Neutral Citation: [2014] IEHC 306

THE HIGH COURT

COMMERCIAL

[2014 No. 177 JR]

[2014 No. 52 COM]

IN THE MATTER OF COUNCIL DIRECTIVE 2004/17/EC AND IN THE MATTER OF THE EUROPEAN COMMUNITIES (AWARD OF CONTRACTS BY UTILITY UNDERTAKINGS) REGULATIONS 2007 (S.I. 50 OF 2007) AND IN THE MATTER OF COUNCIL DIRECTIVE 92/13/EEC AND IN THE MATTER OF THE EUROPEAN COMMUNITIES (AWARD OF CONTRACTS BY UTILITY UNDERTAKINGS) (REVIEW PROCEDURES) REGULATIONS 2010 (S.I. 131 OF 2010)

BETWEEN:

OCS ONE COMPLETE SOLUTION LIMITED

APPLICANT

AND

THE DUBLIN AIRPORT AUTHORITY PLC

RESPONDENT

AND

MAYBIN SUPPORT SERVICES (IRELAND) LIMITED

NOTICE PARTY

JUDGMENT of Mr. Justice Barrett delivered on the 30th day of May, 2014

Background

1. In these proceedings the applicant, OCS One Complete Solution Limited is seeking review of the decision of the respondent, Dublin Airport Authority, to award to the notice party, Maybin Support Services (Ireland) Limited, a contract that was the subject of a procurement process. The contract is for the provision of certain site services at Dublin Airport. OCS has brought its application for review of the award decision pursuant to the European Communities (Award of Contracts by Utility Undertakings) (Review Procedures) Regulations 2010, better known, and referred to in this judgment, as the Remedies Regulations. As part of the application it is seeking a number of reliefs, in particular orders of the court setting aside and/or varying the award decision pursuant to Regulation 9(1) of the Remedies Regulations. OCS has asserted that, pursuant to the Remedies Regulations, the issuing of the within proceedings resulted in an automatic suspension which precludes DAA from entering into the contract that is the subject of the proceedings with Maybin. The DAA has brought the instant application seeking, amongst other matters, an order lifting or discharging any applicable suspension of (a) the procedure for the award of the contract the subject of the proceedings to Maybin and/or (b) implementation of the decision of DAA to award the said contract to Maybin, insofar as such a discharge is required, not least though not only because of OCS's continuing failure to provide an undertaking in damages in order to benefit from any continuation of any suspension arising.

Issues arising

2. During the course of the hearings it became apparent that there are a number of issues that arise to be answered by the court in its judgment: first, whether the issuing by OCS of its proceedings resulted in an automatic suspension which precludes DAA from entering into the disputed contract with Maybin; second, if there is such an automatic suspension, whether it can be lifted on this interim application by DAA; third, if the suspension can be lifted, which party is subject to the burden of proof and what is the appropriate test to determine whether it should be lifted; and fourth, what is the result of the application of that test?

The Remedies Regulations

3. The Remedies Regulations were made pursuant to section 3 of the European Communities Act, 1972, by the late Mr. Brian Lenihan, TD, in his capacity as Minister for Finance, to give effect to Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (O.J. L76, 23.3.1992, p.14), as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (O.J. L335, 20.12.2007, p.31). As the long title of Directive 92/13/EEC suggests, the Regulations cover procurement procedures of entities operating in the water, energy, transport and postal sectors. In a nutshell, the Regulations strengthen the remedies available to candidates and tenderers who consider that their rights have been infringed in the award of contracts. They improve the opportunities for unsuccessful tenderers to challenge unlawful awards and increase the possible penalties on contracting entities for making such awards. In the case of a contract awarded in serious contravention of the rules, the court has the power to declare the contract ineffective. One of the key provisions in the Remedies Regulations is Regulation 8. It is worth quoting Regulation 8(1) and (2):

> *"Application to Court*
>
> *8. (1) An eligible person may apply to the [High] Court –*
>
> *(a) for interlocutory orders with the aim of correcting an alleged infringement or preventing further damage to an eligible person's interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of the contract concerned or the implementation of any decision taken by the contracting entity,*

(b) for review of the contracting entity's decision to award the contract to a particular tenderer or candidate.

(2) If a person applies to the Court under paragraph (1), the contracting entity shall not conclude the contract until –

(a) the court has determined the matter, or

(b) the Court gives leave to lift any suspension of a procedure, or

(c) the proceedings are discontinued or otherwise disposed of…".

4. The court entertains no doubt that as a result of Regulation 8 the issuing by OCS of its proceedings resulted in an automatic and continuing suspension, at least for a time, that has to now precluded DAA from concluding the disputed contract with Maybin. Where the dispute between the parties centres is that OCS maintains that DAA is precluded from entering into the disputed contract until such time as the review of the award decision is completed. Consequently, OCS maintains that the instant application by DAA is entirely misfounded in that the suspension cannot be lifted until the determination of the application by OCS for review of the award decision. As is clear from the reliefs that DAA has sought in this application, it does not accept this reading of the above provisions. So what is the correct interpretation to be ascribed to the above-mentioned provisions? To arrive at an answer, the court must have regard to the comprehensive rules of statutory interpretation that arise for it to apply in this context.

