THE HIGH COURT

COMMERCIAL

[2023] IEHC 336

Record No. 2023/296 JR

BETWEEN

GLENMAN CORPORATION LIMITED

APPLICANT

AND

GALWAY CITY COUNCIL

RESPONDENT

JUDGMENT OF Mr. Justice Twomey delivered on the 20th day of June, 2023

INTRODUCTION

1. This case involves a legal challenge that could lead to a potential delay, of up to two years, in the building of 58 homes in Galway on behalf of Galway City Council ("**Council**"). The Council say that this delay will occur if this Court permits a building company ("**Glenman**") to bring a judicial review, after the deadline has expired, to challenge its exclusion from the tender for this public contract.

2. The contract is worth €10 million and is for the completion of social housing units, which are intended to house 245 people in Ballybaan More, Galway (the "**Project**"), where there is a 10-year waiting period for social housing.

3. The contract in this case is for the 'completion' of the housing units, as the Council terminated the previous contract ("**Previous Contract**") that it had with Glenman for the

works. This Council therefore sought tenders for the current contract ("**Current Contract**") for the completion of the works, which Glenman had started. However Glenman, in seeking to challenge its exclusion from this tender, failed to issue proceedings within the 30-day time-limit, imposed under Regulation 7(2) of S.I. No. 130 of 2012 European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010 ("**2010 Regulations**").

4. The Council claims that if Glenman is permitted by this Court to issue these proceedings some two months after the expiry of the 30-day time-limit, the Council will not be able to award the contract to the winning tenderer in June/July of 2023, as anticipated. Instead, the contract will be suspended, until Glenman's challenge is finally dealt with by courts. This could be for a period of up to two years if the High Court decision is appealed. Therefore, if Glenman is permitted to bring its legal challenge after the expiry of the deadline, the Council says that it will not have these 58 housing units completed by the anticipated completion date of October 2024. The Council points out that these 58 units make up a very substantial proportion of the Council's target of 224 housing units for completion in 2024.

5. The Council says it will be prejudiced if this Court were to permit the challenge to proceed after the deadline and in particular, it says that:

> "In this case, there is a **heightened public interest** in the Project proceeding as quickly as possible, **given that it concerns the provision of housing**." (Emphasis added)

While there is undoubtedly a pressing public interest in the provision of housing, it is important to observe that the law does not permit this Court to refuse Glenman's application on the grounds that there is a public interest in houses being built as soon as possible.

6. However, there is another public interest which is relevant to this case, i.e. the public interest in ensuring certainty regarding the validity of *all* public contracts (for housing, schools, hospitals, critical infrastructure, *etc*). This requires that the time-limit for any challenge to a public contract is strictly enforced and that the reasons for any applications for derogations

from the time-limit are very carefully scrutinised – in order to ensure that public contracts are not subject to endless challenges in the courts.

7. In considering what Glenman says was the reason for its delay, this Court relies in particular on the statements of Murray J. in the Court of Appeal decision in *Arthropharm (Europe) Ltd. v. The Health Products Regulatory Authority* [2022] IECA 109 at paras. 99 and 100 regarding time limits in judicial review cases. He noted that *'adverse consequences'* would follow if '*time limits were set aside lightly'* and that there are *'strong public policy'* reasons that '*lean towards the refusal of extensions of time'*. He also stated that courts *'should scrutinise with particular care explanations advanced for the failure to comply'* with time limits.

8. Having '*scrutinised with particular care'* the reasons provided by Glenman for missing the deadline, this Court concludes that the retrospective characterisation by Glenman of the reasons for its failure to comply with the deadline was affected by confirmation bias - a concept which was considered in the recent unsuccessful medical negligence claim in *Crumlish v. HSE* [2023] IEHC 194.

9. For this and the other reasons set out below, this Court has decided to allow the Council to award the contract for the social housing as early as June/July of this year (according to the Council), rather than months or years into the future.

BACKGROUND

10. The background to this dispute is somewhat unusual, since Glenman was the building company engaged under the Previous Contract, dated 20th December, 2019 to build the 58 housing units which are the subject of this new tender. However, the Council terminated that contract on 21st June, 2022. The reason for that termination is that there were considerable

delays with the works under the Previous Contract, which the Council claims were attributable to Glenman, but which Glenman disputes. As a result of those delays, only 20% of the works on the social housing was completed between 2020 and 2022. This is why the Current Contract now being offered by the Council is for the completion of the remaining 80% of the works.

11. Glenman disputes that the Council was entitled to terminate the Previous Contract. The matter was referred to conciliation and on 20th December, 2022 the conciliator (the "**Conciliator**") upheld the decision of the Council to terminate the Previous Contract (the "**Recommendation**"). However, Glenman filed a Notice of Dissatisfaction with that Recommendation.

12. It is important, at this juncture, to point out that there is a clear conflict of evidence on affidavit as to who is responsible for the historic delay on the building works. This Court cannot therefore resolve at this juncture who is responsible for this 'historic delay'. For this reason, this Court cannot take into account the 'historic delay' as a factor in exercising its discretion on Glenman's application to be permitted to issue proceedings after the expiry of the 30-day time-limit..

The Decision which Glenman wants to challenge

13. The decision which Glenman wants leave to challenge is a decision by the Council to exclude Glenman as a tenderer from the Current Contract, which decision was issued by the Council on the 22nd December, 2022 ("**Decision**"). In excluding Glenman from the tender process, the Council relied on Regulation 57(8)(g) of the European Union (Award of Public Authority Contracts) Regulations 2016 ("**2016 Regulations**"). This provides:

> "(8) Subject to paragraphs (13) and (20), **a contracting authority may exclude from participation in a procurement procedure** any economic operator in one or more of the following situations:

[…]

(g) where the economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract, a prior contract with a contracting entity or a prior concession contract, **which led to early termination of that prior contract,** damages or other comparable sanctions" (Emphasis added)

14. Prior to its decision to exclude Glenman as a tenderer, the Council had received Glenman's response dated 12th October, 2022 to the Suitability Assessment Questionnaire, which had been sent to all the tenderers for the Project. Part 3 of the questionnaire deals with the various grounds which might exclude a tenderer from the process, *e.g.* where a tenderer had been found guilty of criminal convictions, fraud, terrorist offences, *etc.*

15. Paragraph 3.C.14 reads as follows (with Glenman's answers in bold):

"Early termination, damages or other comparable sanctions

Has the economic operator experienced that a prior public contract, a prior contract with a contracting entity or a prior concession contract was terminated early, or that damages or other comparable sanctions were imposed in connection with that prior contract?

Supplier answered? **Yes**

Please describe them:

Yes, 3.C.13 the validity of the termination is a matter of an ongoing dispute resolution process.

Have you taken measures to demonstrate your reliability ("Self-Cleaning") **No**"

Should Glenman be granted leave to challenge the Decision outside the 30-day time limit?

16. Glenman is seeking the leave of the Court pursuant to Order 84A, Rule 4(2) of the Rules of the Superior Courts, to challenge the Decision despite its failure to comply with the 30-day deadline. This rule states:

> "(2) Notwithstanding sub-rule (1), the Court may grant leave, on the application of the intending applicant for that purpose, to make an application to which Regulation 7(2) of the Public Procurement Remedies Regulations or, as the case may be, Regulation 7(2) of the Utilities Remedies Regulations applies **after the expiry of the time** mentioned in sub-rule (1), where the Court considers **that there is good reason to do so**." (Emphasis added)

Glenman claims that that there is '*good reason'* for the deadline to be ignored in this instance.

Letters issued before or immediately after the expiry of the time limit

17. Of key importance, in considering whether there is a '*good reason'* to, in effect, extend the deadline, is the Decision itself and the acts and omissions of the parties after its issue, up to the expiry of the deadline for any challenge to that Decision.

18. However, before getting into detail on the evidence which has to be considered by this Court in this regard, it is useful at this juncture to consider the correct approach to analysing such evidence.

LAW RELEVANT TO LATE CHALLENGES IN PUBLIC PROCUREMENT CASES

19. It is common case that a 30-day time limit applies to any proceedings to be issued by Glenman to challenge the Decision, pursuant to Regulation 7(2) of the 2010 Regulations.

20. It is also common case that, under Order 84A rule 4 (2) of the Rules of the Superior Court, this Court may permit the issue of such proceedings '*after the expiry of the time'* if '*the Court considers that there is good reason to do so*.'

21. The leading case on the extension of time limits for the issue of proceedings in public procurement cases is the Supreme Court case of *Dekra Éireann Teo v. Minister for Environment* [2003] 2 I.R. 270.

22. At the time of that case, the time limit for the issue of proceedings was *three months*. Proceedings in that case were issued *10 days* outside the time-limit. In this case, the delay is considerably longer, since, as noted below, on Glenman's own case, the 30 day time-limit expired on 22nd January, 2023 and the proceedings were not issued until 23rd March, 2023, which is *circa two months* after the deadline.

