THE SUPREME COURT

Keane C.J.
Denham J.
McGuinness J.
Hardiman J.
Fennelly J.

Record No. 107,
118 & 158/02

IN THE MATTER OF THE EUROPEAN COMMUNITIES (REVIEW PROCEDURES FOR THE AWARD OF PUBLIC SUPPLY,PUBLIC WORKS AND PUBLIC SERVICES CONTRACTS) (NO. 2) REGULATIONS 1994

BETWEEN/

DEKRA EIREANN TEORANTA

Applicant/Respondent

and

MINISTER FOR THE ENVIRONMENT AND LOCAL GOVERNMENT

Respondent/Appellant

and

S.G.S. IRELAND LIMITED

Notice Party/Appellant

Judgment delivered on the 4th day of April, 2003 by Denham J.

1. In the course of the last two decades, throughout the common law world, there has been an explosion in litigation by way of judicial review. In addition there has been a development of specialist law fields of judicial review. These include, for example, law on immigration, planning and development and, more recently, public contracts. This case concerns the specialist area of public contracts, which law has its roots in the European Union.

2. This case arises out of the decision by the Minister for the Environment and Local Government, the respondent/appellant, hereinafter referred to as the Minister, to award a contract to S.G.S. Ireland Limited, notice party/appellant, hereinafter referred to as S.G.S., to establish and operate a system for testing private cars in Ireland.

3. Dekra Eireann Teoranta, the applicant/respondent, hereinafter referred to as Dekra, was an unsuccessful tenderer for the contract and on the 25th March, 1999 issued judicial review proceedings against the Minister.

4. On the 15th June, 1999 S.G.S., by notice of motion, sought to strike out the judicial review proceedings on the grounds that Dekra did not comply with the time limits prescribed under Order 84A of the Rules of the Superior Courts and that there were no grounds which would warrant the extension of time.

5. The High Court refused the relief sought. O'Neill J., in a judgment of the 2nd November, 2001, construed the terms of Order 84A and decided to exercise his discretion in favour of extending the time limit in Order 84A.

6. Against that order and judgment of the High Court S.G.S. and the Minister have appealed.

7. S.G.S. filed the following grounds of appeal:

"(i) The Learned Trial Judge erred in law and in fact in refusing to strike out the Judicial Review Proceedings;

(ii) The Learned Trial Judge in finding that time began to run for the purposes of Order 84 A Rule (4) from November, 24, 1998, against the Applicant/Respondent, erred in law and in fact in not striking out the proceedings as a result of the delay from that date to the date of the issue of the Judicial Review Proceedings being the 25th March, 1999, which said period of delay exceeded the three month period and was both inordinate and inexcusable.

(iii) The Learned Trial Judge in holding that the Applicant/Respondent had failed to explain and excuse the delay in instituting the Judicial Review Proceedings erred in law and in fact in failing to accede to the application of the Notice Party/Appellant to strike out the Judicial Review Proceedings on the grounds of the Applicant/Respondents failure to comply with the three month time limit in Order 84 A of the Rules of the Superior Courts 1986 and/or its failure to institute the proceedings in a timely fashion.

(iv) The Learned Trial Judge erred in law and in fact in failing to have any or any proper regard to the essential urgency which was required under EU Directive 89/665 and Order 84A of the Rules of the Superior Courts 1986 in refusing to strike out the Judicial Review Proceedings by reason of the Applicant/Respondents failure to act with urgency and in particular by reason of its inordinate and inexcusable delay and failure to meet the three month time limit.

(v) The Learned Trial Judge erred in law and in fact in holding that the Applicant/Respondent had been guilty of lack of candour in its Affidavits regarding its state of knowledge for the purpose of time running against it and thereafter refused to strike out the Judicial Review Proceedings whether on that ground alone or on that ground coupled with other grounds.

(vi) The Learned Trial Judge erred in law and in fact in assessing the issue of prejudice and in the manner in which he considered that issue and had regard to it in and about reaching his decision to refuse to strike out the Applicant/Respondent's Judicial Review Proceedings.

(vii) The Learned Trial Judge erred in law and in fact in exercising his discretion to extend time in favour of the Applicant/Respondent.

(viii) The Learned Trial Judge erred in law and in fact in exercising his discretion to extend time in favour of the Applicant/Respondent and in particular failed to have any or any proper regard to the fact that he had found that the Applicant/Respondent had not explained and/or excused a significant portion of delay, failed to have any or any proper regard to the huge costs incurred by the Notice Party/Appellant in rolling out their network once the contract was awarded, failed to have any or any proper regard for the need for commercial certainty, failed to have any or any proper regard the *(sic)* statutory objectives encapsulated in the 1994 Regulations and failed to have any or any proper regard for the need for speedy decision making the outcome of which is certain and beyond challenge.

(ix) The Learned Trial Judge erred in law and in fact in the formulation and application of the test to be met by the Notice Party/Appellant in seeking to have the Judicial Proceedings struck out.

(x) The Learned Trial Judge erred in law and in fact in the formulation and application of the test to be applied in relation to extending time for the benefit of the Applicant/Respondent in order to refuse the Notice Party/Appellants application."

8. The Minister filed the following grounds of appeal:

"1. That the Learned Trial Judge erred in law and in fact and misdirected himself in construing Order 84A, Rule 4 of the Rules of the Superior Court, 1986 in such a manner as to permit an extension of the three month time period where the earliest opportunity occurred within that period.

2. That the Learned Trial Judge erred in law and in fact and misdirected himself in applying a different time limit in respect to a claim for damages as distinct from other reliefs in regard to the award of a public contract.

3. The Learned High Court Judge misapplied the proper test in relation to delay laid down by Order 84A, Rule 4 of the RSC, 1986 (introduced pursuant to Statutory Instrument 374 of 1998 and Council Directives 89/665/EC and 92/13/EC) in that notwithstanding that:-

i. the Learned Judge held that there is a primary onus on the Applicant/Respondent who seeks an extension of the time limit to demonstrate on an objective basis that there is an explanation for the delay and a justifiable reason for it;

ii. that he held that there was no explanation or justification for a substantial proportion of the delay in question, in particular six weeks of the delay; and

iii. that he held that the earliest opportunity for the purposes of Order 84A, Rule 4 occurred some six weeks prior to the end of the three month period.

and that accordingly there was no good reason for extending the said period nevertheless determined that such period be extended.

4. The Learned Trial Judge erred in law and in fact and misdirected himself for failing to take into account and/or to give any weight or sufficient weight to the fact that the Applicant/Respondent failed to make full disclosure in his statement required to ground this application for review and in the supporting grounding Affidavit, which would warrant a striking out or dismissal of the proceedings herein.

5. The Learned Trial Judge erred in law and in fact and misdirected himself in that while holding the Applicant/Respondent demonstrated a lack of candour in his application that the Applicant/Respondent did not mislead the Court in the sense of getting the Court to do something it might otherwise not have done because there was no application for leave and no application for interim relief.

6. The Learned Trial Judge erred in law and in fact in failing to have due regard to the effect on the Respondent/Appellant and Notice Party/Appellant of the failure of the Applicant/Respondent to apply to this Honourable Court and for an Order extending the time period under Order 84A of the Rules of the Superior Courts thereby presenting this Honourable Court with a fate *(sic)* accompli in relation to its application thereby wrongly placing the onus on the Notice Party/Appellant and Respondent/Appellant to issue a Motion to dismiss for want of prosecution.

7. The Learned High Court Judge failed to take into account or to give any or any sufficient weight to the prejudice caused to the Respondent/Appellant and Notice Party/Appellant by the commencement of the proceedings herein outside the period prescribed by Order 84A of the Rules of the Superior Courts.

8. The Learned Trial Judge misapplied the correct test in relation to the prejudice caused by giving decisive weight to the time involved in the prosecution of proceedings to a final determination, a test which is not prescribed by Order 84A or the RSC or the Statutory Instrument 374 of 1998 or Directives 89/665/EC and 92/13/EC.

