Case No: HT-14-281

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**TECHNOLOGY AND CONSTRUCTION COURT**
**[2014] EWHC 3728 (TCC)**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 November 2014

**Before**:

**MR JUSTICE AKENHEAD**

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**Between:**

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| **NATS (SERVICES) LIMITED** | **Claimant** |
| **- and -** | |
| **GATWICK AIRPORT LIMITED** | **Defendant** |

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**Sarah Hannaford QC, Calum Lamont and Matthew Finn** (instructed by **Hogan Lovells International LLP**) for the **Claimant**
**Michael Bowsher QC, Rob Williams and Daisy Mackersie** (instructed by **Freshfield Bruckhaus Deringer**) for the **Defendant**
**Philip Moser QC (**instructed by **Simmons & Simmons LLP**) for an **Interested Party (DFS Deutsche Flugsicherung GMBH)**

Hearing dates: 24 October and 3 November 2014

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# JUDGMENT

**Mr Justice Akenhead:**

1. There are three applications before the court in these public procurement proceedings which relate to the tendering process for air navigation services at Gatwick Airport. NATS (Services) Ltd ("NATS") is the incumbent provider of such services but towards the end of 2013 Gatwick Airport Ltd ("GAL") instituted a tendering procurement in which both NATS and DFS Deutsche Flugsicherung GMBH ("DFS") participated and which led to DFS becoming the selected tenderer. Proceedings having been commenced, with the statutory or equivalent suspension preventing the placing of the contract with DFS and with the trial on liability due to start in about four weeks time, NATS seeks by way of two applications permission to re-amend its Particulars of Claim and to secure disclosure of various already disclosed documents to two in-house people who currently are not permitted by way of confidentiality arrangements to see them. GAL seeks to strike out various parts of the Amended Particulars of Claim and opposes a number of the proposed re-amendments.

**Introduction**

2. I adopt the summary of background facts set out by Mr Justice Ramsey in **NATS (Services) Ltd v Gatwick Airport Ltd & Anor** [2014] EWHC 3133 (TCC):

> "GAL published its intention to carry out the Procurement in the Official Journal of the European Union ("OJEU") on 2 October 2013. The tender was divided into two lots. Lot 1 related to air navigation services, including provision of staff for those services and Lot 2 related to maintenance and repair of equipment. The Procurement proceeded by way of Invitation to Tender ("ITT"), a negotiation phase and then the submission of best and final offers ("BAFO").
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> 6. NATS submitted its BAFO for Lots 1 and 2 on 2 June 2014. By letter dated 18 July 2014 GAL notified NATS that its tender had been unsuccessful and that DFS had been successful. In the correspondence that followed NATS sought further information and GAL contended that it did not come within the Regulations.
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> 7. On 18 August 2014 GAL wrote to NATS to give them 7 days' notice that GAL intended to enter into the contract with DFS. NATS therefore issued proceedings and an application for a declaration that there was an automatic suspension under Regulation 45G of the Regulations, alternatively an interim injunction. Particulars of Claim were served on 28 August 2014. On 3 September 2014 NATS issued an application for disclosure. Also on 3 September 2014 GAL issued an Application seeking to lift any automatic suspension, alternatively if the suspension remained in place, an undertaking in damages by NATS.
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> 8. After a hearing relating to disclosure on 5 September 2014 the application for disclosure was adjourned until early October 2014. The other applications were then heard on 10 and 12 September 2014."

3. At that hearing, Mr Justice Ramsey decided that there was a serious issue to be tried in relation to whether the Utilities Contracts Regulations 2006 as amended applied to the procurement and as to whether, even if they did not, an implied contract would have a comparable effect. Having considered whether damages would be an adequate remedy and the balance of convenience, he decided in effect that the statutory or equivalent suspension should continue until further order. Steps have been taken to fix a trial over two weeks at the beginning of December 2014, although there remains a discussion to be had as to how long the trial will be.

4. I will address first GAL's application to strike out parts of the Amended Particulars of Claim together with NATS' application to re-amend its Particulars of Claim, given that at least some of the re-amendments are proffered to overcome alleged deficiencies in the earlier pleading. I will then go on to consider the specific disclosure application.

## Strike-out and Re-amendment

5. Permission to amend the Particulars of Claim was given formally by Mr Justice Ramsey on 10 October 2014, although a draft had been provided 10 days before. An Amended Defence had been served in fact several days before. NATS served its Reply dated 17 October 2014. The original Particulars of Claim were served on 28 August 2014.

6. On 23 October 2014, GAL issued its application to strike out two parts at Paragraph 16 (f) of the Amended Particulars of Claim and the whole of Paragraph 17. That was supported by a statement on the face of the application supported by a Statement of Truth. A witness statement in response dated 30 October 2014 was filed. On 28 October 2014, NATS filed its application to re-amend the Particulars of Claim supported by a statement on the face of the application, that being responded to in part of the least by a witness statement dated 30 October 2014 from Elizabeth Townsend, the Head of Procurement at GAL. A full day's argument ensued on 3 November 2014. The draft Re-amended Particulars of Claim, apart from a number of re-amendments which are not challenged, seek substantially to re-amend Paragraphs 16(f) and 17 and to add a new Paragraph 16(h).

7. It is necessary to summarise the Particulars of Claim and to set out the amendments which are objected to. Paragraphs 3 to 12 address the background history which included the fact that the procurement was related to two Lots, Lot 1 for air navigation services and the provision of operators and Lot 2 for the provision of asset management services. The marketing of the tenders would be 20% for past performance and capability, 30% for requirement compliance, 20% for transition process and service sustainment and 30% for price assessed over five years, with requirement compliance to be marked 7.5 for good, 5 for acceptable, 2.5 for limited value and 0 for no utility. Initial tenders were to be provided followed by a negotiation phase and submission by tenderers of Best and Final Offers ("BAFOs"). Paragraph 13 pleaded duties based on the Utilities Contracts Regulations 2006 whilst Paragraph 14 relied upon an implied tender contract which "required [GAL] to comply with the Regulations, alternatively to treat the Claimant fairly and equally, in a non-discriminatory way, proportionately and transparently, and/or to evaluate the tenders in accordance with the tender documents and/or to make award decisions for the Lots on the basis of the most economically advantageous tenders submitted."

