Neutral Citation: [2017] IEHC 157

THE HIGH COURT

[2015 No. 724 P]

BETWEEN

BAM PPP IRELAND LIMITED

AND

BALFOUR BEATTY IRELAND LIMITED

PLAINTIFFS

AND

NATIONAL ROADS AUTHORITY

DEFENDANT

JUDGMENT of Ms. Justice Baker delivered on the 21st day of February, 2017.

1. The plaintiffs acting collectively under the title BAM Balfour Beatty tendered for the award of a public contract advertised by the defendant for the design, construction, operation and maintenance of the Gort to Tuam motorway.

2. The defendant, the National Roads Authority (the "NRA"), is a statutory body incorporated under the Roads Act 1993 as amended, responsible *inter alia* for the construction of public roads in the State, and was at all material times a contracting authority within the meaning of the European Communities (Award of Public Authorities' Contracts) Regulations 2006, ("the Public Contracts Regulations") (S.I. 329 of 2006), which implemented Council Directive 2004/18/EC.

3. The tender was made under the provisions created by the Public Contracts Regulations and the plaintiffs were a candidate within the meaning thereof.

4. The plaintiffs commenced proceedings by plenary summons on 30th January 2015 claiming damages for breach of contract, negligence and breach of duty, including damages for loss of opportunity and loss of chance, arising from what it pleads was the disclosure of commercially sensitive and confidential information by the defendant in the course of the tender process.

5. The claim arises from the happening of a series of events by which it is pleaded the defendant unlawfully disclosed certain confidential and commercially sensitive information. The plaintiffs had tendered for the contract in June, 2010, and had been identified as the preferred tenderer. The project did not proceed due to the financial crisis, but was reactivated in April, 2011.

6. The plaintiffs assert that in the time between the two processes some information regarding the "relative overall standings" of its tender and that of a rival competitor had been disclosed. It is accepted some disclosure was made in the course of verbal exchanges between agents of the defendants and the representatives of the two bidders. The plaintiffs say that whilst it is clear that its rival did receive some information pertaining to the status of its bid, that, contrary to assertions contained in correspondence form the NRA, it did not obtain any information regarding the competitor's tender.

7. The rival competitor was ultimately awarded the contract.

8. It is expressly pleaded that the second stage of the competition in 2011 was "a development" of the competition, i.e. that there was only one process.

9. The defendant has pleaded that the claim is not properly one that can be maintained by plenary action, as it was not brought by the procedures and within the time limits provided by O.84A of the Rules of the Superior Courts.

10. This judgment is given in the determination of an issue of law agreed to be determined as a preliminary issue on affidavit as follows:

> Whether the plaintiffs were required to pursue the claims they make in the within plenary proceedings by way of proceedings initiated pursuant to O.84A of the Rules of the Superior Courts and/or in accordance with the time limits applicable to proceedings regulated by O.84A of the Rules of the Superior Courts and/or within a timely fashion.

The Irish Regulations: public contracts

11. The Public Contracts Regulations set out procedures for the award of works contracts by public authorities in Member States.

12. Procedures for the review by a court of a Member State of a decision by a contracting authority are set out in Council Directive 89/665/EEC of 21st December, 1989, the Remedies Directive, by which provision is to be made for what is described as "the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts".

13. The Remedies Directive was transposed by the European Communities (Public Authorities Contracts) (Review Procedures) Regulations 2010 S.I. No. 130 of 2010 as subsequently amended by S.I. 192 of 2015, ("The Remedies Regulations")

14. Regulation 3 provides for the application of the Remedies Regulations to contracts and decision as follows:

> "These regulations apply to decisions taken, after the coming in to operation by these Regulations, by contracting authorities in relation to the award of reviewable public contracts, regardless of when the relevant contract award procedure commenced."

15. Regulation 4 identifies the persons to whom review procedures are available and states:

"For the purposes of these Regulations, a person is an eligible person in relation to a reviewable public contract if the person –

(a) Has, or has had, an interest in obtaining the reviewable public contract, and

(b) Alleges that he or she has been harmed, or is at risk of being harmed, by an infringement in relation to that reviewable public contract, of the law of the European Communities or the European Union in the field of public procurement, or of the law of the State transposing that law."

16. The type of remedy available to an eligible person is set out in Regulation 8, and 8(b) provides:

"For review of the contracting authority's decision to award the contract to a particular tenderer or candidate."

17. That the concept of "review" must be seen as having a Community meaning, and not to be confined to the meaning in domestic law, will be considered further later in this judgment.

18. Regulation 7 of the Remedies Regulations provides the relevant time limit of thirty days from the notification of the making of the making of the decision to award the contract as follows:

"Time limits for applications to 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.

19. Provision is made in domestic law for the extension of time, but the present application does not engage those provisions.

