If this Transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person

This Transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY & CONSTRUCTION
COURT (QBD)
[2019] EWHC 3589 (TCC)

No. HT-2019-000274

Rolls Building
Fetter Lane
London, EC4A 1NL

Thursday, 10 October 2019

Before:

MR JUSTICE WAKSMAN

B E T W E E N :

IRIDIUM CONCESIONES DE INFRAESTRUCTURAS, S.A. (1)
HOCHTIEF PPP SOLUTIONS GMBH (2)
DRAGADOS, S.A. (3)
HOCHTIEF INFRASTRUCTURE GMBH (4) Claimants/Respondents

\- and -

TRANSPORT FOR LONDON Defendant/Applicant

____

MS S. HANNAFORD QC (instructed by Bevan Brittan LLP) appeared on behalf of the Claimants/Respondents.

MR J. COPPEL QC (instructed by TfL Legal) appeared on behalf of the Defendant/Applicant.

____

APPROVED JUDGMENT

MR JUSTICE WAKSMAN:

1 There is in prospect a very important and substantial infrastructure project to create a further Thames crossing between Silvertown and the Greenwich Peninsula. There were a number of reasons why that was considered to be important and, put very broadly, apart from traffic needs, the provision for crossings through the Rotherhithe and the Blackwall Tunnels was considered simply to be inadequate now. So far as the Blackwall Tunnel was concerned, it was subject to frequent closures, sometimes because of repairs, sometimes because of its size, it having been built in the Victorian era. Vehicles went into it which were too high, which inevitably caused a collision with the roof and then repairs had to be undertaken, the traffic had to stop and matters of that kind.

2 All of that was made clear in the original proposals back in 2016. Following a competitive tender on 14 June 2019, the defendant awarding authority, the Transport for London, awarded this extremely substantial project to a consortium called RiverLinx which was one of two ultimate bidders under consideration. The other, and ultimately losing bidder, is the consortium which forms the claimant in this action. It is itself part of an extremely large consortium of companies operating in very substantial infrastructure projects across the world.

3 The claimant, having been advised of the decision on 7 July, commenced correspondence with the defendant intimating that it took the view that there were fundamental problems with the tendering and award process which would give it the right to make a claim under the Procurement Regulations, and that correspondence went back and forth until 7 August when the claimant issued the present claim.

4 As is well known, upon the issue of such a claim, the Regulations provide that the contract award process must be immediately suspended. The defendant has the right to apply to discharge the automatic suspension. If it does not do so, the suspension remains in place. The burden on making the application therefore rests on the defendant but once the application is made, the court will consider the position in a way which is virtually identical to an application having been made by the claimant for an interlocutory injunction to suspend the contract award process, to be decided on the familiar American Cyanamid principles.

5 While claimants who seek to maintain a suspension are obviously in the best position to put forward evidence as to why damages might not be an adequate remedy, because the ultimate remedy they seek would be for the process to be re-run or discharged or in some other way so as to give them an opportunity to receive the contract, and while the claimant is obviously in a position to set out why it says that there is a serious issue to be tried, the question of balance of convenience is much more complex; and, at least in my experience, often forms the real battleground where there is a contested application to discharge the suspension. Both sides of course can put in evidence on the question of balance of convenience but not infrequently a defendant applicant will put forward a detailed case as to why any delay which would be caused by the continued existence of the suspension is unsatisfactory, to its financial detriment, to the detriment of the other party, or indeed detrimental to the public interest.

6 The ultimate application to discharge the suspension here was made on 13 September, and on 2 October the claimant consented to the discharge of the automatic suspension. The remaining matter before me, on which I have heard argument today, is the question of costs. The starting point of course is that the defendant is the successful applicant because it won by consent, and therefore the starting point of course is that costs should follow the event. The court is not obliged to come to that decision in every case if cogent reasons can be put forward as to why a different order should be made. The claimant, for reasons which I will explain in a moment, says that although it is the unsuccessful party, this is a case where the successful defendant should either receive none of the costs of the application or only a part of them.

7 At this point, let me just summarise the two key points which are made by the claimant in support of its position. The first is this, that the reason why the claimant only consented once the application was made was that until it was made and until it saw the evidence, and in particular a document called a confidential annexe, it did not have any, or any sufficient detail, of the defendant's case as to why this was a matter of such urgency that any delay would tilt the balance of convenience in favour of the defendant and the position would have been different, and should have been different, if the defendant had done the right thing and produced a proper, detailed case, whether in the form of evidence or in the form of a letter, I do not think matters, to show what the justification was for the application to discharge before the application was made, such that if that had been done, the application probably would not have been necessary. That is the claimant's primary point.

