

THE HIGH COURT

COMMERCIAL

[2017 No. 500JR]

IN THE MATTER OF DIRECTIVE 2004/18/EC AS AMENDED

AND IN THE MATTER OF THE EUROPEAN UNION (AWARD OF PUBLIC AUTHORITIES CONTRACTS) REGULATIONS 2006 (SI 329 OF 2006)

AND IN THE MATTER OF COUNCIL DIRECTIVE 89/665/EEC AS AMENDED

AND IN THE MATTER OF THE EUROPEAN COMMUNITIES (PUBLIC AUTHORITIES' CONTRACTS) (REVIEW PROCEDURES) REGULATIONS 2010 (SI 130 OF 2010) AS AMENDED

BETWEEN:

BECKMAN COULTER DIAGNOSTICS LIMITED

APPLICANT

-AND-

BEAUMONT HOSPITAL

RESPONDENT

-AND-

ROCHE DIAGNOSTICS LIMITED

NOTICE PARTY

EX TEMPORE JUDGMENT of Mr. Justice Twomey delivered on the 31st day of July, 2017.

**Background facts**

1. This is a case involving the challenge by the applicant, Beckman Coulter Diagnostics Limited ("Beckman") to the awarding by the respondent, Beaumont Hospital (the "Hospital"), of a contract worth approximately €57 million to Roche Diagnostics Limited ("Roche"), the notice party to these proceedings, for the implementation and operation of a blood science laboratory in the Hospital.

2. Beckman is the incumbent provider of the blood testing services and its contract with the Hospital expired on the 30th June, 2017. The notice party, Roche, was awarded the contract following a procurement process. The validity of that procurement process is now being challenged by Beckman, which challenge was commenced on the 15th June, 2017, by the issue of these proceedings.

3. Beckman claims, *inter alia*, that the procurement process was flawed because of the existence of undisclosed award criteria.

4. Under regulation 8(2)(a) of European Communities (Award of Contracts by Utility Undertakings) (Review Procedures) Regulations 2010, as amended by the European Communities (Award of Contracts by Utility Undertakings) (Review Procedures) Regulations 2015 (the "Remedies Regulations"), this challenge by Beckman to the procurement process means that the Hospital is not permitted to conclude the contract with Roche, until the Court gives leave to lift any suspension of the procedure. Regulation 8(2)(a) states (and for this purpose the Hospital is the 'contracting authority'):-

"If a person applies to the Court under paragraph (1), the contracting authority shall not conclude the contract until-

(a) the Court has determined the matter, or

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

(c) the proceedings are discontinued or otherwise disposed of, but this is subject to paragraph (2A)."

5. Regulation 8(2)(a) imposes a suspension on the signing of a contract by the Hospital arising from the fact that an application was duly made by the Hospital to this Court by Notice of Motion dated 5th July, 2017, to lift the suspension pursuant to the terms of Regulation 8A of the Remedies Regulations. Regulation 8A, insofar as relevant states:-

"8A (1) On application made to it under this Regulation by the contracting authority, the Court may, notwithstanding the matters referred to in Regulation 8(2A)(a) and (b), make an order permitting the contracting authority to conclude the contract referred to in Regulation 8(1).

(2) When deciding whether to make an order under this Regulation-

(a) the Court shall consider whether, if Regulation 8(2)(a) were not applicable, it would be appropriate to grant an injunction restraining the contracting authority from entering into the contract, and

(b) only if the Court considers that it would not be appropriate to grant such an injunction may it make an order under this Regulation".

6. After close of business on the 27th July, 2017, a Notice of Motion was served on the Hospital by Beckman, returnable for the following day, the 28th July, 2017, in which Beckman seeks an Order from this Court to stay the operation of regulation 8A of the Remedies Regulations. This motion is grounded on the claim that Regulation 8A is unconstitutional under Article 15.2.1° of the Constitution because the inclusion in the Remedies Regulations of a right to lift the suspension of an awarded contract is not, it is claimed, required by Directive 89/665/EEC as amended by Directive 2007/66 Regarding Review Procedures for the award of Public Contracts (the "Remedies Directive"). For this reason, Beckman argues that any such right cannot brought into Irish law by statutory

instrument, as was done in this case, but must be done by an act of the Oireachtas.