8. Paragraph 16 of the draft Re-amended Particulars of Claim pleads breaches of obligations "including the principles of equal treatment, transparency, non-discrimination, proportionality and/or good administration" going on that GAL further or alternatively "acted in manifest error" as follows in the ensuing sub-paragraphs. A major complaint in Paragraph 16(a) is that GAL is said not to have evaluated Lots 1 and 2 separately such that it would or should have won Lot 1 or alternatively Lot 2 if separately assessed. Paragraphs 16(f) and (h) and 17 with the re-amendments underlined and the amendments in italics (and items asterisked in the Confidential Appendix to this judgment) were as follows:

> "(f) Further, the Claimant avers that the quality scores awarded to it were manifestly wrong. The Defendant has admitted by letter dated 30 July 2014 that the Claimant's score should have been increased by a maximum of 0.9%. The Claimant avers that, even taking this into account, its score remains too low in manifest error, as more fully particularised in Schedule 1 hereto. Further, the Defendant has failed to provide any adequate justification for the scores awarded to DFS and the Claimant avers (on the basis of the limited information available to it at this stage) that the scores awarded to DFS the for quality are also likely to have been manifestly wrong. *Without prejudice to the generality of the foregoing, on the basis of the evidence served by the Defendant for a hearing on 10 September 2014, the Claimant avers that DFS was over-scored for its Transition Plan (for which it obtain full marks the both Lots 1 and 2) in circumstances in which (i) it was apparently unable to transition in the required 12 month period; (iii) it needed 12-15 months to transition; (iii) it could not offer a seamless transition whilst maintaining capacity; ~~and/or~~ (iv) it envisaged (as a conservative estimate) a likely capacity reduction of 5% over a 2-4 week period after the end of the transition period* and/or, as is apparent from the documents and/or information disclosed by the Defendant on 15 and/or 20 October 2014, (v) DFS' transition plan(s) and/or proposals were considered by the Defendant to be insufficiently robust and/or required to be "de-risked" and/or "deferred" and/or otherwise modified and/or revised in the period after "normalisation" of the technical scores and after submission of BAFOs in order to be acceptable to the Defendant. The Claimant reserves its right further to particularise this allegation on disclosure of relevant documentation.
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> (h) Further, it is apparent from the documents and/or information disclosed by the Defendant on 15 and/or 20 October 2014 that the decision to award the contract to DFS was not made and/or was not made solely on the basis of the award criteria in the tender documents, but rather took into consideration other unlawful factors, thereby breaching the principles of equal treatment, transparency and/or non-discrimination (as is apparent from papers prepared for the board meetings on 19 June 2014 and 25 June 2014 and 16 July 2014 and the BAFO tender assessment report). The best particulars the Claimant can give are the factors identified in those documents, namely:
>
> > (i) undisclosed criteria and/or sub-criteria including capability, working relationship, business, international business, M port operations, unspecified material available in the public domain, creation of a competitive market for the future, transparency, asset management, total airfields operations, experience of the Defendant and/or overall impression is not directly linked to

the scoring matrix (see page 3 of 19 June 2014 paper, pages 5, 6, 8, 11, 13-19 of 25 June 2014 paper, pages 2, 3, 5, 7, 14-20 of 16 July 2014 paper, pages 6, 7 of the BAFO tender assessment report).

(ii) selection criteria (which cannot lawfully be used at award stage), including unspecified "material supplied by both parties as part of the Pre-Qualification Questionnaire (PQQ)" (see page 13 of 25 June 2014 paper, page 14 of 16 July 2014 paper)."

17. If, which is not accepted, the Defendant is correct that DFS would have won Lot 1 individually assessed at the BAFO stage, on the basis of information disclosed by the Defendant on 15 and 20 October 2014 in relation to DFS' price for its non-compliant bid, it is averred that DFS' tender for Lot 1 and, in consequence its final combined price for both Lots was ~~the Claimant is concerned that the price submitted by DFS for Lot 1 may have been~~ abnormally low. In particular, it is averred that (a) the Claimant's price was *; (b) the Claimant, as incumbent, was very well aware of the cost of carrying out the services; (c) *(d) however, it appears that DFS' Lot 1 price was some X%* below the Claimant's price and consequently that its finally adjusted overall price was some Y%* below the Claimant's price; (e) this was notwithstanding that (1) DFS' rights, but not the Claimant's, needed to include the transition and (2) DFS apparently agreed the Defendant's terms and conditions including unlimited liability. The Defendant has denied in its Defence that DFS' price was abnormally low but does not explain whether it carried out any assessment pursuant to Regulation 30(6). In the circumstances, the Claimant avers that the Defendant failed (in breach of the Regulations, including the principles of equal treatment, transparency and non-discrimination and/or in manifest error) to carry out an investigation adequately or at all into whether the bid was abnormally low and/or to reject it having carried out such an investigation. It is averred that the result of such an investigation should have been a determination that the price was abnormally low and that the bid should have been rejected. ~~The Claimant is not currently aware of the breakdown that DFS' price as this information has not been disclosed by the Defendant. The Claimant is therefore unable at this stage to plead any particulars of breach by the Defendant, but preserves its right to do so once proper disclosure of all relevant documentation has been provided.~~

9. Schedule 1 to the draft Re-amended Particulars of Claim gives "Particulars of Manifest Errors in scoring"; these do not go to price. They list 17 items in relation to quality where NATS says that it was manifestly wrongly marked down, generally from 7.5 (the top score). Although there are some amendments to this list, they appeared for the first time in Paragraph 26 of the Reply served on 17 October 2014. It is pleaded in the schedule that, from disclosed documents, the scores initially given to NATS internally within GAL were changed between March and July 2014 and for some of these scores do not correspond with the detailed response given by GAL to NATS on 30 July 2014 where GAL listed in relation to each of the quality issues is what scores NATS and DFS got together with comments. NATS complains in Schedule 1 that there were clear errors in what GAL did. An example is said to be Item 2.2 relating to Lot 1 in which the score given was 5 but it is said that a score of 7.5 should have been given with particulars being:

> "The Defendant awarded a score of 5 on the basis that copies of report audits were not provided. That complaint is misconceived. The full audit reports sought by the Defendant were in the data room during the procurement. Further, the Defendant could and should have asked for these documents."

10. GAL seeks to strike out the whole of the un-amended parts of Paragraph 17 and to object to the re-amendments. In relation to Paragraph 16 (f), it seeks to strike out the third and fourth sentences and it objects to the incorporation of Schedule 1 in the proposed re-amendment. I propose to deal with Paragraph 17 first.

11. I have no real doubt that Paragraph 17 as originally pleaded did not effectively plead an intelligible cause of action or, to use the words of CPR Part 3.4 (2), it did not disclose reasonable grounds for bringing that claim. At its highest, it simply suggests that there may have been an abnormally low price for Lot 1 and that NATS was concerned about it. One would have little difficulty in reaching such a conclusion if, for instance, in a personal injury case said to have been caused by something which fell onto the claimant, the claimant only pleaded the injury and without much more that he or she was "concerned that the something may have come from the defendant".

