THE COURT OF APPEAL

[2015 No. 347]

The President
Peart J.
Mahon J.
BETWEEN

BAM PPP PGGM INFRASTRUCTURE COOPERATIE UA

APPLICANT/RESPONDENT

AND
NATIONAL TREASURY MANAGEMENT AGENCY AND MINISTER FOR EDUCATION AND SKILLS

RESPONDENTS/APPELLANTS

JUDGMENT of the Court delivered on 6th November 2015

Introduction

1. This is an appeal by NTMA against an order made by the High Court (Barrett J.) on 15th July 2015 on the application of BAM for discovery of 18 categories of documents described under five headings. The substantive proceedings are a challenge by BAM to the identification by NTMA of a competitor as the Preferred Tenderer in respect of a major public procurement contract.

2. The competition is for the design, finance, construction and maintenance of a Central Quad and an East Quad for DIT at the former St. Brendan's Hospital site at Grangegorman, Dublin 7. NTMA is the agency with responsibility for awarding the contract, which is governed by the Procurement Directive and by the European Communities (Award of Public Authorities' Contract) Regulations 2006 (S.I. 329 of 2006). Order 84A of the Rules of the Superior Courts prescribes the procedure to be followed in a challenge to the award of a contract to which the Regulations apply.

3. BAM was one of three qualifying tenderers for the contract. On 27th February 2015, the NTMA notified BAM that it had identified one of the other tenderers, Eriugena, as the tenderer with the most economically advantageous tender and that it would now proceed accordingly. The letter also included a paragraph as follows: -

> "The Authority wishes to note that at the time of submission of the Tender documents to Asite, the uploading of a small number of the Eriugena documents was not completed until shortly after the 5pm deadline on 28 November 2014. Having investigated the matter, the Authority was fully satisfied that no unfair advantage was gained by Eriugena in the circumstances and the Authority exercised its discretion to accept the Eriugena Tender prior to the evaluation exercise commencing."

4. In subsequent correspondence in March 2015, NTMA explained that it had considered the situation following receipt of the various bids and had decided to receive Eriugena's tender, notwithstanding that part of it came in after the deadline. NTMA said that eight documents out of a total of 280 were not uploaded to the Asite website by the 17:00 deadline; the late documents were received in complete form between 17:03 and 18:13; the documents were not modified after the deadline; some of the documents contain material that was already included in documents submitted on time; the Authority considered that Eriugena might not have been solely to blame for the late completion of the uploading process.

5. On 27th March 2015, BAM instituted proceedings pursuant to Council Directives 2004/18/EC and 89/665/EC, the European Communities (Award of Public Authorities' Contracts) Regulations 2006 (SI 329 of 2006) and the European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010 (S.I. 130 of 2010). The reliefs sought include an order setting aside the decision to accept the Eriugena tender and the selection of that party as preferred tenderer, orders requiring NTMA to reject the other tenders and an order appointing BAM as preferred tenderer. The central and essential assertion in the case is that NTMA was not entitled under the Invitation to Negotiate provisions and the relevant legal rules to accept a tender that was received in whole or in part after the expiration of the time fixed as the deadline.

6. It subsequently emerged in Mr. McCarthy's replying affidavit on behalf of NTMA that Kajima, the third bidder, was late with delivery of part of its tender documentation for the competition and in its case also NTMA accepted the tender.

7. In that case, some 37 documents were received at the website by 17:00 and completed their upload at 18:58. Of the 37 files, 10 were modified after the deadline. Mr. McCarthy explained that the tender late files had either not been worked on post-deadline or those that had been modified after 17:00 had amendments that were minor and non-material.

The Proceedings

8. In its statement of grounds, BAM seeks a variety of reliefs, including an order setting aside the decision of the NTMA to select Eriugena as the preferred tenderer; an order requiring NTMA to appoint BAM as the preferred tenderer; a declaration that the decision by NTMA to accept the Eriugena tender was in breach of public procurement law and the Procurement Regulations, the Procurement Directive and the Remedies Directive and Regulations in addition to the general principles of European law. It also seeks a declaration that the decision of the NTMA to accept a tender submitted after the expiry of the deadline was ultra vires, invalid and of no legal effect on the grounds, inter alia, that it was vitiated by manifest errors of law and of fact and was based on relevant considerations.