Principles of statutory interpretation

5. It appears to the court that when confronted with an issue of interpretation concerning one of the ever more numerous pieces of domestic legislation that have their genesis in European Union law, the starting-point to statutory interpretation should and must be what European Union law requires, with all other rules of statutory interpretation necessarily being viewed in the context of, and subject to, these European Union law requirements. One could perhaps see this as a facet of the supremacy of European law, as identified by the European Court of Justice a half-century ago in the context of the laws of the then European Economic Community, in *Costa v. ENEL* [1964] ECR 585, and accepted by the Irish courts in several cases and on somewhat varying grounds as a rule forming part of Irish law, commencing with the ruling of Costello J. in *Pigs and Bacon Commission v. McCarron* [1981] 1 I.R. 451. Notably, in this regard, in recent cases such as *Melloni v. Ministerio Fiscal* C-399/11 [2013] 2 CMLR 43 and *Åklagaren v. Hans Åkerberg Fransson* C-617/10 [2013] 2 C.M.L.R. 46, the European Court of Justice has referred, at paras. 59 and 29 respectively, to "*the principle of primacy of EU law*" and "*the primacy, unity and effectiveness of European Union law*", thereby confirming the transmutation of the longstanding supremacy of Community law into the supremacy of European Union law. However, in truth the interpretive genuflection by the Irish courts towards European Union law in the context of measures that have a European-level provenance can also be viewed less as an aspect of the supremacy of European Union law and more as a particular, though particularly important, dimension of the general and longstanding rule of statutory interpretation whereby the Oireachtas, when it enacts domestic legislation, is presumed to intend to comply with its international legal obligations. This presumption was referred to by both Henchy J. and McCarthy J. in the Supreme Court decision in *O'Domhnaill v. Merrick* [1984] I.R. 151 and their observations in this regard are worth quoting. Thus, in the context of the Statute of Limitations, 1957, Henchy J. states, at 159, that:

> *"Apart from implied constitutional principles of basic fairness of procedures, which may be invoked to justify the termination of a claim which places an inexcusable and unfair burden on the person sued, one must assume that the statute was enacted (there being no indication in it of a contrary intention) subject to the postulate that it would be construed and applied in consonance with the State's obligations under international law, including any relevant treaty obligations."*

6. In a similar vein, McCarthy J. writes, at 166, that:

> *"I accept, as a general principle, that a statute must be construed, so far as possible, so as not to be inconsistent with established rules of international law and that one should avoid a construction which will lead to a conflict between domestic and international law."*

7. The difference between this traditional presumption and the applicable European Union law requirements is perhaps the depth and detail of the latter requirements and of course the fact that conformity with European Union law interpretive requirements is demanded of the court in cases where European Union law comes into play.

8. *Requirements of European Union law.* A central principle of European Union law is that national courts are required to interpret national law in the light of directives, including any directive the time limit for implementation of which has expired but which remains unimplemented in a particular Member State. The case-law in this area began with *Van Colson and Kamann v. Land Nordrhein-Westfalen* [1984] ECR 1891. In that case the European Court of Justice was concerned with the application of the Equal Treatment Directive. However, for present purposes what are of interest are the Court's observations as to the interpretive obligations of domestic courts, the European Court of Justice stating in this regard, at paras. 26 and 28 that:

> *"26…[I]n applying the national law and in particular the provisions of a national law specifically introduced in order to implement Directive No. 76/207, national courts are required to interpret their national law in the light of the wording and the purpose of the Directive in order to achieve the result referred to in the third paragraph of Article 189 [now Article 249]…*
>
> *28. It is for the national court to interpret and apply the legislation adopted for the implementation of the directive in conformity with the requirements of Community law, in so far as it is given discretion to do so under national law."*

9. The application of this principle to circumstances where a directive ought to have been but has not yet been implemented was made clear by the European Court of Justice in *Konstantinos Adeneler et al. v. Ellinikos Organismos Galaktos (ELOG)* C-212/04 [2006] ECR I-6057. However, in terms of strict chronology, the next case of significance, indeed the seminal case in this area is the decision of the Court of Justice in *Marleasing SA v. La Comercial Internacionale de Alimentation SA* C-106/89 [1990] ECR I-4135. In that case the issue referred to the European Court of Justice was, in summary, whether a national court that hears a case which falls within the scope of a directive, there Directive 68/151, is required to interpret national law in the light of the wording and the purpose of that directive. Per the European Court of Justice, at para. 8 of its judgment:

> *"[T]he Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying national law, whether the provisions in question were adopted before or after the*

directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 [now Article 249] of the Treaty."

