Neutral Citation [2015] IEHC 370

THE HIGH COURT

[2015 No. 176 JR]

IN THE MATTER OF COUNCIL DIRECTIVE 2004/18/EC (AS AMENDED)
AND IN THE MATTER OF THE EUROPEAN COMMUNITIES (AWARD OF PUBLIC AUTHORITIES' CONTRACTS) REGULATIONS 2006 (S.I. 329 OF 2006)
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. NO. 130 OF 2010)

BETWEEN:

BAM PPP PGGM INFRASTRUCTURE COOPERATIE U.A.

Applicant

AND

NATIONAL TREASURY MANAGEMENT AGENCY AND MINISTER FOR EDUCATION AND SKILLS

Respondents

JUDGMENT of Mr Justice Max Barrett delivered on 15th June, 2015.

Part I

Introduction

1. Background. It seems such a small matter in one way, but it has a real significance in cash terms. What happened can be briefly stated. The respondents issued an invitation to negotiate (ITN) on 28th April, 2014, for a valuable works contract. Three tenderers pre-qualified and were eligible to submit final tenders: BAM (the applicant in these proceedings), Eriguena and Kajima. Among the requirements of the ITN was the requirement that the completed final tenders be submitted by 17:00 on 28th November, 2014. By letter dated 27th February, 2015, the NTMA informed BAM that it had accepted the final tender submitted by Eriugena even though part of that tender was submitted after the 17:00 deadline. BAM has since learned that Kajima also failed to submit all of its tender documentation by the 17:00 deadline. That leaves BAM as the only party that submitted its completed final tender by the required cut-off time. And that is what has led to the commencement of the within proceedings pursuant to the Remedies Regulations, and the bringing of the related discovery application that is the subject of this judgment.

2. *Essential Issues Arising*. It appears that the key issues arising in the within proceedings are six-fold. 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?

3. *Categories of Discovery*. BAM seeks discovery of six categories of documents. With the limited exception of certain aspects of one category (Category 5), and a discrete category (Category 6) which is agreed, all of the documents relate to the late submission of tenders and are limited broadly, though not quite exactly, to the two-month time period from 28th November, 2015 to 23rd January, 2015. That is not a great length of time, especially as it embraces the end-of-year vacation period, so it is hard to believe that oceans of relevant documentation would have been generated in that timeframe and fall now to be discovered.

4. *Documentation sought*. The discovery sought may be summarised as follows:

- Category 1. Certain documents related to the late uploading of documents by Eriugena and Kajima.

- Category 2. Certain documents related to the investigations and enquiries undertaken by the NTMA in relation to late tenders.

- Category 3. Certain documents related to the assessment by the NTMA of whether to accept the late tenders of Eriugena and Kajima.

- Category 4. Certain documents related to the decision of the NTMA to accept the late tenders.

- Category 5. Certain documents related to particular internal NTMA matters, such as the applicable protocols, correspondence related to the late tenders, and names of relevant personnel.

- Category 6. Certain documents related to the consequence of the submission of a late draft tender.

5. Counsel for BAM made clear at the hearings that BAM is not seeking access in the within application to documentation or information that would result in its knowing (a) the content of such documentation as was furnished to the NTMA by Eriugena and Kajima respectively, or (b) the marking by the NTMA of the respective tenders of Eriugena and Kajima. Accordingly, any order as to discovery made by the court will be subject to the overriding caveat that no such information aforesaid is to be provided to BAM pursuant to such order.

Part II

General principles applicable to a motion for discovery

6. *Applicable principles*. It seems safe to hazard that, sitting in a Victorian-age courtroom, Brett L.J. never envisioned the scale of work that his judgment in *Peruvian Guano* would engender in our data and documentation-rich Information Age when discovery costs so much money, time and resources, typically unleashes a sea documentation which contains only a limited number of documents that are of central focus at the later trial, rarely if ever results in a 'Eureka!' moment in which documentation entirely resolves an issue arising, and is intrinsically vulnerable to abuse. Be that as it may, the court must take the law as it finds it, not as it might like it to be. And when it comes to applications for discovery, the governing principles are well-established, if founded ultimately on precepts from a long-distant and very different era.

7. *Relevance and necessity*. An applicant for discovery must demonstrate that the documents sought are both relevant to the issues arising and necessary for the fair disposal of same. In *Framus v. CRH plc* [2004] 2 I.R. 20, a case that was concerned with a claim for damages for losses allegedly sustained from unlawful and anti-competitive practices allegedly engaged in by the defendants in the markets for cement and related products in the State, certain discovery orders were made in the High Court and appealed

unsuccessfully to the Supreme Court. (A separate ground of appeal concerning the amount of security for costs was successful). In the course of a lengthy judgment, with which McGuinness and Geoghegan JJ. agreed, Murray J. noted, at p.38, that when it comes to the issue of whether or not to grant discovery *"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."* Although this just-quoted text is the segment of the judgment to which the court was referred by BAM, it is perhaps worth noting that it comes in the context of a brief excursus by Murray J. on the difficulties of delay and expense that discovery, especially a too-wide order for discovery, can engender. Thus Murray J. also notes at p.38 of his judgment that:

> *"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….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."*

8. This observation, as Murray J. himself observes in his judgment, is not to gainsay the primary test to which he refers and his summary of which has been quoted above. However, it shows that the primary test does not exist in a vacuum but falls to be applied in the context of other considerations arising. (The court returns to the issue of proportionality later below).

9. The test of relevance was summarised in *Aquatechnologie Limited v. National Standards Authority of Ireland* [2000] IESC 64, a case that arose from an application by the applicant (appellant) for a certificate that certain plastic piping conformed with a particular standard (a certification of some importance in the context of buildings legislation). The successful appeal brought to the Supreme Court arose from a High Court decision to refuse an application for discovery. In his judgment, at p.11, Murray J. states that:

> *"[D]ocuments sought on discovery must be relevant, directly or indirectly, to the matters 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."*

10. A possible gloss added by this Court in its decision in *Re Astrazeneca AB & Patents Acts* [2014] IEHC 189, following consideration of relevant case-law, is that the rules of discovery presently require that an applicant show, *inter alia*, that documentation 'may (not must)' be relevant.

