Summary judgment in public procurement claims (Neology UK v Council of the City of Newcastle Upon Tyne)

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Local Government analysis: This claim concerned the procurement of a contract for equipment to monitor vehicles for enforcement of mandatory clean air zones. Neology UK Ltd came third in a mini-competition to call off such a contract under a framework agreement. Among other things, Neology alleged various scoring errors in the evaluation of its bid and issued an application for summary judgment. The council applied to lift the automatic stay. Mr Justice Kerr dismissed Neology's summary judgment application and lifted the automatic stay on the council entering into a contract with the winning bidder. Written by Jonathan Lewis, barrister at Henderson Chambers.

Neology UK Ltd v Council of the City of Newcastle Upon Tyne and others [2020] EWHC 2958 (TCC)

What are the practical implications of this case?

This is perhaps the first reasoned decision in which a court has grappled with how summary judgment principles (CPR 24.2) apply to claims under the Public Contract Regulations 2015, SI 2015/102 (PCR 2015). The court gave some helpful guidance as to when a claimant could obtain summary judgment in a claim under PCR 2015.

Kerr J decided that, when a claimant economic operator applies for summary judgment in a PCR 2015 claim, the court has to determine whether the defendant has 'no real prospect' of successfully avoiding the remedy of setting aside the contract in question (following the language in CPR 24.2). Further, he held that it was not required to demonstrate that the claimant would have necessarily won the contract (at para [72]), as this was an issue that could, in principle, be decided in a summary judgment application.

However, where the issues in question could not be determined:

- without disclosure, or
- without the court being fully appraised of the factual background and technical concepts it was unlikely that summary judgment would be granted

He suggested that, without a 'knock-out blow' (at para [90]) to the defence, summary judgment could not be obtained.

It follows that practitioners should be wary of applying for summary judgment at an early stage in proceedings under PCR 2015. One would think that this is particularly true where a claimant is alleging manifest errors in the scoring of a bid, as a court would no doubt want to have a broader understanding of the procurement and any technical concepts before being sufficiently confident that a manifest error had been made in the evaluation of a bid.

What was the background?

Neology UK Ltd (Neology) specialises in the installation, provision and maintenance of automatic number plate recognition (ANPR) systems. Newcastle City Council, Gateshead Metropolitan Borough Council and North Tyneside Borough Council required ANPRs in order to enforce

mandatory clean air zones (CAZ), by reading car licence plates and checking the emission status of those vehicles. The ANPR reads the licence plate and sends the information to the local authorities as appropriate.

To procure traffic enforcement cameras and associated systems, the Crown has a framework agreement in place namely the 'Crown Commercial Services Framework RM1089 Traffic Management Technology 2, Lot 2, Traffic Management and Traffic Enforcement Cameras' (the 'framework agreement'). Neology was a supplier under the framework agreement.

In February 2020, Newcastle issued an invitation to tender (ITT) for a mini-competition under the framework agreement. Unsurprisingly, one of the questions focused on how the bidder would provide social value and tackle climate change (see paras [13], [34], [37] and [40]). Neology bid but came third (out of three) (at para [44]), with Siemens winning the contract by a margin of 6.49% over Neology. Neology issued a claim two days after the award decision. This triggered the automatic statutory suspension of Newcastle entering into the contract with Siemens (under PCR 2015, SI 2015/102, reg 95(1), at para [49]). On 28 August 2020, Neology issued its application for summary judgment (at para [55]).

Kerr J noted that no case had been cited to him in which summary judgment had been granted under PCR 2015.

What did the court decide?

Kerr J considered the test for summary judgment under CPR 24.2 in light of procurement law (at para [56]). Newcastle submitted that summary judgment would only be granted in a statutory claim under PCR 2015 if it could show 'it would inexorably have won the contract' (at para [57]). Unless a breach could be shown which prevented the claimant from winning the contract, no loss or damage would arise, and therefore the ingredients for a statutory tort under PCR 2015, SI 2015/102, reg 91(1) would not be made out (at para [58]).

Neology submitted that it was sufficient the contracting authority had 'no real prospect' of resisting the claim to have the award decision set aside, and remedies under PCR 2015, SI 2015/102, reg 97(2)(a) and reg 97(2)(c) (loss and damage due to breach of duty) were available (at para [59]). Neology's application therefore relied on the cause of action being complete if it 'risks suffering, loss or damage' (under PCR 2015, SI 2015/102, reg 91(1)) rather than actually having suffered loss or damage (at para [60]).

Kerr J accepted Neology's submissions in this regard, concluding that the question for the court to determine was whether 'the defendant has no real prospect of avoiding the remedy of setting aside the award decision'. He rejected the argument that the claimant must show that it would have necessarily won the contract (at para [72]). Further, he found that there is no reason why, in principle, a claimant cannot show it has met that threshold and should not obtain that remedy at the summary judgment stage (at para [73]).

Following consideration of the parties' submissions on the concept of 'reasonably well-informed and normally diligent tenderer' or RWIND (at paras [61]–[71]), Kerr J found that, ultimately, the case was 'wholly unsuitable' for summary judgment (at para [90]). While a trial is not needed to ascertain the true meaning of the ITT and requirements placed on tenderers, it is probably needed to explain technical terms and circumstances of the industry, all of which are necessary for the RWIND to make a decision (at para [76]). Though evidence may be adduced at trial concerning Newcastle's scoring of the bid, Kerr J was doubtful that cross-examination or other evidence could contradict

scores given or comments made in reaching a decision, and so the judge was well-suited in principle to decide these issues in a summary judgment application (at para [77]).

Neology's submissions on Newcastle's scoring and reasoning were dismissed as Newcastle was entitled to arrive at the decisions which it had (at paras [83]–[89]). As Neology's submissions concerned the scoring of its bid and Newcastle's reasoning underpinning them (were not breaches of the principles of equal treatment, transparency and proportionality) it lacked the 'knock-out blow to the defence necessary to obtain summary judgment' (at para [90]). Further, Kerr J found that disclosure was necessary to decide the issues in the case, whereas '[s]ummary judgment must stand on its own two feet, unaided by disclosure' (at para [92]). He therefore dismissed the application for summary judgment.

As to Newcastle's application to lift the automatic stay, Kerr J found there were obviously serious issues to be tried (at paras [97] and [128]). He rejected Neology's claim that it would be impossible to quantify its damages (at para [99]) which it had argued involved cost savings through economies of scale and loss of reputation (at paras [101]–[104]). He found that Neology would be adequately compensated by damages (at paras [129]–[135]). One feature of his reasoning was that the procurement was not one which 'is prestigious and internationally famous and involves vast sums of money' (at para [135])—for damages not to be an adequate remedy, the contract would have had to be of much higher value and perhaps the only contract of that type available to the bidder (at para [134]).

Kerr J concluded that the fact that it would not be unjust to confine Neology to the remedy to damages was sufficient to discharge the automatic stay (at para [136]). However, he did go on to note, obiter, that the public interest in achieving implementation of the mandatory CAZ on Tyneside would have been decisive in lifting of the stay (at paras [136] and [140]).

Case details:

- Court: Technology and Construction Court (Queen's Bench Division), Business and Property Courts of England and Wales, High Court of Justice
- Judge: Kerr J
- Date of judgment: 6 November 2020

Jonathan Lewis is a barrister at Henderson Chambers, and a member of LexisPSL's Case Analysis Expert Panels. If you have any questions about membership of these panels, please contact caseanalysis@lexisnexis.co.uk.