

# ABANDONMENT AFTER AMEY V WEST SUSSEX

By Simon Taylor



An issue which arises frequently when advising defendants in procurement cases is whether to abandon the procurement and start again. This can be tempting when faced with a legal challenge given the cost and uncertainty of litigation, particularly where there are doubts over the merits of any defence. It may not however always be the best course, as the judgment of Mr Justice Stuart-Smith in *Amey v West Sussex*<sup>1</sup> illustrates. This article by Simon Taylor discusses the case, the questions that it raises and the guidance it provides for contracting authorities considering abandoning a procedure that has gone wrong.

The EU caselaw is fairly clear that abandonment is permitted provided it entails no breach of EU principles of equal treatment and transparency. There is broad discretion as to whether to abandon and exceptional circumstances are not required. For example, abandonment may be appropriate if an authority discovers that it is unable to award the contract to the most economically advantageous tenderer because of errors committed in the assessment of bids<sup>2</sup>.

The Public Contracts Regulations 2015 ("the Regulations") even envisage abandonment. They provide at Regulation 55 that contracting authorities are to inform bidders as soon as possible after they decide not to award a contract for which there has been a call for competition or to recommence a procurement.

## The Facts

In March 2018, Amey Highways Ltd ("Amey") challenged a highway services tender run by West Sussex County Council ("the Council"), claiming breaches of the Regulations in the assessment of bids which deprived it of the contract and seeking damages of about £28m. The

margin between the scores of the winner (Ringway) and Amey was wafer thin. This was the first claim.

The Council recognised that there were legal risks but secured consent to the lifting of the suspension and sought to strike out the Amey claim. It failed and then concluded, after taking advice, that the risks in entering into the contract with Ringway and defending the litigation were too great. It considered and dismissed rewinding the procurement and decided that abandonment was the best option in order to bring the litigation to an end. The announcement of the abandonment to bidders of 2 August 2018 ("the Abandonment Decision") referred to the expensive, protracted and uncertain nature of litigation. It did not acknowledge any breaches, errors or flaws in the procurement process. A re-tender process was to be pursued using a different service model.

Amey brought a second claim challenging the Abandonment Decision and argued that the Council took the decision to abandon in the mistaken belief that it would bring the litigation to an end. The two claims were consolidated and a trial was held as to the second claim and the effect of the Abandonment Decision on the first claim.

On the evidence, there were no drivers leading to the abandonment other than the litigation. The Court also found that the Council was aware that the Abandonment Decision was not bound to end the litigation with Amey.

## The Ruling

The Court's findings were as follows:

Firstly, all the constituent elements of an accrued cause of action were in place before the abandonment, subject to Amey making good on the factual basis of its claim. There was no reason to cast doubt on the proposition that, if Amey had scored more than Ringway, the Council would not have abandoned and would have awarded the contract to Amey. For example, there was no evidence that, if the decision were

reversed, Ringway would be able to identify errors in the scoring of its bid.

Secondly, the Court rejected the Council's submission that it is a necessary precondition to a claim for breach of the Regulations that there is an ongoing procurement. While procurement claims engage public law duties, they do not fall away when the public decision is withdrawn because they are based on breach of statutory duty and give rise to the private law remedy of damages (subject to satisfying the *Francovich*<sup>3</sup> condition that the breach is 'sufficiently serious'). The Court could "see no reason in principle why the Abandonment Decision should have any impact upon an accrued cause of action".

The authorities reviewed included *Apcoa Parking (UK) Ltd v City of Westminster*<sup>4</sup>. That case related to a claim challenging the abandonment of a tender procedure on the basis that unpublished criteria were being applied and a proper decision could not be arrived at without reference to these unpublished criteria. An application was made for an injunction preventing the authority entering into contracts in the second procedure. The court concluded in *Apcoa* that the defendant was entitled to abandon and therefore no injunction should be awarded. While damages do not appear to have been claimed, the court left open the possibility that a damages award could be made to remedy any actionable breaches.

Thirdly, the Court was not satisfied that the Abandonment Decision was itself irrational as it was an attempt to preserve public funds having regard to various factors, particularly the costs and uncertainty of litigation and avoiding the "double bind" of contracting with Ringway and litigating with Amey. It was said that Amey had not shown that there was any better approach for the Council to take than abandoning and starting again. Nor was it a breach of equal treatment or transparency as all bidders were equally placed in accepting the risk of a rational abandonment. The Court noted that Amey did not pursue the remedy of setting aside the Abandonment Decision.