10. A number of supplementary points may be made in this regard. First, it was clarified in *Marleasing* that the harmonious interpretation obligation applies even to legislation that pre-dates a directive and has no ostensible connection with same. Later cases such as *Pfeiffer v. Deutsches Rotes Kreuz, Krieversband Waldshut eV* (Joined Cases C-397/01 to C/403/01) [2004] ECR I-8835 have made clear that the obligation applies to the entirety of a national legal system. Second, in *Kolpinghuis Nijmegen* Case 80/86 [1987] ECR 3969, the Court indicated that the principle of harmonious interpretation cannot result in aggravated criminal liability for an individual. Third, when it comes to non-criminal liability it appears from the opinion of the Advocate General in *Centrosteel v. Adipol* C-456/98 [2000] ECR I-6007 that a directive may well lead to the imposition upon an individual of civil liability or a civil obligation which would not otherwise have existed. Fourthly, and potentially of great significance in the instant proceedings, is the fact that the obligation of harmonious interpretation does not require a *contra legem* interpretation of national law. This has been made clear in a number of cases such as *Paola Faccini Dori v Recreb Srl* Case C-91/92 [1994] ECR I-3325, *El Corte Inglés v. Cristina Blásques Rivero Case* C-192/94 [1996] ECR I-1281, *Evobus Austria v. Niederösterreischer Verkehrsorgination* C-111-97 [1998] ECR I-5411, *Alcatel Austria v. Bundesministerium für Wissenschaft und Verkehr* C-81-98 [1999] ECR I-7671, and IMPACT v. Minister for Agriculture and Food and Others Case C-268/06 [2008] ECR I-2483. However, there have also been cases such as *Pupino* Case-C 105/03 [2005] ECR I-5285 where, although the European Court of Justice has deferred to the ultimate assessment of the national court, it has nonetheless suggested that an interpretation in accordance with European Union law appears possible. More recently, in the *IMPACT* case, a reference under Article 234 of the EC Treaty (now Article 267 of the Treaty on the Functioning of the European Union) from the Irish Labour Court, the European Court of Justice returned again to the interpretive obligation that arises for national courts under European Union law and summarised the applicable principles, stating at paras 98 to 101:

"[W]hen applying domestic law and, in particular, legislative provisions specifically adopted for the purpose of implementing the requirements of a directive, national courts are bound to interpret that law, so far as possible, in the light of the wording and the purpose of the directive in order to achieve the result sought by it and thus to comply with the third paragraph of Article 249….The requirement that national law be interpreted in conformity with Community law is inherent in the system of the EC Treaty, since it permits national courts, for the matters within their jurisdiction, to ensure the full effectiveness of Community law when they determine the disputes before them….However, the obligation on a national court to refer to the content of a directive when interpreting and applying the relevant rules of domestic law is limited by general principles of law, particularly those of legal certainty and non-retroactivity, and that obligation cannot serve as the basis for an interpretation of national law contra legem….The principle that national law must be interpreted in conformity with Community law nonetheless requires national courts to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by domestic law, with a view to ensuring that the directive in question is fully effective and achieving an outcome consistent with the objective pursued by it…".

11. It is perhaps worth noting that the obligation of national courts to interpret national law, so far as possible, in conformity with European Union law, has been affirmed at least twice in the recent past by the Supreme Court. Thus in *Albatros Feeds v. Minister for Agriculture and Food* [2007] 1. I.R.221, Fennelly J. observes at 243ff., that:

"[It is] perfectly clear that the Court is under an obligation to interpret national law, so far as possible, in the light of the Community provisions it is designed to implement. The national court is subject to the obligation of 'conforming interpretation' as the [European Court of Justice]…described it in its judgment in…Pupino".

12. Again, in the more recent judgment of *Eircom Limited v. Commission for Communications Regulation* [2007] 1 IR 1 at 24, McKechnie J. observed that the Supreme Court, and the same is true of this Court, was and is obliged to interpret national regulations which "*were passed in order to incorporate…directives into national law, in a manner, so far as is possible, in conformity with the directives*".

13. The various European Union law requirements mentioned above might usefully be summarised as follows. First, national courts are required to interpret national law in the light of directives, including any directive the time limit for implementation of which has expired but which remains unimplemented in a particular Member State. Second, this obligation applies even to legislation that pre-dates a directive and has no ostensible connection with same. Third, the obligation applies to the entirety of a national legal system. Fourth, the principle of harmonious interpretation cannot result in aggravated criminal liability for an individual. Fifth, the application of harmonious interpretation may result in the imposition of civil liability on a private party. Sixth, the obligation as to harmonious interpretation does not require a *contra legem* interpretation of national law. Seventh, not mentioned above, though extant under Article 4(3) of the Treaty on European Union, and affirmed by Fennelly J. in *Dellway Investments v. NAMA* [2011] 4 I.R. 1, is the court's obligation to apply the principle of sincere cooperation whereby the European Union and the Member States are each obliged, amongst other matters, to ensure fulfilment of obligations arising from the acts of European Union institutions, to facilitate the achievement of the European Union's objectives and to refrain from any measure which could jeopardise the attainment of the European Union's objectives. Any consideration of the traditional principles of statutory interpretation must, in cases that are concerned with the interpretation of domestic laws that have their provenance in European Union law, be done in the context of, and in compliance with, these requirements of European Union law.

14. *The traditional rules of statutory interpretation.* There are two principal canons of interpretation that have been adopted by modern Irish courts, *viz.* the literal approach and the schematic or teleological approach. At this time the interpretation of legislation in Ireland is also governed by the Interpretation Act 2005.

