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2015/4681

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

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BETWEEN:

ALLPAY LIMITED

Plaintiff;

and

NORTHERN IRELAND HOUSING EXECUTIVE

Defendant.

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HORNER J

A. INTRODUCTION

[1] Allpay Limited ("the plaintiff") challenges the procurement exercise carried out by the NIHE ("the defendant") in respect of Lot 1 and Lot 3. These were contracts firstly to provide a payment connection network and secondly for the provision of a secure web payment service. The defendant proposes to award Lot 1 and Lot 3 to Paypoint plc ("Paypoint").

[2] The plaintiff's Writ of Summons engaged the prohibition of contract formation provided by Regulation 47 of the Public Contracts Regulations 2006 as amended ("the Regulations"). The defendant now seeks to set aside the automatic suspension of the contract award pursuant to Regulation 47H(1)(a) of the Regulations. The plaintiff resists the application claiming that the tender documents offer in Lot 1 are a breach of the defendant's own procurement process and that the defendant has interpreted its own documents in a manner that fails to comply with the requisite standard of transparency and constitutes a manifest error and that the defendant's treatment of the tenders of the plaintiff and Paypoint was in breach of the principle of equal treatment. In addition the plaintiff complains that the tender offers of Paypoint both in respect of Lot 1 and Lot 3 were abnormally low and should have been excluded by the defendant.

B. THE FACTS

[3] The plaintiff is a payment aggregator. It facilitates payments from debtors on behalf of creditors using payment networks owned by third parties in return for a fee for each transaction. It predominantly collects housing rent, council tax and Magistrates' Court Funds on behalf of local authorities by permitting payments at physical payment points, by telephone, online and by mobile phone and tablet apps. The networks which it uses to do this include those run by both the Post Office and Paypoint. It has been carrying out its operations for a period of some 20 years and acts for around 750 local authorities and housing associations.

[4] The defendant is included among the plaintiff's public sector clients. The defendant needs to provide payment collection services for its customers throughout Northern Ireland in its role as landlord of nearly 90,000 properties. The defendant accepts payments for the following:

(a) Rent and rates.

(b) District heating charges.

(c) Leaseholder charges.

(d) Legal payments.

(e) Repair charges and payments for damages.

(f) Housing benefit overpayments.

(g) Hostel/temporary accommodation charges.

(h) Bar-coded invoices.

(i) And any others as and when required.

The defendant requires an extensive network of local outlets throughout Northern Ireland to enable its customers to make payments for the wide range of possible charges it has to collect. The defendant is especially keen to have a network of local outlets available to its customers which are as immediately convenient as possible for them.

[5] The defendant currently receives payments primarily through cash. This is achieved by means of a payment card. It also accepts payment through debit cards, credit cards and cheques. These are the present methods of payment. The volume of payments for 2013/14 received through third party collection services was just over £950,000 with nearly £870,000 being made by payment card.

[6] The defendant elected to conduct a procurement exercise for the provision of these payment services for its customers throughout Northern Ireland. The plaintiff and other potential bidders were advised of the proposed tenders through an advertisement in the Official Journal of the European Union on 1 October 2014. The defendant sought bids in respect of five different lots:

(i) Lot 1: Payment Collections Network.

(ii) Lot 2: Mobile Payment App and Text Payment Service.

(iii) Lot 3: Web Payment Services.

(iv) Lot 4: Annotated Telephone Payment Services, hosted debit/credit card payment facility and manage direct debit service.

(v) Lot 5: Payment Card Production.

Lots 1 and 3 lie at the heart of this application and they are the only ones to which this court need pay attention.

[7] The procurement exercise was governed by the Open Procedure under Regulation 15 of the Regulations. Instructions To Tenderers ("ITT") were issued in October 2014 and the closing date for submissions of tenders was designated as Thursday 6 November 2014. The ITT contained a provision requiring all tenderers to seek clarification on all points of doubt before submitting a tender. Other material provisions included:

(i) A requirement that all tender submissions were made on-line via eSourcingNI site.

(ii) The tenderers had to acknowledge that they could and would meet all areas of the specification.

(iii) A requirement of all tenderers to respond to a request for a more detailed breakdown if the tender appeared to be abnormally high or abnormally low.

(iv) A reservation of right by the defendant to, inter alia, amend or change procedures relating to the competition.

(v) The defendant retained the entitlement (but not the obligation) to take such steps as it considered appropriate (at its absolute discretion) including within limitations to reject a tender as non-compliant.

