APPROVED NO REDACTION NEEDED

THE COURT OF APPEAL

Record No.: 2024/122

Neutral Citation Number: [2025] IECA 7

REVIEW OF THE AWARD OF PUBLIC CONTRACT
IN THE MATTER OF A PUBLIC PROCUREMENT REVIEW APPLICATION
PURSUANT TO ORDER 84A OF THE RSC
IN THE MATTER OF A REVIEW UNDER THE EUROPEAN COMMUNITIES (PUBLIC AUTHORITIES' CONTRACTS) (REVIEW PROCEDURES) REGULATIONS 2010 AS AMENDED

Faherty J.
Allen J.
Hyland J.

BETWEEN

KILLAREE LIGHTING SERVICES LIMITED

APPELLANT

– AND –

MAYO COUNTY COUNCIL

RESPONDENT

AND

ELECTRIC SKYLINE LIMITED

NOTICE PARTY

JUDGMENT of Ms. Justice Hyland delivered on 23rd day of January 2025

Summary of Findings

1. This judgment concerns a challenge to a decision by the respondent, Mayo County Council (the "**Council**"), to exclude the tender of the appellant, Killaree Lighting

Services Ltd. ("**Killaree**") in an award process for a public lighting contract on the basis that the tender submitted was abnormally low. The contract had been concluded with another tenderer in circumstances where it was later found by the High Court – and not appealed – that the Council had breached its obligation to send a standstill letter to Killaree.

2. The High Court's conclusion that the Council did not err in its decision to exclude Killaree's tender is upheld. Killaree argued that the Council had impermissibly identified provisions of the request for tender ("**RFT**") in its correspondence with Killaree. But a contracting authority is quite entitled to refer to extracts from the RFT that are potentially relevant, including the rules on fixed inclusive value and balanced tenders, as well as those on abnormally low tenders.

3. Next, Killaree argued the Council was obliged to accept its explanation for the abnormally low tender i.e. that it had performed other contracts satisfactorily based on the same pricing approach. Article 69 of the Procurement Directive specifies that contracting authorities shall require economic operators to explain the price or cost where tenders appear to be abnormally low. The contracting authority must assess whether a tender is reliable and will not impair the proper performance of the contract (*Tax-Fin-Lex v Ministrstvo,* C-367/19, EU:C:2020:685) and/or is genuine (*Veridos,* C-669/20, EU:C:2022:684). To do that, it must understand why the prices that appear at first glance to be abnormally low are justified. The Council was entitled to conclude that the apparent completion of other contracts by Killaree using a similar pricing approach did not satisfactorily account for the low level of price/costs in the instant tender.

4. Nor can Killaree succeed on its argument that there was no entitlement to treat the tender as abnormally low because the tender total – *a fortiori*, a notional tender total as

opposed to the constituent parts – was not abnormally low, and the Council were precluded from looking beyond the tender total to the constituent parts of the tender. First, the weight of case law is against that proposition, particularly *European Dynamics Luxembourg SA v European Union Agency for Railways,* T-392/15, EU:T:2017:462 and *Commission v Sopra* C-101/22P, EU:C:2023:396. Second, the wording of Article 69(1) TFEU draws a distinction between abnormally low costs and abnormally low price, suggesting that a contracting authority may look at either price or costs, or both. Third, a purposive interpretation of Article 69 undermines Killaree's argument. The objective of assessing whether a tender is abnormally low is to ensure that the tender is genuine, reliable and will not impair the proper performance of the contract. To restrict a contracting authority from looking behind the tender total, despite its concerns about the constituent parts, would significantly limit the scope of the inquiry. Some tender totals will be so low they will inevitably alert the contracting authority to a potentially abnormally low tender. But tenders requiring hundreds or thousands of items to be priced, such as the present tender, may contain abnormally low pricing in some areas but not in others. Killaree's construction of Article 69 would effectively prevent a contracting authority from conducting the necessary assessment of such tenders.

5. Finally, Killaree asserts that there was a failure to follow proper process by the Council because it launched an inquiry into whether its tender was abnormally low without comparing it with other tenders, despite indicating it would take such a course in the clarification document issued by the Council. Properly interpreted, the clarification document does not commit the Council to such a course. The RFT is the primary document: the clarification document is subsidiary to the RFT and must be read in the light of it. There is no conflict or ambiguity between the clarification and the RFT. The

RFT does not limit the contracting authority to launching an inquiry only into those tenders that are abnormally low compared with other tenders.

6. Killaree also alleged a failure to give adequate reasons explaining the decision to exclude it from the tender process. Having regard to Directive 2014/24 of the European Parliament and the Council of 26 February 2014 on public procurement (the "**Procurement Directive**") and Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 (the "**Remedies Directive**"), as well as relevant case law, it is clear that the contracting authority must give the tenderer an opportunity to justify its price and/or cost, must engage with the justification given by the tenderer, and the tenderer must be able to understand why the contracting authority regards the tender as abnormally low following the exchange between them. When considering if those requirements have been met, the entire context must be considered, including the RFT. Where Killaree sought to justify its tender, *inter alia*, not by arguing that the prices represented the real cost, but on the basis that they were included in other prices or that the items were unnecessary, that justification breached the express provisions of the RFT. In the circumstances, Killaree must be taken to know why the justification offered by it was unacceptable. The Council was accordingly entitled to provide reasons in a summary format.

7. In respect of the consequences of the Council's admitted failure to send the standstill letter required under Regulation 5(1) of the European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010 (S.I. No.130 of 2010) (the "**Remedies Regulations**"), Killaree argues that the trial judge erred in refusing to make a declaration of ineffectiveness (either mandatory or discretionary) or impose a civil penalty on the Council. A mandatory declaration of ineffectiveness of a contract is an unusually intrusive remedy and affects the rights of parties other than the contracting

authority and the disappointed tenderer, notably the successful tenderer. Regulation 11(2) provides for a mandatory declaration of ineffectiveness in cases of Regulation 5(1) infringement where (a) the infringement has deprived the tenderer of the possibility of pursuing pre-contractual remedies and (b) is combined with an infringement with the Regulations that has affected the chances of the tenderer to obtain the contract.

8. Contrary to the conclusions of the trial judge, I have concluded Killaree was deprived of the chance to seek pre-contractual remedies because of the failure to send a standstill letter. The letter Killaree received indicated it was being excluded, but did not make it clear that the Council had decided the identity of the successful tender and the clock had started ticking for the purposes of the standstill period. By the time Killaree issued the proceedings, the contract had been signed. The Council's failure to send a standstill letter deprived Killaree of the chance to seek remedies before the contract was signed. However, because Killaree has not identified any substantive infringement of the Regulations in respect of its exclusion for an abnormally low tender or lack of reasons, Killaree cannot obtain a mandatory declaration of ineffectiveness.

9. In respect of a discretionary declaration of ineffectiveness, I consider Killaree sufficiently pleaded its case in that regard, contrary to the conclusions of the trial judge. However, the trial judge did not err in refuse to grant a discretionary declaration of ineffectiveness on the following basis: (a) the significance of the contract both regionally and nationally; (b) the nature of the works, involving as they did public safety and related considerations; (c) the impact that a declaration of invalidity would have on the various contracts concluded with six different local authorities; and (d) the desirability of legal certainty (as identified at Recital 25-27 of the Preamble to the Remedies Directive).

10. Finally, given the uncontroverted breach of the obligation to provide a standstill letter and the refusal to grant a declaration of ineffectiveness, there is a mandatory obligation on the Court to impose an alternative penalty under Regulation 13(1) of the Remedies Regulations. This penalty is to be paid into the Central Fund and not to Killaree. I agree with the trial judge that he did not have the necessary information to adjudicate upon any such application; no Regulation 13(1) plea was contained in the pleadings and no application was made in that respect, even after the judgment of the High Court was given. However, because of the terms of Regulation 13(1), Killaree cannot be precluded from seeking a civil penalty at this stage if it wishes to do so. Therefore, these proceedings will be remitted to the High Court solely on the question of a civil penalty where directions will be given in respect of pleadings, evidence, submissions etc.

Factual Background

11. On 1 July 2020 the Council, on behalf of Galway City Council, Galway County Council, Leitrim County Council, Roscommon County Council and Sligo County Council, put out an RFT for the repair, maintenance, and upgrade of public lighting for those Councils, amounting to 57,049 public lighting units. The value of the contract was €1,400,000 per annum, based on current and future usage at the time. The contract was to be issued for a term of twelve months, and the contracting authority had authority to extend the term for a period or periods of up to six months, up to six times. The tender was to be awarded on the basis of the most economically advantageous tender, having regard to quality and price, and was to be assessed by an evaluation committee.
12. Killaree submitted its tender on 3 August 2020. On Friday 14 August 2020, the Council wrote to Killaree, noting that the evaluation committee had raised concerns about the tendered rates submitted by Killaree. Specifically, the Council pointed out that Killaree ascribed €0.01 values for 66% of the tender items in the Schedule. The Council

requested that Killaree clarify the genuineness of its pricing by providing the specific details as to how it could provide those services, works and goods for the prices it submitted, and requested a response by 18 August 2020.

13. After receiving further time to submit the information requested, Killaree wrote back to the Council with its response on 20 August 2020. Killaree sought to explain that the €0.01 item pricing was attributable to unspecified favourable conditions available to them for the supply of products or services or for the execution of the work relating to the contract. Killaree further noted that it was not in a position to disclose those conditions due to confidentiality concerns but indicated that previous successful tenders and contracts using the relevant rates demonstrated the genuineness of its pricing. It asked for clarification of the rules in respect of abnormally low pricing.

14. On 27 August 2020, the Council wrote to Killaree, inviting it to (a) provide a breakdown of all tendered rates and prices to show that they reflected a fair allocation of the Notional Tender Total; (b) provide details of the constituent elements of the Notional Tender Total and the tendered rates and prices, specifically those items priced at €0.01 values; and (c) provide an explanation of the prices and costs proposed by Killaree.

15. On Friday 4 September, Killaree responded with an itemised and annotated schedule of its proposed pricing structure. Killaree explained that certain items were priced either because it had in place existing services to perform that item of work and would not incur any additional costs for carrying out those works or services, or that certain items would not arise and so the item had been marked accordingly. Additionally, it noted that it had built up strong and lasting relationships with its suppliers and had exceptionally favourable conditions for the supply, and it passes that on.

16. On 15 September, the Council wrote to Killaree explaining that the reasons the Council raised clarification requests were (1) that there were concerns that the tendered rates were not serious; (2) that not all of the amounts in the pricing document provided appeared to cover the full inclusive value of the relevant work; and (3) in light of the works, supplies and services required, the tender appeared to be abnormally low.

17. On 9 October 2020, the Council wrote to Killaree, eliminating it from further participation in the tender competition, and expressing the view of the Council – for reasons set out in full later in this judgment – that the tender submitted by Killaree was abnormally low. The letter concluded by observing as follows: "*Following 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*."

18. On 22 October, the solicitors for Killaree emailed the respondent, asserting that the statement of reasons provided by the Council was, in their view, unsatisfactory and requesting a proper statement of reasons. On 3 November 2020, HG Carpendale & Co Solicitors wrote to solicitors for the Council to notify it that Killaree intended to challenge the decision to eliminate it from the tender competition, by way of application to Court. On 3 November 2020, the contract award notice was published in the Official Journal: with the announcement that Electric Skyline had been awarded the contract; that the contract had been concluded with Electric Skyline on 27 October 2020; and that the contract award notice had been dispatched on 29 October 2020.

Legislative provisions on abnormally low tenders

19. Abnormally low tenders, and the challenges they pose, are specifically addressed in the Procurement Directive. Recital 103 to the Directive explains that tenders that appear abnormally low in relation to the works, supplies or services might be based on

technically, economically or legally unsound assumptions or practices, and provides that where the tenderer cannot provide a sufficient explanation, the contracting authority should be entitled to reject the tender. Article 69 of the Directive sets out the rules on such tenders in the relevant part as follows:

> *"1. Contracting authorities shall require economic operators to explain the price or costs proposed in the tender where tenders appear to be abnormally low in relation to the works, supplies or services.*
>
> *2. The explanations referred to in paragraph 1 may in particular relate to:*
>
> *(a) the economics of the manufacturing process, of the services provided or of the construction method;*
>
> *(b) the technical solutions chosen or any exceptionally favourable conditions available to the tenderer for the supply of the products or services or for the execution of the work;*
>
> *(c) the originality of the work, supplies or services proposed by the tenderer;*
>
> *(d) compliance with obligations referred to in Article 18(2);*
>
> *...*
>
> *3. The contracting authority shall assess the information provided by consulting the tenderer. It may only reject the tender where the evidence supplied does not satisfactorily account for the low level of price or costs proposed, taking into account the elements referred to in paragraph 2.*
>
> *Contracting authorities shall reject the tender, where they have established that the tender is abnormally low because it does not comply with applicable obligations referred to in Article 18(2).*

20. The Procurement Directive was implemented in Irish law by Regulation 69 of the European Union (Award of Public Authority Contracts) Regulations 2016 (S.I. No. 284 of 2016) ("**Award of Public Authority Contracts Regulations**").

21. As referred to in the summary of findings above, there is a separate Directive on remedies for breach of public procurement, the Remedies Directive. That Directive was implemented by the Remedies Regulations.

