Neutral Citation No.: [2008] NIQB 153 | *Ref:* **COG7355**

Judgment: approved by the Court for handing down | *Delivered:* **19/12/08**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

HENRY BROTHERS (MAGHERAFELT) LIMITED, F B McKEE & COMPANY LIMITED

-and-

DESMOND SCOTT, PHILIP EWING
TRADING AS WOODVALE CONSTRUCTION COMPANY LIMITED

Plaintiffs;

-and-

DEPARTMENT OF EDUCATION FOR NORTHERN IRELAND
[NO. 3 REMEDIES]

Defendant.

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COGHLIN LJ

[1] The history and background facts relating to this litigation have been set out in some detail in the judgments that I delivered in Henry Brothers v Department of Education for Northern Ireland [2007] NIQB 116 and Henry Brothers v Department of Education for Northern Ireland (No. 2) [2008] NIQB 105. The first of those judgments related to the plaintiff's application for interim relief and the second to the substantial issues between the parties. Subsequent to delivery of the second judgment in favour of the plaintiffs on 3 October 2008 the parties requested a further hearing to determine the nature and extent of the appropriate remedies.

[2] For the purpose of the remedies hearing the parties were represented, as before, by Mr Bowsher QC and Mr Girvan, who appeared on behalf of the plaintiffs and Mr Shaw QC, Mr McMillan and Mr Williams, who appeared on

behalf of the Department. I gratefully acknowledge the assistance that I have derived from the helpful oral and written submissions from both sets of counsel

Relief/Remedies

[3] The primary relief sought by the plaintiffs is an order pursuant to the Public Contract Regulations 2006 ("the Regulations") that the decision of the Department on 17 October 2008 to enter into a framework agreement and the agreement subsequently reached on 25 February 2008 be set aside. In addition, the plaintiffs seek a declaration that any contracts concluded pursuant to the secondary competition instituted in pursuance the said framework agreement be set aside as contrary to Articles 87 and 88 of the EC Treaty or, alternatively, damages in respect thereof.

[4] The Department's primary submission by way of response is that, since the framework agreement has been entered into, the court's jurisdiction is restricted to an award of damages as a consequence of Regulation 47(9) and, alternatively, if the court has any discretion as to the nature of the remedy or relief to be granted it should be exercised so as to limit the plaintiffs remedy to one of damages. In the alternative, the defendants submit that the court should make a reference to the European Court of Justice pursuant to Article 234 of the EC Treaty.

[5] In support of its primary contention that the court has no jurisdiction to set aside the framework agreement the Department relies upon Regulation 47(9) which provides that:

> "(9) In proceedings under this Regulation the Court does not have power to order any remedy other than an award of damages in respect of a breach of the duty owed in accordance with paragraph (1) or (2) if the contract in relation to which the breach occurred has been entered into."

The plaintiffs maintain that the relevant framework agreement is not a contract to which Regulation 47(9) applies and they rely, inter alia, upon the decision of Deeny J in McLaughlin and Harvey Limited v Department of Finance and Personnel (No. 3) [2008] NIQB 122. It is the plaintiffs' further submission that the fundamental purpose of Regulation 47(9) is to provide protection for the interests of third parties who have entered into specific contracts whether independently or pursuant to a framework agreement.

The Regulations

[6] The question as to whether Regulation 47(9) applies to the type of framework agreement that is the subject of this litigation has been specifically considered by Deeny J in the case of McLaughlin and Harvey Limited v Department of Finance and Personnel (No. 3)[2008] NIQB 122 – see, in particular, paragraphs [7] to [14] of the judgment. After carefully considering and analysing the relevant Regulations Deeny J reached the following conclusion at paragraph [14]:

> "The contention of the Department that it (Article 47(9)) extends to a Framework Agreement flies in the face of the ordinary meaning of the terms used. Furthermore it is frankly contradicted by the interpretation provisions of these varied Regulations which clearly distinguish between a contract and a Framework Agreement. In doing so they are consistent with the relevant Directive of 2004. If the court is dealing with a public contract or a specific contract under the Framework Agreement (which is just another type of public contract) and the party bringing the proceedings has either not sought or been refused interim relief then the court is not at liberty to set aside that specific public contract. Damages are the only remedy. But if 'the contract' is not a contract within the meaning of these Regulations paragraph (9) has no application."

[7] I respectfully agree with Deeny J's analysis of the Regulations with regard to this issue. As he pointed out in the McLaughlin and Harvey case Regulation 2, dealing with interpretation, makes a clear distinction between "public contracts" and a "framework agreement". A similar distinction is also drawn between a framework agreement and specific contracts by Regulation 19. Regulations 31 and 32 deal separately with framework agreements and contracts with regard to contract notices and award procedures. A distinction between the two concepts is also specifically drawn in Regulation 47 itself.

