



Procurement Bill

The Procurement Bill: Contract Management,
Exclusions and the Challenge Process: 20 April 2023

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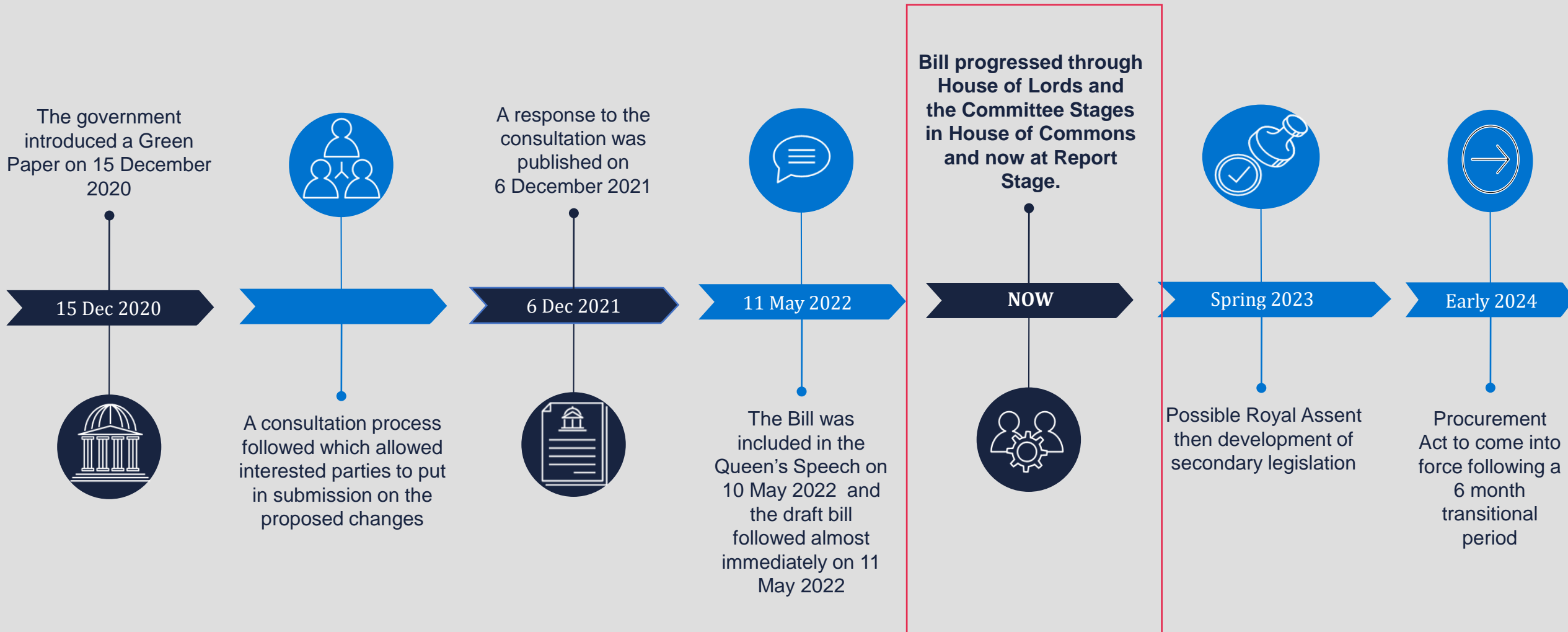


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Timelines for the Procurement Bill