23. The Supreme Court refused to exercise its discretion to extend the time limit, regarding a delay of 10 days (which is much shorter than the delay of *circa* 2 months in this case). In doing so, the Supreme Court set out the reason why the courts strictly apply time limits in public procurement cases

24. At p. 283 of the Supreme Court's judgment, Denham J. stated:

> "At issue in this case is **a specialist area of judicial review** and the construction of the relevant rules as to time limits. **Judicial review litigation has expanded rapidly over the last twenty years.** With the growth in public authority decisions has **come an expansion in review of such decisions**. Further, there has been a growth in specialist legislation and rules as to judicial review. In this case the relevant law and practice is that of public procurement contracts. **An essential feature** of both European law and the consequent Superior Court Rules **is a policy of urgency and rapidity** which is

required in such judicial reviews. Thus, art. 1 of Council Directive 89/665/E.E.C. of the 21st December, 1989, requires that "decisions taken by the contracting authorities be reviewed effectively, and, in particular, as rapidly as possible". In national law, an application under O. 84A, r. 4 to review a decision to award, or the award of a public contract (a) shall be made at the earliest opportunity, (b) and in any event within three months from the date when grounds for the application first arise, (c) unless the court considers that there is good reason for extending such period.

This rule applies to a decision to award, or the award of a public contract and is a specialist area of judicial review. The rules reflect a policy that such **reviews be taken effectively and as rapidly as possible**." (Emphasis added)

25. At p. 304 of the judgment, Fennelly J. stated:

"The strictness with which the courts approach the question of an extension of time will vary with the circumstances. However, **public procurement decisions are peculiarly appropriate subject matter for a comparatively strict** approach to time limits. They relate to **decisions in a commercial field, where there should be very little excuse for delay**." (Emphasis added)

26. As noted by Irvine J. in the public procurement case of *Forum Connemara Limited v. Galway County Local Community Development Committee* [2016] IECA 59 at para. 39, the very strict approach set out in *Dekra* to time-limits continues to apply, even though the time limit of three months referenced for public procurement challenges has since been reduced to 30 days.

27. It is clear from the foregoing extracts from *Dekra* that when Glenman believed, as it did on 6th January, 2023 (according to para 11.1 of its draft Statement of Grounds), that the

Decision was unlawful, it was obliged to respond rapidly and urgently, as it was a commercial operator seeking to challenge a decision in the very specialist field of public procurement.

28. There is no question in this Court's mind that it failed to respond rapidly and urgently, since not only did it miss the very strict 30-day deadline, but it also allowed a further 60 days to pass before issuing proceedings. Glenman nonetheless claims that this Court should exercise its discretion to allow it bring proceedings.

29. Glenman relies in particular on the decision in *Copymoore Ltd & Ors v. Commissioners of Public Works of Ireland* [2014] 2 I.R. 786 in which the Supreme Court permitted the addition of a new ground in a public procurement challenge some 7 ½ months after the proceedings had first been instituted. In that case, it was a mere oversight on the part of the applicant that the particular ground had not been included in the proceedings as originally drafted. The Supreme Court compared the test of extending the time for *issuing* proceedings (*i.e.* whether there was a '*good reason to do so'*) with the test of permitting the *amendment* of proceedings, which have issued within time. At p. 791 Charleton J. paraphrased from the judgment of Fennelly J. in *Keegan v. Garda Síochána Ombudsman Commission* [2012] 2 I.R. 570 at para. 35, that '*there is no reason to impose a more exacting standard'* for an amendment '*than would be the case for a late application'*.

30. In the High Court in *Copymoore*, the trial judge had refused to amend the pleadings, some 7 ½ months late, on the basis that all the information necessary for the insertion of the additional ground was available to the applicant within the time-limit. However, in the Supreme Court, Charleton J. held that this view was overly strict and so Supreme Court held that the amendment should be permitted.

31. Glenman places particular reliance the Supreme Court's statement in *Copymoore* that there should not be a more exacting standard for the *late* amendment of pleadings than for the *late* issue of proceedings.

32. This Court understood Glenman's submissions to be that, because the Supreme Court permitted a 7 ½ month delay in the context of *late amendment* to pleadings (which were issued in time) where the omission was caused by human error, this Court should therefore not have an issue with ignoring a two-month delay in the *late issue* of proceedings.

33. However, it does not seem to this Court that this is what *Copymoore* says, since it was dealing with the late amendment of proceedings, not the late issue of proceedings, as in this case. In particular, it does not follow that if a court is liberal about the *late amendment* of proceedings, which have been issued within time, that it should be liberal about permitting the *late issue* of proceedings, which have not been issued within time. This is because there is a significant difference in the legal consequences which arise when a court permits the *issuing* of proceedings outside a time limit on the one hand, and the late *amendment* of proceedings (which have been issued within the time limit) on the other hand.

Challenging public procurement is one of most powerful legal tools available to a litigant

34. This difference is most acute in public procurement cases. This is because once proceedings in a public procurement challenge issue, provided they have been issued within the very strict 30-day time-limit, this has a potent legal effect, namely the suspension of the contract, the subject of the public procurement.

35. Indeed, it is arguable that the issuing of a public procurement challenge is one of the most powerful legal tools available to any litigant. This is because the *very issue* of the proceedings (and so without any court oversight), and *irrespective* of the merits of those proceedings, leads to the suspension of, in many cases, multi-million-euro public contracts involving critical infrastructure, hospitals, schools, social housing, *etc*. It seems clear that because of the potent legal effect of the *issue* of proceedings in public procurement cases, for very good public interest reasons, the window of opportunity for a potential litigant to exercise

this powerful legal weapon is exceptionally limited, *i.e.* it must be done within 30 days of the decision being challenged.

36. In contrast, where proceedings in a public procurement case have already been issued, the powerful legal weapon has *come into force*, with the suspension of the public contract, and therefore the late amendment of those proceedings, if granted, will *not* have the same powerful legal effect.

37. Thus, a court application to permit the *late issue* of proceedings in a public procurement case (as was *refused* in *Dekra*) is very different from a court application to permit the *late amendment* of proceedings, after they have already issued (as was *permitted* in *Copymoore*). In *Dekra*, if they had been permitted, the late issue of the proceedings would have led to the automatic suspension of a contract, while in *Copymoore*, the contract was already suspended In this case, it is important to bear in mind that one is dealing with the late *issue* of proceedings, as in *Dekra*, and not the late amendment of proceedings, as in *Copymoore*.

38. A similar point regarding the difference between the late issue of proceedings and the late amendment of proceedings was made by the High Court in *Sherwin v. An Bord Pleanála* [2023] IEHC 26 at paras. 37 and 38, *albeit* that it did not involve a public procurement judicial review, but a planning judicial review. In that case, Humphreys J.'s judgement does not provide for Glenman's view that a liberal approach to *late amendments* justifies a similarly liberal approach to the *late issue* of proceedings:

> "The basic principle is that any given set of proceedings challenging a decision should be brought within the statutory period, and any failure to do so must be supported by good and sufficient reason. **However, once such proceedings are brought, any further amendment does not require that same level of "good and sufficient reason"** but rather arguability, explanation and lack of irremediable prejudice, the overall test being the interest of justice. **After all, the main purposes of the statutory**

period has been achieved by a prompt bringing of proceedings, even if elements of the case are refined later. In short, what counts as good and **sufficient reason for an amendment is less demanding then what would count as good and sufficient reason for not bringing the action within time at all**.

This makes sense in a context where, as in *North Westmeath Turbine* and *Keegan*, the normal explanation for an amendment is oversight by an applicant's legal advisers. The law must look comprehendingly on such inevitable human oversights insofar as they occur in the course of the process, **but the system would be hopelessly unworkable if one were to offer equal latitude to oversights regarding the initiation of the process in the first place.** Consequently, it makes complete sense **to have a very high bar for the initiation of the proceedings, thus requiring good and sufficient reason for proceedings to be brought out of time**, **with a less extreme test of explanation (along with arguability and lack of a remedial prejudice) as regards amendments that are brought to proceedings that have been properly instituted within time in the first place**. The reality – much denied or (depending on your point of view) concealed by opposing parties – is that **the vast bulk if not normally all of the public policy objectives sought to be achieved by limitation-type periods for initiating proceedings are achieved by the bringing of the proceedings within that time**. A bit of refinement to the grounds or even reliefs is neither here nor there in that context and does very little injury to the public interest in expedition. Nor does it injure the need for certainty as to the status of a decision – the status is by definition known at that point, being a decision already under challenge." (Emphasis added)

39. Similarly, in *Dunne v. Kildare County Council* [2023] IEHC 73, the High Court was dealing with a challenge to whether proposed works were an exempted development for the purposes of the Planning and Development Act, 2000, which challenge was brought outside

the eight-week period, by one day. The effect of the issue of the proceedings was not the very powerful automatic suspension of a contract, but rather a change in the status of the decision, from one under challenge to one not under challenge. Nonetheless, in considering whether to extend the time limit for the judicial review, Humphreys J. observed the significant difference between, on the one hand, *permitting late proceedings*, which would change the status of the decision (to one under challenge), to, on the other hand, merely *amending the grounds of challenge to a decision*, already subject to challenge. He notes at paras. 36 and 37 that the test for permitting the late issue of proceedings is more demanding than the test for the late amendment of proceedings:

> "The problem for the applicants is that **human error rarely qualifies as good and sufficient reason for the late commencement of proceedings in a context where certainty is particularly important.** It normally cannot **justify an extension of time *to commence the proceedings at all*, although, once commenced, human error can legitimately be a basis *for an amendment of pleadings*** (that is what happened in *Keegan v. Garda Siochána Ombudsman Commission* [2012] 2 I.R. 580 [2012] IESC 29). That is because the **test for what counts as a good and sufficient reason for an amendment is, quite logically and fairly, less demanding than the test for instituting the proceedings out of time. Most if not all of the public policy benefits of expedition are achieved if the action is commenced in time, and later refinement of pleadings inflicts much less if any harm on those benefits**.
>
> To put it another way, a strict approach to time limits for commencement of proceedings is proportionate and fair because **late proceedings change the status of a decision from unchallenged to challenged**. **An equally strict approach to amendments would be disproportionate** and unfair because amendments merely refine the detail but **do not change the status of the decision**, which is already challenged at that

stage. Forbidding amendments that originate from human error would set an unfair and in any event an impossibly high standard and would give opposing parties a windfall benefit from an applicant's error that was disproportionate in terms of the interests of justice. **But it is not disproportionate to be fairly rigorous in setting the bar high for demonstration of good and sufficient reason to extend the 8 week requirement to bring the proceedings at all**." (Emphasis added)

40. On this basis, and as this was not merely a case of an amendment of proceedings that had been issued within time, but rather the permitting of proceedings which *had not been issued in time*, Humphreys J. held that the applicants had missed the deadline, *albeit* only by a day. He held that the human error, which led to missing that deadline, did not justify the extension of the deadline.

41. It has already been noted that the *Forum Connemara* case deal with a public procurement challenge which was subject to the 30-day deadline, as in the present case. At para. 36, Irvine J. noted, as had been done in *Dekra*, the importance of applicants who wish to challenge public contracts doing so '*from the moment'* they become aware of the alleged unlawful decision:

"The need for a relatively strict adherence to the time limits provided for the commencement of proceedings which seek to challenge decisions, including interim decisions, in a procurement process is well understood and it is not disputed by the parties on this appeal that the spirit and purpose of the prevailing time limit is to ensure that unlawful decisions of contracting authorities, **from the moment they become known to those concerned, are challenged and corrected as soon as possible**." (Emphasis added)

42. However, of particular relevance to this case is that Irvine J. made specific reference to the fact that the effect of the issue of a public procurement challenge is that there is a suspension of a public contract. Crucially, she pointed out that the *quid pro quo,* for an applicant having this (very powerful) right to suspend a contract (which is often a multi-million contract in the public interest), is that this right has a very tight time limit. At para. 49, she states:

> "The position of [the applicant] in this case was, in my view, no different from that of any other interested party aggrieved as to the manner in which a particular decision contrary to its interests was made in the context of a procurement contract. If such a party wants to challenge such a **decision they are obliged to do so within the time permitted. The *quid pro quo* for the entitlement to challenge a decision** or the award of a contract in a public procurement process, **given that the effect of such a challenge is that any contract on foot of that decision is stayed** pending the conclusion of the proceedings; is that **they must move** to have that dispute determined with **immediate effect**."

It seems to this Court that the *quid pro quo* is, not only that the right is subject to a very tight time limit, but also that this time limit is strictly enforced. This is because of the observations of the Court of Appeal (Murray J.) in *Arthropharm (Europe) Ltd. v. The Health Products Regulatory Authority* [2022] IECA 109. That case was not a public procurement case, but nonetheless it analyses, in some detail, commercial judicial review reviews generally (of which public procurement cases form a part). He notes at para. 99 *et seq* that:

> "This brings me to a broader issue to which I have already made reference. Every application for an extension of time for leave to seek **judicial review must be undertaken in the light of the objective served by the time limit**. That purpose, as explained by Lord Diplock in *O'Reilly v. Mackman* [1983] 2 AC 237 (at p. 280 to 281)

is to implement a public interest of good administration that state authorities and third **parties should not be kept in suspense as to the legal validity of a decision the authority has reached** in purported exercise of its legal powers for any longer period than is absolutely necessary in fairness to those affected by those decisions. A similar explanation appears in the judgment of Clarke J. in *Shell E&P Ireland Ltd. v. McGrath* [2013] 1 IR 247 at p. 264 and in the judgment of Power J. in *AB v. XY*. Time limits in judicial review proceedings, she explained, fulfil the important function of enabling people to know where they stand on foot of decisions of administrative bodies and to conduct their affairs accordingly: ' **if a practice were to develop whereby time limits were set aside lightly, adverse consequences for the judicial system would, inevitably, follow**' (at para. 52).

Proceedings seeking **judicial review of decisions in the commercial sphere** – most notably of regulators, of licencing authorities, of public bodies in awarding contracts, of decisions impacting on **projects involving large disbursements of public funds** or of decisions of the executive impacting on the conduct of the business of commercial undertakings – are of a kind in which **the courts should usually incline to strict enforcement of the applicable time limits and should scrutinise with particular care explanations advanced for the failure to comply with those requirements**.

This is so for a variety of reasons operating broadly at two levels. First, it is to be expected that both the decision makers and the commercial undertakings affected by such determinations will frequently have adjusted their operations and (in the case of the latter) financial affairs and business operations on the basis of such administrative decisions, and it will often be the case that **they can legitimately expect that those decisions will not be upset outside the period prescribed by the law**. The recognition that certainty in the law is critical to the proper functioning of commercial undertakings

– an assumption exemplified in this jurisdiction by the establishment of the Commercial Court and investment therein of very significant judicial resources — carries an advantage for those engaged in that activity, **but also imposes a corresponding burden upon litigants whose cases originate in, and seek to promote their economic interests within, that context.**

Moreover, and second, it will also usually be the case that the **considerations that may cause the courts to sympathetically incline to extend time for some categories of litigant** (at least for short periods) – ignorance of legal entitlement, inability to access appropriate professional advice, a reluctance to embark upon litigation because of the exposure to legal costs it may entail, particular circumstances of personal vulnerability that rendered proceeding to court difficult and the absence of any countervailing third party interests impacted by enabling a delayed assertion of their legal rights – **will not apply in such cases**. It is to be expected that those who seek to challenge decisions of the kind in issue in this **case will be well resourced, will have legal advice at their disposal, will be robust in their acceptance of the consequences of the risk attending any legal action and will be in a position to organise their affairs so that litigation can be rapidly brought and pursued**. I have earlier noted observations to this effect in *MO'S*, and similar statements can be found throughout the case law (see *Noonan Services Ltd. v. Labour Court* [2004] IEHC 42 (the appeal against which was dismissed in an ex tempore judgment of 14 May 2004), *SIAC Construction Ltd v. National Roads Authority* [2004] IEHC 128, *Mulcreevy v. Minister for Environment* [2004] IESC 5, [2004] 1 IR 72 at p. 80, *Cityjet Ltd v. Irish Aviation Authority* [2005] IEHC 206).

All of this means that there is a strong public policy in such cases that leans towards the refusal of extensions of time – even those of seemingly modest periods.

In public procurement cases, most notably, it is not uncommon to see extensions of a **short number of days being refused** (see *Dekra Éireann Teo. V. Minister for Environment* [2003] IESC 25, [2003] 2 IR 270 and *Veolia Water UK plc v. Fingal County Council*). Indeed, other situations in which there are similarly strong (but — in some cases — different) policy issues in play (notably in planning cases) result in similar outcomes – **nineteen days** in *Kelly v. Leitrim County Council* [2005] IEHC 11, [2005] 2 IR 404, **five days** in *Duffy v. Clare County Council* [2016] IEHC 618, seventeen days in *Irish Skydiving Club Ltd. v. An Bord Pleanála*, **two months and four days** in *McCaffrey v. Central Bank of Ireland* and ors., **twenty-five days** in *Cassidy v. Waterford City and County Council* [2017] IEHC 711, and **two weeks** in *AB v. XY*." (Emphasis added)

Summary of legal principles applicable to this case

43. In conclusion therefore, it seems clear to this Court that the *quid pro quo* for an applicant being given the extremely powerful legal tool:

- of being able to bring a multi-million public contract to build critical infrastructure, hospitals, schools, social housing, *etc* to a shuddering halt,
- by the simple expedient of issuing proceedings,
- which could have a negative impact upon the public interest,
- regardless of the merits of those proceedings, and
- without any court oversight,

is firstly that there is a very tight deadline, secondly that the deadline is strictly enforced and thirdly that the reasons for there to be an exemption from the deadline are very carefully scrutinised.

44. For all the foregoing reasons, this Court believes that the Supreme Court decision in *Dekra*, which dealt with the *late issue* of proceedings in a public procurement case, carries much greater weight in these proceedings than the Supreme Court decision in *Copymoore*, which dealt with the *late amendment* of proceedings in a public procurement case.

45. In particular, it can be seen from the analysis in *Arthropharm* that the approach of the courts to the *late issue* of proceedings in judicial review cases generally has been to enforce very strictly the time-limits, with a delay of 1 to 5 days being held to be sufficient to justify the denial of permission to bring the proceedings.

46. It seems to this Court that when dealing with the sub-category of judicial review cases involving public procurement, where the powerful weapon of the automatic suspension of a public contract is available in effect, 'for the asking' (i.e. by the simple expedient of issuing proceedings), there is an even greater reason for a court to be *'strict'* and to very carefully *'scrutinise'* the reasons put forward for extending the deadline. Accordingly, this is the approach which is taken by the Court in this case.

