



THE COURT OF APPEAL

Neutral Citation Number: [2015] IECA 119

[2014/920 and 932]

**The President
Kelly J.
Peart J.**

BETWEEN

**COPYMOORE LIMITED, CORK OFFICE MACHINE AND SUPPLIERS LIMITED, CUSKEN LIMITED, EMS COPIER SERVICES LIMITED,
EUROTECH OFFICE EQUIPMENT LIMITED, INEST LIMITED, NORMAC LIMITED, MBE MALLOW LIMITED, O'ROURKE OFFICE
SUPPLIES LIMITED, SHARP TEXT CORK LIMITED AND TOS LIMITED
APPLICANTS/RESPONDENTS AND CROSS APPELLANTS**

AND

THE COMMISSIONERS OF PUBLIC WORKS IN IRELAND

RESPONDENTS/APPELLANTS

JUDGMENT of the Court delivered by the President on 11th June 2015

Introduction

1. The Copymoore litigants brought successful High Court proceedings to prevent the operation of a Public Procurement (Framework Agreements) process for identifying a limited panel of suppliers of print services to the public service. The case ultimately narrowed to a challenge by way of judicial review of a Departmental circular which would have significantly interfered with the businesses of these small and medium enterprises. The unsuccessful party to the action, the Commissioners of Public Works in Ireland, appealed against the decision. However, the Departmental circular that the applicants challenged was subsequently withdrawn. In those circumstances, Copymoore and its brethren have brought an application to this court to strike out the appeal on the ground that it is moot because there is no issue remaining in dispute between the parties. The Commissioners oppose the application.

2. The procedure whereby the successful outcome was obtained was highly unusual and has given rise to concern on the part of the Commissioners and the State, which took over the responsibility for arranging such service provision. The High Court held that the applicants were not entitled to relief under O. 84A but did have a basis of claim for ordinary judicial review. The Copymoore litigants had applied under O. 84A for cancellation of the procurement process and on obtaining leave caused the operation of the scheme to come to a stop but they failed on that issue. By that means, they held up the scheme without the usual commitments that are demanded of a party seeking an injunction. There is anxiety because they were able to segue from one mode to the other. If that were to become an option, it would undermine the policy behind the special procedure provided in O. 84A. That might be a reason for pursuing the appeal even if the case otherwise were to be considered moot.

3. This Court holds that there is no continuing lis or controversy between the parties because of the withdrawal of the circular that operated to the detriment of the Copymoore litigants. Neither is there a public interest issue that would justify using Court time to hear the debate. The procedure adopted in the case was wholly exceptional, arose in the special and very unusual circumstances and was a pragmatic expedient that was deployed in the interests of justice. Since it does not accordingly establish a precedent, the issue of procedure alone or with any other feature of the case is not a sufficient reason to outweigh the fact that there is nothing remaining to be decided between the parties.

4. The Court accordingly accedes to the application made by the Copymoore litigants. This judgment explains in more detail the Court's consideration of the application.

Background

5. On 19th July 2011, the Commissioners of Public Works, as contracting authority, invited tenders from service providers to participate in a public procurement competition for the supply of managed print services to local authority and public sector organisations. The process was intended to produce a restricted panel of seven suppliers who would compete among themselves for work that public authorities offered for competition. The framework member which was successful in a competition would enter into a service contract with the authority for a period of two years that could be extended for two further years. The tender envisaged an expenditure of the order of €100m on managed print services by the public sector organisations over the two year initial term of the framework agreement. Membership of the select panel did not carry with it any assurance of contracts or income, merely the right to compete inter se and neither was any public authority obliged to put its work out to such competition.

6. The applicants are eleven small or medium size businesses. Ten of them supply print services to various public bodies, of which schools predominate. The eleventh supplies consumables to the others but does not directly supply print services itself. None of the Copymoore applicants submitted a tender pursuant to the request for tenders.

7. The Commissioners made their contract award decision on the 8th February 2012 whereby they listed the seven parties eligible for contracts for managed print services.

8. The Government was disappointed by the small amount of work made available for competition and decided to change the rules to make it compulsory for public authorities to offer their contracts to the panel of chosen suppliers to compete among themselves.

9. On 25th July 2012, the Minister for Public Expenditure and Reform published Circular 60/12 Public Procurement (Framework Agreements) which stated, *inter alia*, that the Government had decided that it should be mandatory for public service bodies to use the specified framework agreements. The purpose was to increase the usage of National Procurement Services framework agreements and thereby secure best value for money.

