THE COURT OF APPEAL

APPROVED

Record Number: 2022/247
High Court Record Number: 2023 680 JR
Neutral Citation Number [2023] IECA 335

Noonan J.

Faherty J.

O'Moore J.

IN THE MATTER OF DIRECTIVE 2014/24/EU

AND IN THE MATTER OF THE EUROPEAN UNION (AWARD OF PUBLIC AUTHORITY CONTRACTS) REGULATIONS 2016 (S.I. 284 OF 2016)

AND IN THE MATTER OF COUNCIL DIRECTIVE 89/665/EEC AS AMENDED

AND IN THE MATTER OF THE EUROPEAN COMMUNITIES (PUBLIC AUTHORITIES CONTRACTS) (REVIEW PROCEDURES) REGULATIONS 2010 (S.I. 130 OF 2010) AS AMENDED

BETWEEN/

CHC IRELAND DAC

APPLICANT/APPELLANT

-AND-

THE MINISTER FOR TRANSPORT

RESPONDENT/RESPONDENT

-AND-

BRISTOW IRELAND LIMITED

NOTICE PARTY

JUDGMENT of Mr. Justice Noonan (*ex tempore*) delivered on the 15th day of December, 2023

1. This appeal concerns a discovery application by the appellant ("CHC"). The proceedings relate to the award of a contract for the provision of the Irish Coastguard Aviation Service. After a public procurement contract process, the respondent ("the Minister") awarded the contract to the notice party ("Bristow"). These proceedings challenge the validity of that award. A limited description of the background to these proceedings is sufficient for the purposes of this discovery application. CHC is the incumbent provider of the Irish Coastguard aviation services whose contract will expire in 2025. Both CHC and Bristow submitted tenders for the new contract and Bristow was successful.

2. The services concerned primarily involve the operation and deployment of helicopters and, under the new contract, fixed wing aircraft, for, *inter alia*, air sea rescue and other lifesaving operations including emergency hospital transfers. Both CHC and Bristow are global operators in the field of helicopter transport and frequently vie with each other for public service contracts throughout the world.

3. CHC challenges the procurement process on many grounds but since this appeal is confined to three discrete categories of discovery, the relevant grounds of challenge appear to be as follows:

(a) CHC alleges that the Minister provided Bristow with confidential information pertaining to CHC, in particular to what is described as "alternative training", and thus breached the relevant regulations;

(b) the manner in which the evaluation of the final tenders was conducted was deficient and unlawful; and

(c) the Minister wrongly took account of political influence in awarding the contract to Bristow. Evidence of this is said by CHC to be found in a statement made by Senator Gerard Craughwell in the Séanad on the 31st May, 2023 in which he said:

> *"The Department of Transport has set out its preferred tenderer for the search and rescue contract and that is Bristow Ireland, which I congratulate on the job. I am not one bit sorry to see that CHC has not gotten over the line … From our point of view, this House and Committee [the joint Oireachtas Committee on transport and communications] did much work that influenced the way this contract went. It was a good day for Ireland that we did what we did."*

(d) Some of the evaluators appointed by the Minister to assess the tenders had a conflict of interest.

4. The categories that remain in issue between the parties are as follows, noting that in some cases, the High Court ordered partial discovery in respect of the relevant category:

Category 1(a)

All documents comprising and/or recording communications between the Minister for Transport (the "respondent") and CHC Ireland DAC ("CHC") and/or the notice party ("Bristow") during the negotiation phase of the competition which refer to what came to be referred to in the final RFT as alternative training, subject to the redaction and inspection of any confidential and/commercially sensitive information in accordance with the directed Protocol.

Category 3A

(i) Notes of the evaluation meetings/calls referred to in paragraphs 27.3, 27.6, 27.8 and 28 of Andy Evans' affidavit;

(ii) notes taken by individual evaluators comprising their individual assessment of the final tenders submitted by each of a) the applicant and b) the successful tenderer in the competition;

(iii) the technical evaluation report including drafts thereof and the relevant sections of the successful tenderer's final tender submission on which the evaluation is based, insofar as (i) - (iii) above relate to the following criteria:

(a) basing criterion;

(b) ancillary activities criterion;

(c) helicopter performance criterion;

(d) helicopter other mission requirements criterion;

(e) helicopter configuration criterion;

(f) fixed wing performance criterion;

(g) fixed wing other mission requirements criterion;

(h) fixed wing configuration criterion;

(i) availability, response time and resourcing criterion;

(j) operational interface and tracking criterion;

(k) safety criterion;

(l) approvals, transition, acquisition and acceptance criterion;

(m) sustainability criterion.