APPLICATION OF THE LAW TO THE FACTS OF THIS CASE

47. To analyse whether there is a '*good reason'* for this Court to permit the proceedings after the expiry of the deadline, it is now necessary to return to the evidence and in particular to:

(i) the Decision

(ii) the reaction of Glenman to that decision (as evidenced by Glenman's correspondence) and

(iii) the response of the Council to Glenman's reaction (as evidenced by the Council's correspondence).

A key factor in determining whether there is a good reason to permit the proceedings to be issued some two months after the deadline is whether there was a good reason, in the first place, for Glenman not to issue the proceedings before the deadline.

Contemporaneous evidence is important in deciding if there is a 'good reason' for delay

48. For this Court to determine in June 2023 whether Glenman had good reason in January 2023 not to issue proceedings before the deadline expired, one has to examine very carefully what the parties did, and did not do, and also what they said and did not say, as evidenced by the *contemporaneous* letters issued and received by both parties during the 30-day time-limit.

49. Contemporaneous in this context is not used in the context of a note contemporaneously taken of a meeting by an attendee at the meeting, but in the sense of a letter written on a day expressing a party's views *on that day*. Similarly, it is used in the context of a note evidencing what a party actually did or did not do, or what she did or did not say on that day. In determining whether a party had good reason, during the relevant time period, not to institute proceedings, this contemporaneous evidence can be particularly valuable since it provides an insight into what a party was thinking (and what it may not have been thinking) at the crucial time. It is likely therefore to be of more value than affidavit evidence given some months later, which seeks to interpret acts or omissions in hindsight and after the deadline has expired and which is susceptible to confirmation bias.

Confirmation bias in litigation

50. Confirmation bias is invariably a risk in litigation, since litigation by its very nature involves the giving of reasons by a litigant for acts or omissions *after* the event *i.e.* after the alleged negligence, after the alleged breach of contract, after the failure to meet a deadline *etc.*

However, those reasons are given, usually with the benefit of legal advice, and invariably with the benefit of knowing what legal tests have to be satisfied for the litigant to succeed. Once a litigant is viewing her past acts or omissions, while *believing* (or hoping) that they satisfy a given legal test, there is a risk of confirmation bias coming into play. The risk is that she will only view and interpret those acts or omission through that prism and will discount other reasons for what occurred and therefore will interpret those acts or omissions in a way which confirms her belief or hope.

51. The importance of a court being alert to the existence of confirmation bias is highlighted by the recent judgment of Gearty J. in *Crumlish v. HSE* [2023] IEHC 194, in which the plaintiff was unsuccessful in her claim that her doctors were negligent in failing to diagnose her breast cancer sooner. Confirmation bias in that case arose in relation to evidence provided not by a plaintiff, but by the plaintiff's medical expert. In relation to an expert's evidence, confirmation bias arises if the expert seeks out and relies only on evidence which confirms her view, rather than analysing the evidence, without any pre-conceived outcome in mind.

52. In *Crumlish,* the confirmation bias on the part of the plaintiff's medical expert (Professor Nigel Bundred) who provided testimony to the court alleging negligent failure by the plaintiff's doctors to diagnose her cancerous tumour in May 2017, rather than the following October, when it was diagnosed. Gearty J. noted that Professor Bundred had relied, for his claim of negligence, on the fact that the cancerous growth in May 2017 was 15 mm in size, which tumour he claimed the plaintiff's doctors negligently failed to detect. However at para 10.18 *et seq* Gearty J. deals with the '*fundamental'* issue of the presence of confirmation bias in evidence presented to a court (whether by an expert or a litigant):

> "[…] Professor Bundred's calculations as to doubling time are based not only on the Peer paper date but on **his theory that the pea-sized lump felt in May was the same as the tumour in October**. The defence argues that these are different entities. This

line of defence was clear from the pleadings, in which the lump is described as having been a cyst. If Peer's data alone cannot identify the previous size of this tumour, or not with any accuracy, **the estimate of 15 mm is not reliable**. If there is no assumption about what was palpated in May, we are left with only one measurement, that taken in October, no indication as to when the lump formed, and no way of telling where on the growth curve this cancer was at any given time.

This argument is more fundamental than being a comment on where the tumour might be on a growth curve: if the size of the pea-sized lump in May has informed Professseor Brundred's thinking, then it is not just the reliability of the data in Peer that is in issue but **there is strong evidence of a confirmation bias** that the size of the cancer in May **must have been 15 mm as only this size lump will fit with the facts** as to what was palpated **and his theory** that the lump was cancerous.

[…]

Professor Crown also, through the Goldilocks analogy, alerted the Court to the fact that the Plaintiff's expert was **choosing the one doubling time that would lead to a result consistent with his theory**. There was no detailed explanation as to why 45 days was chosen other than to say it was at the faster end of the range identified in Peer. **It appears to the Court that confirmation bias accounts for the specific choice of 45 days** in this case and, as Professor Bundred conceded, the rate could be as slow as 60 days." (Emphasis added)

Because Professor Bundred's evidence was tainted by confirmation bias, it was rejected by Gearty J.

<u>Confirmation bias in this case?</u>

53. In this case, the risk of confirmation bias arises because Glenman has given affidavit evidence retrospectively analysing the reasons for missing the deadline. This evidence, which

characterises in a certain way, what it did/failed to do during the 30-day time-limit, is subject to the risk that Glenman, perhaps unconsciously, will characterise this evidence in a way which best fits its objectives in this litigation. In contrast, there is no risk of confirmation bias in the evidence which came into existence during the 30-day time-limit. This is because the deadline had not expired at that stage and the parties were not seeking in their letters to characterise their acts/omissions in a way which makes them less/more likely to satisfy a legal test. For this reason, this Court attaches particular importance to that evidence.

54. Bearing in mind the risk of confirmation bias attaching to the affidavit evidence and the submissions made by parties, it is relevant to note that the key reason provided by Glenman to this Court, for its failure to issue proceedings in time, was its claim that the Decision, which it was challenging, contained a reference to a '*without prejudice'* document (the Recommendation) and not a document that was merely '*confidential'*.

55. Yet, as noted further below, nowhere in the contemporaneous evidence which came into existence *during* the 30-day period is there any reference to the Recommendation being '*without prejudice'*. As will be seen, there are only references to the Recommendation being *'confidential'*.

56. In the context of this Court determining what was the *actual* reason for Glenman's failure to issue proceedings within the time-limit, it is relevant to note that the first reference, to the allegedly 'without prejudice' nature of the Recommendation being the reason for the delay, is provided *after* the expiry of the deadline.

57. Indeed, even in the initial period after the deadline had expired, it is relevant to note that the claim that the Recommendation is 'without prejudice' is not even mentioned as a reason for the delay. Thus, it is not mentioned in the first letter from Glenman's solicitors dated 10th March, 2023, nor in the first affidavit of Mr. Albert Conneally, on behalf of Glenman, dated 22nd March, 2023. There is only reference in that letter and that affidavit to the

Recommendation being 'confidential'. Instead, it is raised for the first time in Mr. Conneally's second and final affidavit dated 27th April, 2023, which is *circa* 3 months after the deadline has expired. At para 18 he states in explicit terms that the 'without prejudice' status of the Recommendation was the reason why Glenman failed to meet the deadline:

> "However, I say, believe, and am advised that referring to material which is subject to **without prejudice material**, in pleadings or in evidence, amounts to an abuse of process Had Glenman issued proceedings without first requesting the Council to withdraw and re-issue the Decision Letter with the offending sentence removed, Glenman would have left itself open to significant criticism from the Council and/or for exhibiting and referring to privileged material. Accordingly, Glenman sought to engage with the Council to avoid the very scenario that now presents and invited the Council to withdraw and re-issue the Decision Letter. **The is the reason why the proceedings were not issued within 30 days from receipt of the Decision Letter**". (Emphasis added)

58. In addition, in the oral and written submissions to this Court, Glenman puts particular emphasis on this point and it seemed to this Court that the during the hearing, the primary, if not the sole, reason, why Glenman *now* says that it did not issue the proceedings before the deadline expired was because it would amount to an abuse of process for it to institute proceedings exhibiting a '*without prejudice*' Recommendation.

59. For this Court to decide that there is a '*good reason'* for it to permit proceedings after a deadline, it has to be convinced that the *actual* reason for the delay, was the one claimed, and not a reason that occurred to an applicant after considering the matter after the deadline had expired, with the benefit of legal advice and so subject to the risk of confirmation bias influencing the applicant's thinking.

60. In this instance, it is important to note that Glenman's case is stronger if the reason it did not issue proceedings in time was because it was concerned that the Decision referred to a 'without prejudice' Recommendation, rather than merely a 'confidential' Recommendation. However, as there is nothing in the contemporaneous evidence which supports Glenman's claim that the former was the reason, it seems to this Court that Glenman, perhaps unconsciously, is involved in attempting to 'fit the facts into a theory which has the best chance of success for its litigation' (as was done in *Crumlish*). For this reason, this Court concludes that this affidavit evidence (and the submissions made to court) are both affected by confirmation bias, insofar as Glenman claims that the reason for the delay was the 'without prejudice' Recommendation.