12. Reliance has been placed on the judgement of Sir Robin Jacob in **DWF LLP v Secretary of State for Business Innovation and Skills** [2014] EWCA Civ 900. This was a public procurement case relating to legal services in relation to the Insolvency Service of the Department of Business Innovation and Skills; the services were to be delivered through four contracts in England and Wales and two in Scotland; one of the complaints advanced by the Claimant was said to be the "Scottish anomaly" which was said to be that the contracting authority had "inexplicably awarded the claimant lower scores for [England than in Scotland] in circumstances where [its] experience of the former jurisdiction is far greater than the latter". The Claimant had originally pleaded complaints that it had been awarded a lower score for England & Wales (Paragraph 29 of its Particulars of Claim set out in Paragraph 22 of the judgment); Paragraph 28 of that pleading had also pleaded on that the Defendant had acted in breach of the Regulations and Treaty and Directive obligations in refusing to award the claimant a contract. It later sought to amend the Particulars of Claim to amplify the error which is argued had occurred and an issue arose as to whether there was in effect a new cause of action being pleaded (which would otherwise be time barred given the 30 day limitation period imposed by the Regulations). The judge said

> "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."
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> 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."
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> 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.
>
> 43. 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."

13. This decision simply involved an interpretation of a pleading and a consideration of its context to determine whether the original pleading pleaded a cause of action and whether it was treated by the other party as if it had pleaded a cause of action. The Court in that case considered that the answer to these two points was in the affirmative.

14. Applying that thought process to the current case and to the original pleading, Paragraph 17 does not even plead an incipient or theoretical breach of the Regulations, other Directives or Treaty obligations. All it says is that NATS reserves

what it calls "its right to do so" once there has been appropriate disclosure. The reality is that NATS appeared to be saying that it had no idea whether it had any cause of action or not in relation to abnormally low tenders and that is the antithesis (at least in this case) of pleading a cause of action. All that GAL pleaded at Paragraph 17 of the Amended Defence was that:

> "The allegation that the DFS' price may have been abnormally low is unparticularised and embarrassing and is in any event denied. GAL cannot plead further."

This is not acknowledging that there was an identifiable or identified cause of action which needed to be responded to. In my view, the current pleading bears no relationship to that which was under review in the **DWF** case.

15. Paragraph 17 of the Re-amended Particulars of Claim does plead now a cause of action (although GAL argues that it is not a good one) in the sense that statutory breaches are pleaded and a factual basis is identified (see above). Objection is taken however to this proposed amendment on essentially five grounds identified in GAL's Counsels' skeleton argument:

> (a) There is no properly pleaded basis for this claim.
>
> (b) The case is suggested to be wholly inconsistent with facts which have been set out in a Confidential Annex.
>
> (c) The claim is bad in law.
>
> (d) The claim is brought late and out of time.
>
> (e) The introduction of this claim now risks the introduction of requests for substantial fresh disclosure which would be particularly onerous in nature and would imperil the trial date or the prospects of a fair trial.

16. I do not need to decide the case on the basis of the contents of the Confidential Annex and it might well be unfair to have done so because the facts relied upon were first raised as material to be relied upon in these applications only when the skeleton argument was produced the day before the hearing and the NATS team has not had the opportunity to respond by way of evidence of challenging the contents. The Confidential Annex is based on conclusions which might be drawn from NATS' own analysis prior to submitting tenders as to what DFS might sustainably offer. Whilst, on the face of that Confidential Annex, the points raised appear to be strong, there may be an evidential response which undermines the conclusions which are drawn there by GAL.

17. Similarly, I am not in a position on the facts (and it would not be fair for me at this stage) to say that this claim is out of time. It would be out of time if more than 30 days before its application for re-amendment was heard NATS was or should have been aware of the factual basis upon which it relies, now referred to in the re-amended Paragraph 17. NATS says that, until its legal team obtained disclosure on 15 and 20 October 2014 (mainly information which went to the prices submitted by NATS), it could not reasonably be expected to have known whether DFS' prices were

sufficiently low or lower than NATS' properly to justify an allegation that the "abnormally low tender" state of affairs existed. In response, GAL assert that German press reports said to have been expressly referred to during a hearing in September 2014 would have alerted NATS to approximately what DFS' pricing was but that, in my judgment, on its own is factually inconclusive. It is said that it should have been obvious from GAL's letter of 30 July 2014 to NATS from the formula said to have been used by GAL (Score-(Current Contract £- Tender £)/(Current Contract 3- - Lowest £)] * Weighting) what at least approximately DFS' score was but that has not as yet been arithmetically supported. What is commonly done, all things being equal, is to give permission to amend but on terms that, for limitation purposes, the new cause of action (if any) is considered to have been first pleaded for limitation purposes on the day of the application hearing.

18. The real issue is whether the claim is good in law or, put in a slightly different way, whether there is a properly pleaded basis of this claim. Regulation 30 contains the only references to abnormally low tenders and provides:

> "(6) If an offer for a contract is abnormally low the utility may reject that offer but only if it has—
>
> (a) requested in writing an explanation of the offer or of those parts which it considers contribute to the offer being abnormally low;
>
> (b) taken account of the evidence provided in response to a request in writing; and
>
> (c) subsequently verified the offer or parts of the offer being abnormally low with the economic operator."
>
> (7) Where a utility requests an explanation in accordance with paragraph (6), the information requested may, in particular, include—
>
> (a) the economics of the method of construction, the manufacturing process or the services provided;
>
> (b) the technical solutions suggested by the economic operator or the exceptionally favourable conditions available to the economic operator for the execution of the work or works, for the supply of goods or for the provision of the services;
>
> (c) the originality of the work, works, goods or services proposed by the economic operator;
>
> (d) compliance with the provisions relating to employment protection and working conditions in force at the place where the contract is to be performed; or
>
> (e) the possibility of the economic operator obtaining State aid.
>
> (8) Where a utility establishes that a tender is abnormally low because the economic operator has obtained State aid, the offer may be rejected on that ground alone only after—
>
> (a) consultation with the economic operator; and

> (b) the economic operator is unable to prove within a reasonable time limit fixed by the utility, that the aid has been granted in a way which is compatible with the EC Treaty.
>
> (9) Where a utility rejects an abnormally low offer in accordance with paragraph (8), it shall send a report justifying the rejection to the Minister for onward transmission to the Commission."