20. The court hearing a review is given the powers set out in Regulation 9 as follows:

"9. (1) The Court—

(a) may set aside, vary or affirm a decision to which these Regulations apply,

(b) may declare a reviewable public contract ineffective, and

(c) may impose alternative penalties on a contracting authority, and may make any necessary consequential order.

(2) The Court may make interlocutory orders with the aim of correcting an alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of a decision of the contracting authority.

(3) The Court may set aside any discriminatory technical, economic or financial specification in an invitation to tender, contract document or other document relating to a contract award procedure.

(4) When considering whether to make an interim or interlocutory order, the Court may take into account the probable consequences of interim measures for all interests likely to be harmed, as well as the public interest, and may decide not to make such an order when its negative consequences could exceed its benefits.

(5) The Court may by order suspend the operation of a decision or a contract.

(6) The Court may award damages as compensation for loss resulting from a decision that is an infringement of the law of the European Communities or the European Union, or of a law of the State transposing such law."

21. For the purpose of the present application the relevant power is that to award damages, ancillary to, instead of and in addition to the other available remedies, including the making of an interlocutory order or the declaration that a public contract is ineffective. Damages may be awarded as compensation for loss in the broad sense, provided loss is shown to result from a decision that is an infringement of the law of the European Communities or the law of the European Union or of the law of the State transposing such law.

22. Irish practice and procedure is set out in O.84A of the Rules of the Superior Courts, as inserted by S.I. 420 of 2010, and provides for application to the High Court pursuant to the Regulations by application for judicial review in accordance with the provisions of the Order. Order 84A is expressly applicable to all claims brought in relation to all or any of the Regulations of 2006, the Regulations of 2007 and the two Regulations of 2010, including the relevant Regulations for the purposes of the present case, the Remedies Regulations of 2010.

23. There is a specific identification that application must be brought under O. 84A in regard to the category of application defined at O.84, r. 2(c) as follows:

"the review of a decision (including an interim decision) of contracting authority taken under or in the course of a contract award procedure falling within the scope of the European Communities (Award of Public Authorities' Contracts) Regulations 2006 or the European Communities (Award of Contracts by Utility Undertakings) Regulations 2007;"

The application

24. The defendant argues that, as a matter of European law the power exists to award damages for breach, the claim of the plaintiffs as formulated in the statement of claim is one for damages for breach of Community procurement law, and the appropriate remedy is found within the remedial regime promulgated by the Remedies Directive. The defendant argues that the Regulations contain a self contained and mandatory code governing any and all claims for relief arising from any and all actions or omissions which constitute infringement of procurement law.

25. The plaintiffs argue that the claim is one at common law for breach of contract and negligent misrepresentation, and that while the Remedies Directive does provide a remedy for breach of procurement law this remedy is intended to be confined to claims by which a disappointed candidate seeks to review a decision to grant a contract, and is not appropriate to govern, nor was it intended to govern, a claim at common law for breach of contract arising from the procurement process.

The overriding principle of the European Regime

26. The Remedies Directive identified the policy that the prosecution of review against a decision in the field of procurement be made with expedition. The recitals include a desire that there be:

> "tangible affects, effective and rapid remedies … in the case of infringements of Community Law in the field of public procurement and national rules implementing that law;"

27. The objective is that "adequate procedures" exist in all Member States to permit the setting aside of decisions taken unlawfully and in breach of Community procurement law, and to provide for "compensation of persons harmed by an infringement".

28. Article 1 of that Directive states the desirability that the review of decisions by a contracting authority should be done "as rapidly as possible", and no limitation regarding the type of remedy is identified as being outside this general statement of expedition and urgency, which must therefore then be seen as a desirable end in regard to all and every remedy of whatever type arising from a breach.

29. In the Supreme Court decision in *OCS One Complete Solutions Limited v. Dublin Airport Authority* [2014] IESC 6 Clarke J. considered that an Irish court must construe the Regulations in conformity with the obligation on the State arising from the Directive and in a manner designed to achieve the result sought to be achieved thereby. This principle of harmonious interpretation is well established in European Law and does not need to be further examined by me here.

Strict time limits irrespective of remedy sought

30. In *Dekra Éireann Teoranta v. Minister for Environment and Local Government* [2003] IESC 25, [2003] 2 I.R. 270 the Supreme Court was considering the then relevant provisions of Order 84, rule 4. The principles engaged by the court are substantially similar to those in issue in the present case. In particular Denham J. at page 283 of the judgment describes the nature of the judicial review conducted in a procurement matter to be a "specialist area" which "reflects a policy that such reviews be taken effectively and rapidly as possible".

