THE HIGH COURT

COMMERCIAL

[2018 No. 102 J.R.]

[2018 No. 22 COM]

IN THE MATTER OF COUNCIL DIRECTIVE 2014/18/EC

AND IN THE MATTER OF THE EUROPEAN COMMUNITIES (AWARD OF PUBLIC AUTHORITIES' CONTRACTS) REGULATIONS (S.I. 284 OF 2016)

AND IN THE MATTER OF THE EUROPEAN COMMUNITIES PUBLIC AUTHORITIES' CONTRACTS) (REVIEW PROCEDURES) REGULATIONS 2010 (S.I. 130 OF 2010 AS AMENDED BY S.I. 192 OF 2015 AND S.I. 327 OF 2017)

BETWEEN

SANOFI AVENTIS IRELAND LTD TRADING AS SANOFI PASTEUR

APPLICANT

AND

HEALTH SERVICE EXECUTIVE

RESPONDENT

AND

GLAXOSMITHKLINE IRELAND LTD

NOTICE PARTY

JUDGMENT ON COSTS of Mr. Justice Denis McDonald delivered on the 14th day of December, 2018.

1. This judgment deals solely with an application for costs made by the above named notice party ("Glaxo") on 30 November, 2018. The underlying facts have already been set out in detail in the judgment delivered by me on 12 October, 2018 (neutral citation [2018] IEHC 566) and therefore do not require to be repeated here. In this judgment, I will use the same abbreviations as in my October judgment. At this point, it is sufficient to record that Glaxo was the successful tenderer in respect of the award of a contract for the supply of the 6 in 1 vaccine to the respondent ("the HSE") for a 5 year period commencing in January 2018.

2. The applicant ("Sanofi") was a disappointed tenderer and, in these proceedings, Sanofi challenged the award of the contract to Glaxo on a number of grounds. The three grounds argued before me related to (i) adequacy of reasons; (ii) the principles of equality of treatment and transparency (in respect of which two complaints were advanced namely that there had been an alleged failure to clearly set out the award criteria and that the HSE had allegedly failed to disclose a number of sub-sub-criteria applied by it in the assessment of tenders); and (iii) manifest error (the argument being that the HSE had allegedly failed to sufficiently recognise in the marks allotted to Sanofi, that its vaccine was significantly superior in a number of respects to the Glaxo vaccine).

3. In my judgment delivered on 12 October, 2018, I rejected the case made by Sanofi save to the limited extent set out in paras. 145-146 of the judgment where I held that there had been a failure to provide adequate reasons in respect of two award sub-sub-criteria. However, I took the view that it would not be proportionate to set aside the award of the contract on that basis.

4. Thereafter, on 9 November, 2018, I heard argument in relation to the costs of the proceedings as between Sanofi and the HSE (who fully defended the proceedings). In an ex tempore ruling given on the same day, I awarded the HSE 75% of its party and party costs of the proceedings (to include the costs of discovery and an overnight transcript). In light of the fact that the HSE had not succeeded in full, I came to the conclusion that it should not recover any more than 75% of its party and party costs.

5. In circumstances where it did not involve itself in the debate relating to the adequacy of reasons, Glaxo now seeks 100% of its party and party costs (to include the costs of putting in place a redaction protocol, the costs of the 4 day hearing in July and its share of the cost of the overnight transcript).

6. In support of its application for costs, Glaxo argued that, as the successful tenderer, it had a direct and crucial interest in the outcome of the proceedings. Glaxo acknowledged that this might be said of the successful tenderer in all procurement challenges but it argued that its interests went beyond the norm in circumstances where (a) Sanofi challenged the "safety and efficacy" of its vaccine; (b) there was a significant concern about the need to preserve the confidentiality of Glaxo information; and (c) it was suggested that Glaxo, by reason of its long experience as a tenderer, was particularly well placed to assist the court in relation to what the RWIND tenderer would understand by the terms of the IOT and related documents.

7. In response, Sanofi accepted that the issue in relation to confidentiality was a legitimate concern but contended that this could have been adequately addressed in correspondence; it did not require full scale participation in the proceedings. With regard to the position of the RWIND tenderer, Sanofi drew attention to the fact that this had been addressed extensively by the HSE in its affidavit evidence before the court. Sanofi also suggested that Glaxo, in its submissions on costs, had overstated the issue relating to its vaccine; Sanofi urged that it had not called the safety of the Glaxo vaccine into question; it had made the case that its own vaccine had significant advantages over the Glaxo product such that it should have received a substantially higher score than Glaxo (this was the manifest error issue).

