PUBLIC PROCUREMENT DIRECTIVES AS A PARADIGM FOR REMEDIES HARMONISATION

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Mr Chairman, Ladies and Gentlemen it is a great pleasure to be here at this conference on the important topic of the quest for an effective remedy. It is a marked and additional pleasure to be visiting for the first time this famous seat of learning.

The search for effective remedies has certainly been prominent in the field of public procurement law. The High Court in Northern Ireland has had more than its share of these cases which no doubt explains the invitation to us to provide a speaker for this conference, for which role I have found myself volunteered. We have thirteen judgments on line through www.courtsni.gov.uk, all, so far, at first instance, of which I am the author of six. These are all since 2007. An outside observer might think that this willingness of economic operators to challenge an adverse award of a contract indicated the litigious character of the Irish and, to a degree, they may be right. While one writer has said that the English like their law dull the Irish, north and south, have tended to view litigation as a spectator sport to be enjoyed on a par with politics or horse-racing. I do not think that the number of cases indicates any great lack of care on the part of public authorities but it may well be linked to the size of the public sector in Northern Ireland.

In any event it may be that our experience in this matter of dealing with these cases may be of some slight interest to others. I have sought to identify three issues, or problems, as our continental colleagues might say, which have arisen with particular relevance to the field of remedies. This is against the background of a series of Directives which have sought to harmonise remedies across the European Union while leaving a measure of discretion to member states. The two principal remedies are the setting aside of a contract awarded in breach of transparency and fairness, or damages, or both.

Firstly what are the appropriate criteria to apply when an interlocutory injunction is sought restraining a contracting authority from concluding a contract which an unsuccessful contractor wishes to challenge? When should an injunction be given and when should the unsuccessful tenderer be left only to a remedy in damages?

Secondly, for the purposes of the Directives and the Public Contracts Regulations 2006, as amended, is a framework agreement a contract within the meaning of Regulation 47(9) which prohibits any remedy other than damages when a contract has been awarded?

Thirdly, can a public authority which is awarding a Part B services contract not covered by Regulation 32(1) nevertheless be restrained from proceeding with the contract?

The first issue of the interlocutory injunction is one which my colleagues and I have had to address in several different cases. Whereas some public authorities were content to suspend the procedure until the court had a trial, preferably an early trial, of the substantive issues others were not and hearings on the granting of an interlocutory injunction were held.

It seemed to me that the exercise of the court's discretion in that context ought to be guided by two decisions of the House of Lords, namely American Cyanamid Company v Ethicon Limited [1975] AC 296 and R v Secretary of State for Transport, ex parte Factortame Limited and Others (No. 2) [1991] 1 AC 603. Reading these two judgments together, one identified eight relevant headings to be addressed.

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

2. Would damages be an adequate remedy for the plaintiff if an injunction were refused?

This requires the court to take into account a range of factors. If the disappointed tenderer was the party presently performing the work for the public authority and wholly dependent on it it may not survive the period of time that might elapse before the hearing of a trial and appeal. In Partenaire Limited v Department of Finance and Personnel [2007] NIQB 100, Coghlin J, as he then was, found that damages would not be an adequate remedy because the period of the framework agreement in question from which the plaintiff was excluded was to be 25 years. Assessing damages over such a long period at a damages hearing would be almost impossible. Furthermore, the company would suffer incalculable loss from being excluded from an important area of contracts for such a long period of time.

3. Will the defendant authority be compensated in damages by the plaintiff's undertaking if an injunction is granted but the plaintiff ultimately loses?

This was a live question in several cases. In one case the authority successfully argued against an injunction by the assertion that funds from the Treasury would be lost if they were not allowed to go ahead with the contract. It was disappointing to find when the substantive trial was held six months later that in fact they had not entered into the contract which was so pressing at the time of the interlocutory hearing. One aspect of the question

in such cases is whether the plaintiff would be a mark for damages on foot of its undertaking in the event of it losing. In one such case I imposed a condition on the plaintiff in granting the injunction that £250,000 would be placed on joint deposit receipt between the solicitors so that the public authority could recover its costs in the event of the plaintiff losing and having ceased to be a mark. In fact that plaintiff did go into administration. It did not seem to me the authority would suffer otherwise while awaiting trial.

