



**THE COURT OF APPEAL**

**UNAPPROVED**

**Neutral Citation Number [2020] IECA 361  
Court of Appeal Record No. 2020/243**

**IN THE MATTER OF COUNCIL DIRECTIVE 89/665/EEC, AS AMENDED BY  
DIRECTIVE 2007/66/EC**

**AND**

**IN THE MATTER OF THE EUROPEAN COMMUNITIES (AWARD OF PUBLIC  
AUTHORITIES' CONTRACTS) REGULATIONS 2006 (S.I. NO. 392 OF 2006)**

**AND**

**IN THE MATTER OF THE EUROPEAN COMMUNITIES (PUBLIC  
AUTHORITIES' CONTRACTS) (REVIEW PROCEDURES) REGULATIONS 2010  
(S.I. NO. 130 OF 2010)**

**AND**

**IN THE MATTER OF THE EUROPEAN UNION (AWARD OF PUBLIC  
AUTHORITY CONTRACTS) REGULATIONS 2016**

**AND**

**IN THE MATTER OF ORDER 84A OF THE RULES OF THE SUPERIOR  
COURTS 1986**

**Costello J.**

**BETWEEN**

**ROBERT OWENS**

**APPELLANT/  
APPLICANT**

**- AND -**

**KILDARE COUNTY COUNCIL**

**RESPONDENT**

**JUDGMENT of Ms. Justice Costello delivered on the 21st day of December 2020**

1. This case concerns the conduct of a tender competition for the establishment of a Multi-Party Framework Agreement for Planned Building Maintenance Works for County Kildare (“the new framework agreement”) and, in particular, the decision of Kildare County Council (“the council”) to eliminate the applicant from any further participation in the tender competition. The applicant sought declarations that the decision made was:

- (a) *ultra vires* the decision-making powers of the council;
- (b) arrived at on foot of a decision-making process that was flawed, unfair, unequal, discriminatory, arbitrary and otherwise not in accordance with natural and constitutional justice and the applicant’s right to fair procedures; and
- (c) that the decision breached the council’s duty to give full and proper reasons as required by the European Union (Award of Public Authority Contracts) Regulations 2016 (S.I. No. 284/2016), (“the procurement regulations”).

He also sought declarations that any step taken after his elimination was void and any contract concluded for the framework agreement was ineffective, and sought an injunction restraining the council from taking any further steps in the decision-making process for the framework agreement.

2. The proceedings commenced on 4 February 2019. This had the effect of automatically suspending the new framework agreement by operation of Regulation 8(2) of the Remedies Regulations 2010. This provides:-

*“If a person applies to the Court under paragraph (1), the contracting authority shall not conclude the contract until—*

- (a) the Court has determined the matter, or*
- (b) the Court gives leave to lift any suspension of a procedure, or*
- (c) the proceedings are discontinued or otherwise disposed of.”*

3. Thus, the act of commencing the proceedings had the effect of suspending the process and prevented the council from establishing the new framework agreement.

4. Judicial Review proceedings are normally heard on affidavit. Most unusually, in this case, cross-examination of witnesses was permitted and the case was heard over four days on 9, 10 and 11 October 2019 and 12 November 2019. Judgment was delivered on 4 September 2020. The trial judge, Quinn J., refused the reliefs sought. In accordance with the Practice Direction of 24 March 2020, the parties delivered electronic submissions regarding the costs of the proceedings. By a further written judgment delivered on 7 October 2020, Quinn J. gave his decision in relation to the costs. The order was perfected on 29 October 2020.

5. The applicant appealed the decision of the High Court on 23 November 2020. The appeal was listed in the Directions List of the Court of Appeal on 27 November 2020 and it was assigned a hearing date on the 26 March 2021. The appellant was given leave to bring this motion returnable for the 14 December 2020. On 1 December 2020, he issued a motion seeking the following reliefs:-

1. an order granting a stay in respect of the High Court's judgment of 4 September 2020 dismissing the appellant's proceedings, concerning the respondent's elimination of the appellant from further participation in the respondent's tendering process for the Multi-Party Framework Agreement for Planned Building Works 2018 (Lots 1 and 2), pending the outcome of the appellant's appeal of the High Court's decision and judgment to this Honourable Court;
2. an order granting a stay on the respondent's implementation of the Multi-Party Framework Agreement for Planned Building Works 2018 (Lots 1 and 2), or conclusion of contracts in relation thereto, pending the outcome of the

appellant's appeal of the High Court's decision and judgment of this Honourable Court;

3. in the alternative, an interlocutory injunction preventing the respondent from proceeding with the implementation of the said Framework Agreement, pending the finalisation of the appellant's appeal herein.

### **Background**

6. The council initiated a tender competition through a contract notice dated 19 April 2018 in order to appoint contractors to a new framework. The work subject to the new framework relates to renovation, maintenance and upkeep work on the council's public housing stock. The work is divided into two lots. Lot 1 relates to "*minor works*" which would generally involve the refurbishment of houses under the council's control for social housing purposes and include works done under the Disabled Person Grant Scheme which allows for adaptations and extensions to be done to cater for the needs of qualifying people. Lot 2 relates to "*quick-turnaround works*". These are generally less substantial than projects coming within Lot 1, and generally involve minor refurbishment to and maintenance of houses under the control of the council.

7. In 2019, approximately 240 vacant units were refurbished and by early December 2020, approximately 200 units had been refurbished. It was anticipated that this number would increase in 2021 due to the significant number of units being added to the stock of social housing. The council completed 42 Disabled Person Grant projects in 2019, though far fewer such projects were completed in 2020 due to the risks associated with Covid-19 to vulnerable groups.

