Neutral Citation no. [2010] NIQB 138 | *Ref:* **WEA8010**

Judgment: approved by the Court for handing down | *Delivered:* **22/11/2010**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

_____

TRAFFIC SIGNS AND EQUIPMENT LIMITED
Plaintiff

-v-

DEPARTMENT FOR REGIONAL DEVELOPMENT

and

DEPARTMENT OF FINANCE AND PERSONNEL
Defendants

PRELIMINARY ISSUE

WEATHERUP J

Public Procurement Proceedings.

[1] On 3 August 2010 the plaintiff issued a Writ of Summons against the defendants to prevent the letting of public procurement contracts on the basis that the defendants had infringed the Public Contracts Regulations 2006 as amended by the Public Contracts (Amendment) Regulations 2009. The defendants have made an application to dismiss a part of the plaintiff's claim as being statute barred. Mr O'Donoghue QC and Mr Aiken appear for the plaintiff and Mr Hanna QC and Mr McMillen for the defendants.

[2] The plaintiff is a limited liability company engaged in the manufacture, sale and supply of road traffic signs. The first defendant is the government

department with responsibility for the procurement of road traffic signs in accordance with the requirements imposed upon a public authority by the Regulations and the Council Directives on the award of public contracts. The second defendant, through the Central Procurement Directorate, oversees the arrangements for such public procurement.

[3] The plaintiff's claim relates to the manner in which the defendants carried out the tender process in 2010 for the award of contracts for the supply and delivery of permanent and temporary road signs and signposts. The contract notices were published on 22 April 2010, the closing date for tender submissions was 8 June 2010 and letters of intention to award the contracts were issued on 21 July 2010. The procurement exercise related to twenty one separate contracts and the tender competition was conducted on the basis of the most economically advantageous tender, with an assessment of each tender based on 60% cost and 40% quality. The three main tenderers were the plaintiff, Hurst Signs Limited, an English firm and P W S Ireland Limited, based in Newry. After the evaluation of the tenders the plaintiff was to be awarded two of the twenty one contracts, Hursts one contract and P W S the remaining eighteen.

[4] The plaintiff commenced proceedings on 3 August 2010. In accordance with the scheme of the Regulations the contracts were not let when the proceedings were commenced. Again, in accordance with the Regulations, the requirement that the defendants refrain from entering into the contracts continues until the Court orders otherwise or the proceedings are concluded. By their defence the defendants pleaded the expiry of the limitation period against the plaintiff in respect of parts of the claim. The plaintiff denies that the limitation period had expired and if it had expired seeks an extension of time. The proceedings have progressed to a substantive hearing. As a preliminary matter evidence has been heard and a ruling sought in respect of the limitation issues.

The extent of the Defendants objection that the proceedings were issued out of time.

[5] Paragraph 12 of the amended Statement of Claim itemises the grounds of challenge raised by the plaintiff. There are three broad grounds of challenge, being (a) discrimination and bias, (b) use of a cost/quality ratio of 60/40 and (c) manifest error. The three grounds are pleaded with a total of twelve particular points. The defendant's reliance on the limitation period relates to four of the particular points pleaded by the plaintiff as follows -

The second challenge for discrimination and bias reads -

> "(a)(ii) Favouring PWS over the plaintiff and Hursts by the use of 40% marks for qualitative assessment which would enable the DRD to ensure its preferred contractor was awarded the contracts framework agreements."

The third challenge for discrimination and bias reads -

> "(a)(iii) In the alternative favouring PWS over the plaintiff and Hursts by changing the cost quality ratio from 80/20 to 60/40 the plaintiff only became aware of this change as a result of his solicitor examining the discoverable documents in this case on 5 November 2010."

The challenge on the cost/quality ratio reads –

> "(b) The 2010 process was not sufficiently objective or capable of verification given the award of 40% marks for qualitative assessment carried out by the impugned evaluation panel."

The first challenge for manifest error reads -

> "(c)(i) The use of 40% marks for qualitative assessment."

[6] It will be noted that while the limitation issue concerns variations on the use of a 60/40 price/quality ratio, the particular points arise under each of the plaintiff's three broad grounds of challenge.

The Time limits in the Regulations.