10. Appendix 1 of the Circular indicated that in the case of managed print services, there were seven named suppliers that these arrangements were to be used by Central Government, Local Government, the Defence Forces, An Garda Síochána, the Prison Service, the Health Sector and all levels of the Education Sector including VECs.

11. The new mandatory arrangements came into force on 1st September 2012.

The High Court Proceedings

12. The applicants challenged the validity (a) of the public service procurement process which resulted in the award of the seven Framework Agreements and (b) of Circular 60/12 Public Procurement (Framework Agreements).

13. The judgment of the High Court found the applicants could not be regarded as "eligible persons" within the meaning of Article 4 of the European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010 since they did not participate in the MPS Framework Agreement and therefore lacked the requisite *locus standi* to object to the contract. Neither were they prejudiced by any of the alleged irregularities of which they complained.

14. Notwithstanding the above, the Court found that the applicants had standing to challenge the 2012 Circular if even they had no standing to challenge the outcome of the tender process.

15. The Court held the 2012 Circular had the effect because it was mandatory of effectively locking the applicants out of key public sector markets. Hogan J. held as a conclusion:-

"In these very particular and unusual circumstances, I feel compelled to hold that the 2012 Circular is ultra vires as incompatible with EU law inasmuch only as it makes the use of the MPS Framework Agreement mandatory. If it were otherwise, it would mean that key objectives of the EU's public procurement regime could (and, in the present case, would) be compromised indirectly by means of administrative regulation published shortly after a particular tender award which the contracting authority was itself implementing, even if – which is doubtless the case here – this was a consequence which was not foreseen, much less intended. Absent such judicial control the entire basis of a procurement award could be entirely distorted by administrative regulation of this kind."

16. On foot of the finding that the 2012 Circular was *ultra vires* insofar as it made the use of MPS Framework Agreements mandatory throughout the Public Sector, the Commissioners appealed to this Court. Copymore cross-appealed in respect of the ruling that they lacked standing to challenge the tender process.

Events Subsequent to the High Court Proceedings

17. Following the judgment of the High Court on 29th May 2013, the Department of Public Expenditure and Reform issued Circular 16/13 on 28th September 2013, which it expressly stated would replace the 2012 Circular. Importantly, the 2013 Circular removed the mandatory requirement upon Public Sector bodies to avail of the Framework Agreements. It stated:-

"2. Public bodies are reminded that such central procurement frameworks are targeted at securing best value for money and facilitating contracting authorities to deliver services within their budgetary constraints. In this regard, public bodies should encourage and promote the use of central frameworks by the public bodies under their remit."

4. Where public bodies do not utilise central procurement frameworks they should be in a position to provide a value for money justification. Value for money justifications should take into account the full costs of running a public procurement competition. Public bodies must comply with their obligations under national law and guidelines."

18. In light of the above, Copymore argues that any appeal before this Court is moot as the controversy between the parties has been extinguished by the effect of Circular 16/13.

Submissions

19. Copymore submitted that the appeal is now manifestly moot as there is no longer any live issue between the parties. Furthermore, the case does not raise any issues of exceptional public importance and there are no special reasons in the public interest for hearing the appeal. There is, accordingly, no basis for departing from the normal rule in respect of a moot proceeding and the appeal should be dismissed. The fact that a case raises an important point of law is not of itself a reason to bring it within the exceptional category.

20. The Commissioners submitted first that the case is not moot. Secondly, and alternatively, even if it is to be so considered, the case falls within the exception exemplified by *O'Brien v. Personal Injuries Assessment Board (No. 2)* [2007] 1 I.R. 328 and *Irwin v. Deasy* [2010] IESC 35.

21. It was submitted that the appeal is not moot because this set of circumstances involving the same applicants may arise again if there were to be another tendering for a Framework Agreement. It has a continuing impact and will arise again. The effect of the judgment of the High Court is not spent. The case involves matters of principle that go beyond the Circular and will have ramifications for the State's operation of Frameworks Agreements in the future.

22. If it is moot, it stills falls within the discretion of the Court to hear it for various reasons. It was submitted that the decision of the High Court would have implications far beyond the present applicants, as there has been a proliferation of procurement cases before the courts in recent years. The finding that a Circular, an administrative document, would be capable of invalidating a tendering process retrospectively is a concept that would have far reaching implications. So if it is considered to be a moot this is a case that warrants full argument in light of the far-reaching findings of the impugned High Court decision.

Whether the Appeal is Moot

23. It is well-established that the Court will not determine issues which have become moot unless there are special or exceptional circumstances to justify that. The Court's role is not as an advisory Tribunal.