11. *Necessity*. The test of necessity was addressed by Fennelly J. in *Ryanair plc v. Aer Rianta cpt* [2003] 4 I.R. 264. That was a case in which Ryanair claimed that Aer Rianta was in breach of national and European Community competition law in several respects and sought voluntary discovery of certain documentation. This voluntary discovery was refused, the High Court subsequently ordered discovery of all the documentation that had been sought. This last order was then appealed and was varied in part by the Supreme Court. In the course of his judgment, Fennelly J. stated as follows, at p.276:

> *"In the great majority of cases, discovery disputes have revolved around the issue of relevancy. There are fewer cases concerning necessity. There are good reasons for this. If there are relevant documents in the possession of one party, it will normally be unfair if they are not available to the opposing party. Finlay C.J. in his judgment in Smurfit Paribas Bank Ltd. v. A.A.B. Export Finance Ltd. [1990] 1 I.R. 469 emphasised, at p.477, 'the full disclosure both prior to and during the course of legal proceedings which in the interests of the common good is desirable for the purpose of ascertaining the truth and rendering justice'. The overriding interest in the proper conduct of the administration of justice will be the guiding consideration, when evaluating the necessity for discovery."*

12. Fennelly J. further observed, also at p.276 of his judgment, that "In order to establish that discovery of particular categories of documents is *'necessary for disposing fairly of the cause or matter,' the applicant does not have to prove that they are, in any sense absolutely necessary"*.

Part III

Discovery in Judicial Review Proceedings

13. In *Carlow Kilkenny Radio Limited v. Broadcasting Commission of Ireland* [2003] 3 I.R. 528, the applicants were unsuccessful applicants in a competition held by the Broadcasting Commission to award franchises to radio broadcasters in Counties Carlow, Kilkenny and Kildare. Having been granted leave to seek relief by way of judicial review by the High Court, the applicants brought a motion on notice seeking discovery of various categories of documents. The High Court (Kearns J., as he then was) refused the motion for discovery in respect of eleven of thirteen categories sought. The applicants appealed to the Supreme Court which dismissed the appeal. In his judgment, Geoghegan J. considered the law applicable to discovery in judicial proceedings, observing as follows, at p.537:

> *"The established English and Northern Irish jurisprudence, which would seem to be in conformity with our own principles of discovery, is to the effect that discovery will not normally be regarded as necessary if the judicial review application is based on procedural impropriety as ordinarily that can be established without the benefit of discovery. Likewise, if the application for judicial review is on the basis that the decision being impugned was a wholly unreasonable one in the Wednesbury sense, discovery will again not normally be necessary because if the decision is clearly wrong, it is not necessary to ascertain how it was arrived at. Where discovery will be necessary is where there is a clear factual dispute on the affidavits that would have to be resolved in order properly to adjudicate on the application or where there is prima facie evidence to the effect, either that a document which ought not to have been before the deciding body was not before it or that a document which ought not to have been before the deciding body was before it."*

14. In *Fitzwilton Limited v. Judge Alan Mahon and Others* [2006] IEHC 48, Laffoy J. was confronted with an application for discovery in the context of judicial review proceedings where, *inter alia*, a declaration was sought that the Mahon Tribunal on planning and payments had failed to comply with its own terms of reference in electing for a public hearing into a particular payment, which public hearing was contended to be *ultra vires* the respondents and in breach of the applicants' constitutional rights.

15. In the course of dismissing the application for discovery, Laffoy J. indicated, at p.12 of her judgment, her view that the same principles apply to discovery in judicial review proceedings as apply generally in civil proceedings, albeit that *"the practical application of those principles may result in discovery being less frequently ordered in judicial review proceedings than in other civil*

proceedings." After considering the then recent authorities, Laffoy J. concludes, at p.16 of her judgment that *"What clearly emerges from a review of the recent Irish cases is that, where discovery is sought in judicial review proceedings, the determinant as to whether discovery will be ordered in many cases is whether it is necessary having regard to the ground on which an application is founded or the state of the evidence."*

16. In *Evans v. UCC* [2010] IEHC 420, the question before the court was the ambit of discovery in judicial review proceedings which, in that case, sprang from a recommendation by the Head of the School of Medicine at University College Cork, that had the potential to impact on a particular lecturer's future livelihood, and on his constitutional right to a good name. At paras.5–6 of his judgment, Hogan J. succinctly identifies the principles applicable to discovery generally and to discovery in the context of judicial review proceedings. Per Hogan J:

> *"5. Before considering the merits of this application, it is scarcely necessary to recall that discovery will only be ordered where the tests of both relevance and necessity are satisfied: see, e.g. PJ Carroll & Co. Ltd. v. Minister for Health and Children (No. 2) [2006] IESC 36….In this context, relevance is determined by the pleadings, see e.g., the comments of Murray J. in Framus….The scope of discovery must thus accommodate itself to the parameters of the case as pleaded rather than the other way around. In this regard, I cannot accept…the argument advanced…for the applicant that the decision of the House of Lords in Tweed v. Parades Commission for Northern Ireland [2007] 1 A.C. 650 is of any material assistance to his case. Prior to that decision, the various courts in the UK had been reluctant to order discovery in judicial review save by reference to what Lord Carswell described in Tweed as the 'restrictive rule' that effectively precluded any orders for discovery in judicial proceedings save where there was a clear contradiction or inconsistency in the affidavits sworn by the respondent public body. That has never been the situation in this jurisdiction, either in theory or (just as importantly) in practice. It is equally clear that Tweed is now authority in the United Kingdom for the proposition that discovery can be more extensive in cases involving a challenge to the proportionality of any administrative decision. But that is equally an unexceptionable proposition so far as this jurisdiction is concerned.*
>
> *6. A further consideration is that, in the words of …Bingham MR for the English Court of Appeal in R. v. Health Secretary, ex p. Hackney LBC (July 29, 1994) it is not open to an applicant…'to make a series of bare unsubstantiated assertions and then call for discovery of documents by the other side in the hope that there may exist documents which will give colour to the assertion that the applicant, or the plaintiff, is otherwise unable to substantiate.' Added to this is the factor that while…[the Rules of the Superior Courts make clear] that the ordinary discovery rules apply in judicial review applications, this is tempered by the consideration that the essential facts are generally not in substantial dispute in judicial review applications. In addition, it should be noted that as judicial review is normally concerned with procedural matters rather than substance, this will inevitably limit the range of documents which are both relevant and necessary in judicial review matters: cf. the reasoning of Geoghegan J. in Carlow Kilkenny Radio".*

