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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **14/9/2011**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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Traffic Signs and Equipment Ltd and David Connolly's Application (Leave Stage) [2011] NIQB 81

AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW BY

1. TRAFFIC SIGNS AND EQUIPMENT LIMITED

2. DAVID CONNOLLY

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WEATHERUP J

[1] This is an application for leave to apply for judicial review of a decision of the Department of Regional Development of 21 March 2011 to award fifteen contracts for the provision of traffic signs under a public procurement process that was completed in 2010. Mr Aiken appears for the applicant and Mr McMillen for the proposed respondent.

[2] An earlier dispute between the first applicant and the Departments of Regional Development and Finance and Personnel led to a public procurement challenge in the High Court which resulted in judgment on 4 February 2011, neutral citation [2011] NIQB 25. The judgment found a breach of the Public Contracts Regulations 2006 as amended in 2009.

[3] The procurement process for traffic signs involved the award of twenty-one contracts, with three contacts to Traffic Signs, three contracts to a firm described as

Hirsts and fifteen contracts to a firm described as PWS. The Departments had completed the assessment of the tenders by adopting a 60:40 split between price and quality. At paragraph 66 of the judgment the conclusion is stated that the adoption of 40% for quality did not, in all the circumstances referred to in the judgment, accord with the obligations of objectivity and transparency.

[4] At paragraphs 74 to 77 of the judgment remedies were discussed. Regulation 47I provides that where the Court is satisfied that a decision was in breach of duty under the Regulations the Court may set aside the decision or action concerned, order the contracting authority to amend any document or award damages to an economic operator who has suffered loss or damage. I ordered the setting aside of the decisions of the Departments in respect of three of the contracts that had been identified as contracts that would have been awarded to the first applicant had the apportionment of price and quality been 80:20 rather than 60:40. The decisions of the Departments in respect of the other eighteen contracts were not set aside. There were three of the eighteen contracts that would have been affected had the 80:20 ratio been applied and they would have been awarded to Hirsts. However Hirsts had not issued proceedings to enforce the Departments duties under the Regulations and Traffic Signs, who had issued proceedings, had not suffered loss as a consequence of that breach. No order was made setting aside the award of those three contracts.

[5] Regulation 47G provides that when proceedings are issued it operates as a stay on the award of contracts and the Regulation permits the stay to be removed when the proceedings at first instance are determined, discontinued or otherwise disposed of. A decision on the removal of the stay on the remaining eighteen contracts that were not set aside was delayed during the period for appeal against the decision of 21 March 2011. There being no appeal it was eventually ordered that in respect of the eighteen remaining contracts the stay would be removed from the letting of those contracts.

[6] On 24 March 2011 solicitors on behalf of the second applicant, a director and shareholder of the first applicant, wrote a letter to the Department requesting a

decision in relation to the remaining eighteen contracts and indicating that if the Department had let the contracts the second applicant might embark on litigation to review that decision and the letter was to be treated as a pre action protocol letter for a judicial review of any decision of the Department to let the contracts. The Department's solicitors replied on 12 April 2011 to indicate that fifteen of the eighteen contracts were let by letters dated 21 March 2011. The three contracts that had been set aside had not been let. The three contracts that would have been awarded to Hirsts on an 80:20 price/quality ratio had not been let. The decision to let the remaining fifteen contracts is the subject matter of this application for leave to apply for judicial review.

[7] The grounds relied on by the applicants appear in the Order 53 statement as follows -

> (a) The High Court of Justice held that the 2010 traffic signs procurement process engaged in by the DRD, relating to 21 separate contracts for the provision of traffic signs, was unlawful in that there had not been, *inter alia*, a proper and sufficient objective consideration of the setting of the 60/40 cost/quality split utilised by the DRD (in the unlawful process, using the 60/40 split, Traffic Signs had secured 2 of the 21 contracts).
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> (b) The Court however held, pursuant to the provisions of the Public Contracts Regulations 2006 (the Regulations) (as amended), that Traffic Signs, based on a notional 80/20 cost/quality split, would have only won a further 3 contracts in the original tender process, and accordingly, based on an economic operator's entitlement to remedies under the Regulations, quashed only the DRD' s decision to award those additional *3* contracts that may have been obtained by Traffic Signs on a 80/20 cost/quality split (a further 3 contracts would

have gone to Hirsts Signs Limited (Hirsts) on the same basis although these contracts were not quashed because Hirsts were not a Plaintiff).

(c) Following the decision of the High Court the DRD then proceeded to award the other 15 contracts (not the 3 quashed or the 3 that Hirsts might have had quashed had they been a Plaintiff). whi.ch were tainted, by the same unlawfulness as the 3 quashed by the High Court decision but which were not caught by the challenging economic operator's remedies entitlement under the Regulations.

