THE SUPREME COURT

[Appeal No: 37/2020]

Clarke C.J.
O'Donnell J.,
MacMenamin J.,
Dunne J.,
O'Malley J.

BETWEEN/

WORD PERFECT TRANSLATION SERVICES LIMITED

APPLICANT/APPELLANT

AND

MINISTER FOR PUBLIC EXPENDITURE AND REFORM

RESPONDENT

Judgment of Mr. Justice Clarke, Chief Justice, delivered the 25th of September, 2020.

1. Introduction

1.1 It might be felt that the law concerning the discovery of documents is very well settled, at least at the level of general principle. However, this Court has been called on to clarify the law in this area in a number of cases in recent years. Obviously those cases were considered by the Court to meet the constitutional threshold of involving a matter of general public importance. As the Court has pointed out in many determinations delivered in respect of applications for leave to appeal since the establishment of the Court of Appeal, the application of well-established principles to the facts of an individual case will rarely, if ever, meet the constitutional threshold. However, the Court has also noted that the application of very broad principles to specific areas can itself give rise to issues of general public importance, not least where the areas concerned arise regularly in litigation.

1.2 This case is, perhaps, a particular example. How the general rules concerning discovery should apply in the particular context of public procurement litigation is the issue which the Court has to address. It may be possible to see this appeal as either involving a suggestion that somewhat different rules may apply to discovery in public procurement cases or, at least, that the application of the same broad principles may lead to a different approach in practice, not least because sensitive commercial information may be involved.

1.3 There is also potentially a European Union law dimension to the issues which arise, in that the applicant/appellant ("Word Perfect") asserts that European Union law may potentially influence the proper application of discovery procedural rules in a case such as this.

1.4 Word Perfect challenges the award by the respondent ("the Minister") of a contract for translation services. In the context of that challenge, an application for the discovery of documents was made. The High Court (Simons J.) granted discovery of the nine categories of document sought. (see – *Word Perfect Translation Services Ltd. v. Minister for Public Expenditure and Reform* [2019] IEHC 153). The Minister appealed to the Court of Appeal, which overturned the decision of the High Court in its entirety (see the

judgment of Peart J., speaking for the Court in *Word Perfect Translation Services Ltd. v. Minister for Public Expenditure and Reform* [2019] IECA 264). Word Perfect then sought leave to appeal to this Court.

2. The Determination and the Scope of the Appeal

2.1 By determination dated 18th May 2020 (see - *Word Perfect Translation Services Ltd. v. The Minister for Public Expenditure and Reform* [2020] IESCDET 61), this Court granted Word Perfect leave to appeal the decision of the Court of Appeal. The Court set out the issues of general public importance which it considered arose on the application for leave as made by Word Perfect in the following terms:-

> *"5. … [T]he fact that there was such a marked difference between the outcome in the High Court and the Court of Appeal, while both courts applied the same case law, suggests that the decision in BAM has not removed all uncertainty in this field. Furthermore, the question of whether or not the court should apply a test similar to that set out in the case law of England and Wales, in Roche Diagnostics Ltd. v. The Mid Yorkshire Hospitals NHS Trust [2013] EWHC 933 (TCC), and the question of whether discovery may be refused where no reasons are given in respect of those headings where the successful tenderer received either the same or less marks than the challenger, is a matter of some importance for public procurement proceedings generally. The court is satisfied therefore that the issues raised in this appeal are of sufficient general importance for such public procurement proceedings to justify an appeal to the court, and accordingly grants leave to appeal."*

2.2 It should also be noted that a dispute has arisen between the parties as to the permitted scope of the appeal. The Minister argued that some of the grounds of appeal sought to be pursued by Word Perfect did not come within the issues of general public importance identified in the Court's determination and that the appeal is necessarily confined to the grounds which come within the parameters of the broad issues of importance identified.

2.3 On this basis, it was the Minister's submission that only some of the grounds of appeal put forward by Word Perfect can properly be advanced. These are the grounds relating to Categories 1 and 2 of the discovery sought, which concern what are said to be undisclosed award criteria, certain aspects of Categories 6,7 and 8, insofar as they relate to the award criteria where Word Perfect scored equal points to its rival tenderers and Category 9, which concerns a standstill period. The Minister therefore argued that Category 3, concerning the evaluation of tenders by reference to a Quality Assurance Plan, and Categories 4 and 5, concerning complaints in respect of the evaluation of Word Perfect's own tender, did not fall within the scope of this appeal. It was further submitted that Categories 6, 7 and 8 should also be excluded from the appeal insofar as they relate to award criteria in which Word Perfect did not score equal or lower points than the successful tenderer. The categories of discovery sought by Word Perfect will be set out in more detail later in the judgment.

2.4 Word Perfect submitted that the disputed issues were raised as grounds of appeal in their application for leave and that the determination of this Court did not suggest any

restriction in that regard. It was Word Perfect's submission that the determination is general and grants leave to appeal on the basis requested, which would appear to be on all grounds. It was therefore argued that it was not necessary to reformulate the grounds of appeal.

2.5 It follows that it will be necessary for this Court to address the question of the scope of the appeal based on the issues of general importance identified in the determination. It was agreed by the parties, and accepted by the Court during case management, that the issue concerning the proper scope of the appeal should be left over for debate at the hearing of the appeal.

2.6 The facts underlying this appeal and the precise nature of Word Perfect's complaint against the Minister are set out in detail in the judgments of the High Court and the Court of Appeal. However, in order to give context to this appeal, it is necessary to give a brief account of the background to Word Perfect's application for discovery and an explanation of the categories of discovery which are sought.

3. Background to the Application for Discovery

3.1 Underlying this discovery application is a challenge by Word Perfect to the Minister's decision to award a contract for the provision of translation services in respect of An Garda Síochána to a rival tenderer. Word Perfect seeks discovery of nine categories of documents which it argues are necessary to allow to pursue its application for judicial review.

3.2 In January 2016, The Minister executed a Multi-Supplier Framework Agreement for the provision of interpretation services. Word Perfect, along with two other translation providers, were awarded a place on the framework. The Office of Government Procurement later issued a Supplementary Request for Tenders ("SRFT") to the framework members for the purposes of conducting a mini-competition for the provision of the relevant interpretation services. The SRFT specified various criteria which were to be met by the tenderers and identified the marks available under each category. In October 2018, the Minister informed Word Perfect that its tender had not been successful and that the contract had instead been awarded to a rival tenderer. The Minister set out the reasons for this outcome in a notification of decision, which was provided to Word Perfect.

3.3 Word Perfect identified what it said were a series of legal errors in the conduct of the tendering process. In particular, it was alleged that the Minister relied on undisclosed award criteria, carried out an unlawful evaluation of the tenders, made an award to an abnormally low tender and failed to observe a standstill period. The Minister denied these claims and argued that each of the alleged undisclosed award criteria was actually "an example, characteristic or relative advantage provided to the applicant with the notification letter to assist it with, which the applicant has mechanistically converted into an alleged undisclosed award criteria". The Minister also resisted the application for discovery on the basis that, amongst other things, the documents sought were not

"indispensable" to the resolution of the proceedings and that the documentation sought in respect of the successful tender was commercially sensitive.

3.4 Category 1 of the discovery request seeks all documents relating to the evaluation of tenders by reference to Criterion 4.1(b) of the SRFT, "Very Urgent Requests For Service". Category 2 seeks all documents relating to the evaluation of tenders by reference to Criterion 4.1(e) of the SRFT, "Interpreter Support".

3.5 Word Perfect submitted that the Minister applied undisclosed award criteria to its evaluation of these requirements and, furthermore, that the Minister's evaluation of these requirements was conducted in an unlawful manner. In respect of Category 1, Word Perfect pleaded that the Minister relied on prioritisation as an undisclosed award criterion. In a comparison table appended to the notification of decision, Word Perfect was criticised for not demonstrating an approach to prioritising and establishing the urgency of requests for service. Word Perfect also complained that the successful tenderer was rewarded for outlining that all interpreters would be on site within 90 minutes, notwithstanding that this was not a specified requirement under the SRFT.

3.6 With regard to Category 2, Word Perfect received 1.5 fewer marks than the successful tenderer for its responses on interpreter support. The reason provided by the Minister was that, unlike Word Perfect, the successful tenderer had outlined an out of hours support service and demonstrated that it could provide 24/7 support to its interpreters. Word Perfect complained that this was not a criterion specified in the SRFT and that, had it been aware that this was a requirement, it would have amended its tender accordingly.

3.7 In respect of Word Perfect's complaint of unlawful evaluation, the Minister's notification of decision stated that Word Perfect had scored 2.4 fewer marks than the successful tenderer for its responses on very urgent requests for service on the basis that its tender had failed to clearly outline its anticipated arrival times. Word Perfect argued that this was despite the fact that, in its tender, it had confirmed that it would meet the requirements of very urgent requests for service and that its average response time was approximately 30 minutes. Word Perfect pleaded that arrival times were addressed as clearly as was possible in its tender and that the Minister therefore acted unlawfully in deducting marks from Word Perfect's tender on this basis.

3.8 Word Perfect argued that discovery of Categories 1 and 2 is necessary in order to determine whether the alleged undisclosed award criteria were applied during the evaluation and whether the alleged undisclosed award criteria were in fact "an example, characteristic or relative advantage" of the successful tenderer's tender, as asserted by the Minister.

