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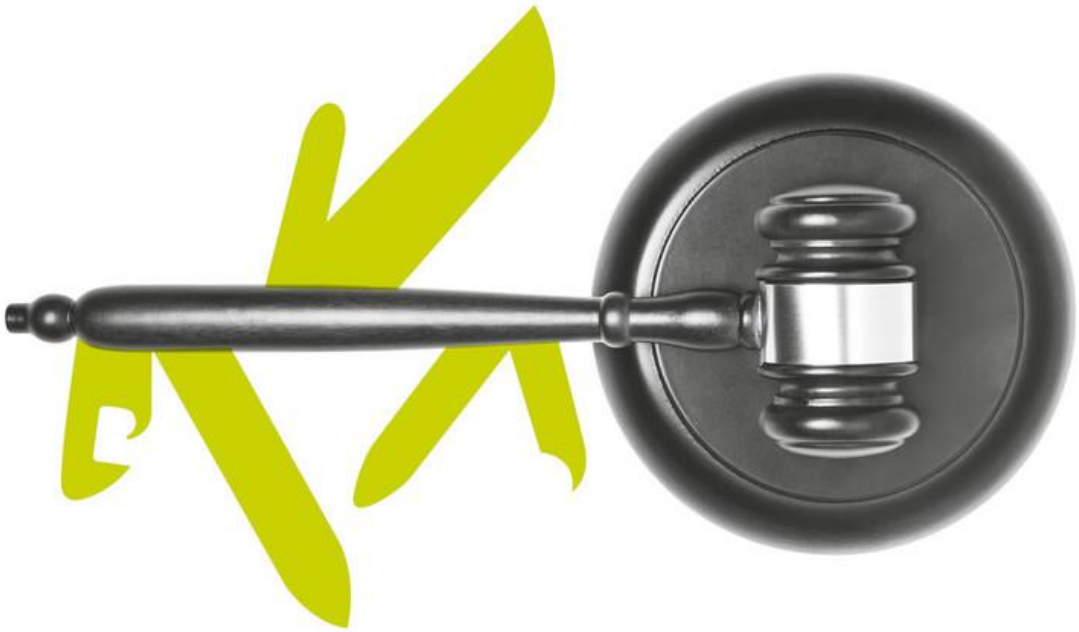
Legal toolkit

Procurement Casenote (ROI): Stays pending appeal – *Owens v Kildare County Council*



Background

The Irish Court of Appeal (Costello J) recently considered whether there were grounds for putting a stay on the conclusion of contracts pending the appeal of a decision of the High Court which determined that there was no merit to the procurement challenge brought by the applicant. The Court of Appeal refused to grant the relief pending the appeal and shed light on the factors that ought to be weighed up in these circumstances.

In April 2018, Kildare County Council ('the Council') initiated a tender competition for the establishment of two above-threshold, multi-party framework agreements for building maintenance works. Owens ('the Applicant') submitted tenders for both Lots in advance of the tender deadline on 9 October 2018. The Council subsequently sought clarification from the Applicant in respect of the absence of a Quality Assessment proposal and the presence of various abnormally high and low rates contained in the Pricing Document for Lot 2. The Applicant responded to the Council but did not provide the required quality submission for either Lot or a revised pricing document for Lot 2. On 14 December 2018, the Council notified the Applicant of its decision to eliminate him from the competition due to his failure to provide Quality Assessment proposals for either Lot and his submission of abnormally high and abnormally low pricing. In addition, contrary to the rules of the competition, the Applicant had failed to submit a revised pricing document when required to do so.

The Applicant disputed the decision on 20 December 2018, claiming in a letter to the Council that other tenderers had an unfair advantage as they had been afforded an opportunity to adjust their rates on specific items. The Council responded on 15 January 2019 reiterating the contents of its initial rejection letter. On 4 February 2019, the Applicant commenced legal proceedings, seeking to quash the decision to eliminate him from the tender process. The initiation of legal action had the effect of automatically suspending the award process for both Lots.

The case proceeded to trial in October/November 2019 and in September 2020, the High Court found in favour of the Council[1]. In dismissing the reliefs sought by the Applicant, Quinn J decided that there had been no manifest error in the decision to eliminate the Applicant and no breach of the equal treatment principle, as the Applicant was in a "*radically different position"* to other tenderers[2]. The Court also determined that sufficient reasoning for the decision had been provided to the Applicant; it clarified that there was no obligation on an authority to set out the advantages of successful tenderers where the unsuccessful tenderer has not submitted an admissible tender. This decision led to the automatic suspension imposed by the Remedies Regulations[3] being lifted. In October 2020, the Council alerted the Applicant of its intention to establish the new frameworks. The Applicant wrote to the Council suggesting that he might appeal the decision and that if he chose to do so there would be a further stay on the award of the frameworks (a mistaken belief, as it happened); for this reason, he believed that pending his decision whether or not to appeal, the Council ought not to proceed to award. The Council replied, confirming that it would proceed to award the frameworks and on 14 October 2020, new framework agreements were duly established.

