Neutral Citation Number: [2017] EWHC 2667 (TCC)

Case No: HT-2016-000150

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURT OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Rolls Building, Fetter Lane, London, EC4A 1NL

Date: 31 October 2017

Before:

THE HON MR JUSTICE COULSON

- -

Between:

The Queen (on the Application of Hersi & Co Solicitors)	**Claimant**
- and -	
The Lord Chancellor (as Successor to the Legal Services Commission)	**Defendant**

- -
- -

Mr Martin Westgate QC and **Professor Pavlos Eleftheriadis**
(instructed by **Hersi & Co**) for the **Claimant**
Mr Simon Taylor (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 16, 17 and 18 October 2017

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON MR JUSTICE COULSON

The Hon. Mr Justice Coulson :

1. INTRODUCTION

1. In 2009/2010, the defendant conducted a public procurement exercise for the award of contracts to provide publicly-funded legal services relating to immigration and asylum and mental health work. There were 10,000 individual bids. For the immigration and asylum work, there were more than 400 applicants, and for the London region, the defendant was one of 218 firms who bid for that work. 127 of those firms were successful; however, the claimant was not.

2. On 6 July 2010, the claimant appealed against the decision not to award it a contract. On 5 August 2010, that appeal was refused. On 9 November 2010, the claimant commenced judicial review proceedings in the Administrative Court.

3. I do not propose to set out the procedural history at this stage because, ultimately, it is irrelevant to any consideration of the merits of the claimant's claim. However, I do deal with it in **Section 11** below, in the hope that, in setting out the sorry saga of this case between 2010 and 2016 (when the case was transferred to the TCC), it will come to be regarded as an example of how *not* to conduct a public procurement challenge.

4. The substantive issues could not be more straightforward. As part of the tender, there were 7 particular questions, grouped under the heading 'Selection Criteria', which all applicants were required to answer. The claimant answered the first three, but then left blank the answers to Questions 4, 5, 6 and 7. In consequence, the defendant awarded the claimant no points for its answers to those questions and the claimant's tender failed to gain the required points to justify the award of a contract. The claimant now argues, either that the defendant should have sought clarification of their non-answers, and/or that the answers to the questions were plain from other parts of the claimant's tender and should have been scored accordingly. In addition, the claimant has a wider case in which it seeks to compare the defendant's treatment of numerous other applicants on other aspects of their tenders, so as to allege inequality of treatment.

5. I deal with the issues that arise in this way. In **Section 2**, I set out the relevant legal principles. In **Section 3**, I set out the relevant facts. In **Sections 4-7** inclusive, I address the claimant's complaints about the defendant's treatment of their failure to answer Questions 4, 5, 6 and 7. There is a short summary of my conclusions on the merits of the claimant's specific claims at **Section 8**. In **Section 9**, I go on to address the claimant's wider case on its alleged comparators. I deal briefly with the damages claim at **Section 10**. Thereafter, as noted above, I deal in **Section 11** with the procedural history. I identify my conclusions and the consequential matters that will have to be dealt with following the handing down of this Judgment in **Section 12**. I am grateful to both counsel for their clear and concise submissions.

2. RELEVANT LEGAL PRINCIPLES

2.1 General

6. The applicable version of the **Public Contracts Regulations** in this case was the version which came into force on 31 January 2006. Relevant regulations for present purposes were:

> "4(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.
>
> …
>
> 47(1) The obligation on—
>
> (a) a contracting authority to comply with the provisions of these Regulations, other than regulations 14(2), 30(9), 32(14), 40 and 41(1), and with any enforceable Community obligation in respect of a public contract, framework agreement or design contest (other than one excluded from the application of these Regulations by regulation 6, 8 or 33); and
>
> (b) a concessionaire to comply with the provisions of regulation 37(3);
>
> is a duty owed to an economic operator.
>
> …
>
> 47(6) A breach of the duty owed in accordance with paragraph (1) or (2) is actionable by any economic operator which, in consequence, suffers, or risks suffering, loss or damage and those proceedings shall be brought in the High Court."

7. The best general guidance as to the scope of these duties can be found in the judgment of Morgan J in ***Lion Apparel Systems Limited v Firebuy Limited*** [2007] EWHC 2179 (Ch). By reference to a number of other authorities, Morgan J summarised the relevant legal principles to be applied to any public procurement challenge:

> "26. The procurement process must comply with Council Directive 92/50/EEC, the 1993 Regulations and any relevant enforceable Community obligation.
>
> 27. The principally relevant enforceable Community obligations are obligations on the part of the Authority to treat bidders equally and in a non-discriminatory way and to act in a transparent way.