Directive 2004/18/EC

[8] The Regulations were promulgated for the purpose of implementing Direction 2004/18/EC of 31 March 2004 – the "Classic Directive". In such circumstances it is hardly surprising to discover that the Classic Directive also maintained a clear distinction between public contracts and framework agreements. The recitals to the Classic Directive referred to the need to amend earlier directives relating to the co-ordination of procedures for public service contracts, public supply contracts and public work contracts and provided at paragraph (11) that:

> "(11) A Community definition of framework agreements, together with specific rules on framework agreements concluded for contracts falling within the scope of this Directive, should be provided."

Article 1(2) provided a specific definition of the generic term 'public contracts' and its various sub-categories which was quite distinct from the definition of 'framework agreement' contained at Article 1(5). Framework agreements were separately dealt with in Article 32.

[9] This distinction has also been acknowledged by the Commission. In an explanatory note on framework agreements the Commission confirmed that, while it referred exclusively to "Framework Agreements", the Classic Directive actually covered two different situations. These were to be sub-divided between '***framework contracts***' and '***framework agreements stricto sensu***'. Framework contracts were described as "legal instruments" which established all the terms applicable to any orders in a manner that was binding for the parties to the framework agreement. The Commission contrasted such an agreement with framework agreements that did **not** establish all the terms (framework agreements stricto sensu) which were by definition incomplete in that they either did not include certain terms or did not establish all the necessary terms in a binding manner. In a footnote at page 4 of the Explanatory Note confirming that Article 32 of the Classic Directive covered both types of framework agreement the Commission referred to an earlier explanatory memorandum that defined the type of framework agreement used in this litigation (a framework agreement stricto sensu) in the following terms:

> "Framework agreements are not public contracts within the meaning of the Directives; they are not contracts to the extent that they do not lay down specific terms and thus cannot give rise to performance as a contract does. By contrast, it is pointed out that contracts with several economic operators (such as widely used purchase order contracts) are public contracts within the meaning of the Directives (see Article 1(2)). They must be awarded in accordance with those provisions if the thresholds are exceeded."

[10] The distinction between public contracts and framework agreements stricto sensu, characterised by the Commission as lacking specific terms and the obligation to perform, was reflected in the implementing Regulations which defined framework agreements as not only including agreements but

also "other arrangements". As always, it is important to consider the substance rather than the form of any legal relationships and, in common with the agreement considered by Deeny J in McLaughlin and Harvey, the framework agreement in this case contained a "non-Exclusive Value of this Agreement" clause in the following terms:

> "Non-Exclusivity
>
> 6.1 The Authority does not give any guarantee and/or warrant the actual value of any of the Works and/or number of NEC Contracts (if any) which may be procured in connection with this Agreement and the parties acknowledge that the Authority or any Employer is not bound to enter into any NEC Contract or other contractual arrangement with the Contractor as a result of entering into this Agreement.
>
> 6.2 The Authority and any Employer may procure any works or services (including such works as are contemplated under this Agreement) with any third party for the duration of this Agreement."

[11] On behalf of the Department Mr Shaw accepted that this type of framework agreement was "not synonymous" with the definition of public contract and that the distinction between the concepts was reflected in both the Classic Directive and the Regulations. He also agreed that the framework agreement in this case was a framework agreement stricto sensu complying with paragraph 3.4 of the Commission guidance. However he maintained that no such distinction was drawn when it came to the question of remedies.

The Remedies Directives

[12] In addition to implementing the Classic Directive the Regulations of 2006 also sought to implement the remedies contained in Council Directive 89/665/EEC of 21 December 1989 (the "Remedies Directive"). The purpose of the Remedies Directive was to ensure that Member States provided effective and rapid remedies in the case of infringements of Community Law in the field of public procurement or national rules implementing that law. The Directive required Member States to ensure that review procedures were available including interim measures to suspend or ensure suspension of a procedure for the purpose of correcting alleged infringements, setting aside decisions taken unlawfully and damages. In relation to damages Article 2.6 expressly provided that:

> "Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person harmed by the infringement."

It seems clear that it was this requirement that was implemented by Regulation 47(9).

[13] The original Remedies Directive did not deal specifically with framework agreements since that concept was not introduced into the field of public procurement until the advent of the Utilities Directive and Classic Directive in 2004. In that context it is worth noting that the recitals of the Remedies Directive referred to the opening up of public procurement to competition with the need to substantially increase guarantees of transparency and non-discrimination and emphasised the short duration of procedures at that time for the award of public contracts. On 9 January 2008 Directive 2007/66/EC came into force which, inter alia, amended the original Remedies Directive with regard to improving the effectiveness of review procedures concerning the award of public contracts. One of the principal innovations was the introduction of a suspension or "standstill period" between the award and conclusion of a contract to enable aggrieved parties sufficient time to take account of effective review procedures as well as some refinements in relation to time limits for applying for review and ineffectiveness. The new Directive again confirmed the power of a Member State to provide that after the conclusion of a contract in accordance with Article 1(5), paragraph 3 of Article 2 or Articles 2a to 2f the powers of the reviewing body should be limited to awarding damages.