15. *Literal interpretation:* The literal interpretation is the modern articulation of the rule that received its classic expression in the judgment of Tindal C.J. in the *Sussex Peerage* case (1844) 11 C1 & Fin 85, as well as a more recent reformulation in the judgment of Budd J. in *Rahill v. Brady* [1971] I.R. 69 at 86 to the effect that:

"In the absence of some special technical or acquired meaning, the language of a statute should be construed according to its ordinary meaning and in accordance with the rules of grammar. While the literal construction generally has prima facie preference, there is also a further rule that in seeking the true construction of the section of an Act the whole Act must be looked at in order to see what the objects and intention of the legislature were; but the ordinary meaning of the words should not be departed from unless adequate grounds can be found in the context in which the words are used to indicate that a literal interpretation would not give the real intention of the legislature."

16. It is clear from the judgment of Budd J. that an absolute literal approach has never been favoured by the Irish courts. Historically,

to avoid absurdities and inconsistencies of interpretation, the literal rule operated in combination with the 'golden rule' and the 'mischief rule'. In his judgment in *The People (Attorney General) v. McGlynn* [1967] I.R. 232, Budd J. succinctly describes the golden rule in the following terms:

> *"[T]he golden rule in the construction of statutes is that the words of a statute must prima facie be given their ordinary meaning. That literal construction has, however, but prima facie preference. As Lord Shaw said in Shannon Realties v. St. Michel (Ville de)…'where alternative constructions are equally open, that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to be regulating; and that alternative is to be rejected which will introduce uncertainty, friction or confusion into the working of the system".*

17. The other traditional rule of interpretation which allayed the risk of absurdity that a too-rigid application of the literal rule might otherwise yield was the 'mischief rule'. This received its classic formulation in *Heydon's* case (1584) 3 Co Rep 7a. It assumed that the legislature does nothing without a reason, and so that there is a reason for the passing of every Act and every provision within it; this reason is the legal or social mischief that the Act or a provision therein is intended to address: grasp that mischief and you grasp what the Act or provision is intended to mean. Originally the mischief rule was formulated by common lawyers suspicious of Parliamentary designs on 'our lady the common law'. A possible deficiency in the rule, at least in modern times, is that statute is not now always intended to cure a mischief; sometimes it is intended to advance a positive social cause. It might also be considered that the very term 'mischief' has a slightly archaic ring to the modern ear. Even so, as a shorthand term it has a longstanding meaning and thus one still finds references to the 'mischief' against which particular measures are directed in recent cases such as *DPP (Ivers) v. Murphy* [1999] 1 I.R. 98, and *An Blascaod Mor Teo v. Commissioners of Public Works* [2000] 1 I.R. 1. So to some extent, even if only as a verbal formula, the term 'mischief' continues to reverberate within the halls of justice, albeit that, as is considered below, the rule from which the term derives has in practice been largely, if not entirely, subsumed into the schematic or teleological approach to statutory interpretation that is often employed by contemporary Irish courts.

18. One still finds the literal approach to statutory interpretation hallowed in case-law as the primary principle of statutory interpretation and in one sense it is: the courts cannot but read legislation literally in the first instance. Thus, for example, in *Cork County Council v. Whillock* [1993] 1 I.R. 231 at 237, Flaherty J. states that:

> *"[I]t is clear to me that the first rule of construction requires that a literal construction must be applied. If there is nothing to modify, alter or qualify the language which the statute contains, it must be construed in the ordinary and natural meaning of the words and sentences…"*

19. While this may be so, what must be remembered is that when it comes to measures that derive from European Union law, the literal rule always operates hand in glove with the European Union law principle of harmonious interpretation, with the latter enjoying primacy. In the context of such measures, if 'the ordinary and natural meaning of words and sentences' yields a result that is contrary to European Union law then the courts must seek to find a meaning that conforms with European Union law.

20. *Schematic or teleological approach:* Whereas, historically, the risk of absurdity was mitigated by means of the golden and mischief rules, in recent times the preference, certainly in Ireland, has been simply to refer to the scheme and purpose of a particular statute, rather than to the golden or mischief rules. An early example of this approach is evident in *Frascati Estates Limited v. Walker* [1975] I.R. 177. However, perhaps the classic Irish case in which the approach is employed is that of *Nestor v. Murphy* [1979] I.R. 326 in which, in the course of a particularly succinct judgment, Henchy J. states, at 329, that:

> *"To construe the sub-section [at issue] in the way proposed on behalf of the defendants would lead to a pointless absurdity…[and] would be outside the spirit and purpose of the Act. In such circumstances we must adopt what has been called a schematic or teleological approach. This means that s.3(1) must be given a construction which does not overstep the limits of the operative range that must be ascribed to it, having regard to legislative scheme as expressed in the Act of 1976 as a whole."*

21. Notably, statute-law in the form of s.5(1) of the Interpretation Act 2005 allows the courts to depart from the literal meaning in circumstances where, amongst other matters, the result would be absurd, providing that:

> *"In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction) –*
>
> *(a) that is obscure or ambiguous, or*
>
> *(b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of…in the case of an Act [the Oireachtas or the parliament concerned], the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole."*

