

Submission to the Review of the Administration of Civil Justice

This very brief submission concerns a specific aspect of civil procedure – discovery in public procurement cases. It is prompted by a discussion chaired by Mr Justice Barniville at a recent public procurement conference in the Royal Irish Academy (on 28 June 2018).

At present, there are no special discovery rules for public procurement cases.¹ I think a case could be made that if there were, or if there were a protocol or Court guidance concerning disclosure of documentation in procurement cases, this could potentially assist in reducing the time and cost that is often spent in discovery disputes in these cases.

Arguably, costs would be reduced if the parties disclosed, at an early stage, key documents which would ultimately be subject to discovery in any event. This is what the Technology and Construction Court in England and Wales encourages, through its *TCC Guidance Note on Procedures for Public Procurement Cases*.² Some of the special features of these cases, and the reason why some particular discovery procedures might be appropriate to them, are discussed in the TCC Guidance Note and in cases such as *Roche Diagnostics Limited v The Mid Yorkshire Hospitals NHS Trust* [2013] EWHC 933. The TCC Guidance Note also discusses the use of confidentiality rings, which will often be an important element of document disclosure in procurement cases, where details of different tenders are at issue.

I know that reform of discovery is a major item on the Review Group's agenda. There may be a question as to whether, for reasons of principle, policy or something else, all types of civil litigation should have the same discovery rules and I imagine that may not be a straightforward issue. But it can be questioned whether discovery rules which might be appropriate for largescale commercial litigation between two companies, say, are fully appropriate for cases like public procurement.³ If some specialist rules or procedures could be shown to potentially have a significant cost-saving benefit, while also promoting the fair resolution of the dispute, they may be worth considering.

I apologise that this submission has so little detail and does no more than flag the issue. As noted above, it was only prompted arising from a conference a few days ago.

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¹ See *BAM v NTMA* [2015] IECA 246.

²<https://www.procurementportal.com/files/Uploads/Documents/TCC%20Guidance%20Note%20on%20Public%20Procurement%20Cases%20final.pdf>

³ This point is made by the Commercial Litigation Association of Ireland, at footnote 9 of its submission to the Review Group, where it is noted: "It is recognised that the proposed new rules may not be appropriate for certain forms of litigation (e.g. judicial review proceedings) and that more specialised rules may be required for discovery in technology/ intellectual property actions and certain types of competition law cases."