Neutral Citation [2012] IEHC 425

THE HIGH COURT

[2011 No. 1043 J.R.]

[2011 No. 249 COM]

BETWEEN

STUDENT TRANSPORT SCHEME LIMITED

APPLICANT

AND

THE MINISTER FOR EDUCATION AND SKILLS

RESPONDENT

AND

(BY ORDER OF THE COURT) BUS ÉIREANN

NOTICE PARTY

JUDGMENT of Mr. Justice Brian J. McGovern delivered on 23rd day of October, 2012

1. These proceedings concern the School Transport Scheme (the "Scheme"), an administrative scheme by which the respondent provides school transport to over 100,000 school children every day, including children with special needs. The Scheme in its present form was created in 1967, and has been administered by the notice party since that time.

2. The applicant company was formed in June 2011, and commenced these proceedings some four months later. The applicant contends that a contract exists between the respondent and the notice party and that this contract ought to have been put out to tender. The applicant complains that because it was not in fact put out to tender it has thereby suffered loss. The issue of damages (should they arise) has been deferred by the agreement of the parties and by virtue of a direction by Kelly J. in the course of case management.

3. The proceedings are brought by way of judicial review application and have been admitted to the Commercial Court.

4. At the commencement of the hearing, counsel for the applicant informed the court that the reliefs being pursued at the hearing are to be found in paragraphs 7, 11, 12 and 13 of the notice of motion. Paragraphs 11, 12 and 13 deal with the issue of damages and other ancillary relief and costs. Paragraph 7 is the substantive point which arises at this hearing. In paragraph 7, the applicant seeks "a declaration that the Contract to which the Services relate is ineffective, pursuant to the Remedies Regulations". These are the European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010 (S.I. No. 130 of 2010) (hereafter the "Remedies Regulations").

5. Counsel for the applicant accepted that he has to satisfy the court of the existence of the contract contended for. If there is such a contract, then the issue of eligibility and the issue of delay have to be considered. However, both of these assume the existence of a contract.

6. The award of public service contracts is regulated by Council Directive 2004/18/EC of the European Parliament and of the Council of 31st of March, 2004, on the coordination procedures for the award of public works contracts, public supply contracts and public service contracts, O.J. L 134/114 30.4.2004 (hereafter "the Public Contracts Directive") and the European Communities (Award of Public Authorities' Contracts) Regulations 2006 (S.I. No. 329 of2006). In addition, the Treaty of the Functioning of the European Union O.J. C 83/47 30.3.2010 (T.F.E.U.) and the principles established by the Court of Justice of the European Union (E.C.J.) apply to the procurement of services whether or not they fall within the scope of the Public Contracts Directive. The review of public service contracts is regulated by Directive 2007/66/EC of the European Parliament of the Council of 11th December, 2007, amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, O.J. L 335/31 20.12.2007 (hereafter "the Remedies Directive") and the Remedies Regulations (S.I. No. 130 of2010).

7. The Remedies Directive provides under Article 1(3):

> "*Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and has been or risks being harmed by an alleged infringement*."

The rules are to be availed of by a person"... *having or having had an interest in obtaining a particular contract* . .."This presupposes the existence of a contract. In these proceedings, the respondent denies that there was ever a contract in place between the respondent and the notice party.

8. In 1966, the Government introduced free post-primary education in Ireland. The evidence establishes that on 10th February, 1967, the respondent informed Córas Iompair Éireann (C.I.E.) that it had "*decided to give the total administration of this scheme to CIE'.* The scheme in question was the School Transportation Scheme. C.I.E. was to administer the Scheme as agents of the respondent. In 1973, Ireland entered the European Economic Community. In January 1975, the accounting arrangements between the respondent and C.I.E. for the operation of the Scheme were put in place.

9. On 22nd June, 2006, the earliest legislation relied on by the respondent came into force, namely, the Public Contracts Directive. The applicant contends that on 1st September, 2011, a contract commenced between the respondent and the notice party in respect of the 2011/2012 school year. This is denied by the respondent and the notice party who maintain that preparation for the

2011/2012 school year commenced in March, 2011. In order to determine whether or not a contract existed between the respondent and the notice party, it is necessary to look at the nature of the Scheme.

10. The Scheme supports the State's obligation to provide for free primary education and access to education. Its purpose is to facilitate equality of access to primary and post-primary education for those children who, because of where they reside, might otherwise have difficulty in attending school regularly.