31. In his judgment in *SIAC Construction Limited v. National Roads Authority* [2004] IEHC 128 Kelly J. put beyond doubt that the then relevant O.84A applied "not merely to the decision to award a contract or the award of a contract, but also to decisions taken by contracting authorities regarding contract award procedures".

32. That judgment was given in regards to the time limits for commencing a claim but explains the policy behind the adoption of strict time limits in domestic law. The purpose of the strictness of the time limits had been considered by the Supreme Court in *Dekra Éireann Teoranta v. Minister for the Environment and Local Government* that O.84, r.4 "reflect a policy that such reviews be taken effectively and as rapidly as possible" (per Denham J. at p. 283), and that there was "a degree of urgency required in applications of this type" (p.285). Kelly J. adopted this approach.

33. In *Matra Communications SAS v. Home Office* [1999] 1 W.L.R. 1646 Buxton L.J. pointed to the obvious fact that a continuing damage claim was likely to have an unsettling and disruptive effect on contractual relations established by the award decision. Kelly J. noted this and quoted with approval the statement of Buxton L.J. that no distinction is to be made between damages and other remedies. At p. 22 Kelly J. stated the following:

> "Accordingly, it follows that because the only claim which is made here is one of damages, it is not to be treated differently from a time limitation point of view to any of the other remedies that are provided for in the directive."

34. The plaintiffs argue that the proceedings commenced by them are not ones that seek to dispute the contract and accordingly no concern arises that the damages claim might have an "unsettling effect". That argument seems to me to misconstrue the purpose of the Regulation and fails to have regard to the overriding intention that there would be a harmonious interpretation of the nature of the remedies, and that the remedies for which provision is made are remedies to be construed in accordance with Community Law.

35. This is clear from the judgment in *SIAC Construction Limited v. National Roads Authority* where Kelly J. said:

> "It is clear that national authorities are obliged to ensure that the Remedies Directive in full is implemented. Such implementation cannot be confined to decisions to award a contract, or the award of a contract, but must extend to other decisions taken in respect of contract award procedures. It follows, therefore, that O.84(A) in order to be in accord with applicable Community law, must be interpreted as applying not merely to a decision to award a contract, or award of a contract, but also to decisions taken by contracting authorities regarding contract award procedures." (p. 28)

36. The point regarding the nature of the remedy cannot be answered therefore by reference to the type of relief sought and does not require that an applicant has challenged a decision to award a contract. With that proposition in mind, I turn to examine the nature of the claim.

Is the claim within Regulation 8(1)(a) or (b)?

37. A distinction can be seen between the remedies afforded by Regulation 8(1)(a) and (b) as follows:

> "8.—(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.

38. The plaintiffs argue that their claim does not come within the provisions of Regulation 8(1)(a), the aim of which is to correct an infringement at the interim stage of the process. In *OCS One Complete Solutions Limited v. Dublin Airport Authority* Clarke J. explained

the distinction correctly understood made in Regulation 8(1)(a) and Regulation 8(1)(b), the latter regulating review of the decision of a contracting entity to award the contract. What is intended to be encompassed by Regulation 8(1)(a) was explained by Kelly J. in *SIAC Construction Limited v. The National Roads Authority*, that reference to "an interlocutory" application was not a reference to that concept as understood in domestic law, i.e. not to an interim remedy, but rather to a final remedy at an interim stage of the process.

39. The plaintiffs say that none of the remedies referred to in Regulation 8(1)(a) could be construed in any sense as a remedy which would enable a plaintiff to claim damages, and this is notwithstanding that an award of damages is contemplated in the regulations.

40. It seems to me that the claim of the plaintiffs is properly characterised as a claim under Regulation 8(1)(a) and that while the complaint is made with regard to the manner in which the process was engaged by the defendant, the plaintiffs' claim is one by which it attempts to review the decision and in that context to persuade a court that damages should lie for errors in the decision-making processes and actions.

Is there a "decision" in the process to which the proceedings relate?
41. The plaintiffs say that the disclosure in respect to which the claim is brought is not in any sense a "decision" taken at any stage in the process, but arises by virtue of a breach of the contractual nexus created by the process. Reliance is placed on the opinion of *Advocate General Léger in Commission v. Spain* Case C-214/00, where he advised the adoption of a broad meaning for the concept of "a decision".

42. He said:

> "88. In view of the objectives of the review directive and of the wording of Articles 1 and 2, the Court thus intended to give a broad definition of the term 'decision', within the meaning of those provisions. 'Decision' therefore means any act or measure, alleged to be unlawful in the light of the procedure directives, adopted during the procedure to award the contract in question, which produces effects or results which may be taken into account by the contracting authority in the final award decision."

43. Because the Court did not consider that the Spanish legislation was deficient in regard to the class of decision in respect to which remedies were provided, it did not need to consider the correctness of the broad definition for which Advocate General Léger contended. But the approach of Advocate General Léger is consistent with the Irish Authorities that adopt a broad and inclusive construction of the procedures.

