APPROVED
NO REDACTION NEEDED

THE COURT OF APPEAL

CIVIL

Appeal Number: 2024/30

Neutral Citation Number [2024] IECA 235

Allen J.

Meenan J.

O'Moore J.

BETWEEN/

LOC8 CODE LIMITED

PLAINTIFF/APPELLANT

- AND –

DEPARTMENT OF ENVIRONMENT, CLIMATE SUPPORT AND COMMUNICATIONS,

CAPITA BUSINESS SUPPORT SERVICES IRELAND LIMITED

AND

AN POST

DEFENDANTS/RESPOPNDENTS

JUDGMENT of Mr. Justice Allen delivered on the 30th day of September, 2024

Introduction

1. This is an appeal against the judgment of the High Court (Barrett J.) delivered on 20th December, 2023 ([2023] IEHC 752) and consequent orders made on 16th January, 2024

striking out the appellant's proceedings against each of the respondents on the grounds that the claims were in substance claims for breach of public procurement law which had been brought years out of time.

2. The summons was indorsed with a claim for damages for conspiracy and the appellant is – as it was in the High Court – adamant that the action is not founded on any alleged breach of public procurement law but on conspiracy. It is accepted, however, that if the claims are – as the respondents contend – claims for breach of public procurement law, the action is manifestly out of time.

Background

3. As I will come to – and as was candidly acknowledged by counsel – the case pleaded by the appellant was not all that it might have been and much of what was alleged by the appellant was hotly contested by the respondents. However, the objective factual background is common case, and it is by reference to that objective factual background that the issues can best be understood and analysed.

4. In October, 2009 the Minister for Communications, Energy and Natural Resources officially announced the Government's intention to proceed with the implementation of a National Postcode System *("NPS")*.

5. Part 3 of the Communications Regulation (Postal Services) Act, 2011 made provision for The National Postcode System. Section 66(2) of the Act of 2011 provided that:-

> *"(2) The Minister may, with the prior consent of the Minister for Public Expenditure and Reform, enter into a contract with one or more than one person for the development, implementation and maintenance of a system (in this section referred to as the 'national postcode system') for the allocation, dissemination and management of postcodes for the purposes of, or relating to, the provision of postal*

services and the use of the national postcode system by other persons for such other purposes as the Minister considers appropriate."

6. In January, 2011 – before the legislation had been enacted – the Department of Communications, Energy and Natural Resources decided to establish a list of candidates (proposed contractors for the NPS contract) with the capability required to successfully design, realise, disseminate and manage an Irish NPS, and to that end issued a Pre-Qualification Questionnaire *("PQQ")* for the appointment of a Postcode Management Licence Holder. The PQQ stated that the procurement process would follow the Negotiated Procedure set out in the European Communities (Award of Contracts by Utility Undertakings) Regulations, 2007 (S.I. No. 50). The declared objective of the 2007 Regulations was to give effect to Directive 2004/17/EC (as amended by Directive 2005/51/EC) on the coordination of procurement procedures of entities operating in the water, energy, transport and postal services sectors.

7. The appellant was incorporated in 2009 as a company limited by shares. Its founder and chief executive officer, Mr. Gary Delaney, had already developed a digital address code.

8. By letter dated 23rd February, 2011 the appellant, by its then solicitors, wrote to the Department. The appellant – it was said – wished to participate in the tender process but had been precluded from doing so under the PQQ. The tender process – it was said – contravened Department of Finance guidelines and a number of identified EU directives in a number of specified respects. Among the appellant's objections was that the PQQ required – or was said to require – that each member of any consortium should have an annual turnover of not less than €40 million. The appellant did not participate in the tender process.

9. One of the participants in the tender process was the third respondent, An Post, the national postal service provider, which was unsuccessful.

10. Another of the participants in the tender process was the second respondent, Capita Business Support Services Limited *("Capita")* which was successful and which on 21st December, 2013 was awarded a ten year a contract with an option to renew for a further five.

11. The contract award to Capita was a contract in the terms contemplated by s. 66(2) of the Act of 2011 for the development, implementation and maintenance of a system for the allocation, dissemination and management of postcodes for the purposes of, or relating to, the provision of postal services and the use of the national postcode system by other persons for other purposes.

The proceedings

12. By plenary summons issued on 2nd September, 2022 the appellant commenced proceedings against the three respondents claiming:-

1. Damages for conspiracy, including exemplary and punitive damages;
2. Interest pursuant to statute and common law;
3. Injunctions:
    (i) restraining Capita from operating outside its statutory and contractual mandate and restraining the Department from financing such operations;
    (ii) restraining the Department from the use of State political and administrative resources to unlawfully promote the commercial activities of Capita to the detriment of the appellant's business;
    (iii) restraining the Department from allowing the operation or use of the National Postcode (Eircode) without effective and independent oversight; and
    (iv) restraining the Department from renewing or extending the licence holder contract of Capita for the National Postcode (Eircode) on or about

20th December, 2023 or until the conclusion of the action, whichever is later.