61. In analysing very carefully this affidavit evidence and submissions, and in considering whether it is subject to confirmation bias, this Court relies on the judgment of the Court of Appeal in *Arthropharm* that the courts '*should scrutinise with particular care explanations advanced for'* the delay.

62. In this instance, this Court takes this to mean that particular scrutiny should be applied to explanations given *after the fact*, for an act or omission, when a party is seeking to justify its failure to comply with a deadline, particularly where those explanations are nowhere to be found in the contemporaneous evidence. In applying '*particular scrutiny'* this Court needs to be alive, in particular, to confirmation bias on the part of a litigant seeking, consciously or unconsciously, to fit within the legal tests to be satisfied for her to win her case.

63. It is also clear that the reason for the strict approach to the enforcement of the deadline and the strict scrutiny of explanations for non-compliance therewith, is because such an approach is in the public interest, i.e. to ensure that important public works, which are invariably intended to be in the public interest (such as social housing, in this case) are subject to certainty regarding their legality, as soon as possible, and are not delayed, if at all possible

by court challenges after the expiry of the deadline. This point is particularly relevant in the present context, where there is a well-publicised shortage of housing in the country and where there are few more important matters in the public interest than the provision of housing.

Analysis of the contemporaneous evidence

64. Having referred to the key reason why Glenman says it missed the deadline (i.e. the reference to the allegedly '*without prejudice*' Recommendation), which reason is *not* contained in the contemporaneous evidence, this Court will next examine what *is* contained in the evidence which was generated during the 30-day time-limit. This will assist this Court in deciding what the actual reason was for the delay by Glenman in issuing proceedings and then deciding whether this amounts to a '*good reason*' for this Court to permit the proceedings to issue outside the deadline.

65. First, it is relevant to note what the Decision states and what Glenman would have understood it to mean.

Letter of 22nd December, 2022 from the Council to Glenman

66. The first letter, which it is necessary to set out in full, is the Decision itself, which is dated 22nd December, 2022 and is from the Council to Glenman. It states:

> "Re Invitation to Pre- Qualify
>
> Garraí Beag Social Housing Scheme, 58 Units, Ballybaan More, Galway
>
> A Dhaoine Uaisle
>
> I refer to your application to prequalify for the Competition above.
>
> I write to advise you that the Council deems (subject to the below) your organisation to have failed Criterion 3.1 (Evidence of Applicant's Personal Situation) as specified in the Suitability Assessment Questionnaire ("SAQ"). This is due to your organisation

falling within Regulation 57(8)(g) of the European Union (Award of Public Authority Contracts) Regulations 2016 (the "2016 Regulations"), namely:

> *'where the economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract, a prior contract with a contracting entity or a prior concession contract, which led to early termination of that prior contract, damages or other comparable sanctions;'*

The Council is of the view that your organisation's termination under Clause 12.1 (Termination on Contractor Default) on the previous Ballybaan More scheme constitutes a scenario to which Regulation 57(8)(g) of the 2016 Regulations applies. Further, your organisation acknowledged as part of its European Single Procurement Document ("ESPD") response to the SAQ that it **experienced a prior public contract that was terminated early, although its stated that '*the validity of the termination is a matter of an ongoing dispute resolution process'***. As a consequence, neither the Council nor your organisation appears to be in disagreement as to the application of Regulation 57(8)(g) of the 2016 Regulations. **The validity of the Council's termination under Clause 12.1 was also confirmed by the Standing Conciliator's recommendation dated 20 December 2022 arising from a recent referral to conciliation on the Ballybaan More project.**

Your organisation also indicated within its ESPD '*no*' when asked '*Have you taken measures to demonstrate your reliability ("Self-Cleaning")?*. As a consequence, the Council is of the view that your organisation has waived its right under Regulation 57(12) of the 2016 Regulations to '*provide evidence to the effect that measures taken by the economic operator concerned are sufficient to demonstrate its reliability dispute*

the existence of a relevant ground for exclusion.' and therefore intends to exclude your organisation from the Competition due to lack of adequate evidence to demonstrate measures to demonstrate its reliability.

If your organisation did not intend to waive its right under Regulation 57(12) of the 2016 Regulations it must provide **such evidence of its reliability to the Council by no later than 5pm on Friday 6th January 2023** for assessment by the Council in accordance with Regulations 57(12) to (16) (inclusive). **If your organisation does not provide such information by this date and time, it will be excluded from the Competition**.

Subsequent to invitations to tender being issued to the shortlisted candidates, the identification of the successful tenderer and the observance of the mandatory standstill period, it is anticipated that the name of the winner will be published by means of a contract award notice.

Is mise, le meas." (Emphasis added)

Before considering the remaining letters during the 30-day time-limit, it is helpful to consider, at this juncture, the deadline which applied to any challenge by Glenman to the Decision.

What was the deadline for the challenge to the Decision?

67. In its written legal submissions at para. 75, Glenman appears to accept that the 30-day time-limit began to run from the 22nd December, 2022 (the date of the Decision), since it states that the deadline expired on 22nd January, 2023:

> "Therefore, the actual delay to be assessed is the period between the expiry of the 30 day period (22 January 2023) and the date on which this application issued 23 March 2023".

In its draft Statement of Grounds, Glenman states that:

> "On 6 January 2023, Glenman wrote to [the Council] identifying the infringements challenged in these proceedings".

Thus, it is also clear that by 6th January, 2023, Glenman was aware of the grounds for challenging the legality of the Decision.

68. For its part, the Council, in its letter of 1st March, 2023 to Glenman, which is referenced below, suggests that the 30 day time period began to run from 22nd December, 2022. However, it also acknowledges that the latest possible date for the deadline to expire was the 10th February, 2023 (on the basis, it seems, that the Council issued a letter dated 11th January, 2023, referenced below, which had the effect of confirming what was stated in the Decision, i.e. the exclusion of Glenman from the tender process.

69. On Glenman's own case therefore, the deadline expired on 22nd January, 2023 and so it was a full two months *after* the expiry of that 30-day deadline, on 23rd March, 2023, that Glenman issued these proceedings, seeking leave to challenge the award of the public contract, despite the expiry of deadline. Thus, in this Court's exercise of its discretion as to whether to permit the late issue of proceedings, it is relevant to note that Glenman's delay (of *circa* 60 days) in issuing the proceedings was *twice the length of the window* (30 days), within which it was required to issue those proceedings.

70. Bearing in mind that when Glenman issued its response on the 6th January 2023, there can have been no doubt in its mind that there was a 30-day time-limit to issue proceedings, it is important to consider, not what Glenman says *now* was its reasons and motivation for not

issuing proceedings, but what it stated in correspondence were its reasons during the 30-day period.

71. In addition, as this Court is dealing with a commercial judicial review over a €10 million contract, it is '*to be expected'* that Glenman was well resourced, had legal advice at its disposal and knew that, not only was there a tight deadline, but also that it was strictly enforced, and that it could organise affairs so that litigation could be brought rapidly (as observed by Murray J. in *Arthropharm* at para. 102).

72. Yet, as will be seen, Glenman chose not to institute proceedings within the 30-day time limit, but instead waited *circa* two further months to issue proceedings in its attempt to put a halt to the building of the social housing.

73. Having set out the Decision, this Court will now '*scrutinise with particular care'* Glenman's statements regarding the Decision, during the period when the deadline had not expired, but when it chose not to issue proceedings.

Letter of 6th January, 2023 from Glenman to the Council

74. The first letter exhibited from Glenman to the Council is dated 6th January, 2023 and insofar as relevant it states:

> "As you are well aware, we strongly dispute the suggestion that there were any 'significant or persistent deficiencies' in our performance of our obligations under the previous Ballybaan Contract […]
>
> **Regarding the Recommendation, we are surprised that you have seen fit to refer to the content of this document, given its confidential status**. Having done so, it would seem to follow that your **letter is covered by the same confidential status**.
>
> In any event, as you know, we have rejected the finding of the Recommendation that the termination was valid under sub clause 12.1.1 (3), and so that aspect of the

Recommendation has absolutely no status. In the same way as the Standing Conciliator's Recommendation to the effect that [the Council] was not entitled to terminate under sub clause 12.1.1(3) in February 2022 has no status, given that you rejected that Recommendation. It is also worth recording that the Standing Conciliator found that [the Council] failed in 13 other grounds on which it had attempted to terminate.

We call on you to confirm that you will now drop your reliance on Regulations 57(8)(g) and 57(12) and proceed to assess our pre-qualification application fairly, transparently and impartially. If you proceed to exclude us from the pre-qualification process, we are well aware of our rights in the sphere of Public Procurement and we will vigorously challenge that action." (Emphasis added)

75. It is important to note that from the date of this important first response of Glenman to the Decision (6th January, 2023), it is claiming that the reference in the Decision to the Recommendation should not have been contained in the Decision, as the Recommendation was a '*confidential*' document.

76. In effect, Glenman is claiming that the inclusion in the Decision of the reference to the '*confidential'* Recommendation (and, as shall be seen, the Council's subsequent refusal to remove that reference) is so significant that it was a good reason for Glenman not to issue proceedings within the deadline.

