Neutral Citation No: [2020] NIQB 50 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **COL11269** *Delivered:* **01/06/2020**

2010/41557

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

F P McCANN LTD

Plaintiff

and

DEPARTMENT OF REGIONAL DEVELOPMENT

Defendant

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COLTON J

Introduction

[1] The court gave judgment in this matter in favour of the plaintiff on 21 June 2016.

[2] The court gave a further judgment in relation to the plaintiff's entitlement to damages on 12 December 2019.

[3] The court was about to deliver its final judgment on quantum when the defendant made an application to raise an issue with the court before it delivered that judgment.

[4] The background to the issue is that on 23 October 2019 the Competition Markets Authority ("CMA") issued a decision finding that the plaintiff and two other companies infringed Section 2(1) of the Competition Act 1998 and Article 101 of the Treaty on the Functioning of the European Union ("TFEU").

[5] The CMA determined that the plaintiff and two other companies, from at least as early as July 2006 to 13 March 2013, participated in a single continuous infringement of competition law through an agreement or a concerted practice which had as its objective the prevention, restriction or distortion of competition in

relation to the supply of precast concrete drainage products to customers in Great Britain.

[6] The plaintiff was ordered to pay a fine of £25,449,676. The actual decision of the CMA was published on 20 December 2019. On the same date the plaintiff issued a Notice of Appeal.

[7] In essence the CMA determined that the plaintiff and two other companies formed a cartel whose objective was to ensure higher prices for precast concrete drainage products than would be the case in a properly functioning and competitive market and to maintain market share.

[8] The decisions which were the subject matter of the challenge in these proceedings took place in late 2009 and early 2010 when the defendant was assessing a joint tender by the plaintiff for a major road construction project in Northern Ireland.

[9] In short the defendant says that had it been aware of the plaintiff's conduct at that time, as evidenced by the CMA decision it is highly probable, if not certain, that the bid would have been excluded from the competition.

[10] At the relevant time the procurement competition which is the subject matter of the action was governed by the Public Contract Regulations 2006. Regulation 23(4)(e) provides:

> *"A contracting authority may treat an economic operator as ineligible or decide not to select the economic operator in accordance with these regulations on one or more of the following grounds, namely that the economic operator –*
>
> *(e) has committed an act of grave misconduct in the course of his business or profession."*

[11] The Regulations are part of the implementation of EU Directive 2004/18. In the context of this issue the relevant provision is Article 45 of the Directive.

[12] The underlying purpose of Article 45 was considered in **Michaniki C-213/017**.

[13] At paragraph 42 the CJEU notes that the legislative intent was:

> *"To adopt only grounds for exclusion based on the objective finding of facts or conduct specific to the contractor concerned, such as to cast discredit on his professional reputation or call into question his economic or financial ability to complete the works covered by the public contract for which he is tendering."*

[14] The CJEU considered the concept of professional misconduct at paragraph [35] of its judgment in **Generali Providencia C-470/13** when it said:

> *"It must be observed that the concept of 'professional misconduct', for the purposes of that provision, covers all wrongful conduct which has an impact on the professional credibility of the operator at issue and not only infringements of ethical standards in the strict sense of the profession to which the operator belongs … In those circumstances, the commission of an infringement of the competition rules, in particular where that infringement was penalised by a fine, constitutes a cause for exclusion under Article 45(2)(d) of Directive 2004/18."*

[15] In short, the defendant says that on the basis of the CMA decision if it had known at that time that the plaintiff was engaged in the conduct referred to in the decision when it was assessing the tender submissions in this competition it is "all but certain" that the plaintiff would have been excluded.

[16] This conduct was not known to the defendant when it was assessing the tender in which the plaintiff was involved, nor was it known to the court until the issue was raised by the defendant.

[17] Now that this information is available the defendant submits that the court should take it into account. It is argued that the plaintiff's actions were so outrageous that had it been known to the defendant at the relevant time exclusion from the competition would have been inevitable.

[18] In those circumstances the defendant submits that the plaintiff should not recover any damages.

[19] The defendant goes on to submit that if it is not accepted that the plaintiff should be excluded entirely from obtaining damages then the findings have an impact on quantum. It is submitted that exclusion from procurement contracts must be all but inevitable for a considerable period, perhaps about 3 years. To the extent therefore the claim is based on the allegation that the error on the part of the defendant has diminished the work that the plaintiff could seek alone or as part of a consortium or the return that it could obtain, it is therefore unsustainable.

[20] The defendant further argues that given that a major contention in this case was the plaintiff's approach to pricing then any calculation of loss must be approached with considerable caution.

[21] In response the plaintiff says that the court should simply refuse any consideration of the matter at this late stage. It is submitted that any decision to

permit the defendant to raise this new issue offends the overriding objective in Order 1, Rule 1A of Rules of the Supreme Court.

