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Judgment: approved by the Court for handing down | *Delivered:* **22.02.2008**
*(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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ACTION 2008 NO. 5070

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McLAUGHLIN AND HARVEY LIMITED

Plaintiff;

-v-

DEPARTMENT OF FINANCE AND PERSONNEL

Defendant.

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DEENY J

[1] The plaintiff in this matter issued proceedings on 16 January 2008 seeking, inter alia, an order suspending the procedure being conducted by the defendant with the aim of concluding a Framework Agreement entitled Integrated Supply Team Framework Agreement (CPD No. 1542/06). Following an ex parte application on the same date the defendant agreed not to conclude the said framework agreement until the application by the plaintiff for an interlocutory injunction was heard by the court on 12 February and following days. At the conclusion of the hearing of the application for the interlocutory injunction before me on Friday 15 February the defendant undertook to maintain their position until the delivery of this interlocutory judgment.

Facts

[2] The plaintiff's claim arises in this way. The Central Procurement Directorate ("CPD") is a Directorate of the defendant department. In affidavits before the court officials of the CPD explain with reference to a

series of reports including one by Lord Levene, as he now is, of 1995, how Government thinking with regard to construction procurement has evolved over the last 15 years. A view has been formed that competitive tenders awarded to the tenderer with the lowest price do not, in fact, always yield the best value for the public. The Government now favours a "partnering approach rather than confrontational relationships which have often marred the successful delivery of projects. It is based on contractors and their design teams working together in Integrated Supply Teams with the Client." (Stewart Heaney first affidavit).

[3] An example of that approach is the current proposed Framework Agreement. This process will select five contractors to lead integrated supply teams to undertake projects, as the need arises, by means of a secondary competition among those appointed to the Framework Agreement. The process is conducted on behalf of the CPD. This particular Framework Agreement relates to a number of construction contracts which it is hoped to implement over the next four years at a cost of £500-£800m. They include urban regeneration, further education, arts and sports developments. It is relevant to note that they do not cover schools, health or roads ie. that a contractor excluded from this Framework Agreement may well still be eligible for much other public procurement work over the coming four years. These developments in public procurement have clearly not been confined to the United Kingdom as they are recognised under the relevant current European Directive 2004/18/EC, to which I will refer in due course.

[4] In this case a contract notice was published, as required, in the official journal of the European Union on 15 March 2007. The primary tender documents were issued on 24 April 2007. The tender of the plaintiff was submitted on 5 October 2007. On 17 December 2007 they were informed that they had been unsuccessful. They sought a debrief meeting as they were entitled to but for various reasons this did not take place until 10 January. The plaintiff would say that it was only on this occasion that they realised and learnt that the defendant through the CPD had marked the plaintiff's tenders alongside all the other tenders with a particular methodology that had not been disclosed in advance to the plaintiff. The heart of the case is the plaintiff's attack on the very fact of that methodology which it alleges constitutes new and "secret" criteria relied on by the defendant in breach of the European requirement of transparency and in a way that was unfair to the plaintiff. As the plaintiff came sixth in the competition only 1% behind the contractors placed fifth and fourth even a modest improvement in its marking by a proper approach, it contends, would materially affect the outcome. The defendant denies these are new criteria but says they are a perfectly legitimate working out in detail of the material which had been included in the tender documents. Furthermore, in an analysis furnished to the court on the third day of the hearing, the defendant's expert drew attention to the fact that the plaintiff's solicitors had furnished the defendant with the first draft of their

tender. He was able to point out that it anticipated correctly the very points which the plaintiff's expert was now saying were unexpected and not foreseeable. In a number of instances, however, these matters were deleted between the first and second tenders. For reasons that will appear I do not consider it necessary for me to go much further into the detail of the argument on the merits between the parties.

Interlocutory Injunction

[5] Conscious that this was an application for an interlocutory injunction pursuant to Order 29 of the Rules of the Supreme Court, although the term interim injunction seems to prevail in England and Wales, the parties concentrated their submissions on the three key factors that arose from the decision of the House of Lords in American Cyanamid Company v Ethicon Ltd [1975] A.C. 296, although the decision was not opened to me itself. The judgment of Lord Diplock, with which the other members of the House all agreed, merits a re-reading and citation. At page 416 he deals briefly with the history of the injunction in the 19th century and the development of the plaintiff's undertaking to pay damages to the defendant for any loss sustained by reason of the injunction if it should be held at the trial that the plaintiff had not been entitled to restrain the defendant from doing what he was threatening to do.