The order of the High Court was perfected on 29 October 2020 and the Applicant had 28 days thereafter to appeal the decision, which he did on 23 November 2020. He was granted leave to bring a motion seeking a stay on the order of the High Court pending the outcome of his appeal to the Court of Appeal. The Court of Appeal considered this motion on 14 December 2020.

Court of Appeal[4]

The Court of Appeal cited the recent Irish Supreme Court decision in a planning case, *Krikke v Barranafaddock Sustainable Electricity Limited*[5]*,* in which it was noted that the appropriate test to apply when considering a stay on appeal was set out by Clarke J in *Okunade v Minister for Justice,*

[1] [2020] IEHC 435

[2] It noted that he principle of equal treatment does not require that all participants in a tender process be treated identically (Fabricom SA v BelgiumC-21/03 [2005] CMLR 25)

[3] European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010

[4] [2020] IECA 361

[5] [2020] IESC 42

Equality and Law Reform[6]. In *Krikke*, O' Donnell J noted the similarities between an application for an interlocutory injunction pending trial and an application for a stay pending appeal, however, the judge also emphasised the difference. An application to stay a judgment of a trial judge comes after there has been a final determination of the issues; in these circumstances, the appellate court has the benefit of the trial judgment and an understanding of the factual and legal analysis, which it does not have in during an interlocutory application when there are often rival contentions as to the evidence and the law.

According to the *Okunade* test, assuming an applicant has established an arguable case, the court should consider where the greatest risk of injustice would lie. In doing so, it should:

(a) give all appropriate weight to the orderly implementation of measures which are prima facie valid;
(b) give such weight as may be appropriate (if any) to any public interest in the orderly operation of the particular scheme in which the measure under challenge was made;
(c) give appropriate weight (if any) to any additional factors arising on the facts of the individual case which would heighten the risk to the public interest of the specific measure under challenge not being implemented pending resolution of the proceedings; and
(d) give all due weight to the consequences for the applicant of being required to comply with the measure under challenge in circumstances where that measure may be found to be unlawful.

In addition, the court should, in those limited cases where it may be relevant, have regard to whether damages are available and would be an adequate remedy. Furthermore, the court can place due weight on the strength or weakness of the applicant's case.

Applying this approach, the Court of Appeal considered the following:

***Prima facie valid measures*:** All appropriate weight is to be given to the orderly implementation of measures which are prima facie valid. The Court noted that the actions of the Council were "*more than prima facie valid"* – in the present case, they had *in fact* been found to be valid by the High Court.

***Public interest in the orderly operation of the scheme*:** Such weight as may be appropriate must be given to any public interest in the orderly operation of a particular scheme. The Council argued that significant public interests would be adversely impacted if the stay was granted - there had already been lengthy delays; Ireland is in the midst of a public housing shortage which any further stay would negatively impact; and the new framework has significant advantages over the previous framework.

***Additional factors*:** Appropriate weight is to be given to additional factors which might heighten the risk to the public interest if a stay is granted. The Court noted that the Council had proceeded to implement a new framework on 14 October 2020 and had already sought supplementary mini-tenders from the successful framework members. The previous framework was no longer operative, having been superseded by the new one. If a stay were to be granted, the Council would have no lawful basis for continuing the draw-down contracts which had been awarded under the new framework. There was therefore uncertainty as to how the Council would be able to carry out important public works. Furthermore, the business and employees of the successful tenderers would be harmed by any further stay.

Damages. The Applicant argued that he stood to lose his business and livelihood. He questioned the adequacy of damages as a remedy for him and referred to the Court of Appeal's previous decision in *Wordperfect Translation Services Limited v Minister for Public Expenditure and Reform*[7], which found that only *Francovitch* damages were available and that any entitlement to these was "*highly conditional and limited*". In *Wordperfect*, the Court had found that the fact that damages were not an adequate remedy was decisive in terms of any evaluation of where, in *Okunade* terms,

[6] [2012] IESC 49
[7] [2018] IECA 35

the greatest risk of possible injustice lay[8]. However, the Court distinguished *Wordperfect* against the facts of the current case – firstly, *Wordperfect* concerned an appeal in respect of an application to lift an automatic suspension and therefore concerned the availability of a pre-contractual remedy, whereas the Applicant had already benefitted from that remedy - his case had gone to trial and the automatic suspension had lapsed; secondly, the availability and adequacy of damages is not a standalone requirement to be considered in isolation, but rather part of a broader analysis[9] - while it was an important factor that damages would not adequately compensate the Applicant, it was not as decisive as it was in *Wordperfect*. In addition, damages would not be an adequate remedy for the Council either, and this too had to be considered as part of the broader analysis.