3.9 Furthermore, Word Perfect contested the finding by the Court of Appeal that the disputes underpinning Categories 1 and 2 were issues of interpretation. Rather, it is submitted by Word Perfect that there is a direct factual dispute between the parties regarding the criteria used in evaluating the competing tenders and the lawfulness of that evaluation which disputed, it is said, can only be resolved by granting discovery of the documents in

Categories 1 and 2. Word Perfect also argued that, in procurement proceedings, unlawfulness must be demonstrated by reference to manifest error, which, it is submitted, requires a higher standard of review than the irrationality test applied by this Court in *O'Keeffe v. An Bord Pleanála* [1993] 1 IR 39. It is submitted that, when assessing manifest error, the court must work carefully through how the evaluation itself was carried out and that this would not be possible without sight of the documents in Categories 1 and 2.

3.10 Category 3 seeks all documents relating to the evaluation of tenders by reference to Criterion 4.3 of the SRFT, namely "the Quality Assurance Plan", for which Word Perfect was awarded 37.5 less marks than the successful tenderer. The reason provided by the Minister for this discrepancy in the notification of decision was that Word Perfect had compiled its reports for a *quarterly* period rather than on a *monthly* basis, as specified in the SFRT. Word Perfect complained that this deduction of marks was manifestly erroneous, irrational and entirely disproportionate as, in its view, the reports would not have been materially different if the underlying data was provided for one month, rather than three. It was further pleaded that the reports provided by Word Perfect were of a high quality and well-presented and that, save that the reports had been prepared on a quarterly rather than monthly basis, they complied with all the requirements set out by the Minister. These pleas are denied by the Minister. On this basis, Word Perfect submitted that, contrary to the findings of the Court of Appeal, there is a direct factual dispute between the parties in relation to the evaluation of the Quality Assurance Plan, as well as in relation to whether aspects of the successful tenderer's tender conferred any benefit to the Minister. It was submitted by Word Perfect that discovery is required in order to resolve these disputes.

3.11 Category 4 seeks all documents relating to the evaluation of tenders by reference to Criterion 4.2(b), namely "Management Structures", while Category 5 seeks all documents relating to the evaluation of tenders by reference to Criterion 4.2 (c), entitled "Management Escalation Processes". Word Perfect complained that these criteria were unlawfully evaluated by the Minister and that marks were consequently deducted from the evaluation of its tender without basis. In respect of Category 4, Word Perfect received 0.5 fewer marks than the successful tenderer on the basis that its tender lacked detail in relation to systems and processes. In the High Court, Word Perfect pleaded that its tender had contained detailed explanations of systems and processes, albeit within the restrictions of the applicable word limit.

3.12 In respect of Category 5, Word Perfect received 1 mark less than the successful tenderer for its response to the management escalation process. The Minister, in the notification of decision, justified this deduction on the basis that Word Perfect's tender did not specify timelines, nor did it explain how serious complaints were to be handled and classified. However, Word Perfect argued that its tender made clear that matters would be investigated quickly and within a period of not more than three days and that other complaints were to be dealt with "immediately" and implemented "without delay". In response to the issues surrounding complaints, Word Perfect pleaded that its tender

explained how serious complaints are treated and that it distinguished between various different types of complaints. It was also pleaded by Word Perfect that its tender explained how complaints are eventually addressed, contrary to what was stated by the Minister in the notification of decision.

3.13 The Minister denies this plea of unlawful evaluation. Word Perfect submitted that clear factual disputes arise between the parties on these issues and that the Court of Appeal therefore erred in concluding that the disputes underpinning Categories 4 and 5 were purely issues of interpretation and in refusing to order discovery on this basis. It is submitted by Word Perfect that discovery of these categories of documents is necessary in order to determine whether the Minister conducted an unlawful evaluation of these criteria. Word Perfect also maintained that, despite the narrow differential in marks between its responses and the successful tender's responses in relation to Categories 4 and 5, discovery of these documents is proportionate.

3.14 Category 6 seeks discovery of the Successful Tenderer's tender and all documents submitted by the Successful Tenderer in response to the SRFT and/or in response to any requests for clarification, including any communications between the Successful Tenderer and the Minister during the course of the competition. Category 7 concerns all documents relating to the evaluation of the Successful Tenderer's tender while Category 8 seeks all documents relating to the evaluation of Word Perfect's tender. Word Perfect submitted that it had not been furnished with any reasons in respect of half of the qualitative award criteria and that discovery of these documents is therefore necessary in order to assess whether the Minister breached equal treatment in the evaluation of Word Perfect's tender by comparison with that the of the successful tenderer. Word Perfect also submits that discovery of Categories 6-8 is necessary in order to determine whether the successful tenderer received unjustifiably high scores and should have been awarded fewer marks in respect of those award criteria and also whether the Minister unlawfully accepted an abnormally low tender from the successful tenderer. It is submitted that Word Perfect cannot sustain these grounds of review without sight of the documents in Categories 6-8, and that insight into these documents is necessary in order to prove causation of loss. Word Perfect therefore argued that discovery of these documents is both relevant and necessary, and that the Court of Appeal erred in refusing to grant discovery.

3.15 Category 9 seeks all documents relating to the Minister's failure to observe a standstill period. A standstill period refers to the requirement, applicable in the case of certain award procedures, that a number of days must elapse following the notification of the unsuccessful tenderers before the contract is executed. The assertion made on behalf of the Minister was that there was no obligation to observe a standstill period in the context of this mini-competition. Word Perfect argued, however, that, it had a legitimate expectation that a standstill period would be observed and that this legitimate expectation had been breached by the Minister. In this regard, it was submitted by Word Perfect that the Minister had previously always observed a standstill period when awarding contracts pursuant to the framework agreement and, more generally, as a matter of the Minister's custom and practice, a standstill period is usually observed for contracts awarded

pursuant to a framework agreement. It was stated that Word Perfect has tendered for many public service contracts in Ireland over many years and had never previously come across a situation where a standstill period had not been observed. Word Perfect submitted that the Minister's denial that he was obliged to observe standstill period in this mini-competition amounted to a clear factual dispute between the parties and that the Court of Appeal was, therefore, incorrect in finding that the pleas underpinning Category 9 raised purely questions of law.

3.16 It has already been noted that, at least on one view, there is a European Union law aspect to the issues which arise for, on Word Perfect's case, it was said that certain requirements of European Union law should inform the proper approach to discovery in a case such as this. It is considered appropriate to address that issue first.

4. The European Dimension

4.1 At the level of general principle, it is, of course, the case that discovery is a procedural matter and that, subject to the principles of equivalence and effectiveness, each member state enjoys procedural autonomy. It is certainly the case that discovery in the form in which it operates in this jurisdiction is very much a feature of common law jurisdictions and does not have an exact equivalent in the civil law world. There can be no doubt but that European Union law does not, of itself, require any particular regime for the disclosure of materials. However, it is also clear that, again at the level of general principle, the procedures applied in any member state, in litigation involving the potential vindication of European Union law rights, must provide both an effective remedy and must equally provide equivalent procedures to those which would be involved in purely national law litigation of a similar type.

4.2 It is against that background that it is necessary to consider what was said by both the High Court and the Court of Appeal on this question and also outline the position of the parties in relation to the European Union dimension.

4.3 Word Perfect placed significant reliance on the requirements of effectiveness, equivalence and transparency which, it is said, are necessary for the vindication of its EU rights. Word Perfect contended that, in light of the uncertainty surrounding the operation of the national law principles set out in *BAM PPP PGGM Infrastructure Cooperatie UA v. National Treasury Management Agency and Minister for Education and Skills* [2015] IECA 246 ("*BAM*"), as identified by this Court in paragraph 5 of its determination, it is now necessary for this Court to have regard to the requirements of EU law when determining whether to grant discovery of the documents sought.

4.4 The Minister, however, submitted that the principles governing discovery in Irish law remain those of relevance and necessity, as set out in *BAM*. The Minister argued that the reliance placed on the EU law requirements by Word Perfect in the present appeal was purely abstract, as Word Perfect was said to have failed to specify in what way the principles in *BAM* are unclear and how they fail to provide effective judicial protection.

4.5 The *BAM* principles, which to date have governed applications for discovery in procurement proceedings, were summarised by Ryan P. at para. 29 of his judgment in that case as follows:-

> *"1. The primary test is whether the documents are relevant to the issues between the parties. Once that is established it will follow in most cases that their discovery is necessary for the fair disposal of those issues.*
>
> *2. Relevance is determined by reference to the pleadings. O. 31, r. 12 specifies discovery of documents relating to any matter in question in the case.*
>
> *3. There is nothing in the Peruvian Guano test which is intended to qualify the principle that documents sought on discovery must be relevant, directly or indirectly, to the 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."*

4.6 Word Perfect acknowledged that discovery in procurement is an exception to the harmonised remedial regime found in Council Directive (89/665/EEC) (the "Remedies Directive") and that, therefore, discovery is not itself a regime which is governed by EU law. Rather, Word Perfect accepted that discovery in procurement falls within the realm of national procedural autonomy. However, it was submitted by Word Perfect that the requirements of effectiveness and equivalence found in EU law nonetheless influence the correct application of national procedural discovery rules in the context of procurement.