9. The Learned Trial Judge misapplied the correct test in relation to the prejudice caused by the delay in laying down new criteria not prescribed in the said Rules, Statutory Instrument or Directives such as that the prejudice must be such as to pose an unusual or oppressive burden on the Respondent/Appellant and/or that the default of the Applicant/Respondent must be gross and/or that the prejudice caused by it must be real and substantial and immediate.

10. The Learned Trial Judge erred in law and misdirected himself in relation to the issue of prejudice to the Respondent/Appellant by having regard to the fact that the 'State has ample resources'.

11. That the Learned Trial Judge erred in fact and in law and misdirected himself in holding that by dismissing the proceedings of the Applicant/Respondent would be to repel the Applicant/Respondent from the seat of justice unheard when in fact the Applicant/Respondent had ample opportunity within the prescribed period of three months to initiate the proceedings herein."

9. Mr. Gerard Hogan, S.C., counsel for S.G.S., filed written and made oral submissions. He submitted that the learned trial judge had applied the wrong test. He argued that Dekra were outside the time limit established in Order 84A, rule 4 and that there were no good reasons for extending the time. He stressed that Dekra had neither explained nor justified a significant period of their delay, especially that which occurred from mid January, 1999. He submitted that Dekra had not moved in a case of great urgency at the earliest opportunity as required by Order 84, rule 4. Further, he submitted that the delay had the potential to cause S.G.S. significant prejudice, even if the reliefs now claimed are confined to damages. That the proceedings are, in effect, an attack on the validity of the licence award.

10. Mr. Michael Carson, S.C., counsel on behalf of the Minister, filed full written and made oral submissions in the matter. He submitted that there was no basis in fact or law for extending time in the circumstances and that the learned trial judge misdirected himself and misapplied the correct tests and had regard to irrelevant factors when deciding to grant an extension of the time limit in Order 84, rule 4 to the 26th March, 1999. He submitted, *inter alia*, that the learned trial judge failed to give due weight to the public interest in deciding to extend the time, having regard in particular to the provisions of the EC Review Procedures Directives that the review process of public contract awards be carried out 'as quickly as possible'.

11. Mr. W. Shipsey, S.C., counsel for Dekra, filed full written and presented oral submissions on the appeal. The issue of *locus standi* remained formally in the appeal. It was submitted that S.G.S. lacked *locus standi* to bring the application. However, correctly, this issue was not pressed. In essence it was submitted that this appellate court should not interfere with the exercise of discretion by the learned High Court judge to extend the time period for the bringing of proceedings.

12. Facts

On the 7th July, 1998 an invitation to tender was issued for the introduction of a system of roadworthiness testing in Ireland provided for by Council Directive 96/96 EC of the 20th December, 1996 on the approximation of the laws of the member states relating to roadworthiness tests for motor vehicles and their trailers, with an indicative timetable of the 13th November, 1998 for selection of preferred tenderer and the 11th December, 1998 for the award of the contract.

On the 24th November, 1998 the Minister notified Dekra by telephone of the decision to award the contract to S.G.S. and issued to Dekra formal notification in writing of the award decision. A press release was issued also by the Minister and by the Minister for State for the Environment and Local Government, announcing the decision to appoint, subject to contract, S.G.S., to provide the national car testing service.

On the 8th December, 1998 there was a debriefing meeting between Dekra and the Minister at which the latter explained the basis for its decision to award the tender to S.G.S.

On the 14th December, 1998 Dekra's solicitor, in a letter to the Minister, raised a number of queries and stated:

> "We would be very grateful if you would respond to us in relation to this concern prior to the formal execution of the contract on Tuesday."

On the same day in a replying letter the Minister stated that he was prepared to provide:

> "details of the initial re-test fee . . . after the formal announcement of the award of the contract by the Minister which is due to take place tomorrow, 15 December, 1998."

Dekra wrote another letter to the Minister on the same day. This letter put the Minister on notice of Dekra's intention to seek injunctive relief unless the Minister notified that he would refrain from awarding the contract on 15th December, 1998. The letter stated, *inter alia*:

> "We have been informed that our client's tender has been unsuccessful and that the contract is to be awarded to S.G.S. Ireland Ltd. . . ."

The letter continued:

> "This is in breach of Council Directive 92/50, as amended, as it involves the award of the contract, in contravention of the awarding authority's own pre-determined rules for the award of the contract, to non-compliant tender and/or to a tender which is not the most economically advantageous tender.
>
> This letter is to put you on formal notice as required by Article 1(3) of the Remedies Directive, Directive 89/665 and Article 5 of the European Communities (Review Procedures for the Award of Public Supply, Public Works and Public Service Contracts) (No.2) Regulations, 1994, that it is our intention to apply forthwith on short notice to the High Court to obtain an injunction suspending the award of this contract unless we receive, by return, a notice from you that no award will be made without firstly providing us the opportunity to apply to the High Court for an injunction restraining the award of the contract.
>
> Kindly indicate by return the solicitor who has authority to accept proceedings on your behalf."

On the evening of the 14th December, 1998 representatives of the Minister met with the Chief Executive Officer of Dekra and with Solicitors representing Dekra. This was a 'without prejudice' meeting. It was agreed that the parties would meet again on the 12th January, 1999.

On the 15th December, 1998 a press reception for the purpose of announcing the award of the NCT contract to S.G.S. was held to which Dekra was invited.

On the 21st December, 1998 Dekra, by letter to the Minister, sought further clarification of the tender result.

On the 5th January, 1999 the Minister, in a replying letter to Dekra, stated:

> "You will recall that following the announcement of the preferred tenderer, DEKRA Eireann accepted the Department's offer of

an oral de-briefing. This took place on the 7 December and during it the basis of the award of the tender was explained in detail. In addition the Department responded in a comprehensive way to a range of questions from DEKRA Eireann about the evaluation process and results. During a subsequent meeting held without prejudice on the 14 December, these matters were again clarified in considerable detail with you and a representative of DEKRA Eireann.

By virtue of these arrangements, the Department considers that it has discharged fully its obligations to provide the reasons why the DEKRA Eireann tender was not selected as the preferred tender together with the characteristics and the relative advantages of the selected tender, and has answered your requests for additional information to the best of its ability.

In all of the circumstances the Department considers that it would not be appropriate to agree to further discussions on this subject."

On the 24th February, 1999 Dekra resumed correspondence and replied to the Minister's letter of the 5th January, 1999 stating *inter alia*:

"We refer to your letter of the 5th January, 1999 in relation to the concerns of Dekra Eireann about the tendering procedures followed in the award of this contract.

We must express our disquiet regarding the last minute cancellation of the proposed meeting with our clients to discuss the growing concerns in relation to the award procedures . . ."

On the 2nd March, 1999 the letter of the 24th February was acknowledged by the Minister's private secretary.

On the 11th March, 1999 the Minister replied to the letter of the 24th February, 1999 and provided the individual result and ranking of the S.G.S. tender in respect of each of the evaluation criteria.

On the 16th March, 1999 in a further letter Dekra complained that not all of the issues raised in the letter of the 24th February, 1999 had been addressed.

On the 25th March, 1999 Dekra issued proceedings seeking judicial review of the award of the NCT contract, pursuant to Order 84(A) of the Rules of the Superior Courts.

13. Law, Rules of Court, E.U. Directives and Cases

Order 84A of the Rules of the Superior Courts, 1986 was inserted into the Rules of the Superior Courts by the Rules of the Superior Courts (No. 4) (Review of the Award of Public Contracts), 1998, S.I. No. 374 of 1998. Rule 4 provides:

"An application for the review of a decision to award or the award of a public contract shall be made at the earliest opportunity and in any event within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending such period."

The time constraints in this rule reflect the objectives in the law and policy of the European Union. EC Council Directive 92/50/EEC and Council Directive 89/665/EEC and 92/13/EEC relate to the review of public contract award procedures. The court was also referred to specific regulations as to public service contracts being the European Communities (Award of Public Services Contracts) Regulations, 1998 (S.I. No. 378 of 1998) and European Communities (Review of Procedures for the Award of Public Supply, Public Works and Public Services Contracts) (No. 2) Regulations, (S.I. No. 309 of 1994).