4. Further or other relief;

5. Costs.

13. Appearances were promptly entered for each of the respondents, who each called for delivery of a statement of claim.

14. By notice of motion issued on 21st November, 2022 Capita applied to have the proceedings entered in the High Court Commercial List. That motion was returnable for 28th November, 2022. The Commercial List judge did not enter the proceedings in the Commercial List but transferred the application to the Competition List for 30th November, 2022. The order of the Competition List judge of 30th November, 2022 shows that the appellant and the Department and An Post neither consented to nor opposed entry into that list but that in anticipation that the proceedings would be entered – and subject to the approval of the court – all of the parties had agreed a timetable. The timetable was approved and provided for delivery of a statement of claim by 12th December, 2022; for the issue by Capita of a motion to strike out the proceedings by 16th January, 2023; and for an exchange of affidavits and submissions with a view to a hearing date for Capita's motion sometime in March, 2023.

15. It is evident from the directions that Capita had determined to move to have the action struck out before it had a statement of claim.

16. The statement of claim was duly delivered on 9th December, 2022 and Capita's motion to strike out the proceedings was duly issued on 16th January, 2023. By the time the action was next listed in the Competition List for mention on 17th January, 2023, the Department and An Post had prepared similar motions to strike out and by leave of the judge, those motions were issued on 17th January, 2023 and made returnable for 23rd March, 2023.

The strike out motions

17. By their separate notices of motion each of the respondents applied to the High Court for orders dismissing the proceedings on various grounds, including that they were irregular; disclosed no cause of action; were frivolous and vexatious; were inadequately particularised; were an abuse of process; and were in substance public procurement proceedings which were out of time.

18. I will come to the statement of claim, but it was a common theme of the respondents' motions that, however they were framed, the proceedings were public procurement proceedings which – apart altogether from the fact that they did not comply with the substantive requirements of the rules as to form and content – had been issued nearly ten years after the award of the contract to Capita.

19. The respondents' motions were each grounded on an affidavit: in the case of the Department, an affidavit of an assistant principal officer, Mr. Daniel Lawlor; in the case of Capita, an affidavit of its managing director, Ms. Gillian Chamberlain; and in the case of the An Post, by an affidavit of a solicitor in the legal department of An Post, Mr. Paul Carroll.

20. In each case, the deponents sought to identify the appellant's core claims – or at least the factual landscape in which the claims were said to have arisen – and to demonstrate that the claims arose from the tender process which had taken place in 2011 for the award of a contract to develop, implement, maintain and promote the national postcode system, and the award of the contract to Capita in 2013. Along the way, the respondents' deponents were highly critical of the manner in which the claims had first been articulated in correspondence and later pleaded but – without for a moment understating the significance of what was said as to the inadequacy of the pleadings – the essential proposition was that however it might be articulated, this was a challenge to a contract awarded after a public procurement process which allegedly did not comply with public procurement rules and was a decade out of time.

21. In response, a long affidavit of Mr. Gary Delaney was filed on behalf of the appellant which – as the judge correctly noted – raised issues that went far beyond what had been pleaded. In reply, further affidavits of Mr. Lawlor, Ms. Chamberlain and Mr. Carroll were filed on behalf of the respondents. Ms. Chamberlain, in her replying affidavit – rather wearily, I thought – suggested that the purpose of the application appeared to have gotten quite lost in the replying affidavit filed on behalf of the appellant.

22. The judgment of Barrett J. reproduces – over 75 pages – the affidavits filed in the High Court. The replying affidavit of Mr. Delaney accounts for 31 pages.

23. The motions were heard together on 28th June, 2023 and judgment was reserved.

The High Court judgment

24. On 20th December, 2023 Barrett J. delivered a lengthy written judgment in which he focussed almost exclusively on the question as to whether the proceedings were public procurement proceedings.

25. The High Court judge found that in essence, the appellant's claim was for breach of public procurement law which was years out of time. There were – he said – also claims concerning conspiracy, breach of competition law, breach of state aid rules, and interference with the conclusion of contracts. Those other claims – he said – were vague and inadequately particularised but were inextricably connected with and indeed derivative to the public procurement claim that was at the heart of the proceedings; and were years out of time.

26. Accordingly, the judge struck out the action against all three respondents.

27. The judge added that even if the proceedings did not fall to be struck out under the Remedies Regulations, he would have struck them out on the ground that they had been brought outside the time limited by O. 84 of the Rules of the Superior Courts.

The appeal

28. The appellant appealed against the order striking out the proceedings on the ground on which they were struck out.

29. The respondents each opposed the appeal on the ground that the High Court judge was correct in his analysis and conclusion. The Capita and An Post also contended that the judgment should be affirmed on the additional grounds that the proceedings were improperly constituted; frivolous and vexatious; an abuse of process; inadequately particularised; disclosed no reasonable cause of action; and did not comply with the requirements of, and had been brought outside the time limited by, O. 84A.