(d) The DRD' s decision to award the remaining 15 contracts, arising from a procurement process adjudged by the High Court of Justice to be unlawful, was *ultra vires.*

(e) The DRD's decision to award the remaining 15 contracts, arising from a procurement process adjudged by the High Court of Justice to be unlawful, was unlawful in that it was in breach of relevant European Union law and in particular (1) the terms of the Public Sector Directive that requires that public contracts should be awarded on the basis of objective criteria which ensure compliance with the principles of transparency, non discrimination and equal treatment and (ii) the enforceable general principles of European Union law, including the principles of objectivity and transparency.

(f) The DRD's decision to proceed to award the remaining 15 contracts, arising from a procurement process adjudged by the High Court of Justice to be unlawful, was *Wednesbury* unreasonable in all the circumstances.

> (g) The DRD's decision to proceed to award the remaining 15 contracts, arising from a procurement process adjudged by the High Court of Justice to be unlawful, breached the legitimate expectation of the Applicants that the award of any traffic signs contracts would only take place after a lawful tender process in compliance with the requirements of relevant European Union law.

[8] The applicants' skeleton argument states that in effect there was only one procurement process the outcome of which determined who was to be awarded each of the twenty-one contracts. As the judgment established that the procurement process had been in breach of the Regulations the effect, according to the applicants, was that the entire 2010 procurement process was unlawful. The applicants' state -

> The central point being made by the applicants and which is of considerable public importance is whether a public authority can proceed to award numerous public contracts on foot of a public procurement process found by a court to have been unlawful (and thus known to the public authority to have been unlawful at the time it takes its decision to proceed to award the 15 contracts) simply because the economic operator who challenged the procurement process was only entitled to limited relief under the remedies provisions in the Regulations.

[9] The applicants refer to the decision of the English Court of Appeal in R (Chandler) v. Secretary of State for Childrens, Schools and Families [2009] EWCA Civ 1011. It is said that the case established that someone who was not himself an economic operator (such as the second applicant in the present case) has standing to apply for judicial review of a procurement decision. Further the applicants contend that if someone who is not an economic operator can apply for judicial review then an economic operator (such as the first applicant in the present case) must have

similar rights of challenge the decision by way of judicial review, otherwise they would be disadvantaged.

[10] On the other hand the proposed respondents contend in essence, first of all that there can be no application for judicial review unless the challenge involves fraud, corruption or bad faith, which are not alleged against the proposed respondent, secondly that there is a statutory code for challenges under the Public Contracts Regulations which ought to govern the situation rather than judicial review and thirdly that in any event the applicants have been guilty of delay and they should not be granted an extension of time to make this application.

[11] In Chandler the immediate concern of the appeal was stated to be the process that must be adopted by a public authority when making arrangements with a sponsor for establishing an academy school. The situation had been labelled 'philanthropic' and the Court was invited to consider whether services offered on a philanthropic rather than a commercial basis fell within or without the public procurement regime. The local council had given provisional approval for the proposals and the Secretary of State had approved the proposals. Ms Chandler sought to have that decision quashed and she alleged that the Secretary of State had failed to apply the public procurement regime. Ms Chandler would have wanted a competition to take place to determine who should be the sponsor of a new academy.

[12] The appeal gave rise to two particular issues. The first issue was whether the public procurement regime applied to expressions of interest such as arose in that case and the second issue was whether Ms Chandler had standing to contend that the public procurement regime was applicable to the arrangements that were being made for academies. On the first issue the Court of Appeal decided that philanthropic arrangements which were made on the basis that no remuneration or benefit would be given by the contracting authority to the service provider were not within the Directive or the Regulations.

[13] On to the second point of whether Ms Chandler had standing, the issue was stated to be academic given that the Court had decided that the Directive and the Regulations did not apply. However the Court considered the issue of standing and set out the position at paragraph 77 of the judgment –

> The judge accepted the submission that a failure to comply with any of the regulations gives rise only to a private law claim (judgment, [138] to [140]). Such a conclusion has potentially far-reaching implications. It means that a person who is not an economic operator entitled to a specific remedy under reg 47 can never bring judicial review proceedings in respect of that failure unless he can bring himself within the exceptional type of claimant in *R (Law Society) v Legal Services Commission*. We consider that the judge's proposition goes too far. The failure to comply with the regulations is an unlawful act, whether or not there is no economic operator who wishes to bring proceedings under reg 47, and thus a paradigm situation in which a public body should be subject to review by the court. We incline to the view that an individual who has a sufficient interest in compliance with the public procurement regime in the sense that he is affected in some identifiable way, but is not himself an economic operator who could pursue remedies under reg 47, can bring judicial review proceedings to prevent non-compliance with the regulations or the obligations derived from the Treaty, especially before any infringement takes place (see generally *Mass Energy v Birmingham CC* [1994] Env LR 298, 306 cf *Kathro,* where Richards J held that the claimants were not affected in any way by the choice of tendering procedure). He may have such an interest if he can show that performance of the competitive tendering procedure in the Directive or of the obligation under the Treaty might have led to a different