44. It seems to me that, as the plaintiffs plead that the disclosure occurred in the course of the competition and not otherwise, that the acts in respect to which complaint is made are properly speaking "decisions" taken by the NRA in the course of the competition, and are to that extent therefore governed by the Remedies Regulations.

45. The plaintiffs also contend that the claim is one capable of being maintained by common law remedies as an action in contract.

The appropriateness of treating the claim as one in contract
46. The plaintiffs seek damages and no form of injunctive or declaratory relief, and argue that the correct way to characterise their claim is to understand it within the rubric of Irish contract law. In that context, it is argued that the ITT does create and is intended to create legal relations, and that the breach by the defendant is a breach of the underlying contract made in the process.

47. I turn now to examine the tender documents and the argument from contract

The tender documents
48. The central question in regard to how to characterise the claim of the plaintiffs is whether the Invitation to Tender ("ITT") has contractual force. The defendant argues that the claim of the plaintiffs arises from the Regulations, or more simply from the procurement process under Community law, but the plaintiffs argue that there was an assumption of contractual liability by the defendant and that as they sue for breach of that contract at common law, they may do so in plenary proceedings.

49. The ITT contains provisions which expressly exclude contractual obligation and the creation of contractual rights or obligations. The document contains a two page preliminary "Important Notice" which contains a number of relevant provisions as follows.

50. In the first paragraph the following appears:

> "In no circumstances shall the Authority, the Local Authorities, the Relevant Authorities, their respective advisers, consultants, contractors, servants and/or agents incur any liability or responsibility arising out or in respect of the issue of this ITT..."

51. That paragraph is a complete exclusion of liability in respect of the issue of the ITT, but does not of itself exclude liability for some elements of the tender document by which contractual liability might arise.

52. In the third paragraph, the Notice describes the ITT as "a summary of available information" and goes on to provide as follows:

> "…no reliance shall be placed on any information or statements contained herein, and no representation or warranty, express or implied, is or will be made in relation to such information."

53. No exclusion is contained in this clause regarding any contractual liability that might be said to arise under the ITT, and what is excluded is any cause of action that might arise from a reliance on any information or statements in the ITT, it is not so broadly drafted in my view so as to exclude liability for any elements of the tender document which might have contractual force.

54. Paragraph 6 excludes liability in regard to the decision to award the contract:

> "Nothing in this ITT is, nor shall be relied upon as, a promise or representation as to the Authority's ultimate decision in relation to the award of the contract for the Project."

55. This clause is further clarified as being an exclusion of liability in relation to the ultimate decision to award the contract, and the later parts of that paragraph identify particulars of such excluded matters including the rights reserved onto the Authority to abandon the competition, to reject all submissions, to change the timetable etc.

56. A further exclusion contained in the following paragraph which provides that nothing in the ITT "is, or shall be relied upon as, a representation of fact or promise as to the future".

57. The combined effect of these two exclusions is that the Authority is not to be taken, by the ITT, to have created any contractual expectation that the competition would be concluded, the contract for the project awarded, and that no future intention of the Authority is to be gleaned therefrom.

58. On the second page there is a further exclusion of liability for the Authority and their advisors, agents etc:

> "… for the legality, validity, effectiveness, adequacy or enforceability of any documentation executed, or which may be executed in relation to the Project."

59. This is not an exclusion of liability in contract but in respect of any interpretative or construction matter that might arise regarding the effectiveness, meaning, validity or enforceability of such documentation. It leaves over to the competitors the matter of taking legal advice with regard to the appropriateness of any documents executed in relation to the competition or the project.

60. The next part of this paragraph is the one on which the defendant places most emphasis and I quote it in full:

> "Except for the letter of undertaking referred to below no legal relationship or other obligation shall arise between a Participant and the Authority unless and until the contract for the project has been formally executed in writing by the Authority and the preferred tenderer and any conditions precedent to its effectiveness has been fulfilled."

61. This clause is clear and expressly identifies that the source of contractual obligations is the letter of undertaking. The letter of undertaking does not appear in the documents adduced in evidence. I am advised that the purpose of such letter is to impose obligations on the tenderer, not on the authority.

62. The following clause contains a general exclusion of contractual liability as follows:

> "Nothing in this ITT shall constitute the basis of a contract in relation to the Project nor be used in construing any contract that may be concluded in relation to the Project."

63. That exclusion simply means that a contract in relation to the project can arise only by a process inside the ITT, and is consistent with the earlier provisions identified above, by which the NRA excluded contractual liability in relation to the project until such time as the contract had been awarded. The "acceptance of delivery" by the participants of the ITT is agreed to constitute "its agreement to, and acceptance of, the terms set forth" in the ITT.