Tender Documents

22. In order to understand the nature of the competition and the impact of the terms of the tender documents on the legality of Killaree's exclusion from the competition, it is necessary to look more closely at some of the rules of the tender. The RFT included at Part 3 a section entitled "S*election and award criteria*". At para. 3.3 the heading "*Award Criteria*" appears. At para. 3.3.1, it is identified that the contract will be awarded on the basis of the most economically advantageous tender as identified. Marks were to be awarded out of a possible 1000, and in accordance with the following criteria: price 700 marks; quality 300 marks. Price is stated to be assessed on the basis of the lowest price of tender. The RFT continued as follows: -

> "*Amounts must be included wherever required in the pricing document. Blank spaces, the term 'nil' or 'included', or dashes or the like must not be used. …*
>
> *Tenders must not use abnormally high or low rates of prices.*
>
> *Each amount in the pricing document must cover the full inclusive value of the relevant work, and, where applicable, a balanced allocation of the notional tender total.*
>
> *All items and quantities in the pricing document must be priced.*
>
> *Tenderers must not use negative rates or prices, or omit rates, or use zero rates, in the pricing document.*

If any tender does not comply with this section, the employer may exclude them from the tender process."

23. At para. d.2 of RFT there is a section on "*corrections, unbalanced and abnormal tenders and rates*." At d.2.2 there is a section on "*unbalanced tenders*" which provides that if the tendered rates or prices do not reflect a balanced allocation of the notional tender total, the employer may (but is not obliged to) do either or both of the following:

- require the tenderer to provide a breakdown of any tendered amounts to show they reflect a fair allocation of the notional tender total and;

- invite the tenderer to adjust rates or prices but without adjusting the notional tender total.

The contracting authority was entitled to reject the tender if they were of the view that the tenderer's tendered rates or prices in the pricing document did not reflect fair allocation of the notional tendered total.

24. At para. d.2.3 there is a heading "*Abnormally low tenders, abnormally high or low prices*". This provides as follows: -

> "*If, in the Employer's opinion, any tendered amounts are abnormally low or abnormally high, the Employer may require the tenderer to provide details of constituent elements of notional tender or the tendered amounts. ... If having considered the information provided, the Employer is of the view that any tendered amounts are abnormally low or abnormally high, the Employer may reject the tender*."

25. The tender document contained a Schedule of Rates. In total, tenderers were presented with 520 individual items and required to price each one individually. The Schedule identifies at the start that it contains quantities that are only for the purpose of determining a notional tender sum, and that the rates entered in the Schedule of Rates

shall be used for preparing task orders, irrespective of the notional quantities against each item. In other words, the tenderers were bound by the rates they entered in the Schedule of Rates, although the quantities might ultimately vary from the notional quantities. Those notional quantities were necessary for the purposes of arriving at a notional tender sum. Moreover, as set out in the affidavits, the notional quantities were based on the experience of the six local authorities in providing similar services in the preceding time period under the previous contract and were informed by that experience. The purpose of the highly detailed breakdown of items was (a) to allow the contracting authority to interrogate the tenderer's ability to deliver at the quoted price and (b) to allow the competing tenders to be fairly compared.

Tender submitted by Killaree

26. The notional tender total for Killaree's tender was €4,292,198.82. To put that in context, the notional tender total of the successful tenderer, Electric Skyline, was €6,426,882.20. Remarkably, 66% of items priced in Killaree's tender, i.e. about 350 items, were priced at €0.01 per item. To understand the concern of the Council in this regard, it is illuminating to consider some of the items for which a rate of €0.01 was inserted. For example, the emergency call-out service, which was to be provided 24 hours a day, 365 days a year, was priced in Killaree's tender at €0.01 per month, totalling €0.48 for the provision of that service over 48 months. Similarly, in relation to the fault reporting service, the total was €0.48 over 48 months. Traffic management, including for traffic management for all works including works on dual carriageways and motorways by traffic management specialists subject to prior agreement with the client's representative, was priced at €0.01 per month. In respect of defects liability insurance, the rate inserted was €0.01 per month making the total amount for insurance €0.48 over 48 months. The performance bond was priced at €0.01 per month, as was the defects

liability bond. The insurances were €0.01 per month, as were the periodic electrical testing and inspections of metered sites. There were large discrepancies in the way in which certain lights were priced as compared to others. For example, 15 Phillips Luma's were priced at €320 each, but 15 units of CU Phosco P851 were priced at €0.01 each.

27. It is quite obvious from looking at certain of those tendered sums they could not possibly cover the costs of the individual items. It is unsurprising that those rates triggered an inquiry by the Council, *inter alia,* into abnormally low tenders.

Killaree's complaints in respect of the conclusion its tender was abnormally low

28. In short, Killaree argues that the decision to exclude it from the competition on the basis that it had submitted an abnormally low tender was unlawful and it appeals the finding of the trial judge rejecting its pleas of illegality. Its complaints as articulated at the appeal hearing may be divided into four.

29. The first criticism is that the Council inappropriately conflated the concepts of "*fully inclusive value*" and "*unbalanced tenders*" with the concept of "*abnormally low tender*", both in the correspondence with Killaree and in the ultimate decision of 9 October excluding it from the competition; and that the trial judge erred in not accepting this (hereafter referred to as the "*confusion of pricing concepts*" argument). It is not clear from the arguments made as to how this negatively affected Killaree.

30. The second argument, linked to the first, is that the Council adopted an unlawful process, *inter alia,* in failing to accept the explanations of the tendered amounts in question, and that it should have reverted to Killaree in respect of the explanations given (the "*failure to accept explanation*" argument). The latter argument i.e. the obligation to revert is repeated in Killaree's complaints about the trial judge's consideration of its lack of reasons ground, and it will be dealt with in that context. This argument was

described by counsel at the appeal hearing as a procedural one, but in fact it amounts to an argument on substance.

31. The third argument is that there was no entitlement to treat the tender as abnormally low because the tender total (as opposed to the constituent parts) was not abnormally low, and therefore the Council were precluded from looking beyond the tender total to the constituent parts of the tender (the "*tender total*" argument). That argument only featured fleetingly in the decision of the trial judge, did not form part of the notice of appeal, and was not identified in the written submissions. Nonetheless, for the sake of completeness this Court will address the argument.

32. The last argument made is that the trial judge erred in concluding there was no error in the process, despite the lack of evidence that the Council had compared Killaree's tender price with those of other tenders (the "*lack of comparison*" argument). Killaree argues there was an obligation to compare arising from the Council's clarification of the rules in respect of abnormally low pricing. No argument is made that Killaree was disadvantaged by the alleged failure, and that, had such a comparison been made, the Council would not have singled out the tender for closer examination. It is perhaps not surprising no such contention is made, given the extraordinarily low rates proposed by Killaree for two thirds of the items requiring to be priced.

Confusion of pricing concepts

33. Killaree argued that the trial judge had erred in law in rejecting the contention that the Council had misinterpreted its own tender documents. Various arguments to that effect were made and rejected in the High Court. At the appeal hearing, the argument had reduced down to one: that the Council – in its correspondence and in its ultimate letter of rejection of 9 October – had inappropriately conflated the ideas of fully inclusive tender, unbalanced tender and abnormally low tender, and in so doing had not correctly

reflected its own tender documents. Curiously, Killaree never explained how this alleged illegality adversely affected it. For example, it did not argue that it was unable to respond to the concerns of the Council because of this alleged confusion, or that it did not get an opportunity to put forward its justification for the tender prices, or that in some other way it was disadvantaged. The complaint appears to be entirely one of form rather than substance.

34. The first document criticised is the email of 14 August 2020 from Mr. Maughan of the Council to Killaree. That identified that the evaluation committee has raised concerns about the €0.01 values inserted in approximately 66% of the tendered rates and requested Killaree by way of clarification to demonstrate the genuineness of its pricing by providing specific details as to how it could offer services, works and goods for the pricing submitted. It was stated that a decision would be made, based on its response, whether to admit or reject the tender. The email reminded Killaree that the RFT and the clarification identified that the tenderers must not use abnormally high or low rates or prices. The email included extracts from the RFT in relation to unbalanced prices, abnormally low tenders, and fixed inclusive value.

35. The trial judge held that the email referred to the RFT and the clarification, that it could have been more clearly drafted and could have identified the individual references but nevertheless did not confuse Killaree. He concluded that the email did not indicate any misunderstanding or misinterpretation on the part of the Council of the tender documents (see paragraphs 159 and 160). In respect of the criticism by Killaree that the Council ought not to have referenced the rules on fully inclusive rates in its email, the trial judge concluded that the Council was quite entitled to remind Killaree of the obligation on its part to fully price each item as identified in the RFT (paragraph 165). Killaree has identified no error in the trial judge's analysis in this respect.

36. Killaree replied to the email of 14 August on 20 August 2020. I should note in passing this response included the following sentence: "*There is no prohibition on abnormally low prices, merely a procedure which may be followed by the Council to raise at its discretion queries concerning abnormally low price*". That sentence discloses a lack of appreciation on the part of Killaree as to the entitlement of the Council to reject a tender for being abnormally low. As noted above, para. d.2.3 of the RFT provided that if the employer was of the view that any tendered amounts were abnormally low, the employer might reject the tender. It is true that there was no absolute prohibition; it is not true that there was "*merely*" a procedure to raise queries. That procedure had as its terminus an entitlement to reject on the basis of abnormally low tendered amounts.

37. The Council responded to Killaree by letter of 27 August 2020. In his judgment, the trial judge noted that Killaree made the following observations regarding this letter. First, Killaree noted that a reference was made without further explanation to the fact that the tender rates did not reflect a balanced allocation of the tender costs. On this point, the trial judge concluded that not only was it clear that this request on the part of the Council clearly arose from its concern regarding the €0.01 rates quoted for much of the work, and that there was no restriction on the Council raising this issue; but also that, while the Council did not provide a reason for making this request, that did not in itself indicate a failure on the part of the Council to interpret the tender documents correctly. In respect of Killaree's argument that it had already furnished explanations which were never acknowledged, the trial judge concluded that this was not an argument that went to the Council's interpretation of tender documents, let alone to establish the alleged misinterpretation of the tender documents. Again, Killaree has failed to identify any error on the part of the trial judge in his analysis of the complaints made about the correspondence.

38. More generally, it is difficult to see why there could be any objection to the Council identifying parts of the tender document that are potentially relevant to the price tendered. These include the rules on fixed inclusive value and balanced tenders, as well as abnormally low tenders. All of those were potentially relevant at this stage and indeed the concept of fixed inclusive value was ultimately very important. Unsurprisingly, no principle of law was identified that precludes a contracting authority from citing extracts from the RFT when identifying a concern about abnormally low pricing. In those circumstances, the trial judge was entirely correct in arriving at his conclusions and there is no basis for disturbing them.

Failure to accept Killaree's explanation

39. This ground of appeal challenges the conclusion of the trial judge that the Council was not obliged to accept the explanation given by Killaree for its abnormally low tender i.e. that it had performed other contracts satisfactorily based on the same pricing approach. It was said by counsel for Killaree that the appeal on this ground was a "*process driven*" one, but in fact this part of the challenge is a substantive one i.e. that the explanation provided by Killaree ought to have been accepted. Before considering the reasoning of the trial judge, it is necessary to examine the first letter sent by Killaree justifying its prices. Following the email of 14 August from the Council, Killaree sought to justify its prices in a letter of 20 August largely by referring to other contracts that it had successfully executed using a similar approach to pricing – or at least other contracts that it had obtained using a similar approach to pricing, and that it had successfully executed. The explanation for the €0.01 item pricing was as follows:

> *"The explanation for the* €0.01 item pricing is that *KLS has exceptionally favourable conditions available to it for the supply of the products or services or for the execution of the work relating to the contract. More specifically, this arises*

from the fact that as KLS have been carrying public lighting contracts for more than 10 years, KLS have established a supply chain of suppliers that have agreed certain competitive prices, which allows KLS to pass these savings on to the client. … In the context of the present tender, KLS decided to pass on these savings over a range of items by marking the pricing rate at €0.01."

40. The letter went on to say that this was based on the experience of Killaree in performing similar type contacts, that due to commercial confidentiality reasons Killaree was not in a position to disclose the precise nature of these exceptionally favourable conditions, but that it could demonstrate its genuineness by virtue of the fact that it had tendered such prices for similar contracts to the proposed contract and had been awarded and performed the contract in the manner tendered. Killaree identified five tenders ranging from 2013 to 2017 to present and indicated that the contracts were awarded to Killaree using extremely similar present structures to that of the tender at issue, with a high proportion of €0.01 rates being used on these contracts on a daily basis.

41. At para. 226, the trial judge described the responses in these letters – with the exception of the reference to the other contracts – as having been "*at a high level of generality and aspiration*" and found that it did not "*in any way demonstrate the genuineness of the tender in the fashion sought by the Council, namely by providing 'specific details' which supports 'all of your pricing' as sought in the email of 14 August*". The trial judge went on to conclude that "*this correspondence does not engage in any detailed way with the request made by the Council to stand over all of the one cent price rates and notes that, with the exception of the reference to the other contracts, the reasons given as to how the one cent rates are maintainable were elusively vague*."

42. I pause here to observe that when one looks at the subsequent justification of the pricing that was submitted by Killaree, i.e. the schedule of pricing examined below, the

justification for the majority of the rates was not in fact that it could offer items for €0.01 due to favourable relationships but rather that the items were considered unlikely to occur and were therefore not being priced, or that the items were covered under some other heading. Nonetheless, Killaree challenges its exclusion on the basis that the Council erred in not taking into account its previous satisfactory performance of other contracts. In particular, it is said that the Council could and should have accessed the requisite material for it to investigate this claim further; that the onus lay on the Council to obtain and go through the tender documents for the contracts which had been identified, including the references that were provided in respect of twelve contracts and various certificates of compliance; and that the Council was obliged to satisfy itself that Killaree had satisfactorily performed past contracts.