Council Directive 89/665/EEC of 21 December, 1989 on the co-ordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, provides, *inter alia*, as follows:

"Whereas the opening-up of public procurement to Community competition necessitates a substantial increase in the guarantees of transparency and non-discrimination; whereas, for it to have tangible effects, **effective and rapid remedies** must be available in the case of infringements of Community law in the field of public procurement or national rules implementing that law;

Whereas in certain Member States the absence of effective remedies or inadequacy of existing remedies deter Community undertakings from submitting tenders in the Member State in which the contracting authority is established; whereas, therefore, the Member States concerned must remedy this situation.

. . .

Whereas it is necessary to ensure that adequate procedures exist in all the Member States to permit the setting aside of decisions taken unlawfully and compensation of persons harmed by an infringement;

. . .

Article 1

1. The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC and 77/62/EEC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, **as rapidly as possible** in accordance with the conditions set out in the following Articles, and, in particular, Article 2(7) on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.

2. Member States shall ensure that there is no discrimination between undertakings claiming injury in the context of a procedure for the award of a contract as a result of the distinction made by this Directive between national rules implementing Community law and other national rules.

3. The Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular public supply or public works contract and who has been or risks being harmed by an alleged infringement. In particular, the Member States may require that the person seeking the review must have previously notified the contracting authority of the alleged infringement and of his intention to seek review.

Article 2

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

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

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

(c) award damages to persons harmed by an infringement.

2. The powers specified in paragraph 1 may be conferred on separate bodies responsible for different aspects of the review procedure.

3. Review procedures need not in themselves have an automatic suspensive effect on the contract award procedures to which they relate.

4. The Member States may provide that when considering whether to order interim measures the body responsible may take into account the probable consequences of the measures for all interests likely to be harmed, as well as the public interest, and may decide not to grant such measures where their negative consequences could exceed their benefits. A decision not to grant interim measures shall not prejudice any other claim of the person seeking these measures.

5. The Member States may provide that where damages are claimed on the grounds that a decision was taken unlawfully, the contested decision must first be set aside by a body having the necessary powers.

6. The effects of the exercise of the powers referred to in paragraph 1 on a contract concluded subsequent to its award shall be determined by national law. Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person harmed by an infringement.

7. The Member States shall ensure that decisions taken by bodies responsible for review procedures can be effectively enforced.

. . .”

(emphasis added)

14. Decision

It was submitted that S.G.S. lacked *locus standi* to bring this application. Correctly, the issue was not pressed. The High Court judge held:

“I am satisfied however, that whatever be the ultimate legal effect of such a declaration on that contract, that a pursuit of such a declaration in these proceedings, and if it were obtained would undoubtedly have in the words of Buxton L.J. in the *Matra* case ‘an unsettling and disruptive effect on that process’. It would seem to me that at the very least such a declaration would give rise to uncertainty as to the status of the contract and the obligations thereunder of the parties, and would inevitably lead to damage to public confidence in the car testing system. I am of the view that these would be real prejudices to both S.G.S and the respondents and hence in my view, S.G.S. have a real interest in the outcome of these proceedings and have in my view a *locus standi* to bring this Motion.”

I would uphold this finding of the learned High Court judge.

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 of 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, the Council Directive 89/665EEC of 21st December, 1989, Article 1 requires that ‘decisions taken by the contracting authorities be reviewed effectively, and, in particular, as rapidly as possible’. In national law an application under Order 84, rule 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.

14(a). Earliest Opportunity

The terms of the rule are mandatory; an application for review shall be taken at the earliest opportunity. The words are clear and unambiguous. They are somewhat similar words to Order 84, rule 21(1) of the Rules of the Superior Courts which provides:

> "21. (1) An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose, or six months where the relief sought is certiorari, unless the Court considers that there is good reason for extending the period within which the application shall be made."

This time limit,

> "promptly and in any event . . . within six months . . . unless the court considers there was good reason for extending the period . . ."

was the subject of analysis in *State (Cussen) v. Brennan* [1981] I.R. 181. In that case the applicant doctor, who had applied for a consultant paediatrician post, had received relevant letters. His absence from an oral Irish test was an issue. Henchy J. held, at p. 196:

> "Once the prosecutor had been informed by the letter of the 19th October, 1978, that he would not be allowed to undergo the oral Irish test, he must have known that he would not be recommended by the Commissioners for appointment to this office. If he was in any doubt about the matter, it was dispelled when on the 25th January, 1979, his solicitors were told formally that Dr. Kearney had been recommended for the appointment. From that date (if not from the 19th October, 1978) it behoved the prosecutor to move with dispatch to have the Commissioner's recommendation undone. Yet, it was not until the 21st May, 1979 - some four months later - that he applied for and obtained conditional orders of certiorari and mandamus. In my view, that delay is fatal to his case.
>
> In *R. v. Herrod* [1976] Q.B. 540 Lord Denning M.R. said at p. 557 of the report:-
>
> > 'If a person comes to the High Court seeking certiorari to quash the decision of the Crown Court – or any other inferior tribunal for that matter – he should act promptly and before the other party has taken any step on the faith of the decision. Else he may find that the High Court will refuse him a remedy. If he has been guilty of any delay at all, it is for him to get over it and not for the other side. In support, I would refer to *Reg. v. Sheward* (1880) 9 Q.B.D. 741; 5 Q.B.D. 179, where five months elapsed. And in *Rex v. Glamorgan Appeal Tribunal, Ex parte Fricker* (1917) 33 T.L.R. 152. Lord Reading C.J. said, at p. 153: "the applicant could not succeed because he had allowed more than two months to elapse before raising any objection to what had happened. If anything wrong had taken place, the party aggrieved should move at once." '
>
> What particular period of inactivity will debar a person from getting an order such as mandamus or certiorari will depend on the circumstances of the case. I have no doubt that in this case it would unjust to grant either mandamus or certiorari."

Thus, under Order 84, rule 21(1) a judicial review application must be brought promptly and within a specified number of months. Whilst there is a discretion in the court to extend this time, there is also a discretion to refuse the application even within the months specified in the Rules of the Superior Courts. This is because judicial review is a process which must be brought promptly. If it is not so brought the court may determine that the justice of the case requires that the application be refused.

Under Order 84A somewhat similar principles are applied to public service contracts. However, additional factors are added. Instead of a policy of requiring that the judicial review be brought 'promptly', Order 84A rule 4 specifically requires that the application be made 'at the earliest opportunity'. This is in accordance with European Union law, that decisions may be reviewed effectively and, in particular, as rapidly as possible. There is a degree of urgency required in applications of this type.

In this case Dekra knew on 24th November, 1998 that it would not be awarded the contract. The facts were found by the learned trial judge that the decision to award the contract was made on the 24th November, 1998. He held:

> "The facts as deposed on Affidavit convince me that by 23rd November 1998 the respondents had made 'a decision to award' the contract to SGS.. There is no doubt that they communicated their decision in that regard to Dekra and other unsuccessful tenderers both verbally and by the letter of 24th November 1998. It seems to me that the terms of the letter are quite clear and unequivocally convey the fact that a decision had been made to give the contract to SGS.. While I would accept that the inclusion of the phrase 'subject to contract' may have given rise to some reflection as to what it precisely meant in the context in which it was used, its inclusion, in this letter does not in my view, at all diminish the clear intent expressed in the letter namely that to award the contract to S.G.S. and does not negate the knowledge that a decision to that effect had been made by the respondent.
>
> Hence I reject Dekra's contention that it was reasonable for them to understand this phrase as meaning that no final decision to award the contract has been made."

I accept and apply this finding of fact of the learned High Court judge. Thus it could be considered that time ran from 24th November. 1998. The words of Order 84A also enable time to run from the award of the public contract. On the facts it is clear that the contract

was awarded on December 15, 1998. This is an alternative date for time to commence. It may be that in some cases, for one reason or another, the date of the decision to award is not appropriate and thus the relevant date may be the date of the awarding of the contract. However, that is not the situation in this case.