4. American Cyanamid was a commercial case but the court must take into account as pointed out by Lord Goff and Lord Bridge in Factortame the public nature of the process here. I was strongly influenced by the consideration that if an injunction was refused but the plaintiff ultimately succeeded the public would not only have to pay the successful contractor for performing the contract with whatever the profit in that was but, in addition, will have to pay the successful plaintiff but unsuccessful tenderer his loss of profit on the same contract. It would be literally a waste of public money. In a commercial context, an individual company might say that that was a risk they were prepared to take. But the situation is rather different with a public authority. A senior official may make the original decision and make the decision to oppose any standstill in the agreement. But that official will not personally be paying the damages if the unsuccessful tenderer ultimately recovers those. It may not even reflect badly on him as he may by then have retired or moved on to some other appointment, as has happened. I am glad to say that Coghlin J shared my concern on that point which indeed to some degree seems to be echoed in some of the recent language emanating from the European Union.

5. If there is doubt about the issue of damages the court will address the balance of convenience.

6. Where other factors are evenly balanced, it is prudent to preserve the status quo.

7. If the relative strength of one party's case is significantly greater than the other, that may legitimately be taken into account. There is an indication of that in Lord Diplock's speech in American Cyanamid pursued by Laddie J in Series 5 Software v Clarke [1996] 1 All ER 853.

8. There may be special factors in individual cases. One of those might be the waste of money point mentioned above. Another might be that these provisions are meant to be an important "safeguard against corruption and favouritism" as the European Commission said in an Interpretative Communication on Community Law Applicable to Public Procurement Directives, 2006/C179/02.

The amending Remedies Directive 2007/66/EC has been implemented in England and Wales and Northern Ireland (Scotland has separate legislation) by means of the Public Contracts (Amendment) Regulations 2009 which came into force in December last year. I am conscious that there are several of these cases still in the pipe line and I may have to construe these regulations in due course and will say little about them in consequence. A new Regulation 47G says that where proceedings have been issued before a contract has been entered into the contracting authority is required to refrain from concluding the contract until and unless the court brings that requirement to an end pursuant to Regulation 47H(1)(a). I quote 47H(2):

> "When deciding whether to make an order under paragraph (1)(a) –
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> (a) The Court must consider whether, if Regulation 47G(1) were not applicable, it would be appropriate to make an interim order requiring the contracting authority to refrain from entering into the contract;
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> (b) Only if the court considers that it would not be appropriate to make such an interim order may it make an order under paragraph (1)(a)."

I am inclined to think that this means that there is no change in the substantive law and the court in deciding whether it would have been "appropriate to make an interim order" will be applying the judgments in American Cyanamid and Factortame as outlined above.

My second issue I think I can deal with quite briefly. It arose in McLaughlin and Harvey Limited v DFP (2008) NIQB 25. The plaintiff there was disappointed at not being included as one of five contractors in the framework agreement. Regulation 47(9) of the Public Contracts Regulation 2006 provided that 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 already been entered into. I concluded that on a proper interpretation of the Regulations "contract" was not intended to include a framework agreement. This was followed by at least one of my brethren. The language of the recent Regulations may lend assistance on this point when it comes to be considered.

The third and final issue on which I will touch arose in this way. In Federal Security Services Limited v The Chief Constable of The Police Service of Northern Ireland and Resource Group [2009] NICH 3 the Chief Constable,

