

THE HIGH COURT

COMMERCIAL

[2015 No. 149 J.R.]

[2015 No. 40 COM]

IN THE MATTER OF THE REVIEW OF THE AWARD OF A PUBLIC CONTRACT PURSUANT TO THE EUROPEAN COMMUNITIES (PUBLIC AUTHORITIES' CONTRACTS) (REVIEW PROCEDURES) REGULATIONS 2010 AND ORDER 84(A) OF THE RULES OF THE SUPERIOR COURTS, AS AMENDED

BETWEEN

WORD PERFECT TRANSLATION SERVICES LIMITED

APPLICANT

AND

THE COMMISSIONER OF AN GARDA SÍÓCHÁNA

RESPONDENT

JUDGMENT of Ms. Justice Costello delivered on 3rd day of November, 2015.

1. In these proceedings the applicant seeks a judicial review of a decision made by the respondent to award interpretation services to certain preferred bidders to the exclusion of the respondent and for other ancillary relief. The decision, the subject matter of these proceedings, was made on 18th February, 2015, and was notified to the applicant by a letter of that date received on 23rd February, 2015. The proceedings were commenced by an originating notice of motion and statement required to ground the application for review of the award of a public contract dated 19th March, 2015.

2. By Notice of Motion dated 24th June, 2015, the applicant sought an order granting it liberty to amend its Statement required to ground the application for review of the award of a public contract. The respondent opposed the application and the matter was argued on 14th October, 2015.

3. Applications to review an award of a public contract must be brought within 30 calendar days of the date of the decision or award the subject of the challenge. This is a requirement of the European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010, Regulation 7 and O.84A, r.4(1)(i) of the Rules of the Superior Courts. Unlike other applications for judicial review, there is no requirement that an applicant obtain leave of the Court to bring the application for judicial review. While there are strict time limits applicable to the application, there is a jurisdiction in the Court both to extend the time to bring an application and to permit an applicant to amend the Statement of Grounds. Rule 8 provides as follows:-

"(1) [t]he Court may on the hearing of the Originating Notice of Motion allow the applicant or any other party to amend his statement whether by specifying different or additional grounds of relief or opposition or otherwise on such terms, if any, as it thinks fit and may allow further affidavits to be filed if they deal with new matters referred to in an affidavit of any other party to the application."

4. The parties are agreed that the principles upon which the Court's discretion should be exercised are to be found in the judgments of the Supreme Court in *Keegan v. Garda Síochána Ombudsman Commission* [2012] 2 I.R. 570 and *Copymoore Limited and Ors v. Commissioners of Public Works of Ireland (No. 2)* [2014] IESC 63.

5. *Keegan v. GSOC* involved a judicial review of a decision of the respondent to investigate the conduct of the applicant in circumstances where the respondent had previously determined that the complaint of a member of the public was inadmissible and had not proceeded on foot of the complaint. The applicant sought to amend his Statement of Grounds to include a new ground to challenge the decision of the respondent. He did not seek to amend the relief sought in the original Statement of Grounds. The explanation for the failure to include the new ground was due to "an oversight on the part of the applicant's legal advisors". The application was refused in the High Court and it was appealed to the Supreme Court. At paras. 30-37 Fennelly J. held as follows:-

"[30] It is not surprising that there is no comprehensive and exhaustive judicial statement of the circumstances in which a court may permit an applicant for judicial review to amend the grounds for the relief sought. It is equally unsurprising that the courts, using varying language, have expressed themselves reluctant to grant such amendment without good reason."

"[31] Persons are permitted to seek review of administrative decisions which affect them within prescribed times and on grounds in law which they propose and which the courts grant them leave to argue. The object of the system is to strike a fair balance between the certainty and security of administrative decisions and the rights of persons affected by them who wish to contest them."

"[32] The strict imposition of time limits is mitigated by the power of the court to permit an application outside the permitted time, provided the court is persuaded that there is good reason for the delay and that no other party is adversely or unfairly prejudiced."

"[33] Once an applicant has obtained an order granting leave to apply for judicial review, he is confined to the grounds permitted. He may not argue any additional grounds without leave of the court."