11. The notice party act as agents of the respondent and tender 85% of school transport services. It recovers its costs through accounting arrangements with the respondent. The operation of the Scheme involves a significant logistical operation serving approximately 111,000 pupils and their families each school day, including some 8,000 pupils with special needs. The Scheme serves approximately 3,000 schools on some 6,000 school transport routes.

12. Following the introduction of free post-primary education in Ireland in 1966, the respondent appointed C.I.E. to administer the Scheme in 1967. This appointment was made because the respondent does not have the resources or expertise to administer such a scheme. By letter dated 10th February, 1967, the respondent entrusted the administration of the Scheme to C.I.E. which accepted the appointment by letter dated 13th February, 1967. In a further letter of 28th May, 1969, the respondent set out the administrative and financial arrangements of the Scheme. Among other things, the said letter provided that:

> "*1. CIE will administer the scheme as agents for the Minister for Education, and as such, will operate the scheme in accordance with his general directions and policy*.
>
> *2. All school transport services will be provided in accordance with the rules for eligibility of pupils and the regulations as to the minimum number of pupils necessary before a service can be established or maintained*. "

The notice party is the subsidiary company which administers the Scheme within the C.J.E. Group. A detailed description of how the Scheme operates is set out in the affidavit of Ms. Patricia O'Connor sworn in these proceedings on 12th December, 2011.

13. The Scheme is administered in accordance with the general directions and policy of the respondent and in accordance with the eligibility criteria laid down by the respondent which derive from the imperative of equal access to education. The operation of the Scheme is divided between scheduled services and special services. Scheduled road passenger services carry approximately 4,700 pupils daily and are ordinary timetabled Bus Éireann, Dublin Bus and private sector licensed operators. Iarnród Éireann timetabled services are also used. Special school services are operated specifically for the purpose of conveying pupils to and from school and these special services carry approximately 106,300 pupils daily and account for 95% of the service provided. The Scheme is managed centrally at the notice party's headquarters in Dublin by a team of seven dedicated employees. At local level, it is administered through eleven regional offices of the notice party.

14. The Scheme is a highly complex and comprehensive one which requires the notice party to carry out, *inter alia*, the following functions:

> (a) Annual review of every route to reflect the changes in pupil turnover;
>
> (b) planning the provision of new services, including route itineraries and scheduling;
>
> (c) continuous monitoring of contractor operations;
>
> (d) procurement of private operators and payment of contractor accounts;
>
> (e) assessment of pupil eligibility;
>
> (f) collection and accounting for pupil contributions;
>
> (g) issuing of tickets/passes to pupils;
>
> (h) planning and deploying the fleet of the notice party vehicles;
>
> (i) day-to-day supervision and monitoring of service, performance and standards;
>
> (j) all administrative support necessary for the operation of the scheme and its accountability as a State service;
>
> (k) garda vetting of all drivers involved in school transport duties in conjunction with the Garda Síochana Central Vetting Unit; and
>
> (I) ensuring, before engaging contractors, that every contractor, driver and vehicle procured meets all relevant standards and legislative requirements.

15. The respondent uses the services of a large number of private bus operators to provide dedicated school transport services on a contractual basis. Approximately 85% of school transport services are provided by private operators. All of the special needs aspects of the Scheme are sub-contracted and over 700 of these services are provided by taxis carrying very small numbers of children. The notice party operates its own fleet of some 570 school buses.

16. The Scheme operates on a cost recovery basis. Accounting arrangements have been in place since 1968 and these were updated in 1975 and have not been amended since. The respondent reimburses the notice party for a range of costs which are directly incurred by the notice party in the operation and administration of the Scheme. In addition. the respondent pays an agreed 13% charge to cover all other direct and indirect costs for the work carried out on the Scheme by the notice party.

Requirement to Establish Pecuniary Interest

17. Under Article 1(2)(a) of the Public Contracts Directive, the applicant is required to establish that the Scheme, as it exists in the 2011/2012 school year, is for "*pecuniary interest*".

18. Undoubtedly, funding passes from the respondent to the notice party but this does not determine whether the Scheme is for pecuniary interest, or indeed whether it establishes the existence of a public contract. In *Commission v. Ireland* (Case C- 532/03)

[2007] E.C.R. I-11353, the Commission alleged that Ireland had failed to fulfil its obligations under the Treaty by reason of the fact that Dublin City Council was permitted to provide emergency ambulance services without any tender procedure having been undertaken by the Eastern Regional Health Authority. The E.C.J. held that the Commission had failed to prove its case against Ireland and stated at para. 37, "... *the merefact that, as between two public bodies, funding arrangements exist in respect of such services does not imply that the provision of the services concerned constitutes an award of a public contract which would need to be assessed in the light of the fundamental rules of the Treaty*."