22. One issue that arises in this context is determining when a particular interpretation would, to borrow from the phraseology of Henchy J. in Nestor, constitute a "*pointless absurdity*" or, to use the wording of the 2005 Act is "*on a literal interpretation…absurd*". Denham J., as she then was, goes some way towards addressing this issue in her judgment in *DPP (Ivers) v. Murphy* [1999] 1 I.R. 98 at 111, stating that:

> *"The rules of construction are part of the tools of the court. The literal rule should not be applied if it obtains an absurd result which is pointless and which negates the intention of the legislature."*

23. However, Denham J. couches this observation in terms which urge due deference by judges to legislators, stating that:

> *"No method of interpretation may be such as to encroach on the constitutional role of the Oireachtas as the legislative organ of the State….If the purpose of the legislature is clear and may be read in the section without re-writing the section then that is the appropriate interpretation for the court to take."*

24. The deference that unelected judges manifest towards elected legislators is apparent in the earlier case of *Rafferty v. Cowley* [1984] ILRM 350, in which Murphy J. declined to read a particular exception into certain legislation on the grounds that had the Oireachtas wanted to create such an exception it could readily have done so. However, such deference might perhaps be contended to sit somewhat uneasily with the European Union law principle of harmonious interpretation which requires of national judges that they act pro-actively to interpret domestic legislation that derives from European Union law in such a way as to conform with

European Union law.

25. Having considered the applicable rules of statutory interpretation, the court turns now to apply those rules in the context of the issues raised by the parties.

Purpose of Remedies Regulations and related European Union measures
26. The objective of the Remedies Regulations is clear: as their preamble states, they were introduced "*for the purpose of giving effect to Council Directive 92/13/EEC, as amended by Directive 2007/66/EC*". In turn one of the predominant purposes of Directive 2007/66/EC was to strengthen pre-contractual remedies for breaches of procurement law. Counsel for OCS has pointed to a number of sources in support of this contention, including the European Commission's Explanatory Memorandum (SEC(2006)557) to its Proposal for what ultimately became Directive 2007/66/EC, the European Commission's Impact Assessment report that was annexed to its Proposal (COM(2006) 195), the case-law of the European Court of Justice prior to the adoption of Directive 2007/66, and the text of Directive 92/13/EEC, as amended. In fact it seems to the court that it is abundantly clear from the text of Directive 92/13/EEC and 2007/66/EC that European Union lawmakers in adopting those measures recognised the importance of pre-contractual remedies, so much so that the court does not consider it necessary to have regard to the other, helpful, sources to which it was referred by counsel. Thus, for example:

> - Recital 3 of Directive 2007/66/EC indicates that a consideration of review mechanisms in Member States indicated that those mechanisms did "*not always make it possible to ensure compliance with Community law, at a time when infringements can still be corrected*";
>
> - Recital 4 of Directive 2007/66/EC indicates that among the perceived weaknesses in existing review mechanisms was the absence of a period allowing an effective review between the decision to award a contract and the conclusion of the contract in question. "*In order to remedy this weakness…it is necessary to provide for a minimum standstill period during which the conclusion of the contract in question is suspended…";*
>
> - Recital 18 of Directive 2007/66/EC refers to the standstill obligation and automatic suspension as "*pre-requisites for effective review*"; and
>
> - it is notable that the new Article 2(3) of Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (O.J. L395, 30.12.1989, p.33), as inserted by Article 1 of Directive 2007/66/EC, provides that when "*a body of first instance, which is independent of the contracting authority*", in Ireland, the High Court, "*reviews a contract award decision, Member States shall ensure that the contracting authority cannot conclude the contract before the review body has made a decision on the application either for interim measures or for review*".

27. There are perhaps a few points of note that might be made in the context of the above-mentioned provisions. First, at no point does Directive 92/13/EEC, as amended, state that the standstill period must last until the determination of an application for review of an award decision. Second, it is clear that what European Union lawmakers are concerned to avoid is a rush to conclude a contract before a body of first instance that is independent of the contracting parties has become involved. Third, Recital 4 of Directive 2007/66/EC refers to a "*minimum*" standstill period. It appears to the court that it would hardly refer to a "*minimum*" standstill period if that period was invariably to endure until the determination of an application for review of an award decision: that is a maximum standstill period and while it is conceivable that such a standstill might be merited in some cases, the fact that the Directive refers to a "*minimum*" standstill period suggests to the court that European Union lawmakers did not consider that a maximum standstill period was the only standstill period that could arise, let alone that it should be the norm. Fourth, the centrality to the review process of the "*body of first instance, which is independent of the contracting authority"* is apparent from Article 2(3) of Directive 89/665/EEC, as inserted by Directive 2007/66/EC. At no point in the European Union legislation is there any language that suggests the intention of the Directives is to oust the jurisdiction of such a body of first instance to apply its discretion and do justice on the facts before it; indeed it would be surprising if European Union lawmakers were ever to manifest such an intention. It seems to the court to follow inexorably from the establishment of a 'minimum' standstill period and the centrality of the body of first instance to the review process that the determination of the duration of the standstill period in any one case must be for that body to decide. Fifth, a literal reading of the new Article 2(3) of Directive 89/665/EEC suggests that a contracting authority may be permitted to conclude a contract where a review body, here the High Court, has made a decision on a related application for interim measures (such as the instant application) or an application for review (here the proceedings brought by OCS).