8. I should explain that, in the proceedings, Sanofi complained that the HSE was manifestly in error in giving Glaxo almost the same score as Sanofi in relation to certain aspects of the tender notwithstanding that the Sanofi vaccine was, on Sanofi's case, significantly superior in that it is fully liquid and is supplied in a pre-filled syringe which does not require reconstitution. In contrast, the Glaxo vaccine requires reconstitution. It is supplied in two parts, namely a pre-filled syringe together with a separate vial. The medical practitioner is required to add the contents of that vial to the syringe immediately before administration of the vaccine. As a consequence, Sanofi contended that it is more time consuming to administer the Glaxo vaccine and that the Glaxo vaccine was more

prone to handling errors.

9. In relation to Glaxo's application for costs, Sanofi also argued that it was of some significance that in the lengthy judgment delivered in October 2018, no mention is made of any submission made by Glaxo. This was not controverted by counsel for Glaxo although, at one point in his submissions he drew attention to one reference in the judgment (at page 82) to an averment made by Grainne Farrell in her affidavit sworn on behalf of Glaxo on 28 June, 2018 where she dealt with what would be known to operators in the vaccine sector about the need that any 6 in 1 vaccine should be capable of being administered to the total cohort of patients. For completeness, it should be noted that I did not rely solely on Ms Farrell's evidence in this context. In relation to the same issue, at page 81 of the judgment, I had already quoted from the very comprehensive affidavit of Ms Cliona Kiersey sworn on behalf of the HSE on 9 March 2018.

Discussion

10. In my view, it is necessary in the first instance to consider the circumstances in which Glaxo came to be joined as a participant in these proceedings. On 16 February, 2018, McCann Fitzgerald, on behalf of Glaxo, wrote to Arthur Cox, on behalf of Sanofi, indicating an intention to apply to the court to join Glaxo as a notice party to the proceedings. In their response of 20 February, 2018, Arthur Cox stated that Sanofi neither consented nor opposed the proposed joinder. However, Arthur Cox also made clear that Sanofi did not consider the joinder of Glaxo to be necessary in circumstances where (as proved to be the case) it was expected that all issues would be fully addressed by the HSE. The letter warned that if Glaxo proceeded with the application, it would be *"entirely at its own risk as to its costs …[and] any application by your client seeking … its costs against our client will be vigorously contested…".*

11. On 26 February, 2018, McCann Fitzgerald responded to say that Glaxo would require to be involved in putting in place a protocol to protect the highly commercially sensitive and confidential information relating to its tender. The letter also stated that it required an opportunity to *"file opposition papers … and such further affidavits as may be required to protect its commercial interests. The pleadings issued in these proceedings to date prejudice our client by, inter alia, making adverse remarks regarding its products. As such, our client requires an opportunity to address these issues. … [W]e would suggest that our client serves its opposition papers 3 business days following … the [HSE's] … opposition papers".*

12. Subsequently, on 5 March, 2018, McGovern J made an order, on foot of a motion by Glaxo, joining Glaxo as a notice party but expressly declining to grant leave to it to deliver opposition papers. Instead, the order gave liberty to Glaxo to file any affidavit it wished to correct *"what it says are factual inaccuracies in the Affidavits already submitted…."*. The order also records that the court declined to make any order requiring the existing parties to copy Glaxo with any correspondence relating to discovery.

13. To my mind, the order made by McGovern J suggests that he did not envisage that Glaxo would play a full part in the proceedings. It appears from the terms of the order that what the court envisaged was that Glaxo would be able to take issue with the factual evidence placed before the court by Sanofi. I am reinforced in that view by the way in which the order expressly declined to permit Glaxo to file opposition papers. The terms of the order suggest that such an order was sought by Glaxo and was refused by McGovern J. I said as much to counsel for Glaxo on Day 4 of the hearing in July 2018 and he did not quibble with that characterisation of the terms of the order. However, he suggested that, at the hearing of the application before McGovern J, he did not press for leave to deliver opposition papers.

14. Subsequent to the order of 5 March 2018, Glaxo filed a number of affidavits which addressed the contention made by Sanofi that its vaccine was superior to the Glaxo vaccine and they also addressed matters such as the position of the RWIND tenderer. However, it should be noted that the HSE, in its very comprehensive affidavits, also addressed these issues in considerable detail.