19. There is no definition of "abnormally low" in the Regulations or indeed in numerous (mostly European) authorities. It is beyond doubt that Regulation 30 does not expressly impose any wide-ranging or indeed any obligation on the utility or contracting authority (in other more utilised Regulations) to reject an abnormally low tender whatever the term means. The context must be that, as the "economically advantageous" and "lowest price" bases of tender are the main bases of tendering legislated for and because price plays a key part in such tendering, the utility under these Regulations in effect has a right to reject an "abnormally low" tender but, if it is considering that it might reject the tender because it considers that the price is suspect, it has to give the tenderer in question the opportunity to explain why it has priced as it has. The answer of course might be that it has made an error in its pricing and the tender rules in any given procurement might permit a correction. The rule goes to a justification of rejection of an "abnormally low" tender. The only questions that remain are: is there some sort of obligation on the part of the utility to vet all tenders so as to consider whether all pricing by all tenderers is overall or in part "abnormally low" and, if so, whether the utility is under a duty to reject an "abnormally low" tender if it is so established and if so, what is the scope of that duty?

20. One needs to understand that the legislation and Directives encourage competition and competitiveness. A key aspect of this is price and tenderers who are keen to secure a project will want to pitch their prices at a level which will be the lowest. They might be keen to break into a market or establish their market share. There is nothing wrong with that for them or for the utilities or contracting authorities, who are (almost) always keen to place contracts at the lowest price and, preferably, at lower than they have budgeted. One needs to consider how, commercially, a tenderer, which is not the incumbent provider or not the market leader, will ever get a contract unless it puts in attractively low prices. Provided that the lowest tenderer is sufficiently robust enough in financial/economic terms to provide the services which have been tendered for (or put another way will not become bankrupt part way through the contract), most utilities/contracting authorities will foreseeably be delighted to place the contract with such a tenderer; their constituents or the people or bodies (e.g. Parliament) would not only expect the truly most economically advantageous tender to be accepted but also would require an explanation as to why possibly millions of pounds have been wasted by rejecting a so-called "abnormally low" tender from a tenderer who is able effectively to provide the tendered services.

21. I turn to the authorities, first looking at the European ones. In the case of **Fratelli** (Case 103/88 [1989] ECR 1839, the Court had to consider the scope of any obligation of a contracting authority to reject an abnormally low tender. The judgement set out Article 29 (5) of the EC Directive 71/305/EEC:

> "If for a given contract, tenders are obviously abnormally low in relation to the transaction, the authorities awarding contracts shall examine the details of the

> tenders before deciding to whom it will award a contract. The result of this examination shall be taken into account.
>
> For this purpose it shall request the tenderer to furnish the necessary explanations and, where appropriate, it shall indicate which parts it finds unacceptable.
>
> If the documents relating to the contract provide for its award at the lowest price tendered, the authority awarding contracts must justify to the Advisory Committee set up by the Council Decision of 26 July 1971 the rejection of tenders which it considers to be too low."

The judgement of the European Court goes on:

> "20…it should be observed that it was in order to enable tenderers submitting exceptionally low tenders to demonstrate that those tenders are genuine ones that the Council, in Article 29(5) of Directive 71/305, laid down a precise, detailed procedure for the examination of tenders which appear to be abnormally low.
>
> 26 The examination procedure must be applied whenever the awarding authority is contemplating the elimination of tenders because they are abnormally low in relation to the transaction. Consequently, whatever the threshold for the commencement of that procedure may be, tenderers can be sure that they will not be disqualified from the award of the contract without first having the opportunity of furnishing explanations regarding the genuine nature of their tenders".

This points very strongly towards the underlying Directive relating to the contracting authority's right to eliminate abnormally low tenderers and, as importantly, to the allegedly abnormally low tenderer being given the opportunity to explain why its tender is as low as it is. This latter aspect is simply, on analysis, a manifestation of the fairness obligation required of the whole procurement process.

22. In **Lombardini and Mantovani** (Case No Joined Cases C-285/99 and C-286/99 [2001] ECR 1-9233), the Court was again concerned with abnormally low tenders in the context of the later Directive 93/37/EEC which stated:

> "30. 4. If, for a given contract, tenders appear to be abnormally low in relation to the works, the contracting authority shall, before it may reject those tenders, request, in writing, details of the constituent elements of the tender which it considers relevant and shall verify those constituent elements taking into account the explanations received.
>
> The contracting authority may take into consideration explanations which are justified on objective grounds including the economy of the construction method, or the technical solution chosen, or of the exceptionally favourable conditions available to the tenderer for the execution of the work, or the originality of the work proposed by the tenderer.
>
> If the documents relating to the contract provides for its award at the lowest price tendered, the contracting authority must communicate to the Commission the rejection of tenders which it considers to be too low."

In the actual procurement in that case, the invitation to tender laid down "abnormally low" thresholds which Lombardini and Mantovani (these being two separate cases) exceeded. Important observations of court were as follows:

> "34. The Directive nevertheless aims…to abolish restrictions on freedom of establishment and on the freedom to provide services in respect of public works contracts in order to whether that such contracts to genuine competition between entrepreneurs in the Member States…
>
> 35. The primary aim of the Directive is to open up public works contracts to competition. It is exposure to Community competition in accordance with the procedures provided for by the Directive which avoids the risk of the public authorities indulging in favouritism…
>
> 36. The coordination at Community level of procedures for the award of public works contracts is that essentially aimed at protecting the interests of traders established in a Member State who wish to offer goods or services to contracting authorities established in Member State and, to that end, to avoid both the risk of preference being given to national tenderer for applicants whenever a contract is awarded by the contracting authorities and the possibility that the body governed by public law may choose to be guided by considerations other than economic ones…
>
> 44. In paragraph 17 of that judgement [Case 76/81 Transporoute [1982] ECR 417], The Court held that the contracting authority may not in any circumstances reject an abnormally low tender without even seeking an explanation from the tenderer, since the aim of Article 29 (5) of Directive 71/305, which is to protect tenderers against arbitrariness on the part of the authority awarding contracts, could not be achieved if it were left to that authority to judge whether or not it was appropriate to seek explanations.
>
> 45. Similarly, the Court has consistently held that Article 29 (5)… prohibits Member States from introducing provisions which require the automatic exclusion from procedures for the award of public works contracts of certain tenders determined according to a mathematical criterion, instead of obliging the awarding authority to apply the examination procedure laid down in the Directive [**Fratelli** referred to]…
>
> 47 According to the Court, a mathematical criterion in accordance with which tenders which exceeded the basic value for the price of the work by a percentage more than 10 points below the average percentage by which the tenders admitted exceeded that amount would be considered anomalous and consequently eliminated, deprived tenderers who have submitted particularly low tenders of the opportunity to demonstrate that those tenders are genuine ones, so that application of such a criterion is contrary to the aim of Directives 71/35, namely to promote the development of effective competition in the field of public contracts is [**Fratelli** referred to]…
>
> 50. Since the requirements laid down by both the initial and the amended version of Article 29 (5) of Directive 71/305 are in substance is identical to those imposed

by Article 30 (4) of the Directive, the foregoing considerations apply equally in relation to the interpretation of the latter provision.