28. In the course of argument before the court, counsel for OCS indicated that the reason for the emphasis on pre-contractual remedies in Directive 2007/66/EC is largely based on a perception that damages are less efficient remedies for breaches of procurement rules. Counsel also pointed to a decision of the Northern Ireland High Court, *Partenaire Limited v. Department of Finance and Personnel* [2007] NIQB 100, in which Coghlin J. suggested that "*it might well be argued that the European jurisprudence reflected in the Remedies Directive as interpreted by the decisions such as Alcatel [1999] ECR I-7671 intended injunctive relief to be the primary remedy*". A judgment of a Northern Ireland court is of course of persuasive value only. Moreover, having considered the *Alcatel* decision, this Court struggles to find therein support for the contention that injunctive relief is intended generally to be the primary remedy in the context arising. Rather, the judgment seems focused on the need for avoidance of a contract as a remedy additional to any relief in damages that is available. Be that as it may, even if one accepts that in all procurement cases damages are necessarily a less efficient form of remedy, and the court does not accept this, this still leaves open the possibility that damages may be the most efficient remedy in a particular case arising.

Interpretation of Regulation 8 of the Remedies Regulations
29. The text of Regulation 8 has been quoted above, the court has considered the general rules of statutory interpretation to which it is subject, and also the purpose of the Remedies Regulations and the European Union provisions that they implement. The court turns now to address some of the issues arising in the instant application.

30. *Does the issuing by OCS of its proceedings result in an automatic suspension that precludes DAA from entering into the disputed contract with Maybin?*

Regulation 8(1) of the Remedies Regulations provides, amongst other matters, that an eligible person may apply to the High Court, amongst other matters, for review of "*a contracting entity's decision to award the contract to a particular tenderer or candidate*". The term "*eligible person*" is defined in Regulation 4 of the Remedies Regulations as embracing, in relation to a reviewable contract such as that which DAA seeks to award to Maybin, a person who:

> *"(a) has, or has had, an interest in obtaining the reviewable public contract, and*

(b) alleges that he or she has been harmed, or is at risk of being harmed, by an infringement, in relation to that reviewable public contract, of the law of the European Communities or the European Union in the field of public procurement, or of a law of the State transposing that law."

31. There is no doubt that OCS is an eligible person and, in this capacity, it has made application to the High Court under Regulation 8(1). Regulation 8(2) of the Remedies Regulations provides that if a person makes a Regulation 8(1) application, the contracting entity shall not conclude the contract until (a) the High Court has determined the matter, (b) the High Court gives leave to lift any suspension of a procedure, or (c) the proceedings are discontinued or otherwise disposed of. It is clear from Regulation 8(2) that a suspension necessarily commences immediately upon a Regulation 8(1) application being made. The real issue arising is how long such a suspension subsists. OCS maintains that DAA is precluded from entering into the disputed contract until such time as the review of the award decision is completed. The court does not consider that this contention is consistent with a literal reading of Regulation 8(2), nor does it find any support for such a contention in its consideration of the applicable European Union legislation. On the contrary, the above review of the purpose and context of that legislation suggests that it was not within the contemplation of European Union lawmakers that a suspension/standstill period must last until the determination of an application for review of an award decision. Rather it appears that what European Union lawmakers were concerned to avoid is a rush to conclude a contract before a body of first instance that is independent of the contracting parties becomes involved. The court considers that this objective is secured by Regulation 8 of the Regulations in a manner that is consistent with European Union law: thus Regulation 8 provides for a suspension to come into effect immediately upon a Regulation 8(1) application being made but, in Regulation 8(2), allows the High Court to intervene thereafter. Intervention by the court in this manner is consistent with European Union law which requires a 'minimum' standstill period but at no time requires that this period must subsist until an application for review of an award decision is fully and finally determined. Further, it seems to the court to follow from the establishment of a 'minimum' standstill period and the centrality to the review process, as contemplated by the European Union régime, of the body of first instance, that the determination of the appropriate standstill period in any one case should be for such body, here the High Court, to decide. A literal, and the court considers a correct, reading of the new Article 2(3) of Directive 89/665/EEC suggests that a contracting authority, here DAA, may be permitted to conclude a contract, amongst other circumstances, when the High Court makes a decision on a related application for interim measures such as the instant application, and again Regulation 8 makes consistent provision in this regard.

