Neutral Citation: [2015] IEHC 723

THE HIGH COURT

[2015 No. 21 J.R.]

IN THE MATTER OF THE REVIEW OF THE AWARD OF A PUBLIC CONTRACT PURSUANT TO THE EUROPEAN COMMUNITIES (AWARD OF CONTRACTS BY UTILITY UNDERTAKINGS) (REVIEW PROCEDURES) REGULATIONS 2010

AND ORDER 84A OF THE RULES OF THE SUPERIOR COURTS, AS AMENDED

BETWEEN

SOMAGUE ENGENHARIA S.A. & WILLS BROS LTD

APPLICANTS

AND

TRANSPORT INFRASTRUCTURE IRELAND

RESPONDENT

JUDGMENT of Ms. Justice Baker delivered on the 13th day of October, 2015

1. These proceedings concern the tendering process for the contract for the design and construction of the extension of approximately 5.6kms of the Dublin City Luas Light Railway. The applicants contend in this judicial review that the evaluation of the tender documentation in respect of the contract was vitiated by a number of serious errors and breach of the rules relating to public procurement. The applicants are a joint venture established for the purposes of tendering for the contract and came second in the competition, and claim inter alia that as their tender was awarded a significantly lower price than that of the winning bidder, that the errors and breach of the procurement rules on the part of the respondent had the effect that they lost the contract.

2. The application is fully contested and is brought pursuant to the provisions of O. 84A of the Rules of the Superior Courts as amended.

3. This judgment relates to an application on the part of the applicants pursuant to O. 41 r. 1 and/or the inherent jurisdiction of the court to require Marcello Corsi, who was intrinsically involved in the evaluation process and who has sworn a number of affidavits in these proceedings, to attend for cross examination on those affidavits.

4. The application to cross examine Mr. Corsi is contested.

Background

5. An order was made by me amending the title of the proceedings to reflect the fact that as of 1st August, 2015 the functions, assets and liabilities of the Railway Procurement Agency are transferred to Transport Infrastructure Ireland.

6. The applicants tendered for the construction of the 5.6kms of the Luas line and the tendering process involved, as these matters often do, a long period of pre-tender negotiation and preparation. The respondent opted for a so called "MEAT" (Most Economically Advantageous Tender) type of tender in respect of which points were given, as to 55% of the total marks in respect of the tendered price, and 45% in respect of other qualitative criteria.

7. One of the relevant criteria set out in the conditions of tender was "methodology" containing a number of sub-criteria, the relevant sub-criteria being the method proposed for the constructing of the tie-ins of the new Luas cross city line with the existing Red Line at the O'Connell Street and Marlborough Street junctions. This sub-criteria was worth 10 marks out of the 100 total marks available, and it was in respect of this sub-criteria that the applicants scored significantly worse than the winning bidder.

8. The applicants have accepted that their application is primarily one for damages and no application has been made that the contract, which has already been awarded to the preferred bidder, be suspended pending the determination of these proceedings.

9. The applicants have filed a lengthy statement of grounds but the matters now before me arise from a number of complaints which I now summarise:-

a. that the evaluators applied undisclosed or impermissible criteria,

b. that the evaluators misapplied the stated award criteria,

c. that the evaluators made a manifest error in assessing the Red Line tie-in (RLTI), and

d. that the evaluators in particular considered matters which were not relevant to the evaluation stage of the process.

10. Mr. Corsi was one of the evaluators who evaluated the RLTI and his evaluation notes which have been furnished in the course of discovery are to a large extent the focus of this application.

The Directive

For the purposes of determining this application I must briefly outline the provisions of the Utilities Directive 2004/17/EC, which was transposed into Irish law by S.I. No. 50/2007, the European Communities (Award of Contracts by Utility Undertakings) Regulations 2007. A number of principles contained in the Directive may come to inform my decision and the extent to which those principles as to the application of the tender process might guide me in my consideration of this application is one that I will return to later.

11. The Directive identified a number of general principles with regard to the process leading to the award of public contracts, namely non-discrimination, transparency of competition, proportionality, objectivity and effective judicial protection.

