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Judgment: approved by the Court for handing down *(subject to editorial corrections)**	*Delivered:*	**07/04/2016**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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CLIVE RICHARDSON LIMITED

v

NORTHERN IRELAND HOUSING EXECUTIVE

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KEEGAN J

[1] This is an application brought by the plaintiff, Clive Richardson Ltd, by summons dated 1 April 2016. The grounds for the application are set out in the affidavit of Gerard Patrick Ward, Solicitor, also dated 1 April 2016.

[2] Mr McCausland appeared for the plaintiff, Mr Dunlop for the defendant and Ms Cooper of Tughans Solicitors for the notice party, Landscaping Centre Ltd. I am grateful to all for their assistance in relation to the issues.

[3] The application was dealt with as an urgent matter before me on Tuesday of this week given that there is a substantive hearing listed before Mr Justice Deeny on 15 April 2016. I therefore will give this brief ex tempore judgment to facilitate the timetable set for that hearing.

[4] The plaintiff's application is for early discovery of documents from the defendant in a procurement action. The plaintiff has issued three writs against the defendant which are dated 11 February 2016. These writs principally seek relief pursuant to the Public Contracts Regulations 2015 as to the plaintiff's failure to achieve an award of contract from the defendant in relation to ground and tree maintenance services. There are three writs because there were three failed tenders by the plaintiff but I am told there will be an application for consolidation. A statement of claim has not yet been served. The defendant has applied to set aside the automatic suspension of the award of the contract pending the procurement

action. That is the application listed for hearing on 15 April. The notice party is the successful tenderer regarding the three contracts.

[5] This application relates to documents as set out in Schedule 1 of the summons that is a list comprising 11 items. I was helpfully told by counsel that only one item is at issue, the other 10 items having been provided if available.

[6] The item at issue is number 1 on the list in Schedule 1, namely the quality submission of the winning tenderer. I note that the quality evaluation of the winning tenderer and that of the plaintiff has been provided. Mr McCausland filed a helpful skeleton argument which I have considered and which sets out much of the relevant legal principles and jurisprudence in this area. Mr Dunlop replied to that in his oral submissions and there was no real dispute in relation to the legal principles which I can summarise as follows.

[7] Firstly, reference was made to Order 24 Rules 7 and 9 of the Rules of the Court of Judicature of Northern Ireland 1980. Suffice to say in summary these provisions clearly allow for early discovery. The test it seems to me is set out in Order 24 Rule 9 and that is whether it is necessary for either disposing fairly of the cause or matter or for saving costs. This is clearly a necessity test which also requires a consideration of the cause or matter at issue.

[8] In my view context is significant. This is a procurement action, it is at an early stage where what is at issue is whether the automatic suspension to the award of the contract be lifted. The plaintiff has to be able to argue against that application and the proceedings have to be fair to allow the plaintiff to do that. This is an important issue in terms of whether or not the automatic suspension should be lifted. Notwithstanding the fact that the suspension may be lifted, the plaintiff could still mount a claim in damages. It is important to bear in mind that the hearing on 15 April is in relation to this suspension, it is not a full hearing of the procurement action as Mr Dunlop says. It seems to me correct to state that the suspension hearing involves the application of principles as set out in American Cyanamid Company v Ethicon Ltd [1975] AC 396. Broadly, that involves 2 or 3 steps to be overcome before the court can maintain an interim injunction.

[9] The first question to answer is whether there is a serious issue to be tried. The second step involves considering where the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought. That involves, of course, a consideration of where the balance of convenience lies and whether an applicant would be adequately compensated by an award of damages.

[10] The principles regarding discovery in procurement cases seem to me to be set out fairly clearly in a number of decisions. Principally, the decision put before me is a case Roche Diagnostics v Mid Yorkshire Hospital Trust [2013] EWHC 933 and the principles have been applied in this jurisdiction by Mr Justice Weatherup in a decision of Fox Building and Engineering Ltd v DFP [2015] NIQB 71. The relevant

paragraph in the Roche case that has been referred to me is paragraph 19 which sets out principles from points A-E and these have been repeated by Mr McCausland in his skeleton argument. Reference has also been made by Mr Dunlop in his oral submissions to those principles. They are obviously core to a consideration of this type of case. I do not intend to read them out but I have considered all of them individually in making my determination.