4.7 In respect of effectiveness, Word Perfect argued that it has a right to an effective remedy arising under Art. 47 of the Charter of Fundamental Rights of the European Union. It was submitted by Word Perfect that this right is also guaranteed by the general principles of

EU law, the Constitution, and Articles 6 and 13 of the European Convention on Human Rights and is confirmed by both the Remedies Directive and Article 19(1) of the Treaty on European Union.

4.8 Word Perfect further contended that the requirement of effectiveness creates "forceful obligations" for the national courts of EU member states, requiring them to take measures to ensure the full effectiveness of Union law, including the removal of any procedural disadvantages that may impede the effectiveness of Union objectives. In reliance on the decision of the Court of Justice of the European Union ("CJEU") in *Unibet (London) Ltd v. Justitiekanslern* (Case C-432/05) [2007] EU:C:2007:163, Word Perfect submitted that national courts must interpret their national procedural rules so as to enable those rules, wherever possible, to be implemented to ensure the effective judicial protection of EU rights.

4.9 On the other hand, the Minister contended that the decision of the CJEU in *Unibet* ought not to be interpreted as supporting modification of Ireland's procedural discovery rules. The Minister argued that *Unibet* is, rather, an authority which supports the adoption of national procedural rules in matters of EU law, provided that these procedural rules are no less favourable than those governing similar domestic actions, in line with the requirement of equivalence.

4.10 Word Perfect drew particular attention to the decision the High Court of England and Wales in *Roche Diagnostics Ltd v. Mid Yorkshire Hospitals NHS Trust* [2013] EWHC 933 (TCC), in which it was held that, owing to the "uniquely difficult position" of an unsuccessful tenderer seeking to challenge the evaluation process in the awarding of a public contract, the challenger must be provided with any essential documentation and information relating to the evaluation process carried out. This "uniquely difficult position" was held to be derived from the fact that the unsuccessful tenderer knows that he has failed but does not know the reasons for his failure, which are within the peculiar knowledge of a public authority.

4.11 In the High Court, Simons J. appeared to be persuaded, at least in part, by the approach taken in *Roche Diagnostics* insofar as he was willing to take Word Perfect's "difficult" position as an unsuccessful tenderer into account in deciding to grant discovery of categories 6, 7 and 8, relating to the successful tender and the evaluation process. Simons J. held that access to contemporaneous documentation relevant to the evaluation process was essential in order to ensure that Word Perfect had access to effective judicial review. He was, therefore, willing to grant the discovery sought of documentation relevant to the successful tender and evaluation process on the basis that such discovery was necessary to enable Word Perfect to have a meaningful opportunity to present its case at full hearing. It was submitted by Word Perfect that the High Court was correct to follow the approach outlined in *Roche Diagnostics* and that this Court, when assessing compliance with the principle of effectiveness in the context of procurement, ought to likewise have regard to the unique practical difficulties which arise for an unsuccessful tenderer.

4.12 In the Court of Appeal, however, Peart J. declined to adopt the *Roche Diagnostics* approach and instead held that, in circumstances such as those which arise in the present proceedings, the role of the court is to balance the legitimate business concerns of rival tenderers against an unsuccessful tenderer's application to obtain discovery. In this regard, the Court of Appeal relied on the judgment of the CJEU in *Varec SA v. Belgium* (Case C-450/06) [2008] ECR I-581, in which it was held that effectiveness would be undermined if, in an appeal against a decision taken by a public authority in relation to a contract award procedure, all of the information concerning that award procedure had to be made available to the unsuccessful party. The Court of Appeal recognised that, in circumstances such as these, it is a legitimate concern of rival tenderers that sensitive business information submitted as part of their tender could subsequently become available to their rivals through discovery.

4.13 For his part, the Minister submitted that Court of Appeal was correct in observing that, in circumstances where a discovery category concerns business information pertaining to a rival tenderer, the court must balance the commercial concerns of a successful tenderer with an unsuccessful tenderer's discovery application. The Minister argued that the decision of the Court of Appeal reflects the public policy imperative of promoting competition in the context of procurement. In this regard, it was argued by the Minister that the underlying purpose of the requirements of effectiveness and equivalence in the context of procurement is to serve competition, and that Word Perfect, in its written submissions, had failed to acknowledge that purpose. The Minister contended that the public policy imperative of competition would be impaired if highly sensitive tender documentation could subsequently be disclosed to business rivals, as it was argued that this would inevitably inhibit potential tenderers advancing their best case. This issue of public policy, it was submitted, is particularly relevant in circumstances such as those arising in the present proceedings, where potential tenderers are placed on a pre-existing framework and mini-competitions are held.

4.14 Word Perfect acknowledged that confidentiality and commercial sensitivity are important concerns in the discovery process, particularly in the context of procurement, but argued that confidentiality does not, of itself, provide a barrier to disclosure.

4.15 Furthermore, the Minister argued that the national law principles of relevance and necessity set out in *BAM* are highly flexible and effective and that, in an appropriate case, these principles would permit the discovery of information and documentation relating to the evaluation process. However, the Minister submitted that discovery of the entirety of the evaluation process does not arise in the present proceedings as, in the Minister's written submissions, Word Perfect's allegations were said to concern issues principally of interpretation and law and it was therefore argued that they were not dependent on anything which might be gleaned from discovery of the documentation which is sought. The Minister contended that this position is equally as favourable as a 'domestic' judicial review, where a judicial review turns on interpretation and law, and fully satisfies the principles of effectiveness and equivalence.

4.16 The Minister further submitted that, at all times before this point in proceedings, both parties were in agreement that the core principles governing discovery in the procurement context were those of relevance and necessity set out in *BAM* and that, heretofore, it had not been argued that *BAM* failed to deliver the requirements of effectiveness or equivalence. The Minister maintained that the guiding principles on discovery in procurement cases are those found in *BAM*. The Minister further submitted that the allegations of failures of effectiveness made by Word Perfect were not actually directed at the discovery principles consolidated in *BAM*, but were, rather, a "diffuse attack" relating to issues of delay, the standstill period, reasons and mootness, none of which are said to have been heard or decided at first instance.

4.17 As a result of replies furnished to a request for clarification, issued by the Court in accordance with Practice Direction SC 21, and as the argument developed at the oral hearing, it became clear that both sides were, at the level of high principle, prepared to accept that *BAM* represented the law in this jurisdiction and that it did comply with the requirements of effectiveness and equivalence. However, on one view, it may be that the principles set out in *BAM* are of such a high level of generality that they do not really address the manner in which the difficult questions of balance between the requirement of an effective remedy and transparency, on the one hand, and the need to promote effective public tendering by affording some reasonable level of confidence to sensitive commercial information, on the other, are to be addressed in practice in the context of disclosure in procurement cases. Indeed, as this Court pointed out in the determination by which leave to appeal was granted in this case, the very fact that the High Court and the Court of Appeal came to radically different conclusions as to the proper result, while applying what both courts considered to be the *BAM* principles, perhaps emphasises the difficulty in being sure as to how those principles are to be applied in practice. This is an issue to which it will be necessary to return.

4.18 On the requirement of equivalence, Word Perfect submitted that the case made by the Minister before the lower courts, and which it was said the Minister intended to pursue before this Court, involved a proposition that discovery in the context of procurement ought to be subject to a different, and more restrictive regime. In particular, Word Perfect contended that the Minister suggested that pleas made in procurement proceedings must be viewed with "heightened scepticism". Word Perfect argued that to subject pleas made in procurement cases to a discovery regime of heightened scepticism would be contrary to the requirement of equivalence and would undermine the right to an effective remedy.

4.19 The Minister contested the assertion that an approach of "heightened scepticism" was not contended for but, rather, it was said that compliance is sought with the principles in *BAM*, which condemn what was argued to be the fishing and tactical discovery said to be sought in this case. The Minister also suggested that effective competitive tendering is not severely undermined by application of the *BAM* principles.

4.20 In respect of Word Perfect's allegation of unequal treatment in the evaluation process, the Minister argued that this is a generic plea that could be made in any procurement proceedings in order to obtain far reaching discovery, including discovery of the entirety of a rival tenderer's tender.

4.21 In the High Court, Simons J. held that the grounds of Word Perfect's challenge, including its claim of unequal treatment in comparison to the successful tenderer, were not speculative but, rather, derived from the limited information which the Minister had made available to Word Perfect up until that point. Peart J., in the Court of Appeal, came to a different view and held that Word Perfect's claim of unequal treatment was made without sufficient particularity and was therefore speculative and discovery based on such a claim was considered to amount to fishing.

4.22 The Minister submitted that the Court of Appeal was correct in that finding of fishing. While the Minister acknowledged that equal treatment is a principle of procurement law, it was submitted that it an abstract principle which does not amount to a justification for discovery without particularity. The Minister suggested that, if the logic applied in the High Court were followed to its natural conclusion, it would have wide-ranging implications in procurement law, even beyond issues relating to the discovery of documents, as the mere institution of procurement proceedings creates an automatic injunction/suspension on the conclusion of vital public contracts.

4.23 Word Perfect, for its part, rejected the Minister's submission that a plea of unequal treatment in the evaluation of the tenders is a plea that "could be pleaded in any procurement case". Word Perfect argued that procurement cases may focus on issues such as manifest error or particular breaches of detailed procedural rules, as distinct from breaches of equal treatment and therefore argued that its claim of unequal treatment was not generic.