[34] If he applies for an amendment of his grounds within the judicial review time limit, he should, obviously, at least in normal circumstances, have no difficulty obtaining the amendment. If he applies for an amendment outside the time, he will have to justify the application. He will have to explain his delay, just as in the case of a late applicant. The court will expect him to give reasons to explain his failure to include the new proposed ground in his original application.

[35] On the other hand, it is difficult to see why an applicant for an amendment of grounds should have to satisfy a more exacting standard in explaining delay than is imposed on an ordinary late application. He may say that the additional ground is based on material of which he was unaware when he was making his original application. On occasion, the respondent reveals a new ground of argument in its answer to the application, as appears to have occurred in *McCormack v. Garda Síochána Complaints Board* [1997] 2 I.R. 489 and *Dooner v. Garda Síochána Complaints Board* (Unreported, High Court, Finnegan J., 2nd June, 2000). The applicant may offer a different explanation. There is no reason, in logic, to impose on an applicant a criterion of newly discovered fact to justify an application to amend, when an application for an extension of time is not subject to any equivalent condition. This is not to say that the applicant's knowledge of the facts is irrelevant. In some cases, as in *McCormack v. Garda Síochána Complaints Board*, discovery of new facts may be an explanation for the omission to include a ground. In other cases, the applicant may have been aware at all relevant times of the facts relevant to the new ground and this will weigh in the balance against him, without being necessarily conclusive.

[36] None of this is to take away from the fact that an application for an amendment of his grounds for judicial review must explain his failure to include the proposed new ground in his original application. The cases show that the courts are reluctant to admit new grounds which amount to advancing an entirely new cause of action, as in *Ní Eilí v. Environmental Protection Agency* [1997] 2 I.L.R.M. 458, or a challenge to a different decision, as in *Muresan v. Minister for Justice, Equality and Law Reform* [2004] 2 I.L.R.M. 364. The nature of the decision under attack may also be relevant. If it is one which benefits the public at large or a large section of the public, a challenge may have corresponding disadvantages for a large number of people. This may explain why special and stricter statutory rules have been introduced in cases of public procurement, planning and development, and asylum and immigration. The courts will have regard to the public policy considerations which have prompted the adoption of such rules.

[37] Amendment may be more likely to be permitted where, as in *Ó Síodhacháin v. Ireland* (Unreported, Supreme Court, 12th February, 2002), it does not involve a significant enlargement of the applicant's case. To the extent that leave has already been granted, the public interest in the certainty of a decision is already under question. An additional ground may not make any significant difference, particularly if it is based, as in the present case, on a pure matter of law. A court might take a different view, if the new ground were likely to give rise to further exchange of affidavits relating to the facts."

6. In applying these principles the Supreme Court permitted the amendments sought in the case.

7. *Copymoore Limited and Ors v. Commissioners of Public Works of Ireland (No.2)* was an appeal from the refusal of the High Court of a motion to extend the grounds in a judicial review application in a public procurement challenge. The applicant wished to add two new grounds to its pleadings, one relating to the capacity of the respondent and the other to seek damages. It was accepted that the failure to plead the capacity ground arose through a simple error made by the lawyers in drafting the Statement of Grounds. The ground had been clearly argued in previous proceedings but had not formed part of the determination of the Court and the ground had been clearly notified to the respondent in the initial letter prior to the commencement of the proceedings. The damages claim had not been mentioned in either the original letter or the Statement of Grounds for an application for a judicial review but it did appear in the originating Notice of Motion.

8. Charleton J. gave the judgment of the Court. He stated at para. 1:-

"[s]ince at issue is the validity of a decision to limit the available range of suppliers in public procurement for State bodies, any amendment to proceedings must take into account the public interest in the swift disposal of this kind of litigation and would only allow exceptions to the strict time limits involved where good reasons are advanced."