8 The claimant's secondary point is that the application having been made, there was an unnecessary and unreasonable delay in the period leading up to the acceptance of the defendant's application which was essentially down to the defendant as well, because all of the evidence lodged in support of the application on 13 September was said to be confidential, all of it, and therefore it was delivered only to the lawyers' confidentiality ring which had been established, although a large part of the witness statement was taken out of that on the Monday morning following and should never have been in it. There was a then a debate as to whether a representative of the client, the claimant, should be included so that at least some responsible person from the claimant could see what the actual evidence was on which the defendant relied, but that, as I say, is a secondary point because the application by then had been already made, but it is not entirely irrelevant in my view.

9 I then turn to undertake just a very brief recital of the correspondence. It all starts, the action having been commenced on 7 August, with a letter on 23 August from the defendant. It says this:

> "Our client is minded to make an application to seek an order to lift the suspension. We are writing to seek your client's consent. We ask that you respond to this letter by 12 noon on 29 August [that is six days later] confirming your consent. If your client refuses, please set out your response and the reasons on which your client proposes to resist it and confirm that there will be a cross-undertaking if the suspension is continued."

10 I do regard that as an odd letter. There is no attempt to set out what the defendant's case is for the removal of the suspension. Instead, it simply asks the claimant for its case, which is rather difficult if it does not know what the case is to respond to. That remains the case even if the ultimate exercise by the court is to view this as if it had been an application by the claimant for an interlocutory injunction.

11 The claimant's solicitors write back on 28 August saying that no reasons were given for what the justification was for this potential application and therefore invited the defendant to set out the basis on which he would address the court on *American Cyanamid* principles, including questions of balance of convenience. Then they say, importantly in my judgment:

> "We are more than willing to engage constructively on these issues but in order that our clients can consider whether or not to consent, we do need to understand the basis upon which it would be made and the evidence upon which your client would rely, including the impact on your client and the project as a whole."

There dealing with, as it were, the position of the awarding authority and its plans in relation to this project.

12 That letter is then responded to on 3 September, noting that the claimant's position at that stage was its primary remedy was to be the award of the contract, and saying:

> "We infer, notwithstanding the failure to answer the question, your clients will not consent to an application to lift the suspension."

That simply does not follow. What the claimant was saying is: "tell us what your case is and then we can consider it."

13 However, they go on to say that the claimant was in a position to make its mind up at that point:

> "Your client is intimately familiar with the project, its strategic importance and its urgency, given the fact that they have been involved in the procurement process since the outset."

As Ms Hannaford says, in broad terms that is true. The claimant was obviously aware of the reasons for having the project in the first place, as set out in the document of 2016, but the fact that it was aware of those matters in general does not, in my judgment, absolve the applying defendant from giving proper detail as to the basis on which it says that the suspension should be lifted according to *American Cyanamid* principles.

14 That is pretty much what the claimant's solicitors came back with on 4 September. They said that:

> "Any application should be supported by reasons. While our clients are of course very familiar with the projects, we cannot speculate what arguments would be raised in support of arguing that the balance of convenience falls in their favour or adequacy of damages. We need to have those reasons before properly advising our clients."

They go on to say that in principle they would offer a cross-undertaking if the suspension remained in place but they needed to know what the size of that was likely to be.

15 The claimant's position was rebutted by the defendant's solicitors in a letter of 6 September, saying that the claimant's position was illogical and inconsistent and that they were equivocal. It goes on to say:

> "The ongoing suspension is holding up a major project of public importance and is causing our client significant cost and delay."

Obviously, it is known that it is a major project of public importance. It is obvious that, if there is a suspension, it will hold that up. One can see that there will be cost and delay but, in my judgment, the Defendant still did not condescend to the sort of particulars that the claimants were entitled to. On the question of cross-undertaking, the defendants then put forward some very large figures as to what they said the financial import of that cross-undertaking would be if the cross-undertaking was activated at the end of the day.