77. However, if the reference to a confidential Recommendation is so egregious as to merit a failure to comply with the 30-day deadline, it does seem curious that Glenman would itself so casually refer in this letter of 6th January, 2023 to a previous *confidential* recommendation of a conciliator under the Previous Contract (and which letter might also have to be exhibited in the proceedings which Glenman were contemplating). This fact therefore undermines, to a

certain degree at least, the claim that the reference to the 'confidential' Recommendation was the primary or real reason for the failure by Glenman, at that time, to issue proceedings in time.

78. What is equally relevant to note is what is *not said* in this letter of 6th January, 2023, particularly as on this date, according to Glenman's draft Statement of Grounds, it was in a position to identify '*the infringements challenged in these proceedings*' (which it duly did in this letter). Yet, in this letter there is no reference to the Recommendation being 'without prejudice'.

79. At this stage therefore (and, as will be seen, throughout the 30-day time limit), the only *stated* reason for Glenman not complying with that deadline is that the Decision referred to a *'confidential'* document. In these circumstances, it is hard to avoid the conclusion that the fact that the Recommendation was allegedly '*without prejudice*' was not a reason, during the 30-day time limit, for Glenman's failure to issue proceedings in time.

80. It is important to note at this stage, as is clear from the draft Statement of Grounds, that Glenman had all the information that it needed to issue proceedings, but it failed to do so. Accordingly, when this Court is exercising its discretion as to whether to permit the proceedings after the deadline, this is not a case where Glenman only became aware of the grounds for a legal challenge after a deadline expired. Glenman accepts that by 6th January, 2023, at the latest, it was aware of its grounds to challenge the Decision, but it chose not to do so.

81. Indeed not only did Glenman have all the information it needed to issue the proceedings, it stated in very clear terms in this letter of 6th January, 2023 that it would '*vigorously challenge'* the Decision. However, it failed to do so within the 30-day deadline and now it is seeking permission to do so *circa 60 days later*.

82. Crucially, in this letter (in which Glenman accepts that it had identified the infringement in the Decision), and in which it states that it '*will vigorously challenge'* the Decision, there is

no suggestion that Glenman requires additional reasons for the Decision or that it misunderstands the reason for the Decision.

83. Thus, it is clear at this stage that Glenman knows that the reason it is being excluded from the tender is because of the termination of the Previous Contract.

84. Similarly, there is no suggestion that Glenman misunderstands why Regulation 57(8)(g) was invoked. Thus, at this stage, Glenman, a sophisticated and experienced tenderer, had everything it needed, to issue proceedings, and knew or should have known that there was a 30-day time-limit for issuing proceedings. However, instead of issuing proceedings, it finished this letter by asking the Council to, in effect, re-consider the Decision, by dropping its reliance on Regulation 57(8)(g) and so, in effect, to admit Glenman to the tender process.

85. In considering whether there is a good reason for this Court to permit the proceedings to be issued after the deadline, it is important to pause at this stage (and not be overly influenced by retrospective analysis which may be subject to confirmation bias) and to remember that this is what Glenman was doing - when it knew that it had grounds to challenge that Decision. It was *not* issuing proceedings, so as to be within the 30-day time limit, but rather it was *asking the Council to reconsider* its Decision and *engaging in legal argument* about the status of the 'confidential' Recommendation.

Letter dated 11th January, 2023 from the Council to Glenman:

86. It is relevant to note that the Council replied very promptly to this letter from Glenman, as the reply is sent only five days later on 11th January, 2023 and insofar as relevant, it states:

> "I refer to the letter from Galway City Council (the "Council") on 22 December 2022 which confirmed that your organisation would be excluded under Regulation 57(8)(g) of the European Union (Award of Public Authority Contracts) Regulations 2016 (the

"2016 Regulations") in the event that evidence of measures adopted under Regulation 57(12) of the 2016 Regulations was not provided by 5pm on Friday 6 January 2023.

On the basis that your letter of 6 January 2023 has confirmed that no such evidence will be provided, **the exclusion of your organisation from the competition pursuant to Regulation 57(8)(g) has taken effect in accordance with our letter of 22 December**.

Please note that contrary to the assertions raised in your letter of 6 January, this exclusion is a manifestly appropriate and indeed a necessary response in circumstances where your organisation's prior conduct has led to the early termination of a previous contract with the Council, in addition to the imposition of liquidated damages for delay under the same contract (as it happens, on the Ballybaan More scheme – the scheme that is the subject of this Competition).

Your letter of 6 January makes reference to the confidentiality of a conciliation process and to 'surprise' at reference to the status of a recommendation in that context. For the avoidance of doubt, **given that the conciliation process in question was between the Council and Glenman, the parties to this chain of correspondence, we fail to see the point you seek to make regarding confidentiality**. We also note also that our letter of 22 December 2022 predated your 'rejection' of the recommendation in question, which occurred on 30 December 2022. Regardless of your rejection of the recommendation, the termination, for the reasons outlined above, remains in place and the grounds for the exercise of the discretionary exclusion under Regulation 57(8)(g) have arisen. The Council relies on its rights under the 2016 Regulations in this regard.

The Council has at all times dealt with your organisation in compliance with the principles of transparency, equal treatment and non-discrimination outlined in

Regulation 18(1) of the 2016 Regulations, which is wholly compatible with the terms and effect of Regulation 57(8)(g) of the 2016 Regulations.

With the above principles in mind, the Council's letter of 22 December called upon you to provide evidence of your measures taken to demonstrate your reliability pursuant to Regulation 57(12), however, your letter of 6 January 2023 confirms that no such measures have been taken. Accordingly, as a result of your organisation's failure to provide the requisite evidence outlined by our letter of 22 December in accordance with the 2016 Regulations, **your organisation has been excluded from the Competition**." (Emphasis added)

It is clear from this letter that the Council refused to reconsider its decision and it instead confirmed that Glenman has been excluded from the tender. The Council also confirmed that it did not see any confidentiality issue arising from the reference to the Recommendation.

87. At this stage therefore, the die is cast and Glenman knows that the *Council is not going to reconsider the Decision* and does not see that there is any *confidentiality issue* with the reference to the Recommendation in the Decision. Despite this, and despite the clock ticking down on the deadline and despite its previous threat to vigorously challenge the Council if it failed to reconsider the Decision, once again Glenman fails to issue the proceedings. This is clear from the next letter from Glenman to the Council, which is issued seven days later and is dated 18th January, 2023.

Letter of 18th January 2023 from Glenman to the Council

88. Insofar as relevant, this letter states:

"In circumstances where [the Council] is very well aware that Glenman does not accept that it has done anything to justify the termination of its Contract and absolutely rejects the validity of the termination of that Contract, the requirement for us to provide

evidence of measures adopted under Regulation 57(12) was simply a device adopted by [the Council] to exclude us from the competition to carry out works which we are eminently qualified to carry out.

We do not accept the validity of this exclusion, and we intend to challenge it in the High Court.

Regarding the reference to the Standing Conciliator's Recommendation, we note that you 'fail to see' the point we make regarding confidentiality. Given that we intend to challenge our exclusion in the High Court, we would hope that your failure will be short lived. As the Recommendation is confidential, **it cannot be referred to in correspondence which will form part of the High Court proceedings**. Put another way, the correspondence referring to the Recommendation **cannot be relied upon in Court**.

We would therefore ask that you write to us again advising us of our exclusion and **omitting any reference to the Recommendation** and, therefore, any reference to you letter of 22 December 2022. We will leave it to you as to how this is to be managed." (Emphasis added)

89. This letter, in part, repeats what was stated by Glenman in its letter of 6th January, 2023, particularly where it states that '*it does not accept the validity of the exclusion'* and '*will challenge it'.* Glenman proceeds to ask once again for the Council to revisit its Decision, this time by asking the Council to issue the Decision without the reference to the Recommendation. In this letter, Glenman also states that in the proceedings, *which it says it will be issuing*, to challenge the Decision, it cannot refer to the Decision letter of 22nd December, 2022, since it refers to the Recommendation, which is confidential.

90. Again, it is relevant to note that there is no reference in this letter to the Recommendation allegedly being '*without prejudice*'.

91. Despite knowing that the deadline was fast approaching, and despite having all the information it needed to issue the proceedings, Glenman did not issue the proceedings after this letter. In this regard, on Glenman's own case, the deadline expired on the 22nd January, 2023 and so it is relevant to consider the state of play on the 22nd January, 2023, which is the date that Glenman states the deadline expired and when it knew, or should have known, it had to issue proceedings or miss the deadline.

92. On that date, Glenman knew everything it knew on 23rd March, 2023 (when it actually issued the proceedings), namely that the Council had excluded it from the tender and that the Council was not going to reconsider that Decision by admitting Glenman to the tender.

93. In addition, as of 22nd January, 2023, the Council had failed to agree to re-issue the Decision without a reference to the 'confidential' Recommendation, despite being requested to do so in the letter of 18th January, 2023 (this was confirmed in writing by the Council in its letter of 26th January, 2023, referenced below).

94. Yet, instead of issuing proceedings on 22nd January, 2023, Glenman lets the deadline pass.

95. At the hearing, counsel for Glenman stated that its letter of 18th January, 2023, and in particular its request for a re-issue of the Decision without the reference to the Recommendation, is '*critical'*. However, if this request is critical in these proceedings, it gets answered very clearly, eight days later, in the reply of 26th January, 2023 from the Council. In it the Council refuses in the clearest of terms to re-issue the Decision without the reference to the 'confidential' Recommendation. Yet, as will be seen, there are still no proceedings issued by Glenman.