***Applicant's delay tactics*.** The Court considered the implications of further delay on the Council and on the successful tenderers. It was noted that the Applicant had delayed in progressing matters following the High Court decision in early September 2020. The Applicant was informed by the Council in early October 2020 that it intended to establish the new framework by mid-October. However, the applicant failed to apply for a stay on the decision until after the perfection of the High Court order on 29 October 2020 (by which time frameworks had been concluded). The Court also remarked upon the tactics of the Applicant which it felt were designed to delay the Council and improve his negotiating position.

***Strength/weaknesses of the appeal*:** In appropriate cases, a court may have regard to the apparent strength or weakness of the appeal. The Court of Appeal noted that the trial judge had accepted that the Applicant's tender had not been supported by a quality submission (despite the Applicant being given the opportunity to remedy the position) and the decision to eliminate him from the competition was not a manifest error; on that ground alone the proceedings were dismissed. The Court of Appeal acknowledged that the strength or weakness of his appeal on this point was crucial.

Decision

The Court of Appeal noted that the Council did not dispute that the Applicant had arguable grounds for appeal. It also accepted that damages would not be an adequate remedy for the Applicant who had asserted that his case may be moot if stay were not granted. According to the Court:

> *"This consideration, though of undoubted importance, is not as decisive as in Wordperfect and must be assessed as one factor, albeit a weighty one, amongst many to be balanced by the court."*

The Court considered that damages would not be an adequate remedy for the Council either. It considered that there is an unavoidable risk of injustice in the event that the order made on a stay application is different to the order made on the appeal. The risk of injustice, of itself, cannot determine the issue as to whether to grant or refuse a stay. The real issue is how to balance or weigh the competing potential injustices.

In seeking to balance the overall justice of the case based on a broad and flexible analysis of all relevant factors, the Court of Appeal found that it was important to give weight to the fact that the grant of a stay would have the effect of disapplying a decision which has been arrived at as a result of a process which the High Court had found to be valid.

Preventing operation of the framework agreement could seriously undermine the Council's ability to maintain much needed public housing stock and would deprive successful tenderers of work:

> *"In my opinion, if a stay is refused the risk of injustice to the applicant is out of all proportion to the equivalent risk of damage to the public interest and to third parties if the stay is granted. As was pointed out in Krikke, the court must give due weight to the fact that there is*

[8] In Ireland, there has been a marked decrease in the number of application brought to lift the automatic suspension since the Court of Appeal's *Wordperfect* decision in 2018.

[9] Merck Sharp & Dohme Corporation v Clonmel Healthcare Limited [2019] IESC 65

no remedy should it transpire that the challenge was not justified, and the weight is perhaps even greater where the application is for a stay pending appeal."

In both *Okunade* and *Krikke*, the Supreme Court said that it is appropriate to have regard, in appropriate cases, to the strength or weakness of the case, or in these circumstances, the appeal. Without pre-judging the appeal, the Court found that the Applicant's case in relation to the quality submission was 'flimsy' and its weakness had to be taken into account. It was also relevant that the Applicant had delayed in seeking the stay and that this was part of its negotiating strategy. This delay allowed the Council to conclude the framework and this "*significantly tilted the balance in favour of refusing this application*". The Council was entitled to conclude the frameworks before the Applicant lodged his appeal; indeed, it was incumbent upon it to proceed with all due expedition subject to alerting the Application of its intentions. Weighing all of these factors, the Court held that the justice of the case required it to refuse the application for a stay on the High Court order and the implementation of the framework.

Comment

The case demonstrates that, in Ireland, applicants challenging award decisions cannot assume that their position will continue to be protected in circumstances where they plan to appeal a decision of the High Court. The automatic suspension falls away with an adverse decision in the High Court and there is no guarantee that a stay will be granted pending an appeal.

In the present case, the Applicant's argument does appear to have been significantly weakened by the fact that it delayed making its application, enabling the authority to conclude new framework agreements in place of previous contracts. This was undoubtedly an important factor for the Court and it narrowed the scope for relief to be granted. The fact that the substantive case was considered 'flimsy' was an additional difficulty for the Applicant. It is unclear whether the outcome would have been different if the underlying case had been stronger and the Applicant acted more expeditiously.

The case provides useful guidance on how the Courts will weigh up the competing interests of the parties when a stay is sought; these circumstances are somewhat different to those of interlocutory injunctions or applications to lift automatic suspensions prior to any substantive trial. The decision also demonstrates again how important timing can be in procurement cases. It can be a significant benefit for the awarding authority if it can proceed to contract execution following success in the High Court; on the other hand, applicants intending to appeal should not delay in seeking a stay. [10]

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[10] This case note was first published in the Public Procurement Law Review, Issue 3/2021, by Thomson Reuters.