7. All of these circumstances led to an urgent application by the Hospital to lift the suspension under Regulation 8A and an urgent application by Beckman for a stay on the operation of Regulation 8A to enable its constitutionality be challenged by Beckman. The matter was heard by this Court on Friday 28th July, 2017, the second last day of the Trinity term. As both parties wished to have a decision before the commencement of the next legal term in October, this Court has agreed to give an ex tempore judgment on the last day of term notwithstanding the significance of the issues at stake and in particular the issue of whether this Court will put a stay on domestic Irish law on the grounds that a litigant alleges that it is unconstitutional.

### Analysis

8. It is clear that the effect of Beckman's application, if successful, would be to deny the Hospital its right to seek from this Court the lifting of the suspension of the procedure and therefore prevent the Hospital from signing a contract with Roche, until the substantive proceedings challenging the allegedly flawed procedure and the constitutionality of Regulation 8A were heard.

9. For this reason, while chronologically the first issue is whether the Hospital is entitled to have the suspension lifted under the express terms of Regulation 8A (assuming that they are constitutional), it is clear that the key issue at this hearing was whether this Court will put a stay on the operation of domestic law (i.e. Regulation 8A) as requested by Beckman because it wishes to challenge its constitutionality. This is because if this stay is granted, this would have the effect of depriving the Hospital of the opportunity of lifting the suspension of the procedure under the terms of Regulation 8A, as that provision would no longer apply in Irish law.

10. For this reason consideration will first be given to whether Beckman is entitled to a stay on the operation of Regulation 8A.

### A stay on the operation of Regulation 8A

11. It is clear that such an application by Beckman to stay a provision of Irish law on the grounds that it is unconstitutional, although not unprecedented, is most unusual since it requires an order from the High Court, as an interim or interlocutory order pending trial, that a provision of domestic law should be suspended from operation.

12. To quote Sullivan J. from the High Court case of *Martin v. An Bord Pleánala* [2002] 2 IR 655 at page 671:-

"It is clear from authority that it would take something almost overwhelming for a court to suspend the continued application of domestic law pending a trial."

13. So what is it, that Beckman regards as 'overwhelming' to enable this Court make such an order? In essence, Beckman relies on the judgment of Clarke J. in the Supreme Court case of *OCS One Complete Solutions Ltd v. Dublin Airport Authority* [2015] IESC 6. In that case, Clarke J. contemplated three possible scenarios regarding the interaction between the Remedies Directive on the one hand and the power of the court to lift the suspension of the procedure and allow a contract be signed under the Remedies Regulation on the other hand. The first scenario was that the Remedies Directive did not contemplate the possibility of an application to lift the suspension, the second was that the Remedies Directive required there to be a right to apply to lift the suspension and the third scenario was that the Remedies Directive permits, but does not require, there to be such an application to lift the suspension. Clarke J. ruled out the possibility that the Remedies Directive requires there to be under Irish law a right to apply for the lifting of the suspension. Accordingly, Clarke J. concluded that the Remedies Directive either does not require there to be such a right under Irish law or permits, but does not require, there to be such a right under Irish law.

14. While the comments of Clarke J. are of considerable significance, it is crucial to note that he was not dealing with the issue of whether Regulation 8A was constitutional. In particular, no consideration was given in his judgment as to whether, in line with the Supreme Court case of *Maher v Minister for Agriculture* [2001] 2 IR 139 the inclusion of the power to lift the suspension was within the "principles and policies" of the Remedies Directive and therefore something which could indeed be enacted by ministerial order, rather than by primary legislation, and so be compliant with Article 15.2.1° of the Constitution.

