OUTER HOUSE, COURT OF SESSION

[2013] CSOH 119

OPINION OF LORD WOOLMAN

in the cause

NATIONWIDE GRITTING SERVICES LIMITED

Pursuer;

CA93/12

against

THE SCOTTISH MINISTERS

Defenders:

Pursuer: M Ross; MacRoberts LLP

Defenders: O'Neill Solicitor Advocate; Scottish Government Legal Directorate

11 July 2013

Introduction

[1] Transport Scotland is an agency of the Scottish Ministers. It has responsibility for the management and maintenance of trunk roads in Scotland. In the cold winters of 2009/2010 and 2010/2011 the roads required extensive gritting. For that purpose Transport Scotland purchased de-icing salt in January 2010 and again between August 2010 and February 2011. The salt was obtained from several suppliers, including Ineos Enterprises Limited.

[2] The procurement of the salt was governed by the Public Contracts (Scotland) Regulations 2006 (as amended) SSI 2006/1. It stipulates that:

(a) A contracting authority must (i) treat economic operators equally and without discrimination and (ii) act in a transparent and proportionate manner - Reg 4 (3).

(b) It must award public contracts on the basis of the lowest or most economically advantageous offer - Reg 30 (1).

(c) It must use defined procedures in making any award. That includes publishing a contract notice in advance to invite tenders - Reg 12 (1).

(d) In certain exceptional cases, including "extreme urgency", a contracting authority does not need to publish a contract notice in advance - Reg 14 (1).

(e) After a contract is made, the contracting authority must publish a contract award notice in the *Official Journal of the European Union ("OJEU")* - Reg 30 (1).

[3] Nationwide Gritting Services Limited ("NGS") is based in Southampton. It supplies salt and other materials throughout Europe. In the present action, it claims that Transport Scotland infringed the 2006 Regulations. In particular, it failed to publish either a contract notice or a contract award notice. NGS argues that the weather conditions were foreseeable. Accordingly Transport Scotland should have arranged to

procure salt supplies at an earlier date. If a contract notice had been published, NGS states that it would have lodged a tender at prices lower than those of the actual supplier.

[4] Transport Scotland maintains that it was entitled to enter into contracts for the supply of the salt without a competitive tendering procedure because of the extreme urgency of the situation. That is the substantive dispute between the parties. It admits that the failure to publish a contract award notice was a breach of the 2006 Regulations.

[5] The matter came before me for debate on a preliminary issue. The Scottish Ministers submit that the claim is time-barred. The claim had to be brought within three months of the date when the grounds for bringing the proceedings first arose. NGS served the summons in the present action on 28 August 2012. Accordingly, the critical date is 28 May 2012. The Scottish Ministers contend that NGS had the grounds to bring proceedings prior to that date.

Public Contracts (Scotland) Regulations 2006

[6] The 2006 Regulations implement European Directive 89/665 (as amended). Its objective is to "guarantee the existence of effective remedies for infringement of EU law in the field of public procurement": *Uniplex (UK) Ltd* v *NHS Business Services Authority* [2010] 2 CMLR 47 at para 26. In that case, the Court of Justice emphasised that the review of unlawful decisions of contracting authorities must not only be effective, but be as swift as possible: *ibid* at para 29.

[7] With regard to rapidity, Regulation 47 prescribes that:

"(7) Proceedings under this regulation may not be brought unless-

(a) the economic operator bringing the proceedings has informed the contracting authority ... of the breach or apprehended breach of the duty owed to it in accordance with paragraph (1) or (2) by that contracting authority ... and of its intention to bring proceedings under this regulation in respect of it; and

(b) those proceedings are brought promptly and in any event within three months from the date when grounds for the bringing of the proceedings first arose unless the court considers that there is good reason for extending the period within which proceedings may be brought."

[8] In *Uniplex* the Court of Justice held that the words "promptly and" were too uncertain and fell to be disregarded: at paras 41 and 42. It also held that the relevant date is the one on which the claimant knew or ought to have known of the alleged infringement (paras 35 and 47).

[9] Those propositions were applied by the Court of Appeal in *Sita UK Limited* v *Greater Manchester Waste Disposal Authority* [2011] 2 CMLR 32. In that case the contracting authority selected a preferred bidder for a large waste disposal contract, while Sita was the reserve bidder. Sita claimed that there had been further negotiations with the preferred bidder after the tender stage, which should have led to the process being re-opened. At first instance the claim was held to be out of time and that decision was upheld by the Court of Appeal. In considering when time began to run, Elias LJ stated that:

"Once the prospective claimant has sufficient knowledge to put him in a position to take an informed view as to whether there has been an infringement in the way the process has been conducted, and concludes that there has, time starts to run" (para 22).

