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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:*	**21/06/2023**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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COMMERCIAL DIVISION

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Between:

CAUSEWAY GEOTECH LIMITED

Plaintiff

and

QUEEN'S UNIVERSITY BELFAST

Defendant

_____

Mr Rob McCausland (instructed by Edwards & Co Solicitors) for the Plaintiff
Ms Anna Rowan (instructed by Carson McDowell Solicitors) for the Defendant

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HUDDLESTON J

Introduction

[1] This matter comes before the court as a preliminary issue in the form of a question which has been agreed between the parties in relation to a procurement law dispute. The question is in the following terms:

> "Is the plaintiff's claim time barred pursuant to Regulation 92 of the Public Contract Regulations 2015 as amended? If so, should judgment be entered for the defendant?"

[2] The plaintiff's position is that at no time did they have sufficient knowledge to trigger time running for the purposes of Regulation 92 of the Regulations and so their challenge is within time. They suggest that what they had was a 'mere suspicion' and that this is insufficient to 'oblige' a plaintiff to issue proceedings. In support they also say that little or no information was provided by the defendant in reply to correspondence and that its approach instead "created more ambiguity and confusion [such that] it could be considered as an exercise in deflection." The defendant's opposing position is that proceedings were issued almost 14 months

after the contract was awarded to the successful tenderer and almost 13 months after the contract had, in fact, commenced and, indeed, six months after the plaintiff's own pre-action correspondence.

Background

[3] The dispute concerns a public procurement challenge to an exercise conducted by the defendant for the extension of accommodation at its Riddell Hall site in Belfast ("the Works"). There is no dispute that the award of the contract ("the Contract") for the Works was subject to the Regulations.

[4] The competition for the works was advertised by way of a contract notice in the Official Journal on 21 November 2019 ("the Contract Notice"). In November 2019 the plaintiff had undertaken some trial geothermal boreholes commissioned by QUB for the Works which, the plaintiff now suggests, was subsequently used by the defendant to produce a document entitled "Drilling specification, drilling and installation of 30 number 125m deep geothermal boreholes and associated in-well geothermal infrastructure and associated geothermal testing" (the Drilling Specification) which formed part of the tender documents for the Works. The plaintiff notes that the contract notice isolated only "price" in terms of the award criteria for the Contract. It confirms that it issued a quotation for the works which it assessed as necessary to deliver the Drilling Specification to a number of contractors but not, ultimately, to Felix O'Hare & Co Ltd ("FOH") who were subsequently the successful tenderer and the party awarded the main contract. FOH subsequent to that appointment appointed Meehan Drilling as its subcontractor in respect of the works comprised in the Drilling Specification. It is noted that at the tender stage the plaintiff was advised by a number of the contractors with whom it engaged that its quotation for the Drilling Specification was "a lot higher than other sub-contractors." The plaintiff justified this on the basis that other sub-contractors might have adopted a non-compliant approach resulting in a reduced but ultimately non-compliant bid. The plaintiff's position, therefore, is that it priced the work in accordance with the Drilling Specification on a compliant basis whilst others may not have done so. In doing so, the plaintiff feels it was at a disadvantage which ultimately led to the exchange of pre-action correspondence and, indeed, these proceedings.

[5] As only the preliminary issue of whether the proceedings are within time is before me the timeline is extremely relevant. That timeline is as follows:

- 21 November 2019 Advertisement of the competition

- 31 August 2020 The defendant writes to FOH awarding the contract. Subsequent to the contract award the evidence would suggest that the plaintiff provided a quotation to FOH who did not select the plaintiff but appointed Meehan Drilling as the sub-contractor.

- 14 September 2020 Contract commences

- 21 April 2021 Quigg Golden on behalf of the plaintiff writes a pre-action letter to the defendant containing a number of allegations as regards the sub-contractor's alleged failure to meet drilling specifications and make allowance for specified items in pricing.

- 26 April 2021 & 4 June 2021 Replies from Carson McDowell on behalf of the defendant.

- 13 October 2021 Writ issued by the plaintiff

[6] The substance of the plaintiff's challenge is set out in the Statement of Claim but focuses particularly on the following facts:

(a) That Meehan Drilling did not have the ability to meet the drilling specification.

(b) That Meehan Drilling did not have the requisite membership of the British Drilling Association and/or was not a Construction Line Gold Member.

(c) That any relaxation or change to the drilling specification would represent a breach of Regulation 72 of the Regulations.