> 28. The purpose of the Directive and the Regulations is to ensure that the Authority is guided only by economic considerations.
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> 29. The criteria used by the Authority must be transparent, objective and related to the proposed contract.
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> 30. When the Authority publishes its criteria, which conform to the above requirements, it must then apply those criteria. The published criteria may contain express provision for their amendment. If those provisions are complied with, then the criteria may be amended and the Authority may, and must, then comply with the amended criteria.
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> 31. In relation to equality of treatment, speaking generally, this involves treating equal cases equally and different cases differently.
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> …
>
> 34. When the court is asked to review a decision taken, or a step taken, in a procurement process, it will apply the above principles.
>
> 35. The court must carry out its review with the appropriate degree of scrutiny to ensure that the above principles for public procurement have been complied with, that the facts relied upon by the Authority are correct and that there is no manifest error of assessment or misuse of power.
>
> 36. If the Authority has not complied with its obligations as to equality, transparency or objectivity, then there is no scope for the Authority to have a "margin of appreciation" as to the extent to which it will, or will not, comply with its obligations.
>
> 37. In relation to matters of judgment, or assessment, the Authority does have a margin of appreciation so that the court should only disturb the Authority's decision where it has committed a "manifest error".
>
> 38. When referring to "manifest" error, the word "manifest" does not require any exaggerated description of obviousness. A case of "manifest error" is a case where an error has clearly been made."

8. Although the present case is principally concerned with the alleged failure on the part of the defendant to seek clarification from the claimant in respect of the four questions in the Selection Criteria which it failed to answer, it must be remembered that the

court is ultimately concerned with whether or not there has been a manifest error on the part of the defendant. Depending on the nature of the alleged error there may, or may not, be a margin of appreciation. This was summarised by David Richards J (as he then was) in ***J B Leadbitter & Co Limited v Devon County Council*** [2009] EWHC 930 (Ch) at paragraph 55:

> "55. I conclude therefore that the principle of proportionality is capable of applying to the implementation of the terms of a procurement process. In considering its application in a particular case, there are obvious factors to be borne in mind. First, as Mr Henshaw accepts, the exercise of discretionary powers necessarily involves judgment on the part of the contracting authority. The court must respect this area for judgment and will not intervene unless the decision is unjustifiable. This, I would think, is the proper meaning of a manifest error in this context. It will be remembered that in paragraph 43 of the judgment in ***Tideland Signal***, the court stated that the Commission's decision to reject the tender without first seeking clarification "was clearly disproportionate and thus initiated by a manifest error of assessment". In ***Lion Apparel Systems Ltd v Firebuy Ltd*** [2007] EWHC 2179 (Ch), [2008] EuLR 191, Morgan J at paras 26-38 set out a number of principles applicable to procurement distilled from the decision of the Supreme Court of Ireland in ***SIAC Construction Ltd v Mayo County Council*** [2002] IESC 39, [2003] EuLR 1 and the decision of the Court of First Instance in Case T-25-/05 ***Evropaiki Dynamiki v Commission***."

2.2 Scope of Duty to Seek Clarification

9. The duty of a contracting authority to seek clarification of the tender in certain circumstances developed originally out of European law (although, as we shall see, it has been affirmed by the English courts). There were a number of debates in the present case as to the nature and scope of any such obligation and the potential differences between a right and a duty. As I indicated to counsel during argument, it seemed to me that this sort of debate gave rise to a real risk of over-complication. Accordingly, I identify below the authorities which I consider to be of particular relevance and then summarise the general principles at paragraph 17 below.

10. In ***Adia Interim v Commission*** (Case T-19/96, unreported) the Commission did not go back to an unsuccessful bidder to seek clarification in respect of an error in the bid relating to the coefficient for converting the gross hourly wages into billing rates. The court recognised that the Commission had a broad discretion in assessing the factors to be taken into account for the purpose of deciding to award a contract following an invitation to tender, and the court's review had to be limited to checking that there had been no serious manifest error. It was noted that the Commission had strictly applied the conditions of the tendering procedure and that there was no reason to seek clarification. There had been no infringement of the principles of equal treatment and sound administration.

11. In ***Tideland Signal Limited v EC Commission*** [2002] 3 C.M.L.R 33 the original tender period had been 90 days. That was subsequently extended. The tender in question correctly said that it was open for acceptance within 90 days, but it then gave a latest date for acceptance which was within the 90 day period. As a result, the contracting authority refused to consider the tender and the tenderer appealed. In my view, the fact that the court concluded that the authority should have gone back to seek clarification on this obvious point should not have come as a surprise to anyone. It was, and was properly described in ***Clinton***, referred to in paragraph 18 below, as "an exceptional case".

12. The relevant parts of the judgment are as follows:

> "33. The Court recalls 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. Review by the Community courts is therefore limited to checking compliance with the applicable procedural rules and the duty to give reasons, the correctness of the facts found and that there is no manifest error of assessment or misuse of powers (Case T-145/98 ***ADT Projekt v Commission*** [2000] ECR II-387, paragraph 147).
>
> 34. Moreover, it is essential, in the interests of legal certainty, that the Commission should be able to ascertain precisely what a tender offer means and, in particular, whether it complies with the conditions set out in the call for tenders. Thus, where a tender is ambiguous and the Commission does not have the possibility to establish what it actually means quickly and efficiently, the institution has no choice but to reject that tender.
>
> …
>
> 37. In response to the Commission's argument that its Evaluation Committee was nevertheless under no obligation to seek clarification from the applicant, the Court holds that the power set out in section 19.5 of the Instructions