9. The grounds upon which relief is sought may be summarised as follows:

> A. The NTMA did not have any discretion to accept a tender that in whole or in part was received after the deadline specified in the Invitation to Tender Notice.
>
> B. The NTMA misdirected itself in law and made a manifest error of law in considering that it had a discretion to accept a tender that was received after the expiry of the deadline, and insofar as the authority purported to rely on specific provisions in s. 4 of the ITN, it misdirected itself and thereby made a manifest error of law.
>
> C. The authority failed to comply with the requirements of non-discrimination, equal treatment, transparency and

proportionality. This ground proceeds on the alternative assumption, which is rejected by the applicant, that NTMA did have a discretion, but BAM submits that it could only be exercised in exceptional circumstances and in accordance with general principles. BAM pleads that the NTMA was not entitled to take into account the fact that the Eriugena documents were not modified after 17.00 hours on 28th November 2014.

The test for compliance with a deadline is an objective one and the time when a party ceased working on its documents is not relevant. The decision, in effect, permitted Eriugena further time beyond that which was available to a complaint party such as BAM. None of the three reasons put forward by NTMA could constitute an exceptional circumstance on which the authority could rely in deciding to accept a late tender. The decision that NTMA made was in breach of the tender requirements and of the Procurement Directive, Procurement Regulations and the jurisprudence of the European Court of Justice. The decision by NTMA also was lacking in transparency and proportionality and contrary to the requirements of equal treatment and non-discrimination.

D. Under this head, BAM claims that the basis of the decision by NTMA to exercise its discretion to accept the late tender from Eriugena also constituted a manifest error in the exercise of the discretion and is for that reason invalid.

E. The authority took into account irrelevant considerations in deciding to accept the late tender submitted by Eriugena. The first point under this heading is that the reasons put forward by NTMA constitute irrelevant considerations taken into account which vitiate the validity of the decision. It is stated that the authority sought clarification on financial aspects of BAM's own tender on 8th December 2014. The NTMA has confirmed in correspondence that it sought information from Eriugena about the late documents on 9th December 2014 and the information was provided on 11th December 2014. Having regard to this coincidence of dates, BAM pleads: "... the fact that the authority was reviewing the financial aspects of the tenders that were submitted before investigating or deciding whether to accept Eriugena's late tender, is in clear breath of the authority's obligations and calls into question whether the authority was motivated by irrelevant considerations, such as the content and substance of the tenders, in deciding to exercise a discretion to accept a late tender submission by Eriugena". This is the only question of fact that is raised in the statement of grounds.

F. This is a compendium allegation summarising all the legal wrongs that are ascribed to the authority in the preceding paragraphs.

10. In respect of Ground E, BAM pleads as follows at paras. 13.41 and 13.42:

"13.41 It also appear likely that the authority was aware of and had reviewed the financial aspects of the tenders before deciding whether to accept the Eriugena tender. The authority confirms in its letters of 19 March and 24 March 2015 that it sought information from Eriugena about the late documents on 9 December 2014, which information was provided by Eriugena on 11 December 2014. The authority sought clarifications from BAM in relation to its tender as early as 8 December 2014 and in particular sought clarification on financial aspects of BAM's tender on that date.

13.42 The fact that the authority was reviewing the financial aspects of the tenders that were submitted before investigating or deciding whether to accept Eriugena's later tender, is in clear breach of the authority's obligations and calls into question whether the authority was motivated by irrelevant considerations, such as the content and substance of the tenders, in deciding to purport to exercise a discretion to accept a late tender submission by Eriugena."

11. NTMA responds to these pleas in its statement of opposition at para. 61. It first admits that NTMA sought information from Eriugena about the late documents on 9th December 2014 and received the information on 11th December 2014. It also admits that it sought clarifications from BAM in relation to its tender as early as 8th December 2014, and in particular, sought clarification on financial aspects of the tender. Thirdly, it admits that NTMA was aware of and had reviewed the financial aspects of the Eriugena tender before deciding whether to accept it, but it denies that the same was unlawful. The reasons are stated as follows in sub-paragraphs (4) and (5):

"(4) In particular, the Authority will rely on the fact that there was a strict separation between the functions and roles of those responsible for making the decision of whether to accept the late tender of Eriugena and those of its members involved in reviewing the financial aspects of tenders, such that those who made the decision on whether or not to accept the late tender had no prior involvement in the review of the tenders.