64. The question for construction is whether it can be said that the NRA assumed liability to each person entering the tender process to treat commercially sensitive information in the strictest commercial confidence. For the purpose of the present application, I consider that the test I must engage is whether there was arguably an assumption of contractual liability by the authority in the ITT process. There is an express assumption of liability by the NRA at para. 2.3.1. in regard to the process, and is not excluded by the provisions in the exclusionary clauses contained in the document by which contractual force is precluded in regard to the project. The authority arguably did assume liability to engage the process in accordance with the provisions of the ITT and it did assume a liability to respect the confidentiality of commercially sensitive information.

65. Clause 2.3.1 of the ITT provides as follows:

> "Subject to sections 1.4, 4.3, 4.4 and 4.5 of this ITT, the Authority will treat all commercially sensitive information submitted by a Participant and/or discussed in the Dialogue Stage Two Process in the strictest commercial confidence. However, the Authority does reserve the right to discuss aspects of the Participants' proposals with the Local Authorities, Relevant Authorities, Road Operators, and/or the European Investment Bank. Such discussions shall be conducted in the strictest commercial confidence and shall not relieve the Participant of its obligations to consult the Local Authorities and/or Relevant Authorities and/or Road Operators."

66. I consider that Clause 2.3.1 can be construed as an assumption by the contracting authority of a justiciable obligation to protect, and not unlawfully disclose, commercially sensitive information. What is excluded from the ITT is contractual force in relation to the continuance of the competition, the award of the contract for the project to a competitor, and the creation of legal relations by means of any representation or matter of fact referred to in the document. The ITT however can be understood therefore as creating a contractual nexus between the parties, albeit the elements of that contract are elements with regard to the process and not the end result.

67. The claim of the plaintiffs falls squarely within the provisions of Clause 2.3.1 of the ITT, and is therefore and to that extent a contractual claim.

68. However, that does not, to my mind, sufficiently answer the question of the characterisation of the claim for the purpose of the determination of the procedures for the commencement of the action.

The correct approach to characterisation

69. That in considering whether proceedings are properly constituted the court must look at the substance and not the form of an action is clear from a number of decisions given in the judicial review context.

70. The defendant argues that the plaintiffs have sought to reformulate their claim in precisely the manner rejected by the Supreme Court in *O'Donnell v. Dun Laoghaire Corporation* [1991] I.L.R.M. 301 but is not thereby permitted to avoid the strict procedural requirements of the Regulations. I consider this to be correct for the following reasons:

71. In *Shell E. & P. Ireland Limited v. McGrath and Ors*. [2007] IEHC 144, [2007] 4 I.R. 277 Laffoy J. had determined that the entitlement of the defendants to an inquiry as to damages arising from an alleged breach of undertaking survived the discontinuance of the claims by the plaintiff against the defendants. The Supreme Court [2013] IESC 1, [2013] 1 I.R. 247 allowed the appeal of the defendants to the counterclaim, and, having considered the rules regarding the commencement of proceedings by judicial review Clarke J. at para. 43 said the following:

> "However, it seems to me that *O'Donnell v. Dun Laoghaire Corporation* was rightly decided in any event. It would make a

nonsense of the system of judicial review if a party could by-pass any obligations which arise in that system (such as time limits and the need to seek leave) simply by issuing plenary proceedings which, in substance, whatever about form, sought the same relief or the same substantive ends. What would be the point of courts considering applications for leave or considering applications to extend time if a party could simply by-pass that whole process by issuing a plenary summons?"

72. Clarke J. considered that what the proceedings had at their heart was:

> "…a challenge to the validity of the compulsory acquisition orders and the consent brought long outside the time provided for in the rules in that regard and in circumstances where the damages claim requires a finding which renders unlawful actions taken on foot of those measure at a time when they were not subject to timely challenge. In addition it must be noted that, even as the proceedings were originally constituted, the counterclaim went beyond seeking a declaration of invalidity simply as part of a defence but extended to seeking to establish the invalidity of the relevant measures as a basis for pursuing a claim for damages." (para. 52)

73. A similar approach was taken more recently by Keane J. in *Mungovan v. Clare County Council* [2015] IEHC 561 where he considered that the public law claims for declaratory relief were time barred by the statutory time limits under s. 50 of the Planning and Development Act 2000 as amended, and that the time limits also applied to the claim for damages.

74. It is true that the plaintiffs do not seek what would be called judicial review in domestic law, but the claim is rooted firmly in breach of Community procurement law. The plaintiffs do not claim that the contract was unlawfully awarded to the ultimate winner, but that the plaintiffs lost their chance by virtue of the disclosure of the information alleged to have been wrongfully disclosed.

