

Damages in public procurement claims—no bright line rules (*F P McCann v Department for Regional Development*)

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Public Law analysis: Back in 2009, the claimant, via a consortium, tendered for a phased road building contract. Its bid was excluded on the basis that it was abnormally low. It successfully challenged this decision, but the court was not prepared to find that, but for the breaches of the Public Contracts Regulations 2006 (PCR 2006), it would definitely have been awarded the contract. The defendant had entered into the contract with the successful tenderer. Mr Justice Colton therefore found himself with unenviable task of assessing the claimant's recoverable losses. The claimant had only lost the opportunity to be awarded the contract, rather than lost the contract itself. As the contract was complex in nature, with two stages and numerous moving parts, this generated significant uncertainty and complexity in assessing which damages were recoverable and their quantum. Written by Jonathan Lewis, barrister at Henderson Chambers.

F P McCann Ltd v Department for Regional Development [\[2020\] NIQB 51](#)

What are the practical implications of this case?

This decision does not contribute significantly to the law of damages in public procurement claims. Rather, it provides a good illustration of the difficulties both in determining which heads of loss are recoverable and in quantifying such losses. The court reaffirmed the well-established principles as to loss of a chance damages (relying primarily upon *Chaplin v Hicks* [\[1911\] 2 KB 786](#)).

A key take-home from this decision for practitioners is as follows. It is clear that in public procurement law, an award of damages must be an effective remedy where a sufficiently serious breach has been established. This only fortifies the general principle in assessment of damages for loss of a chance that, where there is doubt, uncertainties should be determined in favour of the claimant in circumstances where those uncertainties have been caused by the defendant's wrongdoing.

This decision confirms that a court will be prepared to consider what in fact happened when the contract was awarded to another party (for example, looking at its costs and its prices) as a way of working out what would have happened had the contract been awarded to the party claiming damages. It might also consider different hypothetical scenarios to work out what would likely have happened had the party claiming damages been awarded the contract. The parties will therefore have to adduce comprehensive evidence on all these matters, most likely including expert evidence.

Is this decision valuable for the English and Welsh jurisdiction?

The approach taken by the court is equally applicable and appropriate for cases in the English and Welsh jurisdiction. To the extent that the judge relied upon authority governing the recoverability of losses, it was English authority.

What was the background?

The claimant, a civil engineering contractor, entered into a joint venture with Balfour Beatty Civil Engineering Ltd. The joint venture submitted a tender for a contract to design and construct the A8 dual carriageway between Belfast and Larne. There were to be two phases in the completion of the work. In Phase I, the contractor was to be a consultant, designing the road and providing the

defendant with advice etc. Phase II was the actual construction phase and involved the parties entering into a new contract.

Before a contractor could move into Phase II, it had to meet a number of conditions precedent, for example, relating to the 'target cost' (the best estimate of what the job should actually cost to complete) for Phase II. There were mechanisms in the contract for adjustments to be made depending on whether the contractor came within cost and completed works on time (including a 'pain/gain' cost sharing mechanism). During the course of the contract, interim payments would be made on the basis of 'defined costs'. While tenderers were required to provide prices and output estimates for specified areas of work (being those central to the project), those areas of work did not represent the totality of the work which would be done. The prices submitted would be used as the basis of the target cost at Phase II of the contract.

In January 2010, the joint venture's bid was excluded as being abnormally low. In 2016, Colton J found various defects in the procurement process (in particular breaches of the then in force PCR 2006, [SI 2006/5, reg 30 \(\[2016\] NICH 12\)](#)). He concluded that there was a significant chance that the defendant may have taken a different decision were it not for those breaches. In a second judgment, he found that the breaches were sufficiently serious to merit an award of damages ([\[2019\] NIQB 100](#)). In a third judgment ([\[2020\] NIQB 50](#)) he considered an issue relating to the claimant having been fined by the Competition and Markets Authority for anti-competitive behaviour: whether it should be deprived of damages on the basis that the defendant would have excluded it from the competition had it known of that unlawful activity.

What did the court decide?