17. In the recent case of *McEvoy v An Garda Síochána Ombudsman Commission* [2015] IEHC 203, McDermott J. was presented with an application for discovery in the context of proceedings in which Garda McEvoy had been granted leave to seek judicial review of a decision of the Ombudsman Commission deeming a particular complaint to be admissible. After referring briefly to some applicable case-law, McDermott J. indicates, at pp.18–19, that the issue of discovery in judicial review proceedings falls to be approached on the following basis:

> *"(1). An order for discovery should only be granted where the applicant seeking discovery establishes that it is relevant and necessary for the fair disposal of the issues in the case in the sense indicated by Brett L.J. in the Peruvian Guano case.*
>
> *(2). The court must determine whether the documents sought are relevant to the issues to be tried as determined from the pleadings.*
>
> *(3). A party may not seek discovery in order to find out whether a document may be relevant and a general trawl through a party's documentation is not permitted. However, a reasonable possibility that the documents are relevant is sufficient.*
>
> *(4). Judicial review is not concerned with the correctness of a decision but the way in which the decision was reached. Therefore, the categories of documents which a court would consider necessary to be discovered would be much more confined than if the litigation was related to the merits of the case and this necessarily restricts what may be regarded as appropriate discovery.*
>
> *(5). Discovery will not normally be regarded as necessary if the judicial review application is based on impropriety which may be established without the benefit of discovery.*
>
> *(6). If a decision is challenged as unreasonable or irrational, discovery will not be necessary because, if the decision is clearly wrong, it is not necessary to ascertain how it was reached.*
>
> *(7). Discovery may be necessary where there is a clear factual dispute on the affidavits which must be resolved in order to adjudicate properly or fairly on the application or where there is prima facie evidence to the effect that a document that ought to have been considered before a decision was made was not or a document which not to have been seen before a decision was made, was considered.*
>
> *(8). The court must consider whether discovery is necessary having regard to the grounds upon which the application was founded or the state of the evidence….But the question must be decided in respect of the issues that arise on the judicial review application rather than the substantive issue which was before the decision maker.*
>
> *(9). An 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."*

18. Both parties to the within application appear to accept that the above principles represent a good statement of the present law. So too does the court. Before considering the application of these principles to the within application, the court considers it necessary to highlight a distinction between discovery in judicial review proceedings generally and specifically in public procurement proceedings.

Part IV

Judicial Review in Public Procurement Challenges

19. The best case with which to start in this context is perhaps *SIAC Construction Ltd. v. Mayo County Council* [2002] 3 I.R. 148. That was a challenge to the award of a public contract in which SIAC appealed to the Supreme Court, *inter alia*, on the basis that the trial judge had applied the incorrect test for the review of a decision involving public procurement and rights derived from European Community law. Dismissing the appeal, the Supreme Court considered, *inter alia*, the submission that it was incorrect to assess the validity of the decision of the respondent to award the contract by reference to a test of 'unreasonableness' or 'uncertainty'.

20. Fennelly J. (with whose judgment other members of the Court concurred), stated as follows, at pp.175–176:

> *"There are obvious common threads which run through any system of review of administrative decisions, especially where the primary decision-making function is administrative or governmental. The function of the courts is to guarantee legality, though that notion itself has a number of elements, some procedural and some substantive. The passages which I have cited speak of 'manifest' error as the test for judicial review adopted by the Community courts. This is the standard which applies to the appreciation of facts by the decision-maker. They do not say that this test must be adopted by the national courts. I would observe, however, that the word 'manifest', should not be equated with any exaggerated description of obviousness. A study of the case law will show that the Community courts are prepared to annul decisions, at least in certain contexts, when they think an error has clearly been made."*

21. Fennelly J. then went on to consider the test of manifest error, noting, at p.176, that:

> *"I do not think, however, that the test of manifest error is to be equated with the test adopted by the trial judge, namely that, in order to qualify for quashing, a decision must 'plainly and unambiguously fly in the face of fundamental reason and common sense'. It cannot be ignored that the Advocate General [the Supreme Court was considering the appeal following a reference to the Court of Justice] thought the test should be 'rather less extreme'. Such a formulation of the test would run the risk of not offering what the Remedies Directive clearly mandates, namely a judicial remedy which will be effective in the protection of the interests of disappointed tenderers. It is significant, I think, that member states are required to make available, where appropriate and necessary, measures of interim relief (i.e. potentially halting the public procurement procedure) and damages."*

22. Fennelly J. then considered the margin of discretion allowed to contracting authorities, concluding, at p.176, that *"The courts must be ready, in general, to render effective the general principles of the public procurement, already discussed. Where a failure to respect the principles of equality, transparency or objectivity is clearly made out, there is, of course, no question of permitting a margin of discretion."*

23. From the foregoing, it appears to the court that any suggestion in the decisions considered previously above that discovery is not available to test the reasonableness of a decision, do not, at the least, fall to be applied as rigorously when it comes to public procurement cases in which manifest error is alleged, and where a judicial remedy that is effective in the protection of the interests of disappointed tenderers is required.

24. It seems to the court that the nature of public procurement challenges, by contrast with general judicial review proceedings, is further highlighted by the scope of the orders that can be made by a court on an application for a review of a procurement-related decision. So, for example, reg.9 of the European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010, provides that:

> *"(1) The Court –*
>
> *(a) may set aside, vary or affirm a decision to which these Regulations apply,*
>
> *(b) may declare a reviewable public contract ineffective, and*
>
> *(c) may impose alternative penalties on a contracting authority, and may make any necessary consequential order.*
>
> *(2) The Court may make interlocutory orders with the aim of correcting an alleged infringement or preventing further damage to the interests concerned, including measures to suspend or ensure the suspension of the procedure for the award of a public contract or the implementation of a decision of the contracting authority.*
>
> *(3) The Court may set aside any discriminatory, technical, economic or financial specification in an invitation to tender, contract document or other document relating to a contract award procedure.*
>
> *(4) When considering whether to make an interim or interlocutory order, the Court may take into account the probable consequences of interim measures for all interests likely to be harmed, as well as the public interest, and may decide not to make such an order when its negative consequences could exceed its benefits.*
>
> *(5) The Court may by order suspend the operation of a decision or contract.*
>
> *(6) The Court may award damages as compensation for loss resulting from a decision that is an infringement of the law of the European Communities or the European Union, or of a law of the State transposing such law."*

25. Shortly put, the role of the court when dealing with challenges to decisions in relation to public contracts appears considerably more invasive than the role of the court in general judicial review proceedings. This last factor has to be and is, the court concludes, relevant to the approach that falls to be adopted by the court in an application for discovery in public procurement-related proceedings. An order declaring a contract ineffective, for example, is not an order of a procedural nature. Consequently, it does not seem to the court that such a far-reaching decision of potentially enormous financial consequence ought to be taken in the absence of a complete and accurate account of the relevant facts, provided of course that the customary criteria of relevance, necessity and proportionality are also observed.