Category 7

All documents evidencing and/or recording communications between the respondent and individuals, entities or organisations outside of the Department of Transport relevant to the question of who would provide the service following the expiry of the existing contract including, but not limited to, communications in respect of the conduct of the competition and consideration given by the respondent internally in respect of such communications and the views of such individuals, entities or organisations more generally.

Decision of the High Court

5. The motion judge in the High Court, McDonald J., delivered an *ex tempore* ruling in which he considered each category in turn and ruled thereon. The issue in dispute between the parties regarding Category 1(a) was whether it should extend to documents submitted by Bristow to the Minister. It is and was Bristow's case that the category as drafted would inevitably capture its tendering proposals which are highly confidential and the circumstances giving rise to that confidentiality are set out in the affidavit of Mr. Tye. In this respect, McDonald J. said:

"It does seem to me in the first instance that those paragraphs of Mr. Tye's affidavit establish that the material involved in Bristow's tender proposals are extremely confidential, particularly in the context of their disclosure to a competitor such as the applicant. For the purposes of this hearing, I believe this is the only evidence

that I have and there is no reason not to accept Mr. Tye's evidence in relation to confidentiality. As I said, it goes into very considerable detail.

And that obviously, having regard to the approach taken by the Supreme Court in the Word Perfect 2020 judgment, that obviously means that the court has to consider the request for discovery very, very carefully and to take account of the confidential nature of this element of the respondent's formulation as it is currently framed, which would capture Bristow's tender proposals. And it's clear from the approach taken by the Supreme Court that one has to balance very carefully the position of the claimant on the one hand and the position of the possessor of the confidential information on the other and the Supreme Court judgment makes it clear that one does not necessarily trump the other.

But what the Supreme Court judgment does make very clear is, that if one is going to seek documents which are obviously confidential in this way, one has to put forward sufficient evidence before the court to credibly establish the need for those documents. And obviously the whole foundation of this element of the claimant's case is that the alternative training materials or methodology, if I can call it that, is confidential to it and constitutes confidential information, but I don't have any evidence to substantiate that allegation or to identify the basis on which it is said that this material is truly confidential within the normal meaning of that word. I don't have the equivalent material that I have, for example, in Mr. Tye's affidavit, insofar as Bristow is concerned. Nor have I any information to establish that this particular training methodology represents anything different to what would be - or anything significantly different to anything that is available in the marketplace or

that it in some other way satisfies the requirements, one of the recognised requirements attaching to what is considered to be truly confidential.

And in those circumstances it does not seem to me that, on the basis of the evidence currently before the court, that it would be appropriate to direct the respondent to make discovery of documents confidential to Bristow. That's to say Bristow's tender proposals. Therefore, it does seem to me to follow that I should exclude from Category no. 1 documents from Bristow to the respondent."

6. McDonald J. went on to recognise the difficulty this might create for CHC but he pointed to the fact that CHC knew from the terms of the *Word Perfect* judgment that it was incumbent upon it to put credible evidence before the court to establish the relevance and necessity of Bristow's confidential information. The judge also expressly had regard to the submission by CHC that it would not be able to sustain its grounds of review without sight of the contested documents but he noted that in *Word Perfect*, precisely the same argument had been made but the Supreme Court nonetheless declined disclosure.

7. In the context of the judge's ruling on this category, it is to be recalled that CHC's case in this regard includes a claim that its confidential information pertaining to alternative training was wrongfully disclosed by the Minister to Bristow. In opposing the application, Bristow contended that in fact its alternative training information was conveyed to the Minister as part of its tender prior to CHC having conveyed its information to the Minister. In making his ruling, the motion judge concluded that the evidence put before him by CHC did not credibly establish, unlike the Bristow evidence, that the alternative training information conveyed by CHC to the Minister was in fact confidential to it.

8. With further respect to Category 3A, the judge made reference to what was described as a RWIND tenderer, being a Reasonably Well Informed and Normally Diligent tenderer.