43. Implicit in this argument is the premise that, had the Council been so satisfied, it was obliged to conclude that Killaree would be in a position to perform the contract and therefore it could not rely on the tender being abnormally low to exclude Killaree. This is a remarkable argument, and it is entirely unsurprising that the trial judge rejected it. First, where a contracting authority raises a concern about abnormally low tenders, Article 69 makes it clear that contracting authorities shall require economic operators to explain the price or cost where tenders appear to be abnormally low. The contracting authority shall assess the information provided by consulting the tenderer and, under Article 69(3), may only reject the tender where the evidence supplied does not satisfactorily account for the low level of price or costs proposed.

44. Killaree's reference to other contracts satisfactorily performed cannot be considered to be an adequate explanation for the €0.01 rates, and evidence of other contracts satisfactorily performed cannot constitute evidence that accounts for the extraordinarily low costs proposed by Killaree in respect of certain items. It is notable that there was

no attempt to specify, for example, how many items were sought to be justified on this basis. Nor is it clear how this approach sits with the explanations given in the schedule. Killaree did not identify how those rates could be provided in the context of the contract at issue. No particular rates were focused upon. It was not explained which items so benefited from relationships with suppliers that they could be supplied at €0.01. No explanation was given as to why information on these confidential relationships could not be provided to the Council, given the terms of Section 7 of the RFT which provides that each party to the agreement agrees to hold confidential all information, documentation and other material arising from its participation in this agreement.

45. Providing details of previous contracts satisfactorily completed on an allegedly similar basis cannot be considered an appropriate response to the targeted and specific inquiry of the Council. The contracting authority must assess whether a tender is reliable and will not impair the proper performance of the contract (*Tax-Fin-Lex v Ministrstvo*) and/or is genuine (*Veridos*). To do that, it must understand why the prices that appear at first glance to be abnormally low are not in fact abnormally low. Informing the Council that Killaree had carried out similar contracts in similar situations was simply providing a generic statement that did not in any way discharge the tenderer's obligation to provide the necessary evidence to allay the contracting authority's concerns. The Council was entitled to conclude that the fact that Killaree had – on its own account – completed entirely different contracts using the same or a similar pricing approach did not satisfactorily account for the low level of costs. The Council was entitled to assess this tender for this contract. If other contracting authorities had not interrogated the pricing in previous contracts, this did not impact upon the Council's entitlement to do so.

46. Killaree have argued that Article 69(2) of the Procurement Directive specifically identifies that one of the explanations that may be provided for abnormally low tenders is that there are exceptionally favourable conditions available to the tenderer for the supply of the products. But if a tenderer wishes to explain its tender on that ground, it must do just that: explain how those conditions permit it to offer the goods at a price which has appears abnormally low so the contracting authority can, in the words of Article 69(3), "*assess the information provided*". As per the second sentence of Article 69(3), it may only reject the tender where the evidence supplied "*does not satisfactorily account for the low level of price or costs proposed*".

47. Therefore, the arguments of Killaree that the Council could have satisfied itself in respect of the satisfactory performance of previous contracts had it acted on the information provided, or obtained more information, or checked out references, were misplaced. But even taking this argument at its height, Killaree has failed to identify any illegality in the approach of the trial judge in this respect. The burden was on Killaree to identify any material that it wished to rely upon, which it singularly failed to do so. The Council were not obliged to search in the tender documents for evidence of Killaree successfully completing other contracts. *A fortiori,* it was not obliged – as was argued by Killaree – to ask other contracting authorities for copies of the tenders submitted to them with a view to establishing the basis on which Killaree had obtained other contracts.

48. In summary, for the reasons set out above, the Council was fully entitled to consider that the evidence supplied did not satisfactorily account for the low level of price/costs. The trial judge was entirely correct in concluding that there was no obligation upon the Council to search for material. Killaree has identified no error of law or appreciation in his approach and this ground of appeal cannot succeed.

Tender Total

49. Counsel for the Council argued that this ground was in fact statute barred because the tender documents made it clear that the contracting authority could raise an objection either on the basis of the total tendered amount or the constituent parts and therefore, had Killaree considered this approach to be unlawful, it ought to have challenged it when the RFT was published. I agree this was clear from the tender documents and that any challenge ought to have been launched at that point. However, again for the sake of completeness, the substantive argument will be addressed here.

50. The tender total argument can be disposed of swiftly. First, there is no case law identifying that a contracting authority may only look at the tender total and not the constituent parts. In fact, as identified below, there are two decisions of the CJEU that strongly suggest the contrary is the case. Killaree's argument was primarily based on commentary by Caranta & Sanchez-Graells, authors of *European Public Procurement, Commentary on Directive 2014/24/EU* (Edward Elgar 2021), as well as on the basis of the wording of Article 69(1). The authors argue that the General Court's case-law indicates that a tender is only to be regarded as abnormally low if the total tender price is abnormally low, citing in this respect *Agriconsulting Europe v. Commission*, T-570/13, EU:T:2016:40. They do acknowledge that practice in the Member States is not aligned in this respect and that where quantities are likely to vary over the life of the tender, a different approach may be justified (see paragraph 69.18). Importantly, they observe that:

> "*If the purpose of the framework agreement is to meet the contracting authority's varying demands of various items during the contract period (within the boundaries of the applicable legal framework), the contracting authority may have a legitimate interest in securing that this purpose can actually be*

fulfilled. Abnormally low prices on some of the items … could create a substantial degree of uncertainty in this regard, as the tenderer could prove unwilling or unable to actually deliver the (large) quantities for which the tenderer is potentially obliged" (paragraph 69.20).

51. That observation has particular resonance here where some of ~~the~~ Killaree's justifications for the abnormally low prices, for example in respect of specific lighting units, was that despite their inclusion in the tender by the contracting authority, the tenderer did not expect these would in fact be required.

52. Considered closely, the decision in *Agriconsulting* does not even support the narrow proposition contended for by the textbook authors. In *Agriconsulting*, the applicant argued that the evaluation committee had failed to assess the tender as a whole and had only assessed the costs of additional tasks ancillary to the main works sought. The Court of First Instance responded to that argument in the following terms at paragraphs 60 and 61:

> *"60. Accordingly, even though those anomalies only concerned the additional tasks, they did not, by any means, relate to a minor or isolated aspect of the tender, and were liable to undermine the consistency of the overall price offered and, therefore, the tender as a whole.*
>
> *61. Moreover, the fact that the anomalies only concerned additional tasks does not mean that the tender was not evaluated as a whole. In this respect, it was indeed the overall price of the applicant's tender which was considered to be abnormally low, including in relation to the budget set by the Commission for the entire contract and the overall price offered by the successful tenderer."*

53. The Court concluded that the evaluation committee conducted its assessment by reference to the composition of the tender and the services at issue, and it rejected the

applicant's complaint that the evaluation committee infringed the relevant principles when it found the tender to be abnormally low.

54. It is very hard to see how this case supports the authors' conclusions: the Court is dealing with a case where an examination of the tender price disclosed that constituent parts of it were abnormally low. No statement of principle appears to the effect that a contracting authority is not permitted to look beyond the tender price to see if constituent parts of the tender are abnormally low.

55. Counsel for Killaree sought to bolster his argument by relying on the wording of Article 69 TFEU itself. Counsel for Mayo County Council indicated that in fact the wording of Article 69 implied the opposite. Article 69 is in the following terms in relevant part:

> "(1) *A contracting authority shall require economic operators to explain the price or costs proposed in a tender which appears to be abnormally low in relation to the works, supplies or services*. …"

56. It was argued on behalf of the Council that the reference to price or costs indicates that the contracting authority is not obliged to limit its enquiry to the bottom-line price i.e. the tender total (or in this case, because the quantities were not fixed, the notional total) but rather may consider also the "*costs*", i.e. the constituent parts of the tender. This approach seems well founded. It is difficult to see why the reference to "*costs*" would appear if Killaree was correct in its argument. Costs must mean something different to "*price*". The wording of Article 69 tends to support the construction advanced by the Council i.e. that when carrying out an initial screening for an abnormally low tender contracting authorities may look at the tender total and/or the composite parts of tender.

57. Moreover, a purposive interpretation of Article 69 also points strongly in that direction. The objective of assessing whether a tender is abnormally low is to ensure that the

tender is "*genuine*" within the meaning of the case law, as made clear by the CJEU in *Veridos* at para. 38:

> "*The examination of all the components relating to the invitation to tender and the contract documents concern must enable the contracting authority to determine whether, despite the existence of distance between the suspect tender and the tenders submitted by the other tenderers, that tender is sufficiently genuine*".

58. At paragraph 32 *Tax-Fin-Lex* the Court held:

> *"Thus it is clear from paragraph 1 of Article 69 that where a tender appears to be abnormally low, contracting authorities are to require the tenderer to provide an explanation for the price or costs proposed in the tender, which could relate, inter alia, to the elements set out in paragraph 2 of that article. The explanation provided is thus to be used in the assessment as to whether the tender is reliable and enables the contracting authority to establish that, although the tenderer proposes a price of EU 0.00, the tender at issue will not impair the proper performance of the contract."*

59. If a contracting authority is proposing to reject a tender as being abnormally low, it must require an explanation. To restrict it from looking behind the tender total despite its concerns about the constituent parts would significantly limit the ability of contracting authorities to consider whether a tender is genuine, or is one that will not impair the proper performance of the contract. It may be that some tender totals will themselves be so low as to alert the contracting authority to a concern about abnormally low tenders. But complex tenders, where there are many hundreds or even thousands of constituent items to be priced, may well contain abnormally low pricing in some areas but not in others. This tender is a perfect example of that phenomenon. Killaree's

asserted construction of Article 69 would effectively prevent a contracting authority from conducting the necessary assessment of such tenders.

60. Moreover, such a construction would be particularly problematic in tenders where the tender total is a notional amount because of uncertainty over the quantities required (as indeed Caranta & Sanchez-Graells acknowledged). To bind the contracting authorities to investigate a potentially abnormally low tender only where the notional tender total was of concern would limit the purpose of giving a contracting authority an explicit entitlement in the Directive to investigate abnormally low tenders. When one recalls Recital 103 of the Preamble of the Directive, one sees the basis for the concern about abnormally low tenders:

"*… tenders that appear abnormally low in relation to the works, supplies or services might be based on technically, economically or legally unsound assumptions or practices*."

61. Moreover, the interpretation advanced by Killaree could potentially prevent a contracting authority from investigating a potentially abnormally low tender in the specific cases identified in Article 69 i.e. where the tender is abnormally low because it does not comply with the obligations referred to at Article 18(2) i.e. those in the fields of environmental, social, and labour law. If a contracting authority was confined to considering whether a tender was abnormally low only where the tender total was abnormally low, the ambit of this provision would potentially be very considerably limited. All of these considerations make it highly unlikely that the interpretation advanced by Killaree is the correct one.

62. Case law relied upon by the Council strongly supports the contrary interpretation. In *White Mountain Quarries Ltd v Mayo County Council* [2024] IEHC 259, Quinn J, at para. 52, quoted the General Court in *European Dynamics Luxembourg SA v European*

Union Agency for Railways, T-392/15, EU:T:2017:462. There, the General Court observed at paragraph 83:

> *"The concept of 'abnormally low tender' is not defined either in the provisions of the Financial Regulation of those or the Implementing Regulation. However, it has been held that the abnormally low nature of a tender must be assessed by reference to the composition of the tender and the services at issue."*

63. It is hard to square this wording with a prohibition on the contracting authority looking beyond the tender total to assess abnormally low tenders. The recent decision of *Commission v Sopra* C-101/22P, EU:C:2023:396, is also illuminating on this point. The CJEU (on an appeal from the General Court) observes in the course of a discussion on the first stage assessment of an abnormally low tender that there is no obligation under the Financial Regulation, for the purposes of that assessment, to carry out a detailed analysis of the composition of each tender. All that t is required is a *prima facie* assessment of the tender. At para. 72 it observes as follows: -

> "*Thus, during that first stage, the contracting authority need only determine whether the tenders submitted contain evidence that they might be abnormally low. That is the case, in particular, where the price proposed in a tender is considerably lower than that of the other tenders or the normal market price. If there is no such evidence in the tenders submitted and they therefore do not appear to be abnormally low, the contracting authority may continue the evaluation and the award procedure for the contract.*"

64. In my view those words make clear that the contracting authority may carry out this *prima facia* assessment either where the price is "*considerably lower*", or where the tenders contain evidence that they might be abnormally low. That must refer *inter alia*

to the composition of the tender or its constituent parts, since it is contrasted with the "*price alone*" analysis.

65. In summary, taking into account the wording of Article 69, the necessity of interpreting it purposively, the decisions in *European Dynamics* and *Sopra*, and the lack of any case law from Killaree that actually supports its interpretation, I consider the trial judge was entirely correct in rejecting this argument.

Alleged failure to compare with other tenders

66. Finally, Killaree asserts that there was a failure to follow proper process by the Council because it launched an inquiry into whether its tender was abnormally low without comparing it with other tenders, or indeed the preliminary estimate arrived at by the Council itself. As noted earlier, there is no assertion by Killaree that it was in any way prejudiced by this, or that its tender would not have been identified as abnormally low had it been compared with others or with the Council's preliminary estimate. The asserted obligation in this regard comes from the clarification that was issued by the Council in response to a query.