4.24 In addition to the requirements of effectiveness and equivalence, Word Perfect also sought to rely on the principle of transparency guaranteed by EU law to support its application for discovery. In this regard, Word Perfect relied on the decision of the High Court in *Somague Engenharia S.A. v. Transport Infrastructure Ireland* [2015] IEHC 723 in support of its submission that, in the context of the review of an award of a public contract, the principles of EU law require a transparent disclosure of documents between the parties and mandate a higher degree of scrutiny by the Court of the available evidence.

4.25 In the present proceedings, the High Court was also persuaded by principle of transparency as articulated in *Somague*. Simons J. found that granting discovery was not only necessary in order to enable Word Perfect to mount its case at a full hearing, but also to satisfy the requirement of transparency under EU law. While the judgment in *Somague* was directed to the question of leave to cross-examine, rather than to the discovery of documents, Simons J. considered it germane insofar as it emphasises the need for effective judicial review in procurement proceedings.

4.26 On the other hand, the Minister submitted that the High Court was incorrect to find that the principle of transparency outlined in *Somague* could justify any move away from the principles set out in *BAM* and towards the approach taken in Roche Diagnostics. The Minister argued that, where there is any conflict between *BAM* and *Somague*, it is *BAM* which binds and prevails.

4.27 Before going on to consider the specific issues which arise on this appeal I consider it appropriate, therefore, to address the issues of high principle which arise.

5. The Issues of Principle

5.1 It seems to me appropriate to start by considering the current law of discovery generally in Ireland for the purposes of assessing whether that law meets the requirements of equivalence and effectiveness. The most recent general statement of the law of discovery can be found in the decision of this Court in *Tobin v. Minister for Defence* [2019] IESC 57. As pointed out in *Tobin*, the initial onus rests on a requesting party to satisfy the Court as to the fact that documents sought are relevant to issues arising in the proceedings. If relevance is established, then the second requirement of necessity will also, on a *prima facie* basis, be shown to exist. However, it is open to the requested party to seek to persuade the Court, whether by argument or by evidence, that there is some countervailing factor which should lead the Court to decline disclosure. A range of factors have been identified in the case law. Of particular relevance, in the context of this appeal, is the way in which the disclosure of confidential information has come to be treated most particularly in recent developments in the jurisprudence. It remains, of course, the case that there is a significant distinction between privileged documentation, on the one hand, and documentation which may contain confidential information, on the other. The fact that documentation may contain confidential information does not, of itself, provide a reason for resisting its disclosure but it does provide a factor which the Court can take into account either in determining to decline disclosure or to put in place particular measures to protect the confidential information unless its disclosure should become absolutely essential. In addition, proportionality may provide a basis for declining discovery of documentation which may be of only tangential relevance but where compliance with discovery might be unduly onerous.

5.2 In that context it is, perhaps, appropriate to analyse recent Irish case law. At para. 7.10 of my judgment in *Tobin*, I indicated that a court should only order discovery in respect of confidential documentation "where it becomes clear that the interests of justice in bringing about a fair result of the proceedings require such an order to be made". Irish courts have adopted a proportionate approach to the disclosure of confidential information in a range of cases stretching back at least to the ex tempore judgment in *Yap v. Temple Street Children's University Hospital* (unreported, High Court, Clarke J., 1st June, 2006), a ruling which has subsequently been cited in other judgments. A possible mechanism for balancing rights, which was identified in *Yap*, is that appropriate provision be made for securing the documents containing the confidential information in question and ensuring that they are available at the trial should the trial judge come to the conclusion that their disclosure is truly required in the interests of justice. For example, a party may be

required to swear an affidavit identifying each of the documents in question and be further required to bring the documents to court. The underlying logic behind that approach is that, as the case develops at trial, it may be much easier for the trial judge to reach a detailed and considered view as to whether some or all of the documents in question are truly important to the just and fair resolution of the proceedings.

5.3 A similar approach was adopted in *Independent Newspapers (Ireland) Limited v. Murphy* [2006] IEHC 276 [2006] 3 I.R. 566. The judgment in that case identified proportionality as the appropriate underlying basis for the practice adopted in *Yap* (and continued in the case in question). It was held that there required to be a proportionality between the requirement to disclose confidential information (and in particular information which was confidential to a third party) and the need to secure that there be no risk of impairment of a fair hearing. In the case in question it was determined that, at the interlocutory stage of discovery, it could only be concluded that the documents in question might (but only might) turn out to be relevant.

5.4 A similar approach was adopted in *Hartside Limited v. Heineken Ireland Limited* [2010] IEHC 3, *Flogas Ireland Limited v. Tru Gas Limited* [2012] IEHC 259, *Thema International Fund plc & anor v. HSBC Institutional Trust Services (Ireland)* [2010] IEHC 19 and *Telefonica 02 Ireland Limited v. Commission for Communications Regulations* [2011] IEHC 265. In the latter of those cases, Telefonica, the following is stated at paras. 3.3 and 3.4:-

> "3.3 … [I]t seems to me that the overall approach to discovery or disclosure can perhaps be summarised in the following fashion:
>
> *1) In order for discovery or disclosure to be appropriate the documents or materials sought must be shown to be relevant.*
>
> *2) If the documents are relevant, then confidentiality (as opposed to privilege) does not, of itself, provide a barrier to their disclosure.*
>
> *3) The court is required to exercise some balance between the likely materiality of the documents concerned to the issues which are anticipated as being likely to arise in the proceedings, and the degree of confidentiality attaching to the relevant materials. In that context,* ***the confidence of third parties may be given added weight*** *for it must be accepted that those parties who become embroiled in litigation will necessarily have to disclose information about their confidential affairs when that information is necessary to the fair and just resolution of the relevant litigation. …*
>
> *4) In attempting to balance those rights the court can seek to fashion an appropriate order designed to meet the facts of the individual case so as to protect both the legitimate interests of the party seeking disclosure to ensure that all relevant materials potentially influential on the result of the case are*

before the court and, to the extent that it may be proportionate, the legitimate interests of confidence asserted.

3.4 … It does, of course, need to be reiterated that, if information is really of some significance to the fair determination of proceedings, then it is most unlikely that any confidentiality would be sufficient to outweigh the need for the proper administration of justice. At a general level, it seems likely that confidence will only come into play where there is a disproportion between the level of confidence which would be breached and a very limited potential relevance of the material concerned. Highly confidential information, which would only have a very tangential relevance to proceedings, might legitimately not be disclosed." (Emphasis added.)

5.5 In *Hartside* it is also mentioned that the approach of the Court should be one which seeks to do the least risk of injustice. Injustice can occur if confidential information (and particularly highly confidential information) is disclosed in circumstances where its disclosure may turn out to have no or only a marginal effect on the proceedings. On the other hand, injustice can occur if information which could truly play a material role in the just resolution of the proceedings in accordance with law is not disclosed. As all of the case law makes clear, the disclosure of confidential but non-privileged materials must occur if that disclosure appears to be truly material to the proper resolution of the proceedings. Confidence must yield to the proper administration of justice.

5.6 However, all of the case law to which I have referred also operates on an explicit or implicit acknowledgement that, at the time when an interlocutory application for discovery is under consideration by the Court, it may not be clear as to what type of information will truly turn out to be relevant. That picture is frequently much clearer at trial.

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

5.8 In that context, an analogy with the requirement to particularise claims involving allegations of certain types of wrongdoing may be useful. In some cases courts have encountered a difficulty between, on the one hand, requiring a plaintiff to give sufficient particulars of allegations such as fraud or anti-competitive behaviour while, on the other hand, recognising that the level of detail which might be required before the case actually went to trial might not be capable of being provided until after procedures such as discovery have been invoked (see *National Education Welfare Board v. Ryan* [2007] IEHC 428, [2008] 2 I.R. 816, *Moorview Developments Limited and ors v. First Active Plc and ors.* [2008] IEHC 211 and *Ryanair Ltd. v. Bravofly and Travelfusion Ltd.* [2009] IEHC 41).

For example, in *National Education Welfare Board*, it is suggested that care needs to be taken to ensure that a party cannot "by the mere invocation of an allegation of fraud… become entitled to engage in a widespread trawl of the alleged fraudster's confidential documentation in the hope of being able to make his case". The solution adopted in that and other cases was to require the plaintiff to particularise the claim in sufficient, albeit general, terms prior to discovery, with the further requirement to give more details after inspection of the disclosed materials.

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

5.10 From that review of the case law, it seems to me that the traditional law of discovery in Ireland as it has developed allows for a nuanced and incremental approach to the disclosure of confidential information by the discovery process. The starting point must, of course, be that the information concerned is potentially relevant to the proceedings for if it is not relevant then there could be no legitimate basis for its disclosure in the first place. However, if relevance is established, then the Court will have to consider the appropriate weight to attach to the protection of confidential information in the particular circumstances of the case in question. This will ordinarily involve assessing the importance of the information to the just resolution of the case, the level of confidentiality attaching to the materials and, in particular, whether the materials involve third party confidential information and also paying appropriate regard to the extent to which it is possible, at a pre-trial stage, to form an accurate view as to the appropriate weight to be attached to those matters. The Court can also pay proper regard to the extent to which a credible basis for the claim, in respect of which relevance is asserted, has been made out. In addition, appropriate mechanisms have been identified for ensuring that materials, which can be demonstrated at trial to be required for the just resolution of the case, can be presented and produced. This modern approach to the discovery of confidential information is now well-established as part of our law and it is in the context of that approach that it is necessary to consider compliance with EU law as most particularly explained by the CJEU in *Varec*.