Letter from Council to Glenman dated 26th January, 2023:

96. Insofar as relevant, this letter states:

> "With regard to the reference in your letter to confidentiality, please **note that the Council does not intend to re-issue previous correspondence**, providing notice of Glenman's exclusion from the Competition irrespective of any matters over which you may intend to asset confidentiality, which is entirely a matter for your own consideration." (Emphasis added)

97. It is important to stop and consider what Glenman did on receipt of this letter, bearing in mind that this is a response to its 'critical' letter of 18th January, 2023 and that the deadline had just expired as of 22nd January, 2023 (on Glenman's own case) or indeed at the latest was going to expire on the 10th February, 2023 (on the Council's case).

98. Firstly, it is important to note that the situation could not have been clearer to Glenman in this period between 26th January, 2023 and 10th February, 2023. It now knew that the Council was not going to reissue the Decision (without the reference to the Recommendation) and that there was a disagreement between the parties as to the significance of the 'confidential' Recommendation in relation to any proceedings which Glenman might issue. It also knew, or should have known, that the deadline had expired on 22nd January, 2023, or was about to expire on 10th February, 2023.

99. So what does Glenman do in these circumstances? The same as it did on 6th January, on 11th January and on 18th January, 2023, i.e. nothing. It let the time period run on, not for a few days, but months.

100. Counsel for Glenman described it as having Hobson's choice, namely (i) if it issued proceedings within the time-frame, it was endorsing the reference to the Recommendation which, it believed, should not have been contained in the Decision, or (ii) if it did not issue proceedings in time, it would be too late to challenge the Decision.

101. This Court would not characterise this choice in anything as dramatic a fashion as Hobson's choice. Rather, there was a straightforward dispute between the parties about whether the Recommendation should have been referred to in the Decision. This type of procedural dispute is a feature in a lot of litigation, *i.e.* one party claims that a document is confidential (or even 'without prejudice'), while the other party takes the contrary view. If a dispute of this nature was to prevent the issue of proceedings, there would be considerably less proceedings issued in this country. The courts regularly have to deal, during litigation, with claims that documents or conversations are confidential (or 'without prejudice'). These claims are dealt with in various ways, e.g. by the redaction of documents, the use of confidentiality rings, *in camera* hearings, *ex parte* applications, *etc*. However, the important point to note is that these issues are *considered by the court* i.e. proceedings have been issued to enable a court deal with the procedural dispute. These type of confidentiality issues do not prevent proceedings being instituted. This is because these 'run of the mill' disputes over the confidentiality of a document, which is a key part of the litigation, arise all the time.

102. Nonetheless, in this case, Glenman claims that these issues were of such significance and so insurmountable that it could not have issued proceedings within the 30-day time-limit. Ironically, the fact that they issued the proceedings two months later with a reference to the 'confidential' Recommendation, undermines, to a certain degree at least, their argument that the reference to the confidential Recommendation prevented them from issuing the proceedings within the deadline.

103. It is next proposed to consider the correspondence from 10th February, 2023 until the issue of the proceedings on the 23rd March, 2023, which, it has been noted, is of less significance in evidencing Glenman's reasons for failing to comply with the deadline, since by that stage Glenman knew, or should have known, that the deadline had passed.

Letters issued after the time limit had expired

104. The first of these letters is a letter from Glenman to the Council dated the 10th February, 2023.

Letter dated 10th February, 2023 from Glenman to Council

105. This letter of the 10th February, 2023 from Glenman to the Council, insofar as relevant, states:

> "We intend to seek redress in respect of all aspects of your discriminatory conduct, and we have no doubt that our position will ultimately be fully vindicated.
>
> […]
>
> Regarding the confidentiality issues, you have seen fit to refer to the content of a confidential document in correspondence with us regarding our exclusion from the aforesaid competition. This is not, therefore, correspondence upon which you can rely in Court proceedings regarding the wrongful exclusion. We pointed this out to you to offer you the opportunity to mend your hand by recording the reasons for our exclusion in correspondence which is capable of being relied upon in such proceedings. **You have elected not to do so**. On that basis, we wonder how you intend to justify the exclusion, but **that is obviously a matter for you**. If it is your plan to ignore the confidentiality of the document in question, rest assured we will strenuously resist any such attempt." (Emphasis added)

106. The first thing to note about this letter is that it is a reply to the letter of 26th January, 2023. Accordingly, it is not only well after the 22nd January, 2023 deadline (on Glenman's own case), but it is also *a full 15 days* since the Council's letter was sent.

107. It is important to bear in mind that this 15-day delay arises in a context where Glenman should have known, that the deadline had expired and that public procurement challenges should be dealt with '*rapidly'* and with 'a *degree of urgency'.* Despite this, Glenman, in this

letter, is still *talking about* issuing proceedings *in the future*. Once again, these proceedings are not issued immediately after this letter (and they will not be issued for a further month and a half).

108. It is also relevant to note that, unlike the letters issued while the deadline was being counted down, this *letter does not seek anything from the Council*. Indeed its primary purpose appears to be simply to reiterate once again that Glenman will seek redress, *albeit*, that it is now outside, what Glenman says, was the deadline for issuing proceedings. In addition, Glenman notes in this letter that the Council has not elected to revisit the Decision and further notes that this is a matter for the Council. However, all of this is self-evident and it does not necessitate a letter from Glenman to the Council to state these matters..

109. Not surprisingly, since no reply or demand is sought, or required, from the Council to this letter, no reply is given by the Council. Indeed, there is no possible demand which could be made by Glenman of the Council at this stage, since the stand-off between the parties has been clear since the 22nd January, 2023 (or the 26th January, 2023 at the latest), yet still there are no proceedings issued at this stage by Glenman.

Letter from Glenman to Council dated the 27th February, 2023:

110. Nonetheless, Glenman allows a *further 17 days to elapse* before it writes again to the Council on the 27th February, 2023.

111. It is important to bear in mind that the time-limit for issuing proceedings is a very tight 30 days and by this stage, Glenman had missed the 30-day deadline by *circa* 30 days, in a matter which should have been dealt with '*rapidly'* and with '*a degree of urgency'*.

112. No explanation was provided for this *circa* 30-day delay (from 22nd January, 2023 to 27th February, 2023) by Glenman, nor for the further *circa* 30-day delay (from 27th February, 2023 to 23rd March, 2023) when the proceedings finally issued. This is clearly not in Glenman's favour, from the perspective of this Court exercising its discretion in this case.

113. As regards the content of this letter, insofar as relevant, it states:

> "On 11 January 2023, you wrote to us to advise us that we have purportedly been excluded from, the competition in respect of the [Project].
>
> For the avoidance of doubt, we do not accept this purported exclusion and contend that it is contrary to the public procurement rules…
>
> […]
>
> We do not accept that there were significant and persistent deficiencies. The sole ground upon which [the Council] was held to be entitled to terminate the Contract did not relate to a 'substantive requirement of the contract' and these did not arise at an early stage. There is a **binding Conciliator's recommendation that Glenman had not committed a termination breach as at September 2020**.
>
> […]
>
> Given that Glenman **intends to pursue its rights under the public procurement remedies** regime, we formally request that you issue a compliant letter advising of the purported decision to exclude which letter does not refer to the confidential conciliation process.
>
> If you fail to do so by close of business on 1 March 2023, we will instruct our lawyers to make all necessary and appropriate court applications, including if necessary an application for an extension of time in which to challenge the unlawful exclusion, to protect our position." (Emphasis added)

114. It is to be noted once again that, while seeking to make an issue about the Council referring to a confidential Recommendation in its Decision, in this *inter-partes* correspondence (which is exhibited in these proceedings), Glenman appears to have no issue referring to a

different recommendation from a conciliator dated September 2020. This relaxed attitude to making reference to a different confidential recommendation, once again undermines Glenman's claim that the reason for it missing the deadline was the reference to the 'confidential' Recommendation in the Decision.

115. The other relevant point about this letter is that, unlike the letter of 10th February, 2023, this letter does contain a request. However, it is simply a repeat of the request to reissue the Decision that was made on 18th January, 2023.

Letter from Council to Glenman, dated 1st March, 2023:

116. The reply to this letter is dated 1st March, 2023 and, insofar as relevant, this letter states that:

> "it is not open to you to initiate proceedings in circumstances where the 30-day time period under regulation 7(2) of the 2010 Regulations has expired. **The 30-day time period, commencing on the date on which you were notified of the intention to exclude i.e. 22 December 2022, elapsed on 21 January 2023**. **Even if one was to operate from the later date of 11 January 2023 (the date of the actual exclusion from the Competition), 30 days from this date expired on 10 February 2023**.
>
> Your letter refers to a potential application to extend the above time period. There is no valid basis to bring such an application and, even if such an application could be brought at this late stage, there is no good reason to justify such an extension to this time period, which is now significantly expired.
>
> […]
>
> Finally, while out letter of 26 January 2023 has dealt with your references to confidentiality, we reiterate for completeness that in the event you intend to asset confidentiality over particular material, this is entirely a matter for your own

consideration. **There is no basis for your request that the Council re-issue previous correspondence, and the Council will not do so**. Your claims about confidentiality have no bearing on the date on which you were notified of the exclusion under Regulation 57(8)(g), as outlined above." (Emphasis added)

117. Since Glenman's letter of 27th February, 2023 contained a request for a reply, the Council does reply and it simply reiterates its previous position, namely that it has no intention of reissuing the Decision.