12. Article 55 of the Directive sets out a number of objective criteria to ensure compliance with these principles in the process of the award of a contract, inter alia with a view to ensuring "the necessary transparency to enable all tenderers to be reasonably informed of the criteria and arrangements which will be applied", and a means by which the tenders may be *"compared and assessed objectively".*

The European aim of genuine competition
13. The Utilities Directive is one concrete realisation of the principle of genuine competition between entrepreneurs in member states of the European Union. Transparency, fairness and objectively ascertained criteria are the particular ways in which the Directive mandates that fair competition be achieved in the awarding of public contracts within the Member States. As with many European principles, this objective is required to be protected by the national courts by effective remedies which are equivalent to those that are available in other Member States. Fennelly J. in *SIAC v. Mayo County Council* [2002] 3 IR 148 took the view that a judicial review in procurement cases might not always call in aid the principles of review of domestic decision makers. As he said at para. 83:

> *"I do not think, however, that the test of manifest error is to be equated with the test adopted by the learned trial judge, namely that, in order to qualify for quashing, a decision must "plainly and unambiguously fly in the face of fundamental reason and common sense." It cannot be ignored that the Advocate General thought the test should be "rather less extreme." Such a formulation of the test would run the risk of not offering what the Remedies Directive clearly mandates, namely a judicial remedy which will be effective in the protection of the interests of disappointed tenderers."*

He went on to say at para. 85 that the principles operative in domestic judicial review may be overly narrow to achieve this end:

> *"The courts must exercise their function of judicial review so as to make the principles of the public procurement directives effective. In the case of clearly established error, they must exercise their powers. The application of these principles may not, in practice, lead to any real difference in result between the judicial review of purely national decisions and of those which require the application of Community law principles."*

14. Implicit in this decision is a recognition that there can be in judicial review of procurement decisions a standard or test which can differ from that found in *O'Keeffe v. An Bord Pleanála* [1993] 1 IR 39, bearing in mind the wide margin of discretion allowed to national courts, and provided the remedy is both effective and equivalent in the light of Community principles.

Order 40, rule 1
15. Order 40, rule 1 of the Rules of the Superior Courts permits a party with leave of the court to serve a notice to require the attendance for cross-examination of a person making any affidavit. It is not usual to have cross-examination of the deponents of affidavits in a judicial review governed by domestic rather than Community law and this is because the judge engaged in a judicial review is not himself or herself enquiring into the facts. However, cross-examination has been employed in the judicial review of a public procurement decision governed by European law. This is apparent in a number of decisions including the earliest identified to me, namely *Advanced Totes Ltd. v. Bord na gCon* [2004] IEHC 415 where a notice to cross-examine had been served without demur, and it was clear that the case would in part be run with the benefit of oral evidence.

Application to cross-examine
16. The leading case in this jurisdiction remains the decision of O'Donovan J. in *Director of Corporate Enforcement v. Seymour* [2006] IEHC 369. These were proceedings under s. 160 of the Companies Act 1990 brought by the applicant and the judgment was given in the application by the applicant to cross-examine the respondent on certain affidavits. The following statement of principle remains good law:

> *"In my view, it is axiomatic that, when, in the course of applications to the court which are required to be heard and determined on affidavit, as is the situation in this case, it becomes apparent from the affidavits sworn in those proceedings that there are material conflicts of fact between the deponents of those affidavits, the court must, if requested to do so, consider whether or not to direct a plenary hearing of the proceedings or that one or more of the deponents should be cross examined on his or her affidavit. This is so because it is impossible for a judge to resolve a material conflict of fact disclosed in affidavits. However, while it seems to me that, where it is debatable as to whether or not the cross examination of a deponent on his or her affidavit is either necessary or desirable, the court should tend towards permitting the cross examination, at the end of the day it is within the discretion of the court as to whether or not such a cross examination should be directed and that discretion should only be exercised in favour of such a cross examination if the court considers that it is necessary for the purpose of disposing of the issues which the court has to determine."*

17. Certain matters were apparent from the statement of principle by O'Donovan J. and I set these out below:

> a. Cross-examination will be permitted if there are material conflicts of fact apparent from affidavits.
>
> b. Cross-examination may be required in order to allow a judge to resolve that material conflict.
>
> c. The court should tend towards permitting cross-examination but
>
> d. The discretion must nonetheless be exercised only if cross-examination is necessary for disposing of the issues
>
> e. There may be examined not merely facts taken in the narrow sense but also the construction, or interpretation, or conclusions that a person draws from those facts, and cross-examination may be permitted in those circumstances even if there is no real dispute as to those material facts.
>
> f. Thus opinions and conclusions may be tested by cross-examination both as to their reliability or reasonableness as the case may be.