Whilst Dekra knew the position on 24th November, 1998 the situation was confirmed by 8th December, 1998. On 14th December, 1998 it is quite clear that Dekra not only knew it would not be awarded the contract but also was contemplating litigation. For, on 14th December, 1998, a letter was written on behalf of Dekra to the Minister putting him, as required by European law, on notice of its intention to apply forthwith to the High Court on short notice for an injunction restraining the awarding of the contract.

It is clear that "grounds for the application" were clearly in existence by 14th December, 1998. Thus, taking a benevolent view of the facts, from the applicant's point of view, time for bringing the application ran from 14th December, 1998. Yet proceedings were not issued until 25th March, 1999.

It is clear that Dekra did not meet the requirements of the first part of Order 84A, rule 4. It is clear on the facts that the earliest opportunity may have been on 24th November, 1998 and certainly was by 14th December, 1998. Consequently Dekra did not apply "at the earliest opportunity". Thus the first mandate of Order 84A, rule 4 was not met by Dekra.

14(b). In any event within three months

The second part of Order 84A, rule 4 requires that an application for judicial review of a public contract be made in any event within three months from the date when grounds for the decision arose. This three month period is enabling. It enables an application within three months. However, in all the circumstances of a case a court may determine in its discretion that the prejudice to the public or a party could be such that, as in *Cussen*, the application should be refused. Since urgency and rapidity, is an underpinning policy of applications regarding public contracts the test requires that such applications be made rapidly and an applicant must explain reasonably any delay.

Taking the time as running from 24th November, 1998 or from the date of the letter of Dekra threatening litigation on 14th December, 1998, the application was not made within three months. Thus Dekra failed to meet this aspect of Order 84A, rule 4 also.

14(c). Unless the court considers that there is good reason for extending such period

In this specialist area of judicial review there is a clear policy underlying the law. The policy includes the requirement that an application for review of a decision to award a public contract shall be made at the earliest opportunity. There is a degree of urgency required in such applications. The applicant should move rapidly. The requirement of a speedy application is partially based on the prejudice to the parties and the State in delayed proceedings. Also, there is the concept that the common good is best served by rapid proceedings. The necessary balance to protect fair procedures is met in the saver that the court may extend time for such application for good reason.

Thus the court has a discretion to extend time within which an application may be brought for judicial review of public contracts. The learned High Court judge held:

> "… The respondent submitted that where the 'earliest opportunity' occurred within the three month period, that the rule does not permit or create a jurisdiction to extend the three month time limit. Conversely, they said it was only when the earliest opportunity arose outside of the three months time limit that the court could extend that time limit.
>
> I cannot agree with this submission…
>
> I am of the view that the rule permits an extension of time whether or not the 'earliest opportunity' occurs within or outside the three month time limit."

I agree with the learned trial judge and I would uphold this finding in law.

Further, the High Court held that:

> "There is a primary onus on Dekra who seeks an extension of the time limit to demonstrate on an objective basis that there is an explanation for the delay and a justifiable reason for it."

I agree with the learned trial judge and I would uphold this determination on the law also.

As to the passing of time the High Court held:

> "The fact that Dekra did not initiate these proceedings pending the meeting on the 12th January 1999 is not surprising and I am inclined to view that their explanation of delay up to the point at which they were notified of the cancellation of that meeting is reasonable and justifiable. However, nothing was done from the receipt by them of notification of the cancellation of the meeting until their letter of the 24th February 1999, a full six weeks. There is no explanation whatsoever offered of this six week delay, a delay which formed a very significant part of the period of three months in Order 84 A Rule 4. At that point, namely 24th February 1999, they re-engaged in the same enquiries but obviously with greater elaboration. Having regard to the fact that the respondents had cancelled the meeting on the 5th January, they thereby intimated an end so far as they were concerned, to the discursive process related to the outcome of the tendering procedure.
>
> In my view having regard to the essential urgency which was undoubtedly required having regard to the terms of the E.U. Directive 89/665 and Order 84 A Rule 4 the recommencement of correspondence of this kind on the 24th February 1999 was not justified."

As to the delay the learned trial judge held:

> "Having regard to the foregoing, in my opinion, both the respondent and Dekra contributed to the delay up to the cancellation of the meeting on the 12th January 1999, thereafter the delay was entirely the responsibility of Dekra."

I would uphold this finding of the High Court. There was an onus on Dekra to explain the delay and to give good reason to extend the time within which the application may be brought. Dekra did not explain the whole delay. It explained part of the delay. In addition, no good reason was afforded as to why time should be extended.

In exercising its discretion in such applications the court retains its duty to protect the right of access to the courts. However, there are special weightings which must be given. Thus the requirement under European and Irish law that such applications be brought rapidly is important. So too is the nature of the contract under review. This public contract calls into play the special importance of time and thus the nature of the prejudice to the parties if they are delayed. The court may also consider any prejudice to the public, the common good.

On the facts of this case not only is there no explanation for a considerable part of the delay but also there is no reason, good or otherwise, rendered for part of the delay or for an extension of time. On the facts there is a gap from 5th January to 24th February, 1999. Further, the activity in March 1999 was dilatory and had no place in a situation of threatened proceedings of this type. The court requires that good reason be furnished in an application such as this by an applicant, by Dekra.

The term 'good reason' in Order 84, rule 21 was considered by Costello J. in *O'Donnell v. Dun Laoghaire Corporation* [1991] I.L.R.M. 301. He stated (at page 315):

> "The phrase 'good reason' is one of wide import which it would be futile to attempt to define precisely. However, in considering whether or not there are good reasons for extending the time I think it is clear that the test must be an objective one and the court should not extend the time merely because an aggrieved plaintiff believed that he or she was justified in delaying the institution of proceedings. What the plaintiff has to show (and I think the onus under O. 84, r. 21 is on the plaintiff) is that there are reasons which both explain the delay and afford a justifiable excuse for the delay. There may be cases, for example where third parties had acquired rights under an administrative decision which is later challenged in a delayed action. Although the aggrieved plaintiff may be able to establish a reasonable explanation for the delay the court might well conclude that this explanation did not afford a good reason for extending the time because to do so would interfere unfairly with the acquired rights (*The State (Cussen) v. Brennan* [1981] I.R. 181).
>
> Or again, the delay may unfairly prejudice the rights and interests of the public authority which had made the *ultra vires* decision in which event there would not be a good reason for extending the time, or a plaintiff may acquiesce in the situation arising from the *ultra vires* decision he later challenges or the delay may have amounted to a waiver of his right of challenge it and so the court could not conclude that there were good reasons for excusing the delay in initiating the proceedings."

I am satisfied that this analysis is applicable to the term 'good reason' in Order 84A, rule 4. I apply the test to this case. Thus Dekra had to show that there were reasons which both explained the delay and offered a justifiable excuse. The public contract in issue involved significant liabilities, obligations and expenditure which may raise important factors for a court. The justice of the situation may raise issues such as prejudice to S.G.S. arising from the expenditure and other undertakings in the contract.

Also, I am satisfied, concepts of the public good may be relevant as being prejudiced by protracted and delayed judicial review. The common good could have a heavy weighting in reviews of this type, reflecting the requirement on any applicant to move rapidly.

However, in this case the decision necessary relates only to the reason and explanation for the delay. The discretion in relation to such an application must be exercised in accordance with law. Whilst Order 84A, rule 4 is relatively new it is clear and unambiguous. The concept that the application be "made at the earliest opportunity" is not dissimilar to the term "promptly". The words are informed by the requirement under European law that the application be made rapidly. In all the circumstances, there being an onus on Dekra to give reasons which both explain the delay and give a justifiable excuse, and Dekra failing on both fronts, I am satisfied that there was no good reason given for extending time. Therefore the learned trial judge erred in extending time for the application.