[8] The contract was to run for 3 years initially from 15 April 2015 but the defendant had the right to extend it for two separate 12 month periods. The defendant made it clear that it reserved the right in its absolute discretion to take such steps as it considers appropriate to ensure that genuine competition and transparency were maintained throughout the competition.

[9] The Lot 1 tenderers were evaluated in three stages. These were:

(i) Stage 1 – selection criteria. This was scored as a pass or a fail. Tenderers had to pass all the selection criteria to go forward to the next stage.

(ii) Stage 2 – this was the award criteria - quality which carried 65% of the overall score. 195 was the maximum score possible and a pass of 105 was necessary to go through to the next stage.

(iii) Stage 3 – this required each tenderer to provide a total contract cost. The maximum score that could be achieved was 105.

(iv) Successful tender scores were aggregated and the tenderers were ranked in order of marks scored out of a total of 300 in terms of the most economically advantageous tender. The highest ranked tenderer would, subject to the terms of the ITT, be awarded the contract.

[10] Lot 3 proceeded on a similar basis except that at stage 2 the top score was 195 points and the minimum score was 105 points and at stage 3 the maximum score was 105 marks.

[11] In respect of Lot 1 the defendant required tenderers to offer customers a maximum transaction value ("MTV") for all methods of payment, no lower than £220 and a minimum of 1 pence. Tenderers were asked to specify what the MTV was that they could offer the NIHE.

[12] The plaintiff sought clarification on 27 October 2014 in respect of the MTV as Paypoint, which was one of the network providers which the plaintiff proposed to use, was only prepared to permit the plaintiff an MTV of £200 when using its network. The plaintiff complained that this was unfair as Paypoint was competing with the plaintiff for this contract and that it was thus placed at a distinct disadvantage. On 3 November 2014 the defendant made it clear it would not relax this requirement. It also stated by message of 5 November 2014 that the MTV was dictated by the behaviour of the tenant group and that the MTV should not be confused with the average transaction value ("ATV"), a very different animal indeed. Under Lot 1 the plaintiff did propose two payment networks, namely Paypoint and the Post Office, in its tender, although it knew that it could not offer an MTV of £220 or greater in respect of transactions conducted through Paypoint for the reasons set out above.

[13] On 23 December 2014 the defendant wrote to the plaintiff and informed it that the plaintiff had been unsuccessful in respect of both Lots 1 and 3, the successful tenderer being Paypoint. It advised the plaintiff that the mandatory standstill period expired after midnight on 8 January 2015. A full and comprehensive debrief was provided to the plaintiff in respect of both Lot 1 and Lot 3. Following that debrief the defendant made it clear that the plaintiff's bids in respect of Lot 1 had been evaluated on the Post Office network alone because the Paypoint network did not meet the MTV specified in the ITT.

[14] On 29 December 2014 Ms Justine Norman, the Legal Director of the plaintiff sent two letters in respect of Lot 1 and Lot 3. In the Lot 1 letter she complained that the plaintiff had "set a criteria of a requirement of a Maximum Transaction Value (MTV) of £300 knowing full well that only the incumbent, Paypoint, can meet this criteria alongside other criteria also pertinent only to Paypoint." She complained that the defendant had acted unlawfully in excluding the Paypoint network and complained that but for the MTV requirement of £220, it would have been successful in Lot 1 given the "vastly increased choice of different payment methods and the number of outlets and a renowned quality of service over and above the incumbent".

[15] In respect of Lot 3 the plaintiff complained that:

> "… it is frankly astounding that we apparently scored just 9.20 against 105 available marks versus Paypoint who achieved 105 marks. We require a full and frank explanation in this respect."

The defendant replied on 8 January 2015 rejecting the complaints made and making the point that even if Allpay had achieved full marks for the quality aspects of their submission, it would still not have become the successful tenderer in respect of Lot 1. In respect of Lot 3 it denied that there was any error in its calculations and that Paypoint were entitled as the lowest tenderer to succeed in the tender it had submitted.

[16] It is important to point out that Paypoint succeeded in respect of the tenders it submitted in respect of Lot 1 and Lot 3. It was the present incumbent in respect of both Lots. The plaintiff on the other hand succeeded in respect of Lots 2, 4 and 5. The plaintiff was the present incumbent supplier in respect of Lot 4.

[17] A Writ of Summons was issued on 16 January 2015. This was followed by a Statement of Claim on 2 March 2015. A summons was issued by the defendant for interim relief. There are three grounds specified in that summons, but the only relief that has been pursued before this court is for an order pursuant to Regulation 47H of the Regulations bringing to an end the requirement imposed by Regulation 47G(1) namely that the defendant should refrain from entering into a contract in respect of

tender reference T1244 for the provision of payment services and in particular the contracts for Lot 1, payment collection network and Lot 3, web payment services.