8. The applicant is a contractor who was a member of the old framework which was in place at the time the tender competition was initiated. He entered the tender competition in respect of Lot 1 and Lot 2.

9. On 12 November 2018, the council wrote to the applicant seeking clarification with regard to his tender submission as follows:-

*“(I) The tender assessment panel have advised that no Quality Assessment proposal was submitted in your tender. It is noted that on the tender return checklist you have indicated that the Quality Assessment proposal is completed and included as per Instruction to Tenderers. Can you confirm as to whether it was your intention to submit a Quality Assessment proposal as part of your tenderer submission? If it was your intention, said Quality Assessment proposal shall be submitted to the undersigned in the timeline provided below.*

*(II) The tender assessment panel have advised that the Lot 2 pricing document does not adhere to item 9 in section 2 of preliminaries – ‘The rates inserted in volume C will be checked to ensure that they are priced in a fair and balanced manner and to ensure that there is neither strategic pricing of the more commonly requested items, under-pricing of other less commonly requested items, or front-loading of rates in any element of the document’.*

*The tender assessment panel have deemed tendered amounts to be both abnormally high and low in your submission. With specific reference to the aforementioned, you are requested to submit a revised pricing document. No adjustments made shall affect the Notional Tender Total. You are further advised that having considered any further information provided, Kildare County Council reserve the right to reject the tender if of the view that the contractors tendered rates in the pricing document do not reflect a fair allocation of the Notional Tender Total.”*

10. The applicant gave evidence that he believed that the quality assessment query related to Lot 1 but did not apply to Lot 2. The trial judge said he was willing to accept that the applicant “*may have persuaded himself that the respondent’s para. No. (1) in its*

letter of 12 November, 2018, related only to Lot No. 1 and that para. (2) of the respondent's letter related only to Lot 2." He said this was an error and it was entirely "his own error". He held that the letter was not misleading nor, when carefully and objectively read, justified his interpretation. He said there was nothing in the correspondence which amounted to a waiver, which would have been unique to the applicant, of the requirement for a quality submission for each lot.

11. The applicant replied to the letter of 12 November on 20 November 2018. He stated that it was his original intention to submit a quality submission but he did not take the opportunity to submit one for either lot and the trial judge held that he "*clearly acknowledges that the tender is flawed where he states "We understand we will lose points for that [at the] (sic) end of the assessment."*"

12. The response of the applicant in relation to query no. II was summarised by the trial judge in para. 57 as follows:-

1. *The applicant feels he had priced all items in a fair and balanced manner,*
2. *He has based all prices in conjunction with works relating to Quick Turnaround works carried out over the past four years,*
3. *Some items are "of the lower rate",*
4. *Should he make it onto the Quick Turnaround panel, he will stand over any works that are called for that have been priced at a lower rate,*
5. *He had made a business decision to be more competitive even though "it might not always be the most profitable for us",*
6. *It is a great advantage to the respondent "should our low rated works be called for..."*

7. *If the respondents feels there is a rate which it deems high “please revert for clarification or adjustment on it and an agreement can be met for such items of we are in the run for been [sic] a successful tenderer... ”,*
8. *There has been “no front loading of any rates on most commonly used items ... ”,*
9. *The applicant will stand over his low rates,*
10. *“please do not hesitate to contact me if any further clarification/queries or adjustments are deemed necessary by you the client.””*

**13.** At para. 58 of the judgment, the trial judge summarised the response of the applicant as being:-

- “1. The applicant elected not to submit a Quality Submission for either Lot or a revised Pricing Document as requested,*
- 2. The applicant stood over all of the low price rates provided,*
- 3. If the respondent deemed any of the rates high, it should revert for clarification on those rates and an agreement could then be made for such items, if the applicant was “...in the run for been [sic] a successful tenderer... ”,*
- 4. That if the respondent had any further clarifications or queries it should revert to the applicant.”*

**14.** The correspondence of the 12 and 20 November 2018 was before the Tender Assessment Panel (TAP) when it met to make a decision whether to eliminate the applicant from further participation in the tender competition in light of the failure of the applicant to provide either a quality submission or a revised pricing document for Lot 2. The TAP made that decision on 26 November 2018 and the trial judge held that, on the basis of the evidence before it, the decision that the applicant had failed to comply with the requirements of the tender was wholly within the scope of the council’s discretion and he found that it did not fall into error in making that decision.

**15.** The decision to eliminate the applicant from any further participation in the competition was communicated to the applicant by letter dated 14 December 2018. He was informed that he was disqualified from the tender competition on the basis that, in respect of Lot 1 he had failed to submit a document required under the rules of the tender competition, in which tenderers were required to identify in detail the manner in which they would undertake the work in question (“Quality Document”), and in respect of Lot 2 he had both failed to submit a Quality Document and had submitted a Pricing Document which contained both abnormally high and abnormally low pricing and, contrary to the rules of the tender competition, failed to submit a Revised Balanced Pricing Document when required to do so.

