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IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURT
OF ENGLAND & WALES
TECHNOLOGY & CONSTRUCTION COURT (QBD)
[2019] EWHC 419 (TCC)

No. HT-2019-000028

Rolls Building
Fetter Lane
London, EC4A 1NL

Monday, 11 February 2019

Before:

MR JUSTICE FRASER

B E T W E E N :

THE CHANNEL TUNNEL GROUP LTD
AND OTHER (TOGETHER T/A "EUROTUNNEL")

Claimant

- and -

SECRETARY OF STATE FOR TRANSPORT

Defendant

MR D. BEARD QC, MS V. SLOANE and MR J. WILLIAMS (instructed by Messrs Freshfields Bruckhaus Deringer) appeared on behalf of the Claimant.

MR E. WEST and MS A. SUTERWALLA (instructed by the Government Legal Department) appeared on behalf of the Defendant.

J U D G M E N T

MR JUSTICE FRASER:

- 1 This is a case between two claimants, Channel Group Ltd and France Manche SA (who together I am going to refer to as “Eurotunnel” as the claimants) and the Secretary of State for Transport as the defendant. There are two sets of proceedings before the court today. One set is judicial review proceedings which were issued in the Administrative Court, and the other are Part 7 proceedings issued in the TCC which comprise a procurement challenge under the Public Contract Regulations 2015.
- 2 The background to these proceedings concerns the award of three contracts by the Secretary of State for Transport in relation to extra freight services across the Short Straits (part of the English Channel), those contracts taking effect from 29 March 2019 which is a date which everybody refers to colloquially as “Brexit” day. It is the date upon which the United Kingdom will be leaving the European Union, and it is a date set down in primary statute.
- 3 Eurotunnel provide cross channel services, currently rail services, but they have also in recent times provided ferry services under a different name which is called My Ferry Link. They have a range of objections to what in fact has occurred so far as the way that the Department of Transport has placed these contracts, which are referred to as the Capacity Contracts, for extra cross channel services. I am just going to briefly identify what those objections are.
- 4 The Capacity Contracts were issued, it is said, one, without the Department holding a publicised (or perhaps any) competition; two, without a prior information notice; three, without a voluntary Ex-Ante transparency notice and, four without a contract notice being published in the OJEU. Indeed the first that Eurotunnel says it knew about these separate capacity contracts was when the Department of Transport published three separate contract award notices on 28 December 2018, stating that it had already entered into contracts with the contractors on 21 and 22 December 2018.
- 5 Eurotunnel has issued an application for an expedited trial. It is correct to say that the Secretary of State for Transport accepts an expedited trial is justified; however, the dates for that trial are not agreed. Eurotunnel wish to have it in late February, and that is, very importantly, so that a decision is known on liability issues in the procurement proceedings well before Brexit day on 29 March 2019. The Department for Transport wishes to have it in April, after Brexit has occurred, and by definition, after the services the subject of the Capacity Contracts have started to be provided.
- 6 For today’s application the Department of Transport lodged two witness statements; one was from Mr Barlow, an employed barrister in the Government Legal Department, which was dated 8 February 2019. The other is from Mrs Solomon who is the Head of the Maritime Freight Policy at the Department of Transport, also dated 8 February 2019. Both of those witness statements explain why in the view of both of those deponents it is unfeasible for the Department of Transport (and I am summarising) to react to any judgment that might be adverse to it in March of this year.
- 7 I should say that neither of those witness statements refer to a statement which was made by the Department of Transport which may have been on 8 February 2019, or the same day, or it may have been the next day, 9 February 2019. However, on Saturday 9 February 2019 at least one national newspaper, and also the BBC, reported that one of the three capacity contracts, namely that let to a company called Seaborne Freight, had in fact been cancelled.

It appears to have been cancelled either on or shortly before 8 February 2018, the day the witness statements were lodged.

- 8 There is no evidence before the court in respect of that and the BBC report on the cancellation quote a Department of Transport spokesman who said:

“The Government is in advanced talks with a number of companies to secure additional freight capacity, including through the Port of Ramsgate, in the event of a no deal Brexit.”