67. The RFT provides for clarifications, with para. 2.7 dealing with the procedure applicable to queries and clarifications. The question in response to which the clarification was given was as follows: "*Can you please advise on the procedures in place to identify and deal with Abnormally Low Rates submitted by Contractors*". The answer given by the Council was that a tender was assumed to be abnormally low if:

> "*In relation to which the tenderer cannot explain his price on the basis of the economy of the construction method, or the technical solution chosen, or the exceptionally favourable condition… In the light of client's preliminary estimate & of all the tenders submitted, it seems to be abnormally low by not providing a margin for a normal level of profit*" (emphasis added).

68. A reference was given in the same answer to the definition of abnormally low tender from the European Commission Guide to the Community Rules on Public Procurement of Services, paragraph 6.3.2 being "*a level below which an offer cannot be considered as being serious having regard to the services provided*." The answer also made reference to the procedure to be followed (as derived from CJEU case law):

> "*The contracting authority will identify suspect tenders; secondly, to allow the undertakings concerned to demonstrate their genuineness by asking them to provide the details which it considers appropriate; thirdly, to accept the merits of the explanations provided and, fourthly, to make a decision as to whether to admit or reject those tenders*".

69. At para. 157 of his judgment, the trial judge referred to the answer to the clarification query and indicated that the reasonably well-informed tenderer would understand that what was set out was a series of ways in which abnormally low tenders would be identified and dealt with, including the scheme set out by the CJEU in *Impresa Lombardini*. He found that the Council had not confined itself to deciding if a tender was abnormally low only after all other tenders were received and compared with each other. He noted that such an exercise would involve the Council significantly limiting its ability to deal with tenders that it did not feel were genuine, and would involve requiring it to allow all of these to proceed to a very advanced stage of the process. He concluded there was no reason why such a limiting approach would have been taken by the Council towards its entitlement under the tender documents and in particular its power to exclude at a relatively early stage tenderers who did not appear to be genuine. At para. 188, the trial judge observes that there was no obligation on the Council to wait until all tenders had been submitted and then carry out a comparison between them

before it excluded any individual tenderer from the process on the grounds that the tender was abnormally low.

70. As a matter of first principles, the RFT is the primary document that contains the "*rules of the game*" and the tenderers must provide a declaration saying they accept its provisions. By definition, the clarification document is subsidiary to the RFT as it is simply clarifying queries arising out of the RFT. The clarification must be read in the light of the RFT. Here, there is no conflict or ambiguity between the clarification and the RFT. The RFT identifies a process in relation to abnormally low tenders and does not limit the contracting authority to launching an inquiry only into those tenders that are abnormally low compared with other tenders. Paragraph d.2.3 identifies that if, in the employer's opinion, any tender amounts are abnormally low or high, the employer may require the tenderer to provide details.

71. The clarification identifies the procedure as set out in the *Impresa Lombardin*i case in respect of the identification of suspect tenders. The clarification does not establish a binding method of so doing. Indeed, had it done so by specifying that an anomalous tender must be identified solely by comparing it to other tenders, it would have been in breach of the case law of the Court of Justice. At para. 37 of *Veridos* it is observed that comparison with other competing tenders, however useful it may be in certain cases for the purpose of identifying any anomalies, cannot constitute the sole criterion used by the contracting authority to identify tenders that appear suspect. The clarification must be interpreted in a manner consistent with the case law of the CJEU to the extent possible.

72. Here, there is a description of the circumstances in which a tender will be assumed to be abnormally low. These include situations in which, after a comparison, it does not appear to be providing a margin for a normal level of profit. Properly interpreted, the

clarification does not dictate the circumstances in which a contracting authority can identify a tender as abnormally low but rather gives guidance as to when it might do so, including but not limited to circumstances in which it might make an assumption in that respect.

73. In those circumstances I agree with the conclusion of the trial judge that the clarification should not be read as a type of mandatory procedure and that there was no breach by the Council in the manner in which it identified Killaree's tender as being potentially abnormally low.

Reasons

74. The duty to give reasons is well established in both Irish and EU law. The rationale for the provision of reasons is the same in both contexts: the person must understand the reasons for the decision, and the reasons must be sufficient to allow them to make a decision whether or not to challenge it. There is an express duty in the Public Procurement Directive to give reasons. Article 55 of the Directive identifies an obligation on the contracting authority to inform each candidate and tenderer of decisions reached concerning, *inter alia*, the award of the contract, and in the case of an unsuccessful tenderer such as Killaree, the reasons for the rejection of its tender. The Remedies Directive and the implementing Irish Regulations also contain provisions in relation to reasons, considered in more detail below when discussing the standstill obligation arguments.

75. The following relevant principles emerge from the extensive jurisdiction on the duty to give reasons in EU and Irish law:

    - the adequacy of reasons must be considered in the context of the individual situation, and reasons may be derived in a variety of ways, either from a range

of documents or from the context of the decision or in some other fashion (see paras. 6.15 and 7.4 of *Connelly v An Bord Pleanala* [2018] IESC 31);

- where a contracting authority finds that a tender appears to be abnormally low and therefore conducts an *inter partes* examination procedure with the tender concerned, it is necessary to make a record of the result in writing (*Veridos,* para. 43);
- documents providing reasons specifically in the procurement context should not be construed as if they are legislative or contractual documents (see para. 56 of *Somague Engenharia SA v Transport Infrastructure Ireland* [2016] IEHC 435).

76. In this case, the trial judge concluded the reasons given in the letter of 9 October, 2020 in support of the finding that the tender was abnormally low were sufficient. Having summarised the reasons provided, the trial judge, concluded at para. 234 that:

> "*any tenderer would have understood, as any reasonably well informed tenderer would, that the decision of the Council was that Killaree should be excluded from the process because the Council, having sought information about the genuineness of the tender, had come to the view that the tender was not serious or genuine as it was abnormally low*."

77. Killaree appeals that finding. It is useful at this point to set out the justification provided by Killaree in the email of Friday 4 September, 2020 and the attached schedule. In that email, Killaree explained that the items which had been priced €0.01 had been so priced either because Killaree had in place existing services to perform that item of work at that price and would not incur any additional costs for carrying out the works or services, or that certain items would not arise and so the item is marked accordingly. Killaree also noted that it had built up "*strong and lasting relationships with our suppliers*", and that it had "*exceptionally favourable conditions available*" for

supply of products and services, certain of which it passes on to its contracts. In the schedule, Killaree provided explanations for every €0.01 rate price. Under "*general maintenance*" – which relates to maintenance of Council public lights, and is broken down by specific types of lighting units – Killaree justified its €0.01 rates either by saying that "*All .01 item are covered in the overall grand total for general maintenance. KLS have carried out analysis of the local authority infrastructure and using tried and testing costing analysis procedures have calculated the monthly costs for maintaining the local authority infrastructure. This sum is presented in the total for general maintenance*." Killaree also noted that LED lanterns will be covered under warranty and so the only likely maintenance issues would be the result of photocells, fuses, or cable faults. In relation to cleaning, and tree and foliage pruning, Killaree noted that these can be carried out in general maintenance. Under "*replacement maintenance*" – which mainly deals with lantern replacement, lamp post construction, and the installation of brackets and control gear – Killaree justified its €0.01 rates by stating that it has assessed that the items marked at this price arise infrequently or not at all, or that it has chosen this price as it has set up a supply chain with a company called Signify, so that it gains the most economically advantageous prices. Under "*civil works*", Killaree similarly justified its pricing of new lanterns at €0.01 by either the favourable rates it receives via its supply chain, or that it has assessed the rates, and that this is an item that is rarely used but that it will stand over the rate if it is used.

78. Following receipt of that document, the Council wrote a letter largely focused on responding to the legal grounds in the letter of 4 September from Killaree. The substantive reasons given in the letter of 9 October were that:

> *"66% of the tendered rates submitted in the Pricing Document were priced at €0.01 values;*

The rates priced at €0.01 do not cover the full inclusive value of the relevant works, supplies and services;

The clarifications and explanations provided by Killaree do not provide sufficient evidence that the tendered rates and prices submitted in its Pricing Document are not abnormally low or that they reflect a balanced allocation of the Notional Tender Total; and

In light of the works, supplies and services required under the Contract, the Contract is not capable of being performed on the basis of the tendered rates."

79. Killaree argues that those reasons were inadequate as they did not permit it to understand the reasons for its rejection. In particular, it focuses on the absence of any engagement by the Council in its letter of 9 October with the schedule provided by Killaree on 4 September. Killaree has relied upon case law on the provision of reasons in the context of abnormally low tenders. Interestingly, much of the case law relied upon is not in respect of the reasons that must be provided to a tenderer excluded on the basis that its tender was an abnormally low tender, but rather in respect of the reasons required to be given to an unsuccessful tenderer who asserts the successful tender was abnormally low.

Analysis

80. Helpfully, the principles governing the inquiry process that a contracting authority must engage in were identified by the CJEU some 24 years ago in the case of *Impresa Lombardini*. The CJEU was considering the rejection of tenders on the grounds that they were abnormally low. The judgment recalls that the primary aim of the Directive is to open up public works contracts to competition and that exposure to Community competition in accordance with the procedures provided for by the Directive avoids the risk of the public authorities indulging in favouritism. The contracting authority is

required to comply with the principle that tenderers should be treated equally. The principle of non-discrimination on grounds of nationality implies an obligation of transparency to allow the contracting authority to ensure that it has been complied with. The contracting authority may not reject an abnormally low tender without even seeking an explanation from the tenderer.

81. Nor are Member States entitled to introduce provisions which require the automatic exclusion of contracts according to a mathematical criterion instead of obliging the awarding authoring to apply the examination procedure. The Directive requires the awarding authority to examine the details of tenders which are obviously abnormally low and for that purpose obliges it to request the tenderer to furnish the necessary explanations (see also *Fratelli Costanzo v Comune di Milano* C-103/88 EU:C:1989:256 in this respect).

82. At para. 51, the CJEU observes that the Directive obliges the contracting authority, after it has inspected all the tenders and before awarding the contract, first to ask in writing for details of the elements in the tender suspected of anomaly which gave rise to doubts on its part in the particular case and then to assess that tender in the light of the explanations provided by the tenderer concerned in response to that request. At para. 55, the Court set out what has become the classic description of the enquiry to be undertaken:

> *"The contracting authority is under a duty, first, to identify suspect tenders, secondly to allow the undertakings concerned to demonstrate their genuineness by asking them to provide the details which it considers appropriate, thirdly to assess the merits of the explanations provided by the persons concerned, and, fourthly, to take a decision as to whether to admit or reject those tenders."*

83. At para. 58 the Court refers to the obligation to request clarification on points of doubt emerging on first examination and giving the undertakings concerned the opportunity to put forward their arguments in that regard. The Court describes this as an *inter partes* procedure.

84. Given the regime prescribed under Article 69(3) of the Directive i.e. that the contracting authority shall assess the information provided by consulting the tenderer and may only reject it where the evidence supplied does not satisfactorily account for the low level of price or costs, it is clear that the tenderer must be able to understand why the contracting authority rejects the tender despite the evidence supplied. That is clear from para. 82 of *Impresa Lombardini*, where the CJEU noted that the contracting authority is required to take into consideration all the explanations put forward by the undertaking before adopting its decision whether to accept or reject the tender.

85. The case of *Fratelli* involved a reference from Italy as to whether the Directive prevented Member States from introducing provisions requiring the automatic exclusion from procedures for tenders according to a mathematical criterion. The CJEU observed at para. 16 that, following the contracting authority requesting the tender to furnish the necessary explanations: "*Article 29(5) [of Directive 71/305 concerning the co-ordination of procedures for the awarding of public works contracts] further requires the awarding authority, where appropriate, to indicate which parts of those explanations it finds unacceptable*". Counsel for Killaree relied heavily on *Fratelli*, as well as the decision in *Sopra*. In the latter case, the CJEU was considering the nature of the obligation to give reasons where the contracting authority decided a tender was not abnormally low. At para. 74 it observed: -

> "*In order to provide an adequate statement of reasons for the fact that, after an in-depth analysis, the successful tender is not abnormally low, the contracting*

> *authority must set out the reasoning on the basis of which …* [the tender complies with the legislation of the country] *and, second, that it has verified that the proposed price included all the costs arising from the technical aspects of that tender".*

86. That case is not particularly helpful as it is focused on what is required when a contracting authority decides a tender is not abnormally low – the opposite of the position here. Counsel for Killaree also relied heavily on the decision in *PC-Ware Information Technologies* T-121/08. In that case, the Court of First Instance was concerned with reasons for a price/quality decision rather than an abnormally low tender and therefore its utility in the present context is limited. The recent decision of *Veridos* was also relied upon, referred to above. There, Bulgarian law had provided for fixed criteria to establish whether a tender was abnormally low – much the same issue that had been before the Court some 34 years previously in *Fratelli*. The CJEU recalled that it is for the Member States and contracting authorities to determine the method of calculating an anomaly threshold, and that the contracting authority is under an obligation to identify suspect tenders, citing *Impresa Lombardini.* However, no further light is shed on the obligation to give reasons.

87. In short, having reviewed the case law identified and relied upon by Killaree's counsel, there is no case that is prescriptive in relation to the nature of reasons required in the present context. It is certainly clear that the contracting authority must engage with the justification given, and the tenderer must be able to understand why the contracting authority regards the tender as abnormally low following the exchange between them.

88. Before analysing the reasons given to see if the trial judge was correct in concluding adequate reasons had been given, following *Connolly*, it is necessary to consider the context in which the letter of 9 October must be assessed. That includes not only the

previous correspondence but, critically, the RFT. Paragraph 2.2 of the RFT identifies that tenderers must conform with and comply with all instructions and requirements of RFT. Paragraph 2.4 says they must submit a statement. That statement is attached at Appendix 3 to the RFT and it provides that the tenderers accept the terms and conditions of the RFT and the selection and award criteria at Part 3. That means that Killaree must be taken to be aware of the obligation to price each item on a fully inclusive basis and as well as on an individual basis.