15. Conclusion

For the reasons given I am satisfied that the learned High Court judge erred in refusing to strike out the judicial review proceedings and erred in the exercise of the discretion given to him. The learned trial judge having held, correctly, that Dekra had failed to explain and excuse the delay in commencing the judicial review proceedings, erred in failing to accede to the application by S.G.S. to strike out the proceedings on the grounds of failure to comply with the three months time limit in Order 84A of the Rules of the Superior Courts, 1986. That being the case, the issue of any failure to have any proper regard to the urgency which is required under E.U. Directive 89/665 and Order 84A of the Rules of the Superior Courts, 1986 did not arise. Nor did the issues of failure to give sufficient weight to the matter of prejudice to the Minister and S.G.S. or the common good by the commencement of the proceedings outside the time prescribed in the Rules arise.

Dekra did not comply with the time limit in Order 84A, rule 4 of the Rules of the Superior Courts. Dekra neither explained nor gave excuses which justified the delay. There were no good reasons given for extending the time limit.

I would allow the appeal. I would set aside the order of the High Court granting the extension of time and I would refuse the application by Dekra for judicial review of the public contract in issue.

THE SUPREME COURT

Record No 107, 118 and 158/02

Keane C.J.
Denham J.
Hardiman J.
McGuinness J.
Fennelly J.
BETWEEN

DEKRA EIREANN TEORANTA

Applicant/Respondent

and

MINISTER FOR THE ENVIRONMENT AND LOCAL GOVERNMENT

Respondent/Appellant

and

SGS IRELAND LIMITED

Notice Party/Appellant

JUDGMENT delivered on the 4th day of April, 2003 by FENNELLY J.

A disappointed tenderer for a public works contract under European Union public procurement procedures must bring his complaint by way of Judicial Review within three months, unless he can show good reason for an extension of that time. The present appeal concerns such an order made by O'Neill in the High Court.

The Legal and Factual Background

Council Directive 96/96EC of 20 December 1996 on the approximation of the laws of the Member States relating to roadworthiness tests for motor vehicles and their trailers (OJ L 046 of 17th February 1997) obliges Member States to ensure that motor vehicles registered in each state undergo periodic roadworthiness tests, specified in detail. Pursuant to Article 1 of that Directive, the tests must *"be carried out by the State or by a public body entrusted with the task by the State or by bodies or establishments designated and directly supervised by the State, including duly authorised private bodies."* Article 11 provided for implementation no later that 9th March 1998.

The Irish Government decided to seek a contractor from the private sector for the testing of private motor cars. Because of the scale of the contract, it had to observe the public procurement procedures laid down by European Union directives. On 31st March 1998, the Respondent/Appellant, the Minister for the Environment and Local Government ("the Minister"), as awarding authority, caused to be published in Irish newspapers as well as in the Official Journal of the European Communities an invitation to tender for the establishment and operation of a system of roadworthiness testing of private cars in Ireland. The deadline for the receipt of applications was 28th April 1998.

The notice stated that the contract was to be awarded in accordance with the restricted procedure stipulated in Council Directive 92/50EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ L 209 of 24th July 1992). This meant that only invited service providers might submit a tender. It was also stipulated that the contract would *"be awarded to the service provider offering the most economically advantageous bid…"* Directive 92/50EEC, as amended by European Parliament and Council Directive 97/52EC, was implemented in the State by the European Communities (Award of Public Service Contracts) Regulations, 1998 (S.I. 398 of 1998). I call these the public procurement directives.

The final tender documentation was forwarded to shortlisted candidates on 7th 1998. The documents specified a number of dates, including:

- Clarification meetings in July, August and September;
- Receipt of tenders: 25th September 1998;
- Selection of preferred tenderer: 13th November 1998;
- Award of contract: 11th December 1998.

There were four tenders. The tenderers included the Applicant/Respondent ("DEKRA"), which is a joint venture company formed by DEKRA International S.A. & CIE and the Society of the Irish Motor Industry. They also included the Notice Party/Appellant, SGS Ireland Limited ("SGS"), the tenderer to which the contract was awarded.

Following the evaluation of the four tenders, a report was submitted to the Minister on 17th November 1998, recommending the tender of SGS. On 23rd November, the Minister approved the award of the contract to SGS. On 24th November, Mr Des Coppins, Principal Officer, Vehicle Control Section, Department of the Environment wrote to DEKRA to say that it had not been selected as the preferred tenderer, but that SGS had been chosen, *"subject to contract."* The letter offered an opportunity to have a "*debriefing*" meeting. On the 8th of December 1998, such a meeting was held between the representatives of DEKRA and the respondent. DEKRA claim that no information was given about the price at which SGS had been awarded the contract and, in particular, no information about SGS's re-test fee. However, DEKRA accepts that, in the following days, it learned from other sources that the SGS proposed re-test, fee was substantially in excess of its own. On the following day, DEKRA learned from press reports of the location of the test sites proposed by SGS. It is also common case that, by this date, they were aware of the essential facts to ground its other complaint, which is based on an alleged conflict of interest due to the involvement of Messrs Copper & Lybrand as consultants to the Minister, when an associated firm had previously advised a company linked to SGS in the United States.

On the 14th of December 1998, the respondent informed DEKRA that the formal announcement of the award of the contract would, as in fact it did, take place the following day.

DEKRA were clearly disappointed with the result of the tendering process and took steps, as they were entitled to do, to inform themselves both directly and indirectly of the reasons for their failure.

On 14th December, Lee McEvoy, solicitors, on behalf of DEKRA, wrote to Mr Coppins. The letter includes the following:

> *"We refer to our debriefing meeting last Tuesday.*

We understand from this and from other information that the re-test fee submitted by DEKRA Eireann was substantially lower than that submitted by other tenderers. This has caused us concern. We would be grateful if you would respond to us in relation to this prior to the formal execution of the contract on Tuesday."

[omissis]

"Paragraph 6.10 of the Information and Terms under the heading "key assumptions" states the following:

'Tenderers should index the Test Fees to a fixed level below inflation as measured by the Consumer Price Index and Tenderers are required to set out their proposals in this regard. In addition, in order to ensure transparency and fairness in the testing regime, tenderers should set re-test fees at a level that only covers variable cost plus profit.'

In submitting its tender, DEKRA Eireann was guided by this requirement. Our re-test fee accordingly reflected the marginal cost of re-testing together with DEKRA Eireann's projected profit margin ….

Although we have not been supplied with the exact details of the SGS's test fee, it appears that SGS's test fee was substantially higher than that submitted by DEKRA Eireann. It has already been confirmed that SGS's initial test fee significantly lower than that of other tenderers. This suggests to us that the SGS test fee proposal was unbalanced and that it was designed to take unfair advantage of re-tests, in breach of paragraph 6.10 of the Information and Terms. If the SGS re-test fee did not reflect the marginal cost together with SGS's projected profit … then this tender must be rejected for non-compliance.

The calculation of the re-test fee was a very important issue in the preparation of the DEKRA Eireann proposal, in view of DEKRA Eireann's concern that the re-test rate would be significant. Had DEKRA Eireann known that the requirements of paragraph 6.10 of the Information and Terms could be varied or disregarded, it would most certainly have submitted a substantially greater re-test fee and consequently, a significantly reduced initial test fee."

The letter ended by asking that the Minister refrain from executing the contract "*pending resolution of this issue*." Mr Coppins, in an immediate letter of response on behalf of the Minister, contested the arguments in the DEKRA letter and declined to postpone the step of executing the contract. The solicitors' letter appears to have been interpreted as a threat to institute proceedings, since the reply indicated that any proceedings should be served on the Chief State Solicitor. It also asked that, in the event of any application for "*injunctive relief, the letter of the Minister be brought to the attention of the court*" and that the Minister would hold DEKRA responsible for any loss caused.