[7] The Regulations make provision for the award of public contracts. Regulation 47A applies to the obligation on a 'contracting authority' to comply with the Regulations and that obligation is a duty owed to an 'economic operator'. For the purposes of this contract the DRD is a contracting authority and the plaintiff is an economic operator.

Regulation 47C provides for the enforcement of duties through the Court. Paragraph (1) provides that a breach of the duty owed in accordance with Regulation 47A is actionable by any economic operator which in consequence suffers or risks suffering loss or damage. Paragraph (2) provides that proceedings for that purpose must be started in the High Court.

Regulation 47D provides for the general time limits for starting proceedings. Paragraph (1) provides that the Regulation limits the time within which proceedings may be started where proceedings do not seek a declaration of ineffectiveness (which is the present case). Paragraph (2) provides that such proceedings must be started 'promptly and in any event within three months beginning with the date when grounds for starting proceedings first arose'. Paragraph (4) provides that the Court may extend the time limit where the Court considers that there is 'good reason for doing so'.

[8] There are three aspects of the time limits that require to be considered.

First of all the primary limitation period for the bringing of proceedings is that the plaintiff must apply promptly and in any event within three months (Regulation 47D(2)).

Secondly time runs against the plaintiff from the date when grounds for starting the proceedings first arose (Regulation 47D(2)).

Thirdly there may be an extension of the time limit where the Court considers that there is good reason for doing so (Regulation 47D(4)).

The Interpretation of the Time Limits in light of the Judgment of the ECJ.

[9] The operation of these three aspects of the Regulations must be modified to take account of the decision of the European Court of Justice in Uniplex UK Limited v NHS Business Services Authority C-406/08 which was issued on 20 January 2010.

-the primary limitation period

[10] In respect of the first matter, namely the operation of the primary limitation period, the ECJ found that the use of the word "promptly" in the Regulation was contrary to the Directive.

[11] The objective of the time limits is to pursue proceedings speedily but the ECJ noted that this must be achieved in compliance with the requirement for legal certainty. This was not achieved with the requirement to apply promptly. The ECJ concluded at paragraph 43 of its judgment that the Directive precludes a national provision on the basis of a criterion, appraised in a discretionary manner, that such proceedings must be brought promptly. Accordingly the use of the word "promptly" is to be disregarded and the primary limitation period under Regulation 47D(2) is three months.

-the date from which time begins to run.

[12] In relation to the second matter, namely that time runs from the date on which the grounds for proceedings first arose, the ECJ found that time must run from the date on which the plaintiff knew or ought to have known of the infringement and not from the date of infringement.

[13] The ECJ found, at paragraph 47 that the national Court must, as far as possible, interpret the national provisions governing the limitation period in such a way as to ensure that the period begins to run only from the date on which the plaintiff knew or ought to have known of the infringement of the rules applicable to the public procurement in question. Further, at paragraph 48, the ECJ found that, if the national provisions do not lend themselves to such an interpretation, the Court is bound, in exercise of the discretion conferred on it, to extend the period for bringing proceedings in such a manner as to ensure that the plaintiff has a period equivalent to that which it would have had if the period provided for by the applicable national legislation had run from the date on which the plaintiff knew or ought to have known of the infringement of the public procurement rule.

[14] Thus there are two steps to be taken in the interpretation of the Regulations in relation to the date from which time begins to run. First, the Court must determine if the Regulation can be interpreted compatibly with the requirement that time runs from the date of knowledge. Secondly, if the Regulation cannot be interpreted compatibly, the Court must determine if the discretion to extend time can be used to achieve time running only from the date of knowledge.

[15] As to the first step, Regulation 47D(2) provides that the date from which time runs is the date when the grounds first arose. This is the date of the infringement. The infringement occurred on the date of publication of the impugned tender document. That date may not be the same date as that on which a plaintiff had actual or constructive knowledge of the infringement. The domestic Regulation is not compatible with the Directive, nor can it be read compatibly. That being so, step two is to consider whether the Court may exercise discretion in effect to apply the date of actual or constructive knowledge as the operative date from which time begins to run. Compatibility can be achieved by the exercise of discretion to extend the time from the date of infringement to the date of actual or constructive knowledge and therefore provide that time will run from the date of such knowledge. This is the approach I intend to take in the present case. I note that this approach has been taken in England and Wales by Mann J in Sita UK Limited v Greater Manchester Waste Disposal Authority [2010] EWHE 680 (Ch).

