension were lifted and they then succeeded at trial?
3. Would damages be an adequate remedy for the contracting authority if the suspension remained in place and it succeeded at trial?
4. Where does the balance of convenience lie?

In this note, I will briefly run through the most recent cases on the matter in light of the above test:

1. *Practice Plus Group Health and Rehabilitation Services Ltd v NHS Commissioning Board* [2022] EWHC 2082 (TCC);
2. *Braceurself Limited v NHS England* [2022] EWHC 1532 (TCC);
3. *Camelot UK Lotteries Ltd v the Gambling Commission* [2022] EWHC 1664 (TCC);
4. *Draeger Safety UK Ltd v London Fire Commissioner* [2021] EWHC 2221 (TCC);
5. *Vodafone v SoS for Foreign and Commonwealth and Development Affairs* [2021] EWHC 2793 (TCC); and
6. *Kellogg Brown & Root Ltd v Mayor's Office For Policing And Crime & Anor* [2021] EWHC 3321 (TCC).

Practice Plus Group Health and Rehabilitation Services Ltd v NHS Commissioning Board [2022] EWHC 2082 (TCC)

1. Is there a serious issue to be tried?

Yes, the contracting authority accepted that there was a serious issue to be tried.

2. If so, would damages be an adequate remedy for the challenging bidder if the suspension were lifted and they then succeeded at trial?

The challenging bidder failed to persuade the Court that damages would not be an adequate remedy.

3. Would damages be an adequate remedy for the contracting authority if the suspension remained in place and it succeeded at trial?

The Court held that damages would have been an inadequate remedy for the contracting authority if the suspension was 'wrongly' upheld – 'the interference with [the NHS's] public functions cannot be compensated in damages. Further, any deficiency in healthcare provision to serving prisoners by reason of delay in making the new contracts is likely to result in increased burdens on the general NHS when the prisoners are released into the community, a cost incapable of calculation' (para 24).

4. Where does the balance of convenience lie?

The Court held that, even if Limb 4 had resulted in the opposite conclusion, the balance of convenience fell in favour of lifting the suspension.

Braceurself Limited v NHS England [2022] EWHC 1532 (TCC)

1. Is there a serious issue to be tried?

Yes.

2. If so, would damages be an adequate remedy for the challenging bidder if the suspension were lifted and they then succeeded at trial?

The Court held that damages would be an adequate remedy for the challenging bidder.

3. Would damages be an adequate remedy for the contracting authority if the suspension remained in place and it succeeded at trial?

The Court held that damages would not be an adequate remedy for NHS England.

4. Where does the balance of convenience lie?

The automatic suspension was lifted confining Braceurself to the remedy of damages. It was established at trial that Braceurself should have been awarded the contract however the Court ruled that the contracting authority's breach of procurement law was not 'sufficiently serious' to give rise to a right of damages.

Camelot UK Lotteries Ltd v the Gambling Commission [2022] EWHC 1664

1. Is there a serious issue to be tried?

Yes, the issue of whether the lawful running of the procurement should have resulted in an award of the National Lottery Licence to Camelot or Allwyn.

2. If so, would damages be an adequate remedy for the challenging bidder if the suspension were lifted and they then succeeded at trial?

The Court held that damages would be an adequate remedy for Camelot.

3. Would damages be an adequate remedy for the contracting authority if the suspension remained in place and it succeeded at trial?

The Court held that damages would not be an adequate remedy for the Gambling Commission.

4. Where does the balance of convenience lie?

As a result of the above tests, the balance of convenience lay in lifting the suspension.

Draeger Safety UK Ltd v London Fire Commissioner [2021] EWHC 2221 (TCC)

1. Is there a serious issue to be tried?

Yes.

2. If so, would damages be an adequate remedy for the challenging bidder if the suspension were lifted and they then succeeded at trial?

The Court held that, whilst the procurement was not considered to be unique or high value, as it was being watched by other fire and rescue services it was 'likely to be perceived as setting the standard for improved protective equipment in the sector' and therefore it was 'arguable' that if the automatic suspension was lifted, Draeger could suffer reputational damage for which damages would not be adequate.

3. Would damages be an adequate remedy for the contracting authority if the suspension remained in place and it succeeded at trial?

The Court held that, following the Grenfell disaster, damages would not be adequate for the delay in replacement of outdated RPE.

4. Where does the balance of convenience lie?

The Court considered that the timely replacement of outdated RPE was in the public interest but determined that it could offer an expedited trial date and therefore maintained the automatic suspension.

Vodafone v SoS for Foreign and Commonwealth and Development Affairs [2021] EWHC 2793 (TCC)

1. Is there a serious issue to be tried?

Yes, whether or not the award to Fujitsu was lawful.

2. If so, would damages be an adequate remedy for the challenging bidder if the suspension were lifted and they then succeeded at trial?

The Court held that damages would not adequately compensate Vodafone. Vodafone would not have the chance to bid for a comparable opportunity for a long time.

3. Would damages be an adequate remedy for the contracting authority if the suspension remained in place and it succeeded at trial?

The Court accepted that damages probably would not be an adequate remedy, but in this case it was likely that the trial would take place within 4 months and so the Court held that delaying the award of the contract for a relatively short period of time would not lead to any specific threat to national security.

4. Where does the balance of convenience lie?

It was concluded that there would be demonstrable and irremediable harm to Vodafone if the contract was signed before determining whether or not the tender process had indeed been lawful and on the other hand, the contracting authority had not convincingly demonstrated prejudice from delaying signature of contract signing.

Kellogg Brown & Root Ltd v Mayor's Office For Policing And Crime & Anor [2021] EWHC 3321 (TCC).

1. Is there a serious issue to be tried?

Yes.

2. If so, would damages be an adequate remedy for the challenging bidder if the suspension were lifted and they then succeeded at trial?

The Court held that damages would be an adequate remedy for Kellogg Brown.

3. Would damages be an adequate remedy for the contracting authority if the suspension remained in place and it succeeded at trial?

The Court held that there was a risk that damages would be an inadequate remedy for the contracting authority.

4. Where does the balance of convenience lie?

The Court held that the balance of convenience supported the lifting of the suspension.

Contact

Mark Hickson

Head of Business Development

onlineteaminbox@brownejacobson.com

+44 (0)370 270 6000

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