Neutral Citation [2015] IEHC 369

THE HIGH COURT

RECORD NO. 2015/160 JR

BETWEEN/

FORUM CONNEMARA LIMITED

APPLICANT

AND

GALWAY COUNTY LOCAL COMMUNITY DEVELOPMENT COMMITTEE

RESPONDENT

JUDGMENT of Mr Justice Max Barrett delivered on 15th June, 2015.

PART I

BACKGROUND

1. Galway County Local Community Development Committee took a decision last September that for the purposes of a tender for distributing certain Government funds, all of Galway would be treated as a single 'lot'. Forum Connemara has objected to that decision from the day it was made. It has liaised with politicians to see what can be done; some of those politicians have been vocal in their criticism. The public in west Galway are so incensed by the decision of last September that a meeting in the village of Maam Cross in March attracted hundreds of attendees. The problem is essentially as follows. West Galway and the Aran Islands are quite different from the rest of County Galway. Not least among these differences is that they are among the few places in Ireland where the Irish language continues to be spoken widely and as a mother-tongue, rendering them a linguistically, and perhaps also culturally, distinct area. There are concerns that if, as presently intended – thanks to Forum Connemara having lost out in the tender for distribution of the Government funds – the responsibility for distribution moves from Connemara and is centralised elsewhere in County Galway, a great deal of local knowledge, experience, community activism, community commitment, efficiencies and know-how will be lost irretrievably. So the decision of last-September has led to serious and various concerns, though it seems to the court that all of them fall into one or both of two categories: the way the decision was made; and the ultimate effect of the decision.

2. As to the way the decision was made, the core of the issue arising is this. The Local Community Development Committee is a statutory committee that was established in June of last year, following the enactment of the Local Government Act, 2014. It met for the first time on 30th September of last year. Section 36 of the Act of 2014 provides that the Committee is charged with *"developing, co-ordinating and implementing a coherent and integrated approach to local and community development".* As a committee, the LCDC is representative of the communities it serves. So, for example, it has members from Údarás na Gaelteachta, Comhar na nOileán Teo., Galway Chamber of Commerce, and even companies that have historically been involved in the disbursement of public funds, such as Forum Connemara. Forum Connemara itself, though a private limited company, is part of a partnership of voluntary, local and statutory bodies based in Connemara which have, as their objective, putting in place strategies and programmes to tackle the problem of rural decline among peripheral communities in west County Galway.

3. At the meeting of 30th September, a staff-member of Galway County Council who was present as the Committee's Chief Officer, produced a conflicts of interest policy that was agreed to by the Committee. This conflict of interests policy had the result that when it came to deciding how new Government funding, the "SICAP" funding, would be distributed, no fewer than eight of the Committee members present had to leave the meeting-room. In their absence, the five members remaining decided (by a 4–1) decision that the SICAP funding would be distributed by a single tenderer throughout all of County Galway. So four out of 19 people decided the basis on which funding in excess of €1 million would be spent. When the excluded members returned to the meeting-room, objection was made to the decision. But to no avail. After the meeting was over, politicians and public objected to the decision. But to no avail. The objections appear to have been focused on the fact that west Galway is quite different to the rest of Galway and this difference had historically been recognised by having certain government funding locally disbursed there because of the local conditions pertaining and local knowledge required. In fact, it is alleged by Forum Connemara that at a meeting of 10th September in Ballina, which it attended, a senior member of the Department of the Environment, Community and Local Government, no less, had indicated that Galway was too large and disparate for funds to be distributed on an all-county basis. There is also a contention in Forum Connemara's submissions that, in effect, Galway County Council 'pulled a fast one' at the meeting of 30th September and used the conflicts of interest policy to engineer an end which it, for whatever reason, preferred, namely that SICAP funds would be distributed in Galway by a single party on an all-county basis.

4. The adoption of the conflicts interest policy, the subsequent exclusion of many Committee members from the meeting-room, the fact that the decision as to the distribution of the SICAP funds was decided by four members of a 19-member committee, and the suspicion that all of this was contrived to produce a result that Galway County Council wanted to achieve are, the court understands, the principal pillars relied upon to support Forum Connemara's contention that the decision of 30th September was made in a wrong manner. As to the substance of the decision, the objection taken by Forum Connemara to it is that the decision never made sense, and has never been considered by it to make sense, that it sat and sits badly with the assurance allegedly given by the Department of the Environment, Community and Local Government at the meeting of 10th September, and that it made and makes no sense when viewed in the context of how funds have been historically distributed in west-Galway, and how Connemara and the Aran Islands have historically been treated as a quite different region from the rest of Galway.

