



## THE COURT OF APPEAL

Neutral Citation Number: [2016] IECA 397

[2016 No. 457]

[2015 No. 160 J.R.]

**The President**

**BETWEEN**

**FORUM CONNEMARA LIMITED**

**APPLICANT/APELLANT**

**AND**

**GALWAY COUNTY LOCAL COMMUNITY DEVELOPMENT COMMITTEE**

### **JUDGMENT of the President delivered on 21st December 2016**

1. This is a judgment on an application by Forum Connemara for a stay on the implementation of the decision made by the respondent Committee on 2nd March 2015. That decision was subject to the review regime for procurement procedures of public sector bodies prescribed by Directives of the EU and implemented in the State by statutory instruments. Forum mounted a series of challenges to the procurement process culminating in a decision of the High Court on 10th August 2016 and a perfected order made on 15th September 2016. The court rejected the challenge by way of judicial review to the decision of the Committee. There was a stay on the implementation of the decision during the currency of the High Court proceedings and the court granted a further stay until 3rd October 2016, stating that any further postponement of the decision would be a matter for the Court of Appeal. That deadline passed without an application, but on 12th October 2016, Forum issued a notice of motion seeking a further stay until the determination of the appeal from the judgment of the High Court. That application came before me on 16th December 2016. Although the motion seeks the extension of the stay originally granted when leave was obtained, there is actually no stay in place at present, but the Committee has not proceeded pending this decision.

2. Under Article 8 of the European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010 – S.I. 130 of 2010, as amended, if a person applies to the court challenging a decision to which the procedures apply, the Contracting Authority may not conclude the contract until the court has determined the matter. We are not concerned with other provisions, including a capacity to apply to avert the automatic suspension.

3. Forum Connemara was one of the applicants for appointment to implement in County Galway a programme aimed at alleviating poverty and social exclusion in disadvantaged communities. The respondent Committee was the selecting and appointing body for that region. By decision of 30th September 2014, the Committee decided that there should be one service provider for the county for SIPAC, the Social Inclusion and Community Activation Programme. Following the receipt and consideration of tenders, the Committee awarded the contract to provide the service to Galway Rural Development Company Limited. The Committee notified Forum Connemara that it had been unsuccessful by letter of 2nd March 2015.

4. On 23rd March 2015, Forum Connemara obtained leave to seek judicial review of the Committee's decisions, first, to appoint only one service provider for the county, and secondly, to award the contract to Galway Rural Development. The Committee applied to the High Court to strike out the proceedings concerning the single operator decision of 30th September 2014, and on failure in that measure, appealed to the Court of Appeal, which upheld the Committee's contentions. That still left the other limb of challenge, concerning the decision notified on 2nd March 2015, of the appointment of Forum's rival.

That case concluded with the judgment of Hedigan J. on 10<sup>th</sup> August 2016.

5. The question that now arises is whether this Court should impose a stay on the implementation of the Committee's decision to appoint Galway Rural Development to be the service provider. Forum Connemara submits that the procedural provisions in the Statutory Instrument require that the original stay that came into effect with the grant of leave for judicial review should continue until the determination of the appeal. Alternatively, assuming that the stay is not automatic and mandatory, Forum proposes that justice requires that there be no appointment until its proceedings on appeal have been concluded. The Committee argues that justice and the balance of convenience are powerfully in favour of refusing the stay application and permitting the contract with Galway Rural Development to be signed.

6. Article 2 of the 2010 Regulations, S.I. 130/2010, defines court as the High Court. The provision in Article 8, as amended, that the contracting party shall not conclude the contract in question until the court has determined the matter must accordingly be considered to apply to the High Court – and in my view, only to the High Court. This interpretation is in accordance with normal rules of analysis of statutory provisions and it is also consistent with reasonable procedural justice. The provision in question is endeavouring to strike a balance in circumstances where there is a challenge to a public procurement process in order to protect the interest of the complaining party from being shut out unjustly from an opportunity to qualify. At the same time, the successful contender is entitled to respect for its position and it cannot be assumed in advance that a challenge is or is not going to succeed. Another point is that it may be difficult to define when the last stage of litigation in respect of an appeal has been reached. It is quite conceivable in our system that an appeal to the Court of Appeal will firstly take some considerable time to come on for hearing; secondly, there may well be a significant delay before judgment is delivered; thirdly, a party has a right to apply to the Supreme Court to admit an appeal and finally, there is the possibility, at least, of a further application to a European Tribunal, whether the Court of Justice or the European Court of Human Rights. For all these reasons, it has to be inferred that the definition in the Statutory

Instrument means what it says and only what it says.

7. That leaves the court in the position of endeavouring to do justice between the parties, which means balancing their interests. The test is the balance of convenience. Is it more oppressive or onerous to impose a stay or to permit the execution of the contract? The affidavits filed in support of and in opposition to the motion for a stay debate the rival claims to justice, but the essential facts are clear and not in dispute. In my judgment, the balance of convenience and the interest of justice are strongly in favour of the Committee's position in resisting the stay.

8. The affidavit of Ms. Catherine McConnell of 23rd November 2016 explains that the Social Inclusion and Community Activation Programme was to operate for a 36- month period, of which 20 months had elapsed when she swore the affidavit. The successful tenderer has been excluded from providing the service that it applied to supply. The full intended scheme has not been put in place. Instead, Forum Connemara remains in situ in effective occupation of the position that its rival has won. There is dispute in the affidavits as to whether Ms. McConnell is correct in asserting that the full benefit of the intended service has not been provided to the deserving recipients, but in my view, it does not matter whether she or Mr. Terry Keenan of Forum Connemara is correct. The practical reality is that Forum Connemara has held onto its position to the detriment of its rival, notwithstanding the result of the Tender competition process and the outcome of the various court applications brought by Forum. In my view, imposing a further stay would be seriously unfair to Galway Regional Development.

9. Obviously, any question of financial prejudice suffered by deprivation of payment for the service provided operates equally in respect of Galway Regional Development and Forum Connemara.

10. It is more than unsatisfactory that a process designed to ensure fairness should in practice operate to frustrate the implementation of the result. While one can understand the disappointment of the promoters, managers and operators of Forum Connemara that they did not succeed, it is unreasonable, to say the least, that the successful party should be left waiting in the wings while the greater part of the contract period ebbs away.

11. The balance, therefore, is clear. Forum Connemara is not entitled to have a new stay imposed.

12. I therefore refuse the application.