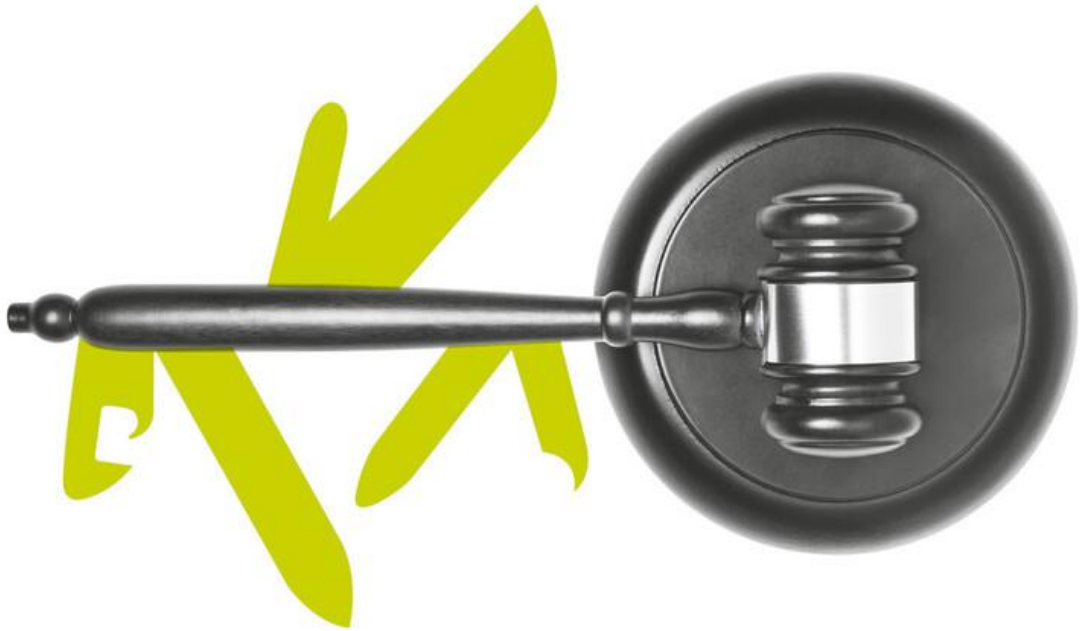
EVERSHEDS SUTHERLAND

Legal toolkit

Casenote: Automatic Suspension and Adequacy of Damages: Irish Court of Appeal Clarifies Rules in Context of Multi-Supplier Frameworks



Introduction

The Irish Court of Appeal (Mr Justice David Barniville) gave an extensive judgment in *Word Perfect Translation Services Limited v Minister for Public Expenditure & Reform*[1] on 12 November 2021, a case dealing with the lifting of automatic suspensions in circumstances where multi-supplier frameworks are being procured. It is an authoritative decision which clarifies and confirms Irish law in a number of important respects and will provide support to those seeking to challenge the structural aspects of framework competitions.

Background

The Minister ("**Respondent**"), acting through the Office of Government Procurement, published a Request for Tenders on 12 May 2021 to establish three Multi-Supplier Framework Agreements for the provision of "*reliable and high quality Irish language translation services for Framework Clients as and when required*". The 'Framework Clients' in question consisted of a range of Irish central government departments and other public bodies on whose behalf the Respondent conducted the competition. Word Perfect Translation Services Limited ("**Appellant**"), an Irish company which provides translation and interpretation services throughout the State to public and private sector clients, challenged three substantive aspects of the competition.

Call-off contracts under the first Framework Agreement (lot 1) were to be awarded by rotation; call-off contracts under the other two Framework Agreements (lots 2 and 3) were to be awarded by mini-competition. *Firstly*, the Appellant complained that the rotation system to be used on lot 1 to allocate work would lead to work being allocated randomly and not to the service provider who had submitted the most economically advantageous tender. *Secondly*, the Appellant challenged the fact that minimum prices had been set under each lot; tenderers were not permitted to offer rates below those specified by the Respondent, which the Appellant argued undermined their ability to compete on price (in breach of competition law) and was inconsistent with the MEAT criterion. *Thirdly*, the Appellant argued that the minimum turnover requirement was too low and would therefore admit tenderers who did not have the capacity to perform the contracts (at the expense of those who did), which, it was alleged, was a further unjustified market intervention by the authority.

The initiation of proceedings did not prevent the Respondent from receiving tenders and evaluating them but it was prevented from concluding Framework Agreements with successful tenderers by the automatic suspension which came into play. The Respondent applied to the High Court, under Regulation 8A of the Irish Remedies Regulations[2], for an order seeking to lift the suspension and permitting the Respondent to enter into the Framework Agreements with successful tenderers. The High Court initially lifted the suspension however, the Court of Appeal reinstated it.