PART II

'HAVING YOUR CAKE AND EATING IT'

5. Forum Connemara's challenge to the decision of 30th September has been commenced well out of time. And it comes after it competed unsuccessfully, in the tendering process that followed the decision of 30th September, to be the sole distributor of SICAP funds in County Galway. It is a classic example, the respondent contends, of a failed tenderer seeking to have its cake and eat it. The court does not consider it to be anything of the sort. Just because circumstance forces a party through a tendering process, which it maintains from the outset to be flawed and contrived, does and should not have as a necessary consequence in all instances that such party has by its participation forfeited any right to object to that process thereafter. On and since 30th September, Forum Connemara has made patently clear that it is completely dissatisfied with the basis for the tendering process. But when, on 20th October, the invitation to tender issued following the decision of the 30th, what was Forum Connemara to do? It could hardly stand aside while a contract for distribution of in excess of €1 million of funds was whipped from under its nose and given to another. So it did what likely anyone would do. It bid for the tender, and it and interested members of the public and some public and community representatives kept up the efforts on the political front.

6. There may be (the court reaches no conclusion in this regard) that there was a possible touch of naïveté in the approach adopted by Forum Connemara. Once matters had formalised into an invitation to tender and a formal bidding process had begun, there was perhaps only one place a dispute was going to end up – and it has duly ended up in that place. But as this Court stated at para.7 of

its judgment last year in *Harrington v. EPA* [2014] IEHC 307: -

> *"The courts in applying the law must be sensitive to the personal and social background of persons who present before them. This is what makes our courts hallowed places in which, subject at all times to what the law requires, measured justice is dispensed and unmerited harshness avoided. The correctness of this approach has been confirmed by the Supreme Court in the recent past…in Comcast International Holdings Limited v. Minister for Public Enterprise and Others [2012] IESC 50".*

7. Here one is dealing with a company that works in the community sector, not some IFSC-based commercial venture stuffed to the gills with legal 'whizz-kids'. The court fully accepts that it may not have occurred immediately to Forum Connemara that if it wanted to conform to the usual 30-day timeline for procurement-related challenges under Order 84A of the Rules of the Superior Courts, it needed to be making a fast-trek up to the Four Courts. Indeed there is a real and natural concern apparent in Forum Connemara's affidavit evidence that, having now arrived (belatedly) at the Four Courts and, worse, having ended up in the Commercial Court, it may yet incur very substantial legal costs. What so-called 'ordinary' person or community-based enterprise would not balk at incurring such costs and elect instead to see if a remedy to its concerns could be secured via the political system, while at the same time participating in a tendering process to which it was fundamentally opposed so as to try and ensure that vital funds did not slip its grasp? In this regard, the court is reminded of the decision of Costello J. in the long-ago water-rates case with a strangely contemporary resonance, *O'Donnell v Dun Laoghaire Corporation* [1991] I.L.R.M. 301, in which Costello J. stated, at p.318, that:-

> *"Mr O'Donnell…tried to get redress through political pressure. When he was advised to do so, he went to a solicitor. It is true that he has not sworn that he did not get legal advice before this because he had not the means to do so but I think I am entitled to take into account the notorious fact that current levels of legal fees are perceived by most people to be very high and that this fact constitutes a powerful disincentive to legal action by persons like Mr O'Donnell who are in receipt of a public service pension and who live in a home which could be seized and sold to pay costs should his action fail."*

8. As it was with Mr O'Donnell, so it is with Forum Connemara, and understandably so. Forum Connemara has not sworn that it did not get legal advice that there was a 30-day time limit from bringing a challenge to the decision of 30th September. However, the court is prepared to take into account, as 'good reasons' for the delay in commencement of the within legal challenge, Forum Connemara's, no doubt genuine, fear of legal costs, its pursuit of a political remedy, and the fact that it is a community-based venture that does not sit around thinking how best to sue people and on what basis. As for 'having its cake and eating it', the court considers that this is more a case of 'taking Peel's Brimstone and suffering it', *i.e*. Forum Connemara went along with the tender because what else could it do even if, as was the case, it at all times objected to the manner and substance of the decision of 30th September?