[18] Mr Bowsher QC led Mr Richard Coghlin for the plaintiff. Mr Dunlop appeared for the defendant. Both sets of counsel and their legal teams must be complemented for the quality and thoroughness of their submissions and for the well presented paperwork that accompanied them.

C. THE COURT'S APPROACH TO THE SET ASIDE APPLICATION

[19] There has been some controversy about the tests which a court should apply when considering a set aside application.

Regulation 47G of the Regulations provides:

> "(1) Where –
>
> (a) a claim form is issued in respect of a contracting authority's decision to award the contract;
>
> (b) the contracting authority has become aware that the claim form has been issued and that it relates to that decision;
>
> (c) the contract has not been entered into,
>
> the contracting authority is required to refrain from entering into the contract."

Regulation 47H states in respect of interim orders:

> "(1) In proceedings a court may, where relevant, make an interim order –
>
> (a) bringing to an end a requirement imposed by Regulation 47G(1); …
>
> (2) When deciding whether to make an order under paragraph (1)(a) –
>
> (a) the court must consider whether, if Regulation 47G(1) were not applicable, it would be appropriate to make an interim order requiring

the contracting authority to refrain from entering into the contract; and

(b) only if the court considers it would not be appropriate to make such an interim order may make it under paragraph (1)(a).

(3) If the court considers it would not be appropriate to make an interim order of the kind mentioned in paragraph (2)(a) in the absence of undertakings or conditions, it may require or impose such undertakings or conditions in relation to the requirement in Regulation 47G(1)."

In First4Skills v Department for Employment and Learning [2011] NIQB 59 McCloskey J considered the test which the court should apply under Regulation 47H(1)(a). He held at paragraph [14] as follows:

"[1] I am in agreement with the consistent line of decisions in England that applications of the present *genre* are to be determined by applying the principles in ***American Cyanamid –v- Ethicon*** [1973] AC 396. In short, it is incumbent on the court, fundamentally, to decide at this stage whether the Plaintiff has a good arguable case (or has raised a serious issue to be tried) and, further, to evaluate the balance of convenience, taking into account particularly (but not exhaustively) the adequacy of damages as a remedy; the availability, terms and apparent efficacy of any cross undertaking in damages by the Plaintiff; the possibility of irremediable prejudice to third parties; the obligation imposed by Article 4(3) of the Treaty on European Union (frequently labelled "*the Maastricht Treaty*") to take all appropriate measures to ensure the fulfilment of obligations arising under the Treaties; and the demands of the public interest. The correct approach in principle was expressed by Akenhead J in ***Exel Europe –v- University Hospitals Coventry and Warwickshire NHS Trust*** [2010] EWHC 3332 (TCC) in the following way:

"*26. For many years, the Courts of England and Wales have, with regard to interlocutory or interim injunctions, applied the principles and practice laid down in the well-known case of* ***American Cyanamid Co v Ethicon*** *[1975] AC 396. The first question which must be answered is whether there is a serious*

question to be tried and the second step involves considering 'whether the balance of convenience lies in favour of granting or refusing interlocutory relief that is sought (page 408B). The 'governing principle' in relation to the balance of convenience is whether or not the claimant 'would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was thought to be enjoined between the time of the application and the time of the trial.'

27. It is quite clear that, prior to the amendments to Regulation 47 made by the 2009 Regulations (see above), ***Cyanamid*** *principles were applied in considering whether or not an injunction should be granted to an unsuccessful or discontented tenderer preventing the placing of the relevant contract or agreement by the contracting authority. A good example is the recent case of* ***Alstom Transport v Eurostar International Ltd and another*** *[2010] EWHC 2747 (Ch), a decision of Mr Justice Vos. The Court of Appeal had upheld this approach in* ***Letting International v London Borough of Newham*** *[2007] EWCA Civ 1522.*

28. The issue arises whether these principles apply following the imposition of the amendments to the Regulations. Regulation 47H addresses interim orders which the Court may make in circumstances, where, pursuant to Regulation 47G, the commencement of proceedings, as in this case, has meant that the contracting authority (the Defendant in this case) is statutorily required to refrain from entering into the framework agreement (in this case). In my judgement this is primarily simply a question of interpretation of Regulation 47H. Regulation 47H(1) gives the Court the widest powers in terms of what it may do with regard to entering into contracts. It is in Regulation 47H(2) that one finds what exercise the Court 'must' do: it must consider whether, if regulation 47G(1) was not applicable, 'it would be appropriate to make an interim order requiring the contracting authority to refrain from entering into the contract'; it then goes on to say that it is 'only if the Court considers that it would not be appropriate to make such an interim order may it make an order under paragraph (1)(a)'. This is saying in the clearest terms that the Court

