Neutral Citation Number: [2014] EWCA Civ 900

Case No: A1/2014/1586

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT, QBD
MANCHESTER DISTRICT REGISTRY
His Honour Judge Raynor QC
Case A50MA011

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/07/2014

Before:

LADY JUSTICE ARDEN
LADY JUSTICE BLACK
and
SIR ROBIN JACOB

- -

Between:

DWF LLP	**Appellant**
- and -	
THE SECRETARY OF STATE FOR BUSINESS INNOVATION AND SKILLS, ACTING ON BEHALF OF THE INSOLVENCY SERVICE	**Respondent**

- -
- -

Michael Bowsher QC Akhlaq Choudury and Joseph Barratt
(instructed by DWF LLP) for the Appellant
Sarah Hannaford QC and Andrew Sharland
(instructed by Eversheds LLP) for the Respondent

Hearing date: 11th June 2014

- -

Sir Robin Jacob (giving the first judgment at the invitation of Arden LJ)**:**

Introduction

1. This appeal is from a judgment of 9th May 2014 of His Honour Judge Raynor QC sitting as a Deputy Judge of the Technology and Construction Court. He refused an application by the claimant firm of solicitors (DWF) for permission to amend its Particulars of Claim.

2. The claim is against the Insolvency Service ("IS"). It comes about this way. On 5th July 2013 the IS issued a notice for a tendering exercise to procure the provision of legal services both for England and Wales and for Scotland. It envisaged there would be awarded up to six contracts, 4 in England and Wales and 2 in Scotland for a period of 3 years. The value of the proposed contracts (bafflingly called a "framework") was of the order of £32-50m.

3. The notice was in the Official Journal of the EU. The Invitation to Tender set out details of what services were wanted ("Statement of Requirements") the award criteria and the scoring scheme to be used.

4. DWF tendered both for England and Wales and for Scotland on 5th November 2013. DWF went to a presentation meeting on 10th December which was followed by a Q&A session.

5. By a letter of 23rd January, to which was attached an "Award Decision Notice," the IS told DWF that its bids for both Scotland and England and Wales had failed. The contracts for England and Wales were to go to the three incumbent providers and a new provider for England and Wales, Shepherd and Wedderburn, who were also awarded one of the Scottish contracts.

6. The Award Decision Notice provided details of the scores achieved. DWF had been awarded scores of 47% in respect of the Statement of Requirements ("Criterion 1") and 27% in respect of the Pricing Model ("Criterion 2"), the total weighted score being therefore 74%. It was behind Shepherd and Wedderburn and another bidder for England and Wales by just 1%. The other winners had higher scores.

7. By letter dated 24th January 2014 DWF asked the IS to explain why it lost. There was a debriefing meeting on 29th January 2014. The IS said that the Shepherd and Wedderburn proposal contained more detail and gave greater comfort. On that basis that firm had been scored equally with the claimant under Criterion 1, but more highly on Criterion 2. Nothing was said in the course of that briefing about the presentations or any moderation (i.e. revision) of the scores.

8. A little later the IS provided DWF with the total scores of the bidders and a detailed breakdown of its scores. This surprised DWF. For it had scored better for Scotland than for England and Wales. That appeared inexplicable because its insolvency team had direct knowledge and experience of working in England, but not in Scotland, and this contrasted with the position of Shepherd and Wedderburn, which, so far as DWF was aware, had no or very limited experience in respect of provision of contract services in England and Wales. This "inexplicable" (I make no finding that it is – that will be for the trial) result was called the "Scottish anomaly."

9. On 3rd February 2014 DWF issued proceedings against the IS claiming that the latter had breached its obligations under the Public Contracts Regulations 2006 ("the Regulations"), EU Directive 2004/18/EC and general EU law principles. For present purposes it is sufficient to concentrate on the Regulations.