Discussion on the test

18. O'Donovan J. in *Director of Corporate Enforcement v. Seymour* identified the primary purpose of cross-examination on affidavit as to allow a judge *"to resolve a material conflict of fact disclosed in affidavit."* Of more importance is the fact that O'Donovan J. suggested that the discretion of the court should be exercised when cross-examination is necessary for the disposing of the issues.

19. Kelly J. in *IBRC v. Moran* [2013] IEHC 295 refused leave to cross-examine on the basis that there was no *"sufficient conflict on the affidavits on any issue relevant to the question".* Thus the test is twofold: there must be a conflict of evidence on affidavit and it must be necessary to resolve that conflict in order to determine the issue before the court.

20. However, O'Donovan J. did not take a restrictive view of what might be a "fact" and he considered that certain elements of the mind of a decision maker required to be examined under oath, and that was so even if there was no identifiable conflict of fact or dispute on facts as such.

21. O'Donovan J. made the following general proposition with regard to an opinion expressed in an affidavit that:

> *"… if that opinion is challenged, notwithstanding that the facts upon which the opinion is based are not disputed, the court is entitled to know the mindset of the challenger and, in my view, the only way that that can be ascertained is by confronting the challenger under cross examination."*

22. The decision in *Director of Corporate Enforcement v. Seymour* was followed by Kelly J. in *IBRC v. Quinn* [2012] 4 IR 381 where he accepted that O'Donovan J. had identified the correct approach and found in that case that cross-examination ought to be permitted, inter alia, *"to provide the plaintiffs with full information".*

23. Counsel for the respondent, while he argues that cross-examination is neither necessary nor appropriate, does not go so far as to argue that the Rules of the Superior Courts, nor the particular judicial review envisaged by the amended O. 84A, preclude oral evidence, or cross-examination of affidavit evidence, in all cases. What he argues however is that cross-examination of affidavit evidence should only be permitted when there is a conflict of facts is required to be resolved for the determination of the issues. I accept that he is correct in this.

The substantive complaint about the process engaged by Mr. Corsi

24. In summary the argument made with regard to the process engaged by Mr. Corsi is that in the course of evaluating the relevant sub criteria for the RLTI he broke down the various sub tests in a particular way and then rebundled them in a way that was not permissible having regard to the tender criteria themselves. Mr. Corsi's working papers or notes have been discovered and these show that he awarded marks to the tenderers under a number of criteria.

The evidence of Marcello Corsi sought to be cross-examined.

25. Mr. Corsi was one of the evaluators who evaluated the RLTI, one of the competition sub criteria in respect of which ten marks out of the total of 100 was available. The applicants obtained four marks for this sub criterion and the winning bidder eight marks.

26. Mr. Corsi's notes were discovered as part of the discovery made in the proceedings and part of the matter now arising is what the applicants claim are certain discrepancies in his approach. The documents discovered show entries under eight headed columns in respect of which he assessed the bids. One of these, General and Track Installation Methodology which bore heading 5.3.1, was a particular focus of the applicants, who received a score of 20 as against 80 for the winning bidder. In particular Mr. Corsi described the bid of the applicants as having a "very poor methodology" and no track geometry analysis.

27. Another element of this sub criterion was the traffic management required for the dismantling and reconstruction of the existing Red Line. The applicants scored zero under this head on the grounds that no drawings or sketches were given, and the extent and scope were not shown or described. The winning bidder scored 40. A particular focus of the applicants in the substantive case is that Mr. Corsi identified what he saw as an error, namely that the drawings were incorrect and did not match the proposed modification to the Luas profile reference design, while on the other hand the winning bidder was thought to contain a good geometrical assessment and good drawings. The applicants argue that Mr. Corsi was incorrect in assessing their bid by reference to this test because its tender relied on the reference design and accordingly it was not permissible to score their tender in this way, as the reference design was a starting point of their tender and it did not require to be separately assessed.