> *approaches the exercise of interim relief as if the statutory suspension in Regulation 47G(1) was not applicable. That means that one does not as such weight the exercise in some way in favour of maintaining the prohibition on the contracting authority against entering into the contract in question. What in practice it means is that the Court should go about the **Cyanamid** exercise in the way in which courts in this country have done for many years."*

This test has been applied in a number of different decisions in Northern Ireland e.g. see the decision of Gillen J in Resource v University of Ulster [2013] NIQB 64.

[20] However, in a number of recent cases in England and Wales that approach has been challenged. In NATS (Services) Limited v Gatwick Airport Limited [2014] EWHC 3133 (TCC) it was claimed that the appropriate test was a balance of interests test on the basis that the Regulations should be construed in accordance with the wording and purpose of the Remedies Directive under Article 2(1)(v) which provides as follows:

> "Member States may provide that the body responsible for review procedures may take into account the probable consequences of interim measures for all interests likely to be harmed, as well as the public interest, and may decide not to grant such measures when their negative consequences could exceed their benefits."

[21] Ramsey J in NATS had no difficulty in concluding that the test in American Cyanamid was consistent with the Remedies Directive on the basis that the tests allow the court to take into account the probable consequences of the interim measures and all interests likely to be harmed.

[22] A similar challenge was made in Group M UK Ltd v Cabinet Office [2014] EWHC 3659 (TCC). Akenhead J rejected the argument and commented that the High Court had confirmed repeatedly in England and Wales that the appropriate test was the American Cyanamid and this was consistent with the Remedies Directive. This approach has been taken in Northern Ireland in all procurement cases which have considered this issue and it is one which this court proposes to follow.

[23] Accordingly this court will proceed on the following basis:

(i) Is there a serious question to be tried?

(ii) Are damages an adequate remedy, and this will include consideration of the cross undertaking offered by the plaintiff;

(iii) Where does the balance of convenience lie? In considering this issue the court is entitled to take into account inter alia the public interests and the strengths and weaknesses of the plaintiff's claims.

Serious Issue

[24] There cannot be much dispute that the hurdle of persuading a court that there is a serious issue to be tried is a modest one. The court is usually bound to find that there is a serious issue to be tried if there is a relevant factual dispute between the parties. However, a court will often be prepared to resolve disputed issues of law at this stage, if this can be done without having to resort to involved and convoluted legal argument.

Damages – Adequate Remedy

[25] In American Cyanamid Co v Ethicon Ltd [1975] AC 396 the court said at 408(b)-(c):

> "The court should go on to consider whether … if the claimant were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages … would be an adequate remedy and the defendant would be in a financial position to pay them, no interim injunction should normally be granted, however strong the claimant's claim appeared to be at that stage."

Accordingly, it follows that if damages would not adequately compensate the plaintiff for the temporary damage, and if the plaintiff is in a financial position to give a satisfactory undertaking as to damages, and an award of damages pursuant to that undertaking would adequately compensate the defendant in the event of the defendant being successful at the trial, then an interim injunction may be granted. In this case there is the offer of a cross-undertaking in damages from the plaintiff.

Balance of Convenience

[26] Balance of convenience was explained by May LJ in Cayne v Global and Natural Resources PLC [1984] 1 All ER 225 at 237(h) where he said that:

> "The balance that one is seeking to make is more fundamental, more weighty, than mere **convenience**. I think it is quite clear … that, although the phrase may well be substantially less elegant, the **balance of the risk of doing an injustice** better describes the process involved."

This test allows the court to take into account the wider public interest. It also permits the court to take into account the relative strengths of the parties' cases.

In National Commercial Bank Jamaica Ltd v Olint Corp Ltd [2009] 1 WLR 1405 Lord Hoffman reviewed the rationale of American Cyanamid. He said:

> "It is often said that the purpose of an interlocutory injunction is to preserve the status quo, but it is of course impossible to stop the world pending trial. The court may order a defendant to do something or not to do something else, but such restrictions on the defendant's freedom of action will have consequences, for him and for others, which a court has to take into account. The purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result. As the House of Lords pointed out in *American Cyanamid Co v Ethicon Ltd [1975] AC 396*, that means that if damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the defendant's freedom of action by the grant of an injunction. Likewise, if there is a serious issue to be tried and the plaintiff could be prejudiced by the acts or omissions of the defendant pending trial and the cross-undertaking in damages would provide the defendant with an adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted.
>
> 17 In practice, however, it is often hard to tell whether either damages or the cross-undertaking will be an adequate remedy and the court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irremediable prejudice (and to what extent) if it turns out that the injunction should not

