

THE HIGH COURT

[2013 No. 211 J.R.]

JUDICIAL REVIEW

BETWEEN

**COPYMOORE LIMITED, CORK OFFICE MACHINES & SUPPLIERS LIMITED, CUSKEN LIMITED, EMS COPIER SERVICES LIMITED,
EUROTECH OFFICE EQUIPMENT LIMITED, INEST LIMITED, MBE MALLOW LIMITED, O'ROURKE OFFICE SUPPLIES LIMITED,
SHARPTX CORK LIMITED AND TOS LIMITED**

APPLICANTS

AND

COMMISSIONER OF PUBLIC WORKS OF IRELAND

RESPONDENT

JUDGMENT of Neill J. delivered on the 9th day of May 2014

1. By notice of motion dated 15th January 2014, the applicants seek an order pursuant to the Rules of Superior Courts, granting liberty to amend the originating notice of motion and statement of grounds dated 19th March 2013, as well as an order extending the time period for bringing this application.

Background

2. The respondent issued a 'Request for Tenders' on 31st January 2013, with a view to establishing a multi-supplier framework agreement for the supply of printers and printing devices. The closing date for receipt of applications was 20th March 2013. The applicants contend that the qualification criteria as set out in the Request for Tenders is disproportionate to the relevant market and discriminatory in a manner prohibited by Regulation 8(1) of the European Communities (Public Authorities' Contracts)(Review Procedures) Regulations 2010, also referred to in these proceedings as the 'Remedies Regulations'. The originating notice of motion and statement of grounds are dated 19th March 2013. The proceedings were returnable before the High Court on 22nd April 2013, and have been adjourned on a number of occasions. The respondent's statement of opposition and replying affidavits are dated the 15th August 2013.

3. On 4th November 2013, the applicants' solicitors wrote to the respondent *"for the purposes of seeking the Respondent's consent to the amendment by our clients to the Statement of Grounds. . ."* This letter stated that the applicants were seeking to challenge *"the capacity of the respondent to enter into and/or conclude the proposed framework agreements on behalf of the clients specified in the framework agreements"*. It was explained that this matter had already been argued before the High Court in separate proceedings between the two parties, but that due to an oversight, the relief was not sought in these proceedings.

4. By letter dated 8th November 2013, the respondent's solicitors informed the applicants that the respondent was not willing to furnish the consent sought for the following reasons:

"Firstly, as you are aware specific and strict time limits are provided for the in the relevant statutory regulations and Rules of the Superior Courts and it is clear that your clients are far out of the allowed time to raise these matters.

Secondly, if applicants were permitted to avoid the effect of the strict time limits laid down in procurement matters by the statutory regulations, the Rule of the Superior Courts and the case law of the courts on the basis of mere "oversight", those time limits – which are imposed in the public interest – would be rendered nugatory.

Thirdly, the pleadings are closed and extensive affidavits have already been exchanged in this matter... if your clients were permitted to raise this matter at this juncture it would require an additional verifying affidavit to be delivered by your clients...Furthermore, the new grounds which are sought to be raised would require the delivery of new and additional affidavit evidence on behalf of our clients."

5. Finally, it was stated that the introduction of these issues into the proceedings would cause considerable costs to be incurred and would almost certainly result in delay. As a result of this refusal, the applicants commenced these proceedings by notice of motion dated 15th January, 2014.

Statutory Framework

6. The *European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010* entitles an 'eligible person' to apply to this Court for relief under the Regulations in respect of a "reviewable public contract". Regulation 7 sets out the time limits for applications to the Court:

"7. (1) Subject to any order of the Court made under a rule referred to in Regulation 10(2), an application to the Court shall be made within the relevant period determined in accordance with this Regulation.

(2) An application referred to in subparagraph (a) or (b) of Regulation 8(1) shall be made within 30 calendar days after the applicant was notified of the decision, or knew or ought to have known of the infringement alleged in the application.