89. Therefore, when Killaree sought to justify its tender not by arguing that the prices represented the real cost, but on the basis that they were included in other prices or that the items were unnecessary, that justification breached the express provisions of the RFT. In the circumstances, Killaree must be taken to know that was an unacceptable justification, and why it was unacceptable. It had already been reminded in the correspondence with the Council about the rules of the competition. There cannot be an obligation on the authority to explain over and over something that the tenderer well knows. In the circumstances, the Council was entitled to reject a justification that was non-compliant with the RFT and treat the abnormally low tender as not having been satisfactorily explained without further recourse to Killaree. This necessarily means the Council was entitled to provide reasons in a summary format because of the knowledge that was correctly assumed on the part of the tenderer.

90. The reference in *Fratelli* at para. 16 (relied upon by Killaree) to the awarding authority being obliged to explain the parts of the tenderer's explanation it finds unacceptable "*where appropriate*" comes into play here: Killaree did not need to receive a detailed response as to why the explanations it provided in its schedule had not been accepted. It had signed up to certain obligation and thus knew what was required in terms of the provision of adequate justification for its proposed prices and costs. It flowed from that

that the explanations Killaree gave did not, in the words of Article 69, satisfactorily account for the low level of price or costs proposed. Indeed, at no point in these proceedings did Killaree indicate that it now understands the reasons for its exclusion but did not at the time because of any alleged failure on the part of the Council. Again, this appears to be an objection of form over substance.

91. Further, in respect of the obligation to give sufficient reasons to enable a challenge to be brought, it is undoubtedly glib to say that the mere bringing of the proceedings may tend to show there were sufficient reasons; nonetheless, the nature of the challenge must realistically be considered in any argument that inadequate reasons were given. Here, there was an extremely detailed statement of grounds filed on behalf of Killaree, containing the four arguments identified above. It is difficult to see any gap in its knowledge or understanding and no such gap has been identified.

92. For all those reasons I conclude that the statement of reasons in the Council's letter of 9 October, 2020 although not elaborate and not referring in terms to the schedule provided, nonetheless met the threshold for reasons and that there was no flaw in the reasoning of the trial judge in this respect.

Breach of obligation to send standstill letter

93. Moving from substantive challenges to procedural challenges, Killaree argues that the trial judge erred in refusing to make a declaration of ineffectiveness or impose a civil penalty on the Council, despite finding that there was a breach of Regulation 5(1) of the Remedies Regulations.

94. The factual background has been set out above, including details of the exchange in relation to the question of abnormally low tenders. That culminated in a letter of 9 October from the Council to Killaree, discussed above in the context of abnormally low

tenders. The final paragraph of that letter is of considerable importance in the context of this aspect of the appeal. That paragraph was in the following terms: -

> "*In accordance with the request for tenders, you are herewith eliminated from any further participation in the tender competition.*
>
> *Following 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*."

95. As found by the trial judge, the difficulty with this letter was that it was not, contrary to the contentions of the Council in the High Court, a standstill letter as defined by the Directive and the Remedies Regulations. There is no cross-appeal by the Council against that finding.

96. It is important at this point to set out precisely what the Regulations require. Regulation 5(1) of the Remedies Regulations is headed up "*Standstill period*" and provides as follows: -

> *"(1) A contracting authority shall not conclude a reviewable public contract to which a standstill period applies under these Regulations within the standstill period for the contract.*
>
> *...*
>
> *(3) The standstill period for a contract begins on the day after the day on which each tenderer and candidate concerned is sent a notice, in accordance with paragraphs (2) and (3) of Regulation 6, of the outcome of his or her tender or application.*
>
> *(4) The duration of the standstill period must be at least [14] or [16] calendar days."*

97. Regulation 6 is concerned with notices to unsuccessful tenderers and candidates and provides as follows: -

> "*6. - (1) The notice referred to in Regulation 5(3) … shall be as set out in this Regulation.*
>
> *(2) Such a notice -*
>
> *(a) shall inform the … tenderers concerned of the decisions reached concerning the award of the contract … including the grounds for any decision not to award a contract …,*
>
> *(b) shall state the exact standstill period applicable to the contract, and*
>
> *(c) for each unsuccessful tenderer … shall include -*
>
> *(i) …*
>
> (ii) *in the case of an unsuccessful tenderer, a summary of the reasons for the rejection of his or her tender.*
>
> *(3) In the case of a tenderer who has submitted an admissible tender (that is, a tender that qualifies for evaluation under the rules of the relevant tender process), the summary required by paragraph (2)(c)(ii) shall comprise –*
>
> *(a) the characteristics and relative advantages of the tender selected,*
>
> *(b) the name of the successful tenderer, …* "

98. It may be seen from the above that because Killaree had been excluded and therefore did not qualify for evaluation under the RFT, it was not entitled to the name of the successful tenderer and the characteristics and relative advantages of the tender selected. On the other hand, it <u>was</u> entitled to be informed of the decision reached concerning the award of the contract, the exact standstill period applicable to the contract, and a summary of the reasons for the rejection of its tender. In the High Court,

the Council argued that the letter of 9 October was in substance a standstill letter since it had observed a standstill period after sending it on the basis that no contract was concluded until 27 October i.e. 18 days after the sending of the letter, thus exceeding the 14/16-day period required by the Regulations. Correctly in my view, the trial judge did not agree and on the appeal the Council has not contested the correctness of that conclusion.

99. At para. 51 of the judgment, the trial judge noted that counsel for Killaree had argued that there were further defects with the letter because it did not contain a summary of the reasons for the rejection of the applicant's tender and did not include the decision to award the contract to the successful tender and the reasons for the award of the contract to the successful tenderer. The trial judge observed that it was submitted by counsel for Killaree that this was a particularly egregious situation as the standstill period did not even commence to run as against Killaree at the time the contract was awarded to Electric Skyline. Nonetheless, for the purpose of analysing the consequences, he noted that counsel for Killaree was content to treat the Council's conduct as a breach of Regulation 5(1) of the Remedies Regulations.

100. At para. 73, the trial judge concluded that while there was no obligation to inform Killaree of the name of the successful tenderer, there was an obligation to inform tenderers of the decisions reached concerning the award of the contract and the standstill period and this had not been done as Killaree had been kept in the dark about the date of the award of the contract. Accordingly, the trial judge concluded that the letter of 9 October did not constitute a standstill letter within the meaning of the Remedies Regulations. Importantly, that decision has not been appealed by the Council. Equally importantly, at para. 76 the judge recorded counsel for Killaree submitting that this should be treated as a Regulation 5(1) infringement, noted there was no opposition

to that approach, and indicated he would consider the consequences of the infringement on that basis.

101. By notice of appeal filed on 22 May 2024, Killaree appealed against the judgment and Order of the High Court on fifteen numbered grounds, running to nine pages.

102. The substance of the first ground of appeal is that the trial judge, having held that the Council's letter of 9 October 2020 did not constitute a standstill letter within the meaning of the Remedies Regulations of 2010, erred in law and in fact in failing to consider and/or give appropriate weight to the legal consequences of that finding, including that the Council had entered a reviewable public contract to which a standstill period applied under the Regulations *"prior"* to the commencement of the standstill period within the meaning, and for the purposes of, Regulation 5 of the Remedies Regulations. At ground 1(iv) it is suggested that because the letter did not constitute a standstill notice, it followed that pursuant to Regulation 5(3) the standstill period had never begun and that the judge erred in failing to properly consider and give adequate weight to this. At ground 1(v) it is suggested that the statutory framework of the Remedies Regulations requires the commencement of a standstill period in order for the protective provisions under Regulations 11(2)(b) and 11(7) to become engaged.

103. By this ground Killaree sought to raise issues which were not only never raised in the High Court but were at variance with the case pleaded and presented. Nowhere in the notice of appeal or in its written or oral submissions did Killaree quibble with the observation at para. 75 of the High Court judgment that it had invited the trial judge to deal with the letter of 9 October as a Regulation 5(1) infringement, and to consider the consequences of the infringement on that basis.

104. While the statement of grounds is, perhaps, less precise than it might have been, Killaree has steadfastly – in this Court as well as below – asserted that it sufficiently

set out its case. Starting with the title, the proceedings sought a review of a public contract under the European Communities (Review of Public Authorities' Contracts) (Review Procedures) 2010, as amended. The foundation of the proceedings was that the contract was a contract to which the Regulations applied, and that those Regulations had been infringed. It is true that the relief sought was a declaration that the contract was *"ineffective and/or void"* but the statement of grounds did not assert that the contract was void, still less set out any basis on which that was contended. The declaration of ineffectiveness sought was plainly a Remedies Directive remedy. It was asserted that the Council had concluded the contract prior to the commencement of the standstill period but the consequence of that was said (at para. 56) to be that there had been a breach of Regulation 5(1) such that – coupled with the asserted breaches of the Public Authorities' Contracts Regulations – Regulation 11(2)(b) was engaged.

105. The case so made by Killaree in its statement of grounds was opposed on the basis on which it had been made and argued before the High Court accordingly. For example, on Day 1, page 40, line 11 it was submitted that there had been a breach of Regulation 5(1); and on Day 1, page 98, line 10 it was said that what Killaree was *"primarily looking for [was] a declaration that the contract is ineffective or void. And that's in accordance with the regulations."* As in the relief claimed by the statement of grounds, the word *"void"* crept in but the remedy of ineffectiveness in accordance with the Regulations could only be available if the Regulations were engaged. On Day 2, page 98, line 10 it was suggested by counsel for Killaree that the infringement was, variously, *"at least, at the very minimum … [and] a worse offence or infringement in terms of regulation 5(1)"* but it was plainly relied on as a Regulation 5(1) infringement because counsel immediately moved to Regulation 11(2)(b), from there to the question of a

discretionary declaration under Regulation 11(7) and then to the obligation on the Court under Regulation 13 to impose an alternative penalty.

106. The High Court judge, as he had been asked to do, considered the case on that basis. Despite the commitment by counsel in the High Court, in the notice of appeal, Killaree identifies that it is asking this Court to make a reference to the CJEU in the following terms: -

> "*Where a contracting authority has concluded a reviewable public contract to which a standstill period applies under Council Directive 89/665, as amended by Directive 2007/66* ***prior*** *to the commencement of a standstill period, what remedies should a national court apply and/ or consider applying in a review of the same*?" [Emphasis in the original.]

107. No reference was made either in the written legal submissions or at the hearing of the appeal to the necessity for a preliminary ruling. This is unsurprising given the clear acceptance identified above that the breach was to be treated as a Regulation 5(1) infringement and the trial judge proceeded on that basis. On the contrary, the argument advanced by Killaree at para.5.1 of its written submissions to this Court was that- *"The failure to serve a standstill notice ipso facto demonstrates that [Killaree] was deprived of its pre-contract remedies within the meaning of Article 11 of the 2010 Regulations …"*; and at para. 5.4, that *"… a declaration of ineffectiveness of the contract … would have been the appropriate (and indeed mandatory) remedy… "*. Accordingly, the question identified as requiring reference does not arise. The question as formulated is premised on an assumption the breach is not an Article 5(1) breach, and therefore not subject to the clear scheme of remedies in the Remedies Regulations. But this is entirely at odds with the way in which the case was argued both in the High Court and on appeal

i.e. on the basis that the remedies available are clear from the Regulation but that the trial judge erred in not applying those remedies correctly.

108. In those circumstances, I will proceed on the basis that the breach is to be treated as an infringement of Regulation 5(1) and that the appeal turns on whether the trial judge correctly refused relief in respect of the remedies available where there was an uncontroverted breach of the Regulations in respect of the failure to send a standstill letter.

109. This question may be broken down into three parts. The first assertion by Killaree is that the trial judge was obliged to declare the contract ineffective pursuant to Regulation 11(2) i.e. a mandatory declaration of ineffectiveness. The second assertion is that, even if the trial judge was correct in deciding not to make a mandatory declaration of ineffectiveness, he ought to have exercised his discretion under Regulation 11(7) to make a declaration of ineffectiveness in the circumstances of this case i.e. a discretionary declaration of ineffectiveness. The third contention was that, even if the trial judge was correct in refusing to entertain the Regulation 11(7) argument and/or exercise his discretion under Regulation 11(7), he erred in law in not awarding a civil penalty against the Council under Regulation 13(1) for the established breach of Regulation 5(1).

Mandatory declaration of ineffectiveness – Regulation 11(2)

110. Regulation 11(2) of the 2010 Regulations provides as follows: -

"Subject to paragraphs (3), (4) and (5), the Court shall declare a reviewable public contract ineffective in the following cases: …

(b) the cases of a Regulation 5(1) infringement or a Regulation 8(2) infringement where the infringement –

(i) has deprived the tenderer or candidate applying for review of the possibility of pursuing pre-contractual remedies, and

(ii) was combined with an infringement of the Public Authorities' Contracts Regulations that has affected the chances of the tenderer applying for a review to obtain the contract".

111. It is apparent from a reading of Regulation 11(2) that the conditions in it are cumulative. In other words, there is to be a mandatory declaration of ineffectiveness in cases of Regulation 5(1) infringement where (a) the infringement has deprived the tenderer of the possibility of pursuing pre-contractual remedies and (b) was combined with an infringement with the Regulations that has affected the chances of the tenderer to obtain the contract.