The only relief given was an order that Amey's claim for damages may be pursued.

## Analysis

*Amey v West Sussex* was under appeal but has settled so the Court of Appeal will not have the opportunity to adopt a different approach and the ruling stands. The case has certainly caused a stir amongst procurement practitioners. It raises a number of questions:

- What should an authority do when faced with a meritorious challenge from an unsuccessful bidder – should it reverse the award decision or abandon?

<sup>1</sup> [2019] EWHC 1291 (TCC)

<sup>2</sup> (see *Embassy Limousine T-203/96* [1999] 1 CMLR 667, *Metalmeccanica* [2000] CMLR 1150, *Kauppalato* [2003] ECRI-12139).

<sup>3</sup> See *Nuclear Decommissioning Authority v EnergySolutions EU Ltd* [2017] UKSC 34, *Francovich v Italian Republic* [1995] I.C.R.722

<sup>4</sup> [2010] EWHC 943 (QB)

- Does that choice depend on whether the claimant would have won had it been scored properly and how does the authority work that out without going to trial?
- Is the court right to find that the lawfulness of the abandonment can be assessed independently from that of the accrued action in damages?
- Should the Court in *Amey v West Sussex* have set aside (or left open the possibility of setting aside) the Abandonment Decision on the basis that the abandonment ultimately caused the loss?
- Could the Court if the breaches were established make a declaration that the Council was entitled to reverse the award decision or even an order requiring the Council to contract with the challenger?
- When a challenge is made, what should the successful bidder do? Does the successful bidder need to scrutinise its own scores in case they are unfairly low and then intervene in the litigation?

### Lawfulness of Abandonment

On the first issue, it seems surprising that Amey apparently did not seek the reversal of the decision in its favour. Possibly, it preferred the damages claim.

*“There is a tension in finding on the one hand that the Abandonment Decision was not contrary to the Regulations, and on the other, that an accrued cause of action in damages survives in the Claimant’s favour for breaches of the Regulations.”*

In my view, the proper course of action for a responsible authority which realises that it has awarded the contract to the wrong bidder is generally to reverse the decision and award it to the right bidder – not to abandon the tender and start again. It can establish how far it has gone wrong through a rescoring exercise, possibly involving a new evaluation team to avoid confirmation bias.

Clearly, if it realises the claim has merit but is unable to say who should have won, that is different. In those circumstances, abandonment may well be the best option (see below).

Furthermore, there is a tension in finding on the one hand that the Abandonment Decision was not contrary to the Regulations, and on the other, that an accrued cause of action in damages survives in the Claimant’s favour for breaches of the Regulations. This is because the cause of action is only complete if it results in, or is likely to result in, loss and it is the abandonment which ultimately causes the loss.

Clearly, there would be no loss to Amey if the decision had been reversed. It is also clear that contracting with Ringway would cause loss if Amey was the rightful winner. Equally, abandonment causes loss to Amey if it has been wrongly deprived of the contract, though that loss may be mitigated if Amey wins the re-tender.<sup>5</sup>

It seems to follow that, in circumstances where Amey was the rightful winner, abandonment must be a breach of the equal treatment principle, just as an award to Ringway would be.

It may be that ultimately the court would favour a remedy in damages over set aside and might, as in *Apcoa*, deny interim relief. However, it is difficult to see how the abandonment can be lawful when the scoring breaches reverse the bidder order because these are steps in the same causal chain.

### Loss of a Chance

Even more difficult is the question of whether there can be a complete cause of action on abandonment where it is clear that the process is flawed but unclear who the rightful winner should be. At paragraph 46 of the Judgment, the Court stated that Amey’s alternative claim, of a loss of a chance of winning the contract, is also capable of completing the cause of action:

*“The loss of a significant chance of winning the contract is also capable of constituting loss and damage for the purposes of completing the cause of action asserted by Amey, the loss being*

*suffered at the latest when the contract would have been concluded if Amey’s chance had come to fruition.”*

The loss of a chance in procurement cases was recently explained by the Court of Appeal in *Ocean Outdoor UK Ltd v LB Hammersmith & Fulham*<sup>6</sup> in the judgment of Lord Justice Coulson at paragraph 91:

*“So in public procurement cases, the loss of a chance principle is most likely to arise where there is a close comparison between the unsuccessful and the successful bids, and where it can be shown that the illegality in the tender process may have contributed to the rejection of the losing bid. The principle can be applicable because of the uncertainties caused by the number of hypothetical variables in play. But it will not apply where, even taking into account all those uncertainties, it is plain that the claimant’s bid would have been rejected in any event”.*

In other words, loss of chance damages may be available for a breach where the claimant cannot show that it would have won the contract (had it been scored properly) but can show that there was a breach and that it might have won, subject to variables. In the classic scenario of the authority contracting with the so-called successful bidder following a defective tender from which no winner could be said to emerge fairly, the claimant is entitled to a proportion of the loss of profit on the contract.

It is more problematic to apply the same analysis where the authority has effectively done the right thing by abandoning a tender which it could not lawfully complete.

The problem with the court’s statement in *West Sussex* is that if the tender is abandoned the court would not be able to bring the lost chance to fruition – all it could do is assess what the effect of correct scoring against the award criteria would have been if the breach had not been committed.

If it finds that the claimant would have won, the accrued cause of action would crystallise in full loss of profit damages. But less easy to understand is the notion that if, due to variables such as ambiguous criteria which make the tender unworkable,

the authority is unable to determine who should have won, the claimant would be entitled to loss of chance damages.

Surely the better view is that, in those circumstances, abandonment was the proper course of action and the loss of opportunity in the first procedure (suffered by all bidders who were potential winners) is neutralised by the opportunity to participate in the second. Again, it is difficult to divorce the accrued cause of action from the lawfulness of the abandonment decision. If the latter is the right course, the former should fall away.

### Alternative Remedies

The court will not order an authority to enter into a contract save in exceptional circumstances. In *Woods*, the claimant established the scoring breaches and it was held following trial that, all other things being equal, the claimant should have scored higher than the successful bidder. However, the court was not prepared to order the authority to contract with the claimant, partly because that relief was not sought and also due to the flawed nature of the procurement and held that the claimant was entitled to damages.

A similar conclusion was reached in *MLS (Overseas) Ltd v Secretary of State for Defence*<sup>7</sup>, but in that case Mrs Justice O’Farrell decided that the appropriate remedy in the circumstances was a declaration that it would be lawful for the Ministry of Defence to enter into a contract with the claimant.

In *Amey*, the Court could have similarly held that if the alleged breaches were established to such an extent that Amey was the rightful winner, the abandonment would be unlawful and the Court would then consider the appropriate remedy.

That could be damages or it could be a declaration that it would be lawful for the Council to reverse its award decision and contract with Amey.

### Position of the Successful Bidder

Finally, what can the successful bidder do to mitigate the risk that an authority could abandon or even reverse its award decision following a meritorious challenge?

The first point is that the successful bidder will need to establish whether there is merit in the challenge and will want to review the pleadings and establish interested party status in the proceedings. It will also scrutinise carefully any abandonment decision and may well want to challenge an abandonment resulting from an unmeritorious challenge or one that does not acknowledge any flaws in the procurement.

But it should also consider its own scores. That may be prudent given the risk that the authority and ultimately the court may be undertaking a rescore of the challenger’s bid.

