



**THE COURT OF APPEAL**

Neutral Citation Number: [2018] IECA 235

**Record No. 2016/457**

**Hogan J.  
McGovern J.  
Baker J.**

**BETWEEN**

**FORUM CONNEMARA LIMITED**

**APPLICANT**

**- AND -**

**GALWAY COUNTY LOCAL COMMUNITY DEVELOPMENT COMMITTEE**

**RESPONDENT**

**JUDGMENT of Mr. Justice McGovern delivered on the 17th day of July, 2018**

1. This is an appeal from a decision of Hedigan J. delivered on 10th August, 2016, in which he refused the appellant's application for judicial review of a determination by the respondent in the award of a public contract.
2. The applicant is a rural development partnership of voluntary, community and statutory bodies which has as its main objective the putting in place of programmes to tackle problems of rural decline and peripherality in the Connemara area. The applicant/appellant was established in 1990 in order to administer the EU Poverty 3 Programme and other social programmes.
3. The respondent is a statutory body established pursuant to the provisions of s. 49A of the Local Government Act, 2001 (as inserted by s. 36 of the Local Government Reform Act 2014), which provided for the establishment by resolution of a local authority in respect of its administrative area of Local Community Development Committees ("LCDC's"). The LCDC is a "committee" of the local authority established for the purpose of "developing, coordinating and implementing a coherent and integrated approach to local and community development"
4. Further provisions for the establishment of such committees were provided for in Statutory Instrument No. 234/2014, which came into force on 1st June, 2014.
5. The respondent was at all material times the contracting authority for the purposes of the award of the public contract under challenge in these proceedings.
6. One of the programmes administered by the respondent is the Social Inclusion and Community Activation Programme ("SICAP") which is aimed at tackling poverty and social exclusion in disadvantaged communities. Prior to September 2014, Co. Galway had been divided into two administrative areas for the purpose of SICAP and the programme in Co. Galway had been implemented by two separate bodies, namely the appellant and another company, Galway Rural Development Company Limited. At a meeting held on 30th September, 2014, the respondent made a decision that there should be only one service provider for SICAP for the entire county of Galway.
7. The competition for the award of the contract for SICAP was a two stage process, the first stage of which involved whittling down possible candidates. The appellant went through to the second stage of the process as one of five entities. The appellant submitted a tender in respect of Co. Galway, but it was not awarded the contract. The successful candidate was Galway Rural Development Company Limited. By letter dated 2nd March, 2015, the appellant was advised that it had been unsuccessful in its tender and in these judicial review proceedings it challenges the decision of the respondent not to award it the contract.
8. The contract which is the subject matter of these judicial review proceedings expired on 31st December, 2017. Since then, another tender process has been completed and the contract has been awarded to the successful tenderer in the disputed contract namely Galway Rural Development Company Limited. That contract runs from 1st January, 2018, to 1st January, 2023 and there has been no legal challenge in respect of it. Counsel for the respondent argues that this appeal is, therefore, moot and the court should not hear it.
9. While the respondent has made out a compelling argument that this appeal is now moot, there is no need to decide that issue having regard to the reasons which are set out hereunder. Although the appeal comprised two issues, namely, locus standi and adequacy of reasons, the greater focus of the appellant was on the locus standi issue.

**The issue of locus standi**

10. The *locus standi* issue concerns whether or not the respondent's legal team had instructions to defend the proceedings. The appellant contends that the respondent has not demonstrated that they have taken a decision and/or lawfully given instructions to defend the proceedings. The appellant argued that the respondent was unable to show:

- (i) that this matter was discussed by the statutory committee;
- (ii) that the defence of the proceedings was authorised;
- (iii) that the motion to enter into the Commercial Court was authorised; and
- (iv) that the application to have preliminary issues dealt with in the Commercial Court was authorised.

11. The questions thus framed support the contention of the respondent that the issue is more properly characterised as one regarding the authority of the respondent to defend the proceedings.

12. The first matter to be addressed is whether the issue of standing or authority was decided by the High Court.

### **The hearings before the High Court**

13. In legal submissions to the High Court, the appellant argued that Galway County Council, not a party to these proceedings, gave instructions through its law agent to defend the proceedings but that no decision to do so had been taken by the respondent. The evidence before the High Court established that the chief executive officer of Galway County Council, Mr. Kevin Kelly, delegated certain functions to Ms. Catherine McConnell pursuant to s. 154 of the Local Government Act 2001, as amended, and she gave evidence that she authorised the defence of these proceedings by the law agent's office of Galway County Council. Section 153(1)(b) of the 2001 Act establishes that the defence of proceedings is an executive function of the manager of a local authority which can be delegated under section 154. It argued that an attempt by Catherine McConnell in an affidavit sworn on 11th May, 2015, to draw a distinction between "*reserved functions*" and "*executive functions*" and the claim that the decision to defend these legal proceedings is an executive function is wholly misguided.