28. Further it is argued that Mr Corsi applied the "pass/fail criteria" prescribed in section 5.5.6 of the Conditions of Tender relating to preparation presurvey, track geometry and special track work investigation which the applicants claim are not directly applicable to the final award criteria as set out in 5.3 of the contract document. In simple terms the applicants claim that the pass/fail criteria ought not to have had any role in the ultimate marking scheme applied to the persons who passed the prequalification stage of the tender process, of whom the applicants were one.

29. In general the applicants argue that the discovered notes of Mr. Corsi identify a different methodology, or one not permissible under the published Conditions of Tender and eight individual criteria were separately assessed by him which it is argued did not mirror the tender documentation. They argue that, in those circumstances, cross examination of Mr. Corsi, in order to identify his approach, and to test that against the mandated approach, is necessary to fully prosecute their proceedings.

30. Mr. Corsi swore three affidavits, a particular feature of two of which was that his affidavits were short and were sworn for the purpose of confirming the contents of the affidavits of Tony Redmond of the 10th April, 2015 and 8th July, 2015.

31. The evidence of the respondent is that Mr. Corsi's initial notes were what one might call "working notes" and that they had "not been directly reflected in the final scoring", as stated by Mr. Redmond in his affidavit of the 8th July, 2015. Instead Mr. Redmond says that the "notes simply helped splitting some wider aspects of the proposals into more manageable technical aspects… they were not used for the final assessment".

32. The first point in respect of which Mr. Corsi is sought to be cross examined is whether that assertion is true, more particularly it seems to me that what the applicants seek to is to understand and thereby to challenge the evaluation criteria applied by Mr. Corsi and the evolution of his analysis, even if they did not directly come to inform either his final score or the average score achieved in the process engaged by him and his other two evaluators.

33. The applicants say that there is a dispute between the parties as to the meaning of the notes, and inference that could be drawn from the notes and the role which the note played in the evaluation of tenders.

Discussion on general approach of Mr. Corsi

34. It seems to me that there is an issue to be resolved on oral evidence in this case and that is for two primary reasons. Somewhat unusually the replying affidavits of Mr. Corsi take the form of affirming and approving the contents of Mr. Redmond the chief procurement director. Mr Redmond was not part of the three person team which dealt with these sub-criteria. One of the members of that team has no notes as he was the lead evaluation and his notes became merged in the team notes. Accordingly the notes of Mr. Corsi and Mr. Kernan are the only notes available of the three persons on that team. Two facts emerge from this. While Mr. Corsi has identified that he agrees with, or accepts, the statement by Mr. Redmond in his affidavit that Mr. Corsi's own technical working method did not come to be directly reflected in the final scoring, it is not clear to me whether and how his method is in accordance with the tender criteria or whether they were fully known and understood by the other persons in the three man team of which he was part. Mr. Corsi himself does not swear an expansive affidavit identifying the reason for his approach, why certain questions were regarded by him as important or how the notes were dealt with at team meetings.

35. Another element where clarity might be required is that the applicant scored 20 overall in this sub category but as a result of the team meeting a score of 40 was ultimately agreed. Counsel for the respondent makes the point that however one might seek to analyse the approach of Mr. Corsi, that the score he awarded was doubled when the team came to consider the score of the applicant. The respondent's counsel makes the obvious point that in those circumstances Mr. Corsi's score had limited influence on the final result, and that accordingly it does not avail the applicant to cross examine him. This may be so but it seems to me that that point is one more properly made in a substantive case than in this application to cross examine, and as I will fully consider below, transparency in the approach of the evaluators is an important element in the process, and expressly required under the Directive.