10. The Regulations provide the legal basis for the claim. Reg. 4(3) imposes on a contracting authority certain duties:

> "(3) A contracting authority shall (in accordance with Article 2 of the Public Sector Directive) -
>
> (a) treat economic operators equally and in a non-discriminatory way; and
> (b) act in a transparent way."

Reg. 47A makes those duties "owed to an economic operator." The claim here (speaking generally for the moment) is that the IS was in breach of its duties to DWF to act in accordance with the requirement.

11. The effect of the commencement of proceedings (or more precisely that they have been issued and the contracting authority has become aware of them) is that the contracting authority "is required to refrain from entering the contract" In the jargon of the procurement world this is called "automatic suspension". It can be lifted by an interim order of the court whilst proceedings are pending (see Reg. 47G(2) with more detail in Reg.47H).

12. In this case the suspension of the award of contracts by the IS remains in force because although Judge Raynor granted the IS's application for lifting of the suspension, he stayed the effect of that until 23rd May and on 22nd May Maurice Kay LJ, in addition to granting permission to appeal (which Judge Raynor had refused), continued the stay until this appeal was decided.

13. We therefore have two issues before us:

i) whether or not Judge Raynor was right to refuse DWF's application to amend its Particulars of Claim, and

ii) only if that is allowed (Mr Bowsher QC for DWF concedes that if it is not, it should go) whether the automatic suspension should continue until judgment in the action.

The Amendment Issue

14. Clearly a procurement dispute will need to be started early and resolved quickly. So there is a very short limitation period. Reg. 47D(2) says:

> …. such proceedings must be started within 30 days beginning with the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen.

15. The Claim Form issued by DWF on 3rd February was not accompanied by Particulars of Claim. It said under the "brief details of the claim" that it was seeking an order preventing the IS from awarding [the contracts]:

> "Because the defendant had breached and/or continues to act in breach of Directive 2004/18/EC, regulation 4(3) of the Public Contracts Regulations 2006 and/or general principles of EU law in relation to the award of the Proposed Contract. The Defendant has (amongst other things) inexplicably awarded the Claimant lower scores for its bid in respect of the provision of legal services in England and Wales than its bid for such work in Scotland in circumstances where the Claimant's experience of the former jurisdiction is far greater than in the latter. It appears to the Claimant (based on the limited information made available to it thus far as to the assessment and evaluation of the tenders) that, among other matters:
>
> (i) the Defendant committed manifest errors in its assessment and/or scoring of the Claimant's tender and/or of the tenders of one or more of the successful firms; and/or
>
> (ii) the Defendant has not treated the Claimant equally with other tenderers in the approach taken to evaluation of the tenders in relation to each jurisdiction and, in particular, that insufficient or less favourable consideration may have been given to the Claimant's bid as regards experience of providing the contract services within the relevant jurisdiction.."

16. The Judge said:

> [20] It is in my view significant that whilst there was a general allegation of breach of the Directive and Regulation 4(3), the grounds did not allege a breach of the obligation stated in Regulation 4(3)(b) to act in a transparent way. A breach of the obligation to treat operators equally was, however, alleged and Mr Choudhury, Counsel for the claimant, points out that under EU law the principle of equal treatment implies an obligation of transparency in order to enable verification that there has been equal treatment. That is correct. However, the obligation to act in a transparent way is a distinct obligation, separately enumerated in the Regulation, although not separately enumerated in the Directive.

17. I do not see the significance for several reasons:

i) First there is actually a direct reference to Reg. 4(3) which refers to both non-discrimination and transparency;

ii) Second although the word "transparency" is not mentioned explicitly in the claim form whereas there is reference to unequal treatment, the two can and do necessarily overlap and are closely intertwined: transparency flows from

equal treatment. The ECJ put it this way in *ATI EAC* Case C-331/04, [2005] ECR I-10109:

> [24] Similarly, in order to ensure respect for the principles of equal treatment and transparency it is important that potential tenderers are aware of all the features to be taken into account by the contracting authority in identifying the economically most advantageous offer, and, if possible, their relative importance, when they prepare their tenders.