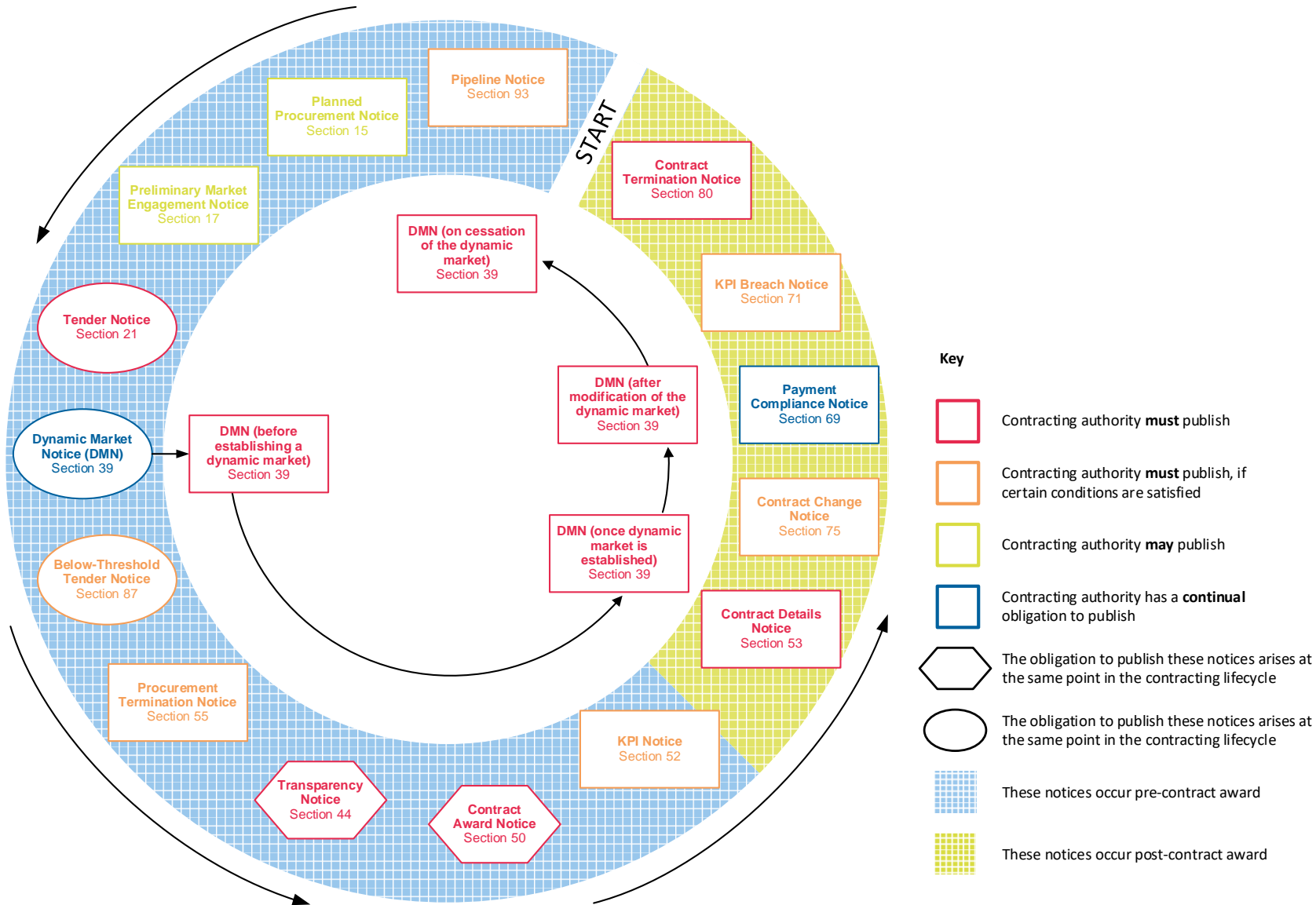
Contract Management

Contract Management

- Significant increase in the focus on active management of contracts after they have been entered into and not just the procurement process itself.
- Two key drivers for this:
 - Increased transparency of process to continue into the contract term; and
 - Tighter controls over poorly performing suppliers
- Increased mechanical transparency throughout the process delivered via significantly increased notification requirements.



Transparency – Contract Lifecycle



Implied Payment Terms

- Implied payment terms in all public contracts re payment within 30 days of payment due date under an undisputed invoice
- Not a new requirement – see regulation 113 of the Public Contracts Regulations 2015 but note subtle change in trigger for 30 day payment period (valid, undisputed invoice under PCR; later of day invoice received and specific due date notified in the invoice under the Bill)
- Obligation to publish payment compliance notices within 30 days of the end of a 6 month reporting period in which a payment was made under the public contract – notice to be approved by a specified person (secondary legislation to deal with this and content requirements)
- Obligation to publish specified information regarding any payments greater than £30,000 under a public contract – within 30 days of the end of a quarter in which payment made.



Contract Modifications (1)

- Obligation to publish a contract change notice before modifying a public contract.
- Subject to 'de minimis' value thresholds – 10% for goods/services contracts, 15% for works contracts and threshold of 10% of the term of the contract.
- Change notice may contain a voluntary standstill period during which contract may not be entered into – at least 8 working days.
- Does not apply to defence contracts, light touch contracts, private utilities.
- Must also publish a copy of the modified contract or the modification itself within 90 days of the modification.
- Note – provisions to prevent splitting of modifications to circumvent the legislation e.g. aggregation of 'below-threshold' modifications to a contract or where "could reasonably have been made together".