> have been granted or withheld, as the case may be. The basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other. This is an assessment in which, as Lord Diplock said in the *American Cyanamid case [1975] AC 396* , 408:
>
> *"It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them."*
>
> 18 Among the matters which the court may take into account are the prejudice which the plaintiff may suffer if no injunction is granted or the defendant may suffer if it is; the likelihood of such prejudice actually occurring; the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking; the likelihood of either party being able to satisfy such an award; and the likelihood that the injunction will turn out to have been wrongly granted or withheld, that is to say, the court's opinion of the relative strength of the parties' cases."

D. THE CHALLENGE

[27] The plaintiff's challenge to the procurement exercise carried out by the defendant is made on two different and distinct grounds.

Claim 1

[28] The plaintiff complains in respect of Lot 1 the Specifications as set out in the Tender Document were in error. The Specifications did not state that the MTV of no lower than £220 for all methods of payment was a mandatory requirement or how an MTV of less than £220 would be marked. Further, on the face of the Specifications, the MTV applies to all methods of payment and not just to cash which is how the defendant has treated the bids.

Claim 2

[29] The plaintiff complains that in respect of Lots 1 and 3 that the bids submitted by Paypoint were abnormally low and that the defendant failed in its obligation to investigate them.

E. Claim 1

[30] There can be no doubt that the tender documents in Lot 1 could have been better crafted. But whether a tender could be improved, is not the test. The central issue is how the tender offer would have been understood by a reasonably well-informed and diligent tenderer ("RWIND tenderer"); see the judgment of Lord Reid in Health Care at Home Ltd v the Common Services Agency (Scotland) [2014] UKSC 499 at paragraph [12].

[31] This exercise must be carried out by looking at the tender document as a whole. It is clear from the service specifications that the defendant was seeking an extensive network of local outlets to facilitate its customers in making payments of various charges. The section on MTV states:

> "The NIHE requires tenderers to offer customers a maximum transaction value, for all methods of payment, not lower than £220."

It is also important to note that the defendant was keen "to offer customers a choice of payment methods and seek to promote financial inclusion. There is a mandatory requirement for all outlets to receive and process cash payments."

The RWIND tenderer would have appreciated:

(i) it was mandatory only to offer cash payments through the networks;

(ii) it was to its advantage to offer services for payments other than cash; and

(iii) if payments were other than cash, then they would have to satisfy the MTV if they wished to score points.

That construction flows from the sense of the document taken as a whole. Of course, it would have been better and clearer if the section had said that the MTV had to be not lower than £220 "for all methods of payment **offered by the tenderer**".

[32] The plaintiff claims in argument that the tender has to be construed against a background that includes the following:

(a) The fact that many participants in the market composed their networks physical payment points from two or more sub-networks provided by a third party.

(b) The knowledge that the average value of the transactions processed on behalf of the defendant was £62.39 (see JN1 para 62).

(c) The knowledge that the defendant ought to procure the services using criteria connected to the subject matter of the contracts.

(d) The defendant's duty not to impose overly onerous technical requirements.

This confuses the difference between average and maximum. It does not follow that because there are a large number of small transactions, the defendant does not require to process a significant number of higher value transactions. Although the average payment is just over £60, the maximum transaction value in the present contract is £220. Rents are increasing above the rate of inflation. Indeed the defendant estimates according to Mr Craig 220,000 transactions over £200 will be processed over the course of the new contract and 67,000 will exceed £220. The defendant states that in these circumstances the reduction of the MTV in the new contract which is aimed at improving services to its customers would make no sense. There is very considerable force in this.

[33] If the plaintiff was in any doubt about whether a tenderer had to offer an MTV of greater than £220 in respect of any network which it proposed to use, which a court considers unlikely, it was dispelled or should have been dispelled after the plaintiff received the following clarification to the message which it sent on 27 October 2014. The plaintiff's message stated:

> "In relation to Lot 1, we are a reseller and traditionally offer both Paypoint and Post Office payment collection networks and are mindful of NIHE's commitment to provide **varied and convenient ways for our customers to pay all charges …**
>
> We are aware of NIHE's requirement for an MTV of £300 (to obtain full marks) and £220 to obtain any marks. In order to fully meet the requirements of NIHE (referenced above and more generally in the ITT) however, we would like to offer both Post Office and Paypoint.
>
> Allpay has directly asked Paypoint to allow us to offer an MTV of £300 to NIHE but unfortunately, Paypoint will not let us have an MTV of more than £200 for this particular contract. Paypoint will however bid directly with an MTV that meets NIHE's minimum and maximum requirement. This places Paypoint at a distinct advantage compared to other network providers and other resellers for Lot 1 in particular.

