

11KBW

Early disclosure

Confidentiality rings

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17 November 2017

Early disclosure – the *Roche* test

The *Roche Diagnostics* test:

“In general terms, therefore, and always subject to issues of proportionality and confidentiality, the challenger ought to be provided promptly with the essential information and documentation relating to the evaluation process actually carried out, so that an informed view can be taken of its fairness and legality. ..

However, notwithstanding that general approach, the court must always consider applications for specific disclosure in procurement cases on their individual merits. In particular, a clear distinction may often be made between those cases where a *prima facie* case has been made out by the claimant (but further information or documentation is required), and those cases where the unsuccessful tenderer is aggrieved at the result but appears to have little or no grounds for disputing it.”

Early disclosure – the *Roche* test (2)

In *Roche*, the Court ordered disclosure, into a confidentiality ring, of:

- the instructions that were given to the defendant's evaluation team.
- all of the documentation produced for and occasioned by the actual evaluation process itself.
- any documents generated by any independent check of the evaluation process actually carried out.

Confidentiality rings – the general law

Dyson Ltd v Hoover Ltd (No 3) [2002] RPC 42

“the essential starting point for considering what to do about disclosure is that there should be full disclosure to the parties to the litigation of all those materials which are going to be considered and which may be put before the court.”

“[the onus] is on the party trying to restrict disclosure to justify it and to show why, in all the circumstances, notwithstanding onerous undertakings as to confidentiality and the like, nevertheless documents should not be shown to the litigant on the other side.”

Confidentiality rings - *Bombardier*

Bombardier Transportation v Merseytravel (No. 2) [2017] EWHC 726 (TCC)

- Challenge to large-scale train procurement.
- Confidentiality ring established by consent to receive confidential information (CI) and highly sensitive documentation (HSD), including the winning tender.
- Shortly thereafter, application to amend the terms of the ring so that independent consultants could consider HSD, client representative to be added and disclosure in electronic format. Defendant neutral, winning bidder opposed.

Confidentiality rings – *Bombardier* (2)

- Given risk of unequal treatment of tenders, “*a claimant in the position of Bombardier is entitled to investigate fully the comparative treatment of the tenders, either to confirm criticisms it has already made, or to found freestanding allegations*” (§23). On that basis, the winning bid would be disclosable.
- The conclusion that Bombardier was engaged in “*an unjustified fishing expedition .. cannot be reached at this stage*” (§24).
- Absent cogent evidence, the Court would assume that individuals will comply with their undertakings (§42).

Confidentiality rings – *Bombardier* (3)

- Application to extend access to HSD granted (§29).
- Electronic format application granted (§8).
- But access of client representative refused, for now, due to forthcoming tenders and risk of inadvertent disclosure (§3).
- *Prima facie*, the winning bidder, which had resisted the application, was liable for costs (although not a party to the litigation) (§53).

Confidentiality rings - *Cemex*

Cemex UK Operations v Network Rail [2017] EWHC 2392 (TCC)

- Challenge to contract for supply and manufacture of railway sleepers, by third-placed bidder, on grounds that winning bid was “abnormally low”.
- Application made to extend time for service of PoC and for specific disclosure, including of winning tender.
- Dispute about terms of confidentiality ring.
- But make-up of confidentiality ring “*classically matters for the parties to sort out and agree*” not for court to rule on (§44).

Confidentiality rings – Cemex (2)

- Cemex criticised for refusing to accept documents on a lawyers-only basis (§27).
- And for refusing to sign an undertaking for external experts with a “reasonable” three year exclusion from future procurements in this area (§47).
- Disclosure of winning bid material refused:
 - need to ensure that early disclosure focused on the central issues and to guard against fishing expeditions (see *Alstom v London Underground* [2017] EWHC 1584 (TCC) where parts of winning tender not to be disclosed - §39).
 - it was for the authority (subject only to manifest error) and not a claimant to assess whether a bid was “viable on a long term basis” (§22).
 - disclosure would reveal the DNA of the company to competitor (§53).

Confidentiality rings - issues

Which documents?

The winning tender?

Lawyers only? Independent experts? Clients?

Undertakings

Role of winning bidder?

Arrangements for trial

The question ...

How are challengers benefiting from the shift in balance between (1) transparency, (2) access to remedies and (3) confidentiality in the context of the *Bombardier v Merseytravel* case?