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Judgment: approved by the Court for handing down | *Delivered:* **31/12/12**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN

LOWRY BROTHERS LTD
and

ALBERT GEORGE WILSON, TRADING AS A G WILSON
Plaintiffs

and

NORTHERN IRELAND WATER LTD
Defendant

McCLOSKEY J

Introduction

[1] These are separate actions, proceeding in tandem, in which the Plaintiffs challenge the outcome of an exercise conducted by the Defendant concerning the procurement of contracts for what is known as the "*IF019 Capital Delivery Framework*" (hereinafter "*CDF*"). The overarching purpose of this scheme is described as the improvement of water and sewerage services, including customer services and the achievement of substantial operational and capital investment efficiencies, in Northern Ireland.

[2] The relevant statutory framework is provided by the Utilities Contracts Regulations 2006 ("*the 2006 Regulations*"). Both Plaintiffs were unsuccessful in their quest to be invited to negotiate for appointment as a contractor in the scheme known as "*LOT 2 CDF*" (in shorthand). I shall describe these as "the impugned decisions". Having been notified of the impugned decisions by separate letters dated 31 August 2012 and following some skirmishing in letters exchanged, each Plaintiff issued separate writs on the same date, 4 October 2012, claiming the following relief:

(a) An order pursuant to Regulation 45I of the 2006 Regulations setting aside the impugned decisions.

(b) Further, or alternatively, a declaration that the impugned decisions were unlawful – specifically, in breach of the duties of equality of treatment, transparency and proportionality and in breach of implied contract.

(c) Further, or alternatively, an order restraining the Defendant from inviting any contractor to negotiate for appointment or appointing any contractor to LOT 2 CDF.

(d) Further, or alternatively, damages.

The Defendant's Applications

[3] In each action, by Notice of Motion dated 13 December 2012, the Defendant applied to the court for the following relief:

(a) An order pursuant to Order 33, Rule 3 of the Rules of the Court of Judicature that the question of whether the Plaintiffs' claims are statute barred, having regard to the time limit of 30 days specified in the 2006 Regulations, be tried as a preliminary issue.

(b) An order pursuant to Regulation 47H(1)(a) of the 2006 Regulations terminating the requirement imposed by Regulation 47G whereby the Defendant is precluded from entering into any contract or appointing any contractor in respect of LOT 2 CDF.

[4] Applying the practice which has developed in this sphere of litigation, the court's response was twofold. Firstly, an early preliminary hearing was arranged, taking place on 19 December 2012. Secondly, an accelerated date for the hearing of the Defendant's applications was allocated, namely 1 February 2013. Furthermore, with the approval of the court, the parties agreed a timetable for the regulation of pleadings and other steps in the interim.

Undertaking in Damages

[5] On the occasion of the preliminary hearing mentioned above, conducted on 19 December 2012, the Defendant raised the question of whether the Plaintiffs should be required to provide an undertaking in damages. Pursuant to the direction of the court, both parties provided written submissions, which have been duly considered. Before turning to these, I shall consider the affidavit evidence grounding the Defendant's application and the inter-related contention that the Plaintiffs should provide an undertaking in damages.

[6] The Defendant's deponent describes a 3-year business strategy dating from April 2010. This is driven by:

> "The need to improve water and sewerage services including customer services and the achievement of substantial efficiencies in both operational and capital investment cost terms."

The CDF is described as "an essential and vital part of the Defendant's capital works programme." It is asserted that any delay in executing the necessary works "will have a detrimental and deleterious impact on the water and sewerage network in Northern Ireland". Pursuant to the scheme under scrutiny the Defendant is proposing to execute a framework agreement, described as "a multi-supplier framework agreement broken down over a number of separate lots". This will have a lifespan of 3 years, involving the award of works valued at around £399m. It is suggested that the delay occasioned by the issue of these two actions will have significant costs implications. The extant framework agreement under which construction work was hitherto carried out expired on 23 November 2012 and has no active replacement. Thus, it is averred:

> "It will be necessary to procure a restricted list of contractors who will be asked to tender for future projects. It will take a minimum of 6 months to procure that restricted list and it will cost the Defendant a minimum of £140,000 in staff costs to do so."