> outcome that would have had a direct impact on him. We can also envisage cases where the gravity of a departure from public law obligations may justify the grant of a public law remedy in any event. However, while the court is in general bound to ask itself why a public law remedy is necessary when private law remedies are available, once permission to bring judicial review proceedings has been given, then, unless it is appropriate to deal with standing as a preliminary issue, there is likely to be little point in spending valuable court time and costs on the issue of standing. In that situation, we would not encourage the court to embark on a complex argument about standing. This will especially be the case where standing is a borderline issue.

[14] Thus it was accepted, obiter, that a non economic operator, such as Ms Chandler, could have standing to apply for judicial review of a decision of an authority and that this was not limited to exceptional cases. The Court stated that she was not challenging the Secretary of State's decision because of any interest that she had in the observance of the public procurement regime but because she was opposed to the institution of academy schools. In considering whether Ms Chandler might have been permitted to make the challenge in the particular case the Court stated that it was outside the proper function of public law remedies to give Ms Chandler standing to pursue her claim.

[15] On the approach taken in Chandler a non economic operator, such as the second applicant, may have standing to apply for judicial review even if that applicant is not the exceptional type of claimant with which the Court was concerned in R (The Law Society) v. Legal Services Commission [2007] EWHC 1848. This was a case where the challenge was to the general arrangements made by the Lord Chancellor for the provision of publicly funded legal services and where the Law Society was in effect a trade association of the relevant economic operator, namely the solicitors.

Further the non-economic operator can bring judicial review to prevent non-compliance with the Regulations, where he "is not himself an economic operator who could pursue remedies under Regulation 47". In other words the primary remedy is that which is available under Regulation 47.

In addition it is apparent that failure to comply with the Regulations is unlawful whether or not there are proceedings by the economic operator under Regulation 47 and this is said to be a paradigm situation in which a public body should be subject to review by the Court. However where there have been proceedings under Regulation 47, such as occurred in the present case, there will have been such review by the Court. Such a review by the Court was not otherwise going to occur in Chandler and had the claimant undertaken the judicial review for an acceptable purpose she may have been granted permission to proceed. When the review by the Court under Regulation 47 did take place in the present case the Court applied the remedies available under the Regulations.

[16] If there is a statutory scheme to regulate activity and statutory remedies are provided, as is this case under the Public Contracts Regulations, then judicial review should not displace the statutory scheme. This challenge by the applicants is to the decision of the Department of 21 March 2011 so it is not directly a challenge to the public procurement decisions that were challenged in the earlier proceedings. However, I consider that the present application is in effect a collateral challenge to the judgment of 4 February 2011 in the procurement proceedings. In that judgment the Court applied the statutory remedies and removed the stay on the award of eighteen contracts. It is the case that the proposed respondent has elected not to proceed with three other contracts which were adjudged to have been affected by the price/quality split that was adopted in the 2010 procurement process. The present application seeks to set aside the award of fifteen of the contracts that the judgment did not set aside.

[17] It is sought to achieve this outcome by an application from Mr Connolly as well as from Traffic Signs. Mr Connolly is a non- economic operator and therefore

someone who could not have brought the procurement action. However I am satisfied that Mr Connolly is for practical purposes Traffic Signs as a 50% shareholder and director of that company and the effective promoter through the company of the procurement action and his interest in the matter is the interest of the company. In effect the relief that is sought is that which was not achieved under the Regulations when the award of the contracts was examined by the Court and the statutory remedies were applied. Therefore I consider this application to be a form of satellite litigation which seeks to further the challenge made and remedies sought in the procurement proceedings through the challenge to the later decision of the Department of 21 March 2011.

[18] There may indeed be circumstances where Mr Connolly could bring judicial review proceedings in relation to a procurement affecting Traffic Signs and he may do so in circumstances that are not limited to fraud, corruption or bad faith. I do not accept the proposed respondent's limits on the circumstances where judicial review may arise and I accept the dicta to that effect in paragraph 77 of Chandler. However I believe that Chandler cannot support the burden that is sought to be placed upon it in this application of establishing an entitlement to apply for judicial review by Traffic Signs and Mr Connolly in the aftermath of the procurement proceedings, which have examined under the Regulations the outcome of the procurement process and the award of the twenty-one contracts.

[19] Accordingly I am satisfied that the applicants do not have an arguable case and I refuse leave to apply for judicial review.