**16.** In accordance with the regulation 5 of the Remedies Regulations, a minimum mandatory standstill period of fourteen calendar days from the day following the date of the letter applied. The applicant wrote to the council on 20 December 2018 “*to give notice that we dispute the decision of the employer to eliminate us from the tender process.*” At this point the applicant argued that the quality assessment requested was submitted with his submissions at Stage 1 – Pre-qualification stage. He reiterated his response of 20 November 2018 in relation to pricing and said that it was “*unfair to exclude us from the process on this basis considering that we have re-examined our tender and that we are willing to stand over our prices.*” In addition, he made the point that other tenderers were asked “*to adjust their rates on specific items*” and “*they were asked to increase their rates on some items and reduce them on others. We were given no such specific guidance and feel that our competitors were given an unfair advantage in this case.*”

**17.** This refers to the applicant’s complaint that other tenderers were given specific guidance as to how they could correct errors which the TAP identified in their tenders and



were afforded further opportunities to resubmit their tenders. On 27 November 2018, the council wrote to other tenderers in the following terms:-

*“I am writing to you in relation to your recent tender submission for the above contract, with specific reference to your Lot 2 Pricing Document.*

*The tender assessment panel have raised concerns regarding some abnormally high or low rates for commonly called-up work items within your tender, and this matter needs to be addressed prior to the decision being made with regards to your future inclusion in this competition. We refer to Section 6.2 and 6.3 of the ITT and Section 2.9 of the Pricing Document Preliminaries in particular.”*

**18.** Specific items were then referred to which are redacted in correspondence and then the letter continues:-

*“With specific reference to the aforementioned, you are requested to consider whether some of these abnormally low or high rates can be rebalanced against the remaining tender, bearing in mind that any adjustments shall not affect the Notional Tender Total. If you are in a position to rebalance your rates with this in mind, you are asked to present an amended full Pricing Document in the original Excel tender format.*

*You are further advised that under Section 6.3 of the ITT in Section 2.10 of the Pricing Document Preliminaries; having considered any further information provided by you by return, Kildare County Council reserve the right to reject the tender if of the view that the contractor’s tendered rates in the pricing document do not reflect a fair allocation.*

...

*You are advised that any queries that you may have in respect of this letter shall be forwarded to [unnamed e-mail] prior to 12 noon Thursday 29 November 2018, and a clarification will issue by close-of-business that day.”*

**19.** One tenderer was given specific guidance by Mr. Colm Flynn, an official in the council, who drafted an email which set out that the council could not accept the revised submission “*as essentially his tender price has increased by almost 10%.*” His offer to agree to an “*across-the-board reduction*” of individual rates cannot be accepted in an open tender and the tenderer was afforded a further opportunity to rectify the issue and the time to return the amended Pricing Document was extended by a further 24 hours.

**20.** The council did not reply to the applicant’s letter of 20 December 2018 taking issue with his alleged unfair treatment and on 10 January 2019 the applicant wrote again asking for a reply. On 15 January 2019, the council wrote what was, in effect, a second standstill letter repeating and expanding on the contents of the letter of 14 December 2018.

Subsequent correspondence did not advance matters.

**21.** In the event, these proceedings commenced on 4 February 2019 and judgment was delivered on 4 September 2020.

**22.** This had the effect of automatically lifting the stay imposed by Regulation 8(2) of the Remedies Regulations and thus, the council was free to continue with the tender competition and to appoint the new framework and to award contracts in accordance with the new framework agreement.

**23.** During the standstill period, the parties continued to operate the old framework. The applicant continued to carry out contracts for the council pursuant to the old framework agreement and in late September and early October he sought information from the council regarding the ongoing work. On 2 October 2020, he stated:-

*“[W]e have sent several emails regarding schedules ..we have not got any response from you John/David/Annette to date .. it seems its yere intension (sic) to ignore these emails and not issue any future works to us...whilst you still award contracts to other builders both through the mini tender planned maintenance panel and the QT panel ..must I remind you that I am the no. 1 builder on the existing planned maintenance panel and I am also 1 of the 3 remaining builders on the existing QT panel that still remains in place to date...”*

**24.** Mr. David Creighton replied on behalf of the council later on 2 October:-

*“As (sic) schedule is being completed and will issue on Monday. I note that there are 7 projects with you. 4 have been snagged and one of those returned to you for further work. The remaining 3 are between 25-50% complete.*

*Following the recent judgment in KCC’s favour in relation to the framework agreement for Building Planned Maintenance Work it is our intention to establish the new framework agreement and have initiated communications with framework participants. Any existing arrangements [which] were being operated at KCC discretion until the judgement on the new framework was issued.”*

**25.** Thus, as of the afternoon of 2 October 2020, the applicant was clearly informed that it was the intention of the council to proceed to establish the new framework agreement and to seek mini tenders from the successful tenderers for future work.

**26.** That afternoon the applicant responded as follows:-

*“With Regards to your intention to establish the new framework agreement and initiating communications with framework participants ..I note you have not contacted me[.] I am also a framework participant[.] I should have been the first one for you to contact ...No Final order has been made by the courts and no date set*

*for final order at the moment and when the final order is made we will have a further 28 days within [which] to appeal the decision[.] This would again put a stay on the establishment of the new framework for 12[/]18 months ..[I am] not sure why KCC are prematurely planning a new frame work without the slightest communication with me the main objector to this framework considering I still have the capability to stop this framework progressing ..[W]e have not yet decided on whether to appeal or not ..[T]his will be decided from the outcome of our meetings etc over the next week.”*

**27.** This email, sent four weeks after the delivery of the judgment of the court, indicates that the applicant had not yet decided whether to appeal the decision. The email indicates that he was of the mistaken belief that if he appealed the decision this would operate as a stay on the establishment of the new framework. It is implicit in the email that he believed that pending *his* decision whether or not to appeal, the council ought not to proceed to award the contract notwithstanding the fact that the relief he sought in his proceedings had been refused.