He criticised the purported rule that the plaintiff had to show an ultimate chance of success of more than 50% or a probability and stated the law succinctly at page 47G:

> "The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried."

He continued at page 408A:

> "So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.
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> As to that, the governing principle is that the court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he

would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction.

It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises. It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case. Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo. If the defendant is enjoined temporarily from doing something that he has not done before, the only effect of the interlocutory injunction in the event of his succeeding at the trial is to postpone the date at which he is able to embark upon a course of action which he has not previously found it necessary to undertake; whereas to interrupt him in the conduct of an established enterprise would cause much greater inconvenience to him since he would have to start again to establish it in the event of his succeeding at the trial. Save in the simplest cases, the decision to grant or to

> refuse an interlocutory injunction will cause to whichever party is unsuccessful on the application some disadvantages which his ultimate success at the trial may show he ought to have been spared and the disadvantages may be such that the recovery of damages to which he would then be entitled either in the action or under the plaintiff's undertaking would not be sufficient to compensate him fully for all of them. The extent to which the disadvantages to each party would be incapable of being compensated in damages in the event of his succeeding at the trial is always a significant factor in assessing where the balance of convenience lies, and if the extent of the uncompensatable disadvantage to each party would not differ widely, it may not be improper to take into account in tipping the balance the relative strength of each party's case as revealed by the affidavit evidence adduced on the hearing of the application. This, however, should be done only where it is apparent upon the facts disclosed by evidence as to which there is no credible dispute that the strength of one party's case is disproportionate to that of the other party. The court is not justified in embarking upon anything resembling a trial of the action upon conflicting affidavits in order to evaluate the strength of either party's case.
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> I would reiterate that, in addition to those to which I have referred, there may be many other special factors to be taken into consideration in the particular circumstances of individual cases."

[6] It can be seen that the test laid down by the House of Lords, is sequential.

(1) Has the plaintiff shown that there is at least a serious issue to be tried?

(2) If it has, has it shown that damages would not be an adequate remedy for the plaintiff and would be an adequate remedy for the defendant if an injunction were granted and it ultimately succeeded?

(3) If there is doubt about the issue of damages the court will then address the balance of convenience between the parties.

(4) Where other factors are evenly balanced it is prudent to preserve the status quo.

(5) If the relative strength of one party's case is significantly greater than the other that may legitimately be taken into account.

(6) There may be special factors in individual cases.

I would add seventhly the court has an overall discretion to do what is just and convenient in the circumstances.

For my part I find the summary by Laddie J in Series 5 Software v Clarke [1996] 1 All ER 853, which is quoted with approval in Bean on Injunctions 9th Edition, p. 39, is both helpful and consistent with the decision of the House of Lords.

I would remind parties of the statutory basis for the exercise of the court's power in this regard. Section 91 of the Judicature (NI) Act 1978 empowers the court to grant a mandatory or other injunction "in any case where it appears to the court to be just and convenient to do so for the purpose of any proceedings before it ….". That again makes clear that the court has an overall discretion to exercise this power when it is "just and convenient to do so."

[7] Finally it will be borne in mind that in this case the plaintiff can also rely on the statutory power conferred on the High Court in this jurisdiction pursuant to Regulation 47(8) of The Public Contracts Regulations 2006 to suspend the procedure leading to the award of the contract by interim order. Clearly a discretion exists under this power also.

Serious Question

[8] In this case Mr Shaw Q.C. who appeared with Mr McMillan for the defendant acknowledged at an early stage of the case that there was a serious issue to be tried. He then sought to argue that nevertheless the plaintiff's case was a weak one and that this should lead the court to refuse an injunction. In responding to that argument one of the points made by Mr Bowsher Q.C. who appeared with Mr Scoffield for the plaintiff was that at Section B01 of the tender documents the defendant had put forward a number of criteria upon which his client had written one third of its relevant response but which found no corresponding opportunity for marking in the methodology adopted by the CPT team. Mr Heaney in his affidavit avers that the team, of whom he was a member, used their professional judgment to take into account other relevant evidence provided by the tenderer. But can this be right when the methodology put forward and relied on by the team carefully allocated marks to a series of other key indicators or criteria without giving an opportunity to mark additional matters drawn to their attention by the tenderer? It seems to me that this and perhaps some other matters also will require oral evidence at the trial and reinforce my view that I should be

content to adhere to the position that the plaintiff has shown that there is a serious issue to be tried. The only gloss I would add to that is that they have not demonstrated the opposite to Mr Shaw's contention of self-evident weakness.

