THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 264

Record Number: 2019/110

Peart J.
Whelan J.
McGovern J.

BETWEEN:

WORDPERFECT TRANSLATION SERVICES LIMITED

RESPONDENT/APPLICANT

AND

MINISTER FOR PUBLIC EXPENDITURE AND REFORM

APPELLANT/RESPONDENT

JUDGMENT OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 24TH DAY OF OCTOBER 2019

1. This appeal is from an order for discovery of documents made by the High Court (Simons J.) on the 14th March 2019 wherein, inter alia, the appellant ("the Minister") was ordered to make discovery of nine categories of documents, such discovery to be made in accordance with a Protocol of Inspection scheduled to the said order.

2. These are public procurement proceedings by way of judicial review wherein the applicant/respondent ("Wordperfect"), an unsuccessful tenderer, seeks to challenge the Minister's decision, communicated to it by the Minister's letter dated 12th October 2018, to award the contract for the provision of translation services to An Garda Síochána to another party who participated in the tender competition.

3. Wordperfect submits that the categories of documents that the Minister has been ordered to discover are necessary to enable it to fairly and properly challenge the Minister's decision in these judicial review proceedings on the basis of the grounds set forth in its statement of grounds. The Minister had agreed to make limited discovery in respect of only four of the nine categories of documents sought by Wordperfect and considers that the discovery as ordered is impermissibly and unnecessarily broad in its scope. It is submitted that the trial judge erred in concluding that all documents so ordered are relevant and necessary for the fair and proper determination of the issues in the proceedings.

4. It is convenient to set forth the nine categories of documents as ordered by the trial judge at this point. They are as follows:

    1. All documents relating to the evaluation of tenders by reference to Criterion 4.1 (b) – "Very Urgent Requests for Service".

2. All documents relating to the evaluation of tenders by reference to Criterion 4.1 (e) – “Interpreter Support”.

3. All documents relating to the evaluation of tenders by reference to Criterion 4.3 – “the Quality Assurance Plan”.

4. All documents relating to the evaluation of tenders by reference to Criterion 4.2 (b) – “Management Structures”.

5. All documents relating to the evaluation of tenders by reference to Criterion 4.2 (c)—“Management Escalation Processes”.

6. The Successful Tenderer’s Tender and all documents submitted by the Successful Tenderer in response to the SRFT and/or in response to any requests for clarification, including any communications between the Successful Tenderer and the respondent during the course of the Competition.

7. All documents relating to the evaluation of the Successful Tenderer’s Tender.

8. All documents relating to the evaluation of the Applicant’s Tender.

9. All documents relating to the respondent’s failure to observe a Standstill Period.

5. On this appeal the Minister has divided these nine categories into three distinct groups, and the submissions of the parties have been made by reference to each such group. Group 1 relates to categories 1, 2, 3, 4 and 5. Group 2 relates to categories 6, 7 and 8. Group 3 relates to category 9.

6. The parties are in agreement that the principles which guide the Court in relation to discovery in public procurement cases are best described in the judgment of Ryan P. in this Court in *BAM PPP PGGM Infrastructure Cooperatie UA v. National Treasury Management Agency and Minister for Education and Skills* [2015] IECA 246 (“BAM”) where at paragraph 29 he summarised the relevant legal principles as follows:

1. The primary test is whether the documents are relevant to the issues between the parties. Once that is established it will follow in most cases that their discovery is necessary for the fair disposal of those issues.

2. Relevance is determined by reference to the pleadings. O. 31, r. 12 specifies discovery of documents relating to any matter in question in the case.

3. There is nothing in the Peruvian Guano test which is intended to qualify the principle that documents sought on discovery must be relevant, directly or indirectly, to the matters in issue between the parties on the proceedings.

4. An application for discovery must show it is reasonable for the court to suppose that the documents contain relevant information.

5. An applicant is not entitled to discovery based on speculation.

6. In certain circumstances a too wide-ranging order for discovery may be an obstacle to the fair disposal of proceedings rather than the converse.

7. As Fennelly J. pointed out in *Ryanair plc v. Aer Rianta cpt* [2003] 4 I.R. 264, the crucial question is whether discovery is necessary for "disposing fairly of the cause or matter."

8. There must be some proportionality between the extent or volume of the documents to be discovered and the degree to which the documents are likely to advance the case of the applicant or damage the case of his or her opponent, in addition to ensuring that no party is taken by surprise by the production of documents at trial.

9. Discovery could become oppressive and the court should not allow it to be used as a tactic in war between parties.

7. In addition to these principles, there can be issues of confidentiality and commercial sensitivity which arise for special consideration in a public procurement case, and the court will have to balance those legitimate concerns on the part of the winning tenderer against an unsuccessful tenderer's entitlement to challenge the decision to award the tender to the winning tenderer, and for that purpose to obtain discovery of relevant documents which are reasonably necessary to enable the applicant to properly and fairly do so – see e.g. *Varec S.A. v. Belgium* (Case C-450/06) [2008] E.C.R. I-581 where the Court stated at paras. 51-53 of its judgment:

"51. It follows that, in the context of a review of a decision taken by a contracting authority in relation to a contract award procedure, the adversarial principle does not mean that the parties are entitled to unlimited and absolute access to all of the information relating to the award procedure concerned which has been filed with the body responsible for the review. On the contrary, that right of access must be balanced against the right of other economic operators to the protection of their confidential information and their business secrets.

52. The principle of the protection of confidential information and of business secrets must be observed in such a way as to reconcile it with the requirements of effective legal protection and the rights of defence of the parties to the dispute … and, in the case of judicial review or a review by another body which is a court or tribunal within the meaning of Article 234 EC, in such a way as to ensure that the proceedings as a whole accord with the right to a fair trial.

53. To that end, the body responsible for the review must necessarily be able to have at its disposal the information required in order to decide in full knowledge of the facts, including confidential information and business secrets."

8. In accordance with the principles in BAM already referred to, it is first necessary to identify from the pleadings what are the issues raised by Wordperfect in these proceedings, and with which issue has been joined by the Minister. Clearly where facts are admitted on the pleadings those facts need not be proved, and discovery is therefore not necessary for that purpose, even though they may be relevant in a general sense.