9. The reason the court has apostrophised 'good reasons' in the preceding paragraph is because judicial review of the award of public contracts falls to be brought under Order 84A of the Rules of the Superior Courts, and Order 84A, rule 4(2) allows such a challenge to be brought outside the 30-day limitation period that usually applies *"where the court considers that there is good reason to do so."*

PART III

FEATURES THAT MAKE THIS CASE DIFFERENT FROM OTHERS

10. Before turning to deal with the most relevant of the applicable case-law, the court turns first to address the 'Pandora's Box' argument that the respondent has, perhaps inevitably raised, *i.e*. that by allowing what the respondent perceives to be a belated, collateral attack on a thoroughly legitimate public procurement process, the court will open a Pandora's Box in which all manner of miseries will now be visited on contracting authorities in the form of challenges to their decisions. However, before law firms and lawyers rush to counsel disappointed tenderers that, thanks to the *Forum Connemara* case, we have arrived at a bright new world in which contracting authorities should fear to tread, and tenderers should never fear to sue, it is worth highlighting a combination of grounds that present in this case, and that are unlikely to present in combination in many, if any, other procurement cases, and thus render this case quite unique:

- first, the allegations (and they are but allegations) raised by Forum Connemara as to the suggested abuses at the LCDC meeting of 30th September go to the heart of good government. It is alleged in effect that a local council gerrymandered a voting process, ostensibly in the name of good corporate governance, so as to secure a pre-determined end. If there is a public interest in finality in procurement matters (and there is), there is also, surely, a public interest in ensuring that committees representative of communities are not commandeered by councils into producing decisions that invariably conform with what the council thinks best. Such stark issues of good government seem unlikely to present in many, if any, other public procurement cases.

- second, it is alleged that Forum Connemara received an assurance on 10th September from central government (a senior official at the Department of the Environment, Community and Local Government) that disbursement of SICAP funds would proceed on a directly different basis to that settled upon at LCDC meeting on 30th September. It may be that the LCDC was the contracting authority but an assurance from central government (especially the Department of the Environment, Community and Local Government) gives rise, counsel for Forum Connemara has suggested, to arguments as to legitimate expectation. Such representations seem unlikely to present in many, if any, other public procurement cases.

- third, it appears that this is a case which has generated no little public concern in County Galway. It is not a regular feature of challenges in the procurement field that one has evidence of community and political representatives crying foul, and a community meeting in a small village like Maam Cross bringing out several hundred people. This, of course, is a courtroom, not an assembly-room; it is not the function of the court to act as a representative forum or medium, nor does it purport to do so. However, it seems to the court that it can take cognisance of such genuine public and political concern when determining if there is that "*good reason*" referred to in Order 84A, rule 4(2). Such genuine public and political concern seems unlikely to present in many, if any, other public procurement cases.

- fourth, there is the nature of the contract tendered for. This is not a procurement case concerned with who gets to build a motorway or who gets to build a bridge. It is concerned with who gets to disburse funds to vulnerable members of our society – and the scale of the funds arising, though large, are not limitless; some people will inevitably and regrettably be disappointed by how that money is spent. It might be contended that the need for the cleanest of government in this particular context, and the associated need for the affected public to 'buy into' the granting or refusal of funds, outweighs the 'need for speed' that also presents as a factor in procurement proceedings and offers good reason for allowing a late challenge to the decision of 30th September.

11. It is not just that each of the above issues has presented in this case but that all of them have presented together which to this court makes it not just a case in which there is "*good reason*" to allow Forum Connemara's challenge to proceed, but also a case that

is, perhaps very much, *sui generis*.

12. Finally, before leaving this Pandora's Box argument, it is perhaps worth recalling that at the bottom of the Box, Pandora found hope. In the procurement context, that hope is to be found in Order 84A, rule 4(2) which by allowing late challenges under Order 84A *"where the court considers there is good reason"* brings, to quote from the judgment of Denham J. (as she then was) in *Dekra Éireann Teoranta v. Minister for the Environment and Local Government and Another* [2003] I.R.270 at 287, the *"necessary balance to protect fair procedures"* in the context of a rule of court which generates a 'need for speed' in procurement challenges. If the rule of law means anything, it must be that law means something. It appears to the court that the respondent's contentions, if accepted, would have the effect that Order 84A, rule4(2) would mean little or nothing in a case where the unique combination of factors presenting demands that it mean something, and that this something be meaningful.

PART IV

RELEVANT CASE-LAW
13. As ever, the court has been presented with a rich harvest of judgments by counsel. Some of them have been mentioned above. The principal sheaves remaining are gathered below.