- 9 Judges in general are very willing to engage in detailed pre-reading for hearings in court, particularly important and urgent hearings. It is entirely unusual to have to do this by detailed reference to the media or to daily newspapers rather than in the evidence actually lodged by the parties with the court. Mr West for the Department of Transport has done his best to explain that as at the date of serving the evidence, and the Department of Transport barrister serving its skeleton argument for today, the contract with Seaborne Freight had not been cancelled and that is why it is not referred to at all in either of those documents. I intend to deal with that by ordering a short witness statement in respect of this situation from the Department of Transport. However, the important issue for the purposes of this judgment and this ruling is when can the trial usefully occur and should it be expedited against a rapid timetable?

- 10 In my judgment, these are very important public interest matters. It is agreed by the parties that an early decision is required. In my judgment, given that the claimant has already served its witness statements and did so in January, there is no reason why this matter cannot be ready for a trial starting on the first day of March 2019. I should say that that means that the amount and extent and scope of disclosure that will be ordered against the Department is going to be very much narrower than would otherwise be the case. Eurotunnel has accepted that. I am going to set down a trial for four days. Unusually in this court it is going to start on a Friday because usually Fridays in this court are set aside for urgent applications, as well as for case management matters and pre-trial reviews. However, this trial is going to be set down to commence on Friday 1 March running through up to and including Wednesday 6 March.

- 11 That is effectively the decision in principle about the timetable. Who the trial judge will be, will be identified later today. They will also deal with case management matters and the pre-trial review which I am also going to set down today. The decision as to which judge is going to be made available at this short notice will be made by the President of the Queen’s Bench Division later today. It will also be undoubtedly the case that the parties will be given a decision by that trial judge as soon as is practicable after the trial has occurred, but I am not going to bind him or her as to when that might be. The urgency of the matter is, in my judgment, somewhat obvious, particularly when one takes into account that the relief being sought by Eurotunnel is a declaration of ineffectiveness.

- 12 What the practical effect of any adverse judgment will be on the Department in the days in March, in my judgment, if that occurs, is effectively a matter for them once the decision is known. Regardless of whether there is, or is not, sufficient time in advance of 29 March 2019 for anything to be done constructively might be a substantive argument that the Department may deploy when seeking to persuade the court that no declaration of ineffectiveness should be made. I am not however going to prejudge those matters. They are matters that are going to be dealt with at that time by the trial judge after full argument. This case may also raise certain other important issues.

13 I should also add that insofar as the liability issues are concerned, I have identified in very outline terms four different issues. It is effectively a preliminary draft list of issues which I have this morning provided to the parties. It is undoubtedly the case that it could be refined. In particular it seems to me that issue 4 does need to be refined to make it clear that the issue of principle, as to whether any breach (if one is found) by the Department is sufficiently serious as to entitle the claimant to claim damages, is something that should be dealt with in this trial. That is, so far as I am concerned, on the state of my knowledge of the case, primarily a point of legal argument rather than factual evidence. However, that is something that will develop between now and the trial and what the correct order is so far as disclosure and other directions are concerned, I will now hear from counsel but that is my decision in principle of when the trial should be.

(After a short time)

14 In this case, as I said earlier in my ruling under Part 7 directions for a trial under the Public Contract Regulations claim by the claimant, there are also associated proceedings issued in the Administrative Court on the same day. That date is 25 January 2019 and on 6 February 2019 I made an order in that case which is that suitable directions would be given in the Administrative Court proceedings, and the application for permission to bring judicial review would be considered, today at the same time as the case management conference in the TCC case.

15 I should make it clear that in the ordinary way, the first matter that the court would consider when an Administrative Court judicial review challenge is issued is whether permission should be given for that to proceed. If it were not for the fact that there has been no acknowledgement of service or detailed grounds of resistance, I think it is clear that permission in this case would be justified. The reason, however, that I am not going to give permission and I am just going to defer any directions in the Administrative Court proceedings is simply because the defendant has not yet served either of those, in my judgment, important documents, or taken those important steps.

16 It is obvious to me that there should be no steps taken in the Administrative Court action until the judgment is available on the liability issues in the public procurement action in the TCC. However, whether that is best achieved by a formal stay or just by adjourning this case generally until then, if there is in effect any real difference between those two, I will hear from counsel but it is for that reason that I am not going to grant permission to bring judicial review proceedings today.

CERTIFICATE

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This transcript has been approved by the Judge