30. The first point made by Mr. Lawlor in his affidavit filed in support of the first respondent's application, was that the Department was not a proper defendant to proceedings of this kind. Rather, he said, the proper defendant was the Minister, a corporation sole. That point was never contested by the appellant – and indeed on the hearing before the High Court and on the oral hearing of the appeal was acknowledged to have been correct – but quite remarkably there was no application to amend or substitute. However, although the point was made – and acknowledged to have been well made – it was not pressed. The High Court judge accepted that what Mr. Lawlor had said was correct but did not base his decision on it and it was not marshalled in the Department's respondent's notice as an additional ground on which the judgment of the High Court should be affirmed.

31. The core issue on the appeal is whether the judge was correct in his conclusion that the claim was for breach of public procurement rules.

32. As I will come to, one of the appellant's grounds of appeal is that the judge erred as a matter of law and procedure in failing to have *"allowed/directed amendments to the statement of claim … and/or to have used its powers as the Competition Court to direct bespoke proceedings."* However, in assessing what the substance of the action was, the starting point must be the summons and statement of claim as delivered.

The pleadings

33. The appellant's claim in the general indorsement of claim on the plenary summons for damages for conspiracy, including exemplary and punitive damages, gives no insight into the nature or basis of the action. However, the claimed injunctions clearly convey a challenge to the lawfulness of the business being carried on by Capita and a challenge to the then imminent possible renewal of Capita's licence. The claim for an injunction restraining Capita from operating outside its statutory and contractual mandate rather conveys a complaint that Capita was in fact operating outside its statutory and contractual mandate. The prayer in the statement of claim replicated the relief claimed by the summons.

34. The statement of claim identified the appellant as a company specialising in the development and provision of navigational solutions and software for the guidance of vehicles and personnel to any address or location in the State and in Northern Ireland; the Department as a government department and the successor to the Department of Communications, Energy and Natural Resources; and An Post as a company owned by the State which *inter alia* operates a postal service in the State.

35. Capita was identified as a company incorporated in the State which was licensed to operate and manage the Irish National Postcode until December, 2023, at which time there would be an option to extend the licence for a further five years.

36. Having so identified the parties, the statement of claim pleaded, at para. 5, that:-

> *"5. By reason of the matters hereinafter pleaded the defendants conspired to harm the plaintiff in its business and to its detriment causing it to suffer loss, damage and expense, and loss of opportunity, and loss of reasonable expectation and damage to its reputation."*

37. Absent any indication as to who was said to have agreed what, with whom, and when, it is not easy to see what the alleged conspiracy was. If, inferentially, the appellant's case is

that the respondents conspired with each other, that should not have been left to inference. If it could be inferred from what followed that the appellant's case was that the respondents conspired with each other to injure the appellant by unlawful means, that should have been spelled out. At the oral hearing of the appeal, counsel confirmed that the conspiracy alleged was an unlawful means conspiracy. Moreover, the alleged conspiracy was said to have predated even the Minister's announcement in 2009 of the Government's decision to establish a National Postcode System.

38. In his oral submission – in answer to a series of questions from the Court – counsel for the appellant suggested that the European Union had given a directive that Ireland should have a postcode; which was something which An Post did not want because it would have affected its monopoly; and that *"they"* – the Department and An Post – therefore entered an agreement with Capita to develop a useless postcode. That agreement – it was said – was contrary to the requirement of s. 66(2) of what counsel insisted on referring to as the Postal Act 2011 which – it was said – provides that the Irish postcode should be used primarily for postal services. Glossing over the express provision in s. 66(2) of the Communications Regulation (Postal Services) Act, 2011 that the postcode might be used for such other purposes as the Minister might consider appropriate, the appellant's case was said to be that *"… the national postcode system was not delivered in accordance with the Act, the Eircode does not satisfy it, that it was unusable without the use of the geodirectory which was never something which was anticipated by the Act, or indeed by the European Regulation and that that was unlawful in the sense that what was delivered was not delivered in accordance with the Act."*

39. It was acknowledged by counsel that whatever the appellant's case was, it was not an application for a judicial review of the award of the license. While the appellant's claim for an injunction restraining Capita from operating outside its statutory and contractual mandate

might convey a claim that Capita was in fact carrying on business otherwise than in accordance with its licence, that was not the appellant's case either. Rather, as I will come to, the appellant's contention is that the object or outcome of the alleged conspiracy was that Capita has a licence to carry on a business which is wider than what was envisaged or permitted by the Act. In one breath, the suggestion is that the Minister acted *ultra vires* in awarding the contract to Capita but in the next, the appellant disclaims any challenge to the lawfulness of the licence.

40. The first of what counsel described as the building blocks of the conspiracy is set out at paras. 6 to 8 of the statement of claim. The elements of that building block are first, that on or about 14th January, 2011 the Department announced an invitation to tender in the PQQ; secondly, that Article 47(3) of Directive 2004/18/EC permitted tenders by consortia with a combined turnover in excess of €40 million; and thirdly, that in breach of this provision the Department *"decreed"* that it would not apply to tenders for the Postcode Management Licence. The *"Decree"* by the Department appears to be a reference to an alleged stipulation in the PQQ that all – meaning each – of the members of any consortium must have an annual turnover of €40 million.