A crude example will illustrate how readily there can be overlap. Suppose the authority secretly decides to prefer X over Y and does so. It would be acting both untransparently (maybe opaquely would be a better word) and treating parties unequally.

iii) The factual basis of the complaint is that the IS has "inexplicably awarded the claimant lower scores for [England than for Scotland] in circumstances where the Claimant's experience of the former jurisdiction is far greater than the latter". DWF go on to suggest ("based on the limited information it has thus far") as to why this may have happened. I cannot see that in any way DWF were thereby limiting their claim to lack of equal treatment or an aspect of equal treatment which was not also a lack of transparency. On the contrary I think a fair reading is that the claim is based on whatever went wrong in reaching the inexplicable result, whether that was unequal treatment, lack of transparency or both.

18. Particulars of Claim were served on 21st February 2014 – still within the limitation period.

19. At para. 22 the "Scottish anomaly" was pleaded.

20. At paras. 23 and 25 it is pleaded that a full breakdown of the apparently anomalous scores for all tenderers had been asked for and had been refused.

21. Para. 26 pleads in general terms the duty to carry out the procurement in accordance with the Regulations and Directive.

22. The following paragraphs then provide more detail:

> 27. In particular, the Defendant owed the Claimant a duty:
>
> (a) under reg.47A to comply with the Regulations and the general Treaty principles of EU law in conducting the tender process;
>
> (b) under reg.4 the Directive and Articles 49 and 56 of the Treaty on the Functioning of the European Union ("the TFEU") and the general Treaty principles of EU law, to conduct the tender process consistently with the principles of equality, non-

discrimination, transparency, proportionality and good administration.

28. In refusing to award the Claimant a contract under the Proposed Framework, the Defendant has acted in breach of the said obligations. As the Defendant has thus far refused to provide further information or disclosure so as to explain or seek to explain its decision, the best particulars of breach that the Claimant is currently able to provide, in the absence of further information or disclosure herein, are as follows:

29. Under headings 2.2.3, 2.2.6, 2.3.1, 2.3.2, 2.4.5, 3.1 and 3.2 of the Statement of Requirements in the ITT:

a. The Claimant was awarded a lower score for England & Wales than for Scotland;

b. The subject matter of each such heading would suggest that direct knowledge and experience of that subject matter in the particular jurisdiction would, in the ordinary case, attract a higher score;

c. By awarding a lower score than that awarded in respect of the jurisdiction in which the Claimant had no direct experience, the Defendant thereby committed a manifest error and/or was misdirected as to the correct interpretation and scope of this heading in that it failed to have regard to the Claimant's direct knowledge and experience of the England & Wales jurisdiction. Such knowledge and experience was a factor that ought to have resulted in a score greater than that for Scotland or at the very least resulted in a score equal to that for Scotland. The basis for the scores awarded to the Claimant is not known and has not been disclosed or explained.

30. The general Treaty principle of good administration and the requirements of objective and accurate assessment to which the Defendant was subject required that the appointed scorers were sufficiently expert and experienced to ensure that final tenders were evaluated objectively, accurately and rationally in a manner consistent with the duties of transparency, non-discrimination and equal treatment. The Defendants breached this duty as demonstrated by the manifest errors herein described.

31. By scoring the Claimant as described, the Defendant has not treated the Claimant equally with other tenderers in the approach taken to evaluation of the tenders in relation to each jurisdiction and, in particular, has given insufficient or less favourable consideration to the Claimant's bid as regards its direct knowledge and experience of providing the contract services within the relevant jurisdiction.