118. It is also relevant to note that, unlike Glenman, the Council complies with the *dicta* in *Dekra* regarding moving '*rapidly'* and with a '*degree of urgency'* in public procurement cases, because it replies *within three days* of Glenman's letter.

119. However, in replying to this letter from the Council, once again Glenman delays further, since it is not until 10th March, 2023, i.e. a further *10 days delay*, before its solicitors respond to the Council (to add to the delay of *15 days* in issuing its letter of 10th February, 2023 and the delay of *17 days* in issuing the letter of 27th February, 2023).

Letter from Hayes/Glenman to the Council dated 10th March, 2023:

120. Insofar as relevant this letter dated 10th March, 2023 from Glenman's solicitors to the Council states:

"Respectfully, both parties are bound by Clause 13.2.1. It could not be clearer when its states that *'[T]he conciliation shall be confidential, and the Parties shall respect its confidentiality, except when any of the exceptions in sub-clause 4.16 apply, or to the extend necessary to enforce a recommendation that has become conclusive and binding*.'

[…]

[The Council's] previous correspondence **does not seek to deny the confidentiality of the conciliation**, but rather seeks to infer that the bilateral nature of the communications between the respective sides does not offend the confidentiality obligations.

We do not agree with this characterisation, and we understand that if offends against the principles of non-discrimination, transparency and equal treatment of tenderers in procurement law generally.

[…]

Therefore, please provide by return, and no later than 1pm on Tuesday, 14 March 2023, [the Council's] consent to reference being made by Glenman to the conciliation in its pursuit of its rights under the public procurement remedies regime." (Emphasis added)

121. It is relevant to note that this is the first correspondence from Glenman's solicitors. As solicitors, they would be acutely aware of the significance of 'without prejudice' communications. However, there is once again a complete absence of any reference to the reason for the delay in issuing proceedings being the fact that the Recommendation was 'without prejudice'.

122. The only reference to the reason for the delay is the reference to the Recommendation being '*confidential'*. As previously noted, in the context of confirmation bias, this further undermines Glenman's claim that during the 30-day time limit, the reason it did not institute proceedings was because it was concerned that it would be an abuse of process to reference 'without prejudice' material in the pleadings, which it wanted to issue.

123. This letter simply confirms what was obvious since 26th January, 2023, namely that there was a difference of legal opinion between Glenman and the Council regarding the 'confidential' Recommendation.

124. It is also to be observed that there is yet more talk about issuing pleadings in the future, this time with a reference to a date of 14th March, 2023. However, yet again, this date passes without proceedings issuing.

125. In contrast to the approach of Glenman, the Council, even when instructing solicitors to reply on its behalf, reply very promptly, since it replies *within 4 days* to this letter, by letter dated 14th March, 2023.

Letter from Philip Lee/Council to Hayes/Glenman of 14th March, 2023

126. Insofar as relevant, this letter from the Council's solicitors to Glenman's solicitors states:

> "We note that your letter makes reference to certain confidential material in the context of the contract between the Council and Glenman under which your client's obligations to complete the construction of 58 social housing units has been terminated. While this matter has been dealt with at length by our client's previous letters to Glenman, we confirm that whether your **client intends to assert confidentiality over such material is entirely a matter for its own consideration**. Your suggestion that our client's actions are in any way contrary to its public procurement obligations of non-discrimination, transparency and equal treatment is unclear, plainly at odds with the correspondence exchanged to date and is entirely rejected by our client.
>
> […]
>
> As confirmed by our client's letter dated 1 March 2023, there is no legitimate basis to bring an application to extend the above time period under Regulation 7(2). There is also no basis on which our client should re-issue letter in respect of matters that have already been dealt with in previous correspondence, including your client's ill-conceived assertions regarding confidentiality.

[…]

The Council will vigorously resist any attempts by Glenamn to delay this project further." (Emphasis added)

127. Thus, as regards the question raised by Glenman, in its letter of 10th March, the Council replies by saying it does not consent to Glenman making a reference to the Recommendation, on the basis that it is a matter for Glenman as to how it deals with the confidential nature of the Recommendation in the proceedings.

128. Indeed it is relevant to note that, when Glenman eventually sought leave from this Court to issue proceedings on 23rd March, 2023, it did not in fact make any special arrangements to deal with the 'confidential' nature of the Recommendation. This is because, although in its notice of motion it originally sought an order for an *in camera* hearing or reporting restrictions, in its oral submissions to this Court it confirmed that *'in light of the authorities, that application is not being pursued'*. Thus, the facts of the matter are that Glenman issued proceedings after the deadline referring to the Decision without pursing in court any special arrangements regarding those proceedings because they referred to the 'confidential' Recommendation. This undermines its claim that it could not issue proceedings during the time-limit because of the reference in the Decision to the 'confidential' Recommendation.

Proceedings issued on 23rd March, 2023.

129. It is relevant to note that a *further 9 days* passed from Glenman's self-imposed deadline of 14th March, 2023 until 23rd March, 2023 when proceedings were finally issued. These, it must be recalled, are public procurement proceedings, which the Supreme Court has directed should be dealt with *'rapidly'* and with a '*degree of urgency'*.

CONCLUSION

130. For all the reasons set out above, this Court is not persuaded that the reason given for the missed deadline, as evidenced by the contemporaneous correspondence (i.e. the 'confidential' nature of the Recommendation) is a sufficiently good to reason to allow the late issue of proceedings in this case, particularly when one bears in mind that the delay was one of *circa* 60 days in the context of a very tight time-limit of 30 days.

131. This Court does not accept Glenam's claim, in its affidavit evidence that the reason that it did not issue proceedings in time was because it was concerned about issuing proceedings regarding a decision which referenced a 'without prejudice' Recommendation (as distinct from a 'confidential' Recommendation). This is because this Court has concluded that this evidence was tainted by confirmation bias, whether conscious or unconscious, on the part of Glenman.

132. Indeed, when one considers all the correspondence in the round, *i.e.* the contemporaneous correspondence *before* the deadline expired and the correspondence *after* the deadline expired, it is clear that by the 26th January, 2023, at the latest, the die was cast in this case and nothing changed after that date. If one takes what the Council has stated is the latest possible date for the expiry of the deadline (i.e. the 10th February, 2023), this date of 26th January, 2023 was within that deadline. Yet Glenman does not issue proceedings until 23rd March, 2023.

133. Yet on this date, the 26th January 2023, Glenman knew that the Council disagreed with it about the inclusion of the confidential Recommendation in the Decision and that it was not going to re-issue the Decision, without a reference to it. However, it chose to spend *circa* two months trying to persuade the Council to agree with Glenman's legal view on the issue.

134. If the fact that a defendant does not agree with a plaintiff's legal view (whether in relation to confidentiality issues or any other legal issues) was a valid reason for *not* issuing proceedings in time, then there would be a lot of cases permitted after the expiry of a deadline. The reason we have litigation is because parties *disagree*, not just about substantive

commercial issues, but also about procedural legal issues, such as how confidential documents are to be treated in the litigation. Accordingly, this Court cannot see how this legal disagreement between the Council and Glenman, and Glenman's spending two months trying to persuade the Council of the error of its views, could be a good reason for missing a deadline as important as the 30-day deadline for suspending valuable public contracts – one of the most powerful legal tool available to any litigant.

135. In particular, Glenman knew that the Council did not agree with its views regarding the confidential Recommendation, yet, for whatever reason, rather than simply issuing proceedings within the deadline and raising this issue in court, Glenman delayed issuing proceedings until the 23rd March, 2023.

136. Indeed, it is also relevant to note that when it finally got around to bringing the issue to court, it did not raise the redaction/confidentiality *etc* of the Recommendation as an issue to be resolved by the court (as it concluded that the legal authorities did not support such an application). Thus, Glenman, in effect, pursued the challenge, by exhibiting the Decision which referred to 'confidential' Recommendation, as if it was no longer an issue. It is as if the 'confidentiality' of the Recommendation ceased to be an issue on the 23rd March, 2023, save insofar as Glenman sought to rely on it as a justification for its failure to issue proceedings in time.

137. Accordingly, this Court does not accept that Glenman had good reasons for failing to issue the proceedings within the deadline (whether 22nd January, 2023 or 10th February, 2023). More significantly, since this Court does not believe that Glenman had a good reason for missing the deadline, this Court can see no good reason for it to grant leave to Glenman to permit a public procurement challenge after the deadline.

138. This Court orders the parties to engage with each other to see if agreement can be reached regarding all outstanding matters without the need for further court time, with the terms

of any (draft) agreed court order to be provided to the Registrar. In case it is necessary for this Court to deal with final orders, this case will be provisionally put in for mention one week from the date of delivery of this judgment, at 10.30 am (with liberty to the parties to notify the Registrar, in the event of such listing being unnecessary).