15. Glaxo also filed written legal submissions and solicitor and junior counsel were present in court on its behalf throughout the 4 day hearing in July 2018. Submissions were made on behalf of Glaxo on the final day of the hearing. The oral submissions on behalf of Glaxo commenced at 11.30 on that day and concluded at 12.52. During the course of those submissions, counsel for Glaxo made reference to the affidavits sworn by Ms Farrell on behalf of Glaxo but it is striking that extensive reference was also made to the affidavit evidence filed on behalf of the HSE. This is unsurprising given the very comprehensive nature of the HSE evidence.

Relevant case law

16. In support of the application for costs, counsel for Glaxo relied in particular upon the judgment of Costello J in *Vodafone Ireland Limited v Commission for Communications Regulation* [2015] IEHC 443. In that case, Three Ireland was joined as a notice party to the proceedings on its own motion and it was given liberty to file opposition papers. It delivered a statement of opposition and two affidavits. It also filed written submissions. Four days before the date fixed for the hearing of the proceedings, Vodafone advised Three that the case had been settled and that Vodafone had agreed with the respondent that the case could be struck out with no order as to costs. The settlement made no provision at all for the costs of Three Ireland who was given no opportunity to participate in the settlement discussions. In light of the settlement, the case was never argued. The only argument that took place was in relation to the application of Three Ireland for an order for costs.

17. In her judgment, Costello J carefully analysed the existing case law on the issue and held that the fact that Three Ireland had applied on its own motion to be joined as a notice party did not in any way undermine its ability to seek costs, Similarly, she held that the fact that Three was seeking to defend its commercial interests was not a ground, of itself, for refusing its application for costs.

18. In the Vodafone case, Costello J said that the test that the court must apply is that suggested by Clarke J (as he then was) in *Usk & District Residents Association v EPA* [2007] IEHC 30 and followed by Finlay Geoghegan J in *Treasury Holdings v NAMA* [2012] IEHC 518. As Costello J noted in para. 32 of her judgment, the relevant test is usefully summarised in para. 18 of the judgment in the latter case where Finlay Geoghegan J said:

> *"The approach envisaged by Clarke J. … nevertheless, appears to me to properly apply to KBC on the facts of this application. Rather than commencing from any prima facie entitlement to costs, it appears to me that it must be a matter for the Court to consider, having regard to all the circumstances of the case, including, in particular, the extent of the interest of the notice party in the issues which are the subject matter of the judicial review application, and the extent to which it may be regarded as reasonable for the notice party, in all the circumstances of the case independently to oppose the application to determine whether an order for costs in its favour against an unsuccessful applicant should or should not be made".*

19. Counsel for Sanofi placed reliance on the observations of Clarke J in another judgment cited by Costello J in Vodafone namely *Telefonica O2 v Commission for Communications Regulation* [2011] IEHC 380 where, at para. 3.6, Clarke J said :

> *"As pointed out by Herbert J., a party who has a legitimate interest to protect and who is, therefore, a necessary party*

to judicial review proceedings, will ordinarily be entitled to be joined. Likewise, such a party will ordinarily be required to at least take some steps to place their position on the record. It should not, however, be assumed that simply because a party has a right to be heard, that person is necessarily entitled to the costs of fully participating in the litigation most particularly where the party concerned does not really have anything substantial to add to the argument on the questions which the court has to decide. There is, in my view, a difference between being entitled to be heard and being necessarily entitled to the costs of being heard and, in particular, the costs of being fully involved in proceedings. It should not be assumed that a notice party who sits around for the duration of a lengthy judicial review hearing which is being fully defended by the respondent, is entitled to the full costs of such representation even though what is added to the case either in evidence, written submission, or oral submission, is marginal in the extreme. Each case needs to be judged on its own facts. It is, however, important to note that the mere fact that a notice party has an interest to protect does not necessarily justify doubling the costs of defending judicial review proceedings where the case made by both the respondent and the notice party is substantially the same. That argument applies with even greater force where more than one notice party may be involved".

20. Counsel placed particular reliance on the observation that, simply because a party has a right to be heard, this does not give rise to an automatic entitlement to costs of fully participating in the litigation, especially where that party does not add substantially to the argument on the questions before the court. As noted previously, counsel drew attention to the fact that, in my October judgment, I make no reference at all to the arguments made by Glaxo in relation to the matters in issue in these proceedings.