Delay

36. The respondent first argues that the application to cross examination ought to be refused on the grounds that the applicant has grossly delayed in bring the motion. The proceedings commenced on 15th January, 2015 and the respondent complained that the statement of grounds was pleaded in an overly ambiguous and imprecise way. Two amended statements of grounds have since been served and amended statement of opposition. Discovery was made on 1st and 5th May, 2013, and the trial was fixed for hearing on 13th May, 2015. Two further applications to amend the statement of grounds were made between May 2015 and 27th July 2015, each of which was unopposed. The proceedings were intensively case managed by the Deputy Master, and the respondent says that at no stage in the course of the number of applications before her was there any suggestion that the cross examination of any of the deponents of any of the affidavits would be required. It is clear that on the last occasion the matter came before the Deputy Master on 9th July that no further case management was anticipated. Application to vacate that date by the applicant was successful and the matter was then listed for a three day hearing in Cork on 27th July, 2015 when it came before me in the Cork list, the modular issue of liability only to be dealt with on that occasion. In the events, while the matter was extensively opened, the application to cross examine Mr. Corsi took most of these three allocated days.

37. It was not until the 15th July 2015 that the solicitors for the applicant indicated in a letter to the solicitors for the respondent that they wished to cross-examine Mr. Corsi. The respondent argues that, as the judicial review has to be seen in the context of European law, the requirements of the effectiveness and equivalence of the domestic remedy, are met by judicial review on affidavit evidence, that in many European countries there is often no court process involved in the challenge of procurement decisions, and that the individual imperatives in EU procurement law of expedition and transparency are not in general compatible with the cross-examination of witnesses which would of itself involve a delay in the conduct of the trial and would adversely affect an expeditious conclusion of the matter, a matter of particular importance as frequently there is a stay on the grant of a contract once a review of the procurement decision is commenced.

38. I accept that the expeditious prosecution of a review of a procurement decision is required and this follows from the dicta of Denham J. in the Supreme Court in *Dekra Éireann Teoranta v. Minister for Environment and Local Government* [2003] 2 IR 270 which confirmed that in its specialist area of judicial review:

> *"The rules reflect a policy that such reviews be taken effectively and as rapidly as possible."*

Discussion on delay argument

39. It would be fair to say that the proceedings have not run with the expedition envisaged by the Supreme Court or indeed by Order 84A itself. One factor that does weigh on the court's mind in procurement cases, and which mandates a degree of expedition, is not present in this case in that the contract already awarded has not been suspended. I must also take account of the fact that, in two cases identified to me in the course of argument, *Advanced Totes Ltd. v. Bord na gCon* mentioned above and in the Northern Irish case of *Resource (NI) v. The Northern Ireland Courts and Tribunal Service* [2011] NIQB 121 cross examination did in fact occur in procurement reviews, although in neither case was there a court application or contest as to whether cross-examination was to be permitted. The mere fact that cross-examination on affidavit can occur does not of itself mean that the requirements of expedition are not met. Furthermore O. 84A does envisage a plenary hearing in certain cases. Thus I do not accept the argument of counsel for the respondent that the cross-examination of Mr. Corsi of itself ought to be permitted on account of any perceived delay that that might cause.

40. I consider that an important factor in the exercise of my discretion is what counsel for the respondent argues is the delay by the applicant in bringing the motion to cross-examine, which in essence came to be heard after the case opened, albeit a motion was served some days earlier. Delay is a factor which could be said to influence a court on exercising its discretion in very many areas of law and procedure, and I consider that delay is a factor in an application such as this, and one which has particular significance in the context of the Community requirement for expediency in the determination of procurement challenges. I consider then, that the relevant starting date at which the applicants knew of the contents of Mr. Corsi's notes was the date when there was full disclosure of all of his notes which was the 7th May 2015. After that Mr. Brian Barron swore an affidavit on 13th May 2015 on behalf of the applicant setting out his assertion that Mr. Corsi's notes fell into the errors identified in the statement of grounds outlined above, essentially that the wrong criteria were applied, and the correct criteria not applied to the assessing of the tender. The next document in chronology was the affidavit in reply of the 8th July 2015, almost two months later. That period of 2 months must be discounted from any calculation of delay on the part of the applicants, and I accept the argument made by counsel for the applicants that, had an affidavit come earlier which had explained the issues that had arisen, or offered sufficient comfort to the applicants with regard to the approach taken by Mr. Corsi, this review might not have been thought necessary.

41. What is sought to be cross-examined is the discrepancy which the applicants say arises as a result of the second affidavit of Mr. Redmond sword on the 8th July 2015 and the notes of Mr. Corsi already discovered.