Contract Modifications (2)

- Permitted modifications (see Schedule 8) or not ‘substantial’ or ‘de minimis’ – many familiar concepts here:
 - ‘Substantial’ – narrower concept than existing “Presstext” criteria – **material** change in scope or economic balance or change to term greater than 10% (increase or decrease);
 - ‘De minimis’ – as currently 10% for goods/services, 15% for works;
 - Provided for in contract (and the tender/transparency notice);
 - Unforeseeable circumstances (reasonability test);
 - Disproportionate technical difficulties/substantial costs duplication;
 - Corporate restructuring;
 - Extreme urgency;
 - Protection of life or public order/safety;
 - Materialisation of a known risk – complex drafting and high bar (“no further than necessary”, not in public interest).



Contract Termination

- Implied right to terminate a public contract – as currently (see regulation 73 of the PCR 2015)
- Obligation to publish a contract termination notice within 30 days of the termination.
- Exemption for private utilities or user choice contracts.



Contract Performance (1)

- Clear movement towards tighter control over in-contract management and contractual performance with ability to preclude poorly performing suppliers from public contracts.
- There is an obligation in relation to contracts valued at over £5 million for contracting authorities to set and publish KPIs to be met by the supplier (at least 3).
- Exceptions for light touch, concessions, private utilities and frameworks.
- Performance against these KPIs to be assessed at least annually during the term and on termination and must publish information in relation to this assessment (content to be determined by secondary legislation).
- Statutory obligation on contracting authorities to monitor contractual performance – thought must be given to how these KPIs are set as there are significant implications.



Contract Performance (2)

- Obligation on contracting authorities to publish information within 30 days in relation to breaches or failure of suppliers to meet contractual performance requirements.
- This applies where breach resulting in termination, damages or settlement agreement – reflects existing discretionary exclusion ground for persistent or significant deficiencies in performance of public contracts BUT note settlement agreement also.
- Also applies where contracting authority considers that contract is not being performed to its satisfaction, the supplier has had proper opportunity to improve performance and has failed to do so – performance improvement plans will be fundamental.
- These obligations also apply where supplier subject to performance notice is one relied upon to satisfy selection criteria (“associated supplier”) or is a sub-contractor to a bidding supplier – subject to right to replace.
- These scenarios (including publication of a performance notice) also trigger a discretionary exclusion ground



Exclusions

Exclusions

Many of the grounds for exclusion are similar to the existing regime but there is political momentum behind creating a system which does not allow suppliers who are effective at winning procurements, but may not perform the contracts very well, from being free to bid for further contracts. As such, the mechanism for a discretionary exclusion of bidders relating to contractual performance has been tightened. The discretionary grounds include:

- the supplier has breached a relevant contract, and the breach was sufficiently serious (meaning leading to termination, damages or a settlement).
- a court has ruled that the supplier breached a relevant contract, and the breach was sufficiently serious.
- the supplier (a) has not performed a relevant contract to the regulated authority's satisfaction, (b) was given proper opportunity to improve performance, and (c) failed to do so.
- if a contracting authority has published a notice relating to breach or poor performance in respect of the supplier.



Exclusions

- The contract management obligations do have a direct connection to the exclusion regime.
- If there is a breach of contract or if the supplier is simply not performing to the contracting authority's satisfaction, there is an obligation to serve a notice setting out these details.
- That notice is a ground for discretionary exclusion.
- In circumstances where the supplier may not even accept that issues with the contract are its fault, this has the potential to escalate disputes as it could become more important to the supplier than simply the impact on the contract in question as it potentially excludes the supplier from future public contract tenders.



Exclusions

- An “associated person” is another supplier that the bidder relied on to satisfy the conditions of participation (but does not include a Guarantor).
- If a contracting authority is intending to exclude a bidder because that bidder is relying on an “associated person” that is an excluded or excludable supplier, the contracting authority must first:
 - Notify the supplier of the intention to exclude; and
 - Give that supplier an opportunity to replace the associated person before excluding them.
- When a supplier relies on a sub-contractor that is an excluded or excludable supplier, before disregarding the tender, the authority must:
 - Notify the supplier of its intention; and
 - Give the supplier a reasonable opportunity to find an alternative sub-contractor.



Exclusions

Excluding for Improper Behaviour (1)

- Acting improperly covers:
 - (a) failing to provide information requested by the contracting authority,
 - (b) providing information that is incomplete, inaccurate or misleading,
 - (c) accessing confidential information, or
 - (d) unduly influencing the contracting authority's decision-making.