9. He followed the judgment of Fennelly J. in *Keegan v. GSOC* and in particular paras. 32-37 quoted above. Charleton J. noted O.84A, r.8 on amending a statement of grounds whether by specifying different or additional grounds was silent on the criteria to be met before such amendment would be permitted. He held that "good reason" was required to be shown by the moving party. He noted that the term "good reason" in O.84, r.21 was considered by Costello J. in *O'Donnell v. Dun Laoghaire Corporation* [1991] I.L.R.M. 301 at pp. 315-316:-

"[t]he phrase 'good reasons' is one of wide import which it would be futile to attempt to define precisely. However, in considering whether or not there are good reasons for extending the time I think it is clear that the test must be an objective one and the court should not extend the time merely because an aggrieved plaintiff believed that he or she was justified in delaying the institution of proceedings. What the plaintiff has to show (and I think the onus under O.84 r.21 is on the plaintiff) is that there are reasons which both explain the delay and afford a justifiable excuse for the delay. There may be cases, for example where third parties had acquired rights under an administrative decision which is later challenged in a delayed action. Although the aggrieved plaintiff may be able to establish a reasonable explanation for the delay the court might well conclude that this explanation did not afford a good reason for extending the time because to do so would interfere unfairly with the acquired rights (State (Cussen) v Brennan [1981] IR 181).

Or again, the delay may unfairly prejudice the rights and interests of the public authority which had made the ultra vires decision in which event there would not be a good reason for extending the time, or a plaintiff may acquiesce in the situation arising from the ultra vires decision he later challenges or the delay may have amounted to a waiver of his right to challenge it and so the court could not conclude that there were good reasons for excusing the delay in instituting the proceedings."

10. Charleton J. accepted that this applied to the term "good reason" in O.84A and held at para. 11:-

"[t]hus, the applicant had to show that there were reasons which both explained the delay and offered a justifiable excuse. The public contract in issue involved significant liabilities, obligations and expenditure which may raise important factors for a court. The justice of the situation may raise issues such as prejudice to the notice party arising from the expenditure and other undertakings in the contract."

Also, I am satisfied, concepts of the public good may be relevant as being prejudiced by protracted and delayed judicial review. The common good could have a heavy weighting in reviews of this type, reflecting the requirement on any applicant to move rapidly."

11. The Court held that it was not necessary that an applicant show that a factor was either unknown to it or was one which was not in existence in order for time to commence proceedings to be extended or leave to amend existing proceedings to be granted. Instead, a late application or a late amendment to include a new ground not previously pleaded requires "good reasons".

12. The Court permitted the amendment in relation to the capacity of the respondent on the basis that the ground was essential to the disposal of the controversy between the parties, it was not raised unfairly, as the point had been notified at the earliest opportunity, the amendment would not cause any delay and it would not cause any prejudice to the respondents.

13. On the other hand, when asked to amend the pleadings to include a plea for damages the Court held at para. 15:-

"[t]his is effectively a new point. It was not part of the first set of proceedings. It was not notified to the respondents in an initial letter. It does not in anyway arise naturally or by implication out of the existing pleadings. No reason has been advanced as to why this point was not included in the statement to ground the application for judicial review, as opposed to the originating notice of motion, as initially drafted. The award of damages is not essential to the disposal of the aspect of the case which would be in the public interest."

14. Applying these two judgments to the issues in this case, the following points emerge:

- a) The onus is on the applicant to satisfy a court that there were good reasons to explain why the amendment now sought was not set out in the proceedings as originally drafted;
- b) The courts are reluctant to introduce what amounts to a claim for an entirely new relief;
- c) The courts are reluctant to introduce what amounts to a challenge to a different decision;
- d) If the amendment amounts in essence to a question of pure law and if it does not significantly enlarge the case, the amendment is likely to be permitted;
- e) If the amendment is likely to involve new affidavits and new facts then the courts may be less inclined to allow the amendment sought;
- f) An amendment is likely to be permitted if adding the point will assist in the final disposal of the proceedings. Conversely, if it will not, the courts may be less inclined to permit the proposed amendment;
- g) The courts will ask whether the issue arises naturally or by implication out of the existing proceedings. If it does not, the courts may be less inclined to permit the proposed amendment;
- h) If the proposed amendment is likely to cause delay, the courts may be less inclined to permit the proposed amendment. There is a public interest in the swift disposal of public procurement litigation and there are special and stricter statutory rules applying to this area for that very reason;
- i) In considering a proposed amendment the courts will have regard to the prejudice likely to be caused not only to the respondent but also to third parties who may have incurred interests in the intervening period between the impugned decision and the proposed amendment to the existing pleadings; and
- j) If an applicant has acquiesced in the situation arising from the decision he later seeks to challenge, this is a factor a court may take into account in deciding whether or not the plaintiff has established good reasons to justify a court permitting the proposed amendment.