42. I accept what was said by counsel for the applicant that she seeks now to cross-examine for the purposes of understanding and challenging what she argues is the difference between the assertions contained in Mr. Redmond's second affidavit and the notes of Mr. Corsi. She seeks to cross-examine because she says there is an identifiable error in approach which she says cannot easily be

reconciled.

43. Thus I consider that while it might appear that there was a delay in seeking cross-examination of Mr. Corsi, that no such delay *de facto* exists in that the two month period between May and July 2015, and between the time of the furnishing of the notes and the letter from the solicitors for the applicant indicating that cross-examination was required, lies almost entirely at the feet of the respondent who took almost two months to reply by affidavit to the issues highlighted in the affidavit of the 13th May 2015 of Mr. Barron.

44. Thus while I consider that delay on the part of an applicant could have an influence on the decision of the judge whether to allow cross-examination, that the delay is not operative in this case, and furthermore that to refuse the application merely on account of delay might result in a degree of lack of transparency in the process as a whole which would not be consistent with Community law. I return to that point below. I also consider that the clock stopped running for the purpose of the application to cross-examine once the letter of the 15th July was sent. The delay thereafter was caused *inter alia* by listing problems at the busiest time of the legal year, and because Mr. Corsi was on holidays.

Mr Corsi's score did not prevail
45. Counsel for the respondent argues that in the decision to award the contract it was the ultimate score that was relevant, and is the only score that needs to concern the court in the review of the process. As the ultimate score was higher than that proposed by Mr. Corsi, how Mr. Corsi might have arrived at a lower mark which ultimately did not come to be the operative mark is a matter of no consequence, and no purpose is to be gained from asking Mr. Corsi why he came to agree with his team assessment which led to the higher mark, as of course the higher mark is one the applicants do not challenge.

Discussion on the final score
46. I agree with this proposition and consider that were the final marks the sole question before the court, the cross-examination ought not be allowed when the result of the case is not likely to be influenced by the answers given on cross-examination.

47. I note the decision was a team decision, and indeed that Mr. Corsi's score did not affect the final score, I consider that while this may well come to be a factor in the substantive case, it is not one which ought to influence me in considering whether at this point in time cross-examination of Mr. Corsi should be permitted. This is because, while the results of the competition were arrived at by groups of teams, each assessor was individually assessing the relevant elements of the tender and each assessor gave an individual mark. Had the decision been taken collectively then the approach of the individual members of the team might not be the sole or primary focus. However this was not how this process was engaged and each individual assessor separately carried out an evaluation and separately gave marks. It was only after each individual assessor had carried out his assessment that the team met for the purpose of awarding a final score.

48. The separate integrity of each evaluator in the process was an integral part of the way in which this process was to occur, and transparency in the process requires that that separate integrity be maintained and be capable of evaluation in the review. The average score between the three assessors was 46 and it was brought down to 40, the only possible scores being 40 or 60. I accept what is argued by counsel for the applicant that Mr. Corsi's separate assessment was important as another 4 points in the average mark might have resulted in a score of 60 by a process of rounding up.

49. Furthermore I accept that Mr. Corsi played an influential part in the evaluation process and Mr. Redmond was clear that the assessment of the track and construction issue, on which Mr. Corsi was the expert, was regarded as important.

Discussion on need to cross-examine
50. I consider that counsel for the Applicant is correct in that there is a matter disclosed in the affidavit evidence in this case which requires to be further elucidated. To put it in a general way, Mr. Corsi in his affidavit evidence, which as I have said is in part short evidence by which he confirms the affidavit of Mr. Redmond, confirms that he did not take the wrong approach, but his notes suggest a breakdown of the factors which I consider could have, but may not have, led him off the correct path. Mr. Corsi's notes were the notes of an experienced transport engineer who was entitled to conduct his analysis in whatever way he considered technically and procedurally correct, and he was entitled to intelligently assess the facts and to use his intelligence, knowledge and experience in the way in which he approached the evidence and the mandated tests.

