

**THE HIGH COURT
COMMERCIAL**

**2020 No. 77 JR
(2020 No. 21 COM)**

GLENEAGLE HOTEL (KILLARNEY) LIMITED

(APPLICANT)

AND

CORK CITY COUNCIL

(RESPONDENT)

RULING of Mr Justice David Barniville delivered in writing on 6 April 2020:

1. This is my ruling on an application by the applicant in these public procurement proceedings for an adjournment of the respondent's application to lift the automatic suspension of the impugned decision to award the contract at issue to the successful tenderer and to dismiss the applicant's application for lack of eligibility which is listed for hearing on 7 and 8 May 2020 and for consequential adjustments to the directions timetable. The respondent opposes the application to adjourn the hearing but is agreeable to an adjustment to the timetable to accommodate the applicant's difficulties.
2. The application was brought to my attention on the afternoon of Friday, 3 April 2020. It has been agreed that, in light of current restrictions on movement in the COVID 19 public health crisis, I can deal with this application in writing and without requiring the parties or their legal representatives to appear in person in court.
3. The applicant commenced these proceedings in late January 2020. The proceedings involve a challenge on public procurement grounds to a decision by the respondent to award a contract to provide partial funding to enable the construction of an event centre in Cork to a third party (BAM Contractors Limited). The proceedings were entered in the Commercial List on 17 February 2020. Directions were made on that date for the delivery of opposition papers by the respondent and for the bringing of an application by the respondent to lift the automatic suspension of the decision and to dismiss the applicant's application for lack of eligibility. The respondent's application was listed for hearing two days on 7 and 8 May 2020. A timetable was agreed for the exchange of affidavits and submissions to enable the hearing to proceed on those days. The timetable was varied slightly on two occasions on the application of the respondent (most recently on 5 March 2020). The applicant agreed to those variations, neither of which affected the hearing date.
4. Under the agreed and directed timetable the respondent was to issue its motion and deliver its grounding affidavit to the applicant by 5 March 2020. The respondent was also to deliver its opposition papers by 12 March 2020. The applicant was to deliver its replying affidavit by 30 March 2020. The respondent had until 8 April 2020 to put in any supplemental affidavit. The applicant had until 15 April 2020 to put in any further affidavit which it wished to rely upon. The respondent then had until 21 April 2020 to deliver its outline legal submissions (and any further affidavit). The applicant had until 1 May 2020 to its deliver outline legal submissions. The hearing was listed for 7 and 8 May 2020.

5. On 31 March 2020 (being the day after the applicant was due to deliver its replying affidavit to the respondent's application), the applicant's solicitors, Hallissey & Partners ("Hallissey"), wrote to the respondent's solicitors, Ronan Daly Jermyn ("RDJ") stating that since the directions were put in place and as a result of the outbreak of COVID 19 the applicant's situation had changed dramatically and its business had to close, resulting in over 500 employees being placed on temporary layoff. It was stated that the applicant had to focus on the immediate and urgent needs of its business and its employees and had not been in a position to devote time to the proceedings. They requested that the proceedings be adjourned to a date in the week commencing 16 June 2020 and that revised directions be agreed. RDJ replied on 1 April 2020. They opposed the request for the adjournment and stressed the urgency of the proceedings from the respondent's perspective. They asserted that a delay in the hearing of the respondent's application could result in the failure of the entire project due to the cost implications which were set out in the affidavit grounding the respondent's application. They further asserted that the loss of the project would have very serious financial consequences for Cork and for employment prospects in the area. They raised the possibility that the respondent's application could be heard remotely and referred to the public statement issued by the Chief Justice and the Presidents of the Court Jurisdictions on 31 March 2020 (the "Public Statement"). They stated that the respondent was opposed to any adjournment of the hearing but was agreeable to a reasonable alteration in the timetable to accommodate the applicant's problems provided that it did not prejudice the hearing date.
6. Hallissey replied on 2 April 2020. In that letter, they explained that the applicant was facing a difficult and complex situation caused entirely by the COVID 19 crisis and that the applicant had been in discussions with the HSE for the use of the applicant's hotel in Killarney as a care facility during the pandemic. They reiterated the applicant's need for an adjournment of the hearing and noted that if the respondent refused to consent to an adjournment, an application would be made to the Commercial Court on 3 April 2020 (the last day of the Hilary term). The letter also disputed the urgency of the proceedings for the respondent. RDJ replied on 3 April 2020 reiterating the urgency of the proceedings, and the hearing proceeding on 7 and 8 May 2020, from the respondent's perspective. They pointed out that it was not possible to arrange for counsel to attend at any physical application for an adjournment of the proceedings that day. They further stressed that any delay in the determination of the proceedings would imperil the project itself. Hallissey replied later that day on 3 April 2020. They stressed the difficult situation faced by the applicant and asserted that the current crisis required the applicant's undivided attention such that it was not in a position to provide the necessary instructions for the preparation of the replying affidavit(s).
7. All of this correspondence was forwarded to the Registrar on the afternoon of 3 April 2020 and it was then brought to my attention. Confirmation was sought from the parties as to whether they were agreed that I could deal with this application in writing. That agreement was forthcoming. On the morning of 6 April 2020, the Registrar received a further letter from RDJ enclosing suggested revised directions and a copy of a further letter sent to Hallissey that morning. The revised directions enclosed would afford

additional time to the applicant for its replying affidavit and would alter the dates for the subsequent steps but would leave intact the hearing date of 7 and 8 April 2020.