19. The Scheme is operated by the notice party on a cost recovery basis. It is of some significance that in each year since 2008, the 13% charge to cover all other direct and indirect costs attributable to the Scheme has been reduced at the instigation of the respondent, having regard to the financial difficulties currently facing the State. This indicates that there is no pecuniary interest in the administration of the Scheme such as to satisfy the requirements of Article 1(2)(a) of the Directive.

20. The court has to consider whether or not a contract exists between the respondent and the notice party. On this issue, there is some helpful case law from the E.C.J. In *Asemfo v. Tragsa* (Case C-295/05) (2007] E.C.R. I-02999 ("Asemfo"), the E.C.J. considered whether four municipalities had violated the public procurement rules in ordering the performance of certain services from Tragsa, a publicly owned company, without complying with tendering procedures. Under its rules of establishment, Tragsa was a "*technical service*" of the public administration and it was held at para.51 that the relationship between Tragsa and the public authorities that instructed it was "*not contractual, but in every respect. internal, dependent and subordinate*. At para. 54, the court stated:

> "*It must be observed that, if. .. Tragsa has no choice, either as to the acceptance of a demand made by the competent authorities in question, or as to the tarifffor its services, the requirement for the application of the directives concerned relating to the existence of a contract is not met*."

The court noted that Tragsa was not free to negotiate the scope of its activities, the conditions of its employment or the amount of remuneration to be received when undertaking work for public authorities.

21. In this case, the basis of the operation of the Scheme is entirely administrative:

> (i) The Scheme is based on an administrative arrangement between the notice party and the respondent; and
>
> (ii) the administration of the Scheme was entrusted to C.I.E. by letter dated 10th February, 1967, and, in turn, transferred to the notice party;
>
> (iii) C.I.E. and, in turn, the notice party, had no choice as to whether or not they would administer the Scheme.

22. The definition of a "contract" for the purpose of the Directive is a question of E.U.law (see *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia v. Administración General del Estado* (Case C-220/06) [2007] E.C.R. I-12175 ("Correos"). The requirement that "*the normal conditions of a commercial offer made by* [*the service provider*]" must be present in order for a contract to be found emerges from this case. In Correos, the E.C.J. considered Spanish legislation that permitted public authorities to enter into so-called "*cooperation agreements*" with the state-owned postal service provider, Correos, in order to cover the requirements for postal services, without any requirement to comply with public procurement procedures. In paragraphs 22 and 49, Spain argued that the case involved instrumental, rather than contractual, cooperation because Correos was subject to a statutory requirement to provide such services as came within the scope of the company's objectives, meaning that it was not in a position to choose whether or not to perform a particular service. The court held that the fact that a service provider was obliged to provide a service and to do so for a fixed price was not sufficient of itself to exclude the possibility of a contract, but it stated at para. 54:

> "*It is only if the agreement between Correos and the Ministerio were in actual fact a unilateral administrative measure solely creating obligations for Correos ... and as such, a measure departing significantly from the normal conditions of a commercial offer made by that company ... that it would have to be held that there is no contract and that consequently, Directive 92150 could not apply*."

Council Directive 92/50/EEC of 18th June, 1992 relating to the coordination of procedures for the award of public service contracts, O.J. L 209/1 24.7.92 referred to above relates to the coordination of procedures for the award of Public Service contracts as amended subsequently by Commission Directive 2001/78/EC of 13th September, 2001 amending Annex IV to Council Directive 93/36/EEC, Annexes IV, V and VI to Council Directive 93/37/EEC, Annexes III and IV to Council Directive 92/50/EEC, as amended by Directive 97/52/EC, and Annexes XII to XV, XVII and XVIII to Council Directive 93/38/EEC, as amended by Directive 98/4/EC (Directive on the use of standard forms in the publication of public contract notices). O.J. L 285/1 29.10.2001. On 31st March, 2004, the Public Contracts Directive, Directive 2004/18/EC recast a number of earlier Directives relating to the awarding of Public Service contracts and public supply contracts, including Directive 92/50 in the light of case law of the Court of Justice of the European Union.