51. In consequence, Article 30 (4) of the Directive necessarily presupposes the application of an *inter partes* procedure of for examining tenders regarded by the contracting authority as abnormally low, placing the latter under an obligation, after it has inspected all the tenders and before awarding the contract, first asked in writing the details of the elements in the tender suspected of anomaly which gave rise to doubts on its path in the particular case and then to assess their tender in the light of the explanations provided by the tenderer concerned in response to that request…

53. It is essential that each tenderer suspected of submitting an abnormally low tender should have the opportunity effectively to state his point of view in that respect, giving him the opportunity to supply all explanations as to the various elements of his tender at a time - necessarily after the opening of all the envelopes - when he is aware not only of the anomaly threshold applicable to the contract in question and of the fact that his tender has appeared abnormally low, but also of the precise points which have raised questions on the part of the contracting authority…

55. It is apparent from the very wording of that provision, drafted in imperative terms, that the contracting authority is under a duty, first, to identify suspect tenders, secondly to allow the undertakings concerned to demonstrate their genuineness by asking them to provide the details which it considers appropriate, thirdly to assess the merits of the explanations provided by the persons concerned, and, fourthly to take a decision is whether to admit or reject those tenders. It is therefore not possible to regard the requirements inherent in the *inter partes* nature of the procedure for examining abnormally low tenders, within the meaning of Article 30 (4) of the directive, as having been complied with unless all the steps thus described have been successfully accomplished…

67…it is undisputed that the Directive does not define the concept of an abnormally low and, *a fortiori*, does not determine the method of calculating an anomaly threshold. That is therefore a task for the individual Member States…"

23. In **CoNISMa** (Case C -305/08), a consortium of universities was excluded from bidding for a contract on the grounds amongst others that it was non- profit-making. The court concluded (Paragraph 51) that an interpretation which prohibits non-profit-making bodies from taking part in a procedure for the award of a public contract was precluded.

24. There have been a number of cases in which the European Court has considered challenges by unsuccessful tenderers to the award of contracts to a tenderer which had submitted an arguably "abnormally low" tender. In **TQ3 Travel Solutions Belgium SA (Case No T-148/04)**, the Court dealt with such a challenge in an EC Commission procurement which was based on an arguably major difference between the successful tenderer's price and other tenders. The challenge was dismissed. Relevant parts of the judgement which relate to the implementing rules regulating the Commission are:

> "47. As a preliminary point, it should be recalled that the Commission enjoys a broad margin of assessment with regard to the factors to be taken into account for the purpose of deciding to award a contract following an invitation to tender, and that review by the Court is limited to checking compliance with the procedural rules and a duty to give reasons, the correctness of the facts found and that there is no manifest error of assessment or misuse of powers…
>
> 49…the contracting authority is obliged to allow the tenderer to clarify, or even explain, the characteristics of its tender before rejecting it, if it considers that a tender is abnormally low. The obligation to check the seriousness of a tender also arises where there are doubts beforehand as to its reliability, also bearing in mind that the main purpose of that article is to enable a tenderer not to be excluded from the procedure without having had an opportunity to explain the terms of its tender which appears abnormally low.
>
> 50….only when any tender is considered abnormally low…is the evaluation committee required to request details of the constituent elements of the tender which it considers relevant before, where appropriate, rejecting it… consequently, given that the evaluation committee had no intention, in this case, of rejecting WT's tender, since their tender did not appear to be abnormally low, Article 139 of the detailed implementing rules proved to be irrelevant."

25. In **SAG ELV Slovensko** (case C- 599/10) [2012] 2 CMLR 36, two tenderers were excluded having submitted tenders, on the grounds that their prices were abnormally low, they having been asked to clarify and having clarified their position following questions submitted to them. Reference is made to Article 55 of Directive 2014/18 which addresses procedures for the award of public works contracts which requires a contracting authority if "tenders appear to be abnormally low" to request in writing details of the constituent elements of the relevant tender "before it may reject those tenders". Relevant parts of the judgement are:

> "24. In those circumstances, the Court must understand the questions referred to it, taken as a whole, as seeking to ascertain to what extent contracting authorities, when they take the view, in a restricted public procurement procedure, that the tender submitted by a tenderer is abnormally low or imprecise or does not meet the technical requirements of the tender specifications, may or must seek clarification from the tenderer concerned, having regard to Articles 2 and 55 of Directive 2004/18…
>
> 26. It is in the light of those considerations that the questions referred to the Court must be answered, by examining in turn the situation in which the contracting authority considers the tender to be abnormally low and that in which it takes the view that tender is imprecise or does not meet the technical requirements of the tender specifications.
>
> 27. It must be borne in mind that, under art. 55 of Directive 2004/18, if, for a given contract, tenders appear to be abnormally low in relation to the goods, works or services, the contracting authority must, before it may reject those tenders, "request in writing details of the constituent elements of the tender which it considers relevant".

> 28. It follows from these provisions, which are stated in a mandatory manner, that the EU legislature intended to require the awarding authority to examine the details of tenders which are abnormally low, and for that purpose obliges it to request the tenderer to furnish the necessary explanations to prove that those tenders are genuine (see, to that effect, [**Lombardini**]…
>
> 29. Accordingly, the existence of a proper exchange of views, at an appropriate time in the procedure for examining tenders, between the contracting authority and the tenderer, to enable the latter to demonstrate that it tenderer is genuine, constitutes a fundamental requirement of Directive 2004/18, in order to prevent the contracting authority from acting in an arbitrary manner and to ensure healthy competition between undertakings [see, to that effect, **[Lombardini**]…

26. There has been some English authority on abnormally low tenders in public procurement, the most important being the decision of Mr Justice Flaux in **Varney and Sons Waste Management Ltd v Hertfordshire County Council** [2010] EWHC 1404 (QB) where, materially, he said:

> "153. Thus, the wording of the Directive is somewhat different from that of Regulation 30(6) in the sense that it states that the contracting authority "shall" do certain things before rejecting a tender which appears to be abnormally low, whereas Regulation 30(6) states that the authority may reject a tender which is abnormally low but only if it has done certain things. This difference of wording was one of the matters which led Arnold J in the recent case of **Morrison Facilities Services Limited v Norwich City Council** [2010] EWHC 487 (Ch), to conclude that it was seriously arguable (for the purposes of granting an interim injunction under Regulation 47) that the relevant authority owed a duty, when it suspected that there has been an abnormally low tender, to investigate that tender.
>
> 154. In reaching that conclusion, Arnold J also relied upon the decision of the European Court of First Instance (now the General Court) in **Renco SpA v Council of the European Union** [2003] ECR II-171, where at paragraphs 75 and 76 the Court stated:
>
> > "75 The Court finds that the applicant cannot criticise the Council for checking many of the prices quoted in its tender. It is apparent from the wording of Article 30(4) of Directive 93/37 [the predecessor of the current Directive] that the Council is under a duty, first, to identify suspect tenders, secondly to allow the undertakings concerned to demonstrate their genuineness by asking them to provide the details which it considers appropriate, thirdly to assess the merits of the explanations provided by the persons concerned, and, fourthly, to take a decision as to whether to admit or reject those tenders (Joined Cases C-285/99 and C-286/99 Lombardini and Mantovani [2001] ECR I-9233, paragraph 55). The Court notes, for example, that the Council, in its defence, stated that it had questioned the applicant about very many of the abnormally low prices, namely the price of 319 items in the summary out of a total of 1 020. It also asked the applicant for clarification regarding a series of very blatant anomalies and particularly about the price of the doors, which are the same for single doors, double doors or

> glass doors. The applicant has not provided adequate explanations for those anomalies either in its reply or at the hearing.
>
> 76 In that regard, the Court observes that, although Article 30(4) of Directive 93/37 does not require the Council to check each price quoted in each tender, it must examine the reliability and seriousness of the tenders which it considers to be generally suspect, which necessarily means that it must ask, if appropriate, for details of the individual prices which seem suspect to it, a fortiori when there are many of them. Furthermore, the fact that the applicant's tender was considered to conform to the contract documents did not relieve the Council of its obligation, under the same article, to check the prices of a tender if doubts arose as to their reliability during the examination of the tenders and after the initial assessment of their conformity."

155. In relation to **Renco**, Mr Howell submitted that it was not a case where the European Court was saying that there was a duty to investigate all tenders which appeared abnormally low irrespective of whether they were going to be rejected. In my judgment that submission is correct. Neither **Renco** nor the earlier case in the European Court of Justice of **Impresa Lombardini v ANAS** [2001] ECR I-9233, to which Arnold J refers, were cases where the issue arose directly for decision whether the relevant authority owed a duty to investigate "abnormally low" tenders generally, as opposed to where the authority was considering rejecting the tender. In both those cases, the authority was proposing to reject the tenders in question. Furthermore, although the point did not arise directly in the later decision of the General Court in **TQ3 Travel Solutions Belgium SA v The Commission** [2005], in my judgment it is implicit in the reasoning of the Court at paragraphs 49 and 50 that the relevant authority is not under a duty to investigate a tender which appears abnormally low unless it intends to reject it.

156. Mr Howell submitted that Arnold J had misread the Directive as imposing an obligation to investigate "suspect" tenders generally, when it did not, save in cases where the authority was proposing to reject the tender in question. I agree with that submission. In my judgment, despite the difference of wording, there is no difference in substance between the provisions of the Directive and those of the Regulations. The thrust of both provisions is that an authority cannot reject a tender which is abnormally low unless it does certain things in terms of investigating that tender. For present purposes, there is no difference between saying that you shall do certain things before an entitlement to reject arises and saying that you may reject the tender provided you have done certain things.

157. Either way, there is nothing in either provision to support the contention that there is a general duty owed by the authority to investigate so-called "suspect" tenders which appear abnormally low. Nothing in the European Court decisions to which Arnold J refers dictates a different conclusion. In any event, **Morrison** is only a decision as to what was arguable on an interlocutory basis. Having heard full argument on the point at trial I am quite satisfied that neither the Directive nor the Regulation imposes a duty to investigate so-called suspect tenders generally.

158. It follows that, on the correct interpretation of both the Directive and the Regulation (save in the case of Fourways where the Council did consider the

> tender abnormally low and was contemplating rejecting the tender at least in part if not totally), the Council was not under a duty generally to investigate so-called "suspect" tenders in circumstances where the Council had no intention of rejecting those tenders. In my judgment, this aspect of Varney's complaint that the Council was in breach of duty in failing to investigate the tenders other than Fourways fails at the first hurdle.
>
> 159. Furthermore, I consider that there is another fundamental obstacle to Varney's case that the Council was in breach of duty in failing to investigate the other tenders. Although Regulation 30(6) talks in the abstract of an offer which is abnormally low, the Directive refers to tenders which "appear to be abnormally low" which only makes sense as a reference to what "appears" to the relevant authority. In the circumstances, it seems to me that the duty for which Varney contends could only arise where the Council either knows or suspects that the tender in question is abnormally low. Leaving Fourways out of account, it is quite clear on the evidence of Mr Shaw and Mr King (which I accept) that neither of them actually knew or suspected that the other tenders were abnormally low.
>
> 160. Mr Coppel contended in his cross-examination of Mr Shaw and Mr King and in his submissions that the Council ought to have known or suspected that the other tenders were abnormally low. He submitted that it was a manifest error to have accepted tenders which the Council should have recognised as unsustainable. Alternatively, he submitted that there was a duty to reject such tenders. In terms of what is the correct test in law, I am firmly of the view that the duty for which Varney contends (even if, contrary to the decision I have already indicated, such a duty could arise) cannot arise save in the case where the relevant authority actually knows or suspects that a tender is abnormally low. What it is contended an authority ought to have known or suspected, but did not know or suspect, is not sufficient to impose the duty for which Varney contends. Were it otherwise, an authority would have to investigate all tenders in detail to satisfy itself of the economic viability of each tender, an unrealistic and onerous burden"

27. I draw from all the above authorities and indeed from the wording of Regulation 30 the following:

> (a) It is important, legitimate and proper to interpret statutory instruments in this country which deal with public procurement in the light of EC Directives and legislation. The implementation of such directives and legislation is left to the British legislature. Provided however that the statutory instrument in question is, properly construed, drafted in such a way as not to offend against the contents of EC Directives and legislation, it can be enforced.
>
> (b) The relevant Directives do not require the contracting authority (or GAL assuming it is a utility in this case) to determine whether or not a tender is abnormally low. What they do address is what is to happen if the authority does determine or consider that a given tender is "abnormally low". The authority in those circumstances must, but only if it is considering an option to reject that abnormally low tender, give the relevant tenderer the opportunity to explain itself. The Utilities Contract Regulations 2006 are, in this context, not inconsistent with the relevant Directives.