A. *SIAC Construction Limited v. National Roads Authority* [2004] IEHC 128
14. The applicant in *SIAC* was a minority member of a consortium, called EuroLink, which failed to secure the contract for the construction of the Dundalk Western Bypass. It appears from the judgment that there were three possible key dates presenting from which time started running on the applicant's bringing a challenge to a decision to use the negotiated procedure. Settling for the earliest of the three dates, Kelly J. stated at p.29:-

> *"[C]omplaints of the type which are sought to be advanced here concerning the procedures followed must be brought at the earliest opportunity and, in any event, within three months from the date when grounds for the complaint first arose. Proceedings cannot, and ought not to be, postponed until the decision to award, or the award of the public contract has been made. If that were so, the complaint concerning, for example, the negotiated procedure where grounds first arose in August, 2001 would not be the subject of proceedings until 2004. Such a result…would be absurd."*

15. In the present case, a decision that ought to have been brought in October or November of last year was brought in March of this year. That is late, but not as late as in *SIAC*. Plus there are all the special circumstances presenting here that appear to the court to make this case different from all others. There is also the point that one will search in vain in *SIAC* to find an assertion by Kelly J. that when it comes to reading a provision such as, or akin to, Order 84A, rule 4(2), one must invariably read it in such a way that there can never be an extension of the generally applicable 30-day limitation period. Such a result would be truly absurd and *SIAC* neither reaches that result, nor demands that it be reached here.

B. *Baxter Healthcare Limited v. Health Service Executive* [2013] IEHC 413
16. In *Baxter* the applicant healthcare service provider, a disappointed tenderer, sought the setting aside of a contract that fell to be awarded by the Health and Safety Executive and a direction that the contract be awarded to itself instead. Peart J. declined the reliefs sought. Echoing the earlier decision of Kelly J. in *SIAC*, he notes, at para.82, that:

> *"In reaching a conclusion as to whether the applicant is time-barred…it is essential to keep in mind the fact that the time limit applies equally to interim decisions as it does to the final decision to award the contract at the end of the process…."*

17. The *Baxter* case has perhaps assumed a particular significance in the within proceedings because of a side-issue arising which the court now mentions but which is not relevant to the court's overall conclusions.

18. Forum Connemara contends that the decision of 30th September was not an interim decision and so was not caught by the mention in Order 84A that the procedure (and the limitation period) it establishes shall apply to *"the review of a decision (including an interim decision) of a contracting authority taken under or in the course of a [public] contract award procedure…".* Forum Connemara contends that the decision of 30th September cannot be seen as an 'interim decision' of a contracting authority. It points to the definition of the word "interim" in the Oxford online dictionary as meaning something *"provisional, temporary, pro tem stop-gap, short term, fill-in, caretaker, acting, intervening, transitional, change-over, make-do, make-shift, improvised, impromptu, emergency"*. It submits that there is no way that the decision of 30th September, being a decision as to the (one-lot) basis on which SICAP funds would be disbursed in County Galway was in any way 'provisional', 'temporary', 'stop-gap', 'transitional', 'make-shift', 'improvised' or the result of an 'emergency'. Rather, Forum Connemara maintains, it was a decision of a permanent nature arrived at – it contends, in an unsatisfactory manner – and that to characterise it as simply a cog in a procurement decision is flawed and misguided.

19. To the court's mind, the reason the decision of 30th September does not fall within the Oxford online dictionary definition of "*interim*" is because the decision of 30th September is not and never was an interim decision. Nor was it a cog in a procurement decision. It was and remains a full and final decision taken by a contracting authority regarding a contract award procedure. It is a decision that was and is a part of the contract award procedure and cannot be viewed in any way as sitting apart from it. Moreover, if there is an inference or assumption in the argument advanced by Forum Connemara that every decision made in the course of a contract award procedure falls to be treated as an interim decision, the court does not accept the proposition that any decision in the interregnum between the commencement of a public procurement procedure and the crowning of the successful tenderer is necessarily an interim decision. Both as a matter of logic and procurement law, it seems to the court that it both must be and is possible for a contracting authority to make one or more complete decisions even within the context of a procurement process that is as yet uncompleted at the time the decision is taken. And so the decision of 30th September comes within the scope of Order 84A.

C. *Uniplex (UK) Ltd. v. NHS Business Services Authority* [2010] ECR I-00817
20. This was a case concerned with the issue of when the time for bringing proceedings starts to run under the Review Procedures Directive. Two segments of the judgment of the Court of Justice are perhaps of especial interest. First, its observation, at paras. 30 and 31 that:

> *"30 [T]he fact that a candidate or tenderer learns that its application or tender has been rejected does not place it in a position effectively to bring proceedings. Such information is insufficient to enable the candidate or tenderer to establish whether there has been illegality which might form the subject-matter of the proceedings.*
>
> *31 It is only once a concerned candidate or tenderer has been informed of the reasons for its elimination from the public*

procurement procedure that it may come to an informed view as to whether there has been an infringement of the applicable provisions and as to the appropriateness of bringing proceedings."