(5) It is denied that those members of the Authority who made the decision to accept the late tender of Eriugena were aware of and/or had reviewed the financial aspects of the tender before deciding whether to accept the Eriugena tender."

12. In specific reply to para. 13.42, NTMA says that "none of the individuals involved in the said investigation and decision as to whether to accept Eriugena's late tender was involved at a prior stage in reviewing the financial aspects of the tenders".

13. NTMA's case on this application for discovery is that no issue of fact arises in respect of any of the above grounds with the exception or possible exception of ground E. The unopposed discovery, it claims, is more than sufficient to satisfy the requirements of O. 31 in their application to this case.

High Court Decision and Judgment

14. The judgment of the High Court is dated 15th June 2015 and the judge thereafter made a formal order for discovery in the terms notified by his judgment. The Court concluded that it would order discovery broadly as follows, but subject to conditions, to which BAM had made clear its agreement that protected the contents of rival tenders and the marking of the bids from disclosure. In this appeal there are areas of agreement, of limited dispute and of full disagreement.

15. The following categories are agreed by NAMA, subject to the exclusion of Kajima and restriction to after 17:00, so those points are the only objections to disclosure.

"1.1 Documentation evidencing communications and/or attempted communications from Eriugena and/or Kajima to the NTMA and/or Asite in relation to uploading their tenders (or any tender documents) in respect of tender documents received at, about or after 17:00 on 28th November, 2014.

1.2 Documentation evidencing the evidence and/or information that was obtained by the NTMA as to when Eriugena and Kajima commenced the upload process in respect of each document that was received at, about or after 17:00 on 28th

November, 2014.

1.3 Documentation evidencing confirmations that were received by the NTMA concerning the delivery and/or receipt of the tenders (or any tender documents) submitted by Eriugena and/or Kajima via Asite and received at, about or after 17:00 on 28th November, 2014.

2.4 All documents relating to and/or evidencing communications and/or meetings between the NTMA and Asite in relation to the late submission of the tenders (or any tender documents) of Eriugena and/or Kajima.

3.4 The assessment and/or decision of the NTMA that technical issues caused the delay and/or that the late uploading of documents may not have been wholly the fault of Eriugena or Kajima".

5 "Categories 5.1, 5.2 and 5.3 have been agreed between the parties and so no order for discovery is required. It appears that Category 5.4 has now been agreed between the parties but, for the avoidance of doubt the court will, if necessary, order the NTMA to produce a list of those individuals who accessed the tender documentation from 17:00 on 28th November, 2013 to day-end on 23rd January, 2015. The court turns to the final remaining sub-categories on which adjudication is required." Paragraph 106 of the High Court judgment.

16. Fully disputed discovery in respect of documents listed in Categories 2, 3, 4 and 5.

"2. Discovery of all documents which evidence the investigations and inquiries undertaken by the NTMA concerning the late submission of tender documents by Eriugena and/or Kajima, including but not limited to

(a) all documents evidencing the completeness and compliance checks undertaken by the NTMA in respect of tenders submitted by Eriugena and/or Kajima, insofar as same concern the late submission of final tenders,

(b) all documents evidencing communications and/or meetings between the NTMA and Kajima concerning the late submission of its tender (or any tender documents)—these are 2.4 above, and

(c) all documents evidencing communications and/or meetings between the NTMA and Asite concerning the late submission of the tenders (or any tender documents) of Eriugena and/or Kajima.