75. The claim is pleaded at common law but the breach in respect of which the claim is maintained derives from Regulations 17, 29(5), 29(6) and 34(4), the alleged breach therefore being ones properly characterised as a breach of the rules, regulations, principles and policies of Community procurement law generally.

76. Paragraph 13 of the statement of claim sets out 8 particulars of the alleged disclosure, by the defendant, to a rival consortium of commercially sensitive information pertaining to the plaintiffs' tender. In each case the pleas are made in general that the information was divulged or disclosed without the authority of consent of the plaintiffs, and the plaintiffs invoke the provisions relating to confidentiality in the Regulations, the terms implied and expressed in the ITT which itself was governed by the Public Contracts Regulations. The claim is for breach of those express and implied terms, or in the alternative arising from misrepresentations said to have been through the Invitation to Tender. There is no claim that any breach of contract, breach of confidence or wrongful disclosure arose outside the process, or that the terms and conditions arose or representations were made other than through the Invitation to Tender and the processes associated therewith.

77. Of importance too, is the fact that the claim for damages is not framed as a general claim for loss of general business opportunity but the damages are characterised as being the cost and expenses of participating in the tender competition, and the loss of the contract, or possible loss of future contracts by virtue of the disclosure to a competitor or potential competitor of the commercially sensitive pricing methodology of the plaintiffs in procurement competitions.

78. Furthermore damages are claimed either on the basis that they be measured as the lost opportunity, and as such the lost opportunity is a loss of this contract, or because the winning bidder allegedly had a competitive edge, and damages are to be measured by reference to this alleged advantage.

79. It is of particular importance in the context of European law, where the principles of effectiveness and equivalence must be observed by an Irish court enforcing Community law, and where the concepts insofar as they may be rooted in Irish law must be construed through the prism of Community principles, that the matter of characterisation does not confine the analysis to the form of the proceedings, but would look to the substance of a claim.

80. The approach of the Supreme Court in *Shell E&P Ireland Ltd v. McGrath & Ors*. is the correct approach in the circumstances, and means that a court must look to the substance of the claim and the source of the rights, breach of which is alleged to give rise to remedy. It would in my view be inconsistent with European law and with the approach identified in the Irish authorities for a plaintiff to be permitted to bring a claim by plenary proceedings in respect of the breach of the terms and conditions expressed in the tender process, and said to be implied therefrom. To permit the plaintiffs to do this would be to ignore the State's obligations under European law to create a self contained and complete system for the award of public contracts and for remedies to those dissatisfied either with the process, interim measures, or the ultimate award of the contract.

81. That this is the correct approach is mandated also by the fact that many of the persons who will take part in the competition will not be Irish citizens or bodies registered in Ireland, and the principles of the free movement of services and open competition between Member States are best fostered by a uniform provision for the granting of public contracts and remedies for failure of process and procedures.

82. Accordingly, I consider that the fact that the plaintiffs seek damages for breach of contract at common law cannot of itself indicate the correct characterisation of the proceedings. Damages are a remedy contemplated by the Remedies Regulations and by O.84A, and the fact that damages are sought does not make this a wholly domestic claim. Further, the claim of the plaintiffs for damages is predicated on an argument that the disclosure of the information was an unlawful step taken by the defendant in the course of the process by which the contract was awarded. It is pleaded that absent the disclosure, the winning bid would not have succeeded, and the plaintiffs had at the very least, a realistic or good prospect of success in the process, and this also involves a direct challenge to the decision to award the contract, again a matter in which a court will examine the engagement in the process and how it evolved. As thus understood, it is a challenge to the way in which the decision of the defendant was taken.

83. The plaintiffs however argue that the mere fact that a contract occurs against the backdrop of the procurement regulations does not mean that contractual rights as understood at common law do not arise and are not justiciable. In that sense, it is argued that different causes of action may be differently maintained.

84. The plaintiffs rely on a number of judgments of the courts of England and Wales and Northern Ireland to which I now turn.

Relevant decisions of the courts of England and Wales and Northern Ireland

85. The Court of Appeal of England & Wales in *Blackpool and Fylde Aero Club Limited v. Blackpool Borough Council* [1990] I W.L.R. 1195 considered how to properly characterise an invitation to tender made by the defendants, a local authority, regarding a

concession to operate pleasure flights from a local airport. Bingham J., while he accepted that in general "contracts are not to be lightly implied", took the view that the parties did intend to create contractual relationships, and that the soliciting of tenders from selected parties where the invitation prescribes a "clear, orderly and familiar procedure" had the effect that the invitee had a "contractual right", and not a "mere expectation" that his tender would be considered in conjunction with all other conforming tenders. That judgment cannot influence my decision because the Court of Appeal did not engage any question of Community law.