32. *If there is an automatic suspension, can it be lifted in this interim application?*

Regulation 8(2) provides that where a person makes a Regulation 8(1) application, the contracting entity, here DAA, shall not conclude the contract in dispute until (a) the High Court has determined the matter, or (b) the Court gives leave to lift any suspension of a procedure, or (c) the proceedings are continued or otherwise disposed of. Each of these limbs is separate. If any one limb is satisfied, then it seems implicit in Regulation 8(2) that the contracting entity may proceed to conclude the contract in dispute. The above survey of the purpose and context of the applicable European Union law suggests that the Remedies Regulations are entirely consistent with same insofar as they allow for the lifting of the automatic suspension and insofar as they contemplate, and they clearly do contemplate, that the suspension may be lifted before the full and final determination of the application for review of the award decision that has been commenced. As previously mentioned, the court's review of the purpose and context of the applicable European Union law suggests that it was not within the contemplation of European Union lawmakers that a suspension/standstill period must last until the determination of an application for review of an award decision. Rather it appears that what European Union lawmakers were concerned to avoid is a rush to conclude a contract before a body of first instance that is independent of the contracting parties becomes involved. The court considers that this objective is secured by Regulation 8 of the Regulations in a manner that is entirely consistent with European Union law: thus Regulation 8 provides for a suspension to come into effect immediately upon a Regulation 8(1) application being made but, in Regulation 8(2), allows the High Court to intervene thereafter. Intervention by the court in this manner is entirely consistent with European Union law which requires a 'minimum' standstill period but at no time requires that this period must subsist until an application for review of an award decision is fully and finally determined. Further, it seems to the court to follow from the establishment of a 'minimum' standstill period and the centrality to the review process, as contemplated by European Union law, of the body of first instance, in the present proceedings the High Court, that the determination of the appropriate standstill period in any one case should be for that body to decide. A literal, and the court considers a correct, reading of Article 2(3) of Directive 89/665/EEC, as inserted by Article 1 of Directive 2007/66/EC, suggests that a contracting authority, here DAA, may be permitted to conclude a contract where the High Court makes a decision on a related application for interim measures such as the instant application, and again Regulation 8 makes consistent provision in this regard by allowing, amongst other matters, for the lifting of the automatic suspension arising.

33. *If the suspension can be lifted, which party is subject to the burden of proof?*

It is trite law that in general he asserts must prove. However, even trite law benefits from being attributable to a source. In this instance the court has had due regard to the statement of the law in this regard in McGrath on *Evidence (*2005), in particular the learned author's observations at para. 2-78 to the effect that:

"The general principle applied in civil cases is that he who asserts must prove (Ei incumbit probatio qui dicit, non qui negat). Thus, whichever party contends for the existence of a particular fact will bear the burden of proving its existence."

The court considers that, in the present proceedings, the effect of the general principle identified by Mr. McGrath is that the burden falls squarely on the moving party, here DAA, to satisfy the court that the suspension must be lifted.

34. *What is the appropriate test to determine whether suspension should be lifted?*

Counsel for DAA contended that the legal principles which govern the question of whether to lift suspension are the same principles as those which govern the question of whether to grant an interlocutory injunction, i.e. the principles as expounded upon by the House of Lords in *American Cyanamid Company v. Ethicon Limited* [1975] A.C. 396, adopted in this jurisdiction by the Supreme Court in *Campus Oil v. Minister for Energy (No. 2)* [1983] I.R. 88, and referred to as "*well settled*" by Clarke J. in the recent Supreme Court decision in *Okunade v. Minister for Justice* [2012] 3 I.R. 152 at 180. The court, respectfully, does not consider this contention of counsel to be correct. The court finds that it would be inconsistent with European Union law and, more specifically, with the court's obligation as regards harmonious interpretation, as considered above, were the court to apply what might be styled the *Campus Oil* guidelines in the context of the Remedies Regulations. There are at least five reasons why this is so. First, Regulation 9(4) of the Remedies Regulations provides clear, discrete and self-contained guidance on the factors to be considered in any pre-trial application, including the determination of an application to lift a suspension. Second, Article 2(4) of Directive 92/13/EEC, as amended by Directive 2007/66/EC, provides equally clear guidance on the factors to be considered in any application for an interim order and limits national discretion in this regard. Third, to apply the *Campus Oil* guidelines would be to superimpose requirements and conditions that

are not envisaged by Directive 92/13/EEC, as amended, or the Remedies Regulations and would in fact render it more difficult for an applicant to obtain relief than would be the case if the scheme specified in the Directives were applied. Two elements of the *Campus Oil* guidelines, in particular, appear to add conditions that are not contemplated by Directive 92/13/EEC, as amended, viz. (1) the requirement to demonstrate the impossibility of calculating damages; and (2) the requirement for an applicant to provide an undertaking in damages in order to benefit from the continuation of the suspension. Both conditions would constitute additional pre-conditions to the granting of relief not contemplated by European Union law and would be inconsistent with same. Indeed, in circumstances where an applicant was unable to provide an undertaking as to damages, such an applicant would in effect be denied of any relief at all, a result that would be contrary to the overall scheme contemplated by European Union law and so absurd that the court cannot accept that lawmakers intended that such conditionality should pertain. Thus while the court may consider that it would be preferable were an undertaking in damages to be a pre-condition to the continuation of a suspension, it cannot avoid reaching the conclusion that this and the other requirements that pertain under the *Campus Oil* guidelines, and which would make it more difficult for an applicant to obtain relief, are not contemplated either in Directive 92/13/EEC, as amended, or in the Remedies Regulations, and would be inconsistent with same. Fourth, it follows that to apply the *Campus Oil* guidelines would breach the requirements of the European Union regime. Fifth, counsel for DAA sought in the course of argument to rely on decisions of the English and Northern Ireland courts to justify the application of the *Campus Oil* guidelines in the context of the Remedies Regulations. However, it appears to the court that those decisions, which at best are of persuasive value, are in fact of limited if any value in the present proceedings, given that they relate to and are concerned with the quite different legislative wording utilised by the United Kingdom in its Public Contracts Regulations 2006, as amended by the Public Contracts (Amendment) Regulations 2009. Those Regulations, in particular Regulations 47H(2) and (3) of same, effectively enjoin the application of the *American Cyanamid* principles by the UK courts. That this is so is evidenced in numerous decisions of the English courts, including *Indigo Services (UK) Limited v. Colchester Institute Corp.* [2010] EWHC 3237 (QB), *Exel Europe Ltd. v. University Hospitals Coventry and Warwickshire NHS Trust* [2010] EWHC 3332, and *Metropolitan Resources North West Ltd. v. Secretary of State for the Home Department* [2011] EWHC 1186 (Ch). This is a position that is quite contrary to that which pertains under the Remedies Regulations and a fact which, the court considers, renders the Remedies Regulations a more faithful transposition of the applicable European Union provisions.