6. The English and European Case Law

6.1 There was much debate between the parties both in the written submissions and at the oral hearing concerning what might be said to be differences in approach between the Irish case law, as identified in *BAM* and, perhaps, more fully in *Word Perfect Translation Services Ltd. v. The Minister for Public Expenditure and Reform (No. 2)* [2018] IECA 87 ("*Word Perfect No. 2*"), and the position in England and Wales identified in *Roche*

Diagnostics. In addition, there was much debate as to where that case law lay in the light of *Varec*. I remain unconvinced that the differences are as great as was suggested.

6.2 Turning first to *Roche Diagnostics*, it seems to me that counsel for the Minister was correct to draw attention to the particular context in which that decision was made. The awarding authority had given a number of spreadsheets to the challenging party purporting to set out the basis for its conclusions. The spreadsheets differed one from another and, as I understand it, by the time of the hearing of the application for discovery before Coulson J., all spreadsheets were agreed to be incorrect in some respects. Against that background it is hardly surprising that the challenger was able to persuade the Court that it needed extensive access to the underlying materials so as to be satisfied as to what the true reasons for the decision of the awarding authority actually were. As sometimes happens, it may be that certain passages from the judgment, if taken out of the context of the type of case with which the trial judge was concerned, can give a misleading impression of the adoption of a general principle.

6.3 However, it is clear from subsequent English case law, such as *Pearson Driving Assessments Ltd. v. Minister for the Cabinet* [2013] EWHC 2082 (TCC), that the courts of England and Wales have not accepted that broad disclosure of all documents arising in a procurement process is necessarily required.

6.4 It should first be noted that the particular procedure with which Coulson J. was concerned in *Roche Diagnostics* was a form of early required disclosure which has no direct equivalent in Irish procedural law. Some of the subsequent jurisprudence from the courts of the United Kingdom does appear to turn on the extent to which early disclosure may be required. In that sense there is something of an echo, albeit perhaps a relatively faint one, between the distinction which has been made in the Irish case law, which I have already cited, between granting discovery in the ordinary way or postponing a final decision, on the importance of the disclosure of the relevant confidential materials, to the judgment of the trial judge.

6.5 Coulson J. himself returned to this issue in *Gem Environmental Building Services Limited v. London Borough of Tower Hamlets and Tower Hamlets Homes* [2016] EWHC 3045 (TCC). In his judgment in that case, Coulson J., although disagreeing with such an assessment, acknowledged that *Roche Diagnostics* might be seen as being overly generous to unsuccessful tenderers and that the principles set out in *Roche Diagnostics* could be open to being relied on by claimants in support of more spurious claims, which were far removed from the risks of unfairness identified in *Roche Diagnostics* itself.

6.6 In *Alstom Transport UK Limited v. London Underground Limited* [2017] EWHC 1584, Stuart-Smith J. did accept and endorse Coulson J.'s description of the position of an aggrieved tenderer as being "uniquely difficult". However, that case, again, seems to have turned, to a large extent, on the distinction between early disclosure and what, in the United Kingdom, is described as standard disclosure. However, it is clear that certain categories of document were excluded from the discovery granted by Stuart-Smith J. on the basis that they amounted to fishing.

6.7 It also seems clear from much of the United Kingdom case law that a relevant feature of the regime in respect of early disclosure includes an analysis of the extent to which reasons had been given for the result of the relevant procurement process. It is a theme of that case law that a party who knows they have lost, but who does not have a great deal of information as to why they have lost, may well be entitled to early disclosure so as to enable them to plead their case properly. While of particular relevance in the UK context of early disclosure, it does seem to me that this question is also of wider importance. The greater the extent to which an unsuccessful tenderer is given information as to precisely why its tender was unsuccessful, the more it may be reasonable to expect that party to set out in some detail why it says that, as a matter of law, the decision of the awarding authority is unsustainable and the more it may be possible for the Court to assess both whether a credible basis for each of the allegations made has been put forward and whether any particular confidential information may be relevant and important to the just resolution of a case based on such allegations. The less information concerning the reasons for the result of the process, the more the particular disadvantage identified in Roche Diagnostics may be an appropriate factor to take into account.

6.8 For completeness, it is worth noting that the High Court of Northern Ireland, in *John Sisk and Son (Holdings) Limited v. Western Health and Social Care Trust and Dept of Health, Social Services and Public Safety* [2014] NIQB 123, did apply the principles set out in *Roche Diagnostics* but did, in so doing, refused disclosure of the tender response of the winning bidder on the basis that allowing access to such information would undoubtedly lead to the disclosure of confidential and commercially sensitive information.

6.9 Having analysed the position in the United Kingdom which was, after all, a common law jurisdiction within the European Union with at least broadly similar procedures to our own, it is necessary to next consider the jurisprudence of the CJEU.

6.10 In that context it must also be emphasised that *Varec* draws attention to both of the competing principles at play.

6.11 There is an undoubted emphasis on the need to provide an effective remedy and the requirement that there be sufficient disclosure of even confidential information to enable a proper review to take place. At para. 52, the Court in *Varec* observed:-

> *"52. The principle of the protection of confidential information and of business secrets must be observed in such a way as to reconcile it with the requirements of effective legal protection and the rights of defence of the parties to the dispute (see, by analogy, Case C-438/04 Mobistar [2006] ECR I 6675, paragraph 40) and, in the case of judicial review or a review by another body which is a court or tribunal within the meaning of Article 234 EC, in such a way as to ensure that the proceedings as a whole accord with the right to a fair trial."*

6.12 However, there are also passages which emphasise the importance of protecting the confidential business information of rival tenderers. At paras. 39-41, the Court stated,

> *"39. Admittedly, those provisions relate to the conduct of the contracting authorities. It must nevertheless be acknowledged that their effectiveness would be severely undermined if, in an appeal against a decision taken by a contracting authority in relation to a contract award procedure, all of the information concerning that award procedure had to be made unreservedly available to the appellant, or even to others such as the interveners.*
>
> *40. In such circumstances, the mere lodging of an appeal would give access to information which could be used to distort competition or to prejudice the legitimate interests of economic operators who participated in the contract award procedure concerned. Such an opportunity could even encourage economic operators to bring an appeal solely for the purpose of gaining access to their competitors' business secrets.*
>
> *41. In such an appeal, the respondent would be the contracting authority and the economic operator whose interests are at risk of being damaged would not necessarily be a party to the dispute or joined to the case to defend those interests. Accordingly, it is all the more important to provide for mechanisms which will adequately safeguard the interests of such economic operators."*

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

6.14 It does not seem to me that *Varec* suggests that either of the interests of effectiveness and transparency, on the one hand, or protection of confidential information, on the other, necessarily prevails in all circumstances. Rather, they are factors to be taken into account in the particular circumstances of each case.

6.15 It also would appear to follow that it is necessary to put in place appropriate mechanisms for a nuanced assessment of the precise level of disclosure which is required to ensure an effective remedy in the context of an individual case while protecting, to the maximum extent possible, highly confidential information. How that is to be done is a matter for national procedural law provided that the regime adopted meets the dual aims identified in *Varec*.

7. The Position of the Parties

7.1 Leaving aside for the moment, therefore, the question of whether European Union law mandates any different approach to that which would ordinarily apply in national law, it is

necessary to identify the differences between the parties on the proper approach to a consideration of discovery issues.

7.2 At the level of very broad principle, there does not appear to be a very significant difference between the parties. It is clear from *Tobin* that ordinarily the appropriate sequence in which to consider disputed discovery issues is to first determine whether the documents sought are relevant to the proceedings. If relevance is established then it will be presumed that the discovery of the documents in question are necessary but it is open to the requested party, whether by evidence or argument, to seek to satisfy the Court that it is not necessary to make discovery of a document or category of documents notwithstanding that relevance has been established. The bases on which a lack of necessity can be established may vary, but under that general heading it may, in an appropriate case, be appropriate for the Court to consider whether the disclosure of confidential information (including in particular information which is confidential to third parties) truly needs to be disclosed for a fair resolution of the proceedings. In addition, it is open to a requested party to seek to persuade the Court that the discovery of particular documents may be disproportionate to the likely utility of the documents to the fair resolution of the proceedings. The Court does not understand the parties to disagree, at least at the level of very broad principle, with those propositions.

7.3 However, within the general ambit of the application of those general principles to procurement cases in general, and this case in particular, a number of issues arise.

7.4 The Minister asserts that the High Court did not, or at least did not sufficiently, analyse the question of relevance by reference to the pleaded case. It is asserted that the High Court was influenced by certain UK authorities such as *Roche Diagnostics*, which, it is said, suggests an approach to discovery which requires the disclosure, as a matter of transparency, of all documents material to the procurement evaluation process. The Minister argues that the starting point should be to identify the specific issues which arise on the pleadings so as to determine which documents are relevant.

7.5 In one sense it may well be, however, that the real difference between the parties relates to the specific manner in which the broad principles applicable to discovery in Ireland are to be applied in the context of public procurement cases. As noted earlier, Word Perfect asserts, but the Minister denies, that the approach of the Minister suggests that discovery law in public procurement cases should be different to that in other types of cases. It follows that it is important, before going on to analyse the position in respect of each of the categories of discovery sought, to address the question of the proper approach to the application of the law of discovery in procurement cases and to assess whether that law might be said to deny a party who wishes to challenge a public procurement award from having effective access to justice.