(c) There is no definition either in the Directives or in the 2006 Regulations as to what "abnormally low" means. Various expressions are used in the European decisions, but often not by way of definition: "genuine" (**Lombardini** and **Fratelli**), "genuine and viable" or "sound and viable" (**SECAP** Case C- 147/06 [2008] 2 CMLR 56), "reliable and serious" (**Renco and TQ3 Travel Solutions Belgium**) or "serious" (**PC-Ware Information Technologies BV** T-121/08 [2010] ECRII-1541). I would not wish to add to any confusion but the words "abnormally low" must encompass a bid which is low (and almost invariably lower than the other tenderers) and the bid must be beyond and below the range of anything which might legitimately (in the context of a particular procurement) be considered to be normal. Obviously, a bid which is ridiculously low and which could not be justified on any intelligible commercial basis might well not be considered as genuine and therefore could well be abnormally low. A very low bid which is effectively illegal, such as what is sometimes referred to as "predatory pricing" by a tenderer in effect to eliminate competition, can be rejected because it undermines competition and comprehensiveness and itself runs counter to general Treaty and other European requirements.

(d) There is no obligation on the part of utilities or contracting authorities to determine or consider that bids are "abnormally low". There is no obligation to reject "abnormally low" bids. There is no such express statutory requirement or any expressed requirement in the Directives or European legislation, all of which are primarily directed to giving rights to a tenderer, which has submitted what is considered by the utility or contracting authority to be an abnormally low tender, to be given by the utility or contracting authority the chance to explain itself before its tender is rejected. The Court should be very slow to interpret the 2006 Regulations as imposing some obligation on the contracting authoritu or utility to determine that either there is or might be an abnormally low tender. It is not usual to imply obligations into a statute or statutory instrument in the same way as in this country one implies terms into contracts; that is not to say that a purposive interpretation of statutes is not permissible (it often is).

(e) If that is right, it would not be necessary to consider whether there was independently some "manifest error" on the part of the given contracting authority or utility in failing to appreciate that there was or might have been an abnormally low tender. However, at best, even if the "manifest error" approach could in these circumstances sensibly be adopted, one would have to be able to determine that it was an error which no reasonable contracting authority or utility could realistically have made.

28. I then turn to the amendments sought in Paragraph 17 of the Re-amended Particulars of Claim. Even at the range pleaded as to the relative lowness of DFS' bid in relation to NATS, the pleas depend upon some sort of duty to have rejected the DFS bid as being "abnormally low". There is no pleading or explanation as to why DFS' bid was "abnormally low"; it is not suggested that this bid was not "genuine" or "serious" or "viable". It is not suggested that DFS will not be able to provide the services tendered for to the requisite standards. What the plea amounts to is that the bid was in effect "quite a lot" lower than NATS' bid. It is not suggested that DFS' pricing was predatory or otherwise illegal and it is not pleaded that no reasonable utility could realistically have accepted the lower bid.

29. The amendment of Paragraph 17 should be refused because, as pleaded, it has no realistic prospect of success in any event; a secondary reason is that the pleading is inadequately pleaded with only a few weeks to go to trial (see the preceding paragraph).

30. I now turn to the amendments to Paragraph 16(f) of the draft Re-amended Particulars of Claim. It cannot be said that the original and Amended Particulars of Claim did not plead a cause of action, even if in its original form it was relatively un-particularised. The plea in the first sentence is that in breach of statutory or Treaty obligations or of the implied tender contract the quality scores were manifestly wrong. It is true that the only originally pleaded error was the under marking by 0.9% and by amendment complaints were added about DFS being over-scored in relation to the transition arrangements (whilst it set itself up at Gatwick). Therefore, unlike the ramifications of Paragraph 17, the only effectively arguable ground of objection is that the re-amendment (which is only that which incorporates Schedule 1) is made too late.

31. In **Swain-Mason v Mills & Reeve** LLP [2011] 1 WLR 2735, the Court had particular regard to an earlier Court of Appeal decision in **Worldwide Corporation Ltd v GPT Ltd** 1998 EWCA Civ 1894:

> "69. The appeal in *Worldwide Corporation v GPT Ltd* was by the Claimants against the refusal of Moore-Bick J in the Commercial Court to permit amendments to the claim in the first week or so of the trial, amendments prompted not by discovery of some unsuspected evidence or fact but by a re-appraisal by newly instructed Counsel of the merits of the case. It was said that he felt that the case previously pleaded would fail and that only by way of the amendment could the case be put on an arguable basis. Waller LJ gave the judgment of the court, setting out the reasons why the appeal had been dismissed. Mr Stanley Brodie Q.C. for the Claimants relied on observations as to the generous approach of the court to amendments required to enable the true issues between the parties to be resolved, so long as any injustice can be avoided, mainly by terms as to costs: Bowen LJ in *Cropper v Smith* (1884) 26 Ch. D. 700 at 710-711 is one of the classic statements of this attitude. Another is that of Brett MR in *Clarapede & Co v Commercial Union Association* (1883) 32 WR 262 at 263. More recent statements include that of Millett LJ in *Gale v Superdrug Stores plc* [1996] 1 WLR 1089 at 1098 and following. The court in *Worldwide Corporation v GPT* said this about this attitude:
>
> > "We are doubtful whether even applying the principle stated by Bowen LJ, the matter is so straightforward as Mr Brodie would seek to persuade us. But, in addition, in previous eras it was more readily assumed that if the amending party paid his opponent the costs of an adjournment that was sufficient compensation to that opponent. In the modern era it is more readily recognised that in truth the payment of the costs of an adjournment may well not adequately compensate someone who is desirous of being rid of a piece of litigation which has been hanging over his head for some time, and may not adequately compensate him for being totally (and we are afraid there are no better words for it) "mucked about" at the last moment. Furthermore the courts are now much more conscious that in assessing the justice of a particular case the disruption caused to other litigants by last

> minute adjournments and last minute applications have also to be brought into the scales."

70. Later in the judgment the court said this under the heading "Approach to last minute amendments":

> "Where a party has had many months to consider how he wants to put his case and where it is not by virtue of some new factor appearing from some disclosure only recently made, why, one asks rhetorically, should he be entitled to cause the trial to be delayed so far as his opponent is concerned and why should he be entitled to cause inconvenience to other litigants? The only answer which can be given and which, Mr Brodie has suggested, applies in the instant case is that without the amendment a serious injustice may be done because the new case is the only way the case can be argued, and it raises the true issue between the parties which justice requires should be decided.
>
> We accept that at the end of the day a balance has to be struck. The court is concerned with doing justice, but justice to all litigants, and thus where a last minute amendment is sought with the consequences indicated, the onus will be a heavy one on the amending party to show the strength of the new case and why justice both to him, his opponent and other litigants requires him to be able to pursue it."

71. The court also recognised, as I do, the reluctance with which an appellate court will interfere with discretionary case management decisions, perhaps especially those of a trial judge.