- the discretion to extend time.

[16] In relation to the third aspect referred to above, namely the powers in relation to extension of time, there are two elements to the exercise of discretion in this particular case. The first is the matter mentioned above, namely that the running of time is extended from the date of infringement to the date of actual or constructive knowledge. The time limit is three months from that date of knowledge. The second element of the exercise of discretion is to consider, where it is necessary to do so, whether to extend time from the expiry of three months from the date of knowledge to the date of issue of proceedings.

Whether time ran before the plaintiff was qualified to be a contractor?

[17] The plaintiff contends that, where Regulation 47D(2) specifies the date when grounds for starting the proceedings first arose, this applies to the date when the plaintiff was first eligible to be awarded a contract under the tender process. In the present case the contractor was required to be the holder of a particular certificate which the plaintiff did not obtain until 7 June 2010. Thus the plaintiff argues that time did not run against the plaintiff until the date the certificate was obtained, in which case the proceedings were issued within the three month period.

[18] Regulation 47A(3) provides that references to an economic operator include any person 'who sought, who seeks or would have wished to be' the person to whom a contract to which the Regulations apply is awarded. While it is accepted that the plaintiff is an economic operator Mr O'Donoghue's argument raises the question as to when the plaintiff became an economic operator for the purposes of the Regulations. The plaintiff qualifies as a person who would have wished to be the person to whom the contract was awarded and of course the plaintiff would have so wished prior to the date on which he actually secured the certificate. I consider that the plaintiff was an economic operator for the purposes of the Regulations from the date of the infringement, being the date of publication of the impugned tender documents, and not simply from the date on which the plaintiff obtained the certificate. The plaintiff sought to obtain the certificate because he was a person who would have wished to be awarded the contract.

[19] Under Regulation 47C a breach is actionable by an economic operator 'which, in consequence, suffers, or risks suffering loss or damage'. It does not follow from the plaintiff being treated as an economic operator prior to obtaining the certificate on 7 June 2010 that that concludes the matter. It remains necessary to consider whether the plaintiff, in consequence of the breach, suffered or risked suffering loss or damage. That requires consideration of whether, in the circumstances where the plaintiff was

waiting to obtain the certificate, the plaintiff risked suffering loss or damage during that period.

[20] According to the plaintiff there was no risk of suffering loss or damage because the plaintiff was not eligible to be awarded the contract until the certificate was obtained. According to the defendants the risk was nevertheless present when the tender document was published and the alleged infringement emerged. The defendants contend that at that time the plaintiff was and remained at risk as an economic operator who would have wished to be awarded the contract. I accept the defendants approach to this issue. The breach occurred for these purposes on the date on which the 60/40 requirement was published as a part of the tender documents. If that constituted a breach, as the plaintiff claims, the plaintiff was at risk of loss from that date. There may of course have been contingencies that applied but I am satisfied that the plaintiff was nevertheless at risk. One contingency might be said to be the obtaining of the certificate but the risk was nevertheless present. Had the plaintiff never satisfied the eligibility criterion requiring the certificate the risk would cease, unless there was a challenge to the eligibility criterion. One contingency may be the failure to secure the contract. A tenderer, aggrieved by the process and contending that there has been an infringement, may nevertheless win the contract and thereby cease to be at risk of loss. The prospect of success in the tendering process does not mean that a tenderer is not required to issue proceedings for an alleged infringement within the required time limit. A tenderer considered to be at risk of loss or damage as a consequence of an alleged infringement must not wait until he discovers whether he has succeeded and only then come forward. Time is running even though there is a prospect of success. Equally, when the contingency is whether the tenderer will be able to satisfy an eligibility criterion before the final date for tenders the risk remains. I reject the plaintiff's argument based on the requirement to obtain the certificate.

What was the date of the plaintiff's actual or constructive knowledge?