or to be precise his deputy, awarded a contract for the provision of services to the notice party, Resource Group. This contract was for five years and involved some 500 men and women providing security and driving services to the police. He did so without operating any standstill period, as originally required by the European Court in Alcatel A. G. v Austria Case C-81/98; [1999] ECR 1-7671. This standstill period has since been enshrined in Directives and Regulations but both distinguish between Part A and Part B contracts, as they are defined at Schedule 3 of the 2006 Regulations. Where a contract falls within Part B, Parts 1, 9 and 10 of the Regulations apply but Regulation 32 does not and therefore the requirement of a standstill provision pursuant to Regulation 32(3) is not imposed. It will be recalled that pursuant to Regulation 47(9) of the Regulations once the contract was awarded the plaintiff could only receive damages. As indicated above this was of limited consolation to the plaintiff who, in this case, had been operating the contract for a number of years. It made up 70% of their business in Northern Ireland, although the parent company was based in another member State. Counsel for the plaintiff argued that nevertheless the court was at liberty to grant an interlocutory injunction and he relied on Regulation 47(1), inter alia, which left an obligation "on a contracting authority to comply with the provisions of these Regulations … and with any enforceable community obligation in respect of a public contract, framework agreement or design context … etc". He submitted that there was a general enforceable community obligation to give a standstill period despite the express omission of that for Part B contracts. Part B contracts are rather an eclectic mix, including education, health and security services with transport by water while Part A includes financial and telecommunications services and transport by air. The distinction is based on the view that Part B are not certain to be of community interest It is not that they are smaller contracts. There is a different treatment for contracts under €211,000 but this particular contract was worth, in revenue terms, about £12m a year. These Regulations are ex facie compliant with Article 2(7) of the 2007 Directive.

There is now a considerable body of European Court judgments on this topic although not directly on this point. Domestic legislation should be interpreted in accordance with European law: Marleasing S.A. Case C-106/89. In the light of Alcatel op.cit., Telaustria Verlags Gmbh Case C-324-98, Commission v Ireland [2008] I CMLR 34, Parking Brixen Gmbh [2006] 1 CMLR 3 and Coname Case C-231/03 [2005] ECR 1-7287, I concluded "sufficiently firmly" to use the language of Factortame No. 2, for the purposes of granting an interlocutory injunction, that an obligation could lie on a contracting authority dealing with a Part B case to concede a standstill period which could then be extended by the court. For those purposes, I was of the view that that would only be in exceptional circumstances. I did in fact grant an injunction restraining implementation of the purported contract as there were a number of factors which led me to the conclusion that the circumstances were exceptional in this case. In no particular order they were that there was

cross-border interest in the contract; that it was for a large amount and that the Chief Constable acknowledged that there was a triable issue regarding the procedure which had been adopted on his behalf which included evidence of new criteria being taken into account half way through the process. Furthermore the plaintiff was the body actually carrying out the duties at the time and had already been asked by the police to continue to do so on a provisional basis and, on a purely financial bid basis, their bid was lower than that of the successful notice party. This I considered relevant to the European principles of transparency and fairness. I observe that the tendency towards awarding contracts on a wider more economically advantageous basis inevitably draws in subjective judgments on a wide range of criteria. That approach, as opposed to the old system of simply opening sealed bids, makes the role of the courts all the more important. The price of probity is eternal vigilance. Finally the Deputy Chief Constable had been advised internally, it emerged, to have a standstill period but had rejected that advice - without giving reasons for so doing.

The case was ultimately resolved just before the Court of Appeal was to give judgment on an appeal from my interlocutory ruling. I remain of the same view for such purposes but the point should be considered by the ECJ given the likelihood of it arising again.

I observe that this point has not been rendered academic, it would seem, by the Public Contracts (Amendment) Regulations 2009. It is fair to say that they add significantly, one might think, to the procedural burden on a public authority. The court is given the power of granting a remedy of "ineffectiveness" for unperformed contractual obligations. The Directive allowed either for that outcome by Member States or in the alternative of retrospective ineffectiveness. The court can award civil financial penalties. There is a freeze on contracts once proceedings are issued as I have mentioned. But Regulation 32(1) appears to have been preserved so that Part B contracts would appear to be not covered by the new mandatory standstill period under Regulation 20(A) nor by the duty owed to an economic operator under 47B(2). And see Art. 47D and Uniplex Case C 406/08 (28/1/2010) with regard to the time limits for commencing proceedings in public procurement.

I hope these few comments might illuminate to some small degree the role of public procurement as a paradigm of the out working in practice of remedies harmonization at this time.