112. This judgment upholds the conclusion of the trial judge that the Killaree has not identified any substantive infringement of the Regulations in respect of abnormally low tenders and therefore the second condition is not satisfied. That means that any conclusion that this Court reaches in respect of whether Killaree was in fact deprived of the possibility of pursing pre-contractual remedies is a question that cannot affect the substantive outcome of this appeal. In other words, any conclusion that the trial judge erred in concluding Killaree had not been so deprived would not result in a mandatory declaration of ineffectiveness for Killaree, because it has failed to meet the second condition. Nonetheless, it has been decided to adjudicate on this ground of appeal given the significant part it played both before the High Court and in this appeal.

113. It may be helpful to describe in a little detail the pre-contractual remedies referred to in Regulation 11(2). Once the proceedings are issued, Regulation 8(2) provides for an automatic suspension so the contract cannot be concluded until the proceedings are determined or otherwise disposed of or the High Court lifts the suspension. Therefore,

a person who wishes to stop a contracting authority awarding a contract gets two discernible benefits from the Regulation: (a) a standstill period to allow them to get their affairs in order and to issue proceedings seeking interlocutory relief or a review of the decision to award the contract, during which period no contract can be signed; and (b) if they issue proceedings prior to the end of the standstill period, an automatic stay on the conclusion of the contract. Those are the pre-contractual remedies referred to in Article 11(2)(b).

114. As identified above, it is not sufficient that a person seeking a mandatory declaration of ineffectiveness is able to point to a breach of the standstill period; rather they must go a step further and show that they have *actually* been deprived of the possibility of pursuing pre-contractual remedies. A failure to observe the standstill period (or the automatic stay) may or may not deprive a person of the possibility of pre-contractual remedies. A simple example may illustrate this. If a standstill letter is sent on 1 March indicating that the contract will be signed on 15 March, and the contract is signed on 2 March, it is extremely likely as a matter of fact that a tenderer will be able to show that it was deprived of the chance of applying for pre-contractual remedies. If, on the other hand, the contracting authority signs the contract on 13 March, it may be more difficult for a disappointed tenderer to show it was deprived of an opportunity to pursue pre-contractual remedies; it might, for example, need to persuade a judge it was ready to go with its proceedings on 14 March and would have got the automatic standstill preventing signature of a contract save for the breach of the standstill obligation.

115. That example serves to demonstrate the additional burden that is placed on a disappointed tenderer when they are seeking a mandatory declaration of ineffectiveness. That seems onerous; but it is perhaps explicable by the fact that a mandatory declaration of ineffectiveness of a contract is an unusually intrusive remedy

and affects the rights of parties other than the contracting authority and the disappointed tenderer, notably the successful tenderer.

116. At paras. 77 to 84, the trial judge considered whether Killaree had met the conditions at Regulation 11(2)(b). First, the trial judge concluded that Killaree had not met the requirement of 11(2)(b)(i), observing that "*Notwithstanding its other deficiencies, the letter of the 9th of October made plain to Killaree in unequivocal terms that it was out of the competition*." At para. 78, he observed that the letter of 9 October did not invite any further engagement, submission or argument; that much of the challenge launched by Killaree was based on information available to it prior to 9 October 2020; and that Killaree was not in any way inhibited from issuing proceedings immediately after the letter of 9 October. It should be emphasised that these proceedings were issued on 6 December 2020 before Killaree received any further substantive information from the Council about the contract. At para. 79, the judge observed the letter made it plain the contract would be awarded without further reference to Killaree.

117. At para. 80, the judge noted that Killaree knew on receipt of the letter of 9 October that the contract could be awarded at any time, despite not being told that a decision had already been made to award the contract to Electric Skyline or any other tenderer and that there was no evidence before him to support the submission made by counsel that Killaree felt nothing would happen until it got a formal standstill letter. At para. 81 he noted that, faced with the letter of 9 October and in order to preserve its position, the objectively appropriate thing for Killaree to do was to seek an assurance as to when the contract was going to be awarded and, if no sufficient assurance was received, to commence proceedings. No evidence was provided as to why it did not do so. He concluded that the question as to whether or not the failure to send the standstill letter had deprived Killaree of the possibility of pursing pre-contractual remedies is a matter

of fact, and observed that Killaree had given no evidence as to why it did not pursue pre-contractual remedies given the contents of the letter of 9 October.

118. At para. 83 the judge proceeded on the basis that the onus of establishing the facts was on the applicant, given that it was the applicant who seeks to have the contract declared ineffective, and therefore must establish not just a breach of Regulation 5(1) but also that the infringement had the consequences set out in Regulation 11(2)(b). However, at para. 83 he observed that his ultimate decision would not be different in the event that the onus lay on the Council; although it was difficult to see how the Council could discharge the onus of showing that the infringement has not deprived Killaree of the possibility of obtaining pre-contractual relief.

119. Taking his last conclusion first, I agree with the observation of the trial judge that the burden of showing it had been deprived of the possibility of pursuing pre-contractual remedies lay on Killaree. It would not make sense for a contracting authority to be obliged to establish something they are unlikely to know anything about i.e. whether the breach had in fact deprived a person of the possibility of obtaining pre-contractual remedies. The inquiry demands an engagement with the facts. It is the putative applicant for the pre-contractual remedies who will know the factual landscape. There is no shifting of the burden of proof in the Regulation. Nor has Killaree identified any general principle of EU procurement law to the effect that, where there are specified procurement remedies identified by the Regulation, the burden of proof rests upon a contracting authority. I find no error in the trial judge's decision in this respect.

120. Moreover, I agree with the approach of the trial judge to the effect that the question as to whether a person meets the standard in Regulation 11(2)(b)(i) must be a question of fact in each individual case. As observed by Prof. Arrowsmith in her book, *The Law of Public and Utilities Procurement: Regulation in the EU and the UK* (3rd ed., Sweet

& Maxwell 2020) at para. 22-171, the word "*deprived*" is a strong one. It requires any adjudicative body deciding whether the condition has been met to focus on the cause of the failure to avail of the pre-contractual remedies.

121. To evaluate that in this case, it is necessary to look at the proceedings that were actually brought and what was pleaded in those proceedings about the impact of the letter of 9 October and the breach of the standstill obligations. The proceedings were issued in the Central Office on 6 November 2020. Procurement proceedings are governed by Order 84A and this does not impose any obligation to seek leave prior to issuing proceedings. Therefore, the date of issuing proceedings is the date upon which the proceedings may be taken to have commenced.

122. Killaree clearly knew at that stage that the contract had been signed because a claim for a declaration of ineffectiveness of the contract was included. The Statement of Grounds contained a plea that the breach of Regulation 5(1) was such as to have deprived the applicant of the opportunity of pursuing pre-contractual remedies. In the affidavit of Mr. Lennon, company director of Killaree, verifying the Statement, he exhibits the letter of 22 October 2020 sent on behalf of Killaree by its solicitor (some 13 days after the letter of 9 October) acknowledging the time constraints, referring to the limited time to challenge proceedings and seeking a reply as soon as possible. That letter demonstrates that Killaree understood that it was eliminated from any further participation in the tender competition. Curiously, there was no reference in the letter of 22 October in relation to the awarding of the contract and no inquiry in relation to same. Killaree may have made an assumption that the contract had not yet been awarded. Nor is there any averment in the affidavit of Mr. Lennon in this respect. It is equally curious that, in the letter of reply of 29 October 2020 from A&L Goodbody

Solicitors on behalf of the Council, no reference was made to the fact that the contract had been concluded on 27 October.

123. On 3 November 2020 a letter was written by the solicitors for Killaree indicating that it intended to challenge the decision to eliminate it by way of application to Court (such letter being required under Regulation 8 of the Regulations). There was still no reference to the signing of a contract or the successful tenderer.

124. On 3 November, the contract award notice was published, identifying the contract had been awarded to Electric Skyline on 27 October 2020. On 4 November 2020, a letter was written by the solicitors for Killaree referring to their astonishment that the notice disclosed that the Council had concluded a contract with the successful tenderer. They pointed out that no notice or communication was sent to their client and that because their client was not made aware of a decision to award the contract, it was also not aware that the standstill period for instituting proceedings had commenced. They argued that the effect of the failure to inform Killaree of any intention to conclude the contract deprived them of an opportunity of making an application to Court in advance of the conclusion of the contract, which would have resulted in an automatic prohibition on them concluding the contract. They asserted that the Council have effectively circumvented the automatic prohibition on concluding a contract which would otherwise have automatically applied as a matter of law and that the Council ought to have communicated such intention no later than the letter of 22 October 2020. (That letter was simply a holding letter identifying that A&L Goodbody acted for the contracting authority, were taking instructions and would respond).

125. By reply of 5 November 2020 A&L Goodbody replied indicating that a contract was not concluded until 27 October, and that Killaree clearly had the opportunity between 9 October and 27 October to seek a pre-contractual remedy but failed to do so. The

remaining three affidavits by Mr. Lennon all deal with the question of pricing and do not in any way describe the sequence of events between 9 and 27 of October.

126. Returning to the letter of 9 October, the decision to eliminate Killaree is absolutely clear from the last paragraph. However, it is not so clear that a decision had already been made to identify the successful tenderer. Rather, the second sentence describes what will happen in the future:

> "*Following 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*."

127. I do not think that sentence makes it clear that the Council had decided the identity of the successful tender and the clock had started ticking for the purposes of the standstill period. If one compares this letter with that sent to the unsuccessful tenderer on 9 October 2020, the contrast is striking. The latter letter is in the following terms:

> "*Thank you for your participation in the tender for the supply of Maintenance, LED retrofit, New Works and Associated services for Public Lighting for Six Connacht Local Authorities. The Tenders Evaluation Committee, comprising of a representative of all six local authorities have now conducted the evaluation of the submissions. I regret to inform you that you have been unsuccessful in this competition. We received three tender submissions. Two tenders progressed to the award stage of the competition. Electric Skyline has presented the most economically advantageous tender for the Connacht Public Lighting Maintenance Contract. No formal award of a contract to Electric Skyline will take place before October 26 2020."*

128. There is a clear identification in that letter of the earliest date on which an award will take place. Had that unsuccessful tenderer wished to challenge the decision to award, it

would have known precisely the last date upon which it was obliged to issue proceedings to prevent the contract being signed. The Council concluded the contract with the successful tenderer on 27 October following the expiry of the period notified to the unsuccessful tenderer.

129. It is true that procurement documents should not be construed as if they were legislative or contractual documents (see Baker J. in *Somague*) and that lawyers should not be required to oversee the procurement process. But that does not absolve the contracting authority of the need to be clear.

130. In my view the letter of 9 October to Killaree was not clear, as it did not unambiguously indicate that the decision to award the contract had been made. Because Killaree was being excluded, it may well have understood that the Council was still considering the question of the award to those tenders who had qualified. The trial judge correctly observed that Killaree could have taken steps to ascertain whether and when the contract would be awarded. However, as against this, it knew that it was entitled to a standstill letter and it was entitled to proceed on the basis that, absent that letter, the standstill period could not commence.

131. In summary, the argument of Killaree is that it was entitled to a standstill letter; it was entitled to assume the contracting authority would observe the law; the contracting authority indicated it was excluded but did not indicate that it was proceeding to award the contract; and Killaree relied on the terms of the letter and contested its exclusion but did not turn its mind to the question of pre-contractual remedies.

132. The Council argues that the trial judge was correct in highlighting the omissions on the part of Killaree, namely its failure to inquire as to the award of the contract and/or the standstill period and that, had it done so, it would have put itself in a position whereby it could seek pre-contractual remedies. That may very well be true. However,

the question here is whether the infringement deprived the tenderer of the possibility of availing of pre-contractual remedies.

133. The infringement here was the failure to tell Killaree the contract was being awarded and to tell it of the standstill period. Those failures must be laid at the door of the Council. It is certainly true that, had an inquiry been made by Killaree, it could have put itself in the position where it could have availed of pre-contractual remedies. It is also true that Killaree has told the Court nothing about why it did not do so, or its mindset between 9 October and 3-4 November. A step on its part (which another tenderer in its position might have taken) might have put it in a position where it could have sought those remedies.

Was Killaree deprived of the chance to obtain pre-contractual remedies?

134. In deciding the difficult and finely balanced question in this case as to whether Killaree was "*deprived*" of the possibility of pursuing pre-contractual remedies, one must look to the intention behind the Directive and construe the provisions of Regulation 11(2)(b)(i) with that in mind. Recitals 4 and 6 of the Remedies Directive identify the purpose of the standstill period as follows, and recital 18 explains the purpose of sanctions:

> *"[4] The weaknesses [of the review mechanisms in the Member States] ... include in particular the absence of a period allowing an effective review between the decision to award a contract and the conclusion of the contract in question. This sometimes results in contracting authorities and contracting entities who wish to make irreversible the consequences of the disputed award decision proceeding very quickly to the signature of the contract. In order to remedy this weakness, which is a serious obstacle to effective judicial protection*

for the tenderers concerned … it is necessary to provide for a minimum standstill period ….

[6] The standstill period should give the tenderers concerned sufficient time to examine the contract award decision to assess whether it is appropriate to initiate a review procedure. …

[18] In order to prevent serious infringements of the standstill obligation and automatic suspension, which are pre-requisites for effective review, effective sanctions should apply. …"

135. The purpose of the standstill period as articulated in the recitals i.e. to allow a person to issue proceedings prior to the signing of the contract, must inform any interpretation of Regulation 11(2)(b)(i). The deprivation of the opportunity here was undoubtedly initially caused by the Council's failure to send a standstill letter. Is it therefore in conformity with the purpose of the Directive to conclude that, despite this manifest failure, no such deprivation occurred because Killaree was not entitled to rely on the communication from the Council and ought to have interrogated the Council as to compliance with its obligations? In my view that approach fails to sufficiently acknowledge the obligations on the contracting authority imposed by the Directive for reasons of effectiveness of remedies in the procurement context.