The basis of the applicant's application for leave to amend its Statement of Grounds

15. The application is grounded upon the affidavit of Mr. Mark Regan sworn on 24th June, 2015, the solicitor acting for the applicant in the proceedings. At para. 6 he states:-

"[o]ne of the issues in this case concerns the manner in which the respondent has been and continues to procure interpretation services following the expiration of a previous framework agreement on 31 January 2013 and the expiry of an extension to that framework on the 31 August 2013. The Applicant has alleged that the manner of the procurement carried out by the respondent since that date has involved illegal direct awards".

16. In her Statement of Opposition, the respondent pleaded that she had entered into monthly contracts with the previous Framework members since 31st August, 2013, and she denied that she was engaged in illegal direct awards. In an affidavit sworn subsequently by Mr. John Cunnane on behalf of the respondent on 19th May, 2015, he swore at para. 7 as follows:-

"[a]lthough I do not believe anything turns on the matter, on further inquiry, it is believed that there have not been any formal monthly renewals, and I wish to point out that it is therefore believed that there is an error in the Statement of Opposition in referring to such monthly renewals. It is also not disputed that the individual stations or units in the Respondent requested said services from other service providers not members to the original 2009 Framework, including Accord Translation on a limited number of occasions, from time to time, either through error or on grounds of urgency when members of the said Framework were not in a position to supply these services to the Respondent."

17. On the basis of this averment, the applicant now seeks to amend its Statement of Grounds at para. 34 (reliefs) and paras. 78-80. Three new reliefs are sought in para. 34. They read as follows:-

"(4) A Declaration that by procuring interpretation services since 31 August 2013 without any contractual basis and/or from Accord Translations and/or from Natalia Cotov/Byrne and/or from other service providers and/or on the basis of the framework for the provision of telephone interpretation, face to face interpretation and document translation

services, which commenced on 1 February 2009 and which expired on 31 August 2013, the Respondent has acted unlawfully and in breach of the general principles of European Union law, including the principles of transparency, equal treatment, non-discrimination, competition and good administration.

(5) An Order, including an interlocutory Order, pursuant to Regulation 8 and/or 9 of SI 130/2010, The European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010 (the "2010 Regulations") and/or pursuant to law and/or pursuant to the inherent jurisdiction of this Honourable Court, restraining the Respondent from procuring interpretation services without any contractual basis and/or from Accord Translations and/or from Natalia Cotov/Byrne and/or on the basis of the framework for the provision of telephone interpretation, face to face interpretation and document translation services, which commenced on 1 February 2009 and which expired on 31 August 2013.

(6) Further on or in the alternative, an Order, including an interlocutory Order, pursuant to Regulation 8 and/or 9 of the 2010 Regulations and/or pursuant to law and/or pursuant to the inherent jurisdiction of this Honourable Court, restraining the Respondent, pending the determination of these proceedings and/or pending the re-tender of the services the subject matter of the contract at issue in these proceedings, from procuring interpretation services from entities or persons other than those parties entitled to provide such services on the basis of the provisions of the Department of Justice and Equality's framework agreement for the provision of interpretation services valid from 6 June 2011 to 6 June 2015 or pursuant to such remedy as this Court may deem appropriate and in the public interest."

18. Under "XIII. The Grounds upon Relief is sought", the applicant seeks to make the following amendments to paras. 78-80. I will not reproduce the portions of the existing pleading which it wishes to delete. The amendments are typed in bold.

"78. Since the previous framework agreements under which the Respondent procured interpretation services expired on 31 August 2013, the Respondent has procured services from the service providers which were parties to that expired framework, as well as service providers that were not party to the expired framework, including Accord Translations. The procurement of interpretation services by the Respondent during the period from at least 31 August 2013 to date, has been made without a contractual basis and has resulted in the Respondent making illegal direct awards of contracts. Further or in the alternative, the manner in which the Respondent has procured services since 31 August 2013 has resulted in it making impermissible material changes to public contracts. Any continuation of this method of procurement will amount to new direct illegal awards of public contracts.