Categories 1, 2, 3, 4, and 5

1. All documents relating to the evaluation of tenders by reference to Criterion 4.1 (b) – "Very Urgent Requests for Service".

2. All documents relating to the evaluation of tenders by reference to Criterion 4.1 (e) – "Interpreter Support".

3. All documents relating to the evaluation of tenders by reference to Criterion 4.3 – "The Quality Assurance Plan".

4. All documents relating to the evaluation of tenders by reference to Criterion 4.2 (b0 – "Management Structures".

All documents relating to the evaluation of tenders by reference to Criterion 4.2 (c) – "Management Escalation Processes".

9. The need for these documents is explained by WordPerfect on the basis that in awarding higher marks to the winning tenderer based on information provided under various headings, the Minister has unlawfully applied Undisclosed Award Criteria, and that he has interpreted and applied the Supplementary Request for Tenders ("SRFT") in an unlawful manner. The Minister in his statement of opposition denied this claim, and argued that each of the so-called Undisclosed Award Criteria "is an example, characteristic or relative advantage provided to the applicant with the notification letter to assist it with, which the applicant has mechanistically converted into an alleged undisclosed award criteria".

10. A useful example of such a complaint can be found at para. 64 of the respondent's statement of grounds which states the following relevant to category 1 above ("Very Urgent Requests for Service"):

> "64. With respect to Very Urgent Requests for Service, the respondent applied an undisclosed award criterion, "the Prioritisation Criterion":
>
> (1) The Notification criticised the applicant for not demonstrating an approach to prioritising and establishing the urgency of requests for service (namely, for non-compliance with the Prioritisation Criterion);
> (2) The applicant understood – as would any reasonably well-informed and normally diligent tenderer – that for the purposes of this question, all requests were to be considered "very urgent" (unless they were requested more than 24 hours in advance) and there was no requirement to prioritise between requests;

(3) Further, the applicant understood – as would any reasonably well-informed and normally diligent tenderer – that all "very urgent" requests are to be dealt with within 60 minutes and that any prioritisation would interfere with this approach;

(4) The deduction of marks from the applicant in respect of the Prioritisation Criterion is contrary to the requirements set out in the SFRT;

(5) The Prioritisation Criterion was not specified in the SRFT;

(6) The deduction of marks from the applicant in respect of the Prioritisation Criterion involved the application of an undisclosed award criterion and/or requirement;

(7) Had the applicant been aware of the Prioritisation Criterion, it could and would have amended the applicant's Tender accordingly;

11. Other instances of alleged undisclosed award criteria are contained in the statement of grounds, and are further explained at paras. 10 – 67 of the affidavit of Aonghus McClafferty, solicitor, grounding the application for discovery. As already stated, the Minister refutes the allegation that by awarding higher marks to the winning tender he has applied undisclosed award criteria, and pleads that any advantage identified in the successful tenderer's tender in the feedback that was provided to Wordperfect, and for which additional marks were awarded to the successful tenderer, has been "mechanistically converted" by Wordperfect into an undisclosed award criterion.

12. In response to the letter seeking voluntary discovery of categories 1, 2, 3, 4 and 5 the Chief State Solicitor denied that these categories of documents were relevant and necessary. Notwithstanding that denial, an offer was made on a without prejudice basis to provide certain of the documents within categories 1, 2, 4 and 5. But category 3 was refused in its entirety. In relation to categories 1 and 2 the offer was to provide "the specific sections identified above of the final Evaluation Report as it relates to the applicant". The letter stated that "the balance of the document, which is irrelevant on the pleadings, will not be provided or, where it appears on the same page as a discovered section, will be redacted". In relation to categories 4 and 5, the offer was "to provide the specific sections identified above of the final Evaluation Report as it relates to the applicant". The letter went on to make the same comment regarding redaction.

13. The offer made in relation to providing certain documentation within categories 1, 2, 4 and 5 was not acceptable to WordPerfect, on the basis that the documents offered were insufficient to enable WordPerfect to test whether undisclosed award criteria were applied. The reasons why the documents offered are not considered to be sufficient are explained by Mr McClafferty in his grounding affidavit. Principally he states at para. 17 thereof as follows:

"17. … the category of documentation discovery of which is sought is directly relevant to matters in dispute in these proceedings and is necessary for the fair disposal of the proceedings and in particular, is necessary to enable the applicant to demonstrate that the respondent has interpreted and applied the requirements set out in the SRFT in an unlawful manner with respect to Very Urgent Requests for

Service and also evaluated Very Urgent Requests for Service unlawfully. Discovery of this documentation may also serve to save costs by avoiding disclosure at the hearing and facilitating the admission of certain documents or facts, prior to the hearing."

14. Further paragraphs 21 – 24 of Mr McClafferty's grounding affidavit stated the following:

> "21. The applicant maintains that the respondent conducted an unlawful evaluation of its tender through the application of Undisclosed Award Criteria. The Respondent has "denied that the matters [identified by the applicant] were 'undisclosed award criteria'. Whether or not Undisclosed Award Criteria were applied is therefore clearly in issue between the parties.
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> 22. The discovery offered by the respondent is insufficient to enable the applicant to test whether Undisclosed Award Criteria were applied, as in order to do so, it requires sight, not just of the evaluation notes relating to its own tender, but those applicable to the evaluation of the Very Urgent Requests generally.
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> 23. It is also apparent that the final evaluation report will be insufficient; the application of Undisclosed Award Criteria necessarily arises during the course of the evaluation process. The final evaluation report will not record how that process was conducted and is manifestly insufficient to enable the applicant's claim regarding Undisclosed Award Criteria to be tested.
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> 24. Furthermore, the application of Undisclosed Award Criteria comprises only one of the complaints made by the applicant relating to the evaluation of Very Urgent Requests. By way of example only, another complaint is that the respondent erred in awarding marks to the Successful Tenderer in respect of its approach to identifying a suitable interpreter and notwithstanding that the applicant also addressed this issue. Again, it is obvious that the applicant requires more than sight of the section relating to it in the final evaluation."