24. *Lofinmakin v Minister for Justice* [2013] IESC 49 contains a comprehensive review of the authorities in respect of mootness. In that case, the appellants appealed against the refusal of the High Court to make an order of *certiorari* in respect of a deportation order made by the Minister for Justice that was revoked prior to the hearing of the appeal. The Supreme Court determined that the appeal was moot, since the possibility of a fresh deportation order was remote and in any event the appeal had regard to the specific factual circumstances in which the order had been made.

25. In her judgment, Denham C.J. (with whom Murray, Fennelly, McKechnie and MacMenamin JJ concurred), cited with approval the previously adopted *dictum* of the Supreme Court of Canada in *Borowski v. Canada* [1989] 1 SCR 342 that :-

"An appeal is moot when a decision will not have the effect of resolving some controversy affecting or potentially affecting the rights of the parties. Such a live controversy must be present not only when the action or proceedings is commenced but also when the Court is called upon to reach a decision. The general policy is enforced in moot cases unless the Court exercised its discretion to depart from it."

Denham C.J. went on to note the statement of Murray CJ in *Irwin v. Deasy* [2010] IESC 35:-

"In exceptional circumstances where one or both parties has a material interest in a decision on a point of law of exceptional public importance the court may in the interests of the due and proper administration of justice determine such a question."

26. In *Irwin v. Deasy*, the High Court found that the Revenue Commissioners lacked *locus standi* to maintain a suit for partition in well-charging proceedings brought on foot of a judgment mortgage where the debt in issue was compromised. The Supreme Court, nonetheless, allowed the appeal to proceed on the basis, as noted by McKechnie J. [at para. 46 of the judgment] *"as the Revenue had upwards of 20 cases involving this identical point, it retained a material interest in having it definitively ruled upon at appeal level"*.

27. In *O'Brien v. Personal Injuries Assessment Board (No. 2)* [2007] 1 I.R. 328, the applicant requested the Personal Injuries Board to deal directly with his solicitor in his application pursuant to the Personal Injuries Assessment Board Act 2003. They refused. The plaintiff obtained a declaration from the High Court that such refusal was contrary to s. 7 of the Act. Following the service of a notice of appeal, but before the appeal hearing, the statutory process under the Act concluded, with the result that it was no longer necessary for either party to engage with each other. The Supreme Court allowed the appeal to proceed. The plaintiff, apart from the costs order, had no continuing interest in the proceedings. Notwithstanding the absence of such interest, however, Murray C.J. did not believe that the proceedings had "completely" lost their character as containing a live issue or that a decision would not further resolve "some controversy affecting or potentially affecting the rights of the parties". In such circumstances he was of the opinion that PIAB retained a real current interest in the issue and therefore its appeal should be determined.

28. In this case a "real current interest in the issue" is not present. The Minister withdrew the Circular that made it mandatory for public authorities to send their work only to the select panel. The applicants are back to where they were when the tender process terminated with its seven nominations. The public authorities are free to deal with their old suppliers if they want to.

29. The appeal does not raise any issue of exceptional public importance and there are no special reasons in the public interest for hearing the appeal. The Supreme Court in *Irwin v. Deasy* held:-

"However, the discretion to hear an appeal where there is no longer a live controversy between the parties should be exercised with caution, and academic or hypothetical appeals should not be heard."

In the circumstances, this is not a case where the Court should exercise its discretion to hear a moot appeal.

Order 84A

30. Order 84A is the rule dealing with judicial review of awards of public contracts. See S.I. No. 420 of 2010. When leave was granted, the proceedings had the effect of freezing the decision by the respondents to limit public procurement to the limited panel of providers. The usual obligations on a party applying for an injunction do not apply in a case under O.84A when leave is obtained. In particular, it is a free injunction in that no undertaking as to damages is required of the moving party. It would be a matter of concern if this machinery were to be employed in cases that were not legitimate applications under the Public Procurement Regulations: European Communities (Award of Public Authorities' Contracts) Regulations 2006 (S.I. No. 329 of 2006) and the Remedies Regulations: European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010 (S.I. No. 130 of 2010).

31. The High Court was clear that this was a wholly exceptional and unusual procedural situation and was prepared to entertain the application for judicial review of the Circular in the circumstances in the interests of justice. The Court considers that it does not accordingly establish an alternative procedural option.

Conclusion

32. The withdrawal of the particular circular that made it mandatory to use only the panel of seven service providers means that the issues between the parties are effectively at an end. That was the matter that gave rise to the proceedings. Since there is no continuing issue between the parties and there are no more general questions to be decided, the appeal is moot.