26. One notable decision in which the court has considered the necessity of discovery, in the context of a public procurement challenge, is the decision of Laffoy J. in *AMEC plc and Press Construction Ltd. v. Bord Gáis Éireann and Others* (Unreported, High Court, 4th July, 1997). In broad terms, that case was concerned with alleged breached of contract between Bord Gáis and Press Construction Limited, a construction company, for the construction of portions of the interconnector connecting the Irish and United Kingdom gas grids located on the Scottish mainland, which contract was guaranteed by AMEC plc. The primary issue addressed by Laffoy J. in her judgment was whether discovery could be required before the provision of particulars of the pleadings. She held that in that case it could and should. Laffoy J. also considered the discrepancy between the means of access to information of the two parties. The plaintiffs in that case had argued that, pending discovery, they could not identify with particularity the facts relevant to their claim. The defendant's position was that where allegations are vague and a plaintiff is not able to particularise them, the court should not direct discovery to assist a plaintiff to make its case. Laffoy J. favoured the plaintiff's position, holding in the ultimate paragraph of her judgment, at p.8, that:

> *"In my view, when this motion was issued, as the example I have set out above amply demonstrates, the Plaintiffs had pleaded their claims against these Defendants with sufficient clarity to ensure that these Defendants knew the claims being made against them and the issues between the Plaintiffs and these Defendants had been established. While I express no view as to whether the Plaintiffs have adequately particularised their claims in response to these Defendants' requests for further particulars. I have no doubt that on the present state of the pleadings the Plaintiffs are entitled to an Order for discovery against these Defendants."*

27. The court considers itself to be buttressed in its conclusions as to the particular nature of challenges brought in the procurement context, by the decision last April of the English High Court in *Geodesign Barriers Limited v. The Environment Agency* [2015] EWHC 1121 (TCC). There, Coulson J., dealing with a case that concerned the evaluation process applied in the procurement context, noted his own previous comments in *Roche Diagnostics Ltd. v. Mid Yorkshire Hospitals NHS Trust* [2013] EWHC 933 (TCC), at para.20, that:

> *"…(a) An unsuccessful tenderer who wishes to challenge the evaluation process is in a uniquely difficult position. He knows that he has lost, but the reasons for his failure are within the peculiar knowledge of the public authority. In general terms, therefore, and always subject to issues of proportionality and confidentiality, the challenger ought to be provided promptly with the essential information and documentation relating to the evaluation process actually carried out, so that an informed view can be taken of its fairness and legality.*
>
> *(b) That this should be the general approach is confirmed by the short time limits imposed…on those who wish to challenge the award of public contracts…*
>
> *(c) However, notwithstanding that general approach, the court must always consider applications for specific disclosure in procurement cases on their individual merits. In particular, a clear distinction may often be made between those cases where a prima facie case has been made out by the claimant (but further information on documentation is required), and those cases where the unsuccessful tenderer is aggrieved at the result but appears to have little or no grounds for disputing it.*
>
> *(d) In addition, any request for specific disclosure must be tightly drawn and properly focused. The information/documentation likely to be the subject of a successful application for early specific disclosure in procurement cases is that which demonstrates how the evaluation was actually performed, and therefore why the claiming party lost…*
>
> *(e) Ultimately, applications such as this must be decided by balancing, on the one hand, the claiming party's lack of knowledge of what actually happened (and thus the importance of the prompt provision of all relevant information and documentation relating to that process) with, on the other, the need to guard against such an application being used simply as a fishing exercise, designed to shore up a weak claim, which will put the defendant to needless and unnecessary cost."*

28. The court considers that it is in the context of such comments, and the other case-law considered above, that one must view the, perhaps somewhat broad-brush, observations of Finlay Geoghegan J. in *K.A. v. Minister for Justice* [2003] 2 I.R. 93, that *"It is…in the nature of judicial review that the necessity for discovery will be more difficult to establish than in plenary proceedings"*, of Kelly J. in *Sheehy v. Government of Ireland* [2002] IEHC 26 that discovery in judicial review proceedings is "*rare*", and of McGovern J. in *Viridian Communications v. Commission for Energy Regulation* [2011] IEHC 127, at para.9, that *"in judicial review proceedings, discovery orders are only made in exceptional circumstances".*

Part V

Which Documents Were or Were Not Before the Contracting Authority

29. The fact that discovery can be available in relation to what documents/evidence were or were not before a decision-maker has been stated in several judgments. A very recent example of this is *Callaghan v. An Bord Pleanála* [2015] IEHC 235, a case in which the applicant was seeking judicial review of a decision by the Planning Board that a certain proposed wind farm development at Emlagh, near Kells, in County Meath is a Strategic Infrastructure Development within the meaning of s.37A of the Planning and Development Act 2000, as amended. Per McGovern J. at para.10 of his judgment:

> *"It is…accepted that if a document which ought to have been before the decision maker was not before it or that a document which ought not to have been before the decision maker was before it that discovery might be necessary."*

30. In this regard, the court notes that there are several issues in the within proceedings concerning what was and was not taken into account by the relevant decision-makers as regards the belated acceptance of tender documentation.

Part VI

Alleged manifest error

31. The case of *Greencore Group plc and Another v. Government of Ireland and Others* [2007] IEHC 211 was concerned in essence with the Government's allocation of compensation following a quite radical restructuring of the sugar industry within the European Union. In his judgment in the case, Clarke J. relied upon the decision of Fennelly J. in *SIAC*, stating at para.6.5 of his judgment:

> *"Reliance was placed by the applicants on a number of the judgments of the Court of First Instance in competition cases….While the specific issues with which the Court of First Instance was concerned in those cases concerned…*

assessments made by the Commission in the context of its jurisdiction in the competition law field, those cases do seem to suggest that, at least to some extent, the court, in applying a manifest error test is entitled to look at least at the general methodology adopted. Where that methodology appears to be incorrect then the court is entitled to intervene."