15. For this reason, this Court does not find that the comments of Clarke J. upon which Beckman places such reliance are so overwhelming so as to oblige this Court to put a stay on the domestic law that is Regulation 8A. While the judgment of Clarke J. clearly raises a fair issue to be tried, it is this Court's view that where the issue in question is the unconstitutionality of domestic law, a stay should only be granted at an interlocutory hearing where the evidence in its favour is, in the words of Sullivan J., overwhelming and it is this Court's view that this is not the case here.

16. Even if this Court was wrong on this issue, and it was to conclude that it satisfied the test that there was a fair issue to be tried (even though it involved a stay being put on domestic law), it is this Court's view that no stay should be granted in the particular circumstances of this case, since damages are an adequate remedy pending the hearing of the constitutional challenge. This is because one is not dealing with a provision of domestic law under which a citizen might be subject to a criminal offence, which was stayed pending trial in *Pesca Valentia Ltd v. Minister for Fisheries* [1985] IR 193, but rather with Regulation 8A which is concerned with which commercial entity wins a commercial contract.

17. In this regard, it is relevant to refer to the judgment of Clarke J. in the Supreme Court case of *Okunade v. Minister for Justice* [2012] 3 IR 152 where he had to consider a similar issue to the one in this case, namely whether to grant a stay or an interlocutory injunction in judicial review proceedings in the context of an order to deport an alleged refugee. At page 187 of his judgment he states:-

"Requiring a party to comply with an arguably unlawful measure gives rise to a situation where damages will not be an adequate remedy except, perhaps, in the limited circumstances where the judicial review may be commercial contractual or property oriented in the first place and where the consequences of complying with the measure under challenge may, in those unusual and limited circumstances, be capable of being adequately compensated in damages."

18. It seems to this Court, that the limited circumstances, referred to by Clarke J., where damages will in fact be an adequate remedy in a challenge to the legality of a measure or law, are in fact the circumstances in the case before this Court. This is because in the present case, the consequences of the Hospital benefiting from the measure under challenge, Regulation 8A, if that law is not stayed as requested by Beckman, are consequences for Beckman which are capable of being adequately compensated in damages. This is because from Beckman's perspective the contract for the blood science laboratory and services is a purely commercial contract and the profits lost by Beckman as a result of its failure to be awarded that contract and the costs of its unsuccessful tender bid can be readily assessed. For example, precise figures were provided on affidavit on behalf of the Hospital of remuneration paid by the Hospital to Beckman of €2,085,398, €1,991,865, €2,001,685 and €1,834,218 for each of the past four years.

19. For this reason, it seems to this Court that damages are an adequate remedy for Beckman. Further support for this view can be found in the affidavits sworn on behalf of Beckman, which are referred to below in the context of the second application in this case.

20. While the foregoing analysis deals with the question of whether a stay on the operation of Regulation 8A should be granted to Beckman, it is relevant before leaving the *Okundae* case to refer to Clarke J.'s comments on interlocutory relief in judicial review proceedings. While the present proceedings as currently constituted are not judicial review proceedings, the stay is being sought by Beckman on the grounds of an undertaking to issue a plenary summons challenging the constitutionality of Regulation 8A and so these proceedings are in substance judicial review proceedings. In this regard, Clark J. stated at page 188 of his judgment in that case that:-

"However, there is a further feature of judicial review proceedings which is rarely present in ordinary injunctive proceedings. The entitlement of those who are given statutory or other power and authority so as to conduct specified types of legally binding decision making or action taking is an important part of the structure of a legal order based on the rule of law. Recognising the entitlement of such persons or bodies to carry out their remit without undue interference is an important feature of any balancing exercise. It seems to me to follow that significant weight needs to be placed into the balance on the side of permitting measures which are *prima facie* valid to be carried out in a regular and orderly way. Regulators are entitled to regulate. Lower courts are entitled to decide. Ministers are entitled to exercise powers lawfully conferred by the Oireachtas. The list can go on. All due weight needs to be accorded to allowing the systems and processes by which lawful power is to be exercised to operate in an orderly fashion. It seems to me that significant weight needs to be attached to that factor in all cases. Indeed, in that context it is, perhaps, appropriate to recall what was said by O'Higgins C.J. in *Campus Oil v. Minister for Industry (No. 2)* [1983] I.R. 88. At p. 107 of the report he said the following:-

"The order which is challenged was made under the provisions of an Act of the Oireachtas. It is, therefore, on its face, valid and is to be regarded as a part of the law of the land, unless and until its invalidity is established. It is, and has been, implemented amongst traders in fuel, but the appellant plaintiffs have stood aside and have openly defied its implementation."