(3) An application for a declaration that a contract is ineffective shall be made within 30 calendar days (commencing on the appropriate date determined in accordance with paragraph (4) or (5), as the case requires), in the following cases—

(a) where the contracting authority published a contract award notice in accordance with Regulations 41 and 45 of

the Public Authorities' Contracts Regulations, and, in the case of a contract awarded without prior publication of a contract notice in the Official Journal, on condition that the contract award notice sets out the justification of the contracting authority's decision not to publish a contract notice;

[...]

(6) In any other case an application for a declaration that a contract is ineffective shall be made within 6 months after the conclusion of the relevant contract."

These time limits have been incorporated into O. 84A of the Rules of the Superior Courts.

7. Regulation 8 sets out the relief which may be sought from the Court:

"(1) An eligible person may apply to the Court—

(a) for interlocutory orders with the aim of correcting an alleged infringement or preventing further damage to the eligible person's interests, including measures to suspend or to ensure the suspension of the procedure for the award of the public contract concerned or the implementation of any decision taken by the contracting authority, or

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

[...]

(3) A person who is an eligible person in relation to a reviewable public contract that has been concluded may apply to the Court for a declaration that the contract is ineffective."

8. Order 84A of the Rules of the Superior Courts sets out the procedure for parties seeking to review or set-aside public contracts. Order 84A, r. 8 states that:

"(1) The 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.

(2) Where the applicant or any other party intends to apply for leave to amend his statement or to use further affidavits he shall give notice of his intention and of the proposed amendment to every other party."

9. Under Order 84A, r. 4(2), the time periods in O. 84A are capable of extension:

"Notwithstanding sub-rule (1), the Court may grant leave, on the application of the intending applicant for that purpose, to make an application to which Regulation 7(2) of the European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010 or, as the case may be, Regulation 7(2) of the European Communities (Award of Contracts by Utility Undertakings) (Review Procedures) Regulations 2010 applies after the expiry of the time mentioned in sub-rule (1), where the Court considers that there is good reason to do so."

Applicants' Submissions

10. The applicants contend that O. 84A provides to this Court a clear jurisdiction and discretion to grant the relief sought. In relation to amending the originating notice of motion and statement of grounds dated 19th March 2013, counsel for the applicants accepts that in the context of statutory or non-conventional judicial review, the courts have adopted a strict approach to the amendment of grounds outside of time limits. However, it was submitted, relying on *Delaney & McGrath 'Civil Procedure in the Superior Courts' 3rd Ed., 2012*), that a "different and less restrictive approach" has been adopted where the time period is capable of extension. Reference was made to *Sweetman v. An Bord Pleanála* [2008] 1IR 277, in which Clarke J. held that:

"Where an amendment to grounds is sought to amount to the pleading of a new case and where that amendment is sought outside the statutory time limit, then it can only be granted in circumstances where there is 'good and sufficient reason' for allowing the amendment outside time . . ."

11. Counsel for the applicants referred the Court to a number of previous decisions which, it was submitted, offer guidance on what constitutes a 'good and sufficient reason' for granting the relief sought. In *Muresan v. Minister for Justice, Equality and Law Reform & Others* [2004] 2 ILRM 364, Finlay Geoghegan J. stated:

"It may be that on certain facts the clear oversight or errors by lawyers acting for an applicant may amount to a good and sufficient reason for extending the period under s. 5(2). . ."

12. The applicants also submitted that the proposed amendments do not amount to a serious or significant enlargement of the applicants' case. In *O'Siodhachain v. Ireland (ex tempore, 12th February 2002)*, the Supreme Court granted leave to amend the pleadings out of time where it was satisfied that "the amendments sought did not represent any serious or significant enlargement of or change in the applicant's case". The case of *Aquatechnologie v National Standards Authority of Ireland & Others* [2000] IESC 64 also concerned an application to add additional grounds of relief to the statement of grounds. In considering whether to allow the amendments outside of the time limits, Murray J. stated:

"I think it is also relevant to take into account that the proposed amendments do not extend the ambit of the proceedings in a significant manner. It is not seeking to include a new cause of action, although I would not consider this alone a determining factor. The judicial review proceedings already include a claim for certiorari of a decision of the Minister. The proposed amendments seek to include, if not ancillary, complementary grounds for attacking that decision, albeit more specifically. The Appellant has, in my view, established that it should be allowed at least to make the case grounded upon the proposed amendments.