3. Discovery of all documents which evidence the assessment of whether to accept the late tenders submitted by Eriugena and/or Kajima, including but not limited to

(a) the assessment and/or decision of the NTMA that it has a discretion to accept tender documents received after the tender deadline,

(b) the assessment and/or decision of the NTMA that the non-compliance by Eriugena and/or Kajima with the tender deadline was not material,

(c) the assessment and/or decision of the NTMA that technical issues caused the delay and/or that the late uploading of documents may not have been wholly the fault of Eriugena or Kajima,--these are 3.4 above

(d) the assessment and/or decision of the independent process auditor in the process, including but not limited to any assessment made by such auditor and any communications between him and the NTMA, and

(e) the assessment and/or decision of the NTMA that the documents that were uploaded late by Eriugena and/or Kajima were not required to be compliant, provided that for the avoidance of doubt, no discovery shall be required of such documents which, having regard to the specific comments made by the court in respect of Category 3 and the various sub-categories of same, it is clearly the intention of the court are not to be discovered.

4. Discovery of all documents which refer to and/or evidence the decision to accept the late tenders submitted by Eriugena and/or Kajima, including but not limited to

(a) internal meetings and communications within the NTMA concerning the late submission of the tenders of Erugenia and/or Kajima and the consequences of, and steps concerning same, including any discussions, communications or meetings at which it was decided to accept the late tenders submitted by Eriugena and/or Kajima;

(b) meetings and communications between the NTMA and any other persons concerning the late receipt of documents from Eriugena and/or Kajima and the consequences of, and steps or actions concerning same;

(c) the decision of the NTMA to accept the late tenders submitted by Eriugena and/or Kajima, to the extent that this category has not already been caught by the order to be made under Category 3;

(d) the decision of the NTMA to appoint Eriugena as the preferred tenderer to the extent that such decision refers to and/or evidences the late submission of Eriugena's tender (or any tender documents), in respect of tender documents received at, about or after 17:00 on 28th November, 2014.

5.5 All communications from 28 November 2014 involving any members of the respondents' senior management, technical evaluation team, the legal assessment team, the financial evaluation team, the project board, the project team, and the independent process auditor and Mr. McCarthy (including any indirect communications or communications through other persons) which refer to and /or are otherwise concerned with the specific issue of the late acceptance of the Eriugena and/or the Kajima tender(s)."

The Trial Judge's Principal Findings

17. Barrett J. identified the issues as being six. "First, does the NTMA enjoy a discretion to accept late tenders? Second, was there a manifest error in the manner in which the NTMA purported to exercise such alleged discretion? Third, did the NTMA mis-direct itself as to the basis for the alleged discretion? Fourth, did the NTMA fail to comply with requirements of transparency, non-discrimination,

equal treatment and proportionality? Fifth, did the NTMA take into account irrelevant considerations in deciding to accept late tenders? Sixth, did the NTMA fail to take into account relevant considerations in deciding to accept late tenders?"

18. The Court then proceeded to an analysis of the relevant law, before applying it to the issues for the purpose of the order. The judge adopted the test for discovery as set out in Framus (relevant and necessary) but held that it was subject to a criterion of proportionality. It was sufficient to show that documentation may (not must) be relevant. The judge endorsed the test for necessity in Ryanair plc v. Aer Rianta cpt [2003] 4 I.R. 264, namely, that the applicant does not have to prove that they are in any sense absolutely necessary. He held that the role of the court when dealing with challenges to decisions in relation to public contracts appears considerably more invasive than in general judicial review proceedings. Judgments declaring that discovery is rare or more difficult to establish or is only made in exceptional circumstances in judicial review jurisprudence are of limited application in procurement cases and may be considered somewhat "broad brush" in light of other case law.

19. The Court held that it may have a broader discretion where manifest error is claimed than would be allowed under general judicial review proceedings and because manifest errors are denied by the NTMA in this case there is a clear issue on the proceedings in this regard. The Court expressly accepted that relevance is determined by reference to the pleadings but subject to a significant caveat, declaring that:

> "It does not appear to the court that the words of a Statement of Grounds and Statement of Opposition comprise some complete magical formula upon whose incantation the spectre of discovery falls exclusively in all cases to be raised. In Framus, for example, Murray J. expressly acknowledges, at p.40, that there may be instances in which discovery can be granted of a class of documents which do not even directly relate to a specific event pleaded but which is nonetheless relevant to the issues, noting that '[W]hether such an order should be made and the extent to which it would be made must depend on the particular circumstances of the case'."