> 32. Insofar as it becomes apparent from any further information and/or disclosure herein that the Claimant's scores were subject to any downward adjustment at any stage by reference to matters and/or criteria not apparent from the ITT and/or other tender information, the Claimant reserves the right to contend that the Defendant was in breach of the principles of transparency and/or equal treatment in applying an undisclosed award criterion to the disadvantage of the Claimant.
>
> 33. Insofar as SW obtained a higher score than the Claimant in respect of its bid for England & Wales under any of these headings, the Claimant will say that, given SW's limited direct knowledge and experience of that jurisdiction, it is likely that the Defendant thereby committed a manifest error and/or was misdirected as to the correct interpretation and scope of such heading and/or was the subject of unequal (and more favourable) treatment as compared with the Claimant. The Claimant will say that, if properly evaluated, SW should have been scored less than the Claimant in respect of those headings in the Statement of Requirements where direct knowledge and experience of the jurisdiction was or would be relevant.
>
> 34. The Defendant's stated reason given in the Award Decision Notice for not selecting the Claimant, namely that the "*successful bid(s) had clear direct experience of acting with "authority" on Public Interest Investigations"* suggests a manifest error insofar as it purported to apply to SW's experience as compared to that of the Claimant in England and Wales."

23. The IS pleaded a Defence to these unamended particulars on 24th March. What it said has some significance as I shall demonstrate later.

24. Meanwhile DWF had been pressing for disclosure. The IS responded on 17th March by a witness statement of a Mr Matthews exhibiting a report by Mr Batkin. The Batkin report described what happened at the presentation of 10th December and the moderation of scoring thereafter. The Judge summarises what was said:

> [26] That report disclosed that before the presentations the claimant, Shepherd and Wedderburn and Howes Percival, had each scored 75 points in respect of the non-price Statement of Requirements for England and Wales, and that following the presentation the claimant's score was reduced to 74, with the result that it fell into fifth place and failed to win the contract. The reason for the downward adjustment was explained by Mr Batkin in his report as follows:
>
> > "…the panel received presentations from the bidders and agreed that the presentation from DWF (tied with Howes Percival and Shepherd and Wedderburn) for 3rd and 4th place, indicated a marginal weakness in the

> structure of the firm with an over reliance on two partners, expert in UK Public Interest Law, having to disseminate this knowledge to other insolvency lawyers, which does not apply to Howes Percival.
>
> Shepherd and Wedderburn reinforced their ability and commitment to England and Wales by "fielding" two Insolvency Lawyers from their London office, both experienced in Public Interest Law, and one qualified in both UK and Scots law, who will be supported from the Scottish offices.
>
> Consequently, the panel agreed that of the three "tied" suppliers that DWF represented the marginally weaker proposition, and that the aggregated scores should be adjusted to reflect this."

25. It was this disclosure which caused DWF to seek to amend. This it did by an application notice dated 16th April and subsequently served on the IS. It is common ground that the application notice was issued within the limitation period – that running from the time the Batkin report was disclosed on 17th March. If a fresh claim had been issued on the date the application wasissued and notice of it had been given DWF would have been in time. But DWF did not issue a fresh claim, it applied to amend. The amendments would not, if allowed, be effective on the day of the application. By the time the matter came before Judge Raynor the limitation period had expired. It was common ground before us that the general rule, as decided in *WDA v Redpath Dorman* [1994] 1 WLR 1409, is that an amendment is treated as having been made on the day it is (or would be) allowed, not the date when the application for leave to make the amendment is made – there is no retrospectivity.

26. The proposed amendments look extensive, though in the end I do not think they really are. Paragraph 28 was amended to read:

> [28]. In refusing to award the Claimant a contract under the Proposed Framework, the Defendant has acted in breach of the said obligations. ~~As the Defendant has thus far refused to provide further information or disclosure so as to explain or seek to explain its decision,~~ ~~T~~he best particulars of breach that the Claimant is currently able to provide, ~~in the absence~~ pending ~~of~~ further information or disclosure herein, are as follows:

27. The Judge omits this paragraph, but I think it has some significance. After all it alleges a breach of the "said obligations" which are all the obligations identified in paragraph 27(b) quoted above.