As regards delay, if the Appellant knew or ought to have known of the alleged particular decision of the Minister of June

3rd 1998 on service of the Affidavit of Mr. Michael McCarthy sworn on August 31st 1998 they are out of time for the making of their application by a short period. Nonetheless, having regard to all the circumstances of the case as outlined above I am of the view that the delay is excusable and that the application for leave to amend the Statement of Grounds should be granted."

13. Counsel for the applicants submitted that in the present case, the applicants identified their error in October 2013, and moved swiftly to inform the respondent of this on 4th November 2013. It is submitted that the respondent has yet to file replying affidavits to affidavits filed by the applicants since 15th August 2013, and therefore the respondent will have the opportunity to deal with the amendments, if granted, in those affidavits. It is submitted that good and sufficient reasons have been provided which justify the granting of an extension of time, and that as the respondent is financed by public funds, it is in the public interest to grant the relief in order to prevent the respondent incurring the costs of separate litigation.

14. In relation to the specific amendments to which are sought, the applicants say that the originating notice of motion does claim damages and costs, but that this has been omitted from the statement of grounds. It was submitted that this ground, therefore, already forms part of the proceedings, and that no injustice is caused by allowing the proposed amendment. In relation to the capacity ground which is sought to be added to the statement of grounds, the applicants submit that the respondent was already on notice of this ground in previous proceedings between the parties [[2012 No. 918 J.R.] referred to as the '*Copymoore 1 Proceedings*'. These proceedings were heard before Hogan J. and a written judgment was delivered on 29th May 2013. It is submitted that the 'capacity ground' was expressly pleaded by the applicant and disputed by the respondent in those earlier proceedings and that the respondent is therefore fully aware and apprised of the existence of this ground.

15. It was further submitted that Regulation 8(4) of the Remedies Regulations requires that any person intending to make an application to the court in respect of the Regulation must first notify the contracting party in writing of the details of the alleged infringement and the intention to make an application to the court. It was submitted that the applicants sent the respondent such a 'letter of notification' on 15th March 2013, and expressly raised the 'capacity ground' therein in the following terms:

"3. The NPS has purported to establish the Framework and to award the Contracts for and on behalf of the stated organisation and bodies of the State. We can find no basis in law for the NPS being entitled to do so. Please provide details as to the authority or capacity of the NPS so to do, with reference to each and every statutory provision relied upon by the NPS in so doing." [sic].

16. The applicants contend that no prejudice has been caused to the respondent due to the oversight, nor will there be any, should the relief be granted. It was submitted that the applicants are merely seeking to have the real issues clearly in contention between the parties before the court and the respondent may make any necessary changes to the statement of opposition. The applicants also mentioned the wholly desirable objective of avoiding separate proceedings as a good and sufficient reason for granting the relief sought. The respondent is funded by public funds and the applicants assert that it is therefore more convenient and efficient to determine the capacity ground in these proceedings.

Respondent's Submissions

17. The respondent submits that the applicants are outside the 30-day time limit prescribed by O. 84A and Regulation 7 as outlined above. It was submitted that the new ground on which the applicants seek to rely would have been known at the time the statement of grounds dated 19th March 2013, was issued, and that the reasons provided by the applicants for seeking an extension of time do not meet the requirements of Regulation 7(1) or the provisions of O. 84A, r. 4.