79. In the premises, the Respondent has breached, and continues to breach, the general principles of European Union law, including the principles of transparency, equal treatment, non-discrimination, competition and good administration.

80. Consequently, the Respondent is not permitted to continue to procure services without a contractual basis. Further, it is not permitted to procure services from Accord Translations, which was not even a party to the previous framework or, to the Applicant's knowledge, any contract with the Respondent. Further, the Respondent is not permitted to use the expired frameworks. Pending the determination of the within proceedings, the Respondent ought to procure any required interpretation services by utilising the DOJ Framework or pursuant to such remedy as this Court by deem appropriate and in the public interest."

19. The affidavit sworn on behalf of the applicant to verify the facts set out in the Statement of Grounds was sworn by Mr. Agim (Jimmy) Gashi, a director of the applicant, on 19th March, 2015. At para. 17 of his affidavit he stated as follows:-

"17. In the interim, the previous framework agreements of the Respondent for interpretation services having expired in August 2013, the Respondent has continued to procure services from service providers which were party to the previous framework agreements. While Word Perfect had been a third ranked provider for the Northern region and the fourth ranked provider for the Dublin and Southern regions in the previous framework, it has only very rarely been asked by the Respondent to provide interpretation services since August 2013. To my knowledge, Forbidden City Ltd t/a Translation.ie has been given the largest amounts of interpretation work during this period, with some interpretation work also given to Language Training and Translating Limited t/a Context as well as Ms Natalia Cotov t/a Accord Translations, respectively, all of which are tenderers who have been selected in the current process..."

19. I say and believe and am advised that since August 2013, the Respondent has been either engaging in illegal direct awards of services contracts and/or has unlawfully materially amended previous contracts. In any event, I am advised that the Respondent is breaching the public procurement rules in the manner in which it is currently procuring interpretation services."

20. It is clear from the applicant's Statement of Grounds and the verifying affidavit of Mr. Gashi of 19th March, 2015, that the applicant was aware that the 2009 Framework expired on 31st January, 2013, that it was extended by agreement of the parties to 31st August, 2013, and that the respondent continued to procure translation services thereafter with no formal extension of the Framework Agreement. The applicant provided translation services for the respondent on occasion since August, 2013. To Mr. Gashi's knowledge three other service providers provided interpretation services for the respondent between 31st August, 2013, and 19th March, 2015, one of whom was Ms. Natalia Cotov t/a Accord Translations. Mr. Gashi swore that he had been advised that the respondent was breaching the public procurement rules in the manner in which it was then procuring interpretation services and pleaded that it was engaging in illegal direct awards of service contracts.

The submissions

21. It is said that the first time the applicant became aware of the fact that the respondent was making what it terms illegal direct awards to parties who were not parties to the 2009 Framework Agreement and without a contractual basis was following the receipt of Mr. Cunnane's affidavit of 19th May, 2015. The applicant's case is that the award of any contracts to any party whether or not they were a party to the expired 2009 Framework Agreement amounted to an impermissible breach of the public procurement rules. The argument advanced is that this new information amounts to a second ground for saying that the awards made during the interim period were illegal. It is said that the applicant did not know that awards were being made to parties other than the parties to the 2009 Framework Agreement prior to a receipt of the affidavit of 19th May, 2015. Therefore it could not have pleaded this ground prior to 19th May, 2015.

22. The averment at para. 17 of Mr. Gashi's affidavit of 19th March, 2015, that to his knowledge, three other parties, including Accord Translations, were given translation work post-August, 2013 is acknowledged by Mr. Regan in his affidavit grounding the

application before the Court. Mr. Regan states at para. 16 of his affidavit, sworn on 24th June, 2015, that:-

"the confirmation by the Respondent of this fact itself gives rise to a breach and/or further particulars of breaches of the public procurement rules, of which the Applicant could not have had any knowledge."

He also points out that the provision of services by other unnamed services providers is an entirely new development of which the applicant had no knowledge.