**28.** By an email dated 9 October 2020, Mr. Creighton informed the applicant that the council “*are progressing to establish the new framework agreement... [w]e expect to have the framework established by mid next week.*”

**29.** On 14 October 2020, the council proceeded to establish the new framework agreement. 22 contractors were named on the panels. The old framework agreement thereby came to an end.

**30.** Eleven days after the email of 9 October 2020, on 20 October 2020 the applicant emailed Mr. Creighton as follows:-

*“Hi David,*

*Thanks for your response even though it doesnt (sic) include much hope for our company ..sorry for the delay in getting back to you but we had to have a few discussions with my legal team & accountants.*

*This is my proposal to KCC*

*NO 1. KCC cover there (sic) own costs for the court case. [I'll] cover my own costs*

*..If not all costs at minimum three-quarters of costs.*

*NO 2. a minimum of 12-15 QT houses allocated to us during the phasing out of the old maintenance and QT panels.. I estimate from speaking with some of the builders and KCC staff that it will take up until late December early January to finish all of the projects that have been allocated to date to be finalised.*

*NO 3. a guarantee that we will be allocated response maintenance works to quote for until such time as a new response maintenance panel is established ..we are already on the panel for response work*

*IT WILL COST KCC AT MINIMUM £150,000 (sic) to fight the appeal.. THE STAY will put a hold on the new framework for at least a year ..and if you loose (sic) the appeal which we are fairly confident in.. you will be covering all costs regardless.*

*Remember Colm did say on the stand that I would have been placed no. 1 on the QT panel ..I [t]hink the money would be better spent on housing and as per above my costs written off fully or partially ..you should discuss the consequences with your accountants/finance etc.*

*ALL of the above will allow the new framework come into affect (sic) ..if we are not agreeable with some sort of agreement by tomorrow 12 o clock Wednesday 21-10 ... we will be lodging an appeal and a Stay on the new framework.*

*Please revert back if you wish to discuss ..if we do not hear from you we will proceed with the stay.”*

**31.** The order of the High Court was perfected on 29 October 2020 and the applicant had 28 days thereafter to appeal the decision. The applicant had not to date applied to the High Court for a stay on its order pending an appeal. After the order of the High Court was perfected, the application indicated his intention to apply to the High Court for a stay on its order pending an appeal to the Court of Appeal. The council objected to this approach on the basis that the High Court was *functus officio* and that the opportunity to apply for a stay to the High Court had passed. The applicant lodged his Notice of Appeal on 23 November 2020 and, as I have set out above, when the matter first appeared in the Directions List of the Court of Appeal, he was granted leave to bring a motion seeking a stay on the order of the High Court returnable for 14 December 2020.

**The test for a stay on the decision of the High Court pending appeal**

**32.** In *Krikke v. Barranafaddock Sustainable Electricity Limited* [2020] IESC 42, O’Malley J. held that the appropriate test to be applied when considering whether to grant to stay pending an appeal is *Okunade v. Minister for Justice, Equality and Law Reform* [2012] 3 I.R. 152. She observed that *C.C. v. Minister for Justice* [2016] 2 I.R. 680 confirms that the intention in *Okunade* was not to apply different tests to ordinary civil litigation depending on whether they were public law claims or not, but to identify certain features of public law litigation that may mean that the general principle – the need to minimise the risk of injustice – may need to be applied in different ways in different cases.

She confirmed, following *Dowling v. Minister for Finance* [2013] 4 I.R. 576, that the principles apply to proceedings involving issues of EU law in the same way as to purely domestic litigation, and do not breach the EU principles of equivalence and effectiveness.

**33.** O'Donnell J. delivered a concurring judgment. While acknowledging the similarities between an application for an interlocutory injunction pending trial and an application for a stay pending an appeal, he emphasised that it was important to keep in mind the significance of this distinction. An application to stay a judgment of a trial judge comes after there has been a final determination by a trial judge of the issue. Instead of rival contentions as to the likely state of the evidence and the law, with which a trial judge is presented on an interlocutory application, the appellate court has the judgment of the trial judge, and an understanding of the analysis which applies on an appeal. He cautioned at paras. 9, 10 and 12 that it was:-

*“... insufficiently appreciated that the approach in Campus Oil was not intended to create a set of rigid rules, but rather to restore flexibility. An overly rigid application of the Campus Oil criteria can lead to an applicant with a flimsy case nevertheless obtaining an interlocutory injunction, which in many cases determines the practical outcome of the dispute. ...*

*10. A related problem arises in the field of public law where application of a Campus Oil type of approach can tend to give too much weight to the asserted impact on an individual or business unless it is recognised that the enforcement of the law is itself an important factor and that even temporary disapplication of the law gives rise to a damage that cannot be remedied in the event that the claim does not succeed. The real insight of *Okunade v. Minister for Justice* [2012] IESC 49, [2012] 3 I.R. 152, was to require that weight be given to this factor in any application for an*

*interlocutory injunction. C.C. showed that this factor was also to be taken into account in any application for a stay pending appeal.*

...

*12. ... the temporary disapplication of a measure which is ostensibly valid is a serious matter, and the fact that there is no remedy should it transpire that the challenge was not justified is a matter that must be weighed in the balance on any application for an interlocutory injunction or stay pending trial, and perhaps even more so where a stay is sought pending appeal.”*

**34.** At para. 15, he was of the view that, when properly analysed, 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 outcome of the appeal proper, and that there is a risk of injustice whatever route the court takes and that frequently that risk cannot be removed.