Categories 6, 7 and 8

15. Category 6 seeks the Successful Tenderer's Tender and all documents submitted by that party in response to the SRFT and any other requests for clarification. Category 7 seeks all documents relating to the evaluation of the successful tender, and Category 8 seeks all documents relating to the evaluation of the Wordperfect's own tender. Mr McClafferty's affidavit, and the letter seeking voluntary discovery of these categories explains why this discovery is needed. Firstly, it is contended that the Minister treated Wordperfect unequally by comparison to the successful tenderer (which is denied by the Minister). Secondly it is contended that the Minister has not explained the scores of the Successful Tenderer in respect of a number of different criteria (which is denied). Thirdly, Wordperfect contends that the Successful Tenderer should have been awarded fewer marks in respect of those award criteria (which is denied by the Minister). It is argued also that the Minister ought to have rejected the Successful Tender in its entirety on the basis that it was an abnormally low tender. That is based on Wordperfect's assertion that

as explained in the grounding affidavit Wordperfect tendered its own tender at cost, and yet achieved a lower mark than was awarded to the Successful Tenderer under the cost criterion (the Minister denies this allegation).

16. In relation to categories 6, 7 and 8 the Minister refused to make any offer of voluntary discovery on the basis that this was a general discovery request and amounts to 'fishing', and in addition did not meet the level of indispensability that is referred to in the judgment of this Court in *Word Perfect v. Minister for Public Expenditure* [2018] IECA 87 in relation to discovery of the rival's successful tender document. The Minister's response also stated that the successful tender had expressly asserted the commercial confidentiality of its tender documentation. The Minister considered that Wordperfect had been provided with sufficient information in relation to the relative characteristics and advantages of its own tender.

Category 9

17. Category 9 documents are all documents relating to the Minister's failure to observe a Standstill Period. The Minister declined this discovery firstly on the basis that there was no "failure" as such since the standstill period is voluntary under law. Secondly, the Minister stated that it is in any event not in dispute that there was no standstill period, and that no factual dispute exists in relation to this purely legal question.

The trial judge's judgment

18. Having outlined the grounds upon which Wordperfect seeks to challenge the decision to award the contract to the Successful Tenderer the trial judge determined that all the documents sought on the application were both relevant and necessary, and considered that the application did not amount to a 'fishing expedition'. He considered that the grounds of challenge were not speculative, but rather derive from what he considered to be "the very limited information which [the Minister] has, to date, made available to Wordperfect". He stated that the comparison table that came with notification of the decision purported to identify in a summary form how it is that the successful tenderer was awarded higher marks than those awarded to Wordperfect. He went on to state in para. 61:

> "This comparison table indicates that, in some instances, the successful tenderer was awarded marks for offering to provide a higher level of service than that actually prescribed under the SRFT".

19. The trial judge's conclusions are set forth at paras. 62 – 69 and it is convenient to set them out as they appear in the judgment, as follows:

> "62. WordPerfect wishes to advance an argument to the effect that this approach to marking entailed the Contracting Authority placing reliance on undisclosed criteria. Counsel on behalf of the Contracting Authority … submits that discovery is not necessary to advance this argument … . More specifically, it is suggested that WordPerfect is already in possession of all the documents necessary to make this argument, namely the comparison table and the SRFT. It is suggested that WordPerfect can point to the reasons in the comparison table as indicating that

marks were awarded for particular items, and can then take the trial judge to the terms of the SRFT, with a view to demonstrating that such items are not expressly referenced in the table. Thereafter it is a matter for legal submission as to whether this involves undisclosed award criteria.

63. With respect, I think that this argument involves an oversimplification of what is likely to occur at the trial of the action. It appears from the Statement of Opposition that the Contracting Authority intends to argue at the full hearing that what WordPerfect seeks to portray as undisclosed award criteria are, in truth, no more than examples of characteristics and relative advantages of the successful tenderer. It is further suggested that WordPerfect has simply taken the reasons disclosed in the comparison table for why the successful tenderer received higher marks, and "mechanistically converted" these into alleged undisclosed award criteria.

64. Indeed, this argument was presaged to some extent at the hearing before me in that counsel made express reference to the judgement in *Baxter Healthcare v. HSE* [2013] IEHC 413. On the facts, the High Court rejected an argument that a favourable comment in the evaluation of successful tender, to the effect that the physical layout of the renal dialysis unit proposed by the successful tenderer would involve less noise and disturbance for patients, meant that noise had been introduced as an undisclosed award criterion. It was submitted by counsel that a similar analysis should be applied to the facts of the present case.

65. This attempt to rely on *Baxter Healthcare* is consistent with the approach taken by the Contracting Authority in its pleadings. The Contracting Authority has filed a full defence to these judicial review proceedings. More specifically, the statement of opposition filed on behalf of the Contracting Authority represents a full traverse of the claims made by WordPerfect. Against this background, it is clear that issue has been joined, and all these matters are in dispute.

66. Given the manner in which the issues have been joined in the pleadings, there is simply no basis upon which WordPerfect can properly advance its case without obtaining an order for discovery. Discovery is indispensable. WordPerfect needs to have access to (i) the successful tenderer's tender, and (ii) the evaluation of same, in order to establish inter alia what precise specification the successful tenderer was offering; the extent to which it goes beyond the specified award criteria; and what weight and marks the Contracting Authority awarded for same. To date, WordPerfect only has the benefit of the limited material provided to it by the Contracting Authority. The comparison table is a document prepared *ex post facto*, and is merely a summary of the evaluation process.

67. It may be useful to pause here, and to consider the implications of the Contracting Authority's argument if followed through to its logical conclusion. The essence of the argument is that it is sufficient for the purposes of judicial review that the applicant has access to limited information, authored by the relevant contracting authority itself, which purports to provide an *ex post facto* summary of the

evaluation process. On this argument, neither the applicant for judicial review - nor ultimately the court when exercising its supervisory jurisdiction – is entitled to examine the contemporaneous documentation. With respect, this is to place too great a premium on the accuracy and reliability of a summary prepared by a contracting authority. Without in any way impugning the *bona fides* of contracting authorities, and ex post facto summary is not the best evidence. As the judgment in *Roche Diagnostics Ltd* (discussed at paragraph 13 above) indicates, access to contemporaneous documentation is critical in order to ensure that an unsuccessful tenderer has effective judicial review. More generally, it is wholly consistent with the approach adopted by the High Court (Baker J) in *Somague Engenharia S.A. v. Transport Infrastructure Ireland* [2015] IEHC 723 (discussed at paragraph 12 above).