23. The respondent argued that the affidavit of Mr. Cunnane of 19th May, 2015, did not create any need to amend the Statement of Grounds as it dealt with facts already known to the applicant. She also submitted that the applicant was now seeking to challenge decisions to award contracts other than the decision the subject matter of these proceedings. It was submitted that this is impermissible, will greatly widen the factual scope of the proceedings and will lead to inevitable delays and extra expense. This will prejudice the respondent. Furthermore, the case in relation to the decision of 18th February, 2015, can be determined without the amendments, and thus the proposed amendments will not assist in the final disposal of the proceedings.

24. In response, Mr. Gashi averred that he was not sufficiently certain to instruct the applicant's solicitors to include the particulars of the breach now sought to be incorporated into the Statement of Grounds until he read Mr. Cunnane's affidavit. He said that his concerns prior to 19th May, 2015, had been based upon suspicions rather than knowledge. He said that when interpreters applied to the applicant for a job their curricula vitae would typically refer to other interpretation and translation entities for which they had previously worked. From reviewing curricula vitae sent to the applicant he noticed that on a few occasions job applicants had referred to working with Ms. Natalia Cotov t/a Accord Translations carrying out interpretation work at Garda stations. He said that while he was suspicious as to whether or not An Garda Síochána may have been procuring interpretation services directly from Accord Translations, since interpretation services at Garda stations can be requested not only by An Garda Síochána but also by a solicitor representing his/her client, his "*suspicion that An Garda Síochána were using Accord were simply that, suspicions, and not firm factual information.*"¹

25. The applicant also argues that the decision to award contracts in the period between 31st August, 2013, and 17th February, 2015, is already part of its case, that the decisions are connected to the decision of 18th February, 2015, that it would be uneconomic to force the applicant to challenge these decisions in different proceedings and that the amendments do not involve the addition of a new cause of action but rather the further particularisation of an existing cause of action.

Discussion

26. In this application, the applicant argues that as a result of the filing of the affidavit of Mr. Cunnane of 19th May, 2015, the applicant became aware of the fact that there were in fact no monthly renewals of the contracts, contrary to what was set out in the Statement of Opposition. However, the applicant had no reason to believe that there were monthly renewals of the contracts when it instituted its proceedings. However it knew from its own knowledge that the respondent was procuring interpretation services subsequent to the expiry of the 2009 Framework Agreement, given the fact that it provided translation services on occasion for the respondent in the intervening period after the extension of the Framework had expired. The fact that the respondent erroneously pleaded in his Statement of Opposition that there were such monthly renewals and then subsequently corrected the position does not alter this fact. Whether there were or were not any formal monthly renewals of contracts is not relevant to the applicant's case that any such procurement, whether pursuant to monthly contracts or otherwise, was illegal. Specifically, it does not mean that subsequent to 19th May, 2015, the applicant was presented with new information which had not previously been available to it. The factual position was corrected and reflected its state of knowledge when it instituted the proceedings. In my opinion the delivery of Mr. Cunnane's affidavit of 19th May, 2015, does not afford good reason to make any amendment to the Statement of Grounds in relation to this factual matter.

27. It is quite clear that at all material times up to 19th March, 2015, the applicant was aware of the fact that the respondent was making direct awards to various service providers, including the applicant, subsequent to the expiration of the 2009 Framework Agreement and not on the basis of the Department of Justice and Equality's Framework Agreement. Any case which it wished to make in respect of what it claims were illegal direct awards of contracts or the provision of services without a contractual basis are arguments which it should have advanced when it commenced these proceedings.

28. If the amendments sought are allowed they are likely to involve new affidavits and new facts in order to deal with these alleged indirect illegal contracts. There is likely to be a considerable delay in progressing this aspect of the case. The applicant has indicated that it would require discovery before it can identify all of the contracts which it alleges were granted in breach of the requirements in relation to public procurement procedures.

29. Insofar as the applicant seeks to challenge the procedures adopted by the respondent in the interim period, it appears that the applicant acquiesced in the situation. It was fully aware of the fact that the 2009 Framework Agreement had expired, that the respondent was continuing to procure services and it in fact on occasion provided such services.