The judge noted that Category 3A was said to be relevant to four aspects of CHC's case, first manifest error, second taking irrelevant considerations into account, thirdly conflict of interest and fourthly the case made in relation to RWIND tenderer.

9. At the outset, the judge observed with regard to Category 3A that *"it hasn't been established to me that that very extensive category is appropriately mapped to the underlying pleadings."*. He said that he was conscious of the fact that it would require disclosure of every aspect of the evaluation of all the criteria in the request for tenders, even though not all are in issue in the proceedings. He noted that what was sought went well beyond the evaluation core report or extracts from the evaluation report which was not the approach taken by the Supreme Court in *Word Perfect*.

10. He noted the argument by CHC that this case is different from *Word Perfect* because the notes of the evaluations are required to address the conflict of interest point and also the political interference allegation. However, the judge dismissed this argument on the basis that he had already ruled on other categories which adequately covered these two issues and therefore the case could not be distinguished from *Word Perfect*, in which the Supreme Court limited the disclosure to relevant sections of the evaluation report.

11. Similarly in this instance, McDonald J. considered that the evaluation report should address the CHC case regarding manifest error and taking irrelevant considerations into account. The court did not accept that the RWIND tenderer argument was relevant. Accordingly, he confined the discovery to the characteristics in the evaluation report that are put in issue in the pleadings, appropriately redacted as required. In making this order, the judge allowed for the potential for revisiting the order at a later stage to go beyond the evaluation report.

12. Finally with regard to Category 7, the judge noted that the words attributed to Senator Craughwell were contended by the parties to be capable of different meanings, some innocent. In ruling on this, the judge considered that there was no evidence before the court to suggest that any relevant documents went outside Senator Craughwell and the members of the Joint Oireachtas Committee. Accordingly, the judge amended the category so that the order would read:

> *"All documents comprising or recording communications between the respondent and Senator Craughwell and other members of the Committee which refer to the new IRCG service contract the subject of these proceedings."*

The standard of review on appeal

13. It is perhaps trite to observe that appeals to this Court, particularly from interlocutory orders of the High Court, are not *de novo* hearings on the merits. It is by now well settled that an appellate court will not interfere with the exercise of discretion by a judge of the High Court once that exercise is shown to be within the range of judgment calls open to the court of first instance. That remains the case whether or not the appellate court might have been inclined to exercise its discretion differently. The position was explained thus by Irvine J. (as she then was) speaking for this Court in *Lawless v Aer Lingus Group Plc* [2016] IECA 235, which was also a discovery appeal. At paras. 22 - 23, Irvine J. said:

> *"22. This is an appeal against an order made by the High Court judge in the exercise of her discretion in relation to an interlocutory matter. This is not a re-hearing of that application and that being so this court should afford significant deference to the decision in the High Court. It is nonetheless clear that if an appellate court can detect a clear error in the manner of the approach of the High Court judge it is of course free to interfere with that decision. Further, even if the appellant*

cannot identify such an error the appellate court may nonetheless allow an appeal if satisfied that the justice of the case can only be met by such an approach.

23. However, it seems to me that all too often parties who are somewhat dissatisfied by interlocutory orders made in the High Court seek to use this Court as a venue to re-argue their application de novo in the hope of persuading this court to exercise its discretion in a somewhat different fashion from that which was adopted by the High Court judge at the original hearing. That is a practice which I believe is not to be encouraged. In order for this Court to displace the order of the High Court in a discovery matter the appellant should be in a position to establish that a real injustice will be done unless the High Court order is set aside. It should not be sufficient for an appellant simply to establish that there was a better or more suitable order that might have been made by the trial judge in the exercise of their discretion."

14. Those observations were subsequently approved in *Betty Martin Financial Services Limited v EBS DAC* [2019] IECA 327 - *per* Collins J. at para. 38. Most recently, in *SMBC & Ors v Lloyd's & Ors.* [2023] IECA 273, this Court observed in a discovery appeal that *"this court ought not to interfere with the order of the High Court unless the order under appeal is 'outside the range of any order which could reasonably have been made.' "*

Relevant legal principles

15. The leading authority in this jurisdiction on discovery in public procurement cases is *Word Perfect Translation Services Limited v Minister for Public Expenditure and Reform* [2020] IESC 56. The court's judgment was delivered by Clarke CJ with whom the other members of the court agreed. One of the conclusions that clearly emerged from this judgment was that the rules of discovery are the same in procurement cases as in all other

forms of litigation. Thus, the onus remains on the party seeking such discovery to establish the relevance and necessity of the documents sought.