It is further suggested that the Defendant will have to procure projects via the mechanism of open tender procedures, giving rise to "considerable delay of at least 3 months". As the anticipated annual expenditure is £100m, a minimum delay of 3 months could prevent the Defendant from delivering £25m of projects in the first year (April 2013/March 2014) of the envisaged framework period. The Defendant, it is averred, will be unable to carry forward this amount into the second, succeeding year. The deponent further avers:

> "This will have a significant impact on the delivery of infrastructure improvements to the people of Northern Ireland, potentially frustrating commitments made by the Defendant to the [Utility Regulator] and the Northern Ireland Environment Agency and further delaying the commencement of works to alleviate problems such as out of sewer flooding."

Finally, it is averred that if either Plaintiff ultimately succeeds, damages would be an adequate remedy.

[7] At the stage of determining the undertaking in damages issue, there has been no evidential response from either Plaintiff.

The 2006 Regulations

[8] The relevant provisions of the 2006 Regulations, as amended, are arranged in Part 9. Regulation 45A deals with the duty owed to economic operators:

> *"(1) This regulation applies to the obligation on a utility to comply with –*
>
> *(a) the provisions of these Regulations, other than regulations 30(9) and 38; and*
>
> *(b) any enforceable [EU] obligation in respect of a contract or design contest (other than one excluded from the application of these Regulations by regulations 6, 7, 8, 9, 11 or 34).*
>
> *(2) That obligation is a duty owed to an economic operator."*

Per Regulation 45C:

> *"(1) A breach of the duty owed in accordance with regulation 45A or 45B is actionable by any economic operator which, in consequence, suffers, or risks suffering, loss or damage.*
>
> *(2) Proceedings for that purpose must be started in the High Court, and regulations 45D to 45P apply to such proceedings."*

Under the rubric "General Time Limits for Starting Proceedings", Regulation 45D provides:

> *"(1) This regulation limits the time within which proceedings may be started where the proceedings do not seek a declaration of ineffectiveness.*
>
> *(2) Subject to paragraphs (3) to (5), such proceedings must be started within 30 days beginning with the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen.*
>
> *(3) Paragraph (2) does not require proceedings to be started before the end of any of the following periods –*
>
> *(a) where the proceedings relate to a decision which is sent to the economic operator by facsimile or electronic means, 10 days beginning with –*

(i) the day after the date on which the decision is sent, if the decision is accompanied by a summary of the reasons for the decision;

(ii) if the decision is not so accompanied, the day after the date on which the economic operator is informed of a summary of those reasons;

(b) where the proceedings relate to a decision which is sent to the economic operator by other means, whichever of the following periods ends first –

(i) 15 days beginning with the day after the day on which the decision is sent, if the decision is accompanied by a summary of the reasons for the decision;

(ii) 10 days beginning with –

(aa) the day after the date on which the decision is received, if the decision is accompanied by a summary of the reasons for the decision; or

(bb) if the decision is not so accompanied, the day after the date on which the economic operator is informed of a summary of those reasons;

(c) where sub-paragraphs (a) and (b) do not apply but the decision is published, 10 days beginning with the day on which the decision is published.

(4) Subject to paragraph (5), the Court may extend the time limit imposed by paragraph (2) (but not any of the limits imposed by regulation 45E) where the Court considers that there is a good reason for doing so.

(5) The Court must not exercise its power under paragraph (4) so as to permit proceedings to be started more than 3 months after the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen.

(6) For the purposes of this regulation, proceedings are to be regarded as started when the claim form is issued."

The contract suspension mechanism is contained in Regulation 45G, which provides:

"(1) Where –

(a) a claim form is issued in respect of a utility's decision to award the contract;

(b) the utility has become aware that the claim form has been issued and that it relates to that decision; and

(c) the contract has not been entered into,

the utility is required to refrain from entering into the contract.

(2) The requirement continues until any of the following occurs –

(a) the Court brings the requirement to an end by interim order under regulation 45H(1)(a);

(b) the proceedings at first instance are determined, discontinued or otherwise disposed of and no order has been made continuing the requirement (for example in connection with an appeal or the possibility of an appeal).

(3) . . .

(4) This regulation does not affect the obligations imposed by regulation 33A"

Regulation 45H empowers the court to make interim orders:

"(1) In proceedings, the Court may, where relevant, make an interim order –

(a) bringing to an end the requirement imposed by regulation 45G(1);

(b) restoring or modifying that requirement;

(c) suspending the procedure leading to –

(i) the award of the contract; or

(ii) the determination of the design contest,

in relation to which the breach of the duty owed in accordance with regulation 45A or 45B is alleged;

(d) suspending the implementation of any decision or action taken by the utility in the course of following such a procedure.