72. As the court said, it is always a question of striking a balance. I would not accept that the court in that case sought to lay down an inflexible rule that a very late amendment to plead a new case, not resulting from some late disclosure or new evidence, can only be justified on the basis that the existing case cannot succeed and the new case is the only arguable way of putting forward the claim. That would be too dogmatic an approach to a question which is always one of balancing the relevant factors. However, I do accept that the court is and should be less ready to allow a very late amendment than it used to be in former times, and that a heavy onus lies on a party seeking to make a very late amendment to justify it, as regards his own position, that of the other parties to the litigation, and that of other litigants in other cases before the court.

73. A point which also seems to me to be highly pertinent is that, if a very late amendment is to be made, it is a matter of obligation on the party amending to put forward an amended text which itself satisfies to the full the requirements of proper pleading. It should not be acceptable for the party to say that deficiencies in the pleading can be made good from the evidence to be adduced in due course, or by way of further information if requested, or as volunteered without any request. The opponent must know from the moment that the amendment is made what is the amended case that he has to meet, with as much clarity and detail as he is entitled to under the rules.

> 74. The *Worldwide Corporation* decision was made under the RSC, not the CPR, which only came into force some five months later, but it seems to me that it reflects the tenor of the CPR, which was no doubt in the minds of the judges, who will have been very familiar with the terms of Lord Woolf's reports that led to the reform of the rules. As appears from the passage quoted above from *Savings & Investment Bank v Fincken*, it has been endorsed as appropriate under the CPR."

32. The timing of an application to amend is of key importance when and where the timetable through to trial or the trial itself is or is likely to be significantly impacted by the relative lateness of the application. Thus, if the timing of the application is such that the trial would have to be adjourned to enable the newly pleaded issues to be heard, that may well be a factor strongly supporting the refusal to allow the amendment.

33. GAL says with some considerable justification that the substantive contents of the new Schedule 1 could have been pleaded at the time of the original Particulars of Claim. On 30 July 2014, GAL wrote to NATS answering a number of queries raised by NATS, which included some going to the basis on which the technical scoring (as opposed to price) was done. The answers were given on five sheets of A3 paper against each item in each Lot to be marked in the tender process being set out with the scores for both NATS and DFS with written comments as to why other than full marks were given. What Schedule 1 does is to set out 17 items, for 15 of which complaint is made that the full score of 7.5 was not achieved whilst for 2 items complaint is made of an insufficiently high mark was given. In reality and in substance, the complaints are based upon criticism of the contents of the A3 sheets provided to NATS at the end of July 2014. Ms Hannaford QC sought to argue, with respect to her, unconvincingly, that it was only in or through documents provided to her client's legal team in October 2014 that it was realised that initial marking (at least in some four or five respects) had been higher. It does not seem to me that this is an explanation for not pleading this back in late August or September 2014. At best, these belatedly produced documents provided evidential support for her client’s case (which could have been pleaded earlier) that it should have been marked higher. These documents might then have led to minor amendments which would have been readily allowable if the basic complaint had been particularised almost 2 months ago.

34. One of the aspects of public procurement litigation is that expedition in the trial process and in the hearing of applications is of the essence. The Remedies Directive encourages it. The TCC encourages it particularly in a case such as this where the Court has decided that the statutory suspension should remain in place and that there should be an expedited trial; prejudice to both parties is avoided or limited because the Court will within a short time frame (in this case 3½ months from issue of claim form) decide whether or not there has been a material breach of the relevant Regulations or of any implied contract and will be in a position to decide whether in effect there should be a re-tendering process. The corollary of that level of expedition is a high level of concentration of resources by each party in getting the case ready for trial often, as here, with 2 or more Counsel and up to 8 to 10 solicitors involved.

35. In my judgment, the approach to amendments needs to be the same as and consistent with the practice based on the CPR and the Overriding Objective. The fact that a trial

on liability is being brought on within a short time is not a factor which should excuse (even if on occasion it may explain) any delay in making amendments. Indeed, the fact that the timetable to trial in a case such as this may be very congested is a factor which may in many cases point towards a refusal of an amendment because the impact of the late amendment on the other party's trial preparations may be substantial because there is so much to do in the few weeks leading up to trial.

36. I am satisfied that there is no good excuse for the belated proposed introduction of Schedule 1 and that there is a very real risk that in the few weeks left to trial GAL will have insufficient time to prepare to deal with the Schedule 1 allegations nearly as effectively as it could have done if Schedule 1 had accompanied the original Particulars of Claim some three months ago; it is clear that on both sides a massive amount of work remains to be done in the few weeks left to trial and the introduction of these extensive further complaints will seriously disrupt an already congested trial preparation period. This is an unfairness which could not be readily compensated for by payment of costs. Adjournment is not an option, in any event and it has not been suggested that this might be acceptable by either party. Weighing all the various factors up in the balance, I do not consider that the amendment which incorporates Schedule 1 should be allowed

37. Objection is taken to Paragraph 16 (h). Objection is taken by GAL through its Counsel in the following terms in its skeleton (Page 12):

> "This is a bad claim as is apparent from the documents themselves. Commentary upon the award decision at board level does not amount to a retaking of the decision on the basis of new criteria. This claim is bad and the key documents are before the Court to demonstrate that. This is dealt with by Elizabeth Townsend from paragraphs 16 to 19 of her witness statement."

Essentially, it is argued, largely on the facts, that the relevant decision making board made its decision in effect only on the basis that DFS had "won" and had the best tender score and not on the basis of any of the supposedly extraneous factors which arguably may have been referred to in papers prepared for the purpose of seeking the decision. I consider that this is primarily a question of fact and, although the argument and indeed the evidence of Ms Townsend as presented may turn out to be right, it will all be a question of evidence as to the basis on which, factually, the decision was taken. It is not suggested that there will be any logistic difficulty in GAL dealing with this allegation or in requisite members of the Board or Board sub-group answering questions as to whether they did take into account any (arguably unacceptable) factors in reaching their decision. I will therefore allow this amendment.

38. It follows from the above and, from what the parties have agreed, that all the re-amendments will be allowed save for the incorporation of Schedule 1 in Paragraph 16 (f) and those in Paragraph 17 (which were otherwise be struck out as disclosing no cause of action). Re-amendments to Paragraphs 16 (g) and 16(i) were agreed subject to some final verbal "tweaking" which was in principle agreed by both sides' Counsel on their feet.

## Specific Disclosure

39. Following an unavoidable delay experienced in the production of this judgement (largely due to the intervention of a more urgent public procurement case and the need to reserve and produce a reasoned judgement on it), I have been informed by letter dated 10 November 2014 that the parties have agreed terms on which disclosure may be made into the Second Tier of the Confidentiality Ring.