35. So, what is the correct test to be applied? The court considers that the correct test is that contained in Regulation 9(4) of the Remedies Regulations which provides that:

> *"When considering whether to make an interim or interlocutory order, the Court may take into account the probable consequences of interim measures for all interests likely to be harmed, as well as the public interest, and may decide not to make such an order when its negative consequences could exceed its benefits."*

36. Notably, this test flows directly from, and thus is consistent with, Directive 92/13/EEC, as amended, which provides in Article 2(4) that:

> *"Member States may provide that the body responsible for review procedures may take into account the probable consequences of interim measures for all interests likely to be harmed, as well as the public interest, and may decide not to grant such measures when their negative consequences could exceed their benefits."*

37. Pursuant to Regulation 9(4) of the Remedies Regulations, DAA has to satisfy the court that the negative consequences of making any interim or interlocutory order as is sought do not exceed the benefits of such order. No other requirement arises and the test is untrammelled by the considerations that would arise from an, unwarranted and inappropriate, application of the *Campus Oil* guidelines. This being so, the usual requirement as to an undertaking in damages that would arise were the *Campus Oil* guidelines to be followed does not arise. However, this does not mean that a court could not, when undertaking its analysis under Regulation 9(4) of the Remedies Regulations, factor into its considerations any offer of an undertaking as to damages as might be made.

38. *What is the result of the application of the above-described test?*

Again, the court considers that, pursuant to Regulation 9(4) of the Remedies Regulations, DAA has to satisfy the court that the negative consequences of making any interim or interlocutory order as is sought do not exceed the benefits of such order. In the instant case the principal order that is sought is an order that lifts the suspension. What are the negative consequences of lifting the suspension? From the arguments made at the hearings of this matter it appears that there could be at least four potential negative consequences if the suspension were lifted, three of which pertain directly to OCS and one of which is of a more public interest nature. First, OCS's staff would be transferred to Maybin, a troublesome process for OCS and one that might place the transferred staff at risk of redundancy. Second, OCS might lose expertise and also suffer in terms of its competitiveness. Third, it is possible that, by virtue of any such loss in competitiveness, damages would not adequately compensate OCS for losing out in the procurement process. That damages might not be an effective remedy where the loss of a contract has, amongst other matters, the potential to negatively affect competitive status is anticipated in the decision of the English High Court in *Alstom Transport v. Eurostar International Limited* [2010] EWHC 2747 (Ch.), in which Vos J. acknowledged, at para. 129, that damages would not suffice to compensate a disappointed bidder for the "*specific and uncompensatable*" benefits that would have flowed from its being the successful bidder. Fourth, there is a public interest in fair and transparent processes and in avoiding the burden of damages on the public purse, which damages would be payable on top of anything that would be paid to Maybin under the intended contract with it. It appears to the court that there would be a significant risk to this public interest if the suspension were lifted. What are the benefits of leaving the suspension extant? It appears to the court that the greatest advantage is that leaving the suspension extant effectively maintains the status quo pending the determination of OCS's application for review of the award decision. It avoids a situation in which payments would fall to be paid to Maybin under a contract with it and also perhaps by way of damages to OCS, a situation that would be both wasteful and would entail the potential for increased airport charges. Of course maintaining the status quo at this time means that higher payments are currently payable to OCS than would be payable to Maybin for performing its obligations under the intended contract with it and this too could result in higher airport charges. Also weighing in the balance, however, is the fact that serious allegations have been made by OCS as regards the adequacy of the procurement process that DAA conducted and that OCS has seen fit to incur expense in litigating this matter. The court is not required to, and makes no finding as to whether or not these allegations are in any way true. However, it is entitled to have regard to the fact of such allegations in the context of deciding whether or not to lift the suspension, not least in its consideration of where the public interest lies. Having regard to all of the foregoing, and conscious of the premium placed by the European Union remedies regime and hence, by necessity, the Irish regime on pre-contractual remedies, the court considers that the negative consequences of making an order lifting the suspension exceed the benefits of denying such order. Consequently the court declines at this time to make an order lifting the suspension.