20. The judge rejected NTMA's contention that there is no factual dispute in these proceedings. The issues raised in pleadings can justify discovery and the issues are sufficiently raised in these pleadings such that it would be unjust to confine the basis for discovery exclusively to issues raised expressly in the statement of grounds or the statement of opposition. The judge held that all documents that are relevant to an assessment of the NTMA's decision making should before the court; discovery of such documents is imperative.

21. Other points included that BAM and the NTMA had each invoked the doctrine of proportionality. Also, when BAM submits its replying affidavits, disagreements will be revealed. The judge found that as things stood there were:

> "Clear matters of fact: whether documents were modified after the 17:00 deadline; what the NTMA knew in this regard when it made its decision to accept the late tenders; whether late tenderers were given extra time to work on their tenders; whether it was proportionate to rely on an unconfirmed opinion about where responsibility lay for the lateness of the tenders; and whether there was an exceptional circumstance on which the NTMA relied in accepting the late tenders. It seems to the court that discovery is relevant and necessary to the resolution of these issues."

22. The Court held that there was "prima facie evidence, or at a minimum, a possible incompleteness in the case advanced by the NTMA which justifies at least some of the discovery requests made." There was no basis for claiming that discovery was oppressive and that should not be allowed to defeat BAM's opportunity to present its case.

The Appeal

23. The appellant in its notice of appeal contends that the learned trial judge made a number of errors of law and of fact which underpinned the analysis in the judgment and that he overstated the distinction between judicial review and public procurement review proceedings. They seek to appeal the ruling requiring the discovery of documentation falling within Categories 1, 2, 3, 4 and 5. The appellants do not seek to appeal from the two-part proviso to the order precluding discovery of any documentation or information that would result in the applicant coming to know the content of the tender information furnished by Eriugena or Kajima or any grading by the first named appellant of the respective tenders of Eriugena or Kajima. In respect of categories 1.1-1.3 the appellants only appeal insofar as they apply to Kajima documents and insofar as they apply to documentation received "at" or "about" 17:00 on 28th November 2015 (as opposed to "after" 17:00 on 28th November 2015). In respect of Categories 2.4 and 3.4, the appellants only appeal the said categories insofar as it applies to Kajima documents.

24. NTMA's case is that there are no factual issues between the parties that require to be determined for the decision in the case. In respect of the only area where some issue might arise, NTMA has offered sufficient discovery. NTMA submits that the trial judge went about his task in relation to the discovery application in the wrong way. He ought to have begun at the beginning with a consideration of the case and the issues that arose in it before addressing the question of discovery and whether the particular requests made were indeed in respect of documents that were relevant and necessary for the fair disposal of the action. Instead, the judge engaged in a general discussion of the case law on the basis of an erroneous analysis of the issues in the case, which led him to incorrect conclusions that this Court should overrule. The most obvious one is the judge's declaration that the pleadings are not the essential determinant of the scope of discovery in a public procurement case.

25. BAM submitted that the trial judge was correct in law and in fact by finding that the documents sought were relevant, necessary and proportionate and so there is no basis for disturbing the High Court order. It is also submitted that the approach of the High Court judge in public procurement cases was correct and he did not "exaggerate the difference between public procurement and judicial review proceedings". It was submitted in whether judicial review or public procurement cases, in which the decision maker relies on the existence and content of certain documents the applicant cannot be precluded from obtaining discovery of the documents that were before the decision maker. A general principle not to conflate the roles of the Court and the decision maker is not a legitimate basis for refusing discovery.

26. It was further submitted that the relevance of documents is to be assessed by reference to pleadings cannot be applied to public procurement proceedings with rigidity and inflexibility. It cannot be suggested that the documents ordered were not relevant to the acceptance of the bids.

The Law Applicable

27. Order 31, r. 12 of the Rules of the Superior Courts as inserted by S.I. No. 93 of 2009 provides that any party may apply to the Court for an order directing any other party to any cause or matter to make discovery on oath of the documents which are or have been in his possession, power or procurement relating to any matter in question therein. The notice must specify the precise categories of documents in respect of which discovery is sought. Under r. 12(5), an order shall not be made if the Court is of opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs.