(d) The submission of FOH including as a constituent element the works to comply with the Drilling Specification constituted an abnormally low tender – on the basis that the plaintiff contends that no-one could do the works required by the Drilling Specification at the cost submitted by FOH (on behalf of Meehan Drilling).

Those particularised allegations (as set out in paras [17]-[21] and [22]-[27] of the Statement of Claim) were largely a parsing of the pre-action correspondence that had issued on 21 April.

The Law

[7] On the question of time limits in relation to procurement challenges Regulation 92 of the Regulations provides as follows:

> "**General time limits for starting proceedings**
>
> 92.—(1) This regulation limits the time within which proceedings may be started where the proceedings do not seek a declaration of ineffectiveness.

(2) Subject to paragraphs (3) to (5), such **proceedings must be started within 30 days beginning with the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen.**

(3) Paragraph (2) does not require proceedings to be started before the end of any of the following periods:—

(a) where the proceedings relate to a decision which is sent to the economic operator by facsimile or electronic means, 10 days beginning with—

(i) the day after the date on which the decision is sent, if the decision is accompanied by a summary of the reasons for the decision;

(ii) if the decision is not so accompanied, the day after the date on which the economic operator is informed of a summary of those reasons;

(b) where the proceedings relate to a decision which is sent to the economic operator by other means, whichever of the following periods ends first:—

(i) 15 days beginning with the day after the date on which the decision is sent, if the decision is accompanied by a summary of the reasons for the decision;

(ii) 10 days beginning with—

(aa) the day after the date on which the decision is received, if the decision is accompanied by a summary of the reasons for the decision; or

(bb) if the decision is not so accompanied, the day after the date on which the economic operator is informed of a summary of those reasons;

(c) where sub-paragraphs (a) and (b) do not apply but the decision is published, 10 days beginning with the day on which the decision is published.

> (4) Subject to paragraph (5), the Court may extend the time limits imposed by this regulation (but not any of the limits imposed by regulation 93) where the Court considers that there is a good reason for doing so.
>
> (5) **The Court must not exercise its power under paragraph (4) so as to permit proceedings to be started more than 3 months after the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen.**
>
> (6) For the purposes of this regulation, proceedings are to be regarded as started when the claim form is issued."

[8] Unsurprisingly, there has been significant case law on this point but perhaps the leading authority is *Mermec UK Ltd v Network Rail Infrastructure Ltd* [2011] EWHC 1847 (TCC) which addresses the question of what amounts to sufficient knowledge for the purposes of Regulation 92(2) (as above). In *Mermec* Akenhead J quoted from the judgment in Sita *UK Ltd v Greater Manchester Waste Disposal Authority* [2011] (per Elias LJ) as follows:

> "It is not necessary for the claimant to have knowledge sufficient to enable his legal advisors to draft a fully and comprehensively particularised statement of claim. **… one should ask in broad terms whether the claimant had knowledge of the facts on which his complaint is based."**

[9] In *Mermec* Akenhead J also went on to note in that case that a detailed letter had been sent by the plaintiff to the defendant which "interestingly, articulates a number of reasons and examples why the award decision notice … was said to be defective."

[10] In relation to the "30 day window" Akenhead J said:

> "The fact that Mermec could not be certain about all the facts or that it definitely had an unchallengeable case does not mean that time does not start running. **All that is needed is a knowledge of the basic facts which would lead to a reasonable belief that there is a claim.** There is not one fact pleaded in the Particulars of Claim that was not ascertainable upon a reading of the [pre-action] letter." [emphasis added]

[11] The defendant's case is that the plaintiff's writ is "woefully out of time." They say that the plaintiff was aware of the concerns many months before 21 April 2021 letter and that the plaintiff had been in correspondence with FOH subsequent to the award of the contract (on 31 August 2020) and that, accordingly, it would be reasonable to assume that it was aware of its purported grounds by the contract commencement date of 14 September 2020. As regards the 21 April 2021 letter, the defendant describes it as a "fulsome pre-action letter" and that its date should be the "absolute latest date to be taken into account" on the basis that:

- It emanated from Quigg Golden, Professional Advisors - indicating therefore that professional advice had been taken;

- That the letter was detailed and contained many specific and detailed allegations including: the failure of other tenderers/sub-cotenderers to provide compliant quotations, failure of Meehan Drilling to meet the requirements of the Drilling Specification including particularised reasons as follows:

    (a) that Meehan Drilling "did not have the correct rig on site to perform the requirements of [the Drilling Specification]";

    (b) the borehole casing – in respect of which the plaintiff 'understood' Meehan Drilling not to be complying with the requirements of the Drilling Specification (in particular) paragraph 3.2 with a consequent saving in both time and cost;

    (c) the fact that Meehan Drilling was not a member of the British Drilling Association or Construction Line Gold Members (paragraph 2.12 of the Specification); and

    (d) its failure to comply with the Pricing Document; leading to the plaintiff's view "that FOH may not have allowed for [these] items [which] will inevitably increase the cost of the Works and involve modifications to the Drilling Specifications."