32. The above-quoted extract from Clarke J.'s judgment suggests that the court has perhaps a broader discretion to test whether there is a manifest error than would be allowed under general judicial review proceedings. In particular, the above-quoted observations appear to the court to envision for it a role whereby it would look to the methodology employed by a contracting authority in determining whether there was manifest error. In the within proceedings, manifest errors are denied by the NTMA and there appears to the court to be a clear issue on the proceedings in this regard.

Part VII

Alleged Lack of Proportionality
33. In *Evans*, Hogan J., referring to the judgment of the House of Lords in *Tweed*, set out the established position that when there is a challenge to the proportionality of a decision, more extensive discovery may be appropriate. Thus, per Hogan J., at para.5:

> *"It is equally clear that Tweed is now authority in the United Kingdom for the proposition that discovery can be more extensive in cases involving a challenge to the proportionality of any administrative decision. But that is equally an unexceptionable proposition so far as this jurisdiction is concerned."*

34. This last observation is relevant to the within application as here both BAM and the NTMA have invoked the doctrine of proportionality. BAM has referred to the emphasis placed by the NTMA on the fact that documents were not modified after the 17:00 deadline. This is a fact which BAM pleads was not relevant to whether or not that deadline was complied with. BAM also pleads that taking into account the question of when the documents were modified results in a situation in which late tenderers have more time to work on their document pre-submission. And BAM further pleads that the decision of the NTMA to accept late tenders on the basis of an opinion that the lateness may not have been wholly in the control of the late tenderer was disproportionate, discriminatory and lacking in transparency. BAM also pleads that there is no reason cited by the NTMA which could constitute an exceptional circumstance on which the NTMA could purport to rely in dis-applying a fundamental requirement of the tender process. These last assertions relate to 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.

Part VIII

The relevance/necessity of the documentation sought
35. As will be seen when the court goes through the detail of the documentation of which discovery is sought in the within proceedings, it does not seem to the court that it can realistically be contended that much of the documentation sought is other than relevant to the issues pleaded. However, the principal objection made by the NTMA in its outline written submissions and at the hearing of this application is that certain issues are not in dispute as they are admitted by the NTMA and/or are not contained in the pleadings of BAM. The NTMA contends that it is only issues raised in the Statement of Grounds or the Statement of Opposition that can justify discovery.

36. It is undoubtedly the case, as Hogan J. notes in *Evans*, at para.5 of his judgment, that relevance is gauged by reference to the pleadings. However, 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."*

37. There is in any event an especial factor presenting in the within application that would make it particularly unjust to constrain the basis for discovery exclusively to issues raised expressly in the Statement of Grounds or the Statement of Opposition. Here, it has been agreed between the parties that the present application for discovery can be heard before BAM submits its replying affidavits, and one can be certain that those affidavits will take issue with one or more aspects of the Opposition Papers. One party ought not to be penalised when both parties have elected so to proceed.

38. In the *Carlow Kilkenny Radio* case, Geoghegan J. emphasised, at p.538, that *"There is nothing to indicate either the giving of false information or the improper withholding of information that might justify discovery nor is there any relevant conflict of fact on the affidavits that would justify it."* In Callaghan, McGovern J. refused one category of discovery on the basis that it was sought with a view to challenging material set out in particular affidavits when no evidence to the contrary had been offered by the applicant. Another category of discovery was refused on the basis that no factual dispute had been raised on affidavit as would entitle the party seeking discovery to the type of discovery being sought. McGovern J. took objection to the fact that what the applicant in the case before him was doing was seeking material in order to make a case based on assertion and not on any evidence set out on affidavit.

39. It seems clear from the *Carlow Kilkenny Radio* and *Callaghan* cases that if factual assertions in one party's affidavit evidence are countered by evidence and averments to the contrary by the other party, then discovery may or may not be appropriate on that basis, *i.e.* it is not the case that it simply cannot be appropriate. Moreover, the court does not accept that selective admissions by a party always foreclose questions that may be impacted to some extent by that admission.

40. It appears to the court that there is *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. A few examples suffice.

41. [1] The NTMA relies on its own conclusions that the lateness of the tenders may not have been wholly in the control of Eriugena. Yet Mr McCarthy, a witness for the NTMA, has averred that there is no evidence that electronic submission of documentation was delayed by the NTMA's document management system. How is one to square these assertions? It seems to the court that there is in this apparent disparity of statements evidence that justifies BAM in questioning and testing the position adopted by the NTMA and which makes discovery of all documents related to the pertinent investigations and assessments undertaken by the NTMA both relevant and necessary.

42. [2] The NTMA denies that the persons who made the decision to accept the late tenders were aware of or had reviewed the financial aspects of the tenders. This leaves open the possibility that people who were party to the decision-making process but who were not the actual decision-makers did know of the financial aspects. It is alleged in the Statement of Grounds that it was in breach of NTMA's obligations for it to have reviewed the financial aspects of the tender before deciding whether to accept the late tenders.

43. [3] The NTMA claims that it could not establish when up-loads of late documents commenced. Part of its case in this regard is that it could not be proven objectively by Eriguena as to when upload of the late documents commenced. Thus far, BAM has not seen any document in which the confirmation relied upon by the NTMA was made. Whether the NTMA sought to establish from Eriguena when it attempted to upload the late documents seems to the court to be a real and substantial issue in the within proceedings. Thus it appears to the court that there is a clear basis for pursuing discovery of all documents related to the decision of the NTMA in this regard.

44. [4] A question that arises from the cases as pleaded by the parties is whether the time of modification of documents is a relevant consideration. The NTMA claims that it is. BAM claims that it is not. In his Affidavit, Mr McCarthy appears to indicate that the NTMA disregarded the time of modification of documents when deciding whether to accept the tender. The issue as to whether the time of modification is a relevant consideration and the ostensibly divergent views expressed by the NTMA in this regard offer a 'relevant and necessary' basis for the discovery of such documentation is sought in this regard.

45. [5] When the Statement of Grounds was prepared, the only matter of concern to BAM was the process of review of the tenders. However, Mr McCarthy's affidavit evidence now suggests that there is a real issue as to whether evaluation of the tenders commenced before the decision as to whether to accept the late tenders, opening the possibility that NTMA may have brought to bear on that latter decision what it had learned in any (if any) pre-decision commencement of the evaluation process. Discovery, it seems to the court is necessary to resolve the issue as to what was happening with the review/evaluation/assessment of the tenders before the decision was taken to accept the late tenders.