23. The respondent and notice party argue that in this case, none of the normal features of a commercial relationship exist. For example, there are no mechanisms governing variation of the terms of the alleged contract. On the contrary, the notice party's functions can be varied at will by the Department. Examples were given in the affidavits before the court to show that on a number of occasions, the notice party had to grudgingly accept new terms imposed on it by the respondent regarding the operation of the Scheme. The respondent was able to amend the funding arrangements without having to engage in any consultation or negotiation with the notice party.

24. I am satisfied that the evidence establishes that the arrangements between the respondent and notice party do not contain any terms that might normally be associated with a commercial contract.

25. Each year since 2008, the 13% charge to cover all other direct costs and indirect costs attributable to the Scheme has been reduced on the direction of the respondent in the light of the financial difficulties facing the State during that period. The charge for functions performed by the notice party are laid down under budgetary decisions made by the Oireachtas and not the notice party.

26. The following facts, which have been established, are *indicia* of a relationship between the respondent and the notice party which is not contractual:-

> • The Scheme is unilateral in nature as evidenced by the manner of its inception when the respondent wrote to C.I.E. on 10th February, 1967:-
>
> > "... *I wish to inform you that I have decided to give the total administration of this scheme to CIE*."

In a reply, C.J.E. accepted the task assigned to it and referred to the respondent's letter "*informing [CIE] of your decision to entrust to us responsibility for the total administration of your new scheme for free transport/or children attending post-primary schools*".

• C.I.E./the notice party is required to administer the Scheme as agents of the respondent and is obliged to operate the Scheme in accordance with its general directions and policy. All school transport services are to be operated in accordance with the rules for eligibility of pupils and the regulations as to the minimum number of pupils necessary before a service can be established or maintained.

• The notice party performs its functions because it has been instructed to do so.

• The respondent - not the notice party - controls and directs the policy of school transport through eligibility criteria which are laid down by the Government.

• The Scheme is operated on a cost recovery basis.

• The respondent has increased the charges for children using the Scheme, thereby making it harder to meet eligibility requirements and reducing demand for school transport.

• Funding to the Scheme has been cut by the respondent, and while the notice party was entitled to make representations, it could not bind the respondent in any way to the status quo ante.

27. The applicant argues that there have been changes made to the Scheme which are, in effect, changes to the contract insofar as it impacts on the services carried out by the notice party. It claims that a material amendment to the initial contract will constitute a new contract. Since the procurement rules do not apply retrospectively, the applicant has to prove that a new contract was created which is materially different in character from the original "contract" (1967) in such a way as to demonstrate the intention of the parties to renegotiate the essential terms of the original contract. See *Pressetext Nachrichtenagentur GmbH v. Austria* (Case C-454/06) [2008] E.C.R. I-04401 ("Pressetext") at paragraph 34 of the judgment of the E.C.J.

28. The applicant does not offer any cogent evidence to support a case that parties have renegotiated the essential terms of the Scheme. Even if the arrangement between the respondent and the third party was a public contract, there has not been any change which would constitute a new contract thereby overcoming the principle of non-retroactivity. Even if the applicant succeeds in demonstrating that there has been a material amendment to the administration of the Scheme such as to constitute the award of a "*contract*", the Scheme would be exempt as it involves cooperation between the respondent and the notice party by application of the principles set out in *Teckal Sri v. Comune di Viano and Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia* (Case C-107/98) [1999] E.C.R. I-08121 ("Teckal"). In that case, the E.C.J., at para. 49-50, stated:

> "*As to whether there is a contract, the national court must determine whether there has been an agreement between two separate persons. In that regard . .. it is, in principle, sufficient if the contract was concluded between, on the one hand, a local authority and, on the other, a person legally distinct from that local authority. The position can be otherwise only in the case where the local authority exercises over the person concerned a control which is similar to that which it exercises over its own departments and, at the same time, that person carries out the essential part of its activities with the controlling local authority or authorities*."

It seems to me that even if the applicant was to establish that there was a contract in this case, that the Teckal exemption would apply.

29. Before setting out my final conclusions on the existence of a contract, I should deal with the other points raised by the parties in the case for the sake of completeness in case this matter proceeds further.

Is the Applicant's Claim Time-Barred?
30. Regulation 7(2) of the Remedies Regulations provides as follows:-

> "*An application referred to in sub-sections (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*."

