

**THE HIGH COURT**

**COMMERCIAL**

**[2024] IEHC 229**

**[2020 829 JR]**

**REVIEW OF THE AWARD OF PUBLIC CONTRACTS**

**IN THE MATTER OF A PUBLIC PROCUREMENT REVIEW APPLICATION**

**PURSUANT TO ORDER 84 A OF THE RSC**

**IN THE MATTER OF A REVIEW UNDER THE EUROPEAN COMMUNITIES**

**(PUBLIC AUTHORITIES CONTRACTS) (REVIEW PROCEDURES)**

**REGULATIONS 2010 AS AMENDED**

**BETWEEN**

**KILLAREE LIGHTING SERVICES LIMITED**

**APPLICANT**

**AND**

**MAYO COUNTY COUNCIL**

**RESPONDENT**

**AND**

**ELECTRIC SKYLINE LIMITED**

**NOTICE PARTY**

**DECISION of Mr. Justice Brian O'Moore delivered on the 23rd day of April 2024**

1. The main judgment in these proceedings was given on the 13<sup>th</sup> of February 2024, and bears the neutral citation [2024] IEHC 79. The facts of the case, the legal submissions and my conclusions are set out in that judgment, and need not be repeated here. By way of very brief summary, I found that Killaree had succeeded on one significant issue, namely the validity of the purported standstill letter sent by Mayo. Otherwise, Killaree did not succeed in its challenge to the award of the contract by Mayo to Electric Skyline.

2. There were two issues to be addressed at a hearing on the 29<sup>th</sup> of February 2024. The first of these was an application by Killaree that the court make a declaration to the effect that the standstill letter was not compliant with the requirements of law. Mayo opposed this application. The second matter to be decided was the costs of the proceedings.

3. On the first issue, I have decided not to grant a declaration as now sought by Killaree. No such declaration was sought in the original proceedings. This fact alone distinguishes the current case from the judgment of Costello J in Recorded Artists Actors Performers Ltd v. PPI (Ireland) Ltd [2022] IECA 8, upon which Killaree strongly relies. At paragraph 2 of that judgment, it is noted that the declarations were made (initially by Simons J in the High Court) “in terms of reliefs (1) and (3) of the order and statement of claim...” While there may be occasions where the making of declarations may be appropriate, I am not satisfied that this is one such. The provision of an effective remedy to Killaree does not require my finding in its favour on this point to be supplemented by the making of a declaration. Counsel for Killaree was understandably unable to advance convincing reasons why the making of such a declaration was needed by Killaree. Inasmuch as Killaree’s position on the costs argument might have been thought to be assisted by the granting of a declaration, this is not the case.

When I come to consider the appropriate costs order, as I will do shortly, the success of Killaree on the standstill letter issue will feature as strongly in its favour as if a declaration on this point had been granted. The fact that Killaree succeeded in substance on this question is enough to lead to a conclusion that Mayo has not been wholly successful in defending this claim, and that the costs should be awarded accordingly.

4. On the second issue, Mayo submits that it has been completely successful and should be awarded all its costs. In the alternative it says that there should be no apportionment (or only a minimal apportionment) arising from Killaree's success on the standstill letter for five reasons. These include the form of the pleadings, the assertion by Mayo that certain of Killaree's submissions related to unpleaded matters, a related argument that some of Killaree's affidavit evidence concerned unpleaded issues, alleged difficulties in getting Killaree to agree the issue paper after the hearing, and the limited time spent on the standstill letter at the hearing and in the papers. In my view, only the last of these considerations is relevant given the way in which the costs issue is to be approached. As Mayo was successful in defending the case, it is entitled to the costs of the proceedings less the appropriate adjustment to take into account the important aspect of the dispute which was won by Killaree. The first four factors identified by Mayo are therefore dealt with (in Mayo's favour) by adopting this approach. In deciding the adjustment, the extent to which the standstill issue featured in the papers (and took time at the hearing) is of some significance.

5. Killaree submits that it "was successful in the proceedings as the Court found in its favour on the standstill letter legal ground of challenge"; paragraph 14 of the Killaree written submissions. I do not accept this basic contention. Killaree failed to secure any of the reliefs which it sought. The impugned contract has not been invalidated. Killaree will not be

awarded any damages. To say that Killaree is the successful party as it won one issue, but lost all others, does not reflect reality.

6. At paragraph 22 of its submissions, Killaree claims that it is entitled to its full costs “in the following circumstances”; -

1. The hearing was not exceptionally long, and did not involve discrete modules, so apportionment is not justified. This submission is based on the erroneous proposition that Killaree won the case. In truth, this is an argument which might more properly favour Mayo as it was the successful party.
2. A lot of time at the hearing was taken up with context and background material which was relevant to all grounds of challenge. It follows, according to Killaree, that all or most of these costs would have arisen “even if the Applicant only brought proceedings on a single ground of challenge relating to the standstill letter...” Of course, the proceedings did not relate solely to the standstill letter and involved four other discrete heads of claim. In addition, the ground of challenge involving the standstill letter comprised not only the adequacy of the letter but also whether or not the impugned contract should be set aside. To award full costs to Killaree on this ground would ignore the fact that the issue on which it succeeded was only one of several in the case.
3. “Insofar as the Applicant did not succeed on certain issues, these did not very substantially add to the overall costs of the proceedings or court time.” Again, this approaches the question of costs on the assumption that Killaree was the successful party. I agree that the amount of time spent on the standstill letter

issue is of relevance in carrying out the adjustment to which I have already referred. However, the starting point in such a process is that Mayo was the successful party.