21. Also of interest are the court's observations, at para.47, that:

> *"47 …[T]he national court…must, so far as is at all possible, interpret…national provisions governing the limitation period in such a way as to ensure that that period begins to run only from the date on which the claimant knew, or ought to have known, of the infringement of the rules applicable to the public procurement procedure in question."*

22. This guidance is helpful, so far as it points to the need for the relevant period to begin running from the date on which a claimant knew or ought to have known of the infringement. The court is willing to countenance that the date from which time started ticking on Forum Connemara's bringing a challenge to the decision of 30th September, ran from 20th October, the date when the invitation to tender issued. However, the court does not consider that it is required to make any decision in this regard because by any calculation, Forum Connemara was significantly out of the time allowable under O.84A for commencing its challenge to the decision of 30th September.

D. *Dekra Éireann Teo. v. Minister for the Environment and Local Government and Anor* [2003] I.R.270

23. This case has been mentioned by the court elsewhere above. There, the applicant and the notice party had submitted tenders to the respondent for the operation of a new national car testing system. The applicant was unsuccessful and commenced proceedings against the respondent. The notice party sought to have the applicant's claim dismissed on the grounds that it had failed to institute the proceedings within the prescribed limitation period under Order 84A. The High Court (O'Neill J.) dismissed the notice party's application. The Supreme Court allowed the appeal. In the course of her judgment, Denham J., as she then was, noted, at p.287, that:

> *"In this specialist area of judicial review there is a clear policy underlying the law. The policy includes the requirement that an application for review of a decision to award a public contract shall be made at the earliest opportunity. There is a degree of urgency required in such applications. The applicant should move rapidly. The requirement of a speedy application is partially based on the prejudice to the parties and the State in delayed proceedings. Also, there is the concept that the common good is best served by rapid proceedings. The necessary balance to protect fair procedures is met in the saver that the court may extend time for such application for good reason."*

24. The court has already considered extensively the balance between the 'need for speed' and the need to protect fair procedures, and explained why it considers the facts in this case to present "*good reason*", within the meaning of Order 84A, rule 4(2) as to why this case should be allowed to proceed, albeit that it was commenced belatedly.

E. *B.T.F. v. The Director of Public Prosecutions* [2005] 2 I.R. 559.

25. This was a case in which the applicant had been charged in 1998 with certain historic sexual offences but, thanks to the collapse of a first trial, remained un-tried as of 2002. In 2002 he was granted leave to apply for an order of prohibition preventing any trial from proceeding in respect of those offences. The Director of Public Prosecutions opposed the application on the basis, *inter alia*, of the applicant's delay in bringing his application on time. The High Court (Quirke J.) tried the issue of delay as a preliminary issue and, having tried the issue, dismissed the judicial review proceedings. On appeal, the Supreme Court allowed the appeal, Hardiman J. noting in his judgment, at p.566, following a consideration, *inter alia*, of the well-known principles propounded by Denham J. (as she then was) in *De Róiste v. Minister for Defence* [2001] 1 I.R. 190 at p.208, that "*I doubt whether it will normally be useful to deal with alleged applicant delay as a preliminary issue. Except perhaps in the very plainest of cases, the necessity to inquire into other matters such as those listed by Denham J. will render it inappropriate to deal with the matter by way of preliminary issue."*

26. A number of points might be made about the *BTF* case. First, it is difficult to conceive of a case more different in its facts from those presenting in the within application. Second, the court does not consider that in the above remarks Hardiman J. intended to set aside the entirety of the law relating to limitation periods and to institute instead a system in which all matters proceed to trial regardless of any limitation periods applicable, with an issue as to limitation periods only ever to be considered in the context of a full trial and never before. Third, *BTF* was a case concerned with Order 84, not Order 84A, which latter order establishes a specific and distinctive European Union-law inspired regime of tight time-schedules in the procurement context and which seeks to balance, in a carefully calibrated manner, a right to challenge public procurement processes against the public interest in seeing public works commence in a timely manner. The court does not consider that the *BTF* case is of especial relevance to the within application which addresses a different rule of court, a different area of the law, and which comes more properly within the scope of very different Supreme Court precedents such as *Dekra* (considered above) and *Copymore* (considered below). However, to the extent, if at all, that the decision in BTF is of relevance to the within application, it suggests that trying the issue of delay separate from the substantive issues arising for judicial review may not always be appropriate and thus perhaps buttresses the approach being taken by the court in the within proceedings.