[21] This then takes me on to consider the date of the plaintiff's actual or constructive knowledge of the alleged infringement of the Regulations. The infringement in question is the DRD use of the 60/40 split on price and quality. The tender documentation was published on 24 April 2010. The knowledge of that infringement on the part of the plaintiff was either 27 April, which is the date on which the plaintiff company downloaded the tender documents and was in a position to identify the requisite apportionment, or it was 29 April when Mr Connolly the Director of the plaintiff appears to have read the document and telephoned his solicitor to obtain advice on his complaint.

[22] The plaintiff agrees that the document was downloaded by Ms Mahood, an employee of the plaintiff, on 27 April and the defendants' log of access to the tender documents confirms the download on that date. I am satisfied that the date on which Mr Connolly read the tender document was 29 April. There was uncertainty about the date of the solicitors attendance note recording Mr Connolly's telephone call to his solicitor about the price/quality ratio. I am satisfied that the solicitors attendance note is probably dated 29 April. Mr Connolly was present at the plaintiff's premises on 27 April when the document was downloaded. He knew that the tender documents had been downloaded. He had attended earlier meetings with the CPD when the price/quality issue had been discussed and was alive to the issue. He could have discovered the approach to the price/quality ratio in the tender documents had he read them on 27 April when they were available. I conclude that the plaintiff ought to have known on 27 April of the alleged infringement arising out of the adoption of a price /quality ratio of 60/40, being the date when the documents were downloaded and Mr Connolly had the opportunity to read them and would have known the position had he chosen to read them.

[23] Under the Regulations the three month period therefore runs from 27 April 2010 and the Writ was issued on 3 August 2010. Accordingly the primary limitation period had expired at the date of the issue of the proceedings. It will be noted that the primary limitation would also have expired had the operative date been 29 April 2010, being the date on which I conclude that the documents were actually read by Mr Connolly.

[24] The plaintiff's challenge under paragraph 12(a)(iii) of the Statement of Claim relates to an alleged change in the cost /quality ratio from 80/20 to 60/40 and the plaintiff claims to have become aware of that change as a result of the plaintiff's solicitor examining documents discovered to the plaintiff on 5 November 2010. Thus the date of knowledge in respect of this particular point is said to be 5 November 2010, rather than 27 April 2010 as with the other three particulars, and thus the primary limitation is said not to have expired.

[25] The plaintiff's challenge under paragraph 12(a)(iii) is based on an alleged change in the apportionment between cost and quality and this change, if it occurred, is but an aspect of the adoption by the defendants of the 60/40 apportionment, of which the plaintiff ought to have known on 27 April and did know on 29 April. I am satisfied that, for the purposes of the argument on the operation of the limitation periods, paragraph 12(a)(iii) is not a separate category of actual or constructive knowledge and that all four particulars challenged by the defendants on limitation grounds relate to a date of constructive knowledge of 27 April 2010.

Whether there is good reason to extend time for the issue of the proceedings in respect of the four particulars?

[26] As found above in respect of each of the four particulars, the primary limitation had expired when proceedings were commenced and the plaintiff accordingly applies for the exercise of discretion by the Court to extend time to the issue of proceedings on 3 August 2010 on the basis that good reason exists to do so. In relation to the extension of time Sita sets out a general approach to extensions of time at paragraph [174] of the judgment to the effect that a strict approach should be taken to the issue of discretionary extensions of time and they are not to be lightly given. In doing so reference is made to the judgment of Dyson LJ in Jobling v Department of Health [2002] 1 CMLR 1258 where it was stated that ignorance of the legal significance of facts which are of themselves known to the claimant is not usually a good reason for extending time; that the good policy reasons for proceeding expeditiously with challenges related not merely to the interests of all those who have participated in the tender process but also to the wider public interest in ensuring that the tenders which public authorities had invited in a public process should be processed as quickly as possible. Mann J stated in Sita that the strict approach should be taken with an eye firmly on the policy reasons for prompt challenges.