> As Paypoint are the only bidder that can score advantageously, please could NIHE revisit its requirement and associated scoring for its MTVs?"

This demonstrates that the plaintiff understood that it had to offer an MTV of £220 or greater in respect of all the networks it offered but was looking for the defendant to relax this requirement.

The response from the defendant was terse and emphatic:

> "The NIHE are unable to revise a mandatory requirement as stated in the advertised procurement."

It is clear from this message that the plaintiff did know exactly how the tender was to operate. If they were in any doubt, that doubt was removed by the clarification provided by the defendant.

[34] The complaint was made by the plaintiff that its competitor, Paypoint, who controlled the network was seeking to improve its chances by limiting the plaintiff to an MTV of £200. In other words Paypoint was using its control of its own network to limit the attractiveness of the plaintiff's tender. There was of course nothing to stop the plaintiff from looking to other networks. But in any event there is nothing put before the court to suggest that Paypoint was acting unlawfully in preferring its own interests to that of the plaintiff and that point has not been argued.

[35] The plaintiff did go ahead with its tender and offer the Paypoint network with an MTV of £200 only, but this was not fatal to the plaintiff's claim as it might have been. The defendant did not disqualify the plaintiff as having submitted a non-compliant tender. Instead, the defendant did not award any marks to the plaintiff for the Paypoint network. This was a concession offered by the defendant and gives the plaintiff no grounds for complaints.

[36] The plaintiff further complains that the tender documents stated that the MTV applied to "all methods of payment". The ITT includes a section which states:

> "**<u>Payment Methods</u>**
>
> The Northern Ireland Housing Executive aim to offer customers a choice of payment methods to seek to promote financial inclusion. There is a mandatory requirement for all outlets to receive and process cash payments. Unpaid cheques must be recorded as a charge (cash must be recorded as receipt) on a daily interface file.

> Tenderers must confirm the payment methods accepted that the different networks offered (ie cash, cheque, credit card and debit card)."

[37] Accordingly, the plaintiff contends that an RWIND tenderer would have assumed that it was a mandatory requirement for all tenderers under Lot 1 to offer an MTV of £220 or greater in respect of <u>all</u> payment methods. This is clearly not the case for the following reasons:

(i) If the plaintiff had thought that it applied to all methods of payment, then as it was not offering all the methods of payment it should not have submitted a tender: see section entitled "Non-Compliance in the ITT" and see paragraph 7(ii) of this judgment.

(ii) If the construction suggested by the plaintiff was correct, any tenderer could offer to receive and process payments, but do so for an MTV of £50, which would clearly defeat the purchase of the exercise in offering a wide network, given the requirement of the defendant's customers.

(iii) If all payment methods had to offer an MTV of £220, then the mandatory requirement for all outlets to receive and process cash payments would be rendered otiose.

[38] The court considers that the stance taken by the plaintiff on this issue may be categorised as opportunistic and seeks to take advantage of what might appear at first perusal to be an ambiguity. There can be no doubt that the defendant should have made it clear expressly that the MTV only applied to such payment methods other than cash, offered by that tenderer. However, the plaintiff (and all the other applicants) knew exactly what the defendant had in mind, namely that the MTV applied to cash payments, which were a mandatory requirement, and to any other payments which the RWIND tenderer intended to include in its offer.

[39] It is in those circumstances that the court considers that there is no serious question to be tried on this issue. If the court is wrong, then, it considers that damages would be an adequate remedy for the following reasons:

(i) Day and daily the courts are required to assess damages on all sorts of complicated issues. This exercise can involve, as here, assessing the loss of a chance. There is nothing put forward that would suggest that damages could not adequately be assessed by the court in this case: eg see <u>Pegasus Management Holdings SCA and another v Ernst & Young (A firm) and another</u> [2010] SDC 1461 at paragraph 85.

(ii) A disappointed party applying for damages can rely on the support of experts such as forensic accountants to carry out the necessary calculations. There

will be at their disposal the number of payments transacted through Paypoint during the previous contract period and no doubt the forensic accountants will be able to work out the plaintiff's loss by estimating the likely transactions that would have been processed by looking at the previous contract period. The issue of the possibility of 2 extensions of 1 year can be analysed by looking at the past behaviour of the defendant on other similar contracts. Forensic accountants day and daily have to make such calculations to assist the court including assessing when necessary of the loss of a chance.