68. If WordPerfect is to have a meaningful opportunity to properly present its case at full hearing, then discovery of both (i) the successful tenderer's tender, and (ii) the evaluation of same by the Contracting Authority, are necessary and indispensable. The grounds which it pleads cannot be advanced at trial without WordPerfect being able to take the trial judge to the contemporaneous documentation with a view to persuading the judge that marks were indeed awarded in respect of undisclosed award criteria. The compare and contrast exercise as between the specifications in the SRFT and the evaluation of the successful tender cannot be done without sight of category 6 and category 7.

69. I am also satisfied that WordPerfect has an entitlement to discovery of the evaluation carried out of its own tender (category 8). The grounds of challenge clearly identify concerns as to the manner in which both tenders were marked. As noted above, WordPerfect has shown to a non-speculative level at least that marks appear to have been deducted from it for having a level of service above that [was] specified in the SRFT, whereas in the case of the successful tenderer, the opposite seems to have happened, *i.e.* additional marks seem to have been awarded for offering to exceed the specifications. Further, the argument that the deduction of marks in respect of the mistaken inclusion of monthly rather than quarterly was disproportionate or irrational is one which meets any requirement of non-speculation."

The Minister's submissions:

Categories 1, 2, 3, 4 and 5:

20. The Minister submits that the trial judge erred in ordering discovery of these categories, particularly in the light of the Minister's offer of certain discovery of documents in these categories. The Minister accepts the importance of transparency in a tendering process, and that *inter alia* this must ensure that award criteria by which tenders are assessed are confined to those identifiable from the SRFT. The Minister accepts that the successful tenderer must not be awarded marks for criteria that are not disclosed in advance.

21. However, in the light of the explanations contained in the feedback provided to Wordperfect, the Minister submits that the issue that the Court will have to determine in

this regard is not whether the successful tenderer was awarded correct marks in relation to the particular award criteria identified in the statement of grounds, but rather whether by reference to the explanations provided to Wordperfect the relative advantage or advantages identified in the successful tender which were considered to merit a higher mark than was awarded to Wordperfect are just that (i.e. relative advantages) as the Minister submits is the case, or whether as Wordperfect submits, they amount to undisclosed award criteria. It is submitted that no discovery is required for Wordperfect to advance its arguments in this regard as it will be an issue to be determined as a matter of interpretation of the SRFT according to the test of the "reasonably well-informed and normally diligent tenderer" (also referred to as the REWIND tenderer test), and in that regard the Minister has relied upon the judgment of Finlay Geoghegan J. in *Gaswise Ltd v. Dublin City Council* [2014] 3 I.R. 1, and her reference therein to the judgment of the Court of Justice in *Case C-19/00 SIAC* [2001] ER-1-7725. In this regard, Finlay Geoghegan J. stated:

> " … the court in answering the question should attempt to put itself in the shoes of a reasonably well informed and normally diligent tenderer who would be responding to this particular ITT [Invitation To Tender], i.e. a person providing the relevant gas services, and should not do so as a lawyer."

22. It is submitted that the trial judge will have to interpret the SRFT from the perspective of "the reasonably well informed and normally diligent tenderer" in accordance with these principles, and determine whether the "relative advantages" considered to exist in the successful tender, and which attracted a higher mark that the responses by Wordperfect, amount to or do not amount to undisclosed award criteria. It is submitted that while the documents sought by Wordperfect are clearly relevant to the tender process generally, they are not necessary or indispensable for the advancement of the particular issues of interpretation of the SRFT raised on the pleadings in these proceedings, where no disputed facts exist relevant to that question of interpretation, and therefore should not have been ordered by the trial judge.

23. The Minister has also submitted that if the very broad discovery ordered by the trial judge is permitted, it is likely that in future public procurement cases similar applications will be made, where this is both unnecessary and will simply encourage unsuccessful tenderers to launch an unspecific and broad challenge to the decision to award a tender, in the hope that something can be found on discovery to give it substance – in other words a classic form of 'fishing'.

24. The Minister points also to the fact that categories 1 and 2 as sought and ordered captures not only the tenders of the successful tenderer and that of Wordperfect, but also the third tenderer in the competition, which is not even a party to these proceedings.

25. The Minister is willing, as indicated to Wordperfect in its response to its letter seeking voluntary discovery to provide discovery of sections of the final Evaluation report identified in categories 1 and 2 in so far as they relate to Wordperfect.

26. As for category 3, the Minister submits that the trial judge erred in ordering discovery of "all documents relating to the evaluation of tenders by reference to the criterion 4.3 – the "Quality Assurance Plan". Under this heading parties submitting a tender were supplied with notional information and were asked to present that information based on one calendar month. The successful tenderer did so, but Wordperfect presented it on a quarterly basis, and as a result received a lower mark that the successful tenderer. The feedback received by Wordperfect explained this situation, and Wordperfect has accepted that it did so. No fact is therefore in issue in this regard. Wordperfect submitted that to deduct marks in that regard was irrational and disproportionate. The Minister submits that the trial judge was in error in concluding that all documents relating to the evaluation in relation to this criterion are necessary – again since there is no disputed fact, and it will be a matter for submission and argument at trial. The Minister has relied upon the Supreme Court's judgment in *Carlow Kilkenny Radio Limited v. Broadcasting Commission* [2003] 3 I.R. 528.

27. As for categories 4 and 5, the Minister has submitted that the trial judge erred in order such wide discovery as sought, particularly where these documents are sought in relation to complaints that Wordperfect makes in relation to how its own tender was evaluated, and not that of the successful tenderer. The Minister had offered to provide discovery of those parts of the Evaluation Report relevant to categories 4 and 5 as relate to Wordperfect only. The Minister also makes another point under this category, namely that in any event it would be disproportionate to have to make the discovery ordered in relation to category 4 where the dispute involves a difference of just 1 mark between the mark awarded to Wordperfect and that achieved by the successful tenderer, and where the dispute to which category 5 relates involves a differential of just 0.5 of a mark.

