Neutral Citation No: [2019] NIQB 100 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **COL10699** *Delivered:* **12/12/2019**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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2010 No. 41557

BETWEEN:

F P McCANN LIMITED

Plaintiff;

-and-

DEPARTMENT FOR REGIONAL DEVELOPMENT

Defendant.

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COLTON J

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

[2] As set out in that judgment, the plaintiff is a civil engineering contractor based in Magherafelt. It carries on business in a wide range of contracts for the public and private sector.

[3] Balfour Beatty Civil Engineering Limited ("Balfour Beatty") is a large civil engineering contractor registered in England with a wide experience in the design and construction of highways throughout the United Kingdom. It is an agency subsidiary of Balfour Beatty Group Limited.

[4] As part of a joint venture with Balfour Beatty the plaintiff submitted a tender for the contract to design and construct the A8 dual carriageway between Belfast and Larne. In this judgment I shall refer to the joint venture as BBMC.

[5] The defendant, through the Road Service, was responsible for the public procurement of the contract. Although the joint venture bid was the lowest under the commercial submission in the tender, the defendant decided not to award the

contract to the consortium on the grounds that it had submitted an "abnormally low tender".

[6] The plaintiff's case was that BBMC ought to have been awarded the contract and the decision not to do so was unlawful. The plaintiff sought damages for the loss and damage it has allegedly suffered as a result of that refusal.

[7] The defendant contended that at all times it acted lawfully and that the plaintiff's claim should be dismissed.

[8] The court found that the defendant was in breach of Regulation 30 of the Public Contracts Regulations 2006 and was guilty of a breach of duty to the plaintiff.

[9] It came to the conclusion that there was a significant chance that the defendant may have taken a different decision were it not for those breaches. The court further held that the plaintiff was entitled to an award of damages.

[10] After judgment was delivered the parties agreed to attempt to mediate on the issue of damages. The parties were unable to come to a resolution and the matter came before the court again on 13 and 14 March 2017 for the purposes of submissions on quantum.

[11] In the course of those submissions the defendant referred to the fact that a Supreme Court judgment was awaited in the case of N**uclear Decommissioning Authority v Energy Solutions Limited**. That case dealt directly with the question of the damages that can be awarded under the Public Contracts Regulations 2006, as amended. The court was advised in the course of submissions that the defendant wished to reserve its position, pending the decision of the Supreme Court and the court heard submissions on quantum on that basis.

[12] After the quantum hearing the Supreme Court delivered its judgment – **Nuclear Decommissioning Authority v Energy Solutions EU Limited** [2017] UKSC 34. The court heard further submissions from the parties after the delivery of this judgment.

[13] The Supreme Court held that by virtue of the applicable directives (in particular Council Directive 2007/66/EC "The Remedies Directive"), the obligation upon a Member State to provide a remedy in damages in respect of a breach of the Public Procurement Directive (2004/18/EC), arose only where the breach in question satisfied the **Francovich** conditions (i.e. (i) The rule of law must be intended to confer rights on individuals, (ii) The breach must be "sufficiently serious" and (iii) It must have caused loss or damage). Condition (ii) was the focus of the court's consideration. The Supreme Court also held that while Member States may provide for damages in a broader range of cases, this had not been the intention of the UK legislature. Accordingly, the UK Transposing Regulations (The Public Contract

Regulations 2006, as amended), had imposed no greater obligation on public authorities to provide a remedy than was required by EU law. The 2006 Regulations do not therefore "gold plate" the requirements of the Remedies Directive and did not confer a power upon domestic courts to award damages for a breach of the 2006 Regulations unless the **Francovich** conditions have been satisfied.

[14] Arising from this decision the defendant sought to amend its defence, or failing that, to submit that the court should determine the issue of quantum in light of the Supreme Court's judgment. The defendant's amendments were to reflect a submission that the breaches found were not sufficiently serious to lead to an award of damages.

[15] In this regard the defendant relied upon:

> "*(a) The complexity of the statutory scheme.*
>
> *(b) The lack of clarity in the statute, or in any case law as to what was required by Regulation 30(6)(c) that the parts of the offer considered to be abnormally low were verified with the plaintiff.*
>
> *(c) That the defendant sought, at considerable cost, the assistance of a highly respected, competent and experienced specialist firm to carry out the necessary assessment of tenders and to advise it accordingly.*
>
> *(d) The fact that the defendant had, in compliance with the Regulations, on two occasions, sought explanations from the plaintiff as to the parts of the offer that were considered to be abnormally low which the court found to be lawful and reasonable.*
>
> *(e) That the defendant, its servants and agents, had difficulty understanding the extent of the requirement to verify, and made a bona fide error in arriving at its conclusions in this regard, which is excusable.*
>
> *(f) That asking the plaintiff to confirm that their productivity and unit rates provided for drainage, earthworks, pavements and structures would be used as the basis for agreeing target costs could have led to little, if any, further information as the tender documents had already made this clear.*

(g) That the defendant sought to make allowance for the fact that the tendered matters related to a portion of the expected contract works and therefore the defendant did make a good faith attempt to assess a forecast out-turn costs using the plaintiff's tendered rates.