[12] The defendant's position, therefore, is (to quote from its skeleton argument) "as at 21 April 2021 the plaintiff did not only have knowledge of the basic facts which would lead to a reasonable belief that there is a claim it had knowledge of, to use the wording in *Mermec*, detailed facts sufficient to draft a 'fully and comprehensively particularised Statement of Claim.'"

[13] Notwithstanding that degree of knowledge they say that:

(a) the proceedings themselves were only issued some six months after the detailed letter before action;

(b) that in any event on the facts the court does not have power to extend time for more than three months (see Regulation 9(2)(5) above); and

(c) that there is no "good reason" to extend time in any event – per *SRCL Ltd v National Health Service Commissioning Board* [2018] EWHC 1985 (TCC) in which Fraser J acknowledged the very short (and deliberately so) "time limitation" under the Regulations and the fact that the maximum extension that can be given is three months.

The plaintiff's case

[14] The plaintiff's case I have set out above, but in addition, they rely in support on the case of *Roche v Mid Yorkshire Hospitals* [2013] EWHC 933 (TCC):

> "An unsuccessful tenderer who wishes to challenge the evaluation process is in a uniquely difficult position. He knows that he has lost, but the reasons for his failure are within the peculiar knowledge of the public authority. In general terms, therefore, and always subject to issues of proportionality and confidentiality, the challenger ought to be provided promptly with the essential information and documentation relating to the evaluation process actually carried out, so that an informed view can be taken of its fairness and legality."

On this basis, in essence, the plaintiff argues that it was not provided with the requisite information and that, as per Fraser J in the SRLC case that time should only start to run "from the date when a party has all the necessary information to know that it has a claim."

[15] Mr Doherty in an affidavit filed in these proceedings on behalf of the plaintiff says he raised issues with Felix O'Hare but met with no response and that correspondingly he was:

> "a stranger to the qualifications expertise and equipment of Meehan Drilling and had no understanding about whether Meehan Drilling did in fact meet the specification or not … and that [he] was not in a place to make a bold assertion without sufficient knowledge. In my view, that would have been reckless and imprudent of me. I did not wish to impugn the integrity of either Felix O'Hare or Meehan Drilling nor expose my own company to the risk associated with such an allegation unless I had sufficient knowledge."

[16] He says that he was met with silence in response to the 21 April 2021 letter to the defendant and that a substantial response was not received until 4 June which, in itself, did not address the concerns nor provide the information sought – but assured the reader that the concerns had been "passed … to the winning tenderer to consider in conjunction with its sub-contractor team and managed accordingly ..."

[17] On this the plaintiff suggested that the defendant was not aware of the crux of the issues that underpin this litigation and so time did not start to run for the purposes of Regulation 92.

Consideration

[18] The first point to make is that in terms of policy the time limits within public procurement exercises have been – quite deliberately - set very tightly under the Regulations and that the courts, therefore, are constrained. The rationale for such approach by the legislature is very well captured and set out in SRCL Ltd (supra).

[19] The preliminary question put to the court raises two issues:

(a) when did the plaintiff first "know or have ought to have known that grounds for starting the proceedings had arisen" – Regulation 92(2); and/or

(b) is the court constrained by the three month maximum time limit per Regulation 92(5).

[20] In my view, the letter of 21 April 2021 was indeed a letter which had been written in substantial detail (detail I may say which largely was replicated in a Statement of Claim) and so has resonance with *Mermec*. In the present instance there is a plaintiff who not only had been involved (to an extent that is admittedly disputed) in pre-tender work; but had put together a priced tender for its element of the Works and, at the very least, had been in discussions with a number of the main contractors and was very aware of their reactions and, indeed, the question of what they considered necessary for a compliant bid. Following from the contract award the plaintiff then attempted to be in correspondence with FOH proffering its own services - at that point raising substantially the issues which are now raised in these pleadings - as concerns with FOH directly – as Mr Doherty in his affidavit acknowledges.