F. *Copymore Ltd. v. Commissioner of Public Works* [2014] IEHC 234; [2014] IESC 63

27. The issue of an extension of time was considered in the procurement context by O'Neill J. in *Copymore*, albeit in the context of an amendment of pleadings as opposed to a challenge to a decision that was out of time. O'Neill J. states as follows, at para.23:

> *"The problem here is that these judicial review proceedings relate to public procurement matters, and it is well settled, since the judgments of the Supreme Court in the Dekra case, that in this specialised area of judicial review, a strict or stringent approach must be adopted that in this specialised area of judicial review, a strict or stringent approach must be adopted to applications for relief outside of the prescribed time limits. Whilst there is, undoubtedly, a jurisdiction to extend the time limit in question, this can only be done if it is demonstrated that there is good and sufficient reason for so doing."*

28. O'Neill J. goes on to note that "*good and sufficient reason*", to his mind, entailed something that was not in existence or was unknown to the applicant within the time limit. This last observation was expressly rejected, following an appeal to the Supreme Court, Charleton J. stating, at para.14:

> *"This view is over strict. It is not necessary to demonstrate a factor unknown to an applicant or one which was not in existence for time to be extended. Instead, a late application or a late amendment to include a new ground not previously pleaded requires 'good reason'. That must take into account the factors listed by the learned trial judge, but these are not the only factors. One of the most important factors is the public interest and another is the conduct of the parties. As to the first, there is a clear public interest in the disposal of controversies involving multiple suppliers of goods to the State within a prompt time-frame. There is also, however, an interest in ensuring that such points as can*

be argued and which are applicable to other similar situations are considered and ruled on by the High Court."

29. The Supreme Court allowed the amendment sought on the basis of certain special facts presenting. Notably, Charleton J. clearly has regard to the fact that there may be competing public interests that come into play, *i.e*. the 'need for speed' is not the only public interest that may present. And, for the reasons explained above, the court considers that there are a variety of public interest factors presenting in this case which, combined, have the result that there is "*good reason*" within the meaning of Order 84A, rule 4. (2) as to why Forum Connemara's belated challenge should be allowed to proceed.

30. In passing, the court notes the contention of Forum Connemara that decisions such as *Dekra, Copymore*, and *Baxter* fall to be distinguished from the present case by reference to the substantial scale of the contracts in those cases (national car testing in *Dekra*, commercial printing services in *Copymore*, and sophisticated health services in *Baxter*). It seems to the court that there are at least four reasons why this contention is not correct:

- first, it seems to the court to under-play the fact that this case concerns a public contract worth in excess of one million euro and representing the entire SICAP expenditure for one of the largest counties in Ireland. So it is a contract of some considerable significance, especially in the community sector.

- second, the scale of the subject-matter of a contract seems to the court an unusual basis on which to draw a distinction. After all, if the distinction goes one way, why not the other? And where would that leave many of our principles of commercial, contract and insurance law formulated in 19th-century cases that involved what are now trivial amounts of money? Are they all now to be distinguished on the basis of scale? The answer, of course, is 'no'. For in case-law generally, at least so far as the court is concerned, it is principle, not the principal that is the central matter in issue.

- third, the court does not consider that in good faith and in conformity with the rules of precedent, it can distinguish cases that deal with precisely the principles of law that arise in this case on the basis that the contracts in those cases involved contracts of a different scale.

- fourth, the court fully accepts that the facts in this case are entirely unique. That is true of every case. But the common law works by analogy. A principle or rule of law formulated or applied in one case falls to be applied, mutatis mutandis, to the facts presenting in the next such case unless a precedent falls to be viewed as sui generis by reference perhaps to the facts presenting. The court considers that the above-mentioned precedents fall to be applied in the within application.

PART V

THE DETAIL OF ORDER 84A.