16. As Clarke CJ pointed out in *Tobin v Minister for Defence* [2019] IESC 57, once relevance is established, necessity will be established on a *prima facie* basis, subject to any countervailing factors which should lead the court to decline disclosure. One such factor is confidentiality of the documents in issue although confidentiality in itself is not automatically a reason for declining disclosure. Where disclosure of documents, even those that are highly confidential, is necessary in the interests of justice to bring about a fair result, it will be ordered. As the court put it, *"confidence must yield to the proper administration of justice."* - at para. 5.5.

17. The Chief Justice placed some emphasis on the requirement for there to be a credible basis, beyond mere assertion, for a claim that is said to require the disclosure of confidential documents. Thus at para. 5.7, he said:

> *"It also seems to me appropriate to acknowledge that it may be necessary, in certain cases, to require of a party seeking disclosure of confidential information that it place before the court some credible basis for believing that it has a cause of action of the type asserted. It may not always be necessary to require the party concerned to put forward prima facie evidence, for it may well be the case that the party concerned requires to use the evidence gathered in procedures available to it under the rules to identify evidence. However, mere assertion, without putting forward any credible basis for believing that evidence might be available, may well be insufficient to justify disclosure of significantly confidential information."*

The Chief Justice reiterated this at para. 5.9:

"… It seems to me to be reasonable to require a party, who seeks disclosure of significantly confidential information, to at least put forward a credible basis for believing that the case to which it is said that confidential information may be relevant could possibly be made out at trial. To take any other view would allow mere bald assertion to justify gaining access to potentially highly confidential information. On the other hand, such an approach would not prevent a party who has a genuine case from gaining access to information (even if [it] be highly confidential) which is necessary to enable it to vindicate its rights and establish its claim."

18. The court also analysed the position under English and European law with regard to discovery in procurement cases. He referred in particular to the judgment of the CJEU in Case C-450/06 *Varec*. There, the CJEU, in a passage cited in *Word Perfect*, explained the importance of the protection of confidential information in procurement cases:

"39. Admittedly, those provisions relate to the conduct of the contracting authorities. It must nevertheless be acknowledged that their 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.

40. 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.

41. In such an appeal, the respondent would be the contracting authority and the economic operator whose interests are at risk of being damaged would not necessarily be a party to the dispute or joined to the case to defend those interests. Accordingly, it is all the more important to provide for mechanisms which will adequately safeguard the interests of such economic operators."

19. Commenting on this passage, Clarke CJ said (at para. 6.13):

"6.13 The whole point of public procurement law is to enhance the public interest in ensuring effective competition for public contracts while at the same time affording a level playing field for those who might wish to tender for such business. If there were to be a significant risk of a very high level of disclosure of significantly confidential details from tender documents, this could, as the CJEU pointed out, discourage appropriate tendering and thus defeat one of the very purposes of the public procurement regime."

20. At para 8.4 of his judgment, Clarke CJ identified the principles he considered relevant to discovery applications in procurement cases:

"Without being exhaustive, the following principles can be identified. First, and importantly, the fact that information may be confidential is not, in and of itself, a barrier to its disclosure. Second, the requirement that discovery be proportionate includes a requirement that there needs to be a balance struck between the extent to which ordering discovery of a particular category of document may give rise to the disclosure of confidential information (including especially highly confidential

information and information confidential to third parties), on the one hand, and the extent to which it may be reasonable to anticipate that the information concerned may be important to a just and fair resolution of the proceedings, on the other. Third, it may be disproportionate to direct discovery which would involve the disclosure of confidential information where no credible basis has been put forward for suggesting that there is a sustainable basis for that aspect of the claim in respect of which it is said that the confidential information concerned is relevant. In this latter context, in relation to procurement proceedings, the extent to which adequate reasons for the result of the procurement process have been given may be relevant for it may breach the requirement that there be an effective remedy if a party obtains very limited information about why the result wen the way it did and is then told that it cannot have discovery because it has not put forward a credible basis for suggesting that there was anything wrong with the procurement process. Fourth, it is recognised generally that a judge conducting a substantive hearing of proceedings may well be in a better position to identify whether the disclosure of confidential information is really necessary to enable a fair result of the proceedings to be achieved. On that basis procedures can, and are, put in place to ensure the retention of documentation and the availability of those materials at the hearing should the trial judge consider it necessary."