136. The trial judge focused on the fact that action on the part of Killaree could have altered the situation. However, the judge's focus did not in my view reflect the true focus of Regulation 11(2)(b)(i), interpreted in the light of the objectives of the Directive. Killaree was entitled to assume that the contracting authority would comply with its obligations under the Regulations. By the time Killaree became aware of the signing of the contract, the horse had bolted and the only remedy available to it was a declaration of ineffectiveness. In all the circumstances, I consider Killaree was deprived by the

breach of the opportunity or the possibility of seeking pre-contractual remedies, and that the trial judge accordingly erred in law in concluding that Killaree had not been deprived of a remedy by the failure to provide a standstill period.

137. Nonetheless, despite my conclusion in this regard, Killaree is not entitled to a mandatory declaration of ineffectiveness because, as identified above, the scheme established by the Remedies Directive and Regulations requires both that a person establishes they have been deprived of the possibility of pursuing pre-contractual remedies and that the Regulation 5(1) infringement is combined with a substantive infringement of procurement rules that affected its chances of obtaining the contract. Because there was no substantive breach of the Public Authorities' Contracts Regulations, Killaree did not meet the requisite conditions for a declaration of ineffectiveness and the conclusion of the trial judge in that regard remains intact.

Discretionary declaration of ineffectiveness - Regulation 11(7)

Pleading

138. Regulation 11(7) only comes into play where a mandatory declaration of ineffectiveness has been refused. It gives the deciding body discretion to make such a declaration even where the conditions for a mandatory declaration have not been met. Killaree sought this remedy in the High Court but the trial judge held it had not been pleaded and refused to grant it on this basis. However, he also went on to consider whether the discretionary conditions had been met and concluded they had not. Killaree appeals both of his findings in this respect.

139. On the pleading point, the trial judge noted that the issue paper prepared by the parties did not ask him to declare the relevant contract ineffective pursuant to Regulation 11(7), although it did ask him to decide whether or not he had jurisdiction to make an Order declaring the contract ineffective pursuant to Regulation 11(7). He observed at para. 87

that Killaree, in its extensive pleadings, had not sought any relief pursuant to Regulation 11(7). He noted that no application was made at the hearing to amend the pleadings to invite or require the Court to make Orders under Regulation 11(7).

140. At the appeal hearing, counsel for Killaree argued that, properly construed, the pleadings contained an application for relief under Regulation 11(7). The Council argued that Order 84A is very clear about what must be pleaded and it specifies that the relief sought must be identified. It drew a distinction in this regard between Order 84A and 84 RSC which allows additional reliefs to be granted that have not been specifically sought. It argued that the specific relief was not pleaded.

141. To evaluate whether the pleadings sought the necessary relief, it is necessary to consider them in some detail. The Statement of Grounds is headed up "*Review of the Award of Public Contract, In the matter of a public procurement review application pursuant to Order 84A of the RSC, In the matter of a review under the European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010 as Amended)*". Killaree argues this reference is sufficient, as the Regulations encompass both a mandatory and, in the alternative, discretionary declaration of ineffectiveness. Under paragraph F, '*Reliefs Sought'*, the following declaration is sought: -

> "*A declaration that the contracts concluded between the respondent and the notice party for the supply of Maintenance, LED Retrofit, New Works & associated services for public lighting for six Connaught local authorities on the 27th of October 2020, is ineffective and/or void*."

142. Section V is headed up "*Failure to comply with obligation to notify the applicant of the contract award and standstill period and unlawfully concluding a contract prior to commencement of the standstill period*." That section deals with the issue of the standstill period and the absence of a compliant letter as discussed above, and refers to

Regulation 11(2)(b) and quotes same. The last paragraph pleads that the breach of Regulation 5(1) has deprived the applicant of applying for review and the possibility of pursing pre-contractual remedies etc.

143. It is true there is no reference to Regulation 11(7), but equally there is very little reference to Regulation 11(2)(b). What is clear is that a declaration of ineffectiveness is being sought. It is also true there was a greater focus on Regulation 11(2)(b) in the Statement of Grounds, as the requisite conditions for relief were identified and the case was made (very briefly) why they were said to have been met, whereas Regulation 11(7) was not quoted. Nonetheless, a blanket application for a declaration for ineffectiveness was squarely made; and whether it was sought on a mandatory basis or a discretionary basis does not change the fundamental nature of the relief sought.

144. In Killaree's High Court legal submissions, there is a section dealing with the effect of the breach of the standstill obligation (paras. 17 – 20). There is neither a reference to Regulation 11(2)(b) nor 11(7). At para. 20, it is argued that it follows from the above that the contract ought to be declared ineffective. Again, a blanket approach was being adopted: there was certainly no indication that a declaration on a discretionary basis was being ruled out.

145. The opposition papers are also instructive in this respect. The Statement of Opposition contains pleas that are relevant to a discretionary declaration of ineffectiveness. At para. 117, it is denied that the applicant is entitled to a declaration of ineffectiveness of the contract. The following 11 paragraphs go to the factual context of the contract, including that the contract is an important contract both regionally and nationally; that it is for services in respect of public lighting on behalf of six councils; that public lighting impacts both public safety and security, it uses the "*Deadsure*" system which is critical for road and public safety; that the Councils have 57,049 public lighting units

in their charge; that it is a major item for expenditure in the Councils' budgets; that a break in service in respect of lighting could have negative consequences for the public; that a declaration of ineffectiveness is reserved for the most grave infringements of procurement law; that the applicant delayed in raising any query regarding its exclusion from the tender competition; and that any declaration of ineffectiveness could only be in respect of the contract as between the successful tenderer and the Council but not the other local authorities. These pleas are far more relevant to a claim for a discretionary declaration of ineffectiveness than a mandatory one.

146. Equally, the affidavit of Mr. Maughan of the Council sworn 12 February 2021 makes the case that the contract should not be declared ineffective. At para. 21 of his affidavit, Mr. Maughan notes that the contract was "*critical and important*" and further noted the importance of public lighting for public safety and security, for road safety, and that the public lighting contractor uses "*Deadsure*". Mr. Maughan further noted at para. 75 that the contract was for an initial term of 12 months and would expire in October 2021, and that there was considerable uncertainty as to whether the contract was to be continued beyond the initial term given the cross-over with the Retrofit Project. Further, Mr. Maughan suggested that an ineffectiveness remedy was not warranted where the applicant was excluded from the tender for having submitted abnormally low rates and prices and where the Council informed the applicant clearly and in good faith of its intention to proceed with the identification of the successful tenderer and to conclude a contract following the observance of the mandatory standstill period.

147. It is useful to recall the wording of Regulation 11(7) in this context:

> "*In the case of a Regulation 5(1) infringement or a Regulation 8(2) infringement, (being, in each case, an infringement not covered by paragraph*

(2)(b)), the Court may, after having assessed all aspects that it considers relevant, declare the relevant contract ineffective".

I think it is fair to describe this as a "*drop down*" remedy: in other words, where a declaration is sought but the necessary threshold has not been crossed to obtain it on a mandatory basis, the Court may nonetheless go on to consider whether to grant the declaration on a discretionary basis. Once a declaration of ineffectiveness is sought, as was done in the Statement of Grounds, there is no reason why a respondent should assume it is only being sought on a mandatory basis. As identified above, it appears from the opposition papers that the Council did not so assume as it included in its pleadings and evidence references to discretionary factors.

148. In all those circumstances I cannot agree that the matter was not sufficiently pleaded and therefore I do not agree that the trial judge ought not to have considered the Regulation 11(7) arguments. I emphasise that my finding is not an invitation to avoid pleading with specificity: the pleadings here could and should have been far more specific in relation to Regulation 11(7); but nonetheless they are sufficient in the circumstances outlined above.

Decision to refuse discretionary declaration of ineffectiveness

149. As identified above, despite his conclusion that Regulation 11(7) had not been pleaded, the trial judge observed at para. 89 that, had Killaree sought relief under Regulation 11 (7), he would have refused it. He set out four reasons as to why he would not have granted a declaration of ineffectiveness: (a) the contract was a significant public one both regionally and nationally; (b) the nature of the works involved relate to public safety and the carrying out of those works has particular public importance for the reasons set out in the affidavits filed on behalf of Mayo County Council; and (c) the process impugned by Killaree led not to just one but to several individual contracts with

a number of local authorities and those authorities were not party to the proceedings. In this context, he observed that it was undesirable that the contracts involving the other local authorities should be invalidated as a result of proceedings to which they were not a party, or that the contract with the Council should be struck down but the contracts with the other Councils remain in place despite the fact that it was intended that the Council's contract would be coordinated with the similar arrangements with neighbouring local authorities. Fourth, and finally, the trial judge referred to the desirability for legal certainty and referred to the failure of Killaree to enquire when the contract would be signed, notwithstanding having had ample opportunity to do so. He observed that this was a factor but only as one supporting a decision based on the other three factors.

150. Ground 5 of the notice of appeal challenges the exercise of discretion by the trial judge. Before considering the exercise of discretion, it is necessary to recall the nature of the review to be carried out by this Court in considering the exercise of discretion by a trial judge. The case law makes it clear that there is scope for an appellate court to set aside the exercise of discretion by a trial judge in relation to, *inter alia*, a decision on a procedural application, even where that trial judge has not misapplied the law but also where he or she has come to a conclusion that the appellate court considers to be so fundamentally wrong that it ought to be set aside (see *Cave Projects Ltd. v Kelly* [2022] IECA 245). In *Betty Martin Financial Services Ltd. v EBS* [2019] IECA 327, Collins J. observed that there was no *a priori* rule under which an appellate court could only interfere with the decision of the High Court where an error of principle was disclosed, although great weight should be attached to the High Court's views. In *Hayes v Environmental Protection Agency* [2024] IECA 162 (para. 138), Butler J. summarised the position, noting that whilst the Court of Appeal will give great weight to the views

of the trial judge, the ultimate decision is one for the appellate court, untrammelled by any *a priori* rule that would restrict the scope of that appeal by permitting the appellate court to interfere with the decision of the High Court only in cases where an error of principle was disclosed (per Irvine J. in *Collins v Minister for Justice* [2015] IECA 27 applying *Lismore Builders Limited v Bank of Ireland Finance Limited* [2013] IESC 6).

151. Consequently, Killaree is not required to establish an error of principle as a prerequisite to the Court of Appeal reaching a different conclusion to the High Court. Nonetheless, to displace the Order of the High Court in a discretionary matter, Killaree should be in a position to establish that a real injustice will be done unless the High Court Order is set aside. It is not sufficient for Killaree simply to establish that there was a better or more suitable Order that might have been made (per Irvine J. in *Lawless v Aer Lingus* [2016] IECA 235 and Finlay Geoghegan J. in *McCoy v Shillelagh Quarries Limited* [2017] IECA 185). I must therefore ask myself if there is a real risk of unfairness in the decision of the trial judge such that this Court ought to set it aside, and substitute its own ruling for that of the trial judge.

152. Remarkably, there seems to be very little case law on the circumstances in which it is appropriate to make a declaration of ineffectiveness in a Regulation 11(7) context. No decisions of the CJEU/General Court were cited to the Court by either party. The Council submits that a declaration of ineffectiveness is regarded as a draconian remedy which brings to an end an otherwise lawful contractual relationship, thereby impacting on a successful tenderer who is performing the contract and that the courts have tended to take the view that substantial compliance with legal obligations will suffice to militate against granting such declarations of ineffectiveness. It refers to *AAEW Europe LLP & Ors. v Basingstoke and Deane Borough Council* [2019] EWHC 2050 where Sir Robert Akenhead considered the decision of the High Court in *Alstom Transport v.*

Eurostar International Limited [2011] EWHC 1828 and concluded that there was nothing in the Regulations which required a further call for competition in circumstances where there was a valid OJEU contract notice and the contract ultimately made substantially related to the advertised project. However, in that case the conclusion was that the remedy of ineffectiveness was not available and the case is therefore not particularly relevant.

153. The Preamble to the Remedies Directive is helpful in understanding the purpose of the remedy. At Recital 14 of the Preamble, it is observed that ineffectiveness is the most effective way to restore competition and to create new business opportunities for those economic operators who have been deprived illegally of their opportunity to compete, although it might be noted that this sentence appears in the context of illegal direct award of contracts where there is no contract notice. It is clear that the purpose of automatic suspension in a Regulation 11(2)(b) context is to deter such breaches. Recital 18 of the Preamble identifies that, to prevent serious infringements of the standstill obligation, an automatic suspension/effective sanctions should apply. At Recital 19 it is observed that, in the case of other infringements of formal requirements, Member States might consider the principle of ineffectiveness to be inappropriate. The Preamble discloses an awareness of the concerns in respect of legal certainty which may result from ineffectiveness. At Recitals 25-27, the importance of a reasonable minimum period of limitation on reviews seeking to establish that the contract is ineffective is identified, so as to limit the impact on legal certainty. The net effect of all of this appears to be that the declaration of ineffectiveness is a draconian remedy that nonetheless may be necessary in order to ensure in certain circumstances that a contracting authority does not benefit from a breach of the rules.