31. *Order 84A and public procurement challenges*. Order 84A is the mandatory avenue by which all public procurement challenges must be brought before the court. Order 84A, rule 2 states that the procedure ordained by Order 84A applies to an application to the court pursuant to the 'Regulations' for:

> *"a) interlocutory orders with the aim of correcting an alleged infringement or preventing further damage to the applicant's interests, including measures to suspend or to ensure the suspension of the procedure for the award of the public contract concerned or the implementation of any decision taken by the contracting authority;*
>
> *b) the review of a decision (including an interim decision) of a contracting authority taken under or in the course of a contract award procedure falling within the scope of the Directives;*
>
> *c) the review of a decision (including an interim decision) of a contracting authority taken under or in the course of a contract award procedure falling within the scope of the European Communities (Award of Public Authorities' Contracts) Regulations 2006 or the European Communities (Award of Contracts by Utility Undertakings) Regulations 2007; or*
>
> *d) a declaration that a contract is ineffective".*

32. *Regulations, Directives and timeframe*. The 'Regulations' referred to in rule 2 include all or any of the following: the European Communities (Award of Public Authorities' Contracts) Regulations 2006 (S.I. No. 329 of 2006), the European Communities (Award of Contracts by Utility Undertakings) Regulations 2007 (S.I. No.50 of 2007), the European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010 (S.I. No. 130 of 2010), and the European Communities (Award of Contracts by Utility Undertakings) (Review Procedures) Regulations 2010 (S.I. No.131 of 2010). The Directives referred to in Order 84A include all or any of the following: the Public Works, Public Supply and Public Services Contracts Directive (Directive 2004/28/EC), the Public Utilities Contracts Directive (Directive 2004/17/EC) and the Review Procedures Directives (Directive 89/665/EEC and Directive 92/13/EEC, each as amended by Directive 2007/66/EC). The applicable timeframe that arises for the bringing of a challenge under Order 84A is 30 days after the applicant was notified of the decision, or knew or ought to have known of the infringement. As mentioned above, this may be extended under Order 84A, rule 4(2) "*where the court considers there is good reason to do so*."

33. *Nature of decisions made*. The court finds that the decisions made by Galway LCDC in the course of awarding the (challenged) tender for programme implementers of SICAP were made in respect of a contract which falls within the scope of the Public Works, Public Supply and Public Services Contracts Directive (Directive 2004/18/EC) and the Review Procedures Directive (Directive 2001/17/EC) (as amended), as implemented by S.I. No.329/2006 – the European Communities (Award of Public Authorities' Contracts) Regulations 2006 and S.I. No.130/2010 – the European Communities (Remedies) Regulations 2010. The Invitation to Tender issued on 20th October 2014, states that the type of contract is *"Annex IIB Service Contracts/Category 27 (Other Services) under Directive 2004/18/EC. Other Service Categories may also be relevant, namely; 24 (education and vocational education services) and 25 (health and social services)"*.

34. *Nature of decision of 30th September*. The court further finds that the decision taken by Galway LCDC on 30th September, 2014, that there should be one service provider or programme implementer for SICAP for all of County Galway was – clearly was – a decision taken by a contracting authority under or in the course of a contract award procedure falling within the scope of the relevant Directives. Accordingly, any challenge to the decision of 30th September, 2014, should have been made pursuant to the procedure set out in Order 84A.

35. *Alleged nature of challenge*. Forum Connemara contends, *inter alia*, that the proceedings it has instituted regarding the decision of 30th September are not a simple challenge to the tender process and that, in particular, the decision of the 30th has nothing to do with the Public Works, Public Supply and Public Services Contracts Directive (Directive 2004/18/EC) and the Review Procedures

Directive (Directive 2001/17/EC, as amended). Thus, for example, the chairman of Forum Connemara states as follows at para.33 of his Replying Affidavit:

> *"I say and believe and am so advised that these proceedings do not amount to a simple challenge to a tender process but are far broader than that and encapsulate the actual meeting of the Respondent Committee who decided that there would no longer be two service providers but henceforth only one, which said meeting took place on the 30th September, 2014 and I say and believe and am so advised that this has nothing whatsoever to do with the Public Services Contracts Directive…or the Review Procedures Directive, or indeed Statutory Instrument No.329/2006 [the Award of Public Authorities' Contract Regulations] but rather such decision made by a statutory committee is entirely amenable to normal judicial review procedures particularly given the grounds as outlined in the Statement of Grounds and Verifying Affidavit."*

36. It seems to the court that this assertion and like contentions made at the hearing do not take sufficient account of Order 84A, rule 2(c) which, as mentioned above, provides that the procedure contained in Order 84A shall apply to *"the review of a decision (including an interim decision) of a contracting authority taken under or in the course of a [public] contract award procedure…"*. As is clear from the decision of Kelly J. in *SIAC*, at p.14, this requirement must be construed as extending *"to decisions taken by contracting authorities regarding contract award procedures"*, not least so as to ensure compliance of Order 84A with European Union legislation.