7. Mayo estimates the amount of time at the hearing taken up by Killaree's successful agitation of the standstill letter issue was 11.6 %, in the pleadings alternately 13% and 14%, and in the two principal affidavits alternately 10% and 12%. Counsel for Killaree persuasively argued at the hearing that the calculation of these figures is fundamentally opaque. In particular, I do not know whether any of the evidence, pleadings, or time at the hearing taken up with context and background has been apportioned to the figures relating to the standstill letter question. In my view, one must consider what causes costs to be incurred in litigation. That is not just the time at hearing, or the extent to which evidence is prepared relevant to a specific matter, but also includes the degree to which a particular issue is novel, intellectually challenging, or strategically important in advancing or defending a claim; these last considerations will almost always add to the fees charged by solicitors, counsel or expert witnesses.

8. Taking all relevant considerations into account, I have decided that Killaree should be awarded 15% of the costs of the action against Mayo to reflect the cost of the issue on which Killaree succeeded. Were the analysis to end there, this would see an award to Mayo of 85% of its costs against Killaree. However, there remains Killaree's final argument. This is set out at paragraphs 23 and 24 of the Killaree written submissions. It amounts to an argument that that the failure to deliver a standstill notice is in breach of the mandatory requirements of Regulations 5 and 6 of the 2010 Regulations, that Killaree should be awarded its costs "by

way of consolation” as it did not obtain statutory reliefs “due to its [own] conduct” and that Mayo’s failure to comply with the Regulations “should be marked with some adverse consequences such as an award of costs.”

9. I do not think that, simply because Killaree did not obtain an order setting aside the impugned contract, it should be awarded its costs by way of consolation. I do think that there is force in the argument that Mayo should suffer some adverse consequence as a result of its failure to send a proper standstill notice.

10. As noted at paragraphs 85 to 91 of the main judgment, Regulation 11 (7) requires the court to consider whether to declare a contract ineffective having considered all relevant aspects of the matter. If the contract is not declared ineffective pursuant to this provision, there is then an obligation on the court to impose an alternative penalty on Mayo. This could be the termination of the contract, the shortening of the contract, or a “civil financial penalty” at any level, subject to a maximum of 10% of the value of the impugned contract. At the hearing, Counsel for Mayo accepted that this maximum would, in this case, come to a sum in excess of 400,000 euro.

11. When asked for her response to this element of Killaree’s submissions, Counsel for Mayo replied that the purpose of the Regulation was to ensure that pre contractual remedies could be sought and that, in this case, the failure to send the standstill notice did not lead to any inhibition of Killaree’s ability to seek such relief. This ignores the fact that the Regulations impose a mandatory invalidation of a contract where the infringement has deprived the tenderer of the possibility of pursuing pre-contractual remedies and was

combined with a relevant infringement that has affected the chances of the tenderer applying for a review to obtain the contract. If these adverse consequences do not occur, there is still an obligation on the court to consider declaring the relevant contract ineffective -as already noted, under regulation 11 (7) – and, if that is not done, an obligation to impose a penalty under Regulation 13, as described in the previous paragraph.

12. The whole thrust of the Regulations, and the Directive from which they are derived, is that a failure to serve a proper standstill notice will inevitably have adverse consequences for the infringer. Either it loses the relevant contract, or the contract is shortened, or it is subject to a financial penalty. Even a modest financial penalty carries with it the loss of reputation which inevitably accompanies the imposition of a fine for breach of public procurement law.

13. Mayo has escaped all of these consequences. In particular, Mayo has avoided the alternative penalty under Regulation 13 because Killaree did not seek an order pursuant to this provision. However, Killaree now asks that Mayo suffers a costs consequence to mark the latter's breach of a central requirement of European and domestic public procurement law.

14. I have decided that the costs order in favour of Mayo should be adjusted in order to give effect to the legislative requirement that Mayo cannot walk away unscathed from its failure to serve a proper standstill notice. This would be an appropriate matter to consider, pursuant to s.169(1) of the Legal Services Regulation Act 2015, as among “the particular nature and circumstances of the case...” even if Mayo had been entirely successful. It is certainly an appropriate consideration in the circumstances. The adjustment is a modest one,

given the findings in the main judgment. I will reduce to 75% the costs awarded in favour of Mayo against Killaree. As I assess the likely value of 10% of Mayo's party and party costs, this would be on the lower end of the scale of the possible fines which might have been imposed on Mayo.

15. There will therefore be an award in favour of Killaree of 15% of its costs in bringing these proceedings. Mayo will be able to recover against Killaree 75% of its costs in defending the claim. While conscious of the fact that the costs of one party "may not always correspond to those of the other to the same dispute..." (as was Murray J in *Chubb European Group v. HIA* [2020] IECA 183 at paragraph 36), I will apply a straightforward set off and simply award Mayo 60% of its costs of the action against Killaree.