[14] Furthermore and, perhaps of greater significance in relation to the remedies debate, Directive 2007/66/EC amended Article 1 of the original Remedies Directive by substituting a new article that contained a specific provision that:

> "Contracts within the meaning of this Directive include public contracts, framework agreements, public works concessions and dynamic purchasing systems."

In the course of his helpful submissions on behalf of the Department Mr Shaw relied upon this provision in support of his argument that Regulation 47(9) extended to the framework agreement in question.

[15] While he accepted that by virtue of Article 3 Member States still have until 20 December 2009 to implement the provisions of Directive 2007/66/EC. Mr Shaw submitted that the term "contract" in the regulations should be interpreted so as to be consistent with EC law in accordance with Articles 10 and 249 of the Treaty (Marleasing SA v La Comercial Internacional de Alimentacion SA [1990] ECR 4135 and Pfeiffer and Others [2004] ECR 1 – 8835). He relied upon the case of Adeneler v Ellininkos Organismos Galaktos (ELOG) [2006] ECR 1-6057 for the proposition that the obligation to interpret and apply national legislation in conformity with a Directive arises from the date of publication or entering into force. In such circumstances, Mr Shaw submitted that since the 9 January 2008 the court has been bound to interpret the word "contract" in Regulation 47(9) as including the type of framework agreement that is the subject of this litigation.

[16] In support of these submissions Mr Shaw drew the attention of the court to paragraphs 121 to 123 of the judgment of the Grand Chamber of the European Court of Justice in the Adeneler case in which the court made the following observations:

> "121. In accordance with the Courts settled case-law, it follows from the second paragraph of Article 10 EC in conjunction with the third paragraph of Article 249 EC and the directive in question itself that during the period prescribed for transposition of a directive, the Member States to which it is addressed must refrain from taking any measures liable seriously to compromise the attainment of the result prescribed by it (Inter-Environment Wallonie, paragraph 45; Case C-14/02 ATRAL [2003] ECR1-4431, paragraph 58; and Mangold, paragraph 67). In this connection it is immaterial whether or not the provision of national law at issue which has been adopted after the directive in question entered into force is concerned with the transposition of the directive (ATRAL, paragraph 59 and Mangold, paragraph 68).
>
> 122. Given that all the authorities of the Member States are subject to the obligation to ensure that the provisions of Community Law take full effect (see Francovich and Others, paragraph 32; Case – 453/00 Kuhne and Heitz [2004] ECR 1-873, paragraph 20; and Pfeiffer and Others, paragraph 111), the obligation to refrain from taking measures, as set out in the previous paragraph, applies just as much to national courts.

> 123. It follows that, from the date upon which a directive is entered into force, the courts of the Member States must refrain as far as possible from interpreting domestic law in a manner which might seriously compromise, after the period for transposition has expired, attainment of the objective pursued by that directive."

Conclusions

[17] In my opinion it is important to bear in mind that the interpretative obligation cast on a national court by the coming into force of a relevant directive is to construe domestic provisions in the light of the objective and overall purpose of the directive rather than to focus on any specific terminology. The purpose of Regulation 47(9) implementing, as it does, the relevant provisions in both Remedies Directives would clearly seem to be the protection of third party rights in respect of specific contracts that have been awarded. In that context I again respectfully agree with the views set out by Deeny J at paragraph 15 of his judgment in the McLaughlin and Harvey case. Third parties awarded individual contracts whether as a result of a specific competition, a framework contract in which all the terms are established or "call-offs" following secondary competition in a framework agreement stricto sensu may well have performed work and will have been promised agreed remuneration by way of consideration some of which may already have been received. That is a situation that is in stark contrast to the loose non-exclusive agreement or other arrangement to facilitate public procurement contemplated by the Commission and the Regulations. In the circumstances of specific contracts limiting the right of aggrieved parties to one of damages may be balanced against the interests of the third party contractors and the public for whose benefits the contracts are to be performed.