28. The amended Particulars then strike through the whole of previous paragraphs 29-34. They seek to substitute, under the new heading "Unlawful conduct of presentation and related breaches of duty" new paragraphs 29-38. They read (I omit the underlining which makes it more difficult to read):

> "29. On 28 November 2013, the Defendant invited the claimant to attend a 'clarification' presentation ("the Invitation"). So far as relevant for present purposes, the Invitation stated that:

(1) the presentation *"should encompass the high level description below...";*

(2) *The presentation should encompass a brief introduction of who you are, how you intend to structure your operations to provide all the required services and how you will demonstrate that you are providing value for money on an on-going basis (no more than 25 minutes), followed by questions from the panel on the matters included in your ITT practical operational issues.";*

(3) *"If there are specific questions directly applicable to your firm and tender submission, we will attempt to issue these questions in advance, otherwise they will relate to the general provision of the service requirement".*

30. It is averred that:

(1) The only information provided to the Claimant regarding the object and purpose of the presentation was that provided in the aforementioned ITT (see, *inter alia*, s.11 above) and Invitation , respectively.

(2) The Defendant did not communicate to the Claimant any specific question(s) 'directly applicable' to either the Claimant or its tender in advance of the presentation.

31. The manner in which the Defendant purported to conduct and evaluate the presentation, and subsequently mark-down and reject the Claimant's tender, was unlawful and breached its duties.

32. In a witness statement dated 17 March 2014 ("Richard Mathews 2"), the Defendant disclosed for the first time (at s.49) that the decision to mark-down and reject the Claimant's tender was taken at a meeting conducted by the Defendant shortly after the presentation. The Defendant asserts that this critical meeting was not minuted.

33. Richard Mathews 1 refers to, and exhibits, a report (said to be written by Mr Tim Batkin on 12 December 2013) that purports to record the Defendant's reasoning and justification for marking down and rejecting the Claimant's tender ("the Batkin Report").

34. So far as relevant for present purposes, the Batkin Report:

(1) States that the purpose of the presentation was to apply three evaluation criteria:

(a) "Structure (people, resources)"; (b) "Services (application of the structure and resources to providing the service)"; and (c) "Value for Money (rate cards, scale economies, innovation)" (the Presentation Criteria"). It appears that the Presentation Criteria were used to evaluate the statements made by the Claimant at the presentation.

(2) Identifies a single ground of criticism in support of the Defendant's decision to mark-down and reject the Claimant's tender, namely: "*a [perceived] marginal weakness in the structure of the firm, with an over reliance on two partners, expert in UK Public Interest Law, having to disseminate this knowledge to other insolvency lawyers...".* It is averred that the Defendant here applied a previously undisclosed award criterion relating to numbers of partners or solicitors with expertise in UK Public Interest Law ("the UK PIL Criterion", and, together with the Presentation Criteria, ""the Undisclosed Criteria").

(3) Explains that in marking-down and rejecting the Claimant's tender following the presentation the Defendant did not objectively and transparently apply the published award criteria, but rather:

(a) Undertook a wholly subjective, partial and relative *ad-hoc* comparison between certain (arbitrarily selected) features of the tenders' proposals and/or statements during the presentation.

(b) Relied on that flawed and unlawful comparison to decide which tenders (or tenderers) should be awarded places on the Proposed Framework.

(c) Then engaged in an arbitrary, non-transparent and unequal process of marking down the scores previously awarded to the Claimant's final tender in order to manufacture an adjusted, reduced, score that would be consistent with the result arrived at by the process described in (a) and (b) above. Amongst other breaches of duty, this entailed the Defendant marking down the Claimant's tender not by reference to any (real or perceived weakness in its content, but rather by reference to the Defendant's arbitrary and subjective appraisal of other tenderers' proposals and/or statements at the presentation. No other tenderer's scores were subject to a similar process of marking down.

35. The Undisclosed Criteria differ from the award criteria stated at Appendix 3 to the ITT and were applied to final tenders after they had been opened. It follows that the Defendant is in gross breach of its obligations of objectivity,

transparency, equality of treatment, good administration and proportionality.