18. Counsel for the respondent submitted that public procurement matters such as this are a specialist area of judicial review and that the Supreme court case of *Dekra Eireann Teoranta v Minister for the Environment* [2003] 2 IR 270, emphasised the urgency and rapidity which applies to the review procedures under the Remedies Directive concerning the award of public contracts. In *Dekra*, Denham J. (as she then was) considered the law and practice of public procurement contracts and stated:

"An essential feature of both European law and the consequent Superior Court Rules is a policy of urgency and rapidity which is required in such judicial reviews . . .

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

19. In his judgment in the same case. Fennelly J. stated that:

". . . public procurement decisions are a peculiarly appropriate subject matter for a comparatively strict approach to time limits They relate to decisions in a commercial field, where there should be very little excuse for delay."

20. This principle was cited with approval by Clarke J. in *Veolia Water UK plc. v. Fingal County Council (No. 1)* [2007] 1 IR 690, who also pointed out that the rationale of the Supreme Court in *Dekra* has been adopted on a number of occasions by the courts in the United Kingdom as a basis for a strict approach to time limits in public procurement matters. In *Baxter Healthcare Limited v. HSE and Beacon Medical Group* [2013] IEHC 413, Peart J. considered the level of knowledge required by an applicant before the clock starts to run against it for the purpose of the applicable time limit:

"As soon as it had sufficient facts at its disposal to commence its challenge, an effective remedy was available to it, and therefore the clock had started to run against it. From that point on, it could not sit on its hands . . . It was obliged to act immediately."

21. The respondent submits that the grounds now sought to be relied upon were in the knowledge of the applicants at the time the originating notice of motion was issued, and the applicants have failed to advance a 'good and sufficient' reason for granting the relief sought. It is submitted that in public procurement matters, human or administrative error does not meet the requirements of the Rules of Superior Courts and relevant regulations as set out above.

Decision

22. There has been a candid acceptance on the part of the applicants of what went wrong leading to this application to amend the

original grounds. Quite simply, as a result of a simple oversight, the ground in question *i.e* the capacity ground was not included in the statements of ground which launched the proceedings. Unfortunately, this oversight was not noticed until October 2013, well outside the prescribed time limit. There is no doubt that the capacity ground was included in the originating letter of notification and was thereby notified to the respondent as one of the applicants' grounds of complaint. In the earlier *Copymoore* proceedings between these parties, the same ground was raised and litigated. Thus, it can safely be said that not only is this capacity ground no surprise to the respondent, but there could be little or no prejudice to the respondent in having to meet that ground in these proceedings, nor does the respondent assert any such prejudice.

23. The problem here is that these judicial review proceedings relate to public procurement matters, and it is well settled, since the judgements of the Supreme Court in the *Dekra* case, that in this specialised area of judicial review, a strict or stringent approach must be adapted to applications for relief outside of the prescribed time limits. Whilst there is, undoubtedly, a jurisdiction to extend the time limit in question, this can only be done if it is demonstrated that there is good and sufficient reason for so doing. In other areas of judicial review, mere oversight or error on the part of legal representatives could, as mentioned in the judgement of Finlay Geoghegan J. in the *Muresan* case, be a ground for extending time in an appropriate case. In my opinion, in a procurement case, the stricter approach to compliance with the prescribed time limits required would exclude mere oversight as a good and sufficient reason for permitting an extension of the time limit. It would seem to me, that in order to reach the necessarily high threshold which "good and sufficient reason" requires in these cases, it must be shown that the factor which brings about the application to extend time or to seek relief outside the time limit, was either not in existence within the time limit or was unknown to the applicant within that time limit. In effect, an applicant must be able to demonstrate that insofar as the ground sought to be added to the proceedings is concerned, he was effectively inhibited or prevented from raising that ground within the prescribed time limit.

24. In this case, all the information necessary to plead the "capacity" ground was amply available to the applicants within the time limit. That being so, I feel bound to follow the reasoning of the Supreme Court in the *Dekra* case and applying the strict approach described in the judgements in that case, inevitably results in a conclusion that the applicants have not demonstrated a good and sufficient reason for extending the time limit prescribed so as to permit the amendment sought.

25. Accordingly, I must refuse the relief claimed in this notice of motion.