[27] In Sita there was reliance on four factors which it was claimed provided good reason for an extension of time. However the Court was not satisfied that they were good reasons. The first was the public interest in the scrutiny of the authority's conduct. It was claimed that the dispute was potentially a very large and serious matter. Mann J found that that was of little weight in favour of exercising the discretion. Secondly it was claimed that there was a lack of openness and of transparency on the part of the public authority. That factor was said to boil down to a complaint that the claimant had been kept out of information necessary to start an action. However the action was based not just on such facts but also on later facts and the award of the contract. That the company discovered late in the time period that there were yet further alleged breaches did not justify any delay in commencing proceedings based on the matters of which it was already aware. The third factor was absence of prejudice to the authority. Mann J stated that absence of prejudice would be a potentially relevant factor if there were other factors which supported the exercise of the discretion, at least in the sense that the existence of prejudice pointed the other way, but as a separate factor it was of little weight. The fourth factor relied on the claimant having issued proceedings promptly after certain letters had been received but Mann J was not satisfied that that was relevant to the issue.

[28] In the present case the plaintiff relies on seven particulars of good reason. First that the Writ was issued on 3 August 2010, which is only one week after the primary limitation period had expired. The second reason is

that the limitation point relates to part of the plaintiff's claim only and in respect of that part the proceedings were only seven days out of time. The third ground is that there was no prejudice to the defendants as, in any event, the contracts will not be awarded because of the other grounds of challenge, the defendants will have to defend the other grounds and the proceedings have otherwise progressed speedily. The fourth reason is that the purpose of the public procurement legislation is to ensure that contracts are awarded properly and lawfully. The fifth reason is that the purpose of time limits is to require challenges to be dealt with speedily, which has occurred. The sixth reason is that the plaintiff's right to a fair trial should not be prejudiced when the challenge was only one week late and there was no prejudice to the defendants. Finally the plaintiff contends that there is potential prejudice to the plaintiff if time is not extended and the plaintiff's challenge on the four particular points is not examined over a likely contract period of four years before another tender process.

[29] There are a number of 'good reasons' included by the plaintiff that are relied on as part of most applications for extension of time and in general they do not in themselves constitute good reasons. They are all aspects of the recognition of the need for alleged infringements to be dealt with by expeditious proceedings and the application of strict times and the prevention of delays. They are the reasons that rely on a short period of overrun, in this case only seven days, the public interest in scrutinising alleged infringements, the proceedings in any event being dealt with expeditiously and the Court not prejudicing the plaintiff when there is a short overrun. All of these reasons may be stated in many cases and in general would not in themselves constitute good reason to extend time, either singly or cumulatively. Nor is there any basis in the present case for these reasons to constitute good reason to extend time, either singly or cumulatively.

[30] The other reasons which require attention are that the Court still has to consider the remainder of the plaintiff's challenge, the contract will not be let in any event and further that there is an absence of prejudice to the defendants. I take into account the extent to which the proposed extension relates to a part of the overall case and the extent to which the alleged infringements that are subject to the limitation issue are bound up with the other grounds of challenge. I take account of whether there would be further delay in dealing with the whole matter if these particulars of alleged infringement were to be included in the substantive hearing. I take account of the explanation offered by the plaintiff for not proceeding with the challenge on the basis of the alleged infringement, together with all the other circumstances of the case.

[31] In relation to the extent to which the four particulars are bound up with the remainder of the claim I consider that the price/quality ratio is bound up with part of the claim for discrimination and bias and the claim of

favouring another tenderer and the claim of manifest error. In relation to the overall impact of the intermingling of the four particulars and the other particulars that were within time, I am satisfied that there will be no significant overall delay if all particulars were to be included in the examination at the substantive hearing, save of course to the extent that some additional time will be required to deal with the additional grounds. In relation to the explanation that was offered for not proceeding within time, the plaintiff asserted that the initial focus was on securing the eligibility certificate and that this is not a case where the plaintiff was delaying to await the outcome of the process, which I accept. Of course that does not absolve the plaintiff from the requirement to issue proceedings in time.

[32] Countering those factors which are operating in favour of granting an extension of time I look to the nature of any prejudice to the defendant, beyond that which is necessarily involved in having to defend the additional particulars if I were to extend time. I consider that there is no such counter-balancing consideration on that basis.

[33] Taking account of all the circumstances I am satisfied that there is good reason to extend the time, based essentially on the four particulars that are subject to the expiry of the primary limitation period being inter-mixed to some extent with the other particulars that are due to be examined at the hearing, the contracts not being let pending that examination and the absence of prejudice to the defendants. Taking all considerations into account I propose to extend the time in relation to the four particulars to 3 August 2010 when the proceedings were commenced.