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*Judgment: approved by the Court for handing down
(subject to editorial corrections)*

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Finrone Limited's Application [2008] NIQB 129

**AN APPLICATION BY
FINRONE LIMITED FOR JUDICIAL REVIEW**

WEATHERUP I

[1] This is an application for judicial review of a decision of the Department of Agriculture and Rural Development ("the Department") in relation to the administration of the Farm Nutrient Management Scheme ("FNMS") in relation to the payment of grants for the installation of slurry tanks. Mr McCann appeared for the applicant and Dr McGleenan appeared for the respondent.

[2] The background appears in the grounding affidavit of Gordon Forde, Managing Director of the applicant company, formerly trading as Portapig Ltd, which he describes as one of the United Kingdom and Ireland's leading argi-suppliers. Portapig Ltd was offered and accepted a dealership for stainless steel slurry stores from Germany made under the name Borger. The Borger tanks are constructed of 304 grade stainless steel and according to Mr Forde have an indefinite life and are of superior quality to other tanks available on the market, being extremely robust and durable, with minimal risk of damage, requiring very low maintenance and retaining a high value.

[3] The grant scheme introduced by the Department provided for a cap maximum amount of grant. The applicant contends that the maximum grant was fixed by reference to the cost of Permastore tanks, being one of the main competitors of the applicant. Thus the Department was not assessing the amount of grant by reference to the actual cost of the Borger tanks but was applying a cost figure below the actual cost of the Borger tanks and applying a 60% grant, thereby further increasing the non-grant aided amount that farmers would have to pay if they would have wished to use one of the applicant's tanks.

[4] It was agreed that the Borger tanks were more expensive than the Permastore tanks. However the Borger tanks were stated to have an everlasting lifespan compared with 20 to 30 years for Permastore tanks. Further it was stated that Permastore tanks were known to leak and to have burst through corrosion and rusting. According to the applicant the Borger tanks represented much greater value for money. The overall cost of the products, taking account of lifespan and the risk of damage to the environment and associated costs is said to be much lower with the Borger tanks. Accordingly, the applicant contends that the company was disadvantaged in the administration of the grant scheme because proper recognition was not given to the enhanced value which it was claimed ought to have been attributed to the Borger tanks.

[5] The affidavit sworn on behalf of the respondent by Ronnie Burns, Senior Farms Building Advisor with the Department, described the FNMS as providing financial assistance to farmers who installed facilities to increase the storage capacity for farm manures. The Scheme operates with a £51,000 maximum grant which may be approved for each application. The deadline for completion of claims is 31st December 2008. The approach to the grants relied on a number of costs matters. First, standard costs, being some items, usually minor works under the Scheme that could be completed without the requirement for an applicant to provide quotations. Second, actual costs, being any eligible work not listed as a standard cost item that would be approved on actual costs with the relevant number of quotations being provided with the application. Funding of the various items would be approved at 60% of the lowest quotations, subject to reasonable costs. Third, reasonable costs, with guide costs being issued by the Department to officials from time to time from 26 May 2005.

[6] However Mr Burns noted that in mid-September 2005 some quotations that were submitted appeared to be excessive and this led to internal examination by the Department. At a Senior Management Working Group meeting on 20th October 2005 it was decided that, to ensure value for money, upper limits should be set on the costs to be approved, where quotations seemed excessive. As a result the Department instructed its Quantity Surveyor to calculate maximum costs for a range of items available for funding. There was produced an itemised reasonable costs guide. Where the quotations for actual costs were greater than the itemised amount the maximum funding would be approved at 60% of the reasonable costs.

[7] A Quantity Surveyor's guide set out a pricing structure based on three possible diameters of tanks, namely 34 feet, 42 feet and 67 feet. The cost was calculated in relation to the tank itself and also for the related equipment for the tank and in addition for the necessary site works and ancillary matters required to construct the tank. The guide included, as a measure of the cost for certain items, the prices quoted by Permastore for those items. For example, in relation to the 34 foot diameter tank, the supplier of tank 3415 is quoted at £9,600, this being the price quoted for the Permastore tank. Accordingly Permastore prices determined what

the quantity surveyor specified as the cost for that particular tank, as was the case with the larger tanks and other items. The Quantity Surveyor's guide produced a total figure for the installation and then converted that total into a cost per cubic metre. In the case of the 34 foot diameter tank the price was some £50 per cubic meter.

[8] The figures for the cost of the installation per cubic meter were translated into Notes for Guidance issued by the Department which set what were regarded as the acceptable prices when the Department came to determine the grants that would be paid. These prices were varied from time to time. So, for example, Notes for Guidance 2706, referred to the highest acceptable costs by reference to a sum per cubic metre of capacity. Thus, the applicant contends, the quantity surveyor's figures were based on the Permastore prices, which determined the allowance in the Notes for Guidance as the highest acceptable costs.