86. The decision was followed by the Court of Appeal of England and Wales in a later decision of *Fairclough Building Limited v. Borough Council of Port Talbot* [1993] 62 BLR 86, where Parker L.J. analysed the matter not strictly by reference to whether an implied term could be said to exist but as "a question of contract to be implied from conduct". Again no question of Community law was addressed.

87. In *Harmon CFEN Facades (UK) Limited v. Corporate Officer of the House of Commons* [1999] All E.R. (D) 1178 Judge Humphrey Lloyd Q.C., sitting as a specialist judge in the Technology and Construction Court, was considering a tender within the context of the Public Works Contracts Regulations of 1991 and the question of whether the House of Commons which had tendered for a building project was in breach of Community law by favouring a British firm. At p. 132 of the judgment he said the following with regard to the creation of contractual obligations from the tender process:

> "These contractual obligations derive from a contract to be implied from the procurement regime required by the European directives as interpreted by the European Court whereby the principles of fairness and equality form part of a preliminary contract of the kind that I have indicated. Emery shows that such a contract may exist in common law against a statutory background which might otherwise provide the exclusive remedy. I consider that it is now clear in English law that in the public sector where competitive tenders are sought and responded to, a contract comes into existence whereby the prospective employer impliedly agrees to consider all tenderers fairly: see *Blackpool* and *Fairclough*."

88. In that case, the High Court considered the compensation was to be awarded on a "contractual" basis rather than on a "tortious" basis, and that it was necessary before considering whether the plaintiff was entitled to recover its wasted tender costs, or its loss of profits, to determine whether the plaintiff would have been awarded the contract or what chance it had of being awarded the contract had there been no breach.

89. In his lengthy judgment Judge Humphrey Lloyd Q.C. did not address at all the question raised in the present case, namely whether the claim was one which might be brought other than in accordance with domestic procedural rules which implement the Remedies Directive. While the judgment considered extensively the rules and principles of Community procurement law, it did not consider the form of legal pleadings or proceedings by which claim for breach might be brought.

90. The judgment of the specialist judge in *Harmon CFEM Facades (UK) Ltd. v. Corporate Officer of the House of Commons* was referred to with approval in the judgment of Deeny J. in the Northern Irish High Court in *Natural World Products Limited v. ARC 21* [2007] NIQB 19:

> "I consider that it is now clear in English law that in the public sector where competitive tenderers are sought and responded to, the contract comes into existence whereby the prospective employer impliedly agrees to consider all tenderers fairly." (para. 5)

91. The plaintiff had brought proceedings for a declaration that their disqualification at a late stage in a procurement process for the award of a contract for the provision of organic waste services was in breach of the public service contracts regulations. The order made by Deeny J. was to set aside the decision of the authority to award the contract doing so under the regulations.

92. While the nature of the pleadings is not identified in the course of the judgment, Deeny J. made it clear that "if an order of certiorari is required I will grant one" (para. 42). He was, on my reading of the judgment, hearing the application for an interim order, and did so within the context of the processes and procedures applicable to judicial review.

93. Again, that judgment does not answer the procedural question at issue in the present case.

94. In another judgment of the High Court of Justice in Northern Ireland, *McConnell Archive Storage Limited v. Belfast City Council* [2008] NICh 3, Deeny J. followed the line of authorities already identified by him in *Natural World Products Limited v. ARC 21* and said that the claim arose "both at common law and under regulations made pursuant to European Directives" (para. 11). It seems that those proceedings were commenced by originating summons which sought *inter alia* in order for specific performance of a contract alleged to have been made by the plaintiff and the defendant arising from a tender process.

95. In the last judgment of the High Court of Justice in Northern Ireland opened to me by the plaintiffs, The Personal Representative of the Estate of Samuel Stephenson, *Deceased v. Louis McLaughlin* [2011] NIQB 72, while Weatherup J. addressed the matter as to whether there was a contract between the plaintiff and the defendant by engaging common law principles, the proceedings were commenced by judicial review and again the approach of the court to the common law principles does not assist me in my decision.

96. The Privy Council in *The Central Tenders Board & Anor. v. Vernon White (trading as White Construction Services) (Montserrat)* [2015] UKPC 15 followed the line of authorities just reviewed by me. Lord Toulson giving the judgment of the Privy Council said the following at para. 29:

> "In a case such as the present, there would be no difficulty in finding that the CBT owed an implied contractual duty to the under-bidder and to every other invitee that they would be treated fairly and equally. If a breach of that duty caused a tenderer to suffer a loss of a chance of a contract, the tenderer would be entitled to damages."

97. Those proceedings were determined by judicial review, and for that reason and because no direct considerations had as to how the proceedings should be commenced, I consider that the analysis of the Privy Council does not assist me.