At para. 16, he concluded that in those circumstances:-

*“The court may be entitled to consider whether it has been demonstrated either that the appellant’s case is strong, or that the harm the appellant will suffer is out of all proportion to the damage to the public interest of not being able to enforce the decision of the High Court for some months pending the decision on the appeal.”*

**35.** It is in the light of these judgments that it is appropriate to consider how the principles set out in *Okunade* apply to the circumstances of this case. The principles are set out in para. 104:-

*“As to the overall test I am of the view, therefore, that in considering whether to grant a stay or an interlocutory injunction in the context of judicial review proceedings the court should apply the following considerations:*

- (a) the court should first determine whether the applicant has established an arguable case; if not the application must be refused, but if so then;*



- (b) *the court should consider where the greatest risk of injustice would lie. But in doing so the court should:-*
- (i) *give all appropriate weight to the orderly implementation of measures which are prima facie valid;*
  - (ii) *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; and,*
  - (iii) *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; but also,*
  - (iv) *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.*
- (c) *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 and also whether damages could be an adequate remedy arising from an undertaking as to damages; and,*
- (d) *in addition, and subject to the issues arising on the judicial review not involving detailed investigation of fact or complex questions of law, the court can place all due weight on the strength or weak-ness of the applicant's case."*

### **Application of the legal principles to this case**

#### **Arguable grounds of appeal:**

**36.** The first issue is to determine whether the applicant has established an arguable appeal; if he has not, then the application must be refused. Counsel for the applicant

outlined the substance of the various grounds of appeal. Counsel for the council said, while they did not accept that there were arguable grounds of appeal, they were not opposing the application for a stay on that basis. Rather, they were opposing the application on the basis that the balance of the criteria established in *Okunade* favoured refusing the relief sought. This being the case, I shall deal with the application on the basis that the applicant has arguable grounds of appeal and the strength and weakness of the appeal shall be considered later, if relevant to the determination of this application.

*Prima facie valid measure:*

37. In *Okunade*, the court is directed to give all appropriate weight to the orderly implementation of measures which are *prima facie* valid. In that case, it will be recalled that the application was for an injunction restraining the decision to deport the applicants where their application for leave to seek judicial review was pending. The High Court came to a view that a restraining order should not be made and the judgment of Clarke J. in the Supreme Court was in the context of an appeal from that decision. In other words, it had yet to be determined whether the applicants would be granted leave to seek judicial review, still less had there been a determination by the High Court on the validity of the impugned decision. In this case, the validity of the actions of the council are more than *prima facie* valid: they have been found to be valid by the decision of the High Court. While, of course, this is the subject of the appeal, nonetheless it is qualitatively different to a decision which is subject to a challenge upon which no conclusion has yet been reached. The importance of this point where a stay is sought pending appeal has been emphasised by O'Donnell J. in *Krikke*, which recognises that even the temporary disapplication of the law gives rise to a damage that cannot be remedied in the event that the claim does not succeed. The temporary disapplication of a measure which is ostensibly valid is a serious matter and the fact that there is no remedy should it transpire that the challenge was not

justified is a matter which must be weighed in the balance *a fortiori* where the stay sought is pending appeal.

Public interest in the orderly operation of the scheme:

**38.** In *Okuande*, the court is directed to give such weight as may be appropriate, if any, to any public interest in the orderly operation of the particular scheme. In this case, the council has set out significant public interests which will be adversely impacted if the stay sought is granted:

- (1) This is a public procurement process which should not be unduly delayed. The delay in this case has been from February 2019 until 4 September 2020 which is a very lengthy delay in the context of procurement.
- (2) The council is responsible for the upkeep and maintenance of approximately 4,900 properties and currently has a waiting list of approximately 6,500 awaiting public housing. The number of properties is expected to rise by approximately 565 in 2021. There is a very serious public interest in addressing the national crisis in respect of homelessness and of the need for additional public housing. It is of significant public interest that the council be in a position to address this urgent need as effectively as possible. A stay on the implementation of the new framework would negatively impact this.
- (3) There are significant advantages from operating the new framework compared with the old framework. Additional numbers of contractors have been appointed and this has brought a greater capacity to manage the volume of work. This means that the council has a greater means of ensuring that contracts are completed promptly. In relation to Lot 2, there has also been a

significant increase in capacity. Previously there were only four contractors available for these works and the council had a limited scope to impose sanctions for under performance or to remove contractors from contracts. This limitation has been removed under the new framework.

- (4) In relation to Lot 2, there are now two preferred contractors of sufficient scale to manage a minimum of six projects at any one time and eight reserve contractors to manage additional demand who can be promoted if one of the preferred contractors needs to be suspended or removed from the framework. The council has already engaged six contractors on the reserve list in addition to the two preferred contractors *i.e.* eight of the ten contractors currently available for such works have already been engaged in Lot 2 works.
- (5) The new framework offers further advantages such as allowing the council to impose more stringent performance management processes and the ability to impose sanctions upon contractors who do not perform in accordance with the tender.
- (6) The new pricing arrangements are more competitive in nature resulting in savings for the council.
- (7) The new framework also allows for greater efficiency in tendering and the award of contracts between the council and the framework contractors.

Additional factors:

**39.** The court is also required to give appropriate weight, if any, to any additional factors arising on the facts of the individual case which heighten the risk to the public interest if a stay is granted. In this case, the new framework was adopted by the council on 14 October 2020. The old framework no longer remains in place and cannot be revived. This has two significant implications for this application. If there is a stay on the operation of the new

framework, the council will have no lawful basis for continuing existing contracts awarded to those contractors on the new framework who were not on the old framework. Secondly, it cannot revive the old framework which was concluded. While it was possible to continue to operate on foot of the old framework during the period of the automatic suspension provided for under Regulation 8(2) of the Remedies Regulations, this is no longer automatically the case. The automatic suspension lapsed on 4 September 2020, and the council adopted a new framework agreement on 14 October 2020. At the very least, it is questionable whether it can continue lawfully to award contracts to the members of the old framework, as the applicant appears to believe, simply because they were members of the old framework. It has come to an end and is no longer operative. This means that, at the very least, there is uncertainty regarding the council's ability to carry out these very necessary works and the lawful basis upon which it can continue so to do.