[9] Mr Burns at paragraph 32 of his affidavit explained the purpose of the exercise completed by the quantity surveyor. He stated that "... the Department had invited the surveyor to provide reasonable costs to assist in the assessment of value for money across a wide range of items. The surveyor was not tasked with determining value for money with reference to any specific category of tank including the Finrone Tank".

[10] The affidavit of Brian Irvine, the Deputy Principal in the Department, set out the background to the Scheme. It was to assist farmers to comply with the Nitrates Directive Action Programme and he referred to an economic appraisal on the implementation of the Nitrates Directive which projected that 5,000 farmers would apply to the Scheme and that expenditure was projected at £98 million with grant aid projected at £39.5 million. He stated that from the outset it was envisaged that the Scheme would make a contribution to a proportion of the costs of providing sufficient slurry storage rather than providing grant aid for the total costs. In the event 4,898 farmers submitted full applications to the Scheme and while this uptake figure was in line with the projection, the average cost per application received was significantly higher than estimated. The economic appraisal estimated the average cost would be almost £20,000 but the average cost was over £53,000.

[11] The issue concerns the assessment of value for money in the installation of the tanks. The applicant engaged Dr Rankin, Construction Division Manager, Northern Ireland Technology Centre, Queen's University, Belfast, who reported on the advantages of stainless steel as a material for slurry tanks and on a model for lifecycle assessment. He compared the stainless steel to other tanks made out of concrete or fibreglass and undertook a cost analysis. His conclusion was to the effect that the use of grade 304 stainless steel in slurry tank construction, such as the applicant's tanks, could provide a more durable construction than its main competitors and that lifecycle costing demonstrated the economic advantages of using appropriate materials of higher initial cost and that such lifecycle costing

should be used to examine the total long-term cost of different forms of slurry tank construction.

[12] This approach was not shared by Joe McGlade, employed by Hayes Construction and Property Recruitment Agency as a Chartered Civil Structural Engineer and acting as an advisor to the Department on matters relating to the Scheme. He commented on acid attacks and coating systems on tanks, their liability to leak, the lifecycle cost analysis, the relevant British Standards and the Finrone User Manual and the Borger User Manual. In conclusion he opposed Dr Rankin's view.

[13] Dr Rankin filed a further report setting out the advantages of stainless steel and commenting on the matters appearing in Mr McGlade's affidavit. In his conclusion he restated his view that stainless steel provided a more durable construction than its initially cheaper competitors and that any value for money discussion should take into consideration the real costs over the entire lifespan of the product.

[14] The applicant's grounds for judicial review are set out extensively in the Order 53 Statement but I summarise the essence of the challenge to be this. The reasonable costs approach which has been adopted by the Department does not, according to the applicant, reflect the Department's stated objective of securing value for money, in that the approach fails to take into account the claimed qualities of the applicant's stainless steel system, namely longevity and durability and reduced maintenance and environmental benefits.

[15] First of all I propose to address a preliminary issue that is concerned with bad faith on the part of the Department. This is an issue that was disavowed by the applicant in relation to the Department, however the applicant claimed that Mr Burns was ill-disposed to the applicant. There had been an enquiry into the quotations furnished by the applicant and it was undoubtedly the case that Mr Burns had pursued concerns that he entertained as to the nature of the quotations presented to the Department. Such concerns were matters which, of course, the Department should have investigated where they had grounds for suspicion and that is what was done. The issue was resolved by the Department, with the aid of legal advice. However, the applicant contends, while the issue was resolved by the Department it was not forgotten by Mr Burns.

[16] I have considered all the circumstances in which this issue arose and I find that there is no basis for the contention that Mr Burns approach to the applicant or to the applicant's product or to the operation of the grant system was based on anything other than proper considerations for the administration of the Scheme and appropriate concerns about reasonable costs and value for money.

[17] Turning then to the substance of the application for judicial review. Article 16 of the Agriculture and Fisheries Financial Assistance (Northern Ireland) Order 1987

provides for Farm Capital Grants and the Department may, by a scheme, provide for the making of grants of amounts towards expenditure incurred in relation to agricultural business and any grant under such a scheme will be subject to such conditions as the Department thinks fit. The relevant scheme for present purposes is the Farm Nutrient Management Scheme Northern Ireland 2005, which came into operation on 16 January 2005. The original Scheme provided that the Department may make to any person a grant representing 40% of any expenditure incurred in relation to agricultural business, which was expenditure of a particular type which included fixed disposal facilities for slurry and silage effluent. The expenditure was to be approved by the Department for the purposes of a grant and was not in aggregate to exceed £85,000 for each applicant and initially the Scheme was to run until 30 November 2006.