41. At para. 7 of the statement of claim:-

> *"... The plaintiff avers that the Decree had the effect of preventing SME's like the plaintiff from submitting a tender which, in view of the plaintiff's already developed systems, was likely to have been successful. ..."*

42. By the way, the suggestion that the PQQ required that each of the members of any consortium must have a turnover of €40 million (as opposed to a combined turnover) is disputed by the Department – as it was when the suggestion was first made by the appellant's then solicitors in their letter of 23rd February, 2011 – and I express no view on that. The point for present purposes is that the case which the appellant would make is that the

procurement process was conducted otherwise than in accordance with law and that but for the matters complained of it would, inferentially, have participated in the process and would likely have been successful. In the course of argument, counsel confirmed that the premise of the claim that the appellant had been unlawfully excluded from the tender process was an alleged violation of the public procurement directive. Like the High Court judge, I cannot see that other than as a public procurement claim.

43. At para. 8 the statement of claim pleads that the *"Decree"* – that is the alleged stipulation in the PQQ – breached various principles said to be found in the European Communities (Public Authorities' Contracts) (Review Procedures) Regulations, 2010 and the European Communities (Award of Contracts by Utility Undertakings) (Review Procedures) (Amendment) Regulations, 2017.

44. The 2017 Regulations could not possibly have had anything to do with the 2011 PQQ or a contract awarded in 2013.

45. The 2010 Regulations provide a remedy for a person who has an interest in obtaining a reviewable public contract – which the appellant did – and who alleges that he has been harmed by an infringement of the law of the European Communities or European Union in the field of public procurement – which the appellant did. Regulation 7(2) requires that any application must be made within 30 calendar days after the applicant knows or ought to have known of the alleged infringement – which the appellant did not.

46. At para. 9 of the statement of claim:-

> *"9. The plaintiff avers that the Decree formed part of the said conspiracy to harm the plaintiff in its business, preventing the plaintiff from tendering for and being awarded the licence and thereby favouring the defendants."*

47. Ignoring the misuse of language and the hopeless confusion between the fact of the alleged conspiracy and the steps alleged to have been taken in furtherance of the alleged

conspiracy, the substance of the compliant is that the appellant was wrongfully deprived of its entitlement to tender for the contract.

48. At para. 9 of the statement of claim the appellant goes on to identify eight *"particulars"* on which it would rely. I will not address all of the detail. The Department was said to have had a vested interest in limiting the competition for the licence and favouring An Post: but of course An Post did not get the licence. It was said that in 2008 a Mr. Alex Pigot – who was said to have later led the Capita bid – tried to discourage Mr. Delaney from pursuing the development of Loc8Code, but not that he succeeded. And so on.

49. At para. 9 (vii) of the statement of claim it was pleaded that:-

> *"(vii) At a Cabinet meeting in or about October 2013 the Department decided that the post codes to be tendered would not have to be used primarily for post as required by the Postal Act 2011 and that the focus of the licence holder could be directed in a different direction and for purposes other than as stated in the tender documents ('the Decision') contrary to the reasons/provisions stated in those documents and the Postal Act. The plaintiff was kept in ignorance of the Decision which remained private and confidential to the Department until the matters pleaded in paragraph 10 below."*

50. The substance of the matters pleaded at para. 10 below were that the appellant – by Mr. Delaney – first learned in June, 2018 of the *"Decision"* which had been taken in October, 2013 – shortly prior to the award of the licence to Capita on 21st December, 2013.

51. Leaving aside the conundrum as to how the Department might have decided anything at a Cabinet meeting and the mis-citation of the Communications Regulation (Postal Services) Act, 2011 – and, for the avoidance of doubt, the respondents' denial of any irregularity – the appellant's plea is that there was an irregularity introduced into the tender process in October, 2013, of which it first became aware in June, 2018. In argument, counsel

agreed that the appellant's case was that the use of the postcode for purposes other than as stated in the tender documents would in turn be a breach of the public procurement regulations.

52. Assuming for the sake of argument that the appellant could make out the alleged irregularity, the height of the case it would make is that as of June, 2018 the appellant was a person who had previously had an interest in obtaining a reviewable public contract and only then learned of what it would now contend was an alleged infringement of the law of the European Communities or European Union in the field of public procurement. Regulation 7(2) of the 2010 Regulations requires that any application must be made within 30 calendar days after the applicant knows or ought to have known of the alleged infringement: but no such application was made.

53. At para. 12 of the statement of claim the appellant would make the case that the *"Decision"* formed part of the conspiracy and was *ultra vires* and illegal. Although the following three subparagraphs of particulars are a bit vague, the substance of the case which the appellant would make is that Capita is doing what it is doing on foot of a licence which the Minister did not have the power to grant and which should never have been granted. The business of the appellant may very well be affected by the business of Capita but the challenge which the appellant would make to the licence is a public law challenge, brought coming up to ten years after the making of the impugned decision and coming up to four years after the appellant – on its own account –was made aware of what it now relies on as an irregularity. Not least, I suppose, because the appellant is adamant that it does not seek to challenge to the validity of the licence by way of judicial review, there was no application for an extension of time.