It is clear therefore, that the apparent *prima facie* validity of an order made by a competent authority was a factor to which significant weight was attributed."

21. Thus, in a case such as this which seeks interlocutory relief which is based on a challenge to a statutory instrument, significant weight needs to be attached to the *prima facie* validity of that statutory instrument and in this Court's view this further supports the rejection of the application for the stay sought by Beckman on the application of Regulation 8A in Irish law.

#### **Application to lift the suspension**

22. As regards the substantive application by the Hospital to lift the suspension under Regulation 8A, it is clear from the decision of Costello J. in *Powerteam v. ESB* [2016] IEHC 87 that in applying that provision, this Court is required to:-

"approach the application on the basis that the applicant for review of the procurement procedure [Beckman] is applying for an injunction though in fact the moving party [the Hospital] will be the respondent in the proceedings".

23. On this basis, the first issue is whether Beckman has established that its claim, *inter alia*, that there were undisclosed award criteria for the awarding of the tender such that the tender process was invalid, is a fair issue to be tried and thus a basis for Beckman obtaining an injunction to prevent the Hospital from signing the contract with Roche. Counsel for Beckman submitted that the Hospital had accepted that there was a fair issue to be tried and this was not controverted by counsel for the Hospital. On this basis this Court has assumed that there is a fair issue to be tried.

24. Accordingly, the next part of the test to consider is whether damages would be an adequate remedy for Beckman if it were to win at the substantive hearing, after failing to get an injunction preventing the Hospital from signing the contract with Roche.

25. Beckman has provided sworn evidence that this is a hugely important contract to it. However based on that affidavit evidence, it seems to this Court that this is because it is "*exceptional in terms of its high value*", which is evidenced by comparing the €57 million contract with other hospital contracts that it has in Ireland which are worth €1 million or less. While no doubt financially significant for Beckman, this evidence simply emphasises that the loss caused to it, by this Court allowing the Hospital to sign a contract with Roche, is financial.

26. This is also clear from other affidavit evidence provided on Beckman's behalf e.g. that 'damages are *unlikely* to compensate' Beckman for the serious loss it will suffer, rather than an averment that damages could not, or will not, compensate it if the Hospital is permitted to sign a contract with Roche.

27. In contrast, if the Hospital were to be delayed in implementing the contract for the implementation and operation of a blood science laboratory, sworn evidence has been provided that patients of the Hospital will suffer because this new contract provides, *inter alia*, for a decrease in the turnaround time in which blood tests are carried out in the Hospital. In this regard, evidence was produced to the Court that delays in blood test results leads to prolonged waiting times in emergency departments which adversely impacts upon patient mortality. Professor Elaine Kay, the Director of the Laboratory Directorate of the Hospital gave sworn evidence on the effect of a delay in clinical terms and she concluded:-

"I have been advised and believe that the commencement of these proceedings resulted in the automatic suspension of the conclusion of the Contract. It is difficult to overstate the level of my concern in that regard and as regards the prospect that the implementation of the Programme may be delayed for potentially a very significant period of time."

28. In this context, it seems clear to this Court that any negative effect on patients, arising from the delay in signing the contract with Roche, is not something for which damages are an adequate remedy.

29. As regards the balance of convenience, it seems clear to this Court that in a situation like this where sworn evidence has been provided that a delay in signing the contract with Roche puts patient outcomes at risk, the balance of convenience supports the lifting of the suspension and therefore the refusal of the injunction to Beckman.

#### **Conclusion**

30. For all of the foregoing reasons, this Court will refuse the application to put a stay on the operation of Regulation 8A and it will lift

the suspension on the process to enable the Hospital sign the relevant contract with Roche.