28. Framus v. CRH [2004] 2 I.R. 20 contains an authoritative statement of some of the principles to be applied in an application for discovery of documents. The following passages from the judgment of Murray J. speaking for the Supreme Court are pertinent.

> "The parties also referred to the oft-cited statement of Brett L.J. in Compagnie Financière du Pacifique v. Peruvian Guano Company (1882) 11 Q.B.D. 55 (see for example Sterling-Winthrop Group Ltd. v. Farbenfabriken Bayer A.G. [1967] I.R. 97 to the effect that 'every document [relating] to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose contains information which may - not which must - either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary' should be discovered. As I pointed out in Aquatechnologie Limited v. National Standards Authority of Ireland (Unreported, Supreme Court, 10th July, 2000) there is nothing in that statement which is intended to qualify the principle that documents sought on discovery must be relevant, directly or indirectly, to the matter in issue between the parties in the proceedings. Furthermore, an applicant for discovery must show it is reasonable for the court to suppose that the documents contain information which may enable the applicant to advance his own case or to damage the case of his adversary. An applicant is not entitled to discovery based on mere speculation or on the basis of what has been traditionally characterised as a fishing expedition.

It seems to me that in certain circumstances a too wide ranging order for discovery may be an obstacle to the fair disposal of proceedings rather than the converse. 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'. I think it follows that 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 a trial. That is not to gainsay in any sense that 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."

29. It may be convenient to summarise these principles as they are applicable to this case.

> 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 matter 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.

30. Documents must be relevant to the legal action between the parties; it is not enough that they relate to the dispute that gave rise to the litigation - see Clarke J. in Mac Aodháin v Ireland & The Attorney General [2012] 1 I.R. 430 (at §14):

> "… it seems clear that in judicial review proceedings it is important, when considering relevance, to identify how the document concerned can be relevant to the specific types of issues which will arise in the relevant judicial review application rather than being relevant to the substantive questions which were before the decision maker."

31. There are not special rules for discovery in different kinds of legal action such as judicial review and public procurement cases. It is that the nature of the dispute makes it more or less appropriate for discovery to be ordered. There are analogies between judicial review and public procurement that are reflected in some of the authorities. The test is manifest error for annulment of an award but that "should not be equated with any exaggerated description of obviousness", as Fennelly J. said in SIAC v. Mayo County Council [2002] 2 I.L.R.M. The standard is not the same as unreasonableness in the sense of O'Keeffe v. An Bord Pleanála for judicial review. The relevant principles include equality, transparency and objectivity. In so far as judicial review is relevant by way of analogy, Geoghegan J. in the Supreme Court in Carlow Kilkenny Radio Ltd v Broadcasting Commission [2003] 3 I.R. 528 noted that:

> "[I]t is trite law that judicial review is not concerned with the correctness of a decision but rather with the way that the decision is reached. It follows that the categories of documents which a court would consider were necessary to be discovered will be much more confined than if the litigation related to the merits of the case".

32. Finlay Geoghegan J, refused discovery in KA v. Minister for Justice [2003] 2 I.R. 93 saying that it is:

> "In the nature of judicial review that the necessity for discovery will be more difficult to establish than in plenary proceedings. This follows from the fact that in judicial review what is at issue is the legality of the decision challenged. In many instances the facts are not in dispute" (at 100) (emphasis added).

33. Discovery cannot be used merely to test averments. In Shortt v. Dublin County Council [2003] 2 I.R. 69, Ó Caoimh J stated (at pp 88-89) as follows:

> "…having regard to the nature of judicial review proceedings, and in particular, the onus that lies on an applicant at the leave stage to furnish to the court evidence supporting the grounds advanced, … in the absence of material suggesting that the averments in the affidavits filed on behalf of the respondent are untrue, to direct discovery of documents in circumstances where they can only be sought to impugn the integrity of the deponent would, in general, be oppressive."

34. Similarly, in McEvoy, McDermott J. emphasised (at §25) that:

> "[A]n applicant is not entitled to go behind an affidavit by seeking discovery to undermine its correctness unless there is some material outside that contained in the affidavit to suggest that in some material respect the affidavit is inaccurate. It is inappropriate to allow discovery the only purpose of which is to act as a challenge to the accuracy of an affidavit."