[18] It was further provided by the Scheme that the Department should not approve any expenditure unless the work facility or transaction to which it referred complied with the requirements or prohibitions of the schedule to the Scheme. The schedule provided that new and replacement structures to which the expenditure related must be designed to have a minimum life of 10 years, or 20 years for those installations covered by the Control of Pollution, Silage, Slurry and Agriculture Fuel Oil Regulations (Northern Ireland) 2003, and which met the requirements to the appropriate standards, namely BS5502 parts 22 and 50 and BS8007. Thus the standard was two-fold, in that the product had to have a minimum life of 20 years and it had to comply with the specified British Standards. The Scheme was amended by the Farm Nutrient Management Amendment Scheme (Northern Ireland) 2005 which increased the amount of the grant from 40% to 60% and was further amended by the Farm Nutrient Management Scheme (Northern Ireland) 2006 which provided that the scheme should be extended to 31 December 2008.

[19] Under the Scheme there is in the first place the quality standard, being the minimum 20 year lifespan plus compliance with the specified British Standards. Secondly there is the cost standard, being 60% of expenditure approved by the Department for the purposes of the grant. In relation to approved expenditure the Department adopted what has been called the reasonable costs approach. In determining the test that the Department would adopt for its approval of expenditure on a reasonable costs basis it has adopted what it described as a value for money test. This is apparent from Mr Burns' affidavit, at paragraph 21 set out above, where he stated that when the concerns arose about the excessive quotations in September 2005, the meeting of 20th October 2005 determined that in order to ensure value for money, upper limits would have to be set on the costs. Further, at paragraph 32 of Mr Burns' affidavit, when discussing what was proposed by the quantity surveyor after the meeting of 20th October 2005, the exercise had been undertaken to provide reasonable costs to assist in the assessment of value for money across a wide range of items. In the assessment of value for money it was not a specific category of tank that the Department was concerned with, but more generally.

[20] Thus it was a value for money approach that was adopted. Such an approach was consistent with the statutory scheme where expenditure had to be approved by the Department. The value for money approach could have been achieved in a number of ways. The Department might for example have provided that value for money was to be achieved by requiring that any tank should meet the minimum quality standard at minimum cost. However the Department's value for money approach was not so limited but purported to be a general assessment of value for money.

[21] What the Department did not do and what the applicant contends it should have done, was make an assessment of the exceptional quality which the applicant claims is represented in stainless steel tanks. The applicant's case is that exceptional quality arises from the lifespan factors and the environmental factors. There are of course factual issues between the parties about the value of the lifespan and environmental factors. I am not making an assessment in relation to the quality of these stainless steel tanks but rather whether exceptional quality, were it shown to exist in relation to any particular installation, should be a factor in deciding value for money. If exceptional quality were to be a relevant consideration in the application of a value for money test it would be necessary for the party who relied on such exceptional quality to demonstrate that their product did indeed have exceptional quality and to demonstrate increased value for money, but that is a separate issue. The issue of the moment is whether or not exceptional quality is a factor which should be taken into account in the assessment of value for money.

[22] I am satisfied that value for money should take into account exceptional quality where it is shown to exist. There must be cases where a more expensive item is better value for money. Having adopted a value for money test, the Department must not convert that value for money test into an average cost test. In essence the Department did adopt a form of average cost by adopting the Permastore prices as a standard which informed the approach to permitted expenditure. Value for money can be reflected in exceptional quality where the increased cost may represent greater value for money. That is something that is not reflected in the approach adopted by the Department. Therefore, I am satisfied that there is a shortcoming in relation to the Department's approach to the assessment of value for money.

[23] The Scheme closes on 31 December 2008. The applicant raised the issues at the heart of this judicial review in April 2006. The applicant revived the issues in December 2007 and issued judicial review proceedings in April 2008. I propose to make a declaration as to the above conclusion on the issue of value for money. The declaration, to the extent that it is feasible for it to do so, may guide how the payment of grants are determined for the completion of the Scheme, which is only some two months away.

[24] What is envisaged, therefore, is that the Department will reassess the cost tables to reflect the value for money issue and will apply the outcome to the payment of grants up to 31 December 2008. There will no doubt be issues about

value for money, as is apparent from the affidavits exchanged between Dr Rankin and Mr McGlade. It is for the Department to reach a conclusion on the assessment of value for money in the light of the declaration and then to apply that conclusion. I do not propose to set time limits for the Department's reassessment but would have thought that some analysis might be conducted which would allow the Department to complete a cost benefit analysis that would be fed into the grant assessments by 31 October 2008.

[25] A declaration will issue in relation to the assessment of value for money.