Arguments at First Instance

At first instance, the Respondent argued, inter alia, that there was an urgency to the conclusion of contracts as many State bodies required the translation services to discharge their statutory duties and existing frameworks had expired. It was asserted that there was a public interest in the suspension being lifted; public bodies needed access to service providers who had been competitively procured and offered value for money. The Appellant contended that as an incumbent provider, the frameworks were very important to its business (25%-30% of its turnover). It was claimed that many public bodies had call-off contracts in place under the previous framework which would survive its expiry; some had requirements which were below the threshold for triggering formal procurement rules and any gaps in the provision of translation services to public bodies could be easily addressed by those bodies seeking tenders themselves in the interim or by contract extensions. The Appellant also argued that damages would not be an adequate remedy should it ultimately succeed in the proceedings. In particular, the Appellant argued that it was unclear how damages could be calculated when the ultimate allocation of work was uncertain - the only meaningful remedy would be a decision to quash the tender process. For its part, the Respondent proposed that the Appellant's damages could be calculated by reference to the value of work actually awarded or by reference to work awarded under the previous framework (which had expired and could not be revived), whereas the harm occasioned by the suspension remaining in

[1] *[2021] IECA 305.*
[2] *European Communities (Public Authorities Contracts) (Review Procedures) Regulations 2010 (SI No. 130 of 2010).*

place was not quantifiable in damages - claims which were strongly contested by the Appellant. The Respondent also accepted that if the suspension were lifted it would not dispute that the breaches alleged by the Appellant, if made out, would be sufficient to justify an award of damages in accordance with the *Francovich* criteria.[3]

There was no dispute between the parties in the High Court (or subsequently in the Court of Appeal) as to the test applicable to an application to lift an automatic suspension. Case-law makes clear that the test is akin to that applicable on an application for an interlocutory injunction to restrain the awarding of the relevant contract[4]. In that regard, the applicant in the proceedings must notionally be treated as the moving party who bears the onus of proof on the application. In this instance, although the Respondent brought the application to lift the automatic suspension, the onus of proof rested on the Appellant to demonstrate that an interlocutory injunction should be granted to restrain the Respondent from entering into the Framework Agreements with the successful tenderers.

The relevant elements of the test for the grant of an interlocutory injunction, which are also applicable to an application to lift the automatic suspension, were clarified by the Irish Supreme Court in *Merck*[5] and are as follows:

1. Whether there is a fair question or serious issue to be tried; and
2. Whether the balance of convenience is in favour of or against the grant of the injunction sought, with the adequacy of damages being considered as part of that balance rather than as a separate component of the test.

Decision of the High Court

The High Court lifted the suspension. Having found that there was a fair question to be tried (a relatively low threshold applies), the Court considered the balance of convenience and in particular (a) whether damages would adequately compensate the Appellant; and (b) whether the Respondent could be adequately compensated on foot of the Appellant's undertaking as to damages.

In considering adequacy of damages from the Appellant's perspective, the Court noted that the entitlement to damages under the Remedies Regulations was subject to the *Francovich* criteria, which required an applicant to show a "*sufficiently serious"* breach of EU law. Of relevance was the position adopted by the Respondent which conceded that, if upheld at trial, the breaches of public procurement rules alleged by the Appellant would be *"sufficiently serious"* to sound in damages. The Respondent stated that the breaches in question would first have to be established and there would have to be causal link between the breaches and the alleged loss. The Court noted the Respondent's position and observed that the availability of damages as a remedy did not necessarily mean that they would be *adequate* for the Appellant.

The Appellant had argued that the assessment of damages would be extremely difficult for a number of reasons, including the fact that the legal challenge related to the rules of the competition rather than the award of a contract. It contended that it was "*entirely unknown how the competition would be structured in the absence of the rules under challenge". The Appellant* relied on the English decision in *OpenView*[6] where it was said that the more variables that contribute to the loss of chance calculation "*the more likely it becomes that compensation will not match the outcome"*.

Ultimately, the High Court determined that there was not a serious level of uncertainty as to the ability of the Court to award damages if the Appellant were successful at trial. The Court referred to the Akenhead J's decision in *European Dynamics*[7] and to the decision of McCloskey J of the Northern Ireland High Court in *Lowry Brothers*[8]*,* which were said to demonstrate that there was a basis for grappling with the difficulties and calculating damages in the context of framework agreements.