(iii) The complaint, namely that the court may be likely to underestimate the level of damages because of a desire not to see a disappointed tenderer receive a windfall, is without merit. A court will be just as keen to ensure that at this point a tenderer is not under-compensated. The court will strive, and is likely to succeed with the help of expert accounting evidence from both sides, to arrive at a figure for compensation which puts the plaintiff in the position it would have been in, so far as money can, as if the tender had been conducted lawfully.

(iv) This is not a case in which it can be asserted that there lies a claim for reputation damages which may be difficult to calculate.

(v) There does on the face of the evidence appear to be cogent evidence that even if the plaintiff is vindicated in its interpretation, that would not affect the final outcome. The plaintiff's bid was never going to achieve as many marks as Paypoint's tender. Mr Dunlop made the convincing case that if the plaintiff had been awarded full marks on every quality criterion, it would only have been able to achieve 369 marks based on its costs. The Paypoint bid would still have made it the overall winner.

It is noted that a cross-undertaking has been offered, but it is unlikely that the defendant has suffered any damage given that Paypoint is supplying its services at a lower rate under the existing contract.

[40] If the court is wrong and damages do not constitute an adequate remedy then the court is satisfied that the balance of convenience favours the defendant. It is difficult to reach a final view as to whom the public interest favours, but the court's view is that it is in favour of permitting the contract to be awarded rather than delayed further. It is not good administration to permit further delay in respect of a public contract such as this. It is also quite unfair that Paypoint should subsidise this litigation by being required to provide its services to the defendant under the old contract which according to the defendant attracts lower payments for each transaction than the proposed rates in the new contract. However, the strength of the defendant's case on this issue is overwhelming. This is further reinforced by the fact that more than 30 days appear to have passed following the clarification offered by the defendant in respect of the MTV. Thus the plaintiff's claim is prima facie

time-barred and it is difficult on the present facts to see any good grounds for the 30 day time limit being extended. The strength of the defendant's case is such that if the court has erred in its conclusion about whether there is a serious issue or whether damages are an adequate remedy, this is a decisive factor in favour of granting the defendant's application.

Claim 2: Abnormally Low Bids

[41] The plaintiff avers that the bids of Paypoint in respect of Lots 1 and 3 were abnormally low, being 22% and 93% respectively lower than the plaintiff's bids. The defendant joins issue and says that Paypoint's tender prices are higher than the prices currently charged for Lots 1 and 3 by Paypoint under its present contracts. The defendant complains that the plaintiff's prices are out of line with the market. It is adamant that there is no evidence that the proposed bids of Paypoint are abnormally low. In any event the defendant says that such a claim is unsustainable because the defendant has no freestanding duty to investigate if it is not intending to reject the tender. The defendant makes it clear that it has no such intention.

[42] Article 55(1) of the Public Sector Directive states:

> "If, for a given contract, tenders appear to be abnormally low in relation to the goods, works or services, the contracting authority shall, before it may reject those tenders, request in writing details of the constituent elements of the tender which it considers relevant."

This is transposed by Public Contracts Regulations 2006 Regulation 30(6) which states:

> "If an offer for a public contract is abnormally low the contracting authority may reject that offer but only if it has –
>
> (a) considered in writing an explanation of the offer or of those parts which it considers contribute to the offer being abnormally low …"

In the Law of Public and Utilities Procurement volume I (3rd Edition) at 7-252 Professor Arrowsmith states:

> "The concept of an abnormally low tender is not defined. However, it seems to refer to a tender, that, because of its particularly favourable terms, raises a suspicion either that the economic operator will not be able to perform

> lawfully according to the terms offered (which may create a risk of non-performance/unlawful performance) and/or a danger that the economic operator will seek extra payments or that the tender is affected by unlawful state aid."

In this case there is no serious issue to be tried for the following reasons:

(i) No suspicion has been aroused that the bids of Paypoint are abnormally low.

(ii) The bids both in respect of Lot 1 and Lot 3 are in line with the prices which Paypoint presently charges for the same types of transactions. Accordingly, they are in line with "market rates".

(iii) Paypoint has performed its contractual obligations in a satisfactory manner during the course of the present contract, and without any suspicion that it might be unable to perform them during the course of the previous contract due to under-charging. Indeed, it continues to perform the services to the defendant's satisfaction and to its financial disadvantage, while this litigation continues.