37. The court does not consider that there is any way of describing the LCDC decision of 30th September as other than a decision taken by a contracting authority regarding a contract award procedure. Counsel for LCDC described it as a precursor to the invitation to tender (which clearly set out that County Galway was being treated as a single lot). However, even that characterisation seems to the court to give the decision a free-wheeling status which the court does not consider it to possess. It is, to the court's mind, a decision that is a part of the contract award procedure and cannot be viewed in any way as sitting apart from it.

38. *Nature of decision of 2nd March*. By letter of 2nd March, 2015, the LCDC notified unsuccessful tenderers that Galway Rural Development Company Ltd. The letter set out a summary of reasons why the addressee was unsuccessful by comparison with the characteristics and advantages of the successful tenderer, and against the relevant award criteria. In addition to, and separate from, its grievance concerning the decision of 30th September Forum Connemara Limited seeks to challenge the decision to award the tender to Galway Rural Development Company Limited, as communicated by the letter of 2nd March. The sole ground on which it seeks to do so is a failure to provide adequate reasons. The respondent, not unexpectedly, contends that manifestly adequate reasons were identified in the letter. The LCDC's decision to award the contract, communicated in the letter of 2nd May, 2015, appears to the court to fall squarely within the scope of Order 84A, rule 2(b) in that it was a decision to award a contract falling within the scope of the Directives, and thus falls to be challenged under the Order 84A procedure.

PART VI

RE-CONSTITUTING THE PROCEEDINGS

39. It appears to the court that the 30-day period for bringing a challenge under Order 84A to the decision of 30th September could be contended to run from that date or from 20th October. The court does not consider it necessary to reach a decision in this regard as either way the within challenge, which commenced last March was well out of time. By contrast, the challenge to the letter of 2nd March, which is also a part of the within proceedings, was commenced within 30 days of 2nd March. However, the entirety of the proceedings was commenced under by way of application under Order 84 and, as the court noted above, Order 84A is the mandatory avenue by which all public procurement challenges must be brought. As a result, Forum Connemara has made application that the court allow the within proceedings to be re-constituted as Order 84A proceedings.

40. There are three reasons why the court considers it appropriate to allow the requested re-constitution of the proceedings:

- first, the rules of court are meant to regulate the doing of justice, not to excuse the denial of justice; and if the court was to decline to allow the requested re-constitution/conversion of the challenge to the letter of 2nd March, that would be to allow the triumph of form over substance to the point of injustice.

- second, it might, perhaps not unreasonably, be contended that the court (Noonan J.) having heard the *ex parte* application for leave to apply for judicial review on 23rd March and having allowed the application to proceed on the basis of Order 84, the most basic notion of justice requires that the same court allow re-constitution of the proceedings as Order 84A proceedings, now that it has been realised that this is the necessary route by which the within procurement-related challenges must proceed.

- third, Forum Connemara's legal team have urged on the court that if it finds that the form of proceedings ought to have been done under Order 84A, then any, if any, error on their part ought not to be visited on Forum Connemara. The court mentions this, not to occasion any embarrassment – in fact it salutes the professionalism of Forum Connemara's legal team in advancing this self-deprecatory line of argument – but because it considers that they are entirely right in advancing it as a further and separate ground on which re-constitution of the proceedings is entirely justified.

PART VII

CONCLUSIONS

41. For the reasons stated above, the court:

> (1) declines to grant an order striking out the within proceedings on the basis that the within proceedings, being proceedings the subject-matter of which falls within the provisions of Order 84A of the Rules of the Superior Courts 1986, as amended, are improperly constituted as judicial review proceedings under Order 84;
>
> (2) declines to grant an order striking out, on grounds of delay, Forum Connemara's challenge to the decision of the LCDC made by way of resolution on 30th September last, that the implementation of the SICAP should proceed by way of one lot only;
>
> (3) will grant an order permitting these proceedings and, in particular, Forum Connemara's statement grounding the application for judicial review and all ancillary papers to be amended and/or reconstituted so as in all respects to be treated as an application brought under Order 84A, being applications pursuant to the Regulations mentioned and/or defined therein; and

(4) will, pursuant to Order 84A, rule 4(2), and because, for the reasons stated in the within judgment it appears to the court that there is good reason for it so to do, make an order for the necessary extension of time in respect of the bringing of the now to-be-reconstituted application challenging and/or seeking the quashing of the decision of 30th September. As indicated elsewhere above, the court considers that the challenge to the award of 2nd March was brought within the applicable limitation-period and thus no order for extension of time of the now to-be-reconstituted application in respect of that award is required.