The respondent's submissions on Categories 1, 2, 3, 4 and 5

28. The respondent submits that the trial judge identified the correct legal principles to be applied in these type of cases, and that that he correctly applied them. In particular, it is submitted that the trial judge considered in detail the grounds upon which the challenge to the Minister's decision is made, and concluded that the documents sought by way of discovery "are all directed to issues which are in dispute on the pleadings" and "are predicated on the grounds pleaded". The respondent rejects the Minister's submission that the trial judge disregarded the pleadings and did not carry out the kind of close examination of the issues raised on the pleadings in order to determine if the documents sought by way of discovery were necessary for the determination of the issues in the case.

29. The respondent submits that the trial judge was correct to state that the application for discovery was not a fishing expedition and also that this discovery was necessary if Wordperfect is to have a "meaningful opportunity to properly present its case at full hearing".

30. The respondent characterises the issue raised as to Undisclosed Award Criteria to which categories 1 and 2 relate as a factual dispute as to how the evaluations were carried out. It submits that the question whether undisclosed award criteria were applied is an issue

relating to the evaluation process, which therefore requires to be examined by the Court, and therefore the documents sought under categories 1 and 2 are both relevant and necessary. It is submitted that the offer made by the Minister to provide the Final Evaluation Report will provide only a summary of the outcome and will not assist in scrutinising the evaluation process.

31. The respondent disagrees that the issue as to undisclosed award criteria is purely a question of interpretation and that there is no factual dispute which would be assisted by discovery as sought. It contends that there is a clear factual difference between an undisclosed award criterion and what is called by the Minister "a relative advantage". It submits that this is a question of fact which can only be resolved by an examination of the evaluation documents. It is submitted that there is no error in the trial judge's determination as to necessity of the documents sought and ordered to be discovered.

32. As for category 3 documents, which includes but is not limited to parts of the successful tenderer's tender the respondent submits that the dispute as to Wordperfect's tender being marked down because it presented the notional information on a quarterly basis whereas the SRFT specified that this should be done on a monthly basis, is a factual dispute for which discovery of this category of documents is necessary for its fair disposal. In so far as there may be confidentiality issues arising from the discovery of the successful tenderer's tender submission, and a public interest in promoting a competitive tendering process, Wordperfect submits that this public policy can be adequately safeguarded by the use of a confidentiality ring or inspection protocol such as was envisaged in the Inspection Protocol attached to the order made in this case.

Conclusion on categories 1, 2, 3, 4 and 5

33. In my view, while the trial judge correctly identified from the judgment of this Court in *BAM* that the first task on an application for discovery is to ascertain the issues that arise on the pleadings, as it is these issues alone that arise for determination at the substantive hearing. Clearly the Court cannot decide if documents sought by way of discovery are relevant to the issues in the proceedings until those issues themselves have been clearly identified. Once relevance to those issues is established, the question then arises is whether the documents are necessary for the fair disposal of the issues, and a question of proportionality may then arise also. The principles in *BAM*, which both parties accept are the applicable principles, make that position clear. It is also clear both from *BAM* and long- recognised prior authority that where an issue is raised only to the level of speculation by the party seeking discovery, in the hope that something will turn up on discovery that may substantiate the speculative issue, discovery will not be ordered.

34. The trial judge stated at para. 7 of his judgment:

> "On the facts of the present case, the categories of documents sought are undoubtedly relevant all relate to issues in the proceedings. As explained at paragraph 60 below, the documents all relate to issues in the proceedings".

35. Having so stated the trial judge went on to state that "the debate before me was directed principally to questions such as whether the discovery sought was necessary, reasonable or proportionate".

36. Paragraph 60 of the judgment stated as follows:

> "There is no doubt that the categories of documents in respect of which discovery is sought satisfy the requirement of relevance. They are all directed to issues which are in dispute on the pleadings. In this regard it is to be noted that the Contracting authority has filed a statement of opposition that constitutes a full traverse of the claim."

37. The trial judge was satisfied also that the grounds of challenge were not speculative and derive from the limited information provided to Wordperfect by the Minister.

38. I have already set forth paras 62 – 69 from the judgment of the trial judge. He addressed in some detail the issue to which categories 1 and 2 relate, namely the undisclosed award criteria issue which I have outlines above. Having noted the Minister's contention that this issue was simply a matter for legal submission at the substantive hearing and to which no factual dispute arose, the trial judge stated that he considered that to be an over-simplification of what would likely arise at trial given the position of the Minister as appears from the traverse in the statement of opposition. As seen from para. 66 of the judgment, the trial judge considered that "given the manner in which issues have been joined in the pleadings, there is simply no basis upon which Word Perfect can properly advance its case without obtaining an order for discovery". I have already set forth the balance of paras 62 -69 and will not therefore do so again.

39. While the trial judge's conclusions as to relevance commenced by reference to the undisclosed award criteria, his overall conclusion that discovery was necessary and indispensable appears also to embrace the discovery sought in relation to all categories of documents sought.

40. I respectfully disagree with the conclusions of the trial judge as to relevance and necessity. In my view while he carried out some examination of the issues in respect of which categories 1 and 2 were sought by Wordperfect, namely the allegation that undisclosed award criteria had been applied resulting in Wordperfect receiving a lower mark than the successful tenderer, he failed to appreciate that while the statement of opposition undoubtedly traversed the grounds contained in the statement of grounds, the issue itself is simply whether the reasons given in the feedback provided to Wordperfect for awarding a higher mark to the successful tenderer is properly construed as being an undisclosed award criteria, or whether as the Minister contends it reflects "an example, characteristic or relative advantage" contained in the successful tender submission justifying a higher mark. There is, in my view, no factual issue which must be resolved in order to determine that issue. Wordperfect knows already the marks awarded both to it and the successful tenderer, and the explanation for the difference between the two. That information is already known, and I cannot see that sight of the documents relating to the

evaluation of tenders covered by categories 1 and 2 might assist Wordperfect in making that case. I would refuse discovery of categories 1 and 2 on the basis that they are not relevant to the relatively narrow issue to which they are said to be relevant.

41. In relation category 3, the trial judge would appear to have concluded relevance by the all-embracing conclusion as to relevance contained at para. 7. He makes a brief reference to this category again at para. 69 where he stated:

> "Further, the argument that the deduction of marks in respect of the mistaken inclusion of monthly rather than quarterly reports was disproportionate or irrational is one which meets any requirement for non-speculation".