[18] However, in the case of framework agreements stricto sensu the restriction imposed by Article 47(9) has the potential to be much more damaging particularly to the public in whose interest the community principles of transparency, equality, non-discrimination and open competition are to be observed. In both the instant case and the McLaughlin and Harvey case the court declined to grant interim relief despite being satisfied that the plaintiff's claim was neither frivolous nor vexatious and that there was a serious question to be tried. In each case the court decided that, at that stage, the balance of convenience favoured the public interest. In each case a subsequent full hearing involving a detailed adversarial consideration of the relevant facts and law established significant breaches of domestic and community legal provisions and principles. Despite the provision in Article 5 of Directive 2007/66/EC that a decision not to grant interim measures shall not prejudice any other claim of the person seeking such measures, assuming

that the interpretation of Regulation 47(9) contended for by Mr Shaw is correct, even if no application for interim relief has been made and the aggrieved party proceeds by way of direct action with the benefit of an expedited hearing the contracting authority will be entitled to limit the remedy to one of damages by simply concluding the framework agreement. The inevitable consequence in this case will be the continuation of a framework agreement based upon a manifest error generating specific contracts awarded in breach of the principles of EU competition law and, at least potentially, breaches of Articles 87 and 88. The framework will run for a period of some 4 years and involve the investment of public funds to the extent of some £55 million in the construction and refurbishment of the schools infrastructure in Northern Ireland. While it is perhaps of somewhat less significance in terms of public procurement policy, the plaintiffs will be left to pursue a damages claim which it may well be impossible to quantify until all the relevant contracts have been "called off" thereby substantially increasing the complexity, expense and delay involved in bringing this litigation to a conclusion. Ultimately all such sums by way of damages and costs will be discharged from public funds and will be in addition to any sums paid out in performance of specific contracts. Mr Shaw sought to persuade the court that such an outcome would be quite consistent with the Directives and Regulations being founded upon a predominantly financial framework with the need for a "portcullis device" to allow commercial business to progress.

[19] In his skeleton argument and oral submissions Mr Shaw suggested that in the McLaughlin and Harvey case there had been a failure to appreciate the significance of the words "the contract in relation to which the breach occurred" in Regulation 47(9). However, in my view the difficulty in this case may well have arisen when the Regulations were being drafted from a failure to appreciate the significance of the sub-category of framework agreements introduced into public procurement by the Classic Directive which were not considered by the Commission to be public contracts and could even include arrangements other than agreements. The result seems to have been the implementation of Article 2.6 of the 1989 Directive in the form of Regulation 47(9).

[20] The task of this court is to interpret the term "contract" as it is used in Regulation 47(9). I accept that the approach to interpretation should be consistent with EC principles and jurisprudence since the Regulations implement EC directives. The purposive or teleological approach to statutory interpretation favoured by EC jurisprudence requires the court to interpret provisions and clarify any ambiguity that may exist by reference to the purpose and general scheme of community law and not so as to produce a result contrary to the general policy objectives of any relevant community directive – see Marleasing SA v. LA Comercial Internacional de Alimantacion SA [1990] ECR 4135 and Pfeiffer and Others [2004] ECR 1-8835 and Pupino

[2005] ECR 1-5285. It is clear from the relevant directives considered in the context of this case that the purpose to be served is that public contracts should be awarded on the basis of objective criteria ensuring compliance with the principles of transparency, non discrimination and equal treatment in conditions of effective competition and that, in the event of there being a breach of such principles, adequate and effective procedures should exist to permit the setting aside of decisions taken unlawfully together with compensation for persons harmed by any infringement. Bearing in mind the view of the Commission, expressed both before and after the coming into force of the Classic Directive, that framework agreements stricto sensu are not public contracts it seems to me that the interpretation contended for on behalf of the plaintiffs is to be preferred. At the very least there must be some degree of ambiguity as to the meaning of the term as defined in Directive 2007/66/EC. Applying the above principles to the term "contract" as used in Regulation 47(9) it seems to me that the court should restrict the meaning to framework contracts and exclude framework agreements stricto sensu.

[21] Accordingly, I propose to order that the framework agreement of the 25th of February 2008 be set aside by reason of the breaches identified in my earlier judgment.

Damages

[22] With regard to specific contracts entered into by the department on foot of the framework agreement the court is restricted in its power to order any remedy other than an award of damages. In the course of his oral submissions Mr Bowsher accepted that the court did not have power to set aside such specific contracts that had been entered into and that if there were construction agreements to carry out work on particular construction projects the plaintiffs' remedy was limited to damages. Presumably they will now pursue this aspect of the litigation. The defendants have sought to identify such contracts in a "status report" although the plaintiffs have reserved their position in relation to the contract for construction works at Banbridge Academy.

Costs

[23] The plaintiffs are entitled to the costs of the main hearing and the remedies hearing, such costs to be taxed in default of agreement. The Department succeeded in the injunction proceedings but failed when a full adversarial consideration of the relevant issues had been concluded. In the circumstances I propose to make no order as to costs in relation to the application for interim relief.