Discussion

35. The first task in a discovery application is to ascertain the issues that arise on the pleadings. The Court's function in the substantive case is to decide on the issues put before it by the parties; it does not possess a power to engage in a roving investigation of the relationship between the parties or of the circumstances that gave rise to the proceedings. It is a question of jurisdiction and function fundamentally. The Rules of the Superior Courts require that claims be stated and defended and that particulars be furnished to enable the parties to know the case they have to meet. In the case of the claimant that consists of the statement of claim or equivalent pleading document. For a defendant or respondent party meeting the case, clarity of pleading is also required. The point is that each side should know what the other's position is so that is can address the matters that are in dispute and can take for granted those that are undisputed.

36. The jurisprudence from as far back as Peruvian Guano in 1882 to the recent judgments of the Supreme Court and High Court mandate this approach. There is thus no room for doubt on this point. In Peruvian Guano [1882] 11 QBD 55 at 63/4, Brett L.J. said that in order to determine whether documents were relevant and had to be discovered, "it is necessary to consider what are the questions in the action: the Court must look not only at the statement of claim and the plaintiff's case but also at the statement of defence and the defendant's case".

37. It is clear that relevance is determined by the issues in the pleadings in this case as defined in the statement of grounds and statement of opposition. The trial judge was in error in declaring that the pleadings are no more than part of the consideration that must be taken into account by the Court in deciding on the discovery to be ordered. It is not the case that the issues, as defined in the pleadings in an action, are merely some of the matters to be taken into account by the Court; they are the matters to be taken into account. The dispute between the parties is not to be considered as something outside the pleadings.

38. The matter before the Court and the basis on which the Court can adjudicate are the issues in the pleadings that the parties put before the Court for decision. The Court does not have a roving jurisdiction to conduct a general inquisition or inquiry into the dispute between the parties and any related matters. The Court's function is to decide the case as presented to it for decision and that means considering the materials that define the issues between the parties in order to discover what has to be decided.

39. The moving party claims and asserts and puts evidence before the Court in support of that assertion of entitlement. The responding party puts in a defence or a response in which it may admit certain features of the claim or even the whole claim. The Court then examines the materials to see what questions or issues it has to decide. If the Court goes outside the case as presented, it is doing something other than what it is entitled to do or what it has jurisdiction to do. A Court can only decide on the case that is made by the claimant and responded to by the other party or parties. It cannot decide an issue as against a person who is not a party to the proceedings. Similarly, it cannot decide a matter that is not in issue between the parties.

40. That is the background to this case. It is not a choice that the Court has as to whether it will confine itself to the pleadings or not. The pleadings set the parameters of the debate and of the decisions that the Court has to make. The first task in an application for discovery is to define the issues as they appear from the statement of grounds and statement of opposition. In doing this, this Court finds itself respectfully in disagreement with the learned judge. The issues as they appear to this Court are as follows.

> Did NTMA have a discretion under the ITN (Invitation to Negotiate) to accept (a) a late tender or (b) a tender notwithstanding that some of its documents were received after the deadline or (c) the tender from Eriugena?
>
> Did the NTMA misdirect itself in law or make a manifest error in considering that it had discretion either under the provisions cited in its letter of 6th March 2015 or otherwise?
>
> Did the circumstances that NTMA relied on in letters dated 6th, 19th and 24th March 2015 (a) constitute valid reasons for exercising its discretion or (b) infringe the principles of non-discrimination, equal treatment, transparency and proportionality?
>
> Did the grounds relied on by NTMA constitute manifest error in the exercise of its functions under the ITN?
>
> Did the NTMA take irrelevant considerations into account in deciding to receive the Eriugena tender?
>
> Did NTMA's conduct amount to breach of the Procurement Directive or the Procurement Regulations or the general law?