---

[3] *C-6/90 and C-9/90 Francovich [1991] ECR 1-5357.*
[4] *Beckman, Coulter Diagnostics Limited v Beaumont Hospital [2017] IEHC 537 and Homecare Medical Supplies Unlimited Company v Health Service Executive [2018] IEHC 55.*
[5] *Merck, Sharp & Dohme Corporation v. Clonmel Healthcare Limited [2020] 2 IR 1.*
[6] *OpenView Security Solutions Limited v The London Borough of Merton Council [2015] EWHC 2694 (TCC).*
[7] *European Dynamics SA v HM Treasury [2009] EWHC 3419 (TCC).*
[8] *Lowry Brothers Limited v Northern Ireland Water Limited (No.2) [2013] NIQB 23.*

The High Court considered various losses for which the Appellant contended it would not be adequately compensated by damages. It found that the loss of staff was not in itself a loss for which damages would be an inadequate remedy[9]. Similarly, loss of turnover or profit could be remedied by damages, although the difficulty of accurately assessing loss was a matter to be considered as part of the balance of convenience. Loss of reputation was considered to be a "very inexact science" and difficult to quantify, which again could be factored into the convenience test.

Public interest issues were raised by the Appellant. The High Court considered: (i) the risk of a double payment by the authority in the event the Appellant was successful at trial[10]; (ii) the Appellant's contention that current market rates were cheaper than the minimum prices specified in the tender documents; (iii) the public interest in ensuring compliance with public procurement rules; and (iv) the importance of upholding pre-contractual remedies. Considering matters form the perspective of the Respondent, the Court accepted that the Appellant's undertaking would not adequately compensate the Respondent for the damage caused to the public interest if the suspension were not lifted and the Respondent succeeded at trial. The Court noted that the undertaking was offered to the Respondent alone and not to the individual public bodies (Framework Clients) who would be issuing call-off contracts under the framework. The High Court also considered it relevant that some public bodies would have to pursue individual tender processes if the suspension was maintained and the benefits of the new framework would not be realised for some time. The Court concluded that on balance, lifting the suspension was appropriate for the following reasons: (i) the Appellant's losses are capable of being the subject of an award of damages if it is ultimately successful at trial; (ii) damages would not be an adequate remedy for the Respondent as they could not address damage to the public interests relied upon by it; and (iii) the provision of translation services was of "*systemic importance*" and "*by any standard a badly needed public project*" which was manifestly in the public interest and likely to lead to cost efficiencies.

Decision of the Court of Appeal

The Court of Appeal was called upon to decide two separate and distinct issues, namely:

(a) whether the High Court erred in concluding that damages would be an adequate remedy for the Appellant, as part of the assessment of the balance of convenience or alternatively whether its conclusion that they were would do a real injustice to the Appellant; and

(b) whether the findings of fact made by the High Court to support its conclusion that the balance of convenience lay in favour of lifting the suspension were supported by the evidence and whether this decision would give rise to real injustice to the Appellant.

The Court of Appeal considered that its remit was accurately framed as follows:

> "*…a party seeking to set aside an interlocutory order of the High Court made in the exercise of its discretion must establish that an injustice will be done unless the order is set aside. In making its assessment, this court will place great weight on the views of the trial judge but is untrammeled by any a priori rule restricting the scope of that appeal…*"[11].

In considering whether damages were an adequate remedy for the Appellant, the Court agreed with the trial judge that the remedy of damages would be *available* if the Appellant succeeded in its case but that this did not mean that they were necessarily an *adequate* remedy for it. The Court acknowledged that the correct approach, as set out by O'Donnell J in *Merck*, is to consider the adequacy of damages as part of the balance of convenience rather than as part of a standalone requirement. The Court noted with approval O'Donnell J's views that (i) the sole question at the interlocutory stage is whether the remedy in damages is commensurate with any possible injury so as to preclude the possibility of the grant of an injunction; and (ii) the more complex the calculation of damages and the greater the number of variables involved the more likely it is that a court would be forced to make an estimate or to compound one hypothesis with another to arrive at its best assessment of damages. As O'Donnell J put it: *"The fact that it is in theory possible to gather every feather does not mean that it is not more convenient to stop the*

---

[9] In this context, the High Court referred to the English case of DHL Supply Chain Limited v Secretary of State for Health and Social Care [2018] EWHC 2213 (TCC).
[10] See also McLaughlin & Harvey Limited v Department of Finance and Personnel [2008] NIQB 25.
[11] Quote taken from the judgment of Whelan J in Clare County Council v Bernard McDonagh & Helen McDonagh [2020] IECA 307.

pillow being punctured in the first place."

The Appellant contended that although the trial judge acknowledged that there were likely to be difficulties in assessing damages, insufficient weight had been given to that factor when considering the balance of convenience and the judge had in effect required the Appellant to demonstrate that it would be impossible to calculate damages, a test that had been rejected by the Supreme Court in *Merck*.