[21] Mr Doherty in para [15] of his affidavit said that he was "acting prudently and sensibly … [and] sought to raise the matter with Felix O'Hare because I did not have sufficient knowledge but was met with silence." In reality, however, neither Mr Doherty nor the plaintiff could say that they came into additional knowledge from that which they had at the commencement stages of the contract and/or their letter of 21 April 2021. It would seem, therefore, that the plaintiff was throughout the period from the contract award aware of the concerns which were ultimately reduced to writing in the 21 April letter and that it is the same degree of knowledge

that has informed the later proceedings (as issued). I do not find that in the intervening period much that could be categorised as 'new' was discovered yet despite the intransigence they ascribe to the defendant they were still able to compile a comprehensive pre-action protocol letter and issue a detailed Statement of Claim that is in large part a replication of the contents on the letter before action.

[22] The letter of 21 April 2021 is in itself quite revealing:

- It makes a point that Meehan Drilling "did not have the correct rig on site" which suggests to me a degree of monitoring of the works. I did not see a program for the works themselves but given their nature, again, it is reasonable to assume that the sub-contract works to which the plaintiff objects were carried out at a relatively early stage of the Works – and so given that degree of monitoring it is reasonable to ascribe a sufficient degree of awareness to the plaintiff quite early in the timeline of the contract;

- A similar observation could be applied to the plaintiff's argument (as set out in the April 21 letter) insofar as they were able to allege that Meehan Drilling were not adhering to the requirements of the Drilling Specification;

- Even if I am wrong in that, there are purely factual issues such as the allegations that Meehan Drilling were not a member of the British Drilling Association or a Construction Line Gold Member "in accordance with 2.12 of the Drilling Specification" which as an immutable fact was something that clearly "known or ought to have been known" upon their appointment as sub-contractors.

- Finally, in terms of pricing, CGL indicated that they arrived at their estimate through a careful analysis – providing for "a number of items that were not expressly set out in the Pricing Document but that the well-informed and normally diligent tenderer should have known to include …" Given the selection criteria was focused on price, coupled with the reaction that they had already received from tenderers, would suggest to me that their antennae were on alert both as regards the question of price vs compliancy with the Specification.

[23] The 21 April 2021 letter continues:

> "CGL is of the view that FOH may not have allowed for [those particular] items … [which] will inevitably increase the cost of the Works and involve modifications to the Drilling Specification."

[24] Overall, in my view, the 21 April letter (at the latest) goes further than demonstrating mere knowledge but provides the details as to why there was the

basis of a claim and, as I have said, the details of that claim are essentially those which were then replicated in the subsequent Statement of Claim.

[25] I take the view that *Mermec* is clear. All that is required is a "knowledge of the basic facts which would lead to a reasonable belief that there is a claim." I have concluded, based on a detailed consideration of the 21 April letter and the affidavit evidence, that the plaintiff had formed a view at a much earlier stage, firstly, that other tenderers had or, indeed, could not provide a compliant quotation and/or that if they did there would need to be a modification and, secondly, that Meehan Drilling as a specific sub-contractor did not and could not meet the exact requirements of the Drilling Specification for very particular reasons. I do not, therefore, accept the proposition that the plaintiff did not have the sufficient information and that, as put in *SRCL Ltd*, time had started to run. Indeed, in the present instance, I would say that time had begun to run from the date of the award of the contract to FOH and the disappointment which the tenderer inevitably felt thereafter in recognising not only that it had not been successful but that, for a variety of reasons, the price which it had advanced was substantially higher than the price advanced by other competitors. There is nothing on the papers before me to explain adequately, or to my satisfaction, as to why there was a delay between that and the letter of action of 21 April such that would justify any extension much less anything to justify an extension for a six month period thereafter when proceedings were issued.

[26] That being the case I have concluded that, in answer to the preliminary question, the plaintiff's claim is statute barred pursuant to Regulation 92 both under Regulation 92(2) because I find (as I have indicated above) that its date of knowledge was much earlier than the commencement of its proceedings in that the writ was issued, however one looks at it, six months after the letter of 21 April 2021; 14 months after the contract award and 13 months after the commencement on site.

[27] As regards the statutory maximum which exists per Regulation 92(5) which is in play and, applying *SRCL*, and in light of my conclusions above, the maximum extension that could have been awarded is three months, which again, on the facts, renders the plaintiff's claim out of time pursuant to the Regulations.

[28] If required I will hear the parties on the matter of costs.