Exclusions

Excluding for Improper Behaviour (2)

- If a contracting authority determines that a supplier has acted improperly in relation to the award of a public contract and gained an unfair advantage because of it which can't be avoided in any other way then the supplier must be excluded.
- Before making that decision a contracting authority must allow the bidder to:
 - Make representations and
 - Provide relevant evidence.



Debarment

Debarment List

- There is a new concept of a debarment list centrally managed by government.
- Process for being added to the debarment list:
 - Contracting authorities are under an obligation to report a supplier to the “Minister of the Crown” if they exclude the supplier.
 - The Minister must then decide whether to put the supplier on a debarment list following an investigation.
- Suppliers can apply to be taken off the list/revise the period they are expected to be on the list at any time.
- Applications to be taken off the list will only be considered if there has been a material change of circumstances or if they are accompanied by significant information that has not previously been considered.



Debarment List

- Debarment standstill period – 8 working days from when Minister gives notice to the supplier that it is being put on the debarment list. Suppliers can apply (via the Courts) for suspension of the decision to enter the supplier onto the list.
- Suppliers will also be able to appeal the decision (via the Courts) to add them to the list/regarding the period they are expected to be on the list or the decision not to remove them from it/not revise the period they are expected to be on the list.
- The appeal may only be brought on the grounds that the Minister made a material mistake of law and must be commenced within 30 days of knowledge of the decision.
- Remedy is order setting aside the decision and/or for supplier's wasted bid costs prior to exclusion.



Where do we envisage the main risks of challenge arising?

Challenges?



Public notification of past contractual performance and breaches of contracts and settlements will be controversial and could lead to disputes.

Change in technical wording from previous regime – will existing case law still be relevant or will new guidance and case law be required to clarify how new wording is to be interpreted.

Potential challenges around the debarment list, investigations into bidders and Contracting Authorities – these create a high level of reputational risk and could impact on future contracting opportunities.

Changes to the challenge system

The Challenge System

- The Green Paper had proposed a number of changes to the challenge system
- The majority did not make it into the Procurement Bill
 - No tribunal system
 - No cap on damages
 - No uniform approach to calculating bid costs (not needed as there is to be no cap on damages)
 - No cap on profits for contract extensions where the incumbent has challenged



The Standstill Period

- The process is similar to the existing regime in that bidders are provided with assessment summaries which must provide information about the contracting authority's assessment of:
 - the tender, and
 - if different, the most advantageous tender submitted in respect of the contract.
- The standstill period is now 8 working days rather than 10 days.
- When the contracting authority intends to enter the contract, after the assessment summaries have been sent out, it must publish a Contract Award Notice. Note the change in meaning as a Contract Award Notice under the existing regime is published once the contract has been entered but under the draft bill, it confirms an intention to enter the contract



The Automatic Suspension

- The Bill has retained the principle of the automatic suspension however, it has changed the timing – it appears that the automatic suspension will only apply if a claim is issued before the end of the standstill period (i.e. 8 working days from the date of the Contract Award Notice)
- Under the Bill, when the standstill period ends, the remedy of pursuing the contract is lost whether or not the contract has been signed off. Currently that remedy is lost only when the contract is signed
- As with the current regime, once the automatic suspension applies, the contracting authority must decide whether to apply to lift the suspension
- The new test for maintaining or lifting the automatic suspension is very similar to the current one



Set aside remedy – Clause 104

- The Court will set aside the contract (replacement for the ineffectiveness remedy) if the Court is satisfied that the claimant was denied a proper opportunity to seek pre-contractual remedies because:
 - a required Contract Award Notice was not published;
 - the contract was entered into or modified before the end of any applicable standstill period;
 - the contract was entered into or modified during a period of automatic suspension or in breach of a Court order;
 - the breach became apparent only on publication of a Contract Award Notice or a Contract Change Notice (where exceptions to the mandatory standstill apply);
 - the breach became apparent only after the contract was entered into or modified.



Procurement Oversight – Part 10

- Part 10 of the Bill gives an appropriate authority oversight over contracting authorities and the power to investigate compliance
- It is intended to address systemic or institutional breaches of public procurement law and make recommendations for future compliance. It will not have power to intervene in any specific procurement decisions.
- Investigations may lead to guidance being published to contracting authorities in the form of ‘lessons learnt’



Ability to challenge

- Legal costs – The court fees alone for issuing a procurement challenge are £10,000 for any damages claim over £200,000
- Cross undertaking
- Recent case law – sufficiently serious
 - *Braceurself Ltd v NHS England*
 - *Bromcom Computers Plc v United Learning Trust*
- Reform of the court process



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Thank you