154. Turning to the reasons given by the trial judge for concluding that he would not have exercised his discretion to grant a declaration of ineffectiveness, the first reason relied upon i.e. the significance of the contract, does not in my view constitute an error of principle in taking same into account. Similarly, in respect of the second reason – the identification of the nature of works as being those affecting public safety – there was substantial evidence before the judge in respect of the public safety aspect and the potential impact that a declaration of ineffectiveness might have on the performance of the obligations under the contract. His decision to rely on those factors again does not disclose an error of principle. Equally, no error of principle is disclosed by the trial judge taking into account the fact that the process led to six individual contracts with local authorities who are not party to the proceedings and the difficulties that a declaration of ineffectiveness might cause. Killaree made the argument that the contract should not necessarily be invalidated against those other parties but only as against the Council. That has its own difficulties given that all six authorities were involved in this decision as per the affidavits and also that the contract was tendered on the basis that the successful tenderer would contract with all six contracting authorities. The other five contracting authorities were not joined to these proceedings by Killaree and have not been part of the proceedings, and in the circumstances there are obvious issues with invalidating their contracts with the successful tenderer without hearing them.

155. Finally, the issue of legal certainty is identified by the trial judge and in that respect he took into account the failure of Killaree to take any steps to ascertain the position in relation to the award of the contract despite the terms of letter of 9 October. Legal certainty is undoubtedly a valid matter to take into consideration, ~~is~~ as confirmed by paras. 25 – 27 of the Preamble to the Directive which identify the measures required to limit the potential impact of a declaration of ineffectiveness on legal certainty. Is it

therefore appropriate to take into account Killaree's lack of action following the receipt of the letter of 9 October, despite having concluded that by the terms of that letter Killaree was deprived of its pre-contractual remedies?

156. At first blush that may seem inconsistent. In the context of the discussion on deprivation of remedies, I accepted that Killaree itself had failed to take steps that might have permitted it to avail of pre-contractual remedies but concluded this was not enough to displace the conclusion in relation to a deprivation of remedies given the purpose of the Directive. However, this does not mean that Killaree's actions are immunised from scrutiny in the context of a discretionary decision whether to make a declaration of ineffectiveness or not.

157. The primary cause of the problem was the terms of the letter of 9 October. But although it cannot be considered the primary cause, indisputably, Killaree's inaction contributed to the failure to issue proceedings prior to the contract being signed. Hence, in the context of an application by Killaree to declare the contract ineffective, I do not consider the trial judge erred in considering its behaviour relevant in the context of considering whether a discretionary Order should be made.

158. Having regard to the above, I conclude that the trial judge did not err in principle in the factors that he considered. Both the substantial impact of a declaration of ineffectiveness (on the successful tenderer, the other local authorities and the public), and the inaction of Killaree in the face of the letter of 9 October, mean Killaree is a long way from showing substantial unfairness. In those circumstances, Killaree has failed to establish the trial judge erred in refusing to grant a discretionary declaration of ineffectiveness.

Alternative Penalty: Regulation 13(1)

159. Regulation 13 of the Remedies Regulation provides insofar as is material: -

"*(1) The Court shall impose an alternative penalty if—*

(a) under Regulation 11(5), it declines to declare a contract ineffective, or

(b) in the case of an alleged infringement referred to in Regulation 11(7), it finds that the infringement occurred but declines to declare the contract ineffective.

(2) The alternative penalty shall be either or both of the following:

(a) the imposition on the contracting authority of a civil financial penalty of up to 10 per cent of the value of the contract;

(b) the termination, or shortening of the duration, of the contract.

(3) The Court may take into account all the relevant factors, including the seriousness of the infringement, the behaviour of the contracting authority and any extent to which the contract remains in force. For that purpose, the Court needs to be satisfied of the relevant facts only on the balance of probabilities."

160. Regulation 13(4) provides that a civil penalty shall be paid into the Central Fund. No financial benefit will accrue to Killaree by any payment of a penalty by the Council. At Regulation 13(6), it is provided that the award of damages is not an appropriate alternative penalty for the purposes of this Regulation.

161. In his judgment, the trial judge identified at para. 91 that the remedy of a civil fine or other alternative remedy was not sought by Killaree, either in its pleadings or in the issue paper, and that this presented the obvious difficulty that, while the Regulations require the imposition of some alternative penalty, it was impossible to do so in any way that followed the requirements of the fair procedures that apply in an adversarial system. He identified the necessary information that would have to be before the Court given the entitlement of the Council to know the case against the case being made

against it, including for example what Orders were sought and the legal and evidential basis on which the Orders were sought. He concluded that, given the adversarial nature of the proceedings, the Council should not face any penalty that Killaree had not asked the Court to impose.

162. Unlike the position in relation to Regulation 11(7) discussed above, there was no hint or reference whatsoever in the pleadings to the imposition of a fine or other remedy under Regulation 13(1). Killaree argues that any such pleading was unnecessary because of the reference in the title of the pleadings to the "*Review Procedures Regulations*" and that therefore all of the provisions of those Regulations were available to Killaree. Counsel for Killaree argues that the alternative penalty flowed once Killaree pleaded the ineffectiveness of the contract. He submits that the matter was argued before the High Court, and was ventilated in that way. Counsel emphasised the mandatory nature of the alternative penalty if a court refuses a declaration of ineffectiveness. He argues that Article 2e(2) of the Directive identifies that the review body, in considering the appropriate alternative penalties, should take into account all the relevant factors including the seriousness of the infringement, the behaviour of the contracting authority and, in the cases referred to in Article 2d(2), the extent to which the contract remains in force.

163. In fact, counsel also argued that those factors should be taken into account in respect of the Regulation 11(7) adjudications, but that seems wrong given that that Article 2e(2) is focused on alternative penalties, not declarations of ineffectiveness. In any case, Ireland has implemented the Directive by identifying that those factors are only relevant to alternative penalties (see Regulation 13(3)). In short, Ireland did not choose to make the seriousness and impact of the behaviour of the contracting authority relevant considerations for the exercise of discretion under Article 11(7).

164. The Council seeks to uphold the trial judge's decision in this regard and argues that the trial judge was not so much making a pleadings point in isolation, but rather explaining that the exercise that was required to impose a fine pursuant to Regulation 13(1) could not be carried out without further information. Counsel focused closely on the fact that Order 84A of the RSC requires an applicant to specify the reliefs sought and the grounds upon which each relief is sought and – in contradistinction to Order 84 – does not allow for relief to be granted which has not been specifically claimed. She pointed out this distinction is consistent with the policy objectives of rapidity in procurement litigation, and that new grounds of appeal cannot be raised where they are not properly pleaded or determined in the High Court, and that Court should not hear and determine issues not tried and decided in the High Court. Further, it was pointed out that, had a Regulation 13 plea been made, that might have made a difference to the assessment of the notice party as to whether or not to participate in the proceedings.

165. Counsel submitted that EU law had to be invoked in the same way as domestic law and that there was no obligation on the Court, even as a matter of EU law, to go around of its own motion expanding upon pleadings and deciding issues not specifically raised. Counsel argued that EU law, as a matter of effectiveness, does not demand that a court raise issues of its own motion. She referred to all of the evidence that would need to be before the Court before making a decision in respect of a civil financial penalty, including matters such as proportionality, the gravity of the infringement, intentionality, previous infringements, aggravating/mitigating factors, evidence as to mindset and the impact of a fine on the work of the Council. Counsel commended the finding of the High Court that the Council was entitled to know the legal and evidential basis upon which a fine was sought and that no guidance had been given to the Court in this respect.

166. Counsel referred to the fact that the costs Order had in fact taken into account the question of the conduct of the Council in relation to the breach of the standstill obligation, and submitted that should this Court direct a second module directed to the imposition of a civil penalty, the costs Order would have to be revised. She also suggested that any civil penalty enquiry could not be for the Court of Appeal but would have to be remitted for full consideration. In answer to a question by the Court, she referred to a decision of the Court of Appeal in England in *Faraday Development Ltd v West Berkshire Council* [2018] EWCA Civ 2532 in which it was decided that EU law did not demand as part of the principle of effectiveness that a point be raised by a court that was not pleaded. She said that if the intended meaning of Regulation 13 was that the rules on pleading were displaced, it would have to make that clear.

167. There is no doubt but that Regulation 13(1) is a very unusual provision. It effectively mandates a review body – in this case the High Court – to impose an alternative penalty if a declaration of ineffectiveness is not made where there has been a breach of Regulation 5(1). In this case the appeal has been brought and argued on the basis that the breach will be treated as a Regulation 5(1) breach, and the decision of the trial judge not to make a declaration of ineffectiveness has been upheld. As the trial judge himself acknowledges, that means the Court must impose an alternative penalty. That is an obligation placed upon the High Court by the Regulation. It is not optional. The legal basis for the Remedies Regulations is the European Communities Act 1972 and the obligations derive from Ireland's membership of the EU. Accordingly, any pleading obligations imposed by Order 84A of the Rules of the Superior Courts – to the extent they would otherwise prevent the consideration of an alternative remedy – must yield to the primacy of EU Law.

168. The principle of effectiveness that was referred to by counsel for Mayo County Council does not have any application here, given that the Remedies Directive has gone beyond the general principle of effectiveness (and equivalence), and imposed an obligation on the Member States to ensure that specific remedies are available in national law. It could not be used to entitle this Court to disregard mandatory requirements of EU law as implemented by Irish law. Indeed, it would be very strange if a principle designed to ensure adequate remedies in the context of EU law were to be used to disapply a clearly binding provision of EU law on remedies. That disposes of the argument that the lack of pleading prevents or render unnecessary compliance with Regulation 13(1).

169. It might also be observed that the omission of a Regulation 13(1) plea is not entirely surprising, given that it would only ever come into play where a declaration of ineffectiveness is refused, and that an alternative remedy is mandatory where there is such a refusal. Arguably, it could be said that there is no need to plead a relief that is an inexorable consequence of the refusal of a declaration of ineffectiveness, as it must follow whether pleaded or not.

170. I do not necessarily adopt this view, as in an adversarial system the purpose of pleadings is to allow parties to know what they are facing and in that context it was required to be pleaded. Nonetheless its absence is perhaps more understandable given the context. Moreover, an application under Regulation 13 would be arguably impossible to plead with any precision since the factors referred to above that counsel for the Council correctly identifies as relevant to the imposition of any fine could not be known until the Court decides whether there is a Regulation 5 breach and whether to grant a declaration of ineffectiveness. In fact, any pleadings that identified that a penalty is sought could ever only be a signal that it was intended to pursue same, but

with a recognition that further particulars might be required at a later point in the case. In those circumstances, I do not agree that Killaree can be precluded from seeking a civil penalty because it was not explicitly pleaded.

171. However, what is less understandable is the failure of Killaree to engage with the observation of the trial judge that no finding could be made on the question of a civil penalty without proper pleadings. Having received the judgment on 13 February, 2024 and considered para. 91, it is difficult to understand why, when the matter was later listed for submissions in relation to the form of Order, no application was made for a second module. It was only at this point that Killaree knew that it had succeeded on the Regulation 5(1) point and had not succeeded on the declaration of ineffectiveness point.

172. It must have been readily apparent to Killaree that the trial judge could not possibly have imposed a civil penalty without hearing further from the parties and that the required information in that regard was not before him. The appropriate thing to have done at that stage was to propose a second module. Indeed, the terms of para. 91 do not in my view preclude Killaree from returning to the High Court and seeking a further module. At para. 9 of the notice of appeal, it is pleaded that the trial judge also failed to take into account that any issue of alternative penalty could and/or ought to be addressed in a second module to the proceedings and not determined in the initial judgment. Had an application for a second module been made, and granted, the matters outlined at para. 91 could have been addressed. This issue may be a factor that may be relevant in any costs determination.

173. In any case, it is quite clear that the trial judge was correct in concluding that the issue of a civil penalty could not be determined without further pleadings and evidence and his decision is upheld in this respect. Nonetheless, as identified above, this Court must provide an opportunity to have the question of a fine ventilated if this is a matter

Killaree decides to pursue. Both parties at the appeal hearing ultimately agreed that this could not be done by this Court, but would have to be done by a High Court judge. Therefore, this matter will be remitted to the High Court solely on the question of a civil penalty where directions will be given in respect of pleadings, evidence, submissions etc.

174. It is acknowledged that this Order may have consequences for the costs Order made by the High Court. At para. 13 of the costs decision ([2024] IEHC 229) the trial judge observed that the Council had avoided the alternative penalty under Regulation 13 because Killaree did not seek an Order pursuant to this provision. At para. 14, the trial judge decided that the costs Order in favour of the Council should be adjusted to give effect to the legislative requirement that the Council could not walk away unscathed from its failure to serve a proper standstill notice. The trial judge held that this was an appropriate matter to consider pursuant to s. 169(1) of the Legal Services Regulation Act 2015. He made what he described as a modest adjustment whereby the costs awarded in favour of the Council were reduced from 85% to 75%. There was therefore an adjustment of the costs to reflect the fact that there was a failure to serve a proper standstill notice. The parties are asked to address this issue in any submissions that will be made on the costs of this appeal, given the decision to remit back to the High Court in relation to the question of a penalty.

Conclusion

175. Killaree has been successful in certain of its grounds of appeal but not others. The Order of the High Court will be varied and the question of whether a penalty should be imposed shall be remitted to the High Court to be heard and determined following whatever directions that judge hearing the matter shall deem appropriate.

176. Killaree shall have until 6 February 2025 to file and serve a short written submission limited to 3,000 words; and the Council will have until 20 February 2025 within which to respond. If either party considers that an oral hearing on costs is desirable, they should identify why they take that view in those submissions.

177. As this judgment is being delivered electronically, Faherty and Allen JJ. have authorised me to say that they agree with it and with the Orders proposed.