14. The *locus standi* argument was first raised in a motion heard by Barrett J. in which the respondent sought to strike out the judicial review proceedings on the grounds of delay. Although the issue before him did not include locus standi, extensive argument was made by the appellant on that issue and a response was heard from the respondent. In giving his judgment, Barrett J. admittedly did not explicitly address the issue, but he did make an order extending the time in respect of which the application for judicial review could be brought and this was appealed by the respondent. The appellant had not cross appealed any aspect of the judgment and, in particular, the fact that Barrett J. had not explicitly addressed the issue of *locus standi*.

15. When the matter came before Ryan P. on a motion for directions concerning the appeal, counsel for the appellant accepted that as there was no cross appeal the issue in respect of standing had been finally determined.

16. The judicial review hearing took place before Hedigan J. and again the issue of *locus standi* was raised. In delivering his judgment, Hedigan J. took the view that the issue of *locus standi* was implicitly decided by Barrett J. because he went on to hear the application on whether or not to strike out the judicial review application on the grounds of delay, and that his approach was consistent only with the view that the respondent did have standing to defend the proceedings.

### **The decision to defend the action: Executive or reserved function?**

17. A somewhat unusual feature of the appeal was that it involved a complete change of tack by the appellant in its argument on *locus standi*. Up to the hearing of the appeal and in its legal submissions, the appellant criticised Ms. Catherine McConnell for maintaining the distinction between "*reserved functions*" and "*executive functions*" and stating her belief that the defence of these legal proceedings was an executive function, and that the decision to defend the proceedings did not need the sanction of the elected members. This was described as wholly misguided by the respondent. The appellant maintained that under the underpinning statutory instrument and under the statutory committee's own standing orders that there was no distinction between reserved and executive functions and that the respondent was intended by the legislation to perform wholly independent functions, and that the LCDC ought to be able to demonstrate an independent and separate decision to engage with the proceedings.

18. At the hearing of the appeal, counsel for the appellant abandoned this position and accepted that there was a distinction between "*executive functions*" and "*reserved functions*" but sought to argue that the decision to defend proceedings was a reserved function. I am satisfied that that is not so for the reasons I now consider.

19. The respondent was established by resolution of Galway County Council at a meeting held on 23rd June, 2014. It is designated under the Act as an officially appointed committee of Galway County Council.

20. The staffing of a LCDC is dealt with in s. 128D of the Local Government Act 2001, as inserted by s. 36 of the Local Government Reform Act 2014, and Article 56 of the Local Community Development Committee (s. 128E) Regulations 2014 (S.I. 234 of 2014), which is in turn reflected in the respondent's standing orders at paragraph 2.1.

21. The chief executive of a local authority is directed by 128D(2) to assign one or more of its employees to assist the LCDC in the performance of its functions, and functions may be delegated to him, her or them by the chief executive under 128D(2). Section 154 is expressly stated to apply for the purpose of such delegation, subject only to any necessary modifications.

22. Ms. McConnell was delegated certain functions by Chief Executive Order HR14/396 with responsibilities in respect of the LCDC and for the carrying out the administration generally of the Committee.

23. The chief executive of Galway County Council delegated certain functions to Ms. Catherine McConnell, pursuant to s. 154 of the 2001 Act, as amended and these delegated functions include the authority to defend legal proceedings.

24. The power to defend proceedings is authorised by s. 153(1)(b) and this is clearly an executive function.

25. Ms McConnell's order number CE434 clearly shows the approval of the Law Agent to proceed with the appointment of counsel to defend this judicial review application on behalf of the respondent.

26. There is, therefore, no point of substance in the appellant's argument that the defendant has no *locus standi* to defend these proceedings.

27. As it happens, I see no reason to disagree with the view expressed by Hedigan J. that this issue had been implicitly dealt with by Barrett J. and decided against the appellant. But insofar as it was a live issue before this Court, the appellant's argument on *locus standi* cannot succeed as a decision to defend the proceedings taken by Catherine McConnell by virtue of the powers conferred under the Local Government Act 2001 and which had been vested by delegation in her, was an executive decision permitted under the Act.

### **Reasons**

28. While the main focus of the appeal was on the *locus standi* issue, the appellant somewhat faintly argued that insufficient reasons were given by the respondent for its decision not to award the contract to the appellant. The appellant has not appealed the finding of Hedigan J. that the contract at issue was an Annex IIB Contract to be found in Article 41(2) of EU Directive 2004/18/EC. It was not in dispute that even though the contract falls within Annex IIB, there is a general requirement to state reasons and this was accepted by Hedigan J. in his judgment. In this case, there were bespoke reasons given by the respondent to the appellant as to why

it was not awarded the contract. The finding by Hedigan J. that the reasons provided by the respondent in its letter of 2nd March, 2015, went beyond any general requirement to give reasons cannot be challenged. I would reject the appeal on that ground.

29. In truth, this ground of appeal was not pursued with any vigour by the appellant. The appellant has not been able to point to any legal basis on which this aspect of the decision of the learned High Court judge could be interfered with.

**Conclusions**

30. For the reasons stated in the judgment, I would accordingly dismiss the appeal.