36. Richard Mathews 1 also disclosed for the first time (at Exhibit 5) details of the scores awarded to the Claimant's final tender by reference to the award criteria published in Appendix 3 of the ITT before the changes that followed the presentation. Based on the information provided by the Defendant to date, the Claimant has prepared a table showing the changes made by the Defendant after the presentation (appended to these Amended Particulars of Claim as "Annex 1").

37. It is averred that the changes set out in the Annex: (i) are neither objective nor rationally connected to the content of the Claimant's final tender or statements at the presentation; (ii) are neither transparent nor proportionate, having regard in particular to the questions that were asked and statements made at the presentation; (iii) show that the evaluators arbitrarily, and without regard to published award criteria, reduced the Claimant's scores in order to manufacture an adjusted, reduced, score that would be consistent with the result arrived at by the unlawful process described above; and (iv) evidence that the Defendant fundamentally misdirected itself, breached its duties of transparency and equality of treatment and committed manifest errors.

38. Without prejudice to the generality of the foregoing averments:

(1) The Undisclosed Criteria are not the same as those set out at Appendix 3 to the ITT.

(2) The Invitation did not transparently disclose (or objectively define) the object, purpose and nature of the presentation or the evaluation methodology that the Defendant would purport to apply thereto.

(3) The Defendant did not - either by the Invitation or the questions asked at the presentation - transparently state or define which, if any, areas the Claimant's tender it considered: (i) required clarification; and/or (ii) gave rise to material concern such as might lead to marking-down of the Claimant's scores.

(4) The questions asked by the Defendant at the presentation did not permit the Defendant to conduct any objective clarification or verification of those aspects of the Claimant's tender that the Defendant subsequently purported to rely upon to justify marking down and rejecting the Claimant. Without prejudice to the generality of the foregoing, the Defendant did not at any stage conduct any objective

> clarification or verification of the expertise in UK Public Interest Law of the solicitors tendered by the Claimant to provide services under the Proposed Framework.
>
> (5) The Claimant will also say that: (i) the purported justification for the decision to mark down its tender was not consistent, or reconcilable with, the Defendant's PQQ evaluation and/or the information provided by the Claimant in its response thereto; (ii) the contents of the Claimant's tender; (iii) the written material provided and statements made by the Claimant in the presentation (which specifically referred to the significant expertise and experience in UK Public Interest Law of the three senior solicitors tendered by the Claimant to provide the services under the Proposed Framework).
>
> (6) Further, the Defendant misdirected itself and breached its duty of equality of treatment by purporting to mark down the Claimant's final tender by reference to the UK PIL Criterion in circumstances where SW's final tender for England and Wales relied on only two identified partners. Inexplicably, not only was SW's tender not marked down on this basis, the Batkin Report states that in SW's case this was evaluated as a positive feature.
>
> (7) Yet further, the Batkin Report evidences that SW at its presentation conceded that the two identified partners would be the only solicitors deployed in England and Wales to provide services under the contract. Inexplicably, not only was SW's tender not marked down on this basis, the Batkin Report evidences that in SW's case this was evaluated as a positive feature.

29. The heart of the amended complaint is that the reason for marking DWF down was not a matter within the criteria set out in the tender documentation. It is said (I take this from the Appellants' skeleton argument):

> In short, the Respondents arbitrarily, and without regard to published award criteria, decided that the Appellant should not be appointed to the Framework and then manufactured an adjusted, reduced, score to reflect that result.

30. The relevant limitation rules are contained in CPR 17(4)(1) and (2) (taken from s.35 of the Limitation Act 1980):

> "17.4(1)(a) This rule applies where -
>
> (a) a party applies to amend his statement of case in one of the ways mentioned in this rule; and
> (b) a period of limitation has expired under-
> ...
> ...

> (iii) any other enactment which allows such an amendment, or under which such an amendment is allowed.
>
> (2) The court may allow an amendment whose effect will be to add or substitute a new claim, but only if the new claim arises out of the same facts or substantially the same facts as a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings."