The Court of Appeal found merit in Appellant's argument. This was a case involving a challenge to the structure of the competition. Unlike a typical scoring challenge by a second-ranked bidder, this was not a situation where the challenger would been clearly awarded a contract but for an error by the contracting authority. Here it would be necessary to speculate how the contract would have been re-run without the elements complained of and to consider the many variables involved. What if the competition was conducted without the minimum price requirement? What difference would it have made if the contracts were not to be awarded by rotation? The Court concluded that that there were a very significant number of variables, and hence complexity, which one would have to attempt to accommodate in seeking to assess damages on a 'loss of chance' basis; this would be very difficult and there would be a risk of injustice. The present case fell squarely within the type of situation envisaged by O'Donnell J in *Merck*. It would be more convenient to restrain the conduct concerned than to leave a party with the possibility of an assessment of damages which, although theoretically possible, would be highly imprecise and speculative.

The Court noted the dearth of decisions in the Irish Courts relating to the award of damages in procurement cases. The recent case of *FP McCann*[12] in Northern Ireland was cited as an example of how difficult the assessment exercise could be. If anything, it found, the complexity of the present case was even greater than that in *FP McCann*. The Court concluded that damages would not be an adequate remedy for the Appellant if it was ultimately successful at hearing and that the trial judge had raised the bar for demonstrating that damages would not be an adequate remedy too high.

The Court proceeded to consider broader aspects of the balance of convenience test and found that it was critical to consider the period during which it might be necessary to keep any suspension in place. A full hearing of the case was scheduled for early 2022, which meant that the suspension would likely be in place for 4-6 months. Other public interest factors raised by the Respondent were also considered including the statutory obligations on public bodies to translate a wide range of documents into the Irish language and the desirability of centrally-procured providers. The trial judge had found the translation services to be of "systemic importance", which the Appellant challenged. Ultimately, the Court of Appeal determined the trial judge had correctly identified most, if not all, of the public interests that ought to be taken into account, however it held that a relatively small number of public bodies used existing framework arrangements in practice, many of those had arrangements which would remain in existence for some time yet and others could re-tender themselves if necessary. There was not a "compelling urgency" in the present case to proceed with the tendered contracts and the balance of convenience lay in preserving the suspension until the trial of the action.

Comment

It is clear that the Irish Courts do not require damages to be impossible to quantify before they will maintain a suspension in place. Damages need only be very difficult to assess, as part of an overall balance of convenience test. The greater the complexity to the assessment process and the number of variables involved, the more likely it is that an applicant will be successful. In this regard, the approach of the Irish Supreme Court in *Merck* was fully endorsed.

The complexity of the assessment in this case was due mainly to the fact the authority was procuring multi-supplier frameworks incorporating call-off rules which did not make it straightforward to predict how much work would be won. The substantive legal challenges were (somewhat unusually) to structural aspects of the competitions which added a layer of additional uncertainty.

This is the first application to lift a suspension which has come before the Irish Court of Appeal

[12] *FP McCann Limited v Department for Regional Development [2020] NIQB 51.*

since its decision in *Word Perfect*[13] in 2018, which established that the only damages that an applicant would be entitled to for breach of public procurement rules were *Francovich* damages. Having regard to the high bar for establishing such an entitlement, there has been a marked reluctance in recent years among Irish contracting authorities to apply to have suspensions lifted. It appears that this particular issue was overcome in the present case by the Respondent conceding that any breach, if made out, would be sufficiently serious. This mechanism has been deployed in a number of English cases in recent years[14] but this appears to be first time that it has been noted in any recorded decision of the Irish Courts. Although the contracting authority was ultimately unsuccessful in the Court of Appeal for the particular reasons set out above, the decision may pave the way for similar concessions being made and more applications to lift suspensions in the future.[15]

For more information, please contact:

Peter Curran
Partner, Head of Public Procurement

T: +353 1 6644 990 (Dublin)
T: +44 28 9526 2000 (Belfast)

PeterCurran@
eversheds-sutherland.ie

Aonghus McClafferty
Senior Associate, Dispute Resolution & Litigation

T: +353 1 6644 990 (Dublin)

AonghusMcClafferty@
eversheds-sutherland.ie

[13] *Word Perfect Translation Services v Minister for Public Expenditure and Reform [2018] IECA 35.*
[14] *DHL, Circle Nottingham v NHS [2019] EWHC 1315 (TCC); Alstom Transport v Network Rail [2019] EWHC 3585 (TCC); Draeger v London Fire Commissioners [2021] EWHC 2221.*
[15] *This case note was first published in the Public Procurement Law Review.*

02/22 7364077.1