[43] Indeed, the obvious explanation as to why Paypoint's bids are lower than those of the plaintiff, is that whereas the plaintiff has to pay a network operator, Paypoint does not. There is thus a very obvious saving to Paypoint.

[44] If the court is wrong and there is or should be a reasonable suspicion that Paypoint's bids are abnormally low or if it is sufficient merely that there is a substantial difference between tenders prices, the issue arises as to whether the defendant is required to carry out an investigation. The position in England, Wales and Northern Ireland has been that there is no such obligation to carry out a freestanding investigation unless the contracting authority is contemplating rejection on the basis of the bid being abnormally low. In J Varney & Sons Waste Management Ltd v Hertfordshire County Council [2010] EWHC 1404 (QB) Flaux J concluded at paragraph 157:

> "Either way, there is nothing in either provision to support the contention that there is a general duty owed by the authority to investigate so called "**suspect**" tenders which appear abnormally low. Nothing in the European Court decisions to which Arnold J refers dictates a different conclusion. In any event, Morrison is only a decision as to what was arguable on an interlocutory basis. Having, heard full argument on the point at trial I am quite satisfied that neither the Directive nor the

> Regulation imposes a duty to investigate so called suspect tenders generally."

In Resource v University of Ulster [2013] NIQB 64 Gillen J reached the same conclusion having considered the same issue. His reasoning is set out at paragraphs [42]-[48]. This court has reached the same conclusion as he did when he said at paragraph 49:

> "In the circumstances therefore I find this submission of the plaintiff to be all too speculative and I find no serious arguable issue on the question of an abnormally low bid."

There are good grounds for concluding Article 55 of the Directive was designed to permit a contracting authority to reject low tenders because of the risk that the contract would not be performed. It was also designed to avoid contracting authorities rejecting low tenders where there was a good reason for the tender being low thus ensuring that those countries which benefited from low costs were not discriminated against.

Professor Arrowsmith says at 7-253:

> "The wording of Article 55 referring to explanations **before (the purchaser) may reject those tenders** dates back to the first Utilities Directive 90/531 and the Explanatory Memorandum to that Directive makes clear the purpose of the provision:
>
> "(It) is a particularly important provision because of the differing cost calculation basis which may be underlying tenders from Member States. The purpose of market opening and competitive purchasing would not be achieved if tenders which are abnormally low but sound were rejected because they could at first sight be considered abnormally low and unreliable. (The provision) thus identifies accordingly the cases in which an apparently very low tender may not be rejected.
>
> Thus this provision requiring investigation is concerned with preventing inappropriate rejection of tenders, providing for a specific obligation to ensure that tenderers from low-cost states are not improperly rejected."

However, Mr Bowsher QC relies on SAG ELV Slovensko AS and others v Urad Pre Verejne Obstaravanie and others [2012] 2 CMLR 36, a decision of the European Court of Justice which concluded that this provision required examination of low

tenders in all cases. This decision is the subject of some acerbic comments of those with an expertise in this area. Professor Arrowsmith is recorded as saying:

> "However, the decision was given without an Advocate General's Opinion and the reasoning is brief and fallacious …"

She considers that given "the limited and flawed nature of the court's reasoning, a different view might be taken in future cases": see 7-255 of the Law of Public and Utilities Procurement.

[45] The court does not have to determine definitively whether Gillen J was right to follow the reasoning of Flaux J, although it does appear to be the correct conclusion given that the ECJ failed to have any regard to the words "before it may reject those tenders". However on this issue, namely whether there is a freestanding duty to investigate if the contracting authority does not intend to reject a bid, there is clearly a serious issue to be tried. Accordingly, it is not necessary for this court to go on to consider what is the effect, if any, of the 2014 Public Procurement Directive which attempts to write into the legislation the statement in SAG that there is a duty to investigate an abnormally low tender, however tempting that exercise might be.

[46] For the reasons which have already been set out in extenso, the court considers that damages are an adequate remedy for the defendant. The court also considers that the balance of convenience favours removing the stay. It is in the public interest this contract be awarded. It is unfair to Paypoint that it should be required to subsidise the present litigation process and the defendant also appears to have the stronger argument on the issue of whether there is a free standing duty to investigate.

F. CONCLUSIONS

[47] In the light of the conclusions reached by this court on both Claim 1 and Claim 2, the court removes the stay and leaves the plaintiff to its claim in damages against the defendant should it be able to prove that the defendant has acted unlawfully and in breach of the 2006 Regulations in conducting tenders for Lots 1 and 3. The court has no doubt that the removal of the stay is the best means to ensure the least risk of an injustice in respect of both Claim 1 and Claim 2.