8. Discovery in Public Procurement and EU Law

8.1 I should start by saying that there are many areas of law in which it is possible to identify overarching general principles but where the application of those general principles may differ somewhat, for objective reasons, in different circumstances and in different types of

cases. It seems to me that discovery in the context of confidential information is one such area.

8.2 It must, of course, be emphasised that, before discovery can be ordered in respect of any category of documents, it is necessary for the requesting party to show, by reference to the proceedings, that the documents sought are relevant. In the context of public procurement litigation, it is necessary to have regard to the scope of the issues which properly come before the Court in such cases. While public procurement litigation has some features in common with judicial review proceedings, it does require to be acknowledged that both the standard of review and the scope of the remedies available to the Court are potentially wider. That widened scope of the proceedings has, of course, the potential to also widen the scope of the issues properly arising and thus the categories of documents which may potentially be relevant to those issues. That being said, it remains the case that relevance must be first established before the Court can go on to consider issues arising out of the potentially confidential nature of information which might be disclosed by requiring discovery of any particular document or categories of documents.

8.3 The case law already cited makes clear that Irish discovery law generally provides for a nuanced and flexible approach to cases where confidential information may be relevant and where the disclosure of that information may be necessary to a fair and just resolution of the case.

8.4 Without being exhaustive, the following principles can be identified. First, and importantly, the fact that information may be confidential is not, in and of itself, a barrier to its disclosure. Second, the requirement that discovery be proportionate includes a requirement that there needs to be a balance struck between the extent to which ordering discovery of a particular category of document may give rise to the disclosure of confidential information (including especially highly confidential information and information confidential to third parties), on the one hand, and the extent to which it may be reasonable to anticipate that the information concerned may be important to a just and fair resolution of the proceedings, on the other. Third, it may be disproportionate to direct discovery which would involve the disclosure of confidential information where no credible basis has been put forward for suggesting that there is a sustainable basis for that aspect of the claim in respect of which it is said that the confidential information concerned is relevant. In this latter context, in relation to procurement proceedings, the extent to which adequate reasons for the result of the procurement process have been given may be relevant for it may breach the requirement that there be an effective remedy if a party obtains very limited information about why the result wen the way it did and is then told that it cannot have discovery because it has not put forward a credible basis for suggesting that there was anything wrong with the procurement process. Fourth, it is recognised generally that a judge conducting a substantive hearing of proceedings may well be in a better position to identify whether the disclosure of confidential information is really necessary to enable a fair result of the proceedings to be achieved. On that basis procedures can, and are, put in place to ensure the retention of

documentation and the availability of those materials at the hearing should the trial judge consider it necessary.

8.5 It seems to me that those principles have particular application in the context of procurement cases, precisely because the procurement process will, as the CJEU pointed out in *Varec*, almost invariably involve commercially sensitive and confidential information in the shape of the tenders submitted by competitors. However, it does not seem to me to follow that there is any proper basis for suggesting that any different approach is required to discovery in procurement cases. It is undoubtedly true that issues about the disclosure of confidential information are likely to loom much more largely in such cases, but that is only because of the nature of the case rather than the need to have different rules. The same approach would be adopted in any other form of proceedings in which information, to which a similar level of confidence attached, might be involved. There is not, nor should there be, any special rule for discovery in procurement cases but it is important to recognise that the application of general rules may be somewhat different in procurement cases when compared to other cases which do not involve the same level of confidential information. On that basis, it does not seem to me that there could be any question of a breach of the principle of equivalence. Exactly the same approach would be adopted by an Irish court in assessing how to approach a request for discovery of confidential information in any other proceedings.

8.6 However, it also seems to me that the general approach which I have identified makes clear that the asserted need of a challenger to obtain information for the purposes of substantiating its claim will not necessarily trump, in all cases, the need to protect confidential information furnished to the awarding authority by its competitors. But likewise, the need to protect such information will not always trump an assertion on the part of the challenger of the relevance and necessity of the disclosure sought. As in all other discovery cases involving confidential information, each case will have to be considered on its own merits and having regard to its own circumstances, with an order being fashioned which minimises the risk of injustice and which ensures a fair and just resolution of the proceedings with the minimum disclosure of confidential information necessary to achieve that end.

8.7 In that latter context it is also worth noting that some additional comfort may be obtained if confidential materials are made available under a so-called "confidentiality ring". A confidentiality ring allows for limited disclosure of otherwise confidential documentation and information. Where a confidentiality ring is in place, the confidential documents and information in question are ordinarily made available in confidence only to the parties' legal advisors. In circumstances where the information in question relates to a scientific or technical matter, the confidentiality ring may be expanded to include experts in that field. Where a confidentiality ring is established, it is usually provided for in the order for discovery.

8.8 Confidentiality rings are device commonly used by the English courts in procurement disputes in order to protect commercially sensitive information, while also granting the

discovery necessary for the fair disposal of proceedings. In *Mears v. Leeds City Council* [2011] EWHC 40 (QB), Ramsey J. in the High Court of England and Wales put in place a confidentiality ring in relation to the disclosure of documents in a dispute over a tender for capital improvement and refurbishment work for social housing in Leeds. Ramsey J. found that, while documentation relating to the successful tender should be treated as confidential, the fact that it was confidential did not in itself prevent it from being disclosed. Ramsey J. also emphasised the importance of disclosure in enabling an unsuccessful tenderer to make an informed view as to whether it was appropriate to bring proceedings. The Court held that the confidentiality of the documents could be preserved through a confidentiality ring, which was to be limited, in the first instance, to named solicitors and counsel. In that case, the Court also ordered that claimant should nominate a person who had no past involvement, and would have no future involvement, in the procurement, and who would not disclose any information to others in the claimant's organisation, whose role would be to give instructions to the lawyers. The High Court of England and Wales likewise implemented a confidentiality ring in *Geodesign Barriers Ltd. v. The Environment Agency* [2011] EWHC 1121 (TCC), which also concerned a public procurement dispute. In that case, Coulson J. ordered specific disclosure into a confidentiality ring, made up of the parties' legal representatives, of the bid documents relating to the other unsuccessful bidders where those bids were ranked higher than that of the claimant.

8.9 More recently, the High Court of England and Wales implemented a confidentiality ring in *SRCL v. National Health Service Commissioning Board* [2018] EWHC 1985 (TCC), in which Fraser J. outlined the principles underpinning confidentiality rings in English law, with specific reference to procurement proceedings. Fraser J. first referred to the way in which the courts ought to balance the need for appropriate disclosure with the need to protect confidentiality, citing para. 34 of the judgment of Hamblen J. in *Libyan Investment Authority v Société Générale SA and others* [2015] EWHC 550 (Comm):-

> *"(1) The court's assessment of the degree and severity of the identified risk and the threat posed by the inclusion or exclusion of particular individuals within the confidentiality club [must be considered]…*
>
> *(2) The inherent desirability of including at least one duly appointed representative of each party…*
>
> *(3) The importance of the confidential information…*
>
> *(4) The nature of the confidential information…*
>
> *(5) …the degree of disruption that will be caused if only part of a legal team is entitled to review, discuss and act upon the confidential information."*

8.10 To these principles Fraser J. added at para. 71 of his judgment:-

"(6) In procurement litigation, the confidential information of other parties …will usually be held by the contracting authority. Although it will not invariably be relevant to the claim by the dissatisfied bidder, it will often be relevant. No order for disclosure should be made in respect of such third party confidential information without giving that other third party the right to make representations to the court.

(7) As part of considering the balancing exercise necessary, there are a range of options or special measures available to the court which will both preserve the confidentiality … and balance that against the need for …administration of justice…

(8) … It is not a solution to an objection by a contracting authority (or another bidder) to assume that a party's solicitor acting in the litigation should and can be called to give primary evidence of fact in that party's favour."

8.11 The principles set out in SRCL were subsequently endorsed by O'Farrell J in the High Court of England and Wales in *Marston Holdings Limited v. Ministry of Justice and ors*. [2018] EWHC 3168 (TCC).

8.12 The Irish Courts have traditionally been more hesitant to implement confidentiality rings (see *Burke v. Central Independent Television* [1994] 2 I.R. 61 and *DPP v. Special Criminal Court* [1999] I.R. 60). Recently, however, it appears that the courts in this jurisdiction have been willing to make use confidentiality rings in the context of competition proceedings. In *Goode Concrete v. CRH plc & ors.* [2017] IEHC 534, Barrett J. held that the courts have an inherent jurisdiction to direct disclosure within a confidentiality ring and consequently directed that certain commercially sensitive material be made discoverable to the plaintiff's legal advisors and independent expert advisors only. At para. 99 of his judgment Barrett J. stated,

> *"… there is an inherent jurisdiction on the part of the court to order a confidentiality ring, should it consider that to be appropriate. One important factor for the court to consider in this regard, so at least it seems to this Court, is that these are competition law proceedings and in such proceedings confidentiality rings are increasingly becoming standard practice in the neighbouring jurisdiction because of the increased costs of discovery and the manner in which discovery in such proceedings is prone to being used as a commercial weapon."*

8.13 This decision was recently affirmed by Costello J. in the Court of Appeal (see *Goode Concrete v. CRH plc & ors.* [2020] IECA 56), seemingly endorsing the use of confidentiality rings in competition proceedings in Ireland. Confidentiality rings have also been implemented by the Irish courts in proceedings relating to intellectual property (see *De Lacy v. Coyle* [2018] IEHC 428). It is, however, worth noting that the Irish courts have yet to implement confidentiality rings in the context of public procurement.