54. I pause here to say that this is the context in which the High Court judge said that if the proceedings had not fallen to be struck out under the Remedies Regulations, he would

have struck them out on the ground that they were outside the time limited by O. 84 – for the making of applications for leave to apply for judicial review generally.

55. At para. 13 of the statement of claim the appellant *"avers"* that its Loc8Code system – as the Department well knew – is an accurate and user friendly location system for the benefit of emergency services and had been used by agencies of the State since 2012. The basis on which it is said that the Department well knew this is that Mr. Delaney is said to have said so to the Assistant Secretary General in 2014. *En passant* it is said that the chairperson of an Oireachtas Committee refused to allow Mr. Delaney to testify to the Committee *"on issues of procurement."*

56. At para. 14 it is pleaded that the *"Decision"* – in October, 2013 – was in breach of 2011 Act as amended in 2015. There is complaint that expenditure under the 2011 Act was not lawful for anything other than the purposes of the Act: but the premise of any claim in relation to expenditure can only be that the contract awarded to Capita was not in accordance with the purposes of the Act and so, the supposed invalidity of the licence or supposed irregularity in the grant of the licence.

57. As para. 15 there is woolly talk of misrepresentation, illegal State aid, breach of competition law and discrimination – not as alleged wrongs in themselves but as part of and steps taken in furtherance of the alleged conspiracy. Notably, there was no attempt to identify any allegedly uncompetitive agreement, or a relevant market, or an allegedly dominant position, or any alleged abuse of a dominant position. In truth, the appellant's complaint goes no further than that the respondents – sensibly, it has to be Capita, only – have entered the navigational solutions market in competition with it.

58. At para. 16 it is pleaded that but for the conspiracy, and by reason of its advanced systems and expertise and business relationships, the appellant had a reasonable expectation of being appointed the licence holder. This, it seems to me, at best sits very uneasily with all

that has gone before. As I read it, the suggestion is that the appellant could and should, and but for the matters complained of would, have secured precisely the licence which Capita obtained. In other words, that the appellant should have had a licence to do what the Department – or the Minister – was not empowered to allow anyone to do.

59. At para. 17 of the statement of claim, the appellant pleads that the respondents have continued to interfere with its business by unlawfully targeting navigation markets instead of the Postcode system for the State but the premise of this is the same: that Capita's licence and business should have been confined to the sorting and delivery of mail.

60. At para. 18, the appellant claims that it has suffered loss, damage and expense to its business amounting to €34,726,000, calculated up to 31st December, 2022 as well as a loss of investments of €500,000 since 2010, both by loans to the appellant by the State and by an unnamed private investor. I will come back to the €34,726,000.

The oral hearing

61. Modern litigation – and the number of us who have known any other kind is dwindling – has become very complex. I have often wondered whether perhaps a better word would be complicated.

62. This was an appeal against three orders of the High Court striking out an action *in limine*. The grounds on which the respondents had sought the orders under appeal were many and varied but the grounds on which the orders were made were limited and focussed. If Capita and An Post were convinced that the case was holed below the waterline, it is difficult to see what was hoped might be gained by renewing the barrage.

63. By the time the case got to this Court, the papers had mushroomed into two full boxes. Among the papers were two folders of exhibits – running to 710 pages – and three folders of authorities. To borrow from Ms. Chamberlain, the parameters of the application appear to have gotten quite lost. There was a great deal of disagreement in the affidavits and

to a significantly lesser degree, dispute as to material facts; but of course there was no question that this Court, on the appeal – any more than the High Court at first instance – could resolve any contested question of fact or decide any sensibly arguable issue of law.

64. It must be acknowledged that the breadth of the appeal was increased by the introduction by Capita and An Post of the additional grounds on which it was said the judgment and order of the High Court should be affirmed, but if the judge was correct in the view he took of the substance of the proceedings – and the respondents all argued that he was – the appeal would fail and the action would stand struck out.

65. In very broad terms, the common theme of the additional grounds was that the pleadings failed to disclose or adequately particularise the appellant's cause of action. Yet the premise of the challenge to the proceedings on public procurement grounds – as well as of the High Court judgment – was that the pleadings so clearly showed that the claims were founded on stale public procurement claims that the action was bound to fail.

66. The first submission made by counsel for the appellant in the course of his oral presentation of the appeal was that – contrary to the respondents' submissions – this was not an attempt to re-run the procurement process of the postcode licence. It was accepted that if the action was – as counsel put it – a rebadged procurement claim, the proceedings were plainly impermissible and out of time. This concession was plainly correct. See for example *BAM PPP v. National Roads Authority* [2017] IEHC 157 and the authorities there cited by Baker J.

67. Counsel further accepted that the nature of the claims was to be determined by reference to the pleadings, specifically the statement of claim.