30. The applicant sought an injunction restraining the respondent from providing translation services pursuant to the expired 2009 Framework Agreement and an order directing it to utilise a framework agreement entered into by the Department of Justice. In an affidavit sworn in respect of that application, Mr. Gashi stated on 6th May, 2015, that even though Accord Translations was not on the original Framework he was concerned that it had been providing interpretation services to the respondent. He stated same in his affidavit of 8th May, 2015.

31. The applicant applied for an injunction restraining the respondent from procuring interpretation services on the basis of the 2009 Framework Agreement and an order restraining the respondent pending the determination of the proceedings and/or pending the tender of these services the subject matter of the contract at issue in the proceedings from procuring interpretation services other than on the basis of the provisions of the Department of Justice and Equality's Framework Agreement for the provision of interpretation services. McGovern J. delivered his judgment on 19th June, 2015. He noted that the basis for the claim was that the respondent had been making illegal direct awards of contracts since the expiration of the 2009 Framework Agreement in 2013. McGovern J. applied the principles set out in *Campus Oil v. Minister for Industry (No. 2)* [1983] I.R. 88 and held that the applicant had not met the test for an interlocutory injunction. He based his decision, *inter alia*, on the fact that the applicant had been guilty of delay. He noted that the applicant had been aware of the alleged illegality of which it complained since January, 2013 but the Notice of Motion grounding the application was only filed on 6th May, 2015. He also noted that the Department of Justice and Equality's Framework, which commenced in June, 2011, expired on 5th June, 2015, prior to the delivery of his judgment. These observations apply equally to the present application.

32. It is also important to record that Accord Translations withdrew from the tender procedure on 11th June, 2015.

33. In light of the above, has the applicant advanced good reasons to justify the amendments it now seeks to make to the Statement of Grounds? Applying the principles set out in para. 14 above, each of the proposed amendments will be considered in turn.

Paragraph 34(4)

34. It is clear that the applicant could have pleaded this paragraph when it brought these proceedings with the exception of the reference to other service providers. I do not accept that Mr. Gashi did not have the sufficient knowledge to instruct his solicitors to make the plea now sought to be made against Accord Translations and Ms. Natalia Cotov. At para. 17 of his affidavit grounding the proceedings he clearly swore that to his knowledge some interpretation work was been given to Ms. Natalia Cotov t/a Accord Translations. I am not satisfied that the applicant has advanced good reason such as to persuade me to allow the amendment proposed.

35. It is clear that the applicant knew that, upon its case, interpretation services were being procured without any contractual basis. The only new information available to the applicant which arises out of Mr. Cunneane's affidavit of 19th May, 2015, and which was not previously known to the applicant, was the fact that other unnamed service providers who had not qualified for the 2009 Framework Agreement were requested to provide services in the interim period. I am not satisfied that issues concerning the legality of the decisions to award these unnamed service providers an unknown number of individual contract arise naturally or by implication out of the existing proceedings. They do not assist in determining the issues raised concerning the decision of 18th February, 2015.

36. The existing proceedings are essentially concerned with the decision of 18th February, 2015. Insofar as the applicant urges they extend further than this it is advanced upon two grounds: (1) that there was illegal direct procurement of services following the expiration of the 2009 Framework Agreement and (2) there was a direct award of contracts to Ms. Natalia Cotov. The particular involvement of Ms. Cotov is relevant to the challenge to the decision of 18th February, 2015. There is no direct challenge to the procurement decisions made by the respondent for the provision of translation services between 31st August, 2013, and 18th February, 2015, based upon the procuring of services from a party or parties who is not previously a party to the 2009 Framework Agreement. Thus the introduction of these other unnamed service providers into the proceedings will not assist in the resolution of the proceedings. Furthermore the introduction of this claim amounts to the introduction of a new claim in the proceedings and the challenge to new decisions not the subject of challenge in the existing proceedings. Most importantly, in my opinion, it will lead to a very great expansion of the evidence required to be considered by the Court at the hearing of this action. This will inevitably result in a considerable delay in the proceedings. The applicant accepted that before it could particularise the claim it would require discovery from the respondent. I am conscious of the fact that the courts have been reluctant to introduce what amounts to a claim for an entirely new relief or to introduce what amounts to a challenge to a different decision. In my opinion the introduction of this ground insofar as it relates to the procurement of interpretation services since 31st August, 2013, from other service providers amounts to both a claim for an entirely new relief and a challenge to new decisions. It is likely to cause delay and to add to the expense of the proceedings. It will not assist in the disposal of the existing claim. For these reasons I refuse to permit this amendment.