**40.** It was submitted by counsel for the council, that a stay on the order of the High Court or an injunction on the further continuance of the operation of the new framework could confer no benefit on the applicant as there is no basis upon which the council could continue to award contracts to him based on the old framework. That being so, it was argued, there was no benefit to him in the stay sought, while there was significant, serious detriment to the council and the members of the new framework if there is a stay on the operation of the new framework. This point was not disputed by the applicant, though, in my judgment, while the case may not be as clear cut as counsel for the council maintained, it is nonetheless an important factor to be considered.

**41.** Contractors have been appointed to the new framework under the two lots. Mini tenders are now being issued to the twelve contractors appointed under Lot 1 and contracts are being awarded. The average number of tenders received for each project has risen from 3.7 under the old framework in respect of minor works to 5.5 under the new

framework, with consequent savings for the council. The contractors in question have increased their capacity such that any stay on the new framework would inevitably have very harmful effects on their businesses and employees, particularly the two preferred contractors in Lot 2 as they are guaranteed to receive up to six concurrent projects at any one time and must maintain these resources in order to ensure that they meet agreed turnaround times.

*Consequences for the applicant if he should succeed in quashing the decision to eliminate him from the tender competition:*

42. The applicant says if the new framework is implemented and contracts concluded he risks the wipe out of his livelihood and his business being shut down as a consequence. Seven people, including himself, will lose their livelihood, according to his evidence. If he ultimately succeeds on appeal this may be too late to save his business and the employment of his employees.

*Damages:*

43. The applicant says that if there is no stay, and if he is not awarded any work in respect of Lot 1 and Lot 2 as a result of the impugned decision, he will lose his business and livelihood. Consequently, it would be “*little recompense*” to him that he could be potentially entitled to a measure of damages if he was ultimately successful in his appeal. He makes the point that, in light of the decision in *Wordperfect Translation Services Limited v. Minister for Public Expenditure and Reform* [2018] IECA 35, such damages must be a reference to *Francovich* damages only, which reinforces this point.

44. In *Wordperfect*, Hogan J. concluded that the entitlement to damages for a breach of EU law is itself highly conditional and limited. At para. 56, of the judgment he stated:-

*“The decision in Ogieriakhi illustrates the chasm which has opened up between the prospects of a plaintiff recovering Francovich damages on the one hand and*

*damages in respect of contractual claims on the other. In the latter case the claim to damages rest fundamentally on whether, viewed objectively, there has been a breach of contract. By contrast, in the case of Francovich damages (and, by extension, damages for breach of public procurement rules under Article 9(6) of the 2010 Regulations), it is necessary to show not simply that there had been an objective breach of E.U. law, but rather that such breach was either 'grave or manifest' or 'inexcusable'."*

**45.** Hogan J. concluded, therefore, that the fact that the applicant could only recover *Francovich* damages impacted upon the manner in which these factors should be weighed and balanced. He held, on the facts in that case, that it could not be said that damages have been shown to be an adequate remedy for the applicant. He felt that this was an important, “*perhaps even a decisive*”, factor on the appeal, as there was an arguable case and the arguments as to the balance of convenience were finely balanced. He held, therefore, at paras. 63 and 64 as follows:-

*“63. These competing factors are admittedly rather finely balanced on both sides. In this context, the fact that damages have not been shown to be an adequate remedy has an important - perhaps even a decisive - impact for the present appeal. Irrespective of whether the matter is viewed from the perspective of national or E.U. law, the right to an effective remedy is a constitutional fundamental: see Article 40.3.2 of the Constitution and Article 47 of the EU Charter of Fundamental Freedoms respectively. In the present case adherence to the standstill clause is, in reality, the only real remedy a claimant such as Word Perfect currently enjoys. It is true that Article 9(1)(b) of the 2010 Regulations enables the Court to declare a reviewable public contract 'ineffective', but it is equally clear from Article 11 that this particular remedy is available only in quite special cases – such as where the*

*authority concluded the contract in breach of the standstill clause – none of which apply to the present case.*

*64. At all events, if that protection is lifted by court order then, in practice, Word Perfect would enjoy no real remedy, even if the matter were to go to trial and a material breach of the public procurement regime were ultimately to be established so far as the contract award was concerned. In these circumstances I am driven to the conclusion that the fact that damages are not an adequate remedy is decisive in terms of any evaluation of where, in Okunade terms, the greatest risk of possible injustice lies.”*

**46.** Two points are perhaps worth making. That was an appeal in respect of an application to lift the automatic suspension required by Regulation 8(2) of the Remedies Regulations. Hogan J. acknowledged that the scheme of the Remedies Directive strongly favoured pre-contractual remedies such as the automatic suspension of the process or decision. Of course, in this case, the applicant has had the benefit of that remedy and his case has gone to trial, and the automatic suspension lapsed once his case was rejected.