42. While I would not disagree that the issue is raised above the level of speculation, it does not follow that in order to advance its case on this point, Wordperfect needs discovery of "all documents relating to the evaluation of tenders by reference to Criterion 4.3 – the Quality Assurance Plan". The issue that the Court must determine is whether having specified in the SRFT that reports were to be prepared on a monthly basis, and where Wordperfect failed to comply with this requirement by instead providing a report on a quarterly basis, it was impermissible to award Wordperfect a mark that was lower than that awarded to the successful tenderer where the latter had provided a report on a monthly basis as required. In my view that issue is a matter for legal argument and submission by reference to the SRFT and the feedback report which explains the basis on which marks were awarded. There are no facts in dispute which require sight of the category 3 documents for their resolution.

43. As for categories 4 and 5 as sought, again I consider that the trial judge failed to consider adequately the actual issues to which discovery of these categories is said to be relevant and necessary. He did not identify that the complaints made relate to how Wordperfect's own tender was marked and not that of the successful tenderer. The trial judge addresses these complaints in his judgment at para 40 *et seq*. In so far as the successful tenderer obtained marginally higher marks than Wordperfect in relation to certain aspects of "Management Structures" and "Management Escalation Processes", it is on the basis also that the justification explained amounts to an undisclosed award criterion (see para. 43 of the judgment). Again, I consider that these issues, as with categories 1 and 2 already dealt with, are issues that can be fairly resolved without the discovery of the documentation sought. They are issues of interpretation, not dependent upon information that may be discerned from the documents sought by way of discovery. While the documents sought may have relevance to the tender competition in that general sense they lack relevance to the precise issues that will be determined in the substantive proceedings and are not therefore necessary for the fair determination of the proceedings. Neither would there be a saving in costs. In fact the ordering of discovery would unnecessarily add to the costs of the proceedings. I would refuse to make an order in respect of these categories also.

44. Having said all that in relation to categories 1, 2, 3, 4 and 5, I note that certain documents within categories 1, 2, 4 and 5 were offered by the Minister on a voluntary

basis. That offer was refused. The Minister may well be still willing to offer that discovery if Wordperfect wishes to now avail of it. That is a matter for the parties.

Categories 6, 7, and 8

45. The documents sought under these categories are the followings:

> 6. The Successful Tenderer's Tender and all documents submitted by the Successful Tenderer in response to the SRFT and/or in response to any requests for clarification, including any communications between the Successful Tenderer and the Respondent duringthecourse of the Competition.
>
> 7. All documents relating to the evaluation of the Successful Tenderer's Tender.
>
> 8. All documents relating to the evaluation of the Applicant's Tender.

46. Wordperfect sought discovery of these categories of documents in order to support grounds 8 – 10 of their statement of grounds which allege the following:

> Ground 8: A breach of equal treatment in the evaluation of the applicant's tender by comparison with that of the Successful Tenderer.
>
> Ground 9: A failure on the part of the [Minister] to explain the scores of the Successful Tenderer in respect of a range of Award Criteria and the applicant's concern that the Successful Tenderer should have been awarded fewer marks. [Emphasis provided]
>
> Ground 10: Unlawful acceptance of an abnormally low tender from the Successful Tenderer.

47. Wordperfect submitted in the High Court that given the denial of these grounds in their entirety in the statement of opposition, discovery of these categories of documents was both relevant and necessary for the proper determination of the issues arising.

48. In resisting the application for discovery, the Minister submitted that in seeking the entirety of the successful tenderer's tender and the entirety of the evaluation, Wordperfect was in effect seeking general discovery, and was indulging in a so-called fishing expedition. It was submitted that such general pleas in a statement of grounds could not satisfy a test of necessity in accordance with the principles in BAM, and it was submitted that, in reality, Wordperfect was seeking discovery for the impermissible purpose of obtaining the successful tenderer's tender.

49. The Minister also submitted that it appeared from the statement of grounds that Wordperfect was attempting to make the case that in relation to certain Award Criteria where it received equal marks to those awarded to the successful tenderer, the marks awarded to the successful tenderer had not been explained, and that it needed discovery as sought under these categories in order to make the case that in fact the successful tenderer should not have been awarded even the marks that it did receive. In that regard, it was pointed out by the Minister that Wordperfect had stated in its statement of

grounds that it reserved its right "to provide further particulars once reasons have been provided, whether by way of discovery or otherwise". This, it was submitted, was clearly indicative that the claims in this regard are mere speculation, and that the application for discovery amounted to "fishing". In addition, the Minister submitted that there was no obligation on him to explain scores where equal scores were obtained by each party, since there were no relative advantages identified in favour of the successful tenderer. In making that submission, the Minister had referred to, and relied upon, the judgment of this Court in *WordPerfect v. Minister for Public Expenditure (No. 3)* [2018] IECA 156. (Hogan J), as well as that of McDonald J. in *Sanofi Aventis v. HSE* [2018] IEHC 566 supporting his contention that where marks awarded to the successful tenderer in respect of a particular award criterion are equal or lower, there is no obligation upon the contracting authority under Regulation 6 of the European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010 (S.I. 130 of 2010) to give reasons for the marks awarded in respect of that criterion.

50. On the other hand, Wordperfect had submitted that the claim of breach of equal treatment was similar to the claim made in *Bombardier Transportation Limited v. Merseytravel* [2017] EWHC 726 which held that a claimant alleging a breach of equal treatment "is entitled to investigate fully the comparative treatment of the tenders, either to confirm criticisms it has already made, or to found freestanding allegations". It also relied the judgment of Hogan J. in this Court in *Wordperfect v. Minister for Public Expenditure and Reform (No. 2)* [2018] IECA 87 in which a portion of the successful tenderer's tender dealing with Quality Assurance was found to be discoverable where no explanation had been offered by the Contracting Authority as to why it had been awarded a score of 170 marks.