In a final letter of 14th December 1998, Lee McEvoy, solicitors, joined issue with the Minister. They asserted that the award of the contract to SGS was *"in breach of Council Directive 92/50, as it involves the award of the contract, in breach of the awarding authority's own pre-determined rules for the award of the contract, to a non-compliant tender and/or to a tender which is not the most economically advantageous tender."* The letter terminated with the following important paragraph:

"This letter is to put you on Formal notice as required by Article 1(3) of the Remedies Directive, Directive 89/665 and Article 5 of European Communities Procedures for the Award of Public Supply, Public Works and Public Services Contracts) (No. 2) Regulations, 1994, that it is our intention to apply forthwith on short notice to the High Court to obtain an injunction suspending the award of this contract unless we receive, by return, a notice from you that no award shall be made without firstly providing us with the opportunity to apply to the High Court for an injunction restraining the award of the contract."

DEKRA has made it clear, by affidavit, that, as indeed the letter states, the purpose of this letter was to comply with the requirement to notify a contracting authority of an alleged infringement pursuant to the provision there recited.

Mr Coppins' letter of 14th December had offered a further meeting in order to furnish details of the initial and re-test fees of SGS. There were also some *"without prejudice"* discussions on or about 14th December and there was to have been a further meeting on 12th January. This meeting was cancelled by the Minister. In a letter of 5th January, Mr Coppins stated that the Department considered that it had fully discharged its obligations *"to provide the reasons why DEKRA was not selected as the preferred tender together with the characteristics and the relative advantages of the selected tender……"*

DEKRA next wrote, thorough its solicitors on 24th February 1999. They expressed disquiet at *the "the last minute cancellation of the proposed meeting"* effected by the letter of 5th January. They then embarked upon a more detailed and searching enquiry concerning the matters already raised, in particular the cost of re-test, the location of test centres and the method of scoring used by the Minister. Correspondence about these matters continued until 11th March.

On 25th March 1999, DEKRA commenced these proceedings by issuing a Notice of Motion seeking:

- A declaration that the award of the contract to SGS was in breach of the public procurement directives;
- A declaration that the rejection of DEKRA's tender was similarly in breach;
- A declaration that the Minister had acted *ultra vires*;
- Damages.

The Statement of Grounds accompanying the Notice of Motion specified the following grounds:

The Invitation to Tender required tenderers to set re-test fees at a level which only covered variable cost plus profit. The retest fees set by SGS Ireland in its tender exceeded variable cost plus profit and accordingly did not comply with the requirements;

The Invitation to Tender required each individual National Car Test Centre be located within 30 miles of 90% of the customers served by it. The tender submitted by SGS Ireland did not comply with this requirement;

The contract was awarded in breach of the principles of natural justice, because Price Waterhouse acted as consultants to the process, whereas Coopers and Lybrand, a constituent firm of Price Waterhouse, had previously successfully tendered with SGS Testcom, a company related to SGS Ireland for the New York State inspection Program Data Management System. ("*the conflict of interest issue*.")

The Statement of Grounds also contended that the three-month period specified for review of a contract by Order 84A, Rule 4 of the Rules of the Superior Courts had not expired. It continued:

> *"If the said three month period has expired, which is denied, the Applicant's claim is limited to damages and to ancillary relief. Specifically, the Applicant does not seek to set aside the award of the contract to SGS Ireland. In the premises there is no prejudice to third parties arising from any delay…In the premises there is good reason for extending the time."*

The Statement of Grounds also claimed, alternatively, that the three-month limit was contrary to European Community law, specifically that it was in breach of the Community law principles of effectiveness or equivalence. This argument was rejected in the High Court and has not been pursued in this Court.

The right of a disappointed participant in a tendering procedure governed by the public procurement rules of the European Union to seek a remedy against the award, and other interlocutory or ancillary reliefs, are governed by Council Directive 89/667/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ L 395 of 30th December 1989).("the Remedies Directive"). The Remedies Directive was implemented in the State by the European Communities (Review of Procedures for the Award of Public Supply, Public Works and Public Services Contracts) (No.2) Regulations 1994 (S.I. 309 1004). ("the Regulations"). Article 4 of the Regulations confers the power of review on the High Court.

Article 1(3) of the Remedies Directive authorises Member States to require that a person seeking review first notify the contracting authority of *"the alleged infringement and of his intention to seek review."* Ireland has exercised this option in the form of Article 5 of the Regulations. Member State may also provide that *"where damages are claimed on the ground that a decision was taken unlawfully, the contested decision must first be set aside by a body having the necessary powers."* (Article 2(5) of the Remedies Directive.) Ireland has not exercised this option. Under the Regulations, the High Court may declare a contract or a provision of a contract void, but it may also award damages whether or not it exercises any of its other powers.

In order to give effect to these provisions, the Rules of the Superior Courts (No. 4), (Review of the Award of Public Contracts), 1998 (S.I. No. 374 of 1998) were amended to provide that any application for review pursuant to the Regulations must be made by notice of motion pursuant to the new Order 84A. The procedure closely follows the model of Judicial Review, save, in particular, that there is no requirement to seek prior leave to apply. For the purposes of the present appeal, the central provision is in rule 4:

> "*An application for the review of a decision to award or the award of a public contract shall be made at the earliest opportunity and in any event within three months from the date when grounds for the application first arose unless the court considers that there is good reason for extending such period*".

As has been noted, the Minister decided, "*subject to contract,*" to award the contract to SGS on 24th November 1998 and the contract was signed on 15th December 1998. The notice of motion did not issue until 25th March 1999.

The High Court Proceedings

In the present case, it was SGS which relied on the time limit. On 16th June 1999, it issued a Notice of Motion seeking an order striking out DEKRA's proceedings *in limine* on the ground of its failure to bring the proceedings within the three-month limit provided by Order 84A.

After a very full exchange of affidavits, O'Neill J in the High Court heard the application. He identified the issues as follows:

> the date on which time begins to run for the purposes of Order 84(a) Rule 4;
>
> whether DEKRA initiated proceedings within the time limit;
>
> whether assuming that the answer to (b) is in the negative, "*good grounds*" have been shown for extending the time limit;
>
> whether the proceedings ought to be struck out because DEKRA did not apply at "*the earliest opportunity*";
>
> whether Order 84 (a) Rule 4 is contrary to Article 5 of the E.C. Treaty insofar as it results in procedural conditions where actions relating to the exercise of E.C. law arise which are less favourable than those applicable to similar actions of a domestic nature.

As I have already indicated, the last point has not been argued on this appeal. Accordingly, this judgment does not deal at all with the possibility that the time limit may not be sufficiently effective to protect the interests in question or that it does not give protection equivalent to that afforded in Irish law to equivalent rights.

Two other matters have arisen peripherally. Firstly, SGS contended that DEKRA was guilty of breach of an obligation of utmost good faith in the manner in which it presented the facts surrounding its delay in making its application. I would dispose of this issue at once. DEKRA was not making an ex parte application. All applications under Order 84A are required to be on notice. The Minister and

the Notice Party were on full notice and in a position to answer any incomplete presentation of the facts. In the absence of something gross or fraudulent, there is no reason to extend the salutary rule of utmost good faith which reposes on those making applications ex parte to proceedings inter partes such as the present. Secondly, DEKRA questioned the standing of SGS to bring the application to strike out DEKRA's application. This was not seriously pursued on this appeal, and, in my view, rightly so.

Each of the other matters has been fully argued and it suffices to refer to them very briefly. SGS argued that, where the earliest opportunity to make an application arose outside the three-month time limit from the date of the award there is no jurisdiction to extend the time. The learned High Court judge held that the rule permits an extension of time whether the earliest opportunity occurs within or outside the three-month time limit. He thought the phrase, *"unless the court considers that there is good reason for extending such period"*, as it comes after the conjoined events, namely, at the earliest opportunity and within three months, and there being no distinction made between them, must be construed as including both of these eventualities. He held, contrary to the submission of DEKRA, that the decision of the Minister was made on 23rd November and that the time ran from that date so that, when they issued proceedings, DEKRA were one month and one day out of time.

The learned judge also, in reliance on the judgment of Buxton L.J. in the case of *Matra Communication v. Home Office* (1999) 3 All E.R. 562 at 570 ("*Matra*") held that there could not be a difference to the time limit to be applied to a claim to set aside an award and a claim limited to damages.