Damages

[9] If the plaintiff succeeds at the trial of this action would it be adequately compensated by an award of damages for the loss sustained, in that event, by the defendant's action in excluding it from the group of contractors selected for the Framework Agreement? The first thing to note is that in that eventuality the defendant will be in a financial position to meet an order for damages if made. That will not always be the case. Mr Bowsher, secondly, comments on the difficulties of assessing damages in the event of his client succeeding, but he acknowledged that this test could be carried out as the valuation of the loss of a chance on the principles laid down in Chaplin v Hicks [1911] 2 KB 786. In that regard one notes that there are proposed to be five contractors in this Framework Agreement and that it covers a period of only four years. Certainly retrospectively one would have thought it would be far from impossible to assess the loss of profit to the plaintiff arising from an unlawful deprivation of one of those five places. The situation here is to be contrasted with that which faced Coghlin J in Partenaire Limited [2007] NIQB 100 where the proposed contract was to run for a period of some twenty years and where he concluded the damages would not be an adequate remedy. Assessment of the loss of chance here may include the chance of having made the last five if things had been done differently.

[10] Counsel submitted that his client was a contractor firm which wished to do the work and no merely claim the damages. While that is no doubt a worthy aspiration it should be made clear that there was no affidavit evidence before the court to suggest that the plaintiff company would suffer damage in some crucial or intangible way over and above the loss of profits from participating in the Framework Agreement. The court was not told the number of employees for example of the company let alone the number who would have been working under this Framework Agreement. Importantly it seems to me the case was not made, because it could not be made, that without access to this Framework Agreement the very existence of the company might be threatened. As I pointed out above this Framework Agreement is one of only a number of significant sources of public construction work in the coming years. If it were otherwise that might well be a significant factor in assessing the adequacy of damages. While therefore I acknowledge that damages would not be easily assessable here it does not seem to me that the plaintiff has shown they would be inadequate.

[11] On one view that settles the matter but there are two further factors which would support the court in concluding that an interlocutory injunction

should not issue here and I propose to deal with those. As the House of Lords has made clear the court should take into account the affect on the defendant of granting the injunction but of the defendant ultimately succeeding at the trial. This is dealt with by the plaintiff giving an undertaking or cross-undertaking in damages. However the undertaking offered by the plaintiff here is a qualified one confined to the additional costs sustained by the defendant in putting individual projects out to tender generally pending the trial, and, I observe, the judgment in the action. But the defendant claims that over and above any extra administrative costs which would be relatively modest, £100,000-£200,000, other costs would be incurred. They suggest that construction inflation is running at 4%-6% and that inevitable delays caused by the injunction could add as much as £1.6m to construction costs on projects of this size given a four month delay in trial. (I observe that a full trial of the matter in June, which the parties were contemplating, is likely to indicate a judgment in September). Although it may not have been spelt out precisely the implication in that affidavit evidence elaborated upon to some degree at the hearing was that construction inflation is running at more than monetary inflation and is therefore a real cost to the Department. Furthermore the whole purpose of this Framework Agreement is to obtain greater value for money for the public purse and the loss of that for projects for half a year would cost them £7.5m. While counsel for the plaintiff was entitled to say that these were headings of loss that he would not accept and were contentious, it does seem to me that they are not entirely far fetched. I cannot ignore them. The court is therefore in the position that a factor in this case would be that the plaintiff's undertaking in damages would not fully compensate the defendant in the event of an interlocutory injunction being granted and the defendant ultimately succeeding. It may well be that in the appropriate case, as in Partenaire, that would not be a insuperable barrier. Indeed in the appropriate case the court can grant an interlocutory injunction even though the plaintiff is not in a position to offer any undertaking in damages. But nevertheless in this case it is a factor in the balance against the plaintiff's application.