68. It was accepted by the appellant that a great deal of what Mr. Delaney had had to say in his replying affidavit went far beyond the pleaded case. It was acknowledged that the Court could not resolve any contested question of fact but ought to approach the appeal on

the basis that the appellant could prove what it had pleaded. On the other hand, it was suggested that if the Court were disposed to allow the appeal, the appellant would ask for leave to amend. There was no concrete indication of what amendments the appellant proposed to make, save the substitution of the Minister for the Department. Rather, it was said, the case which the appellant would plead – if the action survived the appeal – was to be found somewhere within Mr. Delaney's 31 page replying affidavit and, I suppose, as many of the two folders of exhibits as were his.

69. I pause here to recall what was said in the High Court about possible amendment. The action, it will be recalled, was being case managed in the Competition List. The respondent's motions to strike out or dismiss were issued in January, 2023 and affidavits and written legal submissions were exchanged in accordance with an agreed and approved timetable. When, on 30th November, 2022, the timetable which had been agreed between the parties was approved by the court, it was hoped that Capita's then proposed motion could be heard in March, 2023. In the event, the motions were heard together on 28th June, 2023 but the exchange of affidavits and written submissions had been completed by 3rd March, 2023.

70. In the High Court, immediately after the appearances were taken, counsel for the appellant – who of course was the respondent to the motions – said that there was one thing which he wanted to mention, which was – he said – that he had a motion to amend the statement of claim. He was not, he said, suggesting that it should come before the court on that day although – he said – *"it would have been convenient but we weren't able to arrange that for this date. … But the whole topic of amendments to the statement of claim may be relevant – well will be relevant, I say – may be relevant to the issue of whether these motions succeed or don't."*

71. Counsel for Capita – who by agreement between counsel was going to take the lead – then said that on 15th June, 2023 his solicitors had received a letter from the appellant's

solicitors enclosing a form of amended statement of claim and asserting – by reference to O. 28, r. 2 – that no leave was required for the amendment of the statement of claim. Capita's solicitors – said counsel – had written back on 23rd June, 2023 to say that the two windows in O. 28, r. 2 had long ago closed. While the appellant might wish to issue a motion, counsel had not seen any motion and no motion had been served. I understand that the same letter was sent to the other respondents' solicitors, who replied in the same terms.

72. There was no further submission on behalf of the appellant and counsel for Capita proceeded to open his application, and was followed by counsel for the Department, and counsel for An Post.

73. Counsel for the appellant, in reply to the respondents' submissions to the High Court, observed that he had expected a searching request for particulars, to which, if there had been one – or three – he would have replied. Counsel stood over the statement of claim but suggested that if it did not pass muster, that could be addressed by pleading particulars or giving particulars. He identified the power in the Competition List rules to order the delivery of a statement of case which set out everything and indicated that the appellant would welcome such a direction. The transcript shows that having gone through the statement of claim, counsel for the appellant said:-

> *"Now, I'm not going to trouble the court with the amendment of the statement of claim which is the subject of another motion. One of the complaints against us is that we should have sued the Minister. So as you might expect, the Minister now features as a defendant. So more particulars have been given. I think there is a paragraph which simply shores up the proposition that this is an overall conspiracy. But, judge, I'm happy for the court to look at this on the basis of the statement of claim before you …"*

… But, judge, in my submission this statement of claim isn't fatally flawed. In my submission it is actually kind of all right. I don't regard myself as the best pleader in the world. But if it is not, it can be saved by pleading further particulars or by the giving particulars or by, under the rules of this court, giving a detailed chapter and verse story from beginning to end and referring to documents. …"

74. Without getting ahead of myself or spoiling whatever – if anything – is left of the plot, what was contemplated is that any – if any – gaps in the statement of claim might be plugged by way of particulars or elaboration. In other words, there would be no change to the substance of the claim.

75. To get back to the oral hearing of the appeal, the appellant's case – it was said – was that it had been shut out by all three respondents from using its systems for delivery of parcels and from selling its services to others who might wish to use it, like the ambulance service. This was not part of the pleaded case and counsel was unable to say how it was the appellant had allegedly been shut out of providing its services unless by the award of the contract to Capita and by Capita using or licensing the use of Eircode for purposes other than the delivery of mail. This chimes with the thrust of the appellant's case, which is that because Capita secured the licence it did – which is not, as the appellant would contend it should be, confined to the delivery of mail – Eircode is in a position to compete with Loc8Code. The appellant, Mr. Delaney, and counsel are all adamant that Loc8Code is vastly superior to Eircode; and I am perfectly prepared to contemplate that it is. However, on the appellant's own case it has lost €34,726,000 in revenue or profit because Capita has been allowed to spread its wings beyond the sorting and delivery of mail.