98. The plaintiffs plead the claim in common law and for breach of the Regulations, and for misrepresentation. The plaintiffs argue that the strong line of authority from the courts of England and Wales and of Northern Ireland would suggest that it is proper in a suitable case and in accordance with sound legal principles that the Irish court would entertain a claim for damages as arising both under Community law and at common law, and that therefore the Community procedural regime established is not exclusive.

Analysis of the case law of England and Wales and Northern Ireland

99. The case law of the courts of England and Wales and of Northern Ireland does not offer much assistance in that there is nothing

in the reports of those decisions which identifies the approach of the courts to the procedural requirements in the law of England and Wales or of Northern Ireland, and indeed as I have noted, the judgments in many cases were given in proceedings commenced by way of judicial review.

100. I consider that the answer must be found in the Regulations themselves. The Public Contracts Regulations provide a regime imposing obligations and rights on the contracting authority and the candidate. Therefore the claim of the plaintiffs for breach of confidentiality is one that finds a direct echo in Regulations 50(3) and (4) of the Public Contracts Regulations as follows:

> "A contracting authority shall communicate and store information in connection with awarding public contracts in a way that maintains the integrity of data and the confidentiality of tenders and preserves requests to participate.
>
> […]
>
> A contracting authority shall ensure that the contents of tenders remain unopened and confidential until the deadline for the receipt of tenders or request to participate has expired."

101. In that regard I adopt the proposition of Morgan J. giving the judgment in *Lion Apparel Systems v. Firebuy Limited* [2007] EWHC 2179 (Ch) where an interim order under the Public Contract Regulations was sought to prevent the award of a public service contract. He was considering the question of whether contractual liability had been assumed in an invitation to tender where the contracting authority had agreed to "seek to secure various matters such as accountability in the process and the maintenance of the principles of transparency, equality, treatment and non-discrimination". At para. 212 he said the following:

> "Those matters are a statement of the obligations on Firebuy under the general law. There is no need to search for another basis, for example a contractual basis, on which to hold that Firebuy is bound by those obligations; it is already bound. Further, given that Regulation 32 of the 1993 Regulations imposes important limits on a bidder's ability to take action against Firebuy for breach of such obligations, I do not think it could possibly have been intended that those obligations would co-exist by way of a contract, where the limitations of Regulation 32 would not apply.

102. That dicta expresses a general proposition which I adopt. The obligations on the NRA are obligations which derived from the Regulations themselves. This is clear too from the judgment in *Harmon CFEN Facades (UK) Limited v. Corporate Officer of the House of Commons* where the specialist judge considered that the obligations derive from a contract to be implied from the procurement regime required by the European directive as interpreted by the European Court.

103. In a judgment of the English High Court in *J Varney and Sons Waste Management Ltd v. Hertfordshire County Council* [2010] EWHC 1404 (QB), Flaux J. took the view that a claim under the Public Contract Regulations ought not to be permitted to be framed as a breach of contract at common law. At para. 233 of his judgment he said the following:

> "In my judgment, there is no basis for the implication of this contract for two reasons. First, the Regulations create their own regime imposing duties on the Council in relation to any tender submitted. Given that legal regime, it is unnecessary to imply a contract and none will be implied. In the context of public procurement, albeit under the previous Regulations, in Lion Apparel Systems Ltd v Firebuy Ltd [2007] EWHC 2179 (Ch) Morgan J decided that there was no scope for the implication of a contract: see paragraph 212."

104. The court went on to note that the court would not in general "enforce rights of common law" which are "inconsistent with statute", such inconsistency is to be understood as that explained by Arden L.J. in *Monro v. HMRC* [2009] Ch. 69 as:

> "By 'inconsistent' I mean that the statutory remedy has some restriction in it which reflects some policy rule of the statute which is a cardinal feature of the statute."

Decision on contract claim

105. The question before me is not one of the source of the remedy or the source of the legal obligations and rights, but the manner in which those rights may be protected and the obligations enforced. Irish procedural rules require that this be done by judicial review under O.84A.

106. The obligations may be ones familiar in common law jurisdictions, but they derive from Community law, and while the concepts are similar and may indeed be identical, the remedy is one governed by European principles. That this is so derives itself from nature of the competitive process envisaged and supported by the Community procurement law. A disappointed tenderer is not deprived of a remedy, but must seek the remedy within the framework as established under Community law. This necessarily, in my view, precludes the bringing of a claim other than by the mechanism provided by O.84A, and even if the claim be one for breach of contract as understood in domestic law, the procedure is one governed by Community law.

Conclusion

107. For these reasons, I conclude that the claim of the plaintiffs is not one that may be maintained by plenary action, and accordingly, I answer the preliminary question as follows:

The plaintiffs were required to pursue the claim in the within proceedings by way of proceedings initiated pursuant to O.84A of the Rules of the Superior Courts.