(h) Insofar as matters that did not contribute to the CEP's view that the offer was abnormally low were mentioned in the CEP report, this was an unfortunate drafting error that would have been apparent by reference to the entirety of the report.

(i) Insofar as the CEP did not intend that all matters referred to in its report contributed to its view that the offer was abnormally low, there is no reason to seek clarification of other matters mentioned.

(j) This court had concluded that the question of the ability to agree a target cost on the basis of the tendered figures was a legitimate concern. This concern at the time the decision was made has been vindicated by subsequent evidence that demonstrated:

(i) The lack of any meaningful pricing strategy on the part of the plaintiff.

(ii) The indications from the contemporaneous evidence that the plaintiff's intention was to obtain the contract using the lowest rates that it considered to be credible and then seek to arrive at a target cost based on its real prices.

(k) It was appropriate to have regard to the question of the A5 tender process as the defendant's attitude to risk was not something that could be limited to consideration within the terms of a single contract having regard to the fact that the plaintiff was a member of joint ventures in relation to contracts that could be awarded for both the A5 and the A8.

(l) That the defendant did seek to confirm bitumen prices for pavements and, albeit that the court concluded that the defendant fell into error when coming to its view, via Mr Scullion, the court

concluded that Mr Scullion had come to a genuine view.

(m) That, as the court found, the plaintiff's bitumen prices were sustainable. This meant that the difference between the plaintiff's prices for pavement were even lower than the defendant considered them to be in its assessment and therefore the variation between the plaintiff and other tenderers was even larger than appreciated.

(n) Overall this court found that the facts were capable of sustaining the conclusion that the bid was abnormally low with a consequence that it was open to the defendant, properly advised, to come to the view that the whole offer was in effect abnormally low and accordingly that the defendant was not wrong or guilty of manifest error in this regard.

(o) That the errors found by the court were errors in the process adopted by the defendant which were made in good faith and without any intention or design to disadvantage the plaintiff and which did not undermine the central finding that it was within the defendant's discretionary power to find that the offer was abnormally low. To this extent, the errors were not a grave disregard of the limit of the defendant's discretion. The errors were involuntary and unintentional.

(p) As such the errors found by the court did not have a manifest effect on the exercise of its discretion and thus the outcome of the process."

[16] The plaintiff objected to any amendment to the defence. It was submitted on the plaintiff's behalf that it would be a significant infringement of its right to a fair hearing and effective remedy if this issue were to be introduced many months after the hearing of evidence and the court's judgment on liability. Notwithstanding the fact that the judgment in the **Nuclear Decommissioning Authority** case was outstanding the defendant had never pleaded a case that there was a further step to be established before the plaintiff could prove an entitlement to damages. If the defendant were to be allowed to amend at this stage then it was further argued that it would be necessary for further evidence to be heard from witnesses and that further discovery would be required to enable the plaintiff to deal with the issues raised in the proposed amendment.

[17] Alternatively the plaintiff argued that on the basis of the material before the court the breaches identified by the court met the "sufficiently serious" test.

[18] The court takes the view that it should make its decision on the basis that the Supreme Court decision in the **Nuclear Decommissioning Authority** case represents the applicable law in this dispute. The plaintiff had relied on the Court of Appeal judgment in that case and the defendant had expressly reserved its position in relation to quantum because of the impending Supreme Court decision.

[19] Before determining the issue of whether an amendment is necessary and whether further oral evidence or discovery is necessary I will first look at the implications of the Supreme Court decision for the court's determination of the issue of quantum.

[20] Of the three **Francovich** conditions it is the second one which requires consideration at this stage. The first condition is clearly met. The third condition has already been relied upon by the defendant and goes to the issue of causation.

[21] Are the breaches the court found "sufficiently serious" to permit an award of damages to the plaintiff?

[22] The test of what is meant by "sufficiently serious" is an objective, multi-factorial one which will vary from case to case. The test for a "sufficiently serious" breach has been elucidated in **R v Secretary of State for Transport ex parte Factortame Limited (No. 5)** [2000] 1 AC 524 and in **Delaney v Secretary of State for Transport** [2015] EWCA Civ. 172.

[23] The approach was summarised by Richard LJ in **Delaney** (at [36]) as follows:

> *"Lord Clyde identified the following factors, though the list was not exhaustive: (1) The importance of the principle which has been breached; (2) The clarity and precision of the rule breached; (3) The degree of excusability of an error of law; (4) The existence of any relevant judgment on the point; (5) The state of the mind of the infringer, and in particular whether the infringer was acting intentionally or involuntarily (i.e. whether there was a deliberate intention to infringe as opposed to an inadvertent breach); (6) The behaviour of the infringer after it has become evident that an infringement has occurred; (7) The persons affected by the breach, including whether there has been a complete failure to take account of the specific situation of a defined economic group; and (8) The position taken by one of the Community institutions in the matter.*

He said that the application of the 'sufficiently serious' test 'comes eventually to be a matter of fact and circumstance'; no single factor is necessarily decisive; but one factor by itself might, particularly where there was little or nothing to put in the scales on the other side, be sufficient to justify a conclusion of liability."