**47.** Secondly, the Supreme Court has emphasised both in *Merck Sharp & Dohme Corporation v. Clonmel Healthcare Limited* [2019] IESC 65 and in *Krikke*, that the *Campus Oil* test is to be applied with a degree of flexibility. O’Donnell J. ruled in *Merck Sharp & Dohme* that the question of the availability and adequacy or otherwise of damages is not a standalone requirement to be considered in isolation, but rather part of a broader analysis. Thus, while I accept that damages in this case will not adequately compensate the applicant if a stay is refused and he ultimately succeeds in his appeal, this, though an important factor to be weighed, is not as decisive a factor as it was found to be in *Wordperfect*.



**48.** In addition, applying the *Campus Oil* approach, it is necessary to ascertain whether damages would be an adequate remedy for the council in the event that the applicant is unsuccessful on his appeal. Mr. Creighton, on behalf of the council, clearly sets out reasons why this is not so. I accept that damages would not be a remedy for the council, even if they were recoverable as a matter of law. This was not disputed by the applicant. The fact that damages would not be an adequate remedy for either the applicant or the council is a factor to be weighed in the balance and forms part of the broad analysis referred to by O'Donnell J.

*Other considerations: delay and the tactics of the applicant*

**49.** This case concerns the award of a public contract by a public authority and therefore, of necessity, impacts upon third parties. It impacts upon parties in receipt of the services of the council and, more directly, on the parties who were successful in the tender competition and who have been placed on the new framework. The relief sought in this application will have a significant impact upon these parties and it is appropriate that the court should have regard to their respective interests in all the circumstances.

**50.** It is also appropriate to have regard to the fact that the appeal has been listed for hearing on 26 March 2021. That being so, it is likely that a decision will be given by the summer of 2021. While this might in some circumstances be considered to be a relatively speedy conclusion of an appeal, this period of time must be viewed in the context of the delay to date in completing the tender competition and of the objectives of procurement legislation. The whole thrust of Directive 89/665/EC ("the Remedies Directive") is to ensure that disputes are resolved speedily. Article 2.1 provides:-

*"1. The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to:*

(a) *take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority; ...*”

**51.** The standstill period provided for in Regulation 5 of the Remedies Regulations is fourteen calendar days if the notification is sent by fax or electronic means and otherwise sixteen calendar days. Regulation 7 provides that an application for review to court “*shall be made within 30 calendar days after the applicant was notified of the decision, or knew or ought to have known of the infringement alleged in the application.*”<sup>1</sup>

**52.** Unfortunately, this case has not been disposed of in the timelines envisaged. The proceedings commenced on 4 February 2019 and the judgment of the High Court was delivered eighteen months later on 4 September 2020. I accept that the applicant is in no way to be faulted for this delay, nonetheless, the significance of a further delay until the summer of 2021 must be viewed in the context of the delay to date and of the delay on the part of the applicant in progressing matters since 4 September 2020.

**53.** On 2 October 2020, the applicant was informed that it was the intention of the council to establish the new framework agreement and that the council had by then initiated communications with the framework participants. On 9 October 2020, it was confirmed that the council were progressing to establish the new framework agreement and that they expected to establish it “*by mid next week*” *i.e.* 14/15 October 2020. The applicant had ample opportunity to consider the judgment and he had fair warning of the imminent decision to establish the new framework agreement, yet he did not apply for a stay on the decision and waited some weeks until after the order of the High Court had

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<sup>1</sup> Regulation 7(6) provides that a declaration that a contract is ineffective must be made within six months after the conclusion of the relevant contract.

been perfected, on 29 October 2020 to appeal and look for a stay on the order and the operation of the framework agreement.

**54.** Furthermore, I believe it is appropriate to consider the attitude of the applicant as revealed in the emails cited above. He clearly envisaged that he would obtain a negotiating advantage against the council if he appealed the decision and applied for a stay on the order of the High Court. He anticipated that this would delay the establishment of the new framework for a year or eighteen months. He appears not to have averted to, or possibly was untroubled by, the significance of the impending decision of the council to establish the new framework agreement and the implications the decision could have on his claim to be entitled to continue to work for the council pending the appeal. The court is entitled to have regard to the fact that he believed that it was to his advantage to delay matters on the basis that it would at least discommode, to put it no higher, the council in the performance of its public duties.

**55.** In my judgment, the delay and the tactical advantage which the applicant quite frankly seeks from bringing the appeal are factors to which the court may have regard on this application and which weigh against the granting of the stay sought.

*Strength/weaknesses of the appeal:*

**56.** In appropriate cases, the court may have regard to the apparent strength or weakness of the appeal under the fourth limb of the analysis in *Okunade*. At para. 71 of the judgment, the trial judge set out the submissions of the council on the quality assessment disqualification:-

- “1. That nowhere in the ITT does it say that the requirement for Quality Submission can be met by reference to materials submitted at Stage 1.*
- 2. There is one important exception to this, in that the Works Requirement Document stated that there was no requirement to resubmit CV’s of team*

*members and the tenderer may simply refer back to their previous submission.*

*The expression of this exception underlies the fact that it was limited to the CV's.*

3. *Nowhere in the applicant's tender document did he refer back to material submitted at Stage 1 even in relation to CV's.*
4. *In his email of 20 November, 2018, the applicant expressly acknowledged that he had not submitted a Quality Submission. Only when he was later informed of his elimination from the competition did he claim, in his letter of 20 December, 2018, that he had already met this requirement through documents previously submitted at Stage 1.*
5. *That this aspect of the applicant's submissions revealed that he was largely relying on his own track record of performance on the respondent's projects, and that this informed his view that the absence of a Quality Submissions would not be fatal to his tender."*

**57.** At para. 72, he accepted the submissions of the council and found as a fact that there was nothing in the applicant's correspondence before the commencement of the proceedings, or in his submissions, which justified his failure to submit a quality submission.