76. It was suggested in the course of argument that the appellant had been assured by the Department – implicitly on behalf of An Post as well as the Department, because the Department has a large shareholding in An Post – that the Department and An Post would be

concentrating on postal services and not the navigational aspects. By the way, that is no part of the pleaded case and it was not said when or by whom or by what authority any such assurance may have been given, or how any such assurance – by whomsoever it might have been given – could have limited the statutory discretion conferred on the Minister by s. 66(2) of the Act of 2011 to decide the purposes for which the national postcode system might be used; but assuming for the sake of argument – and *pace* the Minister and An Post – that such an assurance might have been given, the *causa causans* of the appellant's claimed loss of revenue or profit is that Capita's commercial exploitation of Eircode is not confined to the sorting and delivery of mail, and the *causa sine qua non* of that is that Capita has a licence to do what it is doing. And so, inexorably, the appellant is driven back to the proposition that the licence is invalid; whether because of an alleged breach of public procurement rules or because the licence was not one which the Minister was empowered to grant.

77. Counsel for the appellant appealed to the well-established principle that the jurisdiction to strike out a statement of claim for failing to disclose a cause of action is one which is to be exercised sparingly and only in clear cases and will not be exercised where the deficient pleading is capable of being saved by amendment. Not the least difficulty with the invocation of this principle before this Court was that it was not unequivocally invoked in the High Court.

78. By way of explanation for the fact that there was no application made in the High Court for leave to amend the statement of claim, counsel suggested that the motions to dismiss had come pretty hard and fast on the heels of the delivery of the statement of claim. It is true that the motions to dismiss came soon after the delivery of the statement of claim, but I do not understand how this goes to the appellant's failure to move for leave to amend.

79. The motions to dismiss came on 16th and 17th January, 2023, hot on the heels of the delivery of the statement of claim on 9th December, 2022 but in the case of Capita had been

portended on the motion for entry into the Commercial List. It is difficult to understand how the appellant might have expected a searching notice for particulars – from Capita, at least – in circumstances where Capita was committed to a strategy of seeking to have the statement of claim struck out sight unseen. Capita's motion, when it came, and the Department's and An Post's which swiftly followed, squarely attacked the sufficiency of the pleadings and the basis of the several challenges was spelled out in the respondents' grounding affidavits. There appears to have been some hope that the motions could be heard in March, 2023 but in the event, they were not heard until 28th June, 2023. Thus the appellant was on notice of the precise nature of the respondents' criticisms of the statement of claim for five months before the motions were heard. As Meenan J. observed in the course of the argument, the motions to dismiss heightened the urgency of any application to amend.

80. It is now said that the judge erred in failing to direct or allow the amendment of the statement of claim and/or used the power in the Competition List rules to order the delivery of a statement of case. It is not said when the judge ought to have done any of this. As was observed by counsel for Capita, the power in O. 63B, r. 6 is focussed on the initial directions hearing. On 30th November, 2022 the judge, without demur, entered the case in the Competition List and approved a timetable which would lead to a determination as to whether the action could survive. When the motions came on for hearing on 28th June, 2023 they were – everyone agreed – ready for hearing. While there was talk of an application for leave to amend at some indeterminate time in the future, the appellant's declared position was that it was happy that the court would deal with the motions by reference to the statement of claim as it stood. As to the suggestion that the judge erred in not directing the preparation of a comprehensive case statement, logically, this could only arise if the action could withstand the challenges to it.

81. On the appeal, appellant prayed in aid the judgment of the High Court judge in *X. v Google Ireland Ltd.* [2023] IEHC 56 in which he considered that the plaintiff's pleadings were clearly inadequate in that they failed to disclose a recognised cause of action or the necessary elements of a cause of action but allowed the plaintiff a period of six weeks within which to apply for such amendment as he – the plaintiff – might contend could save the action from being dismissed. The respondents emphasise that Mr. X was a litigant in person, but I am not persuaded that that ultimately makes any difference. The same rules apply whether a litigant is represented or not. But *X.* does not avail the appellant. While this is a case in which the pleading is deficient, that was not the basis on which the action was struck out. Whatever way the case was pleaded, or might have been pleaded, or might be pleaded, the core complaint was that in 2013 Capita was awarded a licence in breach of public procurement rules and had since been carrying on a business which was in competition with the appellant's business; or, perhaps, with the business which the appellant would have been carrying on if it had won the contract; or, perhaps, the business which the appellant would have been carrying on if the licence had not been awarded to the appellant.

82. Absent a proposed draft amended statement of claim, counsel for the appellant was compelled to agree that his argument was that the High Court judge erred in not – of his own motion, and after he had heard and decided the respondents' motions – extending *carte blanche* to the appellant to make whatever amendments it wished to make. More to the point, if the case was – as the judge found that it was – holed below the waterline, it could not have been saved by any rearrangement of the deckchairs.