21. Of relevance in the context of this application, Clarke CJ expressed the view that the Irish law of discovery is harmonious with the requirements of European law identified in *Varec*, saying (at para. 8.15):

"On the basis of that analysis, it does not seem to me that Irish discovery law fails to strike the balance identified in Varec. In appropriate cases, and to the appropriate

extent, a challenger can have access to even the most highly confidential information should that prove necessary to a fair and just resolution of the proceedings. At the same time there is no automatic entitlement to highly confidential information emanating from rival bidders. That seems to me to be precisely the balance which the CJEU has indicated should be struck and it seems to me to be the balance which operates in Irish discovery law generally and, in particular, how that discovery law applies in the particular circumstances of procurement cases."

22. Since the judgment of the Supreme Court in *Word Perfect*, two relevant decisions of the CJEU have been delivered in Case C-927/19 *Klaipédos* and Case C-54/21 *Antea Polska S.A.* In its written submissions, CHC argues, in relation to these judgments:

"14. However, following the CJEU rulings, it is apparent that the approach of the Irish courts to discovery in procurement cases must now be reassessed."

23. This appears to amount to a suggestion that *Word Perfect* has in effect been overruled by these judgments, an argument which does not appear to have been advanced by CHC in the High Court. This submission appears to be based on the following passage from the judgment in *Antea Polska* (at para. 66):

"in order to comply with the general principle of good administration and to reconcile the protection of confidentiality with the requirements of the effective judicial protection, the contracting authority must not only state the reasons for its decision to treat certain data as confidential but must also communicate in a neutral form - to the extent possible and in so far as such disclosure is capable of preserving the confidentiality of the specific elements of that data which merit protection on that basis - the essential content of that data to an unsuccessful tenderer which requests

> *it, and in particular the content of the data concerning the decisive aspects of its decision and of the successful tender".*

CHC submits that this means that it is entitled as of right to *"the essential content"* of the relevant part of Bristow's tender. A similar statement is to be found in *Klaipėdos* at para. 123. In argument today, counsel for CHC put it somewhat differently in response to questions from the Court, saying these cases added to the *Word Perfect* jurisprudence. When asked if this meant that the tests of relevance and necessity no longer applied in this context, counsel agree that this was so.

24. The first point to be made about this submission is, as I have noted, that it was not made in the High Court. On the contrary, it appears that all parties agreed that the governing principles concerning discovery in public procurement cases in this jurisdiction are to be found in *Word Perfect*. That appears to be in significant conflict with the position now adopted by CHC. It is clear that the High Court decided this application squarely based on the *Word Perfect* principles without any suggestion being advanced by CHC that these were no longer to be relied upon.

25. Quite apart from that I am satisfied that this contention is misplaced. The decision in *Antea Polska* is not addressed to discovery applications in litigation. In that context, the judgment in *Word Perfect* has express regard to the relevant EU jurisprudence including *Varec*, reaffirmed in *Klaipėdos*. That judgment also confirms the position adopted in previous cases that each Member State enjoys procedural autonomy in relation to safeguarding the rights of parties in procurement cases.

26. Moreover, the balancing exercise which is a central feature in the judgment of the Supreme Court in *Word Perfect* is mirrored in the judgment in *Klaipėdos* (at para. 50):

> *"… The principle of the protection of confidential information must be reconciled with the requirements of effective judicial protection. To that end, the prohibition laid down in Article 21(1) of Directive 2014/24 must be weighed against the general principle of good administration, from which the obligations to state reasons stems. That balancing exercise must take account of the fact that, in the absence of sufficient information enabling it to ascertain whether the decision of the contracting authority to award the contract is vitiated by errors or unlawfulness, an unsuccessful tenderer will not, in practice, be able to rely on its right, referred to in Article 1(1) and (3) of Directive 89/665 to an effective review … ."*