**58.** The trial judge accepted that the applicant's tender had not been supported by a quality submission, he had been given an opportunity to remedy that admission and an extension of time to do so by letter, which had warned him that the council reserved the right to eliminate him from the tender competition; he had failed to avail of that opportunity and the decision to eliminate him from the competition was clearly within the scope of the council's authority. He held it was not made in manifest error and that, therefore, on that ground alone the proceedings should be dismissed.

**59.** While undoubtedly there were other points in the case, if the applicant loses on this point his appeal must fail; thus, the strength or weakness of his appeal on this point is crucial.

**Decision**

**60.** I am enjoined by the Supreme Court in *Merck Sharp & Dohme* to adopt a flexible approach rather than an overly rigid application of the three criteria in *Campus Oil*.

**61.** As stated above, for the purposes of this application the council does not dispute that the applicant has arguable grounds of appeal.

**62.** Second, I accept that damages are not an adequate remedy for the applicant. The consequences to the applicant of the impugned decision are very grave, so much so, that he has asserted that his case may be moot if a stay is not granted, notwithstanding the fact that the appeal is listed for hearing on 26 March 2021 and judgment may be delivered a few months thereafter. 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.

**63.** It is also important to note that damages are not an adequate remedy for the council either, even assuming that they are recoverable in this case. The court must try to balance the overall justice of the case based on a broad, flexible analysis of all relevant factors at play.

**64.** In *Krikke*, O'Donnell J. pointed out 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. It follows, therefore, that 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.

**65.** The fact that the appeal has been given a relatively prompt hearing and that judgment may be expected by the summer of 2021 is a factor which the applicant says favours granting a stay. The disapplication of the decision of the council to adopt the new framework and to appoint contractors will not be put on hold for a lengthy period. He argues that if he is not granted a stay and he ultimately succeeds on appeal, then he will have been denied an effective remedy as is his entitlement pursuant to the Remedies Directive and the Remedies Regulations.

**66.** In my judgment, it is important to give due 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 has found to be valid. It would prevent the council from operating a framework agreement with all the advantages outlined above. Potentially, it could seriously undermine the council's ability to refurbish and maintain public housing stock when there are 6,500 people on its housing waiting list. It will prevent the successful tenderers who were not on the old framework from carrying out work for the council and thereby deprive them of the benefit of their successful tenders. 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 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.

**67.** Both in *Okunade* and *Krikke*, the Supreme Court has 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. The applicant must establish that the council erred in eliminating him from the tender competition on the grounds that his tender did not contain the required quality submission. His argument is that, in his letter of 20 December 2018,

he referred to the documents he furnished with his Stage 1 Pre-qualification submission. However, as is clear from the terms of the tender competition, which are cited in full in the judgment of the High Court, it was not permissible to have regard to these documents and each tenderer was required to include quality submission material as part of the individual tender. Specifically, it is not open to a tenderer to rely upon his “*track record*” as this is contrary to the rules of a public procurement tender competition. The trial judge found as a fact, based on a construction of the correspondence, that the council informed the applicant of the defect in his tenders and of the fact that he risked elimination from the competition if he did not rectify it; he was afforded an opportunity to do so if he so wished, he replied on 20 November 2018 confirming that he was not going to revise his tenders and that while he had contemplated including a quality submission he acknowledged that he had not done so. Without wishing to pre-judge the appeal, I have formed the view that the appeal in relation to this point is “*flimsy*”, to use the words of O’Donnell J. in *Krikke*, and that it is appropriate to weigh the relative weakness of the applicant’s appeal in my decision.

**68.** I also attribute weight to the delay on the part of the applicant in seeking the relief in this application. He had ample opportunity to seek a stay from the High Court but he did not do so. This is a discrete factor to which I may have regard. More importantly, by reason of his inaction there has been a critical change in circumstances. The adoption of the new framework agreement by the council significantly tilted the balance in favour of refusing this application. The contract has now been awarded. The old framework agreement may not be reactivated. The grant of a stay would have significant detrimental impacts on the successful tenderers. It is no answer to these points to contend that the council ought to have waited until the time for him to appeal had elapsed. There was no such obligation on the council. On the contrary, it was incumbent upon the council to

proceed with due expedition, subject to alerting the applicant, as it did, of its intention to proceed to act upon the decision it had taken in early 2019, in respect of which the High Court had comprehensively rejected the applicant's challenge.

**69.** I also have regard to the emails written by the applicant to the officials of the council which reveal that he was prepared to delay acting in order to try to extract an advantage from the obviously serious implications for the council if a stay pending an appeal were to further prevent it from proceeding with the new framework.

**70.** Weighing all of these matters, in my judgment, the justice of the case requires that I refuse the application for a stay on the order of the High Court, and I refuse to stay the implementation of the framework agreement by the council or conclusion of contracts in relation thereto.

**71.** I did not understand counsel for the applicant to press the application for an interlocutory injunction in the terms of para. 3 of the Notice of Motion. Certainly, the applicant did not give an undertaking as to damages. This was pointed out in submissions furnished by counsel for the council and it did not elicit the necessary undertaking from the applicant. I infer, therefore, that this relief was no longer pursued. In the event that it was, I refuse it for the reasons advanced above in relation to the application for the stay and on the basis that there was no undertaking as to damages offered to the court.

**72.** As this judgment is being delivered electronically, I will list the matter at 2 p.m. on 22 January 2021 to hear short submissions on the costs of the application.