He reviewed in some detail the events that passed between 16th December and 15th March. He concluded that DEKRA were aware by 16th December of the three issues that became of concern to them, namely the re-test fee, the location of tests centres and the conflict of interest issue.

He thought that it was reasonable for DEKRA to await the meeting proposed for 12th January but found that there was no explanation whatever for the six-week delay from then until 24th February. He criticised the behaviour of DEKRA in the period after 5th January and even in their initiation of renewed correspondence on 24th February. In view of the *"essential urgency which was undoubtedly required..,"* he did not consider this latter behaviour to be justified.

At that point, the learned High Court judge embarked on an inquiry into who contributed to the delay. He considered arguments of prejudice advanced on the part of the Minister and SGS, and the issue of the public interest. He then concluded as follows:

> *"I have come to the conclusion that neither S.G.S. nor the respondent will suffer a significant prejudice that can be fairly attributable to the delay on the part of DEKRA. Such prejudice as is discernible is of a potential or indefinite kind and would be the result of the proceedings themselves and the relief sought therein rather than the result of any delay on the part of DEKRA in initiating these proceedings.*
>
> *On the other hand if these proceedings are to be struck out now without been* [sic] *heard, a grave injustice may be done to DEKRA. Balancing that prejudice against any potential prejudice to S.G.S. or the respondent, I have come to the conclusion that the balance must lie in favour of DEKRA. I am mindful of the fact that DEKRA have been in delay and as I have found earlier, have not explained a significant portion of that delay. Nevertheless the relief sought in this Motion by S.G.S. is of the most drastic kind and in my view is such that should only be granted in the clearest of cases where the default is gross or the prejudice caused by it is real and substantial and immediate. In this case the delay is short in terms of time, the extension of time required a matter of some one month. While urgency is clearly required in applications for reviews of the decision to award or the award of a public contract, nevertheless the conduct of these reviews are not a new departure in our jurisprudence such that a wholly different approach to the question of delay should be adopted. The courts are there to administer justice and only in the most extreme case should a party be repelled from the seat of justice unheard. No doubt the award of public contracts is a matter of great public importance involving potentially very serious obligations on the part of the State and where wrong doing occurs remedies which may place a heavy burden on the public purse. Be that as it may, the validity or the relevance to these reviews of the time honoured maxim Fiat Justitia Ruat Coelum remains undiminished.*
>
> *For the foregoing reasons therefore, I have decided to exercise my discretion in favour of extending the time limit in Order 84 A Rule 4 to the 26th March 1999."*

Arguments on the Appeal

Mr Gerard Hogan, Senior Counsel, on behalf of SGS, submitted that the learned High Court judge had erred in his approach to the interpretation of Order 84A and in his application to the facts of the case in essentially respects. Firstly, the date when the decision was made was 24th November 1998. The facts that the grounds for review of the decision were not then known to DEKRA does not alter that fact, though it may be relevant either to the question of *"the earliest opportunity"* or the existence of *"good reason"* for extending the time. Secondly, the onus is on DEKRA to explain the delay (see *O'Donnell v Dun Laoghaire Corporation* [1991 ILRM 301.). DEKRA had not explained the delay. Until they had, the judge could not go on to consider the issue of prejudice, though a relatively short period of delay might be more easily explained. In the context of high-value public services contracts, well-advised parties such as DEKRA bear a heavier onus to explain than immigrants who are subject to a much shorter period of fourteen days. Thirdly, SGS had suffered prejudice. The *"unsettling and disruptive effect"* of a damages claim was recognised in the judgment of Buxton LJ in *Matra*. DEKRA presented its claim ambiguously at first and only later made it clear that it was not seeking to set aside the award of the contract to SGS. There is no basis for distinguishing between damages claims and claims to set aside an award for the purpose of the time limit.

Mr Michael Carson, Senior Counsel, on behalf of the Minister argued that the expression, *"the earliest opportunity"* in Order 84A, rule 4 should be distinguished from the term "promptly" employed in the equivalent provision in Order 84: it is more emphatic. He submitted, in particular, that it is only where an applicant has no opportunity to apply within the three-month period, as where he was ignorant of the grounds for seeking the review or for some other reason, depriving him of the opportunity of making an application that the time can be extended, if good reason can be shown.

Mr Bill Shipsey, Senior Counsel, submitted, on behalf of DEKRA the decision to award the contract to SGS was not made until 15th December 1998. The notification of 24th November was expressed to be "*subject to contract*." He accepted that he had the onus of explaining the delay, even if, on his submission, it was a period of only fifteen days. The information about the re-test charges was not available until after the debriefing on 8th December. Counsel accepted that grounds for DEKRA's application arose on or about 15th December. After that date, it was reasonable for DEKRA to await the further proposed meeting with the Minister: the Minister had promised to give more information about the SGS re-test fees. Even after 5th January, though DEKRA knew the Minister was not

going to supply more information it was reasonable for DEKRA to wait until they were better informed. Parties should not be placed in the position of having to initiate uncertain litigation. The Minister might have supplied information, which would have dissuaded DEKRA from proceeding.

Mr Shipsey emphasised that the decision to extend the time was a discretionary one. In *Re Comet Machinery Co. Ltd.(In Liquidation)* [1999] I.R. 485, Keane J stated that the Supreme Court would give great weight to the views of a trial judge in such a case.

Conclusion

It is convenient to consider, firstly, the argument of the Minister that, where, as here, the earliest opportunity to apply for review of a decision arose within the three-month period after it is made, the court has no power to extend the time. This involves reading the first part of rule 4 of Article 84A entirely separately from the second. The obligation to apply "at the earliest opportunity" is, it is claimed, distinct from the obligation to apply *"in any case within three months from the date when grounds for the application first arose."* The only period mentioned, and therefore the only one that can be extended is the three months.

In my view, this is an unduly restrictive reading of the provision. Taken to its logical extreme, this would mean that, even where an application is made within the period of three months, it is out of time, if it is not made at the earliest opportunity. That would be a startling proposition. To be fair, Mr Carson did not go that far. However, he did say that there is no power to extend the time where the earliest opportunity arose within the period. The first difficulty about the argument is that the three months run from "*the date when grounds for the application first arose."* It is common ground, in the present case, that grounds first arose on or about 16th December. Similarly, on the hypothesis put forward by Mr Carson, the earliest opportunity would arise, when the applicant first knew of the grounds, i.e., the time would not commence to run until then. The answer is, I think, to be found in the clear link forged between the first and the second part of the rule by the inclusive expression, "*in any case*." The three-month period from the date when the decision was made, or when the grounds first arose, if later, is available in every case. The obligation to move at the earliest opportunity reinforces the obligation to act quickly. I do not find it possible to attach any great importance to the choice of this expression rather than the word, "*promptly*." At most, there is a slight difference of degree, but I will return to this.

In short, I am satisfied that the learned High Court judge was correct in rejecting the restrictive interpretation on the power to extend the time proposed by the Minister.

The fact of the matter is that the application was made ten days outside the three-month limit. In this respect, I differ from the judge's analysis. He was correct to hold that the decision was made on 24th November, but did not draw the correct conclusion from his correct finding that the grounds were not known until 15th December. It is to the decision of learned High Court judge to extend the time in these circumstances that I must now turn.

I have already noted the crucial findings of the learned High Court judge concerning the delay of DEKRA in issuing proceedings from 16th December 1998 to 25th March 1999. Essentially, he concluded that there was no good reason for the delay between 5th January and 24th February and that, having regard to the essential urgency of the matter, DEKRA was not justified in embarking on further correspondence and inquiries with the Minister after the latter date. He remarked, correctly that *"any belief they may have had that they would quickly reach a full understanding of the problem and fully inform their conclusion as to whether proceedings were warranted, must have been shattered by the cancellation of that meeting,* [of 12th January] *leaving them under no doubt that proceedings would be necessary if they were to progress their complaint."* Further, while accepting that both sides contributed to delay up to 12th January, he held that *"thereafter the delay was entirely the responsibility of DEKRA."*

In effect, this was a conclusion that DEKRA had not shown good reason for their delay after receipt of the letter of 5th January cancelling the meeting arranged for 12th January. However, the learned High Court judge proceeded directly to consider the arguments for and against prejudice respectively to the Minister and to SGS. As already noted, the High Court decision finally turned crucially on the issue of the absence of prejudice to SGS or the Minister. The appellants submit, however, that the issue of prejudice does not arise until *"good reason"* has been shown by the applicant.