The contention that CHC is entitled as of right to the *"essential content"* of Bristow's tender in a discovery application would set at naught the well-established criteria of relevance and necessity, which must be established before any balancing exercise is undertaken. That exercise is one for the courts of the Member State concerned as the CJEU recognises in *Klaipėdos* at para. 135:

> *"… it is for the competent national court to reconcile the applicant's right to an effective remedy, within the meaning of Article 47 of the Charter, with that operator's right to the protection of confidential information".*

Category 1(a)

27. It will be recalled that the requirement for disclosure of the documents in this category is said by CHC to arise from its claim that its alternative training information is confidential to it and this information was wrongfully disclosed by the Minister to Bristow. Bristow disputes this, not least because it says its own confidential information regarding such alternative training was provided before CHC's, but the motion judge held, correctly in my view, that he could not reconcile any disputes in this regard on affidavit. He did however

lay emphasis on the fact that it was not possible to discern from CHC's evidence that there was any basis for the suggestion that this information was confidential to it. He contrasted this with the evidence of Mr. Tye which clearly established the highly confidential nature of Bristow's evidence regarding alternative training.

28. He had clear regard to the requirement stated in *Word Perfect* for the court to have a credible basis for believing that this case could possibly be made out at trial and in that regard, mere assertion, without putting forward any credible basis for believing that such evidence might be available, was in this case insufficient.

29. CHC now purport to remedy the shortcomings in their evidence identified by McDonald J. in a further affidavit sworn after the High Court gave its decision. CHC submits that it is entitled to rely on this affidavit by virtue of the provisions of O. 86A, r. 4(b) which provides:

> *"(b) Further evidence may be given without special leave on any appeal from an interlocutory judgment or order or in any case as to matters which have occurred after the date of the decision from which the appeal is brought …"*

30. Counsel for CHC submitted that the latter part of the rule relating to *"matters which have occurred after the date of the decision"* was the relevant part in this regard. It seems to me that reliance on this rule is quite misplaced as it clearly refers to circumstances in which it is appropriate to update the appellate court concerning events post-dating the judgment in the High Court in so far as relevant. That does not arise in the case of a further affidavit which merely deals with matters that had arisen before the judgment of the High Court. It was a matter for CHC to put all relevant evidence before the High Court and it cannot seek to do so now *de novo*, at least without making a prior application to this Court for leave to adduce additional evidence. I am therefore satisfied that it is not appropriate for

this Court to have any regard to that subsequent evidence in deciding this appeal, but in any event having considered the relevant portions of the affidavit *de bene esse*, I am not satisfied that it should affect the outcome of this appeal.

31. It is notable that the discovery order under this heading includes communications from the Minister to Bristow but not the converse. Given that the complaint here is that the Minister disclosed CHC's confidential information to Bristow, the order appears to fully address that. It is also relevant to note that the parties agreed before this Court that the iterative approach applies in substance to this category so that CHC's right to seek further and better discovery is preserved following a consideration of the documents discovered.

32. I am accordingly satisfied that the trial judge acted well within his discretion in making the order he did in this category.

Category 3A

33. This category is sought on the basis of CHC's pleaded case concerning manifest error in the evaluation process. The High Court confined this category to the production of sections of the evaluation report, appropriately redacted, as set out in the Minister's response. The judge's view was that the sections of the evaluation report should be confined to the specific characteristics identified by the Minister on the basis that these are the characteristics that are put in issue in the pleadings.

34. Consequently, McDonald J. held that these characteristics are the only ones in respect of which CHC had established relevance. He was also of the view that this accorded with the approach of the Supreme Court in *Word Perfect* where a similar order was made confining the disclosure to relevant sections of the evaluation report. It is also relevant to note that the order that was ultimately made by the High Court gave liberty to CHC to bring

an application for further discovery, if necessary, of documents within Category 3A. Again, this approach mirrored that adopted by the Supreme Court in *Word Perfect*.

35. CHC again makes the argument under this heading that the *Word Perfect* approach has been overtaken by the subsequent CJEU decisions referred to. I have already dealt with this. In addition, the Minister submits that CHC is estopped from contending that the High Court misapplied *Word Perfect*, because it was accepted by CHC in argument in that court that Category 3A went beyond the discovery permitted by the Supreme Court in *Word Perfect*. That submission appears to me to be well founded. In the High Court, the argument was advanced on the basis that CHC's approach was justified because there were additionally allegations of conflict of interest and political interference, both of which were considered by the motion judge to have been adequately covered by other categories of discovery ordered.