46. [6] Mr McCarthy's affidavit suggests that documents may have been accepted from Kajima, although modified after 17:00. This raises a question as to the criteria for late acceptance and whether, despite assertions to the contrary, late-modified documents were accepted from Eriugena.

47. [7] The NTMA cites various provisions and rules that may have conferred it with its alleged discretion to accept late tenders but thus far has declined to state which provision/s was/were relied upon.

Part IX

Alleged failure to provide all documents

48. It is alleged that the NTMA has, in the course of the within proceedings and related interactions between the parties, referred to and relied upon certain documents and information without providing documentation in relation to same. Moreover it has, it is claimed, provided copies of certain documents to BAM without confirming whether it has given all relevant documents. It seems necessary for the court to consider some of the relevant case-law arising.

49. In *Cunningham v. President of the Circuit Court* [2006] 3 I.R. 541, the Supreme Court had to decide whether there should be discovery to Ms Cunningham, the appellant, of certain documentation in the custody and control of the Director of Public Prosecutions (who was opposed to discovery of the documentation on the ground that it related to the Director's core function of deciding whether or not to prosecute, a function heavily protected at law from review). The Supreme Court allowed the appeal, Hardiman J. stating as follows, at p.546:

> *"[T]he correspondence has been 'deployed' in this litigation for the purpose of supporting the second respondent's case, in a manner which permits no real contradiction by the applicant. Furthermore, it will be difficult or impossible effectively to cross-examine two of the deponents on behalf of the respondent, the two officials from the office of the second respondent, without sight of the correspondence and an ability to say whether or not it indeed supports the case made, and meets the description given in the affidavits".*

50. Hardiman J. then referred, at para.28 of his judgment, to his own earlier judgment in *Hannigan v. Director of Public Prosecutions* [2001] 1 I.R. 378, and his observation there, at p.384, by reference to the facts of that case, that:

> *"[T]he position seems to be that the document in question was referred to and its contents summarised, for litigious purposes by the party entitled to claim privilege in it. This deployment seems inconsistent with an assertion either of irrelevance or of harmful effects following from its disclosure.*
>
> *Furthermore no grounds specific to the document itself has been urged against disclosure. The document seems clearly capable of advancing one party's case or damaging that of the other, to adopt the classic statement in…Peruvian Guano".*

51. Hardiman J. then concludes as follows in Cunningham, at para.29:

> *"There are clear similarities between the factual matrix of Hannigan…and that present here. The principal similarity is that the material targeted by the party seeking discovery was in each case material referred to in an affidavit filed on behalf of the respondent. In neither case, therefore, was there any issue as to relevance."*

52. A related point is emphasised by Clarke J. in *MacAodháin v. Éire* [2012] 1 I.R. 430. That was a case in which the applicant claimed, by reference to certain provisions in legislation as to the Irish-language abilities of certain District Judges, to be entitled to various reliefs following the appointment of a particular District Judge. In the course of proceedings, the applicant sought discovery of any documents taken into account by the respondents when considering the judge's appointment. Granting discovery in the terms sought, Clarke J. indicated as follows, at para.15 of his judgment:

> *"Most judicial review challenges which concern decision making involve a challenge to a determination by a person or body which has the legal entitlement to make a quasi-judicial determination or to make legally binding decisions which stem from the exercise of statutory power. In some cases the only issues which could realistically be expected to arise are those which involve procedural questions (for which discovery is unlikely to be relevant) or questions concerning whether it was open to the decision maker to properly come to the conclusion reached on the basis of the materials and evidence before the decision maker concerned. Again, provided that all of the relevant materials which were before the*

decision maker are placed before the court, it is difficult to see how discovery could be necessary."

53. In the present case, BAM claims that it has reason to believe that not all documents that are relevant to an assessment of the NTMA's decision-making will be before the court, unless discovery is made in the terms sought. It has given a few examples of the concerns arising. For example, Mr McCarthy's Affidavit makes reference at various points to certain analysis, reviews, considerations and matters considered by the NTMA. It appears to the court that these are references to *extra*-Affidavit analysis, *etc*. Yet BAM advises that no relevant documentation has been provided to it. At para.7.44 of his Affidavit, Mr McCarthy refers to a meeting at which late tenders were discussed, yet BAM has not received any notes, memos, attendances or minutes of this meeting. Moreover, there are paragraphs of his Affidavit (*e.g.* paras.7.1–7.5) which refer to certain records and communications, but no copies of same have, it seems, been provided to BAM.

54. Suffice it for the court to note that if and to the extent that (a) the NTMA has additional relevant documents in its possession on which it relies by way of reference (or 'deployment') in its Opposition Papers, (b) whose relevance it would therefore seem precluded from denying, and (c) which it has not provided to BAM, discovery of such documents appears to the court to be imperative. To paraphrase Hardiman J. in *Hannigan*, any such deployment would seem inconsistent with an assertion either of irrelevance or of harmful effects following disclosure.

Part X

Disputes of Fact?
55. The NTMA adopts the position that there is no factual dispute in these proceedings. A few examples will suffice to show that this is not so. First, Mr McCarthy indicates in his Affidavit that the non-modification of documents demonstrates, for example, that Eriugena did not benefit from additional time working on its tender submissions. This is disputed by BAM and is clearly an issue of fact. Second, the NTMA has not specifically denied the pleading in the Statement of Grounds that the NTMA was motivated by irrelevant considerations. Notwithstanding this, it seems rather unlikely that this is accepted by the NTMA and thus a question of fact arises. Third, the NTMA has pleaded in the Statement of Opposition that the circumstances arising in this case were exceptional. This is challenged in the Statement of Grounds, and thus an issue of fact arises. The foregoing are but an illustration of the issues of fact that the court perceives to arise from the documentation before it.

Part XI

Proportionality
56. In *Ryanair v. Aer Rianta cpt*, Fennelly J., at p.277, emphasised the importance of proportionality in discovery:

> *"The court, in exercising the broad discretion conferred upon it by O.31, r.12(2) and (3) must have regard to the issues in the action as they appear from the pleadings and the reasons furnished by the applicant to show that the specified categories of documents are required. It should also consider the necessity for discovery having regard to all the relevant circumstances, including the burden, scale and cost of the discovery sought. The court should be willing to confine categories of documents sought to what is genuinely necessary for the fairness of the litigation."*

57. In *Framus*, at para.36, Murray J., whose remarks the court has already part-quoted above, stated as follows:

> *"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."*

58. The NTMA has complained about the oppressive and burdensome nature of the discovery request in the within application. However, as mentioned elsewhere above, the entire application for discovery is limited to the submission of two late tenders and the decision to accept same, and is broadly limited to a time-period of two months that embraces within it the end-of-year vacation period. It does not seem to the court that in the papers placed before it, or at the hearing of the discovery application, the NTMA has advanced any substantive explanation or evidence of the purported burden that the within application for discovery allegedly presents. It does not seem to the court that bare assertions of oppression should be allowed to defeat BAM's right to the opportunity to present the case that it seeks to bring.

Part XII

Conclusion
59. By reference to the above analysis and such other factors as are identified in the Appendix hereto, the court identifies in that Appendix the nature and extent of the discovery that it will or will not allow in respect of each of the categories of discovery sought by BAM.

APPENDIX
60. By way of overriding order, the court will order that no discovery is to be made of any documentation or information that would result in BAM's coming to know (a) the content of such tender documentation as was furnished to the NTMA by Eriugena or Kajima, or (b) any grading by the NTMA of the respective tenders of Eriugena and Kajima.

61. For the reasons stated in the main body of the judgment, the court will order that to the extent that the NTMA has additional relevant documentation in its possession on which it relies by way of reference in its Opposition Papers, and which it has not provided to BAM, discovery of such documentation is required.

62. All of the orders to be made will apply to each of the respondents.

CATEGORY 1
63. ***"1. All documents which relate to and/or evidence the late uploading of tender documents by Eriugena and/or Kajima, including but not limited to [the documents considered at Categories 1.1 to 1.3 below]"***.

64. ***Comment***. This is a request for general and disproportionate discovery. There is no dispute that there was late uploading, nor as to the nature of the documents that were uploaded late. Moreover, the category would capture the late documentation itself, which

is confidential commercial information.

65. ***Conclusion***. By reference to the reasons just stated and the analysis in the main body of the within judgment, this catch-all rubric of discovery is denied.

66. ***"1.1 All documents relating to and/or 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)"***.

67. ***Comment.*** The Applicant's inclusion of "*relating to*" in its wording makes this a general and disproportionate discovery request that is particularly ill-suited to proceedings that appear to the court to raise quite contained and discrete issues. Moreover, the Applicant's wording is not confined to documents about the uploading of late documents, but extends to documentation relating to the uploading of any tender document. The court does not accept the contention that, in effect, Kajima is of tangential interest to the within proceedings.

68. ***Conclusion***. By reference to the reasons just stated and the analysis in the main body of the within judgment, the court will order discovery of 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.

69. ***"1.2 All documents relating to and/or 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 after 17:00 on 28th November, 2014".***

70. ***Comment***. The words "*relating to*" capture what to the court seems an unnecessarily wide and disproportionate range of documentation that is particularly ill-suited to proceedings that appear to the court to raise quite contained and discrete issues. The court does not accept the contention that, in effect, Kajima is of tangential interest to the within proceedings.

71. ***Conclusion***. By reference to the reasons just stated and the analysis in the main body of the within judgment, the court will order discovery of 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.

72. ***"1.3 All documents relating to and/or evidencing confirmations that were received by the NTMA in relation to the delivery and/or receipt of the tenders (or any tender documents) submitted by Eriugena and/or Kajima via Asite."***

73. ***Comment***. The words "*relating to*" and like terminology capture what to the court seems an unnecessarily wide and disproportionate range of documentation that is particularly ill-suited to proceedings that appear to the court to raise quite contained and discrete issues. The wording extends to the uploading of any tender document which again appears to the court to be unnecessarily wide given the quite contained, discrete issues arising in the within proceedings. The court does not accept the contention that, in effect, Kajima is of tangential interest to the within proceedings.

74. ***Conclusion***. By reference to the reasons just stated and the analysis in the main body of the within judgment, the court will order discovery of 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.

CATEGORY 2

75. ***"2. All documents which relate to and/or evidence the investigations and inquiries undertaken by the NTMA in relation to the late submission of tender documents by Eriugena and/or Kajima, including but not limited to [the documents considered at Categories 2.1 to 2.4 below]".***

76. ***Comment.*** This documentation appears to the court to go to the very heart of the dispute arising between the parties. It does not suffice for the NTMA to contend that such selective admissions as it has made obviate the need for this documentation. However, the words "*relate to*" and like terminology capture what to the court seems an unnecessarily wide and disproportionate range of documentation that is particularly ill-suited to proceedings that appear to the court to raise quite contained, discrete issues. The court does not accept the contention that, in effect, Kajima is of tangential interest to the within proceedings. The court indicates, after the consideration of Categories 2.1–2.4, the form of order that it will make.

77. ***"2.1 All documents relating to and/or 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."***

78. ***Comment***. The words "*relating to*" capture what to the court seems an unnecessarily wide and disproportionate range of documentation that is particularly ill-suited to proceedings that appear to the court to raise quite contained and discrete issues. The central issue raised in this case is whether the late tenders ought to have been accepted. The court does not accept the contention that, in effect, Kajima is of tangential interest to the within proceedings. The court indicates, after its consideration of Categories 2.2–2.4, the form of order that it will make.

79. ***"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)."***

80. ***Comment.*** This category of documentation has been agreed and no order is therefore required.

81. ***"2.3 All documents relating to and/or evidencing communications and/or meetings between the NTMA and Kajima in relation to the late submission of its tender (or any tender documents)."***

82. ***Comment.*** The words "*relating to*" and like terminology capture what to the court seems an unnecessarily wide and disproportionate range of documentation that is particularly ill-suited to proceedings that appear to the court to raise quite contained and discrete issues. The central issue raised in this case is whether the late tenders ought to have been accepted. The court does not accept the contention that, in effect, Kajima is of tangential interest to the within proceedings.

83. ***"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.

84. ***Comment***. BAM's inclusion of "*relating to*" and like terminology in its wording again makes this a general and disproportionate discovery request that is particularly ill-suited to proceedings that appear to the court to raise quite contained, discrete issues. The court does not accept the contention that, in effect, Kajima is of tangential interest to the within proceedings.

85. ***Conclusion***. Further to the various comments made above, the court will order 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), 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, 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 2 and the various sub-categories of same, it is clearly the intention of the court are not to be discovered.

CATEGORY 3

86. ***"3. All documents which relate to and/or evidence the assessment of whether to accept the late tenders submitted by Eriugena and/or Kajima, including but not limited to [the documentation considered at Categories 3.1 to 3.7 below]".***

87. ***Comment***. This documentation appears to the court to go to the very heart of the dispute arising between the parties. It does not suffice for the NTMA to contend that such selective admissions as it has made obviate the need for this documentation. However, the words "*relate to*" capture what to the court seems an unnecessarily wide and disproportionate range of documentation that is particularly ill-suited to proceedings that appear to the court to raise quite contained, discrete issues. The court does not accept the contention that, in effect, Kajima is of tangential interest to the within proceedings. The court indicates, after the consideration of Categories 3.1–3.7, the form of order that it will make.

88. ***"3.1 the assessment and/or decision of the NTMA that it has a discretion to accept tender documents received after the tender deadline".***

89. ***Comment***. This category of documentation appears to the court to go to the very heart of the dispute arising between the parties and its discovery appears necessary, relevant, and proportionate. The court indicates, after the consideration of Categories 3.2–3.7, the form of order that it will make.

90. ***"3.2 the assessment and/or decision of the NTMA that the non-compliance by Eriugena and/or Kajima with the tender deadline was not material".***

91. ***Comment.*** This category of documentation appears to the court to go to the very heart of the dispute arising between the parties and its discovery appears necessary, relevant, and proportionate. The court does not accept the contention that, in effect, Kajima is of tangential interest to the within proceedings. The court indicates, after the consideration of Categories 3.3–3.7, the form of order that it will make.

92. ***"3.3 the assessment and/or decision of the NTMA that no advantage (unfair or otherwise) had been gained by Eriugena and/or Kajima in relation to the tenders".***

93. ***Comment***. The court does not see that this category of documentation is relevant. The central issue in this case is whether the late tenders ought to have been accepted. If they ought not to have been accepted, then they ought not to have been accepted – the issue of whether any advantage arose from such late acceptance seems an irrelevance.

94. ***"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"***.

95. ***Comment***. This category of documentation appears to the court to go to the very heart of the dispute arising between the parties and its discovery appears necessary, relevant, and proportionate. The court does not accept the contention that, in effect, Kajima is of tangential interest to the within proceedings. The court indicates, after the consideration of Categories 3.5–3.7, the form of order that it will make.

96. ***"3.5 the assessment and/or decision of the independent Process Auditor in the process, including but not limited to , any assessment made by him and any communications between the independent Process Auditor and the NTMA"***.

97. ***Comment.*** Either the independent process auditor had some involvement in the decision to accept the late tenders or he did not. If he did have involvement then that involvement is clearly relevant to the dispute arising and the discovery of the documentation sought is necessary, relevant and proportionate. The court indicates, after the consideration of Categories 3.6–3.7, the form of order that it will make.

98. ***"3.6 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".***

99. ***Comment.*** Whether the late-uploaded documents were or were not required for the tender to be compliant appears to the court to be central to the dispute arising between the parties. Moreover, as mentioned above the court does not accept the contention that, in effect, Kajima is of tangential interest to the within proceedings. The court indicates, after the consideration of Category 3.7, the form of order that it will make.

100. ***"3.7 the steps that would have been taken if the Eriugena and Kajima tenders were found to be non-compliant"***.

101. ***Comment***. BAM claims that this category of discovery relates to its plea that if the late documentation was not accepted, the NTMA might have cancelled the competition. This is but a power provided for in the invitation to negotiate; it is unclear in what way discovery under this heading could assist the Applicant's pleaded case.

102. ***Conclusion.*** By reference to the reasons just stated and the analysis in the main body of the within judgment, the court will order 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, (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.

CATEGORY 4

103. ***"4. All documents which refer to, relate and/or evidence the decision to accept the late tenders submitted by Eriugena and/or Kajima, including but not limited to***

> **4.1 internal meetings and communications within the NTMA in relation to the late submission of the tenders of Erugenia and/or Kajima and the consequences of, and steps to take in relation to, same, including any discussions, communications or meetings at which it was decided to accept the late tenders submitted by Eriugena and/or Kajima;**
>
> **4.2 meetings and communications between the NTMA and any other persons (including but not limited to advisors, the GDA and DIT) in relation to the late receipt of documents from Eriugena and/or Kajima and the consequences of, and steps or actions in relation to, same;**
>
> **4.3 the decision of the NTMA to accept the late tenders submitted by Eriugena and/or Kajima; and**
>
> **4.4 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)."**

104. ***Comment.*** The general rubric of Category 4, and the terms of items 4.1, 4.2 and 4.3 (to the extent, if at all, that it is not covered by Category 3) and 4.4 (subject to the application of suitable time constraints), appear to the court to go to the very heart of the dispute arising between the parties. However, the words "*relate to*" and like terminology throughout the category capture what to the court seems an unnecessarily wide and disproportionate range of documentation that is particularly ill-suited to proceedings that appear to the court to raise quite contained, discrete issues. The court does not accept the contention that, in effect, Kajima is of tangential interest to the within proceedings.

105. ***Conclusion***. By reference to the reasons just stated and the analysis in the main body of the within judgment, the court will order 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.

CATEGORY 5

106. 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.

107. "***5.5 all communications from 28 November 2014 involving any of those members and Mr McCarthy (including any indirect communications or communications through other persons) which refer or relate to the Eriugena and/or the Kajima tender".***

108. ***Comment***. The "*members*" to whom reference is made are the 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. The court considers that to ensure that only such documentation as is relevant, necessary and proportionate is discovered, this category of documentation should be constrained to such communications as refer to and /or are otherwise concerned with the specific issue of the late acceptance of the Eriugena and/or the Kajima tender(s).

109. ***Conclusion***. By reference to the reasons just stated and the analysis in the main body of the within judgment, the court will order discovery of all communications from 28 November 2014 involving any of those members 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).

110. ***"5.6 communications and/or meetings on or before 23 January 2015 which involved clarifications and/or evaluations of the tenders submitted by Eriugena and/or Kajima."***

111. ***Comment***. The court does not see that this category of documentation is relevant. The central issue in this case is whether the late tenders ought to have been accepted. If they ought not to have been accepted, then they ought not to have been accepted. If there were subsequent clarifications and/or evaluations then, if the tenders ought not to have been accepted for consideration in the first place, any, if any such clarifications and/or evaluations will necessarily fall and do not therefore require to be considered in the context of the within proceedings.