The claimant claimed that, but for the breaches, it would have been awarded the contract, have proceeded to Phase II on favourable terms, there would have been no issues or difficulties with disallowed costs, the contract would have been completed successfully at a profit, and further profits would have been made from collateral matters. It therefore sought to recover its lost profit and a wide variety of other related losses. The defendant maintained that no losses had been suffered because such were the rates tendered by the joint venture that it was highly improbable that the parties would have proceeded to Phase II. Alternatively, if they had proceeded to Phase II, the joint venture would not have made any profit (at para [11]).

Colton J took as his starting point the well-known principles established in *Chaplin v Hicks* which established that, as it was later summarised in *Yam Seng Pte Ltd v International Trade Corporation Ltd* [\[2013\] EWHC 111 \(QB\)](#): '...courts will do the best they can not to allow difficulty in estimation to deprive the claimant of a remedy, particularly where that difficulty is itself the result of the defendant's wrongdoing'. In *Yam Seng*, Justice Leggatt recommended the use of 'reasonable assumptions' which '...err if anything on the side of generosity to the claimant' where it is the defendant's wrongdoing that has created those uncertainties.

To carry out an analysis of loss, Colton J assumed that the claimant had won the contract (para [12]). The immediate difficulty he faced, common to many procurement claims, was that there was not an agreed set of prices because those prices would only have been finalised in Phase I. While some use could be made of the tendered prices (that have some direct functional link to the target prices (at para [14])) there remained uncertainty.

Colton J considered three 'scenarios', which were forms of counterfactuals, to work out what the joint ventures' target cost would have been (paras [16]–[19]). He was prepared to take into account the successful tenderer's costs which were known by the time of the hearing (at para [20]). The use of scenarios was partly necessary to deal with the fact that specific prices had not been tendered for all elements of the contract. He selected the scenario which best reflected the fact that the joint venture would be held to its tender prices for the tendered items, and for the remaining items proceeded on the basis that there was no reason to believe that it would not be in a position to have agreed rates broadly similar to those agreed with successful tenderer (at para [33]). Ultimately, he

concluded that the ‘...most straightforward and fairest method of assessing a potential target cost for [the plaintiff’s joint tender] BBMC is to start with the actual target cost agreed with the successful contractor and make adjustments for the identifiable differences that properly apply from the difference between the respective tenderers’ (at para [35]). While there may be flaws in this approach, it was ‘the best and most reasonable approach available to the court’ (at para [36]).

The court was prepared to conclude that similar ‘compensation events’ under the contract would have occurred if the joint venture had performed the contract as the successful tenderer had (at para [44]). However, there was no principled reason why the claimant should be saddled with the disallowable costs and overspend that the successful tenderer had accrued (at para [47])—those difficulties had been of their own making (at para [48]).

The judge concluded on the evidence that the joint venture had not suffered losses in relation to collateral opportunities (related to a nearby quarry (paras [54]–[61])). On the evidence, he rejected the claim in respect of under-utilisation (the claimant claimed that by reason of its failure to be awarded the contract, it had to maintain equipment and retain labour which it would otherwise have used in the contract) (paras [63]–[70]). He found that the claimant had made out a loss in respect of lost rental income related to the project (paras [71]–[74]).

Colton J found that the only circumstances in which tender costs could be recoverable would be if all the other parts of the claimant’s claim failed (at para [76]). This is because the court is assessing loss on the basis that it would have been awarded the contract. The tender documents expressly say that tender costs are not be recoverable. Tender costs are the costs of doing business.

The judge rejected as being too speculative a claim that had it won the contract, the claimant would have enhanced both its profile and relevant experience of large-scale road construction projects such that it could have tendered for contracts in the future on its own (without using joint ventures) and thus lost out on this opportunities (at paras [77]–[80]). He found that the creation of a new asphalt mixing plant would have provided ‘tangible legacy benefits’ and these were partly compensatable (at paras [81]–[86]).

Once he had completed his analysis of the losses, Colton J turned to analysis of the missed opportunity. He had to assess on a balance of probability the chances of the joint venture having been awarded the Phase I contract and then its chances of proceeding to Phase II. He decided that, because the matter was ‘so finely balanced’ he would award damages on the basis of 50% of the profit the claimant would have made had (a) its tender been accepted and (b) the contract proceeded to Phase II (at para [103]).

Case details:

- Court: Queen’s Bench Division (Commercial Division), High Court of Justice of Northern Ireland
- Judge: Colton J
- Date of judgment: 26 June 2020

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