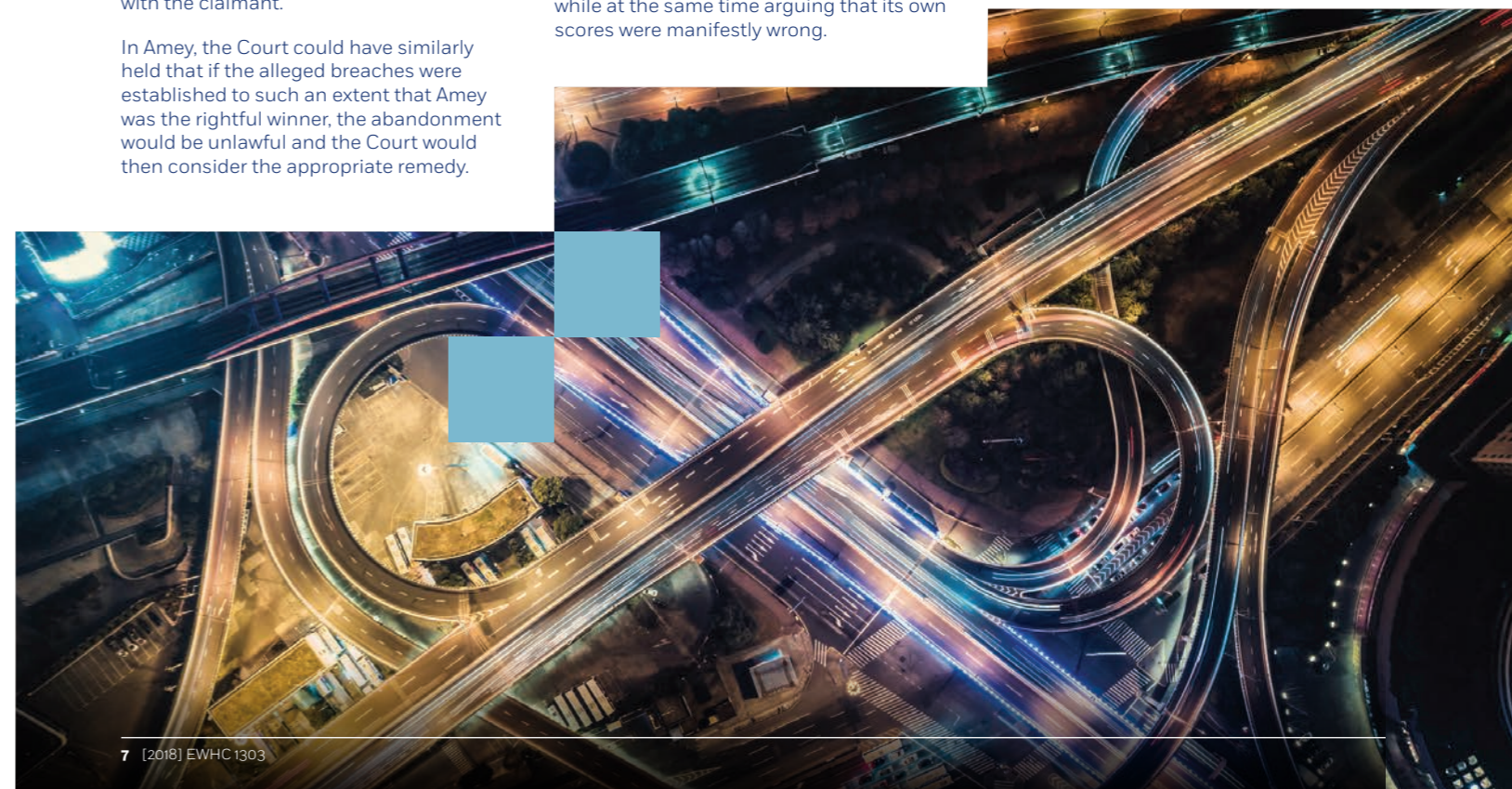
If the challenge has merit but the successful bidder was also underscored, it may need to put its arguments before the court. The authority could choose to make the same arguments itself but may be reluctant to acknowledge further flaws in its procurement process. This could place the successful bidder in the awkward position of supporting the award decision, while at the same time arguing that its own scores were manifestly wrong.

### Conclusion

Abandonment remains an option for a contracting authority after *Amey v West Sussex*, but it will not necessarily put an end to litigation as it carries the risk that a damages claim may already have crystallised. That risk is particularly acute if the evidence indicates that the claim has merit and would, if established, result in the claimant having the highest score.

According to the Court in *Amey*, the abandonment decision may in those circumstances be lawful but the cost in damages could be high. In the circumstances, the authority may be well advised to avoid the damages risk by reversing its award decision, even if that course may risk an unmeritorious claim from the bidder who was wrongly found to be the winner the first-time round.

More tricky is where the authority recognises that the process was flawed but is unable to say who should have won because, for example, the criteria mean different things to different people. If settlement is not available, abandonment is likely to be the best option in these circumstances even if there is a risk, based on paragraph 46 of *Amey v West Sussex* (see above), that a loss of a chance damages claim may survive the abandonment. That issue may yet need to be clarified by the courts.



<sup>5</sup> See *Woods v Milton Keynes* [2015] EWHC 2172

<sup>6</sup> [2019] EWCA Civ 1642

<sup>7</sup> [2018] EWHC 1303