41. It is apparent from this list of the issues that it is only the penultimate one that raises any question of fact. All of the others concern issues of law and of interpretation of the tender documents and rules and of the relevant European law and Irish legal provisions. Insofar as there is a matter of interpretation or of construing a document, there is no issue between the parties requiring to be resolved except the matter of legal discussion of the issues. In relation one final issue as listed, the NTMA has offered discovery as follows:

> Category 2.2: All documents relating to and/or evidencing communications and/or meetings between the NTMA and Eriugena in relation to the late submission of its tender (or any tender documents).
>
> Category 5.1: It is agreed the respondents will furnish a list, the accuracy will be averred to in the affidavit of discovery, of the names of the members of each of the senior management; the technical evaluation team; the legal assessment team; the financial evaluation team; the project Board; the project team; and the combined evaluation team; and the independent process auditor.

Category 5.2: It is agreed to provide: "Such parts of documents as specifically set forth the protocols in place in the NTMA in respect of the accessing within Asite of the tenders (or part thereof) and as set forth the personnel authorised for such access. Documents will be provided in their entirety with any irrelevant sections redacted".

42. In our view, the discovery that was ordered and that is not the subject of appeal is sufficient to meet the requirements of O. 31, r. 12 for discovery of documents relating to the matters in issue in the case. The Court has some doubt as to whether the inclusion of Kajima and the more general expression of time to include earlier than 17:00 hours is required but in case of uncertainty it is preferable to specify the somewhat larger discovery.

43. It is not the dispute that gave rise to the proceedings that defines the scope of discovery, but rather the nature of the legal dispute that exists, as pleaded. This point is relevant here. It might perhaps be thought that everything in the form of documentary or electronic material relating to the receipt of the tender and the decision to accept it is relevant to the question. But that is to make the very mistake that the cases warn against. There is actually no dispute about the basic facts of the case and it is the basic facts of the case that give rise to the issues.

44. The judge held that all documents that are relevant to an assessment of the NTMA's decision-making should before the court; discovery of such documents is imperative. The disputed categories cover the investigations and inquiries undertaken by the NTMA, the assessment of whether to accept the late tenders submitted by Eriugena and/or Kajima, the decision to accept the late tenders submitted by Eriugena and/or Kajima and communications from 28th November 2014 involving any members of the respondents' senior management. The pleading documents do not, however, reveal any factual disputes in respect of these matters, and it is established law that discovery may not be permitted for the purpose of exploring for possible relevant material or for testing averments.

45. The judgment of this Court is that the learned High Court judge made the error of considering that what was relevant to the receipt of the bid must be relevant to the action. But he did not take account of the actual legal issues arising in the challenge by BAM to the decision. The judge said that "the central issue in this case is whether the late tenders ought to have been accepted". With respect, that is incorrect because it is too general as a description of the legal dispute as defined in the pleadings.

46. The nature of the discovery as ordered by the judge in the 18 categories goes to demonstrate that the discovery that was granted is in fact general discovery of everything relevant to the acceptance by NTMA of the Eriugena bid. Although the discovery is segregated into 18 categories under five headings, it cumulatively represents a request for general discovery which BAM has endeavoured to categorise more particularly and specifically. The High Court judge recognised that general discovery is not permissible and is essentially a fishing expedition and consequently he excluded certain categories requested. However, the discovery he ordered represents something close to general discovery and the exclusions do not effect any significant confinement of the material sought to the pleaded issues.

47. The trial judge was in error in seeming to be critical of NTMA for having made concessions or in ignoring the fact that they were made when deciding what the issues were. If a party admits a certain state of affairs that is relevant to the issues in the case, that reduces the zone of controversy. It is unnecessary in those circumstances for the other party to adduce evidence to establish the fact that has been admitted. There may be reasons why it would be legitimate to do that, but in normal circumstances and in the absence of some particular reason to so do, something that is conceded is not the subject of evidence.

48. In short, therefore, the appeal must be allowed. The learned trial judge erred in thinking that he could find the issues in the case elsewhere than in the pleadings, in permitting discovery relating to the underlying dispute rather than the legal action and in ordering discovery of such breadth that it could only be for the purpose of testing credibility. The issues in the case, as they are known, do not demonstrate disputed matters of fact, except potentially in one particular area in respect of which discovery is to be made.

49. The Court will accordingly allow the appeal by NTMA subject to two changes. In respect of the categories that are not in dispute as set out above, the orders as made by the High Court should stand. However, the restrictions sought by NTMA in respect of Kajima and the time of receipt will not be imposed.