Under s.35(2) of the Act a "new claim" is any claim involving, among other things:

> "(a) the addition or substitution of a new cause of action..."

31. The IS contended, and the Judge accepted, that the amendment introduced a new cause of action and was thus out of time. Miss Hannaford QC supported that, submitting that in its original pleading DWF had "nailed its colours to the mast", the mast being a claim based on inequality of treatment, not a claim based on lack of transparency in the form of undisclosed assessment criteria.

32. She pointed to original paragraph 32 which I quote again:

> Insofar as it becomes apparent from any further information and/or disclosure herein that the Claimant's scores were subject to any downward adjustment at any stage by reference to matters and/or criteria not apparent from the ITT and/or other tender information, the Claimant reserves the right to contend that the Defendant was in breach of the principles of transparency and/or equal treatment in applying an undisclosed award criterion to the disadvantage of the Claimant.

33. This she submitted showed that DWF were not at that time relying on lack of transparency – they were saying they would do that if further information came to hand to justify such a claim – "reserves the right to" means "may in the future but not yet."

34. Whether she and the Judge were right depends on the true construction of the original pleading. It is to that I now turn.

35. Firstly I observe that the general principles for the construction of documents must apply to a pleading. Thus one asks what the reasonable reader would think the author meant to convey having regard to the background facts which he or she knew and would know the reader knew. The key reader is the opposite party for the document is primarily aimed at him or her – it is telling that reader what the case against him or her is.

36. The parties would have known that DWF were pressing for an explanation of the "Scottish anomaly" and had not received it. The pleading repeatedly makes it clear that until they have that explanation DWF is working in the dark, see for instance paragraphs 23, 25, 28 and 34. The only "hard" facts which DWF have and refer to are the anomaly itself. That was called a "manifest error."

37. In those circumstances I think the reader would take it that the real complaint was about whatever caused that error. It was in effect saying "here is the error.

Something has gone wrong. My complaint is that that something is a breach of the duties owed to me." In the course of argument I suggested an analogy with the principles of *res ipsa loquitur,* an analogy which I think holds good. If, for instance, you get your car serviced and on the way back from the garage the steering fails, the inference is that the garage was negligent somehow. You only have to plead the fact of servicing and the accident – you do not have to explain how and in what way the steering failed.

38. The "right to reserve" in para. 32 would be understood by the reasonable reader in the sense that DWF were saying that if or when the reasons for the anomaly were disclosed, they would be relied upon too. They were not saying that they were not relying on those reasons now as part of the thrust of their case.

39. I am confirmed in my way of reading the pleading by the fact that it is exactly how the IS understood it. The Defence shows that the IS fully understood that the complaint was that something had gone wrong in the tender process as evidenced by the anomaly. It positively set out to rebut such a complaint, to explain and justify it.

40. Thus paragraph 14 of the Defence (I do not quote it here for it is quite long) specifically seeks to explain the alleged anomaly and denies that it is "inexplicable as alleged or at all." Moreover the Defence specifically pleads to the "reserve the right" paragraph 32 saying:

> "26. As to paragraph 32: (i) it is admitted that the claimant's scores in relation to its tender for a Framework Agreement covering England and Wales were moderated downwards following the claimant's presentation on 10 December 2013…. It is denied that the claimant's scores were moderated downwards at any other stage;
>
> (ii) it is denied that such downward moderation was made by reference to matters and/or criteria not apparent from the ITT and/or other tender information. In particular it is denied that the claimant's scores were moderated downwards because certain of the claimant's partners are the subject of investigation by the Insolvency Service."

41. This shows that the IS read paragraph 32 as containing a present averment; it was not just a pointless reference to a possible future amendment.

42. In the result I think the Judge was in error to conclude that a new cause of action was being alleged. What was being done was to move from a case based on inference from the anomaly to one based on explanation for it. It remained the same case.