The wording of Order 84, rule 21 of the Rules of the Superior Courts, which is very similar to that of the rule now under consideration, was considered by Costello J. (as he then was) in *O'Donnell v. Dun Laoghaire Corporation* [1991] I.L.R.M. 301. He said, at p. 315:-

> *"The phrase 'good reasons' is one of wide import which it would be futile to attempt to define precisely. However, in considering whether or not there are good reasons for extending the time I think it is clear that the test must be an objective one and the court should not extend the time merely because an aggrieved plaintiff believed that he or she was justified in delaying the institution of proceedings. What the plaintiff has to show (and I think the onus under O. 84, r. 21 is on the plaintiff) is that there are reasons which both explain the delay and afford a justifiable excuse for the delay."*

The nature and extent of the burden to show "good reason" calls for some further remarks. The time to be explained by the applicant may commence to run within the period. This flows from the need to move at "*the earliest opportunity*." Nonetheless, a claim cannot normally be defeated for delay if it is commenced within the period. There would need to be some quite special factor such as prejudice to third parties. (*State (Cussen) v Brennan* [1981] I.R. 181). Thus, different levels of importance may be attached to time falling within and without the period. The fact of delay within the period may affect the approach of the court to time falling without. The court must always have regard to the circumstances of the particular case and to the fact that the power to extend the time is there in the interests of permitting the courts to do justice between the parties. This was explained in the judgment of this Court, delivered by Keane C.J. in *The matter of Article 26 of the Constitution and the Illegal Immigrants (Trafficking) Bill, 1999*[2000] 2 I.R. 360 at 394. Dealing with the fourteen-day period permitted by the legislation under consideration for challenge to certain decisions and the power to extend that time for "*good and sufficient reason*," he said:

> *"The court is satisfied that the discretion of the High Court to extend the fourteen day period is sufficiently wide to enable persons who, having regard to all the circumstances of the case including language difficulties, communication difficulties, difficulties with regard to legal advice or otherwise, have shown reasonable diligence, to have sufficient access to the courts for the purpose of seeking judicial review in accordance with their constitutional rights."*

DEKRA, however, has also relied on the following passage from the judgment of McCarthy J in *O'Flynn v Mid-Western Health Board*

[1991] 2 I.R. 223:

> *"There is ample ground for saying that both in principle and in precedent an application for judicial review should not fail merely because it is out of time: The State (Furey) v. Minister for Defence [1988] I.L.R.M. 89. In principle it is right to relieve against delay in challenging an administrative decision where the delay has not prejudiced third parties."*

The proposition there enunciated can no longer be regarded as good law. The precedent upon which it was based, *State (Furey) v. Minister for Defence,* was disapproved by this Court in *de Róiste v Minister for Defence* [2001] 1 I.R. 190. In his judgment, on page 197, Keane C.J stated that the passage from *Furey's* case, upon which the later dictum of McCarthy J was founded was clearly obiter. He went on to accept the explanation of the relevant law contained in the judgments of Denham and Fennelly JJ in the same case. It will suffice if I refer to one passage from the judgment of Denham J, at page 210:

> *"The time element in judicial review proceedings requires early application to court by an applicant. This is indicated by the requirement that the application be made promptly, and in any event within three or six months from when the grounds for application arose, unless there is good reason to extend the period within which the application shall be made. This is a shorter time span than the time required in other proceedings, for example a plenary summons. Time is more of the essence, more urgent, in judicial review proceedings. Indeed in some areas of judicial review, by statutory requirement, an application must be made within weeks. Thus, the case law relating to dismissing proceedings for lack of prosecution has some, but not great, relevance to applications for judicial review. Such cases may be helpful in analysing the reason for delay to see if it is a good reason and to achieve a just decision.*

Although, the *de Róiste* case was an extreme one on its facts, concerning an application delayed for some thirty years, the judgments usefully address some points of distinction between the principles applicable to delay in the context of Judicial Review and in the context of the dismissal of an action for want of prosecution. In the first case, it is incumbent on the applicant to explain any delay on his part in moving the court and the burden is upon him. In the second case, the plaintiff may commence his action within the limitation period laid down by law. The burden of establishing that delay has been inordinate and inexcusable lies on the moving party, ordinarily the defendant. Naturally, in each type of case, the court is called upon to strike a balance, in the interests of justice, between a number of considerations.

There has been a tendency in recent legislation to impose comparatively short time limits for the challenge of administrative decisions. The case of the Illegal Immigrants (Trafficking) Act, 2000 is a notable example. In delivering the judgment of the Court in that case, Keane C.J drew attention to the public policy in this field:

> *"There is a well established public policy objective that administrative decisions, particularly those taken pursuant to detailed procedures laid down by law, should be capable of being applied or implemented with certainty at as early a date as possible and that any issue as to their validity should accordingly be determined as soon as possible."*

In the present case, there are two stages to the decision of the learned High Court judge. In the first stage, he held: that the earliest opportunity for making the application arose on or immediately after 16th December; that DEKRA had the onus of explaining and justifying any delay; that it was reasonable to postpone issuing proceedings in expectation of the meting proposed for 12th January; that the cancellation of that meting by the Minister's letter of 5th January must have left them in no doubt that there was an end to any discursive process with the Minister; that DEKRA had provided no explanation for its delay after that date up to 24th February; that DEKRA was not justified in re-engaging in correspondence after 24th February, having regard to the essential urgency of the matter. In short, though he did not say so in express terms, learned High Court judge effectively concluded that DEKRA had furnished no good reason for its delay.

The learned High Court judge proceeded directly to consider the issue of prejudice. He was undoubtedly influenced by the dictum, quoted above, of McCarthy J in *O'Flynn v Mid-Western Health Board.* I am satisfied, however, that the statement in question does not now correctly represent the law and that the legislative tendency towards the imposition of stricter time limits is matched by corresponding judicial development. An applicant, who is unable to furnish good reason for his own failure to issue proceedings for Judicial Review *"at the earliest opportunity and in any event within three months from the date when grounds for the application first arose"* will not normally be able to show good reason for an extension of time. In particular, he cannot, without more, invoke the absence of any prejudice to the opposing party as the sole basis for the suggested good reason.

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. I agree with the learned trial judge that no more favourable consideration should be given to DEKRA's application for an extension of time by reason of the fact that they limited their claim to damages. Firstly, their initial stance on this issue was ambiguous. Secondly, I agree with the view of Buxton L.J. expressed in *Matra* that a continuing damages claim is capable of having an *"unsettling and disruptive"* effect on the contractual relations established by the awarding decision. However, that issue really arises only when the applicant has shown prima facie good reason for his delay and the respondents plead prejudice. In the present case, the applicant has not satisfied the first requirement. On the facts of the present case, DEKRA were acutely aware of their legal position and of their legal remedies as early as 14th December. If DEKRA had been prevented by concealment from learning the reasons for the failure of their, their position would very likely be different. However, so aware were DEKRA of their grounds of complaint that they were in a position to give and did, in fact, give the statutory notice to the Minister. It is practically uncontested that DEKRA have shown no good reason for their failure to commence proceedings very shortly after the Minister's letter of 5th January. The remedy of Judicial Review derives from the Remedies Directive which requires that *"decisions of contracting authorities may be reviewed effectively and, in particular, as rapidly as possible."* DEKRA did not move as rapidly as possible.

For these reasons, I would allow the appeal. I would set aside the High Court order granting the extension of time and would substitute an order dismissing DEKRA's application.