51. Further, most of the eleven different people who evaluated this tender under its different heads had written notes, all of which have been discovered, and the only persons sought to be cross-examined is Mr. Corsi, because it is asserted that he took an approach which was less orthodox, or perhaps less easily understood in the context of the competition rules. For that reason I reject the argument that what the applicant is essentially seeking to do by cross-examination is a class of "fishing", or as counsel also puts it "digging", in the hope that something might "turn up" on a more full examination of Mr. Corsi's notes.

52. The application to cross-examine has a narrow and identified focus and does not seek to trawl through the entire affidavit evidence of the respondent.

Transparency in the Review?
53. Community rules require transparency in the process of the awarding of a public contract and I turn briefly to consider whether that transparency must influence me in the decision whether to permit cross-examination. It is well established that it is for member states to direct the process by which the rights of an individual under Community law in that member state are to be vindicated. This principle is shown *inter alia* by the decision of the Court of Justice in *Unibet (London) Ltd. v. Justitiekanslern* (Case C-432/05) [2007] ECR I-2271. However, that familiar principle must in matters of Community law also be interpreted so as to contribute to the objective of Community law. This is clear from the judgment Finlay Geoghegan in Gaswise Ltd. v. Dublin City Council mentioned above where she pointed to the requirement of a court giving equal effect to the core principles of equal treatment and transparency as amplified by the judgments of the Court of Justice.

54. Finlay Geoghegan J. was dealing with a substantive and not a procedural matter but it seems that the principles must be the same. Thus in a matter of a review of a procurement, which invokes Community principles, the interpretation of domestic legal principles and procedures must look also to the ultimate objective to be attained, in this case the objective of competition, and what one might call the procedural objective that competition be fair, transparent and equally available to members of all member states.

55. I take note also of the decision of McCluskey J. in Resource (NI) v Northern Ireland Courts and Tribunals Service at para.37 where he said that the following:

> *"any failure by the court to scrutinise with particular care the contents of relevant individual and collective marking*

frames would be in dereliction of the judicial duty objective in this review must involve the court in a degree of judicial scrutiny that may be different at least from a procedural point of view from perhaps the scrutiny of wholly domestic decision makers."

56. Counsel for the respondent argues the transparency mandated is transparency in the process or the competition itself and transparency is not achieved by the court going beyond its normal rules of procedure in the conduct of the judicial review. I disagree with him to this extent, and consider that transparency in every part of the process of the competition may require that the court engage in a degree of scrutiny which requires the transparent disclosure of documents by the parties to the review litigation, and must involve the court carefully scrutinising the evidence before it. The ultimate purpose of cross examination is to allow the court to scrutinise and evaluate the evidence before it, and I consider that a degree of scrutiny is warranted in this case such as the cross examination of Mr. Corsi ought to proceed.

57. I consider that the principles of Community law and the requirements of the utmost transparency and fairness of process in procurement cases does mandate a higher degree of scrutiny by the court of the available evidence, and does require for the purposes of the review that the court be in a position to ascertain the process and methodology engaged in the assessment. For that reason I consider that the applicants are entitled to cross-examine Mr. Corsi on his affidavit evidence.

Clarity in grounds of claim
58. I am mindful however of the general proposition with regard to the procedural parameters of judicial review identified by Murray CJ. in *AP v DPP* [2011] IESC 2 where, *inter alia*, he identified the requirement that a party applying for relief should set out *"clearly and precisely each and every ground upon which relief was sought".* The mischief identified by Murray CJ. is of new issues emerging in the course of a hearing for an application for judicial review, and that this tendency was not consistent with a good administration of justice.

59. Counsel for the respondent identifies this as sounding a warning in relation to the importance of confining judicial review to the matters pleaded. I accept that proposition, and accept that such a confinement is necessary, even in what might be described as the more fulsome procedure which has evolved in certain procurement cases, and even allowing that in certain procurement cases, as happened here, the issues might evolve after disclosure.

60. Thus I consider that the cross-examination to be conducted must be confined to issues pleaded and those identified in this judgment.

Decision
61. Accordingly, I consider then that the applicants are to be permitted to cross examine Mr. Corsi on his affidavit but that the cross examination should be confined to:

a) the methodology disclosed in his working notes

b) the test applied by him in the testing of the tender

c) the interplay between his working notes and the factors identified by him in those notes and how they relate to the disclosed competition criteria.