[24] As further explained by Jay J in **Delaney** at first instance ([2015] 1 WLR 5177 at [84]):

"[84] As is well known, Lord Clyde set out in his opinion a non-exhaustive series of factors which fall to be weighed in the balance. I will be considering these subsequently. What it is important to recognise at this stage is that:

(i) The test is objective (p 554D) (If a government acts in bad faith that is an additional factor which falls objectively to be considered);

(ii) The weight to be given to these various factors will vary from case to case, and no single factor is necessarily decisive;

(iii) The seriousness of the breach will always be an important factor.

Although not expressly mentioned by Lord Clyde I would add that in a minimal/no discretion type of case it will be easier for the claimant to prove the requisite degree of seriousness."

[25] Jay J also rejected a submission that it was necessary to show that there had been egregious conduct or moral culpability on the part of the Member State (at [85]). In particular he held that where a Member State had minimal or no discretion, a material breach of a sufficiently clearly worded provision of EU law with significant consequences for individuals would constitute a sufficiently serious breach.

[26] I now turn to the breaches which I have found have been established in this case. The court has found that there has been a breach of Regulation 30 of the Public Contracts Regulations 2006. In summary the breaches arose from the following findings:

- Matters which were expressly excluded as contributing to the recommendation in fact did or may well have contributed to the actual decision taken by the defendant to reject the plaintiff's bid.

- BBMC were not given the opportunity to explain matters which ultimately contributed to the decision to reject the tender which constituted a breach of Regulation 30(6)(a) which placed an obligation upon the defendant that before it could come to any decision that a tender was "abnormally low" it must request "in writing an explanation of the offer or of those parts which it considers contribute to the offer being abnormally low."

- The defendant took into account issues in relation to the plaintiff's involvement in the A5 tender process without ever informing BBMC of this or giving it an opportunity to deal with any issues of concern.

- The defendant failed to comply with its obligation to verify the offer or parts of the offer which were allegedly abnormally low as expressly required by Regulation 30(6)(c).

[27] In general terms the defendant has sought to argue that these breaches did not demonstrate any bad faith on behalf of the defendant. The defendant was applying a complex statutory scheme and any errors were explicable and did not have a manifest effect on the exercise of its discretion and thus the outcome of the process. It is submitted that the errors were involuntary and unintentional.

[28] In assessing the "seriousness" of the breaches it is important to remember that the court's jurisdiction is to supervise the way in which the process has been carried out, and to review whether proper procedures and basic principles underlying the directive have been respected, for example those concerning equality of treatment and transparency. As was said in **Lion Apparel Systems Limited v Firebuy Limited** [2007] EWHC 2179 at paragraph [36]:

> *"[36] If the Authority has not complied with its obligations as to equality, transparency or objectivity, then there is no scope for the Authority to have a 'margin of appreciation' as to the extent to which it will, or will not, comply with its obligations."*

[29] It is correct to say that the court concluded that the question of the ability to agree target cost on the basis of the tendered figures submitted by BBMC was a legitimate concern which required examination by the defendant. However, there was a clear obligation on the defendant to conduct that examination in accordance with the Regulations and in particular in accordance with the principles of equality, transparency and objectivity. In this regard there is no question of permitting a margin of discretion.

[30] It should be clear from the judgment of the court that it has real concerns about the transparency of the process in this case. On reflection I am concerned that I may have underestimated the part played by the "A5 consideration", something which the defendant robustly relies on in its submissions on this issue. The fact that this was never raised with BBMC in the course of this process is in my view a serious breach given the apparent emphasis placed on it by the defendant.

[31] It seems to me that the principles which have been breached are clear. The Regulations which have been breached are clear, precise and indeed mandatory.

[32] The court is acutely aware of the distinction between the defendant's "discretion" or "margin of appreciation" and has sought to stay clear of interfering with any matters of judgment in relation to BBMC's tender. However the breaches which I have found do not relate to matters of judgment or discretion but constitute, in the court's view, breaches of both the fundamental principles of the procurement process and the specific obligations under the relevant regulations.

[33] I agree with the plaintiff's submission that taken separately and individually, the breaches are sufficiently serious to find an entitlement to damages, all the more so when taken cumulatively. Insofar as the defendant relies on the court's conclusion that the defendant could have reached the same outcome if it had carried out the process lawfully then this could only be relevant to causation, namely the third **Francovich** condition which does impact on the level of damages the court can award.

[34] I have therefore concluded that the breaches I have found clearly meet the second **Francovich** condition and are "sufficiently serious" to justify an award of damages.

[35] In light of that conclusion I do not consider that it is necessary for the defendant to amend the defence. I am satisfied that the court should apply the decision of the Supreme Court in the **Nuclear Decommissioning Authority** case to the facts of this case. I do not consider it is necessary for the court to hear further evidence on the matter or that further disclosure is required. The parties prior to the hearing agreed that the court could determine the matter on the basis of the evidence before it and there is nothing in the Supreme Court decision which changes that.