51. The trial judge referred to those judgments and others to which he had been referred during the course of argument. Addressing the question of the practical difficulties facing an applicant in judicial review wishing to challenge the decision to award a contract to another tenderer due to the fact that the party does not have sight of the successful tender and the evaluation of same, the trial judge stated that "in particular" he had been referred to the judgment in *Roche Diagnostics Ltd v. The Mid Yorkshire Hospitals NHS Trust* [2013] EWHC 933 (TCC) from which he quoted para. 28 as follows:

> "Secondly, and most important of all, I consider that the Claimant is entitled to see all of the documentation produced for and occasioned by the actual evaluation process itself. I consider this to be fundamental. It appears that all of the spreadsheets so far provided are 'after the event' exercises and that, thus far, the defendant has not provided the documents, including the spreadsheets, which were produced during the evaluation exercise. Yet, at trial, in a procurement case such as this, the court will work carefully through how the evaluation itself was carried out. Conventionally that is done by reference to a file of documents which contains the actual evaluation exercise as it was carried out on both bids. That contemporaneous documentation is critical in a case of this kind and the Claimant has made out a clear entitlement to see that material now. (I understand that in

> Germany, for example, public authorities are obliged to keep a file in which all the documentation produced as a result of a tender evaluation is retained. At the end of the bidding process, copies of that file are provided to all the tenderers. For the reasons are apparent in this judgment, I consider that that is an approach which has much to commend it)."

52. The trial judge then referred to a commentary upon the judgment in *Roche* in Browne & McGovern, *Procurement Law in Ireland* (Round Hall, Dublin) where at paras. 15-702/703 the authors state:

> "This decision suggests that once proceedings are issued and the claimant can show a basic case, it is entitled to see documentation relating to how the evaluation process was carried out in order that an informed view can be taken as to its fairness and legality. It is not appropriate for the contracting authority to proffer only documents created after the issuing of proceedings in an attempt to show that its evaluation was carried out correctly. On that basis, those evaluating should be mindful that documents they create at the time of evaluation are disclosable and could be ordered to be disclosed at an early stage in proceedings. Even before proceedings are issued, contracting authorities should consider carefully any request for information and/or documents from a bidder and whether the provision of such information and/or documentation may help resolve a potential dispute without a formal claim having to be made. In *Wealden Leisure Ltd v. Mid-Sussex District Council*, disclosure of the final tenders was ordered to allow the claimant to plead its case that the successful tender may have been abnormally low. However, the High Court of England and Wales (Akenhead J.) refused certain applications for discovery in Pearson and Covanta although certain elements of discovery/disclosure were agreed or ordered.
>
> Aggrieved tenderers are considered to be in 'the uniquely difficult position' of knowing that they have lost while the reasons for their failure remain 'within the peculiar knowledge of the public authority'. The decision in Roche in relation to pre-action disclosure confirms that contracting authorities in England and Wales are under a duty under the Civil Procedure Rules to disclose basic documentation without proceedings having to be issued. This duty to disclose should be construed in conjunction with the Freedom of Information Act and the Environmental Information Regulations."

53. It seems that the trial judge was persuaded by these authorities that categories 6, 7 and 8 of the discovery should be ordered on the basis that without sight of such them Wordperfect would not be in a proper position to mount its case that the successful tenderer ought not to have been awarded the scores that it received under the particular criteria, even though its own scores under the same criteria were equal.

54. The Minister on this appeal has submitted that the ordering of these categories is an error on the part of the trial judge. It is submitted that he has erred in concluding that the grounds of challenge upon which the request for these documents rely are not speculative

in nature, despite the general and generic nature of the pleas in question. It is submitted that such generalised claims can be made in any procurement case, and that to allow discovery in relation to same would have serious implications for the procurement process. In so far as the Minister has submitted that the pleas contained in the statement of grounds with regard to alleged unequal treatment, the Minister referred to the necessity in public procurement cases for grounds of complaint to be stated with particularity, and has referred to my judgment in *Fresenius v. HSE* [2013] IEHC 414, and to the judgment of Hogan J. in *Wordperfect (No. 2)* who stated at para. 13:

> "Relevance for discovery purposes is, of course, determined in the first instance by reference to the pleadings. This is perhaps especially true in procurement cases where the parties are expected to bring forward their entire case with particularity within a short period of time and where the possibility of amendment of pleadings is generally limited. It is therefore necessary carefully to scrutinise the case made by [the applicant] in the grounding statement."

55. The Minister also submits that the question whether the Minister is obliged to provide reasons why particular marks were awarded to the successful tenderer where those marks are equal to the marks awarded to the applicant, is a question of law and therefore not dependent upon anything that might be gleaned from discovery as sought in these categories. The Minister refers to the fact also that in its respondent's notice on this appeal Wordperfect has at para. 8 (15) thereof stated, inter alia, that the point being raised is that "Wordperfect **is concerned** that the Successful Tenderer should have been awarded fewer marks in respect of these Award Criteria" [Emphasis provided]. The Minister submits that being "concerned" amounts to speculation, and as such, cannot form a proper basis for ordering the discovery of these categories of documents. The Minister has placed reliance on the judgment of the CJEU in *Varec S.A. v. Belgium*, Case C-450/06 where at paras 39-40 the Court stated:

> " … effectiveness would be severely undermined if, in an appeal against a decision taken by a contracting authority in relation to a contract award procedure, all of the information concerning that award procedure had to be made unreservedly available to the appellant, or even to others such as the interveners.
>
> In such circumstances, the mere lodging of an appeal would give access to information which could be used to distort competition or to prejudice the legitimate interests of economic operators who participated in the contract award procedure concerned. Such an opportunity could even encourage economic operators to bring an appeal solely for the purpose of gaining access to their competitors' business secrets."

56. The Minister in this regard has referred also to this court's judgment in WordPerfect (No.2) and its emphasis upon the importance of confidentiality and the protection of business secrets in relation to the tender process where business rivals must often reveal their business secrets when advancing their best case in the tender submission.

57. As regards WordPerfect's contention that the successful tenderer submitted an abnormally low tender, and that discovery of these categories is required in order to support that plea, the Minister submits that discovery is not necessary in circumstances where it is not alleged that WordPerfect's pricing strategy was known to the Minister. The Minister points also to the fact that the differential of 9.65% between Wordperfect's tender price and that of the successful is admitted by the Minister, and therefore not a matter in dispute between the parties. The Minister also submits that it is clear that the discovery sought in these categories does not in the main relate to the score awarded in relation to price.