36. Similarly, the only issue taken by CHC with the proposal by the High Court to allow it apply for further discovery, if necessary, once the documents had been examined was based on a submission that CHC *may* need access to Bristow's tender documents. That can hardly satisfy the basic requirements of relevance and necessity, at this stage at any rate.

37. The judge also considered that Category 3A was not appropriately mapped to the pleadings, as he described it, and CHC counters this with the submission that it furnished a detailed table highlighting the relevant pleas in the parties' pleadings. The judge was not satisfied that CHC had demonstrated the necessity for the Minister to, in effect, disclose all documents related to Bristow's final tender. Whilst a long list of the various pleas is provided in Table A, it does not analyse those which it is said make it necessary for access to the documents sought. Further, as the High Court correctly held, the discovery sought *"would require disclosure of the evaluation of every aspect of all of the criteria which were*

set out in the request for tenders, even though not all of those criteria are in issue in the proceedings".

38. The assertion that draft reports and evaluation notes are required to sustain the pleas of alleged conflict of interest and political interference, amount to no more than a bare assertion which, as the judge held, did not justify the discovery of these documents. The High Court's conclusion that the documents sought were not relevant to the RWIND tenderer point was one that was clearly open to it. The RWIND tenderer test is, in any event, a matter of law for the court – per O'Donnell J. in *Word Perfect v Minister for Public Expenditure and Reform* [2021] 1 IR 698. Accordingly, Bristow's tender documents could be neither relevant nor necessary for this purpose.

39. Most importantly however, this category is specifically subject to the iterative approach in the order of the High Court which fully addresses any concerns CHC may have that it will be prevented from making out its pleaded case. It provides an important safety valve following the initial tranche of discovery which accords fully with the *Word Perfect* approach. Counsel for CHC expressed the concern that the fact that the judge held that this category was not properly mapped to the pleadings might present an obstacle to seeking further discovery despite the order expressly permitting it. That was a view expressed at the interlocutory stage by the motion judge but the very fact that he permitted a further application if justified demonstrates that it could not be regarded as set in stone and the parties today agreed that it could not on its own form the basis for an objection to a further application being made.

40. In summary in relation to this category, I am satisfied that the order made was well within the discretion of the judge and that no injustice has been demonstrated by CHC,

particularly when one has regard to the fact that it has been given liberty to apply for further discovery if it can demonstrate that this is required, having seen the discovered documents.

Category 7

41. Discovery under this heading is sought based on a single statement by an individual Senator, the interpretation of which is a matter of controversy between the parties. It may or may not constitute evidence of anything improper, depending upon the interpretation attached to it. The order made by the High Court in this respect appears to me to represent a perfectly proportionate response to the allegation made bearing in mind that the onus lies upon CHC to show the relevance and necessity of any wider category of documents. The height of CHC's submission in this regard is that the order is *"unduly restrictive"* but that appears to me to amount to a submission of the kind that was disapproved in *Lawless*. This is not a rehearing of the motion.

Conclusion

42. For the reasons explained, I would dismiss this appeal. The order made by the High Court appears to me to be one which was well within the judge's discretion to make and certainly within the range of judgments properly available to the High Court. In my judgment, CHC has failed to establish any significant error in the order or injustice arising from it.

Faherty J.: I have listened with care to the judgment just delivered by Mr. Justice Noonan and for the reasons he has set out I too would dismiss this appeal.

O'Moore J.: I have listened to the judgment delivered by Mr. Justice Noonan and for the reasons he sets out I agree with the judgment, and I would agree with the order he proposes. For the sake of completeness I should indicate, with regard to the affidavit which

was put before us today, while counsel originally and primarily, as Mr. Justice Noonan indicates, relied on this being admissible by reference to it being a matter which arose after the decision, that is clearly an unsustainable proposition. If that were the case, any affidavit, simply because it was sworn after the decision, would be admissible. In as much as counsel at the very last moment relied upon it being admissible because it relates to an appeal on an interlocutory matter, we have focused on the elements of the affidavit which were opened by counsel and stressed to us. Given the rather limited nature imposed and having considered the affidavit also in its entirety, it seems to me that the affidavit adds nothing that would displace the decision made by the learned High Court judge.