83. At para. 18 of the statement of claim, the appellant claims that by reason of the matters complained of it has suffered loss and damage to the tune of €34,726,000. The matter most immediately before complained of – at para. 17 – is that its reasonable expectation that it would be awarded the licence was thwarted. Counsel was not able to say

whether the fairly precise and on any view substantial figure of €34,726,000 was in respect of loss of revenue or loss of profit but it was the measure – on one basis or the other – not of the what the appellant would have earned if it had been awarded the licence but of what it had lost by reason of *"being shut out of the navigational opportunities that ought to have remained to the appellant if Eircode had been used solely for postal delivery services."* Counsel confirmed that the appellant's case was that Capita was doing what it was doing on foot of the licence and – in answer to a question from the Court – confirmed that if the licence was valid, then what Capita was doing was lawful, and added:-

> *"But the question as to whether the licence is valid is a matter to be decided upon in this case."*

84. Against the risk that counsel might have misspoken he was given an opportunity to revise his answer but when the question was repeated the answer was repeated:-

> *"MR. JUSTICE O'MOORE: Yes. What you said a few moments ago is that the validity of the licence is something that would have to be established in these proceedings. Is that, in your view, one of the issues that the court will have to decide when the case goes to trial?*
>
> *MR. STIMSON: Well, judge, I think I have to say yes."*

85. On the appellant's case, the action is a direct attack on the validity of Capita's licence.

86. It was submitted that the relief claimed by the appellant – leaving aside, I suppose, the injunctive relief – was not Remedies Regulations relief. That is simply not so. One of the powers available to the High Court on an application made pursuant to the 2010 Regulations is the power – in art. 9(6) – to award damages as compensation for loss resulting from a decision which was an infringement of Community law, or of the law of the State transposing Community law. Of course the Regulations do not contemplate an award of damages for conspiracy. But it is trite that a civil conspiracy is not actionable unless acted upon to the

detriment of the plaintiff. If – for the sake of argument – it were to be assumed that the appellant could establish that the respondents agreed to do what they are alleged to have done, and did what they are alleged to have done, the outcome – on the appellant's case – was that Capita was awarded the contract for the national postcode system and the claim is a claim for damages arising out of that award.

87. The time limits prescribed by the Regulations and by O. 84A are strict. It is impermissible to seek to circumvent those time limits by – as counsel for the appellant put it – rebadging a claim for an infringement of the Regulations as a conspiracy claim. As Baker J. observed in *BAM PPP Ireland Ltd.*:-

> *"To permit the plaintiffs to do this would be to ignore the State's obligations under European law to create a self-contained and complete system for the award of public contracts and for remedies for those dissatisfied either with the process, interim measures, or the ultimate award of the contract."*

88. There was some debate in argument as to whether, in any event, a claim for damages for conspiracy was statute barred. The conspiracy was said to date back to 2008 and the loss to date back to the award of the licence to Capita in 2013. The appellant submitted that it first because aware in June, 2018 of the *"Decision"* which was allegedly taken in October, 2013 but was unable to identify any rule that postponed the running of time on an action for damages for conspiracy by reference to the plaintiff's date of knowledge.

89. I mention for completeness that the suggestion in the appellant's written submissions that it could be inferred from the fact that the judge did not deliver his judgment as soon as he had hoped, or that it could be inferred from the fact that judgment in this case was delivered two days after the judge delivered a mammoth judgment in a case which he heard immediately after this case, that the judge was biased against the appellant was abandoned. As was the completely daft suggestion that the judge might have been adversely influenced

against the appellant by a television advertisement for Eircode which did not mention Loc8Code.

90. There was also a suggestion that the judge betrayed bias against the appellant by characterising the *"facts"* as deposed to by Mr. Delaney as *"allegations"* and – in the version of the judgement initially circulated to the parties – by describing the appellant's claims as *"speculative"* and Mr. Delaney's evidence as *"somewhat sensational"*. On the application of the appellant, these latter descriptions were excised by the judge from the published version. I am not persuaded by the respondents' submission that in principle any inference which be been drawn from the language in the first version of a judgment would necessarily be negated by the removal of the comment from the published version; or by the argument that the willingness of the judge to delete the words to which the appellant took exception necessarily went to show that there was no animus against it. In any event, there was no substance to the argument and, in fairness, it, too, was more or less abandoned.

Summary and conclusions

91. It is perfectly clear from the pleadings – and from the replying affidavit of Mr. Delaney, for that matter – that the foundation of the appellant's claim is for damages arising out of the public procurement process conducted in 2011 for the award of the contract for the national postcode system, and the award of that contract to Capita in 2013.

92. It is quite properly – and necessarily – conceded by the appellant that if the substance of the action is a claim for breach of public procurement rules, it is impermissible and out of time.

93. For the reasons given, I am satisfied that the High Court judge's conclusion as to the substance of the action was not only correct but inescapable.

94. The High Court judge dealt with the respondents' motions – with the agreement of the appellant – on the basis of the pleadings as they stood. In circumstances in which the judge

concluded that the action was fundamentally flawed and impermissible, it could not have been saved by amendment of the detail.

95. I would dismiss the appeal and affirm the order of the High Court.

96. The respondents having been entirely successful on the appeal, they are presumptively entitled to an order for their costs. With the usual warning that it might increase the burden of costs, if the appellant would contend for any other costs order, I would allow it a period of fourteen days within which to file and serve a short written submission – not exceeding 1,500 words – in which event the respondents will each have fourteen days within which to file and serve their responses – similarly so limited.

97. As this judgment is being delivered electronically. Meenan and O'Moore JJ. have authorised me to say that they agree with it and with the orders proposed.