[10] He went on to discuss the position where an authority has breached its duty of transparency and concealed information from the tenderer:

"If by withholding information the tenderer is prevented from acquiring knowledge of information that would otherwise have enabled a claim to be advanced, time should not be allowed to run against him until

that information is available. But ... that principle has no application where the tenderer has sufficient information to commence proceedings." (para 37)

[11] After the decision in *Sita,* another case involving time-bar came before the Queen's Bench Division Technology and Construction Court: *Mermec UK Limited* v *Network Rail Infrastructure Limited* [2011] EWHC 1847 (TCC). Aitkenhead J suggested the following approach at para 22(i):

"The fact that [the claimant] could not be certain about all the facts or that it definitely had an unchallengeable case does not mean that time does not start running. All that is needed is a knowledge of the basic facts which would lead to a reasonable belief that there is a claim."

[12] Both formulations beg the question of what constitutes "knowledge". That admits of no easy answer. In *Haward and Others* v *Fawcetts (a firm)* [2006] 1 WLR 68 at para 9, Lord Nicholls of Birkenhead made the following observations:

"'knowledge' does not mean knowing for certain and beyond possibility of contradiction. It means knowing with sufficient confidence to justify embarking on the preliminaries to the issue of a writ, such as submitting a claim to the proposed defendant, taking advice, and collecting evidence; suspicion, particularly if it is vague and unsupported, will indeed not be enough, but reasonable belief will normally suffice."

[13] That passage finds echoes in a passage in the opinion of Lord Maxwell in *Comer* v *James Scott & Co (Electrical Engineers) Limited* 1978 SLT 235, at 240:

"... whether a person 'knows' a fact seems to me to involve a question of degree. I do not consider it advisable to attempt to define it, but at least I think it involves something approximating more to certainty than mere suspicion or guess. Moreover ... some information, suspicion or belief falling short of knowledge is not transformed into knowledge if it happens to be correct. ... I do not think that any information or belief, however uncertain, necessarily amounts to knowledge ... merely because it happens to coincide with the truth."

[14] Before turning to the facts, it is worth noting that the 2006 Regulations have been superseded by the Public Contracts (Scotland) Regulations 2012.

The Facts

[15] Alan Wylie of European Salt was the agent for NGS at the material time. During the course of 2010 and 2011, he contacted Transport Scotland by telephone and email to try and secure business for NGS. His first contact was a telephone call on 6 January 2010. The general tenor of his communications was to indicate that NGS could provide de-icing salt, together with storage facilities. NGS invited Transport Scotland to send a representative to view its facilities in Southampton.

[16] In August 2010 the Scottish Salt Group published a report entitled "Scottish Road Network: Lessons learned and recommendations following the events of winter 2009/10." It was available on the website for Transport Scotland. It records that the agency had purchased emergency supplies of salt.

[17] In December 2010 the Taxpayers' Alliance published a report into the procurement of de-icing salt by various local authorities throughout the United Kingdom. It was based on freedom of information requests and was also available on the internet. This report likewise indicated that Transport Scotland had acquired salt from named suppliers.

[18] On 27 April 2012 a customer informed NGS that Transport Scotland had purchased and was storing supplies of de-icing salt. NGS decided to follow matters up. It sent an email headed "Formal Request for Information on Procurement Process for Salt" to Transport Scotland on 30 April 2012. It stated:

"... we have come to learn that transport for scotland *(sic)* has purchased substantial volumes of WHITE salt (both white marine and white rocksalt) over the last 2 years (especially winter 2010/11) and much of this stock is in storage. However upon searching we cannot find any request for quote or any published tender for such provision of salt. I would be most grateful if you could give me the reference number or other guidance in relation to the tender for the procurement of this salt.

Furthermore, we assume the services of 'storage' of the current salt stocks are being provided to you by a supplier. However, I cannot find the published tender for these services neither *(sic)*. I would be grateful if you could supply the above information in relation to the procurement of these services too. "

[19] Transport Scotland acknowledged receipt of that email on 1 May and said that it would "reply formally in due course". During the course of the following two weeks, no reply was sent. On 18 May, NGS sent a reminder email. In asking for a response to its email of 30 April, it stated:

"I appreciate you promised a formal reply which we eagerly await as we cannot trace any procurement process undertaken by for example publishing in *OJEU*, despite our extensive investigation ... We are of the opinion that no such process has been followed, although we would be happy to be corrected by you.

We are also of the opinion that excessive prices were paid.