[11] I do note that both the Roche case and the Fox case I have referred to involve discovery at somewhat different stages and in different contexts. I have also considered an authority of Mr Justice Akenhead in a case of Pearson Driving Assessment Ltd and the Minister for the Cabinet and the Secretary of State for Transport which is a decision reported as [2013] EWHC 2082 and I have considered the decision of Mr Justice Weatherup which is referred to in the Fox case of Scott v Northern Ireland Water [2012] NIQB 7.

[12] All of these cases are slightly different on the facts. In this case the important point to bear in mind is that the application for early discovery is made post writ but pre-statement of claim. It is in the context of a hearing regarding the suspension being lifted. I have to consider whether it is necessary. I also have to bear in mind that discovery has already been made of some documents which are relevant. On one hand that may point to the fact that the remaining document asked for should be provided but on the other hand it may point to the fact that enough relevant document has been provided to allow the plaintiff to argue the case on 15 April.

[13] The issue in this case raised by the plaintiff relates to the quality evaluation of the tender and the plaintiff relies on established, and it seems to me, uncontroversial principles that all tenderers are to be treated equally and in a non-discriminatory and transparent way and that the process is fair and free from manifest error. It seems to me that it is only permissible to order discovery if necessary to dispose fairly of the case. The commercial judge directed correspondence to bring clarity to the issues raised between the parties and I have considered this in making my determination and in particular I have considered the letter sent by the plaintiff dated 23 February 2016, the reply from the defendant of 25 February 2016 and the plaintiff's subsequent letter of 4 March 2016.

[14] During the hearing of this application I was also referred to the substance of the documents already provided to the plaintiff. In particular I was referred to the quality evaluation of the plaintiff and the quality evaluation of the successful tenderer, Landscape Centre Ltd. These documents show the scoring applied to the plaintiff and the successful tenderer and some comments are added. It is clear to me that the plaintiff's issues must centre around point 1(ii) in the evaluation where a score of 2 out of 5 was applied to the plaintiff and point 1(v) where again a score of 2 out of 5 was applied. With weighting that essentially led to the 80 point difference between the plaintiff and the successful tenderer.

[15] Mr McCausland argued that he should be provided with the entire quality submission of the successful tenderer and he said that he needed that to argue the case on 15 April and that it would be subject to a confidentiality ring to be provided to him and his solicitor only. I note the submissions of the notice party, the successful tenderer, which really left the matter of discovery to the court but if discovery were to be provided that it should be subject to a confidentiality ring. Confidentiality is obviously an important consideration in this type of case but there is another important consideration which is commercial sensitivity that I have to bear in mind.

[16] The correspondence that I have looked at is instructive and I have considered it in some detail in deciding whether the discovery sought should be provided at this stage. It seems to me that the discovery must be relevant and necessary to fairly dispose of the case and as I have said I bear in mind issues of confidentiality and commercial sensitivity. Looking at the correspondence and considering it in the context of the legal submissions made by both parties it seems to me that much, if not all, of the plaintiff's complaints are regarding how the plaintiff has been assessed against the criteria. It follows from that assessment of the case that I do not consider that the entire successful tender submission of the successful tenderer is required to be discovered. There is then an issue as to whether a part of the document should be discovered.

[17] It appears to me that the arguable points are those in the quality evaluation 1(ii) and 1(v). Having looked at the correspondence I am not convinced that a case has been made out for discovery in relation to those matters. I consider that the plaintiff has enough information upon which to argue against the suspension being lifted and it seems to me that the defendant's answers in correspondence at D, F, G and K are relevant replies in relation to the arguments. I do not see that discovery should be provided in relation to the matters raised regarding 1(ii) and regarding 1(v) as I do not see how this is necessary given that the answers provided by the defendant in correspondence. These seem clear to me particularly in relation 1(v) in relation to the emergency plan being absent and the issue of details. So I am not convinced that Mr McCausland is right to say that he does not have enough information to go on in terms of arguing against the suspension on those two core areas which it seems to me are really at the heart of his claim.

[18] I do not consider that the plaintiff has made out the case for the further discovery sought of document 1 which is the successful tenderer's quality submission at this time. I say at this time because it seems to me that my determination does not preclude application at a later stage of the proceedings, if appropriate. The trial judge may be asked to look at this matter again in the course of proceedings, because the overriding objective is to ensure that proceedings are fair. For the avoidance of any doubt, had I allowed for discovery at this stage I would have applied the confidentiality ring as helpfully accepted by Ms Cooper. So that is my determination in relation to the application made in relation to the one area of outstanding discovery.