[22] The plaintiff further points out that the decision of the CMA is under appeal and that it is unlikely that the hearing of the appeal will take place before October 2020.

[23] Leaving aside the issue of the lateness of the raising of this issue the plaintiff complains that this matter should be properly pleaded by way of an amended defence but that leave should not be granted by the court for this to be done.

[24] On this issue of course the matter could not have been pleaded as it did not come to the attention of the defendant until at the earliest 23 October 2019 when the CMA issued a press release in relation to the matter. I directed that the matter be dealt with initially by way of written submissions which have now been received.

[25] Leaving aside the issue of the timing the plaintiff strongly disputes that it would have been inevitable or highly probable that the joint bid would have been excluded from the tender process if the defendants had been aware of the matters raised in the CMA decision. If the defendant had been aware in late 2009/early 2010 of the conduct said to have been found by the CMA this would not have been an automatic ground for exclusion of the plaintiff's consortium from the competition. The plaintiff points to a number of matters which point against exclusion. These include for example the fact that the conduct complained of related solely to the market in Great Britain. It related solely to the supply of precast drainage products – which was a small part of the contract services in the present case and in respect of which the defendant determined that it had "no issue" with the plaintiff's prices. Indeed, the only concern was whether the prices were too low. The plaintiff points to the experience and standing of both its firm and Balfour Beatty (the joint tenderer). It points to the plaintiff's reliability in terms of producing the products required for delivery of the project and the fact that had the matter been raised it would have been open to the plaintiff to rely upon the cleansing procedures available under the 2006 Regulations. The plaintiff also points to examples of contracts which have been awarded to bodies who have been fined by the CMA or its predecessor the OFT, including ongoing work undertaken by the plaintiff notwithstanding the CMA finding in October 2019.

[26] In summary the plaintiff says that it is simply too late for the defendant to raise this matter on the basis of a CMA decision which is under appeal.

[27] It is submitted that even had the alleged conduct been known to the defendant it would not inevitably have resulted in exclusion from the process.

[28] In addition, any proper assessment of what would have happened will require the court to hear evidence from the defendant to make good the submissions in relation to the potential for exclusion which the plaintiff should be entitled to test.

Conclusion

[29] There is no doubt that if the defendant is permitted to raise this matter at this late stage it will cause prejudice to the plaintiff. The court is in the position to deliver final judgment on the basis of the evidence and submissions it has heard, absent any consideration of the issue raised in the CMA decision. However, in my view the issues raised by the CMA decision are substantive matters which have the potential to impact on the substantive decisions of the court.

[30] In assessing the competing claims of the parties on this issue it seems to me that the balance falls in favour of permitting the defendant to raise the potential implications of the CMA findings as an issue in this action. In the interests of fairness the court is compelled to reach a view on the likelihood of the plaintiff being excluded from the tender process had the defendant been aware of the alleged misconduct.

[31] The prejudice faced by the plaintiff can be met by an award of interest in the event that it succeeds in obtaining damages. As already indicated the court is in a position to deliver its judgment, subject to the issue now raised by the defendant.

[32] In light of the submissions I have received I have come to the conclusion that this matter cannot be dealt with simply by way of submissions and that further steps are required in the action.

[33] I therefore direct as follows:

(i) The defendant should submit an amended defence to specifically plead the issues they say arise from the CMA report. The amended defence is to be submitted within 7 days of the date of service of this ruling.

(ii) The plaintiff is to serve a reply to the amended defence within 7 days of the receipt thereof.

(iii) The defendant is to submit evidence by way of affidavit to support the matters pleaded in the amended defence. It will be for the defendant to identify the appropriate witnesses who can speak to the decision it says would have been made had the information now disclosed in the CMA decision been available to the decision makers. The affidavits are to be sworn within 14 days of the date of the service of this ruling.

(iv) The plaintiff is to file affidavit evidence if it wishes to rebut the evidence submitted on behalf of the defendant or to introduce evidence it considers relevant to the issues raised in the amended defence. This evidence is to be served within 14 days of receipt of the affidavit evidence submitted by the defendant.

(v) Any requests for discovery or particulars from either party is to be submitted within, at the latest, 14 days from the service of the plaintiff's affidavit evidence.

(vi) If the parties require any extension of time in relation to these directions then applications should be made to the Court.

(vii) Given the decision of the CMA is under appeal, subject to submissions from the parties the court does not intend to finalise any hearing date or decision until the outcome of the appeal.

(viii) On receipt of the CAT decision the parties will be given leave to amend or supplement their pleadings and affidavit evidence, if necessary.

(ix) The court will arrange a review of the matter by way of remote hearing before the end of term.