Regulation 7(3) provides:

> "*(3) An application for a declaration that a contract is ineffective shall be made within 30 calendar days (commencing on the appropriate date determined in accordance with paragraph (4) or (5), as the case requires), in the following cases-*
>
> *(a) where the contracting authority published a contract award notice in accordance with Regulations 41 and 45 of the Public Authorities' Contracts Regulations, and, in the case of a contract awarded without prior publication of a contract notice in the Official Journal, on condition that the contract award notice sets out the justification of the contracting authority's decision not to publish a contract notice*;
>
> *(b) where the contracting authority notified each tenderer or candidate concerned of the outcome of his or her tender or application, and that notice contained a summary of the relevant reasons that complied with Regulation 6(2);*
>
> *(c) the cases of a contract based on a framework agreement, and of a specific contract based on a dynamic purchasing system, where the contracting authority has given notice in accordance with Regulation 6(2*). "

Regulation 7(6) provides that in any other case:

> *"... an application for a declaration that a contract is ineffective shall be made within 6 months after the conclusion of the relevant contract*."

31. The proceedings commenced on 28th October, 2011. The notice party argues that the core obligation set down in the Remedies Regulation 7(2) is that applications for review of an award of a contract shall be brought within thirty days of the actual or

constructive knowledge of the alleged infringement (or from notification of a decision, if relevant). It seems to me that Regulation 7(2) presupposes the making of a decision to award a contract and Regulation 7(3) requires that a Contract Award Notice has been published or that tenderers and candidates concerned have been notified of the conclusion of the contract. If I were to conclude that there was no notification of a decision or publication of a Contract Award Notice or notification of same, then it seems to me that Regulation 7(6) applies with a six-month time limit. Even there, there is an assumption that there is a contract because the application has to be made within"... *six months after the conclusion of the relevant contract*". Since the applicant alleges there was a contract, it is appropriate to approach this aspect of the case on the basis that a six-month time limit applies. The applicant was incorporated on 29th June, 2011, but on 20th May, 2011, the applicant's solicitors sought information from the respondent under the Freedom of Information Acts 1997-2003, indicating that even before incorporation, the applicant was aware that the notice party was operating the Scheme in the absence of a tender process having been conducted. The evidence suggests that the arrangements for the operation of the Scheme for the school year 2011/2012 would have been completed in March 2011. If that is to be taken as the "*contract*" between the respondent and the notice party, then, clearly, the applicant is out of time. The applicant has sought to argue for a contract commencing on 15th September, 2011, but appears to have chosen that date in an entirely arbitrary fashion and there is no evidence of a contract or any arrangement being concluded on that date. In the circumstances, it seems to me that the applicant is out of time for bringing these proceedings.

Eligibility
32. Whether a contract exists or not, the applicant has to show that it is eligible to bring the proceedings on the basis that it has or has had an interest in obtaining the reviewable public contract. In *Espace Trianon SA and Sofibail v. FOREM* (Case C- 129/04) [2005] E.C.R. I-07805, Advocate-General Stix-Hackl commented that Member States are only under an obligation to grant standing to those who have participated in procurement processes, save in exceptional circumstances where successful participation in a contract award procedure is impossible due to the conduct of the Contracting Authority. In *Ryanair v. Minister for Transport* [2009] I.E.H.C. 171, Finlay Geoghegan J. cited at para. 50 *The State (Lynch) v. Cooney* [1982]1 I.R. 337, where Walsh J. stated at p. 369:-

> "... sufficient interest is a mixed question of fact and law which must be decided upon legal principles but, it should be added, there is greater importance to be attached to the facts because it is only by an examination of the facts that the court can come to a decision as to whether there is a sufficient interest in the matter to which the application relates."

Finlay Geoghegan J. accepted that Ryanair had standing due to the nature of the breach alleged but stressed that had Ryanair simply been alleging a more general procedural breach, for example, of the principle of equal treatment of tenderers, Ryanair would not have standing.

33. In this case, the applicant has given very little evidence as to its capacity to carry out the Scheme and has cited reasons of "*commercial sensitivity*" for failing to provide more information. The court cannot ignore the fact that the applicant is a shelf company which was only founded a short time before the initiation of the proceedings.

34. In the circumstances, I hold that the applicant has not established that it has met the test for eligibility to be found in Regulation 4 of the Remedies Regulations.

Conclusions
35. The operation of the Scheme does not establish the existence of a contract. I am satisfied, on the evidence, that there was no contract within the meaning of the Directive or the Regulations. Accordingly, the provisions of the Remedies Directive and the Remedies Regulations do not apply and the applicant is not entitled to the declaration of ineffectiveness which it seeks.