(2) When deciding whether to make an order under paragraph (1)(a) –

(a) the Court must consider whether, if regulation 45G(1) were not applicable, it would be appropriate to make an interim order requiring the utility to refrain from entering into the contract; and

(b) only if the Court considers that it would not be appropriate to make such an interim order may it make an order under paragraph (1)(a).

(3) If the Court considers that it would not be appropriate to make an interim order of the kind mentioned in paragraph (2)(a) in the absence of undertakings or conditions, it may require or impose such undertakings or conditions in relation to the requirement in regulation 45G(1).

(4) The Court may not make an order under paragraph (1)(a) or (b) or (3) before the end of the standstill period.

(5) This regulation does not prejudice any other powers of the Court."

This particular provision is central to the Defendant's conjoined applications.

[9] The subject matter of Regulations 45I and 45J is remedies. The former provides:

"(1) This regulation applies where –

(a) the Court is satisfied that a decision or action taken by a utility was in breach of the duty owed in accordance with regulation 45A or 45B; and

(b) the contract has not yet been entered into.

(2) In those circumstances, the Court may do one or more of the following –

(a) order the setting aside of the decision or action concerned;

(b) order the utility to amend any document;

(c) award damages to an economic operator which has suffered loss or damage as a consequence of the breach.

(3) Where the Court is satisfied that an economic operator would have had a real chance of being awarded the contract if that chance had not been affected by the breach mentioned in paragraph (1)(a), the economic operator is entitled to damages amounting to its costs in preparing its tender and in participating in the procedure leading to the award of the contract.

(4) Paragraph (3) –

(a) does not affect a claim by an economic operator that it has suffered other loss or damage or that it is entitled to relief other than damages; and

(b) is without prejudice to the matters on which an economic operator may be required to satisfy the Court in respect of any such other claim.

(5) This regulation does not prejudice any other powers of the Court."

Regulation 45J, in contrast, prescribes the topic of remedies where the relevant contract has been executed:

"(1) Paragraph (2) applies if –

(a) the Court is satisfied that a decision or action taken by a utility was in breach of the duty owed in accordance with regulation 45A or 45B; and

(b) the contract has already been entered into.

(2) In those circumstances, the Court –

(a) must, if it is satisfied that any of the grounds for ineffectiveness applies, make a declaration of ineffectiveness in respect of the contract unless regulation 45L requires the Court not to do so;

(b) must, where required by regulation 45N, impose penalties in accordance with that regulation;

(c) may award damages to an economic operator which has suffered loss or damage as a consequence of the breach, regardless of whether the Court also acts as described in sub-paragraphs (a) and (b);

(d) must not order any other remedies.

(3) Paragraph (2)(d) is subject to regulation 45O(3) and (9) (additional relief in respect of specific contracts where a framework agreement is ineffective) and does not prejudice any power of the Court under regulation 45M(3) or 45N(10) (orders which supplement a declaration of ineffectiveness or a contract-shortening order).

(4) Regulation 45I(3) and (4) (entitlement to tendering costs etc as damages for loss of a real chance of being awarded the contract) apply for the purposes of this paragraph."

In this court's experience, every Plaintiff in these cases invariably argues that [a] the automatic suspension of the contracting authority's ability to execute the contract/s being procured should be maintained and [b] damages would not be an adequate remedy.

[10] In short, two of the provisions of the 2006 Regulations, as amended, fall under the spotlight in these proceedings. The first is Regulation 45D, introduced by amendment with effect from 1 October 2011, which provides that proceedings of this type must be initiated within 30 days beginning with the date when the Plaintiff first knew or ought to have known that grounds for beginning proceedings had arisen. The second is Regulation 45H, which empowers the court to make an interim order terminating the prohibition on contract execution automatically triggered by the initiation of proceedings, imposed *via* Regulation 45G. In my opinion, the correct analysis of Regulation 45H(3) is as follows: in the context of an application for an interim termination order under paragraph (1), the issue of "*undertakings or conditions*" may conceivably arise. Where this issue does arise, the court is empowered, as a matter of discretion, to impose appropriate undertakings or conditions in relation to the extension of the contract execution prohibition triggered by the initiation of proceedings by virtue of Regulation 45G(1). *Quaere*, in passing, whether this provision empowers the court to impose undertakings or conditions on the contracting authority.