[12] There is another important aspect of this matter which might be considered a special factor in Lord Diplock's term or might be considered as part of the balance of convenience and justice. That factor is that the plaintiff may well not be confined to damages alone if it succeeds at the trial of this action. The remedies open to the court at that time may include ordering the defendant to add the plaintiff to the list of contractors who benefit from the Framework Agreement. The argument to the contrary is contained at Regulation 47(9) of the Public Contracts Regulations 2006.

> "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."

[13] That would seem to preclude any award other than damages if this injunction is not granted and the Department proceeds to conclude the Framework Agreement. But does it? Is a Framework Agreement a "contract" within the meaning of Article 47(9)? The interpretation Regulation 2 does not define contract simpliciter but it does define Framework Agreement as follows:

> "Framework Agreement means an agreement or other arrangement made between one or more contracting authorities and one or more economic operators which establishes the terms (in particular the terms as to price and, where appropriate, quantity) under which the economic operator will enter into one or more contracts with a contracting authority in the period during which the Framework Agreement applies."

That seems to clearly distinguish between an agreement or arrangement and a contract which would only be entered into thereafter. That is consistent with the Department's own description of the procedure in the relevant affidavit. Framework Agreements are dealt with further in the Regulations at Regulation 19. Again there is a clear distinction in the language of that Regulation between the Framework Agreement as such and any contract or specific contract made under it.

[14] One can see that the purpose of Regulation 47(9) is not to compel a contracting authority to break a contract with another economic operator which it has entered into. Either the disappointed economic operator obtains interim relief preventing the contract from being entered into or it must be content with damages. But a Framework Agreement is of a different nature. It is the selection of a number of operators, the number not being defined in the Regulations, who will be eligible to bid for these contracts over the duration of the Framework Agreement. A point the other way arises from the wording of Regulation 47(9) itself. The plaintiff has to prove a breach in relation to the Framework Agreement but the Regulation refers to "the contract in relation to which the breach occurred has been entered into".

[15] Mr Bowsher offered only brief submissions on this point, partly because he was counsel in the case of Henry Brothers v The Department of Education. Mr Shaw was unable to offer any submissions, on instructions he told me, because the defence in that action on behalf of the defendant, for whom he also acted, had not yet been served. The Government was considering what its attitude to this question was. This is obviously

unhelpful to the court. However for my own part it seems to me not impossible that the court in this case, if satisfied that there was a breach of transparency or a manifest error on the part of the Department or unfairness which could have had a causative effect on the outcome (McConnell Archive Storage Limited v Belfast City Council (unreported 2008) and Pratt Contractors Limited v Transit New Zealand (2003) B.L.R. 143) may order the Department to add the plaintiff as a sixth contractor to the list. While this should not be a determinative factor I do find it a consideration which it is proper to take it into account on one side of the balance in this case.

Balance of convenience and justice

[16] In the circumstances it is not necessary to go into the arguments on this topic at length. Some of them have already been indicated in the course of this judgment. I make just a few brief observations for the assistance of the parties. A list of worthy projects has been identified by the Department for this Framework Agreement and the court has been urged not to delay the implementation of those projects, by way of interim order. But it does seem to the court that that must be true in every public procurement case. No doubt the contracting authority in any part of the European Union which is intending to spend public money on infrastructural works or acquisitions will consider the project to be a worthy one. Any interim order is more or less likely to delay the commencement of such a project, but nevertheless interim orders are expressly permitted by the European Directive.

[17] There seems to be some more substance in the affidavit of Mr Des Armstrong that a delay of approximately half a year here might have deleterious consequences for the allocation of expenditure to the defendant Department in subsequent years i.e. if it has failed to commence these projects expeditiously and timeously. A significant partial answer to that is that if that it is apprehended the Department can go ahead with individual tenders for a particular project while awaiting the outcome of the challenge to the Framework Agreement.

[18] One additional factor could weigh heavily in an assessment of this kind. It cannot be in the public interest for the public to both pay one contractor for a project, particularly a large one, and to pay a second contractor the profit on such a project from which he was unlawfully excluded. The risk of such an outcome would clearly lead many public authorities to accept some delay in going forward with their projects, by way of interim order or undertaking. I expressly raised this matter with counsel for the Department in this case. I was told that he had express instructions from the Department that this was a risk it was prepared to undertake on the particular facts of this case. I need say nothing more about that in the circumstances therefore. I consider the just and convenient outcome of this application to be a refusal of interlocutory relief, although the court will seek

to facilitate the parties with an early trial of this matter. I shall give directions in that connection.