21. Counsel for Sanofi also relied upon the judgment of Baker J in *Doyle v The Private Residential Tenancies Board* [2016] IEHC 36. That case is different in that it was a statutory appeal rather than a judicial review challenge. Nonetheless, in her judgment, Baker J had regard to the *Usk* principles in dealing with the costs of the notice party there. Baker J noted the observation of Clarke J in *Usk* (at para. 5.5 of his judgment) that the court should consider the extent to which it was reasonable for the notice party to independently oppose the application. At para. 13 of her judgment, Baker J said:

"… I consider that the costs of the notice party are not necessarily always to be treated as costs which follow the event, and the matter of costs will depend on the degree of participation of the notice party and whether that was justified".

22. In *Doyle*, Baker J also had regard to the approach taken by Finlay Geoghegan J in Treasury Holdings and, at para. 19 of her judgment, she said:

"Part of the reasoning of Finlay Geoghegan J. was that the notice party had itself applied to be joined in that case, but at para. 20 she asks, what I consider to be the central question, namely whether a notice party was a 'necessary party'. I consider the question to be whether the notice party is a necessary party as a litigant, *and accordingly the question is not merely one of whether a notice party had legitimate financial or economic interests to protect, as nearly all notice parties will be in that position, but whether it had interests to protect which were different from those of the Tribunal*." (emphasis added).

23. It is instructive to consider the conclusion reached by Baker J in that case. On the facts of the case, she considered that the notice party could have adequately dealt with the appeal by direct engagement with the solicitors for the respondent and a pre-hearing engagement between the notice party and respondent could have assisted in the preparation of the legal submissions to be made by the respondent. One set of legal submissions would have been sufficient.

24. Baker J added that she might have come to a different conclusion had the notice party sought to engage with the respondent and been rebuffed. Her ultimate conclusion was that she did not consider it necessary for the notice party to engage fully with the hearing or (notwithstanding their excellence) to make legal submissions. In substance, Baker J held that the full costs sought by the notice party in that case went beyond what was reasonable in the circumstances. She allowed some costs for some of the earlier stages of the proceedings but refused the balance of the application.

Assessment and analysis

25. The case law discussed above shows very clearly that the court is required to consider all of the circumstances. As Clarke J observed in *Telefonica* (at para. 3.6) each case must be judged on its own facts. In assessing those facts, the court must consider the extent to which it was reasonable for a notice party to independently oppose the application. Any determination of what is reasonable is ultimately a fact specific exercise.

26. In the present case, it will be readily appreciated that Glaxo had a significant commercial interest in the outcome of the proceedings. In addition, it is clear that Sanofi, in its case based on alleged manifest error, was contending that its vaccine has significant advantages over the rival Glaxo product. That contention reflected adversely on the Glaxo vaccine and it is entirely understandable that Glaxo would wish to see that there was appropriate evidence before the court that adequately addressed the case made by Sanofi. Glaxo also had an entirely legitimate concern to protect its confidential and commercially sensitive information submitted in the course of the tender process. I do not think that anyone would deny that, in such circumstances, Glaxo was entirely justified in wishing to ensure (a) that the proceedings would be fully defended, (b) that the contentions about the alleged superiority of the Sanofi vaccine would be comprehensively addressed and (c) that an appropriate protocol would be put in place to protect confidential information including trade secrets. In such circumstances, Glaxo clearly had a right to be heard in the proceedings and it is unsurprising that McGovern J joined Glaxo as a notice party albeit that he declined to allow them to deliver opposition papers. His main concern appears to have been to ensure that Glaxo would be able to controvert the case made by Sanofi that its vaccine was superior to the Glaxo product.

27. By virtue of its joinder as a notice party, Glaxo had the opportunity to see for itself all of the papers in the case and, in particular, to gauge and assess the extent of the defence being mounted by the HSE. Glaxo also had the opportunity to place evidence before the court to correct what it believed to be the misleading impression created by Sanofi that its vaccine had significant advantages over the Glaxo vaccine. Now that Glaxo was a party, it also had the right to raise the issues of confidentiality and to seek to ensure that its confidential material was appropriately protected.

28. Glaxo availed of the opportunity to file affidavit evidence. It also availed of the opportunity to address the manner in which its confidential material could best be protected. In my view, it must be entitled to appropriate costs in respect of those issues. It was clearly necessary that those steps should be taken for the purposes of defending the interests of Glaxo. Furthermore, Glaxo would never have had to incur such costs were it not for the fact that Sanofi had taken these proceedings and raised issues (a) that touched on Glaxo's vaccine and (b) required the HSE to discuss the tendering process in its defence of the claim such that there was at least a risk that some of Glaxo's confidential material might have been disclosed. In my view, it was wholly reasonable that Glaxo

should incur such costs and that Glaxo should now seek to be indemnified by Sanofi.