16 On 9 September the claimant's solicitors write back saying that while they maintain that damages are not an adequate remedy, it does not mean that they would not necessarily consent to the lifting of the suspension. As they repeatedly asked on 28 August and 4 September, they will consider the question of adequacy in the context of detriment and inconvenience, including whether or not that inconvenience could be adequately compensated by a cross-undertaking. They will consider whether or not to lift but they need to say why the suspension should be lifted, so they invite them for a third time to set out in correspondence the basis for the application. It need not be in sworn witness evidence but it ought to be detailed reasons, set out in a comprehensive letter. That is important because at one point it was suggested that the claimants could not possibly be seeking the entirety of the evidence which would support an application in advance of that application being made. The position is somewhat more nuanced than that, as that paragraph discloses.

17 The matter does not get resolved and it is said that that is a duplication of work on the part of the defendant, but I do not quite follow that.

18 Anyway, the result of that was that a final deadline for acceptance of the application was given on 10 September for 11 September and there the matter rested. On 13 September the application was made. There were two witness statements, one by a Mr Keogh, one by a Mr Roe. Mr Roe's contained what we have been referring to as the confidential annexe. The entirety of that evidence was put into the confidentiality ring, quite wrongly, because large parts of Mr Roe's evidence were not confidential at all, and that was recognised by the defendant on the following Monday. That allowed the lawyers to look at the evidence but the problem then was that they wanted to have a representative of their client looking at this so that the client could be advised properly.

19 So far as that is concerned, there are really two aspects of confidentiality. One is the familiar aspect, which concerns relevant information in relation to the successful tenderer and about that there was not much controversy, but the second element, and the element which has been the focus of today's discussion on costs, focused on this different type of confidentiality which concerned information which the defendant awarding authority contended was sensitive and the claimant was entitled to ask for some procedure to be put into place to allow the responsible representative of the claimant to be able to view the entirety of the evidence so that meaningful advice could be given as to whether this application should be contested going forwards or not.

20 In the meantime, there was a strict timetable for the service of any evidence in response by the claimant, because, by now, following representations to the court, a date for the hearing, which would have been today, had been set and in that context the claimant started to set about preparing its own evidence in response. In the event, after 26 September date when the client was able to look at the relevant evidence, on 2 October the claimant told the defendant that it would agree to discharge the suspension. The letter says this:

> "Our clients are firmly of the view that damages are not an adequate remedy, particularly given the significance of the Silvertown project, detrimental impact on its ability to win future contracts and so on. As to balance of convenience, that was disclosed in full on 25 September. Our clients consider the asserted urgency significantly overstated, given these reasons were relied on in the original business case for Silvertown and given that TfL will not be in a position to effect the remedial actions to the Blackwall tunnel until the construction phrase is complete in any event."

21 Pausing there, what is clearly being stated here is that the reasons why the balance of convenience favoured the defendant in so far as it said that urgent work was required, in so far as those simply reflected what had been said and which the claimants were aware of back in 2016, that rather suggested that the urgency was overstated because it was something that had been proclaimed for the last three years and yet it would be a significant period further, probably a few years, before the building project would be complete.

22 However, importantly in my judgment, the letter goes on to say this:

> "It is with reluctance, however, our clients recognise the balance of convenience test is extremely difficult for claimants to overcome at an interlocutory hearing when faced with such extreme assertions of urgency made by a contracting authority in a witness statement supported by a statement of truth. In the absence of any opportunity to test them by way of cross-examination, our client also recognises that the court will find it hard to reject such evidence."

23 The case law makes clear that when there are particularly compelling points that are put forward genuinely and, on the face of it, legitimately, by an awarding authority, which would have a dramatic effect on the whole question of balance of convenience, the courts have said that they will pay very careful attention to those points, and of course the court is not in a position directly to gainsay them.

24 They then, however, said that they were not going to pay the costs. Indeed, they wanted the costs of the application because all of this material should have been disclosed to them at an earlier stage.

25 The overarching point made on behalf of the defendants in resisting this costs application is that this is a fuss about nothing because the truth of the matter is that the claimant, which is a large organisation and was fully familiar with this project, should have had no difficulty at all in consenting to the application straight away and that the reasons why it was urgent to get on with that were known to it and, effectively, despite the fact that the three letters I have referred to really say nothing of any substance or detail in support of the application,

does not matter because it was not necessary for the defendants to say anything more than they had done in that letter.

26 I do not accept that submission and the proof of that is really in the pudding of the evidence which was filed for the purpose of the application. It is not as if the evidence was simply formalising what had been put in correspondence. That would not take very long at all. There were two very substantial witness statements and there was an annexe which was kept confidential to the ring, until arrangements could be made properly for a representative of the claimant to see it, all the way through.