43. Moreover as I have said above, there is no hard and fast distinction between a lack of transparency and unequal treatment. This case is essentially on the overlap between the two. The "anomaly" arises either because there was unequal treatment or because there was a lack of transparency or both.

44. That is sufficient to dispose of the appeal about amendment. It is not necessary to consider the other points raised.

Should the automatic suspension be lifted?

45. The Judge did not have to consider this as a separate matter. Applying *American Cyanamid* [1975] AC 396 principles he said that given the refusal of the amendment no serious issue was to be tried and hence there was no point in suspension.

46. It follows that, given the amendments are allowable, we must consider the question afresh, unfettered by any exercise of discretion below.

47. For present purposes I am content to apply *American Cyanamid* principles, as contended by Miss Hannaford. Mr Bowsher had an argument that somewhat modified principles should apply but it is not necessary to go into that.

48. The first *Cyanamid* principle is to ask whether there is a serious issue to be tried. Miss Hannaford submitted not. Logically this objection could also have been taken to the amendment itself – courts do not allow amendments to plead cases which cannot succeed.

49. I am confident that there is such an issue. The "marking down" may have been justified (after all the tender documents said scores could be "moderated") and it appears to me arguable one way or the other as to whether it was in accordance with the tender criteria. But it is not clear-cut at present and a trial is needed to resolve it.

50. Having passed the first hurdle the next question is to ask how long a period the suspension might be and to what extent it should be in force. You cannot assess the later *Cyanamid* questions without this essential background. We were told that there could be a trial in early August or September. Miss Hannaford, surprisingly, suggested that early August was too soon – that the case could not be ready. I do not accept that. It seems to me clear that all the documents and witnesses must be readily available. Competent lawyers could easily do the job in time. But there is not a great difference between the two dates anyway.

51. As to the extent of suspension, in the end it was agreed that the suspension could be lifted now in respect of the Scottish bids and the "top" bidders for England and Wales. The fight is really only between DWF, Shepherd and Wedderburn and another firm for the last place.

52. Next there is the question of whether an award of damages to be assessed would be an adequate remedy for DWF if it won. I am firmly of the opinion that it would not. The court would be involved in a host of speculative questions. What chance would DWF have had in winning its bid, given that it, Shepherd and Wedderburn and another firm originally tied? Moreover there would be the loss to the firm of general damage to its insolvency department, not only loss of or damage to an established team but also loss of reputation. This is quite impossible to quantify fairly.

53. As to whether damages to the IS would be adequate if DWF were to lose, I think that they would be much easier to quantify. DWF have given a cross-undertaking in damages which will run until judgment in the action. There is no question of its being unable to meet it. As to the amount, it may be that the IS would have to pay somewhat higher prices than it would if there were another provider but that is quantifiable.

54. The IS also suggest that it would have difficulty in sourcing services up to trial. That is wholly improbable given that the period is short, the IS has access to other frameworks, it could do small discrete awards for each job, awards which would be below the threshold for a full tendering process, it could use the Treasury Solicitors and Counsel, and it could allow existing contracts to continue. It is suggested it is deprived of the possibility of innovative services but in the absence of knowing what these are (it is difficult to imagine what they might be) the point cannot be considered seriously. It is suggested, but again without any detail, that there could be "TUPE" issues. Again we have no detail and the point just falls away. Finally it is suggested there could be damage to the successful bidders. Only Shepherd and Wedderburn and the other firm tied for third place fall to be considered because the suspension will only apply to them. As to these bidders it is not for the IS to worry about damage to them – they could (and if they had wanted to should) have applied to intervene to seek their own, independent, cross-undertaking in damages.

Conclusion

55. In the result I would allow the appeal in respect of the amendment, refuse to lift the suspension as regards the award of a contract to Shepherd and Wedderburn but lift the suspension as regards the other successful bidders.

Lady Justice Black

56. I agree.

Lady Justice Arden

57. I also agree.