Paragraph 34(5)

37. This amendment seeks an order restraining the respondent from procuring interpretation services without any contractual basis and/or from Accord Translations and/or from Ms. Natalia Cotov and/or on the basis of the 2009 Framework Agreement. In my opinion this amendment has been overtaken by events. As I have explained above, I am not satisfied that the applicant has made out good reasons for advancing an amendment that the respondent procured interpretation services "*without any contractual basis*" since 31st August, 2013. Accord Translations is no longer participating in the tender procedure. McGovern J. refused the applicant an order restraining the respondent from procuring interpretation services on the basis of the 2009 Framework Agreement. The only question therefore is whether or not the applicant should be permitted to amend its Statement of Grounds to seek a permanent injunction restraining the respondent from procuring interpretation services as set out at para. 34(5). In my opinion it was not advanced any good reasons why the Court should permit it to amend the proceedings in this way. No reason has been advanced as to why this pleading could not have been included in the Statement of Grounds in March, 2015. Furthermore, given the developments in the case it would appear to be moot. I refuse leave to amend the Statement of Grounds on the basis on para. 34(5).

Paragraph 34(6)

38. This relief has already been rejected on an interlocutory basis by McGovern J. on 19th June, 2015. As he pointed out in his judgment, the Department of Justice and Equality's Framework Agreement has in fact expired. I therefore refuse leave to amend upon these grounds. Furthermore, this is a relief that could have been included in the proceedings as originally drafted and the applicant has failed to explain either why it was not pleaded at that time or to establish good reasons why it ought to be permitted to amend its proceedings now to include the late plea.

Paragraph 78

39. I have already set out my reasons for concluding that the applicant has not advanced good reasons to justify the amendment of the Statement of Grounds to plead that the respondent procured translation services after the expiration of the 2009 Framework Agreement from parties, including Accord Translations, who were not parties to that Framework Agreement. I have also indicated that I do not accept that there are good reasons to amend the Statement of Grounds to include a plea that the procurement of these translation services during the interim period was "*without a contractual basis*". For the reasons advanced I therefore conclude that the applicant has failed to advance good reasons for the amendments sought to be made in para. 78 and I refuse leave to amend the paragraph as requested.

Paragraph 79

40. No reason at all was advanced by the applicant as to why this plea could not have been made in March, 2015. It is not related to any factual matters set out in Mr. Cunneane's affidavit of 19th May, 2015. As the onus is on the applicant to satisfy the Court that there is good reason why an amendment should be permitted the applicant has failed in this regard. It is therefore not necessary to consider whether, applying the other principles set out in para. 14 above, it would be appropriate to permit this amendment. I refuse this on the basis that the applicant has not established any good reasons to permit this amendment.

Paragraph 80

41. This proposed amended paragraph has largely been overtaken by events. Accord Translations has withdrawn from the tender process. The applicant has been refused its motion seeking various interlocutory injunctions. The Department of Justice and Equality's Framework Agreement has expired. I have already held that the applicant has not advanced good reasons for permitting an amendment to the Statement of Grounds referring to the procurement of services by the respondent "*without a contractual basis*". This leaves the general plea "*pursuant to such a remedy as this court may deem appropriate and in the public interest*". There has been no explanation as to why this plea was not included in the original Statement of Grounds and no good reason has been advanced for the amendment of the Statement of Grounds to include this plea. Accordingly I refuse the application to amend para. 80 of the proposed amended Statement of Grounds.

Conclusions

42. Applying the principles set out in the judgments in *Keegan v. Garda Síochána Ombudsman Commission* and *Copymore Limited & Ors v. Commissioner of Public Works of Ireland (No. 2)* to the pleadings in this case, I find that the applicant has failed to establish that there are good reasons to permit any of the proposed amendments in this case and I therefore refuse the relief sought.

¹ Affidavir of Mr. Agim (Jimmy) gashi, sworn on 2nd October, 2015, at para. 8.