29. However, I take a different view in so far as the balance of the application by Glaxo is concerned. As noted above, Glaxo undoubtedly had a significant commercial interest in the outcome of the proceedings but, as Clarke J observed at para. 3.6 of his judgment in Telefonica, the fact that a notice party has an interest to protect does not necessarily justify doubling the costs of defending judicial review proceedings where the case made by both the respondent and the notice party is substantially the same.

30. Experience shows that, in some judicial review proceedings, a notice party may play a very significant role making arguments that are not made by a respondent and placing what can truly be regarded as additional evidence before the court. That is not what occurred here. While Glaxo, for the reasons already discussed above, acted reasonably in placing its own evidence before the court, that evidence did not, in my view, add in any substantial way to the very careful and comprehensive evidence which was adduced by the HSE. This is starkly illustrated by the fact that, when I came to deal with manifest error in my October judgment (where the issue as to the alleged superiority of the Sanofi vaccine arose), I did not refer to any of the Glaxo evidence. I resolved the issue by reference to the affidavit evidence of Ms Kiersey and Dr Corcoran filed on behalf of the HSE.

31. Similarly, in so far as the legal submission are concerned, I did not refer anywhere in my judgment to the submissions made by Glaxo. That is not a reflection on the quality of Glaxo's submissions; it is simply that no argument was made by Glaxo that had not already been fully addressed by the HSE. The legal submissions in this case were of a very high quality.

32. Following its joinder to these proceedings, it must have been apparent to Glaxo that the HSE was strongly defending the Sanofi claims and filing extensive and very comprehensive evidence in response to the Sanofi complaints. This is not a case where a notice party could reasonably be concerned that the respondent was mounting an incomplete or half-hearted defence. On the contrary, the affidavit evidence and the legal argument put forward by the HSE was impressive and clearly demonstrated that Glaxo need have no fear about the quality of the defence of the claim.

33. In light of the factors identified in paras. 29-32 above, I do not believe that it is reasonable for Glaxo to expect that Sanofi should indemnify it in respect of its full party and party costs of the proceedings. In my view, Glaxo's entitlement to be joined as a notice party must be distinguished from its entitlement to costs. In circumstances where the proceedings were fully defended by the HSE, there was no need for Glaxo to replicate that defence. While I accept fully the need for Glaxo to file affidavits and to address the confidentiality issue, I do not believe that it was necessary for Glaxo to fully participate in the proceedings. Para. 3.7 of the judgment in *Telefonica* is apposite in this context. There, Clarke J, in language which has particular resonance in the circumstances of the present case, said:

> *"Even where the notice party has something to add it is, in my view, incumbent on the notice party to consider whether their involvement necessarily justifies full representation in all aspects of the case. If their contribution is factual then it might be done by the filing of an affidavit. If there is one additional point which can, perhaps, best be made by a notice party, then there are ways in which the making of that point can be secured without incurring the full costs of the litigation".*

Conclusion

34. For the reasons outlined in paras. 25-33 above, I am of opinion that Glaxo is entitled to an order for its party and party costs as against Sanofi solely in respect of the following:

> (a) Its costs of the application to be joined as a notice party to the proceedings;
>
> (b) Its costs of the preparation and filing of its affidavit evidence;
>
> (c) Its costs of addressing the confidentiality issue including the negotiation of the redaction protocol;
>
> (d) Its costs of the overnight transcript. In this context, I believe that it was entirely appropriate that it should have an opportunity to review what transpired at the hearing lest anything transpire that would require it to address something of importance that might have been missed by the HSE;
>
> (e) The costs of review of the transcript by solicitor and counsel. For the reasons outlined at (d) above, it seems to me that it is entirely reasonable solicitor and counsel should be retained to view the transcript on a daily basis.

35. Save to the extent set out in para. 34 above, I refuse Glaxo's application for costs. In reaching that conclusion I reiterate that this is not an adverse reflection on the submissions made by Glaxo. It is simply the application of the principles discussed in paras. 18-24 above.

36. Finally, I would urge parties in cases of this kind to make serious efforts to try to amicably resolve issues of costs by negotiation. There is an extensive body of case law available that provides clear guidance as to the approach to be adopted. I make that observation in circumstances where the arguments of the parties in relation to costs which took place on 9 and 30 November respectively took up (between them) almost 2 hours of court time. This seems to me entirely disproportionate when one considers that the full hearing of the case (which involved debate in relation to a significant number of relatively complex issues) took no more than 16 hours.