- 8 I have carefully considered the applicant's application and the reasons for it and the respondent's response to the application. I accept that the applicant has experienced major difficulties in complying with the directions previously made (most recently on 5 March 2020) due to the severe effect of the COVID 19 crisis on its business and activities. I further accept that the applicant's efforts, like those of most businesses in the State, have very likely been concentrated entirely on trying to deal with the fallout of the crisis for its business and for its employees (a large number of whom have had to be laid off on a temporary basis) and on negotiating with the HSE a possible arrangement for the use of its hotel as a care facility during the current public health crisis. However, I also accept that there is considerable urgency to the proceedings in general and to the determination of the respondent's application to lift the automatic suspension, in particular, for all of the reasons set out in the correspondence sent by RDJ on behalf of the respondent.
- 9 There remains considerable uncertainty as to how it might be possible to hear cases in the Commercial List and another lists of the High Court in the forthcoming term commencing on 20 April 2020. The Public Statement referred to the fact that work is being done to put in place the necessary infrastructure to enable remote hearings of certain cases to take place and that trials of the relevant systems are to be conducted in the immediate future. It is hoped that remote hearings may be possible for cases in the Commercial List at some point next term. However, it is too early to say when might be the case, what cases might be deemed suitable for remote hearings and how the capacity for such remote hearings will be prioritised between the different cases in the different lists in the High Court (and in other courts). While the respondent's application may well be the sort of case which would be suitable for a remote hearing, if such be possible, it cannot be said at this stage with certainty that it will be possible to accommodate a remote hearing of this application. The position is constantly evolving and developing and, as the Public Statement noted, further statements will be issued from time to time when the position becomes clearer. If remote hearings are not possible, it is unclear as to whether it will be possible for physical hearings to be accommodated next term. That will depend on the Government restrictions and guidelines in force at the time and public health considerations.
- 10 All that being said, I have concluded that the urgency of the respondent's application is such that the application should be brought to a point where it is in a position to be heard on its assigned dates of 7 and 8 May 2020. I cannot, of course, rule out that it might ultimately not be possible to proceed with the hearing on those dates and that it may be necessary to adjourn the hearing, if a remote hearing cannot be arranged and if a physical hearing is not possible. However, on balance, and accepting the undoubted difficulties which have been faced by the applicant in complying with the directions to date, it is I believe necessary to ensure that the respondent's application is in a position of preparedness so that it can if at all possible proceed on its assigned dates. In order to accommodate the applicant's difficulties and, at the same time, to ensure that the

respondent's entitlement to reply is respected, I have decided that the most appropriate way to proceed is to alter the directions timetable so as to allow additional time to the applicant to provide its replying affidavit and to adjust the time limits for the subsequent steps. I have considered the draft adjusted timetable sent by RDJ to Hallissey this morning, 6 April 2020, and copied to the Registrar. It seems to me that, subject to one change, adjusting the timetable in the manner suggested represents a fair reasonable and proportionate response to the difficulties faced by the applicant and the urgency demonstrated by the respondent. I am satisfied that it is appropriate to adopt the revised timetable proposed by RDJ on behalf of the respondent with the one alteration referred to below.

- 11 Accordingly, the applicant will have until close of business on 20 April 2020 for its replying affidavit or affidavits. The respondent will deliver its outline legal submissions by close of business on 21 April 2020. The respondent will have until close of business on 27 April 2020 for any supplemental affidavit or affidavits. The applicant will have until close of business on 1 May 2020 for any further affidavit. The applicant's written submissions must be filed by close of business on 4 May 2020 (giving an additional three days for this). The respondent will have until the same date, 4 May 2020 for any further affidavit. The hearing will then, if at all possible, proceed on 7 and 8 May 2020. This is ,however, subject to the considerations discussed earlier.

- 12 In the circumstances, therefore, I refuse the applicant's application to adjourn the hearing of the respondent's application to lift the automatic suspension and to dismiss the applicant's application for lack of eligibility. If at all possible, the hearing should proceed on the assigned dates. However, I will vary the directions in the manner indicated above. For the most part I adopt the revised directions timetable circulated by the respondent on 6 April 2020. I have allowed an additional three days for the applicant's written submissions. I will give the parties liberty to apply by way of correspondence. Further, if and when the position in relation to the availability of remote hearings becomes clearer, I will give the parties liberty to apply by correspondence as to whether the respondent's application can be heard remotely on 7 and 8 May 2020. I direct that the costs of the applicant's application for the adjournment of the hearing, in the particular unique circumstances, be costs in the cause.

David Barniville

6 April 2020

APPROVED