The Issue

[11] The issue of whether the Plaintiffs should be required to give an undertaking in damages was canvassed by the Defendant approximately 6 weeks in advance of the hearing scheduled for 1 February 2013 (*supra*). The Defendant's contention was that the Plaintiffs should be required to give such an undertaking at this stage. On behalf of the Defendant, Mr Dunlop (of counsel) highlighted that, by 1 February 2013, the total delay occasioned by the initiation of the Plaintiffs' proceedings will be of the order of 4 months. It was submitted that the Plaintiffs should be at risk during this period since, in the event of the Defendant's application for an interim order succeeding, the Defendant will otherwise be exposed to the spectre of uncompensated loss during the intervening period. The central pillar of the riposte of Mr Coghlin (of counsel, appearing with Mr Humphries QC) was that, as a matter of the correct construction of Regulation 45H, the question of whether the Plaintiffs should be required to provide an undertaking in damages cannot arise until the court reaches the stage of determining the Defendant's applications for an interim order, with the result that this discrete issue is canvassed prematurely at this stage.

[12] In my opinion, the effect of Regulation 45H(3), considered in its full context, is to require the court to have regard to the issue of undertakings and conditions in cases where this arises. Where it does so, the main question which the court must pose is whether it is appropriate to restrain the Defendant, by injunctive order, from proceeding to execute the relevant contract without conditions or undertakings. By virtue of Regulation 45H(2), the court is required to give consideration to this question "***when*** *deciding whether to make an Order under paragraph 1A*"[my emphasis] ie at the time of determining the Defendant's application for a 'termination' order. That stage has not yet been reached in either proceedings. Rather, both proceedings are presently at a more embryonic stage: the Writs have been issued, the Defendant has brought its application for a termination order, a timetable for pleadings and related steps has been fixed and the court has allocated a date for the hearing of the Defendant's applications. I consider that "*when*" invites the narrow construction formulated above. There is no evident legislative policy or other reason warranting a broader construction. I would further observe that given the dimension of supreme EU law in this context, it seems unlikely that the court could, at an earlier stage, impose undertakings or conditions by resort to its inherent jurisdiction which, at heart, is designed to protect and fortify the integrity of its process: see Ewing v Times Newspapers [2010] NIQB 65, paragraphs [10]-[11]. I record that there was no argument concerning this question.

[13] I consider, therefore, that it is not open to the court, at this stage, to impose appropriate conditions or undertakings. This conclusion is reinforced by three considerations. The first is that no condition or undertaking could be imposed outwith the framework of an order of the court. Accordingly, the court would have to be engaged in the exercise of making some order. At this juncture, there is no application to the court for any order. Secondly, buttressing the first observation, the condition or undertaking proposed would have to be directly related to the order

concerned. Thirdly, in exercising what is a discretionary power, the court would be obliged to take into account all material factors. This, fundamentally, would require the court to be as fully informed as possible. In the generality of cases, this will not be feasible until the affidavit evidence and pleadings of the parties have been completed. This is merely a reflection of what I consider to be an unassailable principle: the imposition of an undertaking in damages in injunctive contexts is not a matter of routine and should, as a general rule, be evidence based and the product of a true exercise of judicial discretion. To the extent that the passage in Halsbury, Vol 24 [Fourth Edition Reissue], paragraph 982 suggests otherwise, I respectfully disagree. I prefer the formulation in paragraph 976 (*"normally"*).

[14] Furthermore, while the process of determining the Defendant's application for a termination order has admittedly begun, I consider it too early in such process to consider the imposition on the Plaintiffs of an undertaking in damages or any other condition. The court is simply not possessed of sufficient evidence to make an informed decision and to engage in a proper exercise of judicial discretion. Fundamentally, the court has not begun to adjudicate on the substantive underlying application: it is not yet in the position of considering, in the language of Regulation 45H, "*whether*" to make the order sought. The "*when*" stage has not yet been reached. Viewed panoramically, at this stage of the proceedings the court is holding the ring while the parties exercise their respective rights. On the Defendant's side, the right in play is the right of access to the court for the purpose of determining its application for a termination order under Regulation 45H. On the Plaintiffs' side, the right engaged is the right to a fair hearing in the aforementioned context which, at a practical level, translates to a right to submit pleadings and affidavit evidence and to be heard on the listing date of 1 February 2013. The question of conditions and undertakings will, predictably, arise at that stage. While it is difficult to envisage a context in which this question could legitimately arise sooner, the court will, of course, be constantly alert to any possible misuse of its process by any party, particularly in the context of the overriding objective.

Conclusion

[15] For the above reasons, I consider the Defendant's request that the court require the Plaintiffs to provide an undertaking in damages misconceived at this stage. The parties will be heard on the question of costs.