27 I have read the confidential annexe. It has been discussed in the private part of this hearing with counsel. There is no need for me to go into any detail about it, save to say that there are significant parts in my judgment of that confidential annexe which, in the view of any reasonable lawyer acting for a claimant in such a case advising their clients, would have to take very seriously and I do not accept that, in particular, the passages which begin at p.34 of the document, beginning at para.1 of the green section and then going right the way through to para.20, are dealing with matters which are in fact not relevant to the case on balance of convenience being made for the defendant.

28 If that is the case, I cannot understand why those materials were put in the evidence in the first place and it is not necessary for me to dissect those any further; but I reject the submission that this was simply an obviously irrelevant aspect of the evidence which the claimants have now disingenuously seized upon as a reason why it was not possible for them to have consented to the discharge of the suspension at an earlier stage. There is a radical difference between what the defendants were telling the claimants in support of the discharge point before the application and what was then submitted in evidence once the application is made, even making allowances for the fact that some further detail may be added and some degree of formalisation would be required because all of this had to be in or accompanying some witness statements.

29 The position of parties in relation to procurement cases where matters of this kind, on any view, have to be dealt with urgently, is reinforced at Appendix H to the **TCC Guide**, which says, for example, at paras.6 and 7, and I am reading from the claimant's skeleton argument:

> "The parties should act cooperatively and reasonably in dealing with all aspects of litigation. The parties should also act reasonably and proportionately in providing one another with information."

This is a case where the defendant knew there was a real possibility of a claim from 7 July and, if that is the case, the real possibility of a suspension coming into effect, and that was a month before the proceedings were actually issued.

30 In cases of this kind, everyone has to act as fast as possible because applications to discharge the suspension where one side is saying the balance of convenience favours it and the other party says the balance of convenience goes the other way, which often involve consideration of urgency, have themselves to be heard at the earliest possible opportunity; therefore it behoves all the parties to act with commensurate speed.

31 In my judgment, the defendants could and should have provided much more detail in support of their position before the application itself was issued. Mr Coppel QC says,

"Well, there is no actual submission that if that had been done, the claimants would have accepted the defendant's discharge", but that seems to me to be reasonably clear from everything that has been said, and indeed reasonably clear from the very fact that this is not a case where the application was heard and succeeded; this is a case where the consent was proffered on 2 October.

32 It seems to me that for that reason this is a case where the court is entitled to depart from the full application of the principle that costs should follow the event. It is also true, though this is very much a secondary matter, that matters were not helped by the fact that the defendants here sought to produce all of the information when it did as being entirely within the blanket of confidentiality, which could not possibly be right, and there were delays in getting the appropriate client representative involved. The significance of that is that it cannot be alleged against the claimant that it took them until 2 October to announce its position, because inevitably time was elapsing over that period. I take into account the submission that the claimant may have been hedging its bets to some extent because it was preparing some evidence in response. I take into account the fact that there may have been commercial considerations driving the decision as well and that it may not have been based entirely on the balance of convenience evidence which is submitted by the defendant.

33 That does not remove, by any means, entirely the basic point about when it was necessary to provide the underlying detailed information. I do not accept, to the extent that it is relevant, but it is only secondarily relevant because it comes after the issue of the application, that this was a matter which, if for consideration, did not require client input at all and the lawyers should simply have been able to make up their minds and give the advice to the client and the client should simply have accepted it without more. This is a common feature of these applications and often in my experience ways are found to allow a proper representative of the claimant to view the confidential information, particularly here as the confidential information in question was not the sensitive information about the competitor but was information of a different kind, as I have outlined.

34 Having said all of that, I accept that applications of this kind are often having to be made in a much shorter timescale. People do not have the luxury of waiting weeks or months before deciding whether or not to make an application and, to some extent, once a party has sought to obtain a discharge, it is going to be spending money which will arise, either on an application or otherwise, in any event and, of course, if there was detailed information which should have been provided beforehand then money would have had to be spent on providing that information in any event. Taking all of those matters into account, I consider that the defendant should recover 60 per cent of its costs.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

Transcribed by ***Opus 2 International Limited***

Official Court Reporters and Audio Transcribers

5 New Street Square, London, EC4A 3BF

Tel: 020 7831 5627 Fax: 020 7831 7737

civil@opus2.digital

This transcript has been approved by the Judge