58. Turning now to the reliance by Wordperfect upon the judgment in Roche already referred to, the Minister submits that it does not represent the law here, in the light of the judgment of this Court in *BAM* which overturned the judgment of the High Court in that case which had followed the *Roche* approach.

59. In response Wordperfect denies that the pleadings supporting the discovery of these categories are vague, generic and general, and submits that the claims for which discovery of these categories of discovery are sought are clearly set forth in the statement of grounds in paras. 59 – 82.

60. The respondent takes issue with the Minister's reliance upon *Wordperfect (No. 3),* and submits that the Minister has mischaracterised the judgment in *Roche*, and refers to the fact that the Roche judgment is not even referenced in the *BAM* decision of this Court relied upon by the Minister.

61. In my view the seeking of discovery of the documents in categories, 6, 7 and 8 amounts to a fishing exercise in the hope that by obtaining the successful tenderer's tender something may turn up that can substantiate the claims being made. The submissions of Wordperfect on this appeal state that categories 6, 7 and 8 arise from claims made in the statement of grounds as to Breach of Equal Treatment, Unjustified Scores, and Abnormally Low Tender. Those headings appear in the statement of grounds at paras. 78 et seq. But in my view there is insufficient particularity of these claims to indicate that discovery is necessary. I agree with the submissions of the Minister in this regard. To an extent also, what is pleaded mirrors the claims already referred to in relation to undisclosed award criteria, and does not advance the claims further. As regards the plea of unequal treatment stated in para. 78 for example, the following paragraph states that "In this regard, the applicant will rely, in particular (and without limitation) on the pleas already made above".

62. I would refuse discovery of these categories also.

Category 9: The 'no standstill period' claim

63. Wordperfect has pleaded that the Minister acted unlawfully by failing to conduct a Standstill Period in respect of the award of the contract, and further that in so failing, the Minister has breached Wordperfect's legitimate expectations and/or made representations.

64. The basis for these claims appear at paras. 60 and 61 of the statement of grounds. The pleas of unlawfulness are contained in para. 60, and raise purely questions of law. The case being made as to breach of legitimate expectation was summarised by the trial judge at para. 31 of his judgment as follows:

> "31. … It is also alleged that the Contracting Authority breached WordPerfect's legitimate expectation that there would be a standstill period. In this latter connection, a number of factual matters have been pleaded by WordPerfect as follows. It is alleged that the Contracting Authority has previously always observed a standstill period when awarding contracts pursuant to the framework agreement. Express references then made two other mini-tenders conducted pursuant to the framework agreement. WordPerfect pleads more generally that, as a matter of Irish public policy and the Contracting Authority's custom and practice, a standstill period is generally observed for contracts awarded pursuant to a framework agreement. It is stated that WordPerfect has tendered for many public service contracts in Ireland over many years, and has never come across a situation where a standstill period has not been observed. The Contracting Authority has joined issue with all of this."

65. In his statement of opposition, the Minister denied that there was any legal obligation to provide a standstill for this contract, and went on to state that while it was a matter for legal submission, the legal position is that under the EU procurement regime "Member States may avail of derogations from a standstill period including in cases of contracts called off under a framework agreement. This derogation was invoked by Ireland in transposing the EU procurement regime. The Minister also pleaded that the applicant's allegations in respect of the interpretation of tender documentation or time-barred, and therefore that any claim regarding the absence of a standstill period should have been brought within the 30 day time limit. Without prejudice to those objections, the Minister denied that the terms and conditions of the tender documentation incorporated a standstill period for the contract, and stated that at the trial of the action he would refer to the terms and conditions of the tender documentation for their meaning and legal effect.

66. Turning then to the claims being made that the Minister made representations to WordPerfect to the effect that a standstill period would be applied, this claim is denied. The Minister goes on to plead:

> "No such representation was made to the applicant. Further, the custom and practice upon which the applicant purports to rely is not admitted and, in any event, is not a representation made to the applicant whether in the context of the Contract or at all.

67. At para. 13 of the statement of opposition the Minister pleads:

> "13. Without Prejudice to the above, it is admitted that in the context of two previous mini-tenders conducted pursuant to the Framework Agreement a Standstill Period was observed. It is denied that the practice adopted in those mini-tenders

constituted a representation to the applicant or was in any way capable of giving rise to an expectation reasonably held by the applicant to the effect that a Standstill Period would be applied in respect of the Contract."

68. The documents sought in category 9 related to these claims regarding no Standstill Period. The documents sought are "all documents relating to the respondent's failure to observe a standstill period". The trial judge granted this discovery as sought. He does not appear to have given specific consideration to the necessity of such a wide category of documents, but, as previously stated, did conclude that all the discoveries sought in the various categories was both relevant and necessary.

69. It does not seem to me that any case of necessity is made out for such a general category of documents as sought. If WordPerfect wishes to pursue a claim that its legitimate expectation in this regard was breached, it is in a position to give its own evidence as to the basis for the claim both factually and as a matter of law. It will be able to give evidence as to what it considered to be a reasonably held expectation based on the representations as pleaded. It is entirely unclear what documents it considers would be in the possession of the Minister that would be relevant and necessary to support its claim. The Minister submits that this question is a purely legal issue and requires no determination as to fact. Insofar as WordPerfect wishes to rely upon representations giving rise to a reasonable expectation that there would be a standstill period the Minister submits that WordPerfect can give whatever evidence it wishes to give in that regard on affidavit and that discovery of documents does not arise. Indeed, it can be observed that the deponent of the affidavit grounding this application for discovery has made averments as to the basis for the legitimate expectation claim. The Minister makes the point also that the discovery ordered is entirely non- specific and general.

70. Again, I agree with the Minister in regard to category 9 documents. The category seeks a general trawl of any documents that the Minister might have in relation to the failure to observe a Standstill Period relating to this contract. But I am not satisfied that a case of necessity is made out. Indeed, in the absence of any detail as to the sort of documents that might exist it is impossible to be satisfied that such documents would be relevant and necessary. I would refuse category 9 documents as sought.

71. For the above reasons I would allow the appeal and vacate the order dated 14th March 2019.