I would be grateful for an update, as we are pursuing this matter with a view to taking whatever action is advised by our legal advisors including action in the domestic courts and a complaint to the European Commission."

[20] On 21 May, Transport Scotland replied to say that the request was being processed and that it would issue its response by 30 May 2012. That was the last day for such a reply under the Freedom of Information (Scotland) Act 2002. On 30 May Transport Scotland sent an email to NGS. It began "I am replying to your email of 30 April 2012 in connection with the procurement of salt for road de-icing."

[21] The email stated (a) that Transport Scotland did not normally procure salt directly, as that was usually done by its trunk road operating companies; (b) that it had, however, obtained quantities of salt in 2009/10 and 2010/11; and (c) that given the extreme urgency of the situation, a derogation from the 2006 Regulations was granted to allow the procurement to proceed immediately.

Submissions

[22] In the present action, NGS seeks orders for declarator that the Scottish Ministers breached the 2006 Regulations. It also claims damages of £980,000. NGS contends that the key document was Transport Scotland's email dated 30 May 2012. Only on receipt of that information did NGS have the requisite knowledge to bring proceedings for infringement of the 2006 Regulations {14(1)(a)(iv), and the further breaches that flow from that, i.e. unequal treatment in terms of regulation 4(3) and failure to award the contract on the basis of either the most economically advantageous terms or the lowest price in terms of regulation 30(1)}.

[23] The Scottish Ministers argue that NGS had the 'basic facts' well before 28 May 2012. They point to several sources of knowledge which they say justify that inference.

(a) NGS operates in the gritting business. It ought to have been aware that there was a shortage of de-icing salt available to UK public authorities in the winters of 2009/10 and 2010/11.

(b) Two reports available on the internet made it clear that Transport Scotland had obtained supplies from Ineos (a) a report by the Scottish Salt Group dated August 2010, and (b) a report by the Taxpayers' Alliance dated December 2010.

(c) NGS had made several approaches to Transport Scotland in 2010 and 2011 asking whether it could supply salt. It ought to have suspected that Transport Scotland had obtained supplies of salt from elsewhere.

(d) The emails from NGS to Transport Scotland showed an increasing suspicion about matters. By 30 April or at the latest 18 May 2012, NGS knew or ought to have known that it had grounds to bring proceedings.

Decision

[24] What degree of knowledge did NGS possess prior to 28 May 2012? That is the decisive question. In my view, three circumstances inform the correct answer.

[25] First, there is the absence of any business relationship between the parties. Mr Wylie's overtures during 2010 and 2011 were unsuccessful. It would have been relatively straightforward for Transport Scotland to tell him that it had already obtained supplies elsewhere. It chose not to do so. That fact can be coupled with the further consideration that Transport Scotland's principal function is to plan and coordinate the road network. Normally the purchase of de-icing salt is made by other bodies: the operating companies in the case of the trunk roads network; local authorities for local roads.

[26] Secondly, Transport Scotland could have acquired the salt in accordance with the 2006 Regulations. For example, the procurement could have taken place under an existing contract. There was no reason for NGS to assume that a government agency had acted in breach of the procurement legislation.

[27] Thirdly, the failure by Transport Scotland to publish a contract award notice in the *OJEU* is a significant one. It subverted the transparency envisaged by the legislation. If that notice had appeared, NGS could have no quarrel about matters. It would then have had the knowledge it required to raise proceedings.

[28] Against that background, in my opinion NGS might have had suspicions in 2010 and 2011 that Transport Scotland had obtained supplies of salt. But it had no hard information to that effect. What NGS learned from its customer was hearsay evidence. In my view it then acted correctly by enquiring of Transport Scotland whether that information was correct. The email it sent on 30 April invited a swift response. None was forthcoming. It was only on 30 May 2012 that, in my view, the increasing suspicion on the part of NGS ripened into hard knowledge.

[29] In my view the email of 18 May, properly construed, indicates that NGS still did not have the basic facts. It begins by stating that it "eagerly" awaited the formal reply that had been promised. The email continues by stating that NGS is "of the opinion that no such process has been followed". I do not read that in context as meaning that NGS had sufficient information to make an informed decision. It is followed by the words "although we would be happy to be corrected by you." In my view on a proper construction of the email as a whole, it was a further request for information. NGS allowed the possibility that Transport Scotland had an explanation. No allegation of breach is made.

[30] I therefore conclude that as at 28 May 2012, NGS only suspected that an infringement has occurred. That suspicion was unsupported. Accordingly the grounds for bringing proceedings had not arisen by that date.

Conclusion

[31] I reject the time-bar argument and shall put the case out by order to determine further procedure.