8.14 Furthermore, it should, be observed that, in certain circumstances, a confidentiality ring may itself cause difficulties. The practical issues which can arise depend on the extent to which it may be possible for lawyers (and sometimes experts) to be able adequately to put forward the case, based in part on information obtained under a confidentiality ring, without instructions or information from their client. Where, for example, there may be competing expert scientific evidence, it may well be possible for lawyers and relevant scientists to formulate a client's case without reference to any specific information which the client may have. But that will not always be the case. The availability of a confidentiality ring is, therefore, a factor to be taken into account but it does not always provide a suitable safeguard.

8.15 On the basis of that analysis, it does not seem to me that Irish discovery law fails to strike the balance identified in *Varec*. In appropriate cases, and to the appropriate extent, a challenger can have access to even the most highly confidential information should that prove necessary to a fair and just resolution of the proceedings. At the same time there is no automatic entitlement to highly confidential information emanating from rival bidders. That seems to me to be precisely the balance which the CJEU has indicated should be struck and it seems to me to be the balance which operates in Irish discovery law generally and, in particular, how that discovery law applies in the particular circumstances of procurement cases.

8.16 Before going on to deal with how those general principles should be applied in the particular circumstances of this case, it is necessary to touch on two matters. First, in the particular context of procurement cases, it needs to be observed that it is difficult to envisage circumstances where the disclosure of an evaluation of the challenger's own tender could be refused on the grounds of confidentiality. It might, of course, be that certain aspects of that evaluation might be considered irrelevant to the case as pleaded and thus disclosure not be required. It must also be acknowledged that, depending on the way in which any relevant evaluation was carried out, there might well be sections of an evaluation report which addressed not only the assessment of the challenger's tender in some particular respect but also, in comparative terms, the assessment of other competitors including the successful tenderer. Such an assessment might well be expected to reveal commercially sensitive details of a competitor's tender. More detailed analysis would be required in such a case to ensure that there was no unnecessary or inappropriate disclosure of confidential information pertaining to rival tenders unless, in accordance with the principles which I have identified, such disclosure was truly required for the just resolution of the proceedings. Redaction might well form an appropriate approach in such circumstances, subject again to the possibility that the trial judge might ultimately consider, having regard to a more detailed understanding of the issues as emerged at the trial, that some or all of the redaction in question ought be removed and unredacted versions made available. Redaction in that way is, of course, a procedure frequently adopted in dealing with discovery applications where confidential information is involved.

8.17 The second matter which must be addressed is the question of whether, as the Minister asserts, each of the grounds of appeal sought to be advanced on behalf of Word Perfect can properly be said to be within the scope of this appeal. I propose to deal briefly with that issue.

9. The Scope of the Appeal

9.1 As mentioned earlier, the Minister, in the course of case management, asserted that not all of the grounds of appeal sought to be advanced by Word Perfect fitted within the issues of general public importance identified in the determination of this Court by virtue of which leave to appeal was granted. On that basis, it was said by the Minister that only those grounds which could properly be said to engage the issues of general importance identified should be permitted to be pursued.

9.2 Counsel for Word Perfect relied on the fact that all of the grounds sought to be advanced had been set out in the application for leave to appeal as grounds which would be pursued in the event that leave was granted. Counsel pointed to the fact that this Court had not, in its determination granting leave, given any indication that it was limiting the grounds of appeal which could be pursued.

9.3 The parties exchanged correspondence on this issue, which was made available to the Court and both counsel, very helpfully, indicated at the oral hearing that they were happy to rest their arguments on this point on the content of that correspondence.

9.4 On this issue, it seems to me that counsel for Word Perfect is correct. This Court has, of course, since the coming into force of the 33rd Amendment to the Constitution, had an important role in filtering the cases which come to it by reference to the constitutional criteria specified in the 33rd Amendment itself. Appeals must either involve a matter of general public importance or it must be in the interests of justice that an appeal to this Court should be permitted. However, the Court has also cautioned against an overly narrow approach to the scope of the appeal which can be permitted to be pursued once leave is granted. If a case does not meet the constitutional criteria then leave will be refused. However, if the case does meet the constitutional criteria, it may not be in the interests of justice to take an overly narrow view of the grounds which can be pursued, for to do so can run the risk of an unjust result in the overall sense. That being said, it must also be acknowledged that the fact that leave is granted cannot automatically lead to all grounds sought be advanced necessarily coming within the scope of the permitted appeal.

9.5 In that context, it seems clear that, if the Court had wished to narrow the grounds on which Word Perfect was to be permitted to pursue its appeal, the Court would have said so in some way in the course of the determination by which leave to appeal was granted. While it might not have specified the precise grounds which could and could not be pursued, the Court would almost certainly have indicated that it would be a matter for the case management judge to determine which grounds actually came within the proper scope of the appeal. Not having done so, it must be assumed that the Court granting leave to appeal considered that all of the grounds could be put forward. On that basis I

would propose that the Court consider all of the specific grounds advanced in respect of the various categories.

9.6 Against that background it is necessary to turn to the argument between the parties on the specific categories.

10. The Specific Categories

10.1 So far as Categories 1 – 3 are concerned, it would appear that the difference between the parties derives from the contention of the Minister, accepted by the Court of Appeal, that the issues to which the documents in question were said to be relevant were matters either of interpretation or of legal argument and thus not matters in respect of which any evidence would be relevant. In particular, in respect of Categories 1 and 2, an issue arises as to whether the Minister applied undisclosed award criteria when evaluating the tenders or whether, as the Minister argues, the matters considered were examples or characteristics rather than criteria as such.

10.2 So far as Categories 4 and 5 are concerned, the Minister principally contends that the request is disproportionate having regard to what is said to be the very marginal effect of the differential in marks between the tenderers. In addition, the Minister submits that the issues to which these categories are said to be relevant relate to the evaluation of Word Perfect's own tender such that, it is said, the requested documentation is not relevant.

10.3 So far as Categories 6 – 8 are concerned, it is argued on behalf of the Minister that the discovery of all of these categories would amount to a complete disclosure of the successful tenderer's tender which, it is said, is disproportionate in all the circumstances. It is further asserted by the Minister that at least part of the claims made in the pleadings, which are said to justify ordering discovery of the categories in question, amount to no more than mere assertion. In that context, it would appear that the question of the proper approach to the discovery of confidential information may well require to be considered by the Court.

10.4 It is, of course, the case that material which is confidential but not legally privileged is not immune from discovery. The Court does not understand either party to disagree with that very general proposition. There is, also, authority for the proposition that a court should exercise some care in ordering the discovery of confidential information and, in particular, information which is confidential to third parties. The question of the proper approach to discovery of confidential information has a significant potential to be of importance in the context of public procurement litigation where the content of other tenders may be relevant and where, indeed, documents produced by the awarding authority may themselves include information from tenderers other than the party who challenges the award. On one view, it might be said that to accord too high a weight to confidentiality would diminish the legitimate opportunity of a challenger to contest an award. On the other hand, it will be necessary to consider the weight to be attached to the protection of confidential information whose disclosure may not necessarily turn out to be material to the just resolution of the proceedings.

10.5 Finally, so far as Category 9 is concerned, it is again asserted by the Minister, in common with the assertion made in respect of grounds 1 – 3, that any issues arising under the relevant heading are purely matters of law and argument so that, it is said, no evidence is necessary to justly determine the issues in question.

10.6 The Minister also makes a general point arising out of the way the case is pleaded by Word Perfect. It is said that, where details are given in the information furnished to Word Perfect for the result, each detail is said to represent an undisclosed award criteria. Where details are alleged not to have been given sufficiently, complaint is made that no justification has been provided for the relevant aspect of the evaluation.

10.7 In the light of those disputes, and applying the general principles identified earlier in this judgment, I would propose the following general approach.

10.8 So far as Category 9, and the question concerning a standstill period, is concerned, I am not persuaded that it has been shown that there are any factual issues to which discovery could be relevant. The assertion is that Word Perfect has the benefit of a legitimate expectation to the effect that there would be a standstill period. However, for a legitimate expectation to arise it would be necessary for Word Perfect to be able to establish that it was aware of facts or statements at the material time which were sufficient to give rise to a legitimate expectation. Word Perfect must, therefore, itself have evidence of whatever it asserts are the facts or statements which might persuade the Court to hold that a legitimate expectation arose. I could envisage circumstances where there was a clear dispute on the evidence as to whether, for example, a public authority had made a particular statement or given a particular indication so that a court would be likely to be required to resolve a disputed question of fact. In such a case discovery could well be required of any documents which might cast light on the true facts. Likewise, in circumstances where a public authority admitted that it had made a particular statement, but denied that this statement amounted to a representation such as to give risk to a legitimate expectation, discovery of documents such as internal communications, which could help the court to ascertain what the authority's own views on the statement, may well be necessary and relevant. However, in the circumstances of this case, there is no clear assertion of specific fact made by Word Perfect which is, in turn, denied by the Minister, thus giving rise to a pure question of fact which might potentially need to be resolved in order to decide whether a legitimate expectation existed or not. I would refuse discovery of Category 9 on that basis.

10.9 Insofar as issues have been raised concerning what is said on behalf of Word Perfect to amount to an impermissibly low tender on the part of the successful party, I am not presently persuaded that it has been demonstrated that documents in that regard require to be discovered. In normal course, the question of an excessively low tender arises in the context of an awarding authority declining to award the contract concerned to a tenderer about whom it may be said that the tender is so low as to cast doubt on the ability of the tendering party to perform the contract at that price. On the other hand, disclosing information in regard to the successful party's tender would involve Word

Perfect gaining access to highly sensitive commercial information concerning the pricing structure (and possibly the cost base) of a major competitor with whom it is in frequent competition. In accordance with the principles identified earlier in this judgment such information should only be disclosed where it becomes clear that it is necessary to a just resolution of the proceedings. I would, however, leave it open to the trial judge, in the light of any preliminary views which the trial judge took as to the law, to direct that some disclosure in this regard might be required. The method for permitting this will be addressed later.

10.10 The next set of issues arise in respect of those categories where the Minister suggests that a requirement to make discovery would be disproportionate because the margin between the successful tenderer and Word Perfect was very small. In that context, counsel for Word Perfect makes the point that the evaluation is a cumulative one and a series of small differences can add up. However, the starting point has to be to recognise that the assessment did give quite a significant winning margin to the successful tenderer. At the outcome of the tender process, Word Perfect was awarded 848.37 marks, and the successful tenderer was awarded 949.15 marks. The difference between the two tenders was 100.78 marks, of which 57.7 marks were attributable to the costs criteria. It is clear that this margin could not, in itself, be narrowed significantly, let alone closed by a small number of errors being identified each one of which only made a difference of one or two points. On the other hand, if Word Perfect is able to persuade the trial judge that it should succeed on some of the areas where there was a significant difference between the marking of the respective parties, then it remains possible that some further small victories could make a difference to the overall result. Again, based on the principles identified earlier in this judgment, I would propose that discovery not be ordered now in relation to those categories involving a very small margin but rather that this matter can be revisited by the trial judge if, in the light of how the trial judge views the case as a whole, it is felt that success on some of those relatively marginal matters might ultimately be able to tip the balance in favour of Word Perfect.

10.11 I turn next to those areas where Word Perfect was not given any reason for the marking in the area concerned because, relying on the judgment of Barrett J. in *Word Perfect Translation Services Ltd. v. Minister for Public Expenditure and Reform* [2018] IEHC 237, the awarding authority did not consider it necessary to give such reasons where Word Perfect obtained equal or greater marks than those given to the successful tenderer. Obviously granting discovery in this respect might well result in the giving of reasons which the Minister claims not to be obliged to do. Whether the Minister is correct in that regard may be a matter for the trial judge. It may, however, be useful to consider a very simple example. One might assume a tender process where there were only two criteria of equal weighting, being price and quality. We might also assume that there were only two tenderers. Price is, of course, capable of fairly exact mathematical comparative calculation. Even where price may be determined in accordance with complex formulas, the method of assessment will normally be specified in advance. For example, a long term income stream may be specified as being converted to a current sum with a net present value calculated by reference to a specified discount rate. Be that as it may, it is

easy to envisage a case where it could be shown, objectively, that the unsuccessful tenderer was 1% dearer than the successful tenderer.

10.12 However, in such a case it would hardly be particularly surprising if the slightly more expensive tender was also higher in quality. The ultimate outcome of the tendering process would, in such circumstances, depend on whether the unsuccessful tenderer was assessed as having quality not more than 1% better than its competitor, for if it was assessed as having a greater margin on the quality side then this would inevitably outweigh its slight disadvantage on price. In those circumstances the whole tendering process would depend on whether (say) the more expensive tender was deemed to be 1.5% better on quality or only 0.5% ahead. In both cases the more expensive tender would have obtained higher marks than its competitor and would, on the existing case law cited, not be entitled to any reasons. However, those reasons would be the very nub of the assessment for they would entirely determine who was to be the winner.

10.13 However, for present purposes, it is only possible to say that this is an issue which may need to be determined as a question of law. I would, however, be concerned if it should transpire that an unsuccessful tenderer is put in a position where it is given no reasons as to why it might not have had a better margin over its competitor in an area where it did well and also then be informed that it could not have discovery in relation to any issues which might arise in such areas. There would, in such circumstances, potentially be a real risk that there might not be an effective remedy.

10.14 As noted earlier in the commentary on the UK case law, it may be reasonable to expect a party who has been given detailed reasons to go itself into some detail as to how it can be maintained that there is a credible basis for suggesting a manifest error before giving that party access to confidential information. The situation will not be at all the same where the party concerned is not, on whatever basis, given any reasons at all. In those circumstances I would favour the approach adopted by Hogan J. in *Word Perfect (No 2)* and direct discovery in respect of those areas where no reasons were given. The discovery concerned should involve disclosure of the assessment of the awarding authority of Word Perfect's tender, together with any aspect of the remainder of the evaluation in respect of those areas which can be disclosed without revealing sensitive commercial data submitted by competing parties. It is worth noting, however, that this discovery should, at least at this stage, be limited to the evaluation report (redacted as appropriate), and should not include the prior drafts of the evaluation report nor documents relating to the successful tender. Once Word Perfect has obtained such discovery, I would emphasise that it would be open to it to seek to persuade the trial judge to disclose further information if it can make out a credible basis for suggesting that such additional information is truly necessary to a just and fair resolution of these proceedings. I would also emphasise that discovery of these documents is granted solely on the basis that Word Perfect did not receive any reasons for the marking in the areas concerned. In circumstances where a public authority had furnished an unsuccessful tenderer with reasons for its marking, it would be much more difficult for that tenderer to

make an argument that it is entitled to discovery of documents relating to areas where it outperformed the successful tenderer.

10.15 Insofar as issues have been raised concerning the application of undisclosed tender criteria by the Minister in the evaluation process, I would, again, direct that discovery is granted of the evaluation report, subject to redaction. In order for Word Perfect to assess how the various award criteria were treated by the Minister during the evaluation process, and to then advance its case for judicial review, it is necessary for it to have sight of the evaluation report. Once Word Perfect has obtained this discovery, I would, again, emphasise, that it would be open to it to seek to persuade the trial judge that discovery of further documents is needed for the fair resolution of proceedings.

10.16 I would add that I do not consider that those pleas contained in Word Perfect's claim, which merely express "concerns" (such as paras. 81 and 82 of the Statement of Grounds) provide a sufficient basis for establishing a claim with some established possibility of success so as to justify discovery of confidential documentation said to be relevant to such claims.

11. A Proposed Course of Action

11.1 As noted earlier, there are a number of types of document where I propose that immediate discovery not be ordered but that the position be preserved so that the trial judge can require further disclosure should it become clear at the hearing that such disclosure is necessary for a just and fair resolution of the proceedings. In that context it is appropriate to note that the Remedies Directive does require that parties wishing to challenge public procurement decisions should have access to a speedy process. The approach that I suggest should be adopted in appropriate procurement proceedings involves directing immediate discovery of documents which are relevant and which either do not involve confidentiality (or any other issue which might be relied on to suggest that relevant documents did not have to be disclosed) or where it is clear, even at the interlocutory stage, that the disclosure of confidential information will be required but where it is left to the trial judge to determine whether further disclosure may be necessary. It seems to me that this approach is one which improves the likelihood of a speedy resolution to the proceedings.

11.2 Where an iterated process is required in order to achieve a proper balance between the competing interests of effectiveness and confidentiality, then a speedy resolution would not be achieved if there were to be a series of separate interlocutory applications for discovery. It is for that reason that I propose that any second round of additional discovery should be left to the judge actually conducting the full hearing rather than a process which might involve a second or third motion for discovery in advance of that hearing.

11.3 I should also indicate that the comments which I have made concerning further disclosure being directed by the trial judge should be taken as applying equally to a situation where immediate discovery is made of documentation which may be redacted and where the trial judge may have to consider whether the making available of an unredacted copy

(either in whole or in part) may be necessary for the just and fair resolution of the proceedings.

11.4 I would propose that the Court should direct that all documents in respect of which it is appropriate to adopt such an iterated approach should be the subject of an affidavit sworn contemporaneously with the main affidavit of discovery. However, that additional affidavit should not be handed over at that time. The affidavit, together with the documents referred to in it, should be available in court so that there can be immediate disclosure of any materials which the trial judge directs. For the avoidance of doubt, that should include unredacted copies of any documents in respect of which a redacted copy is made available at this stage.

11.5 I would also propose that the parties be given an opportunity to consider this judgment and to seek to agree the form of order for immediate discovery which should be made on the basis of this judgment. I would suggest that the parties should be urged to engage constructively on that matter. If there are specific issues on which the parties cannot agree, I would propose that the Court should direct early and focussed written submissions which would allow the Court to finalise an order for discovery in early course.

11.6 Clearly the order which this Court will make should also include the provisions referred to earlier concerning the preservation and availability of additional documentation which may become the subject of further disclosure directions by the trial judge. The aspect of the order which the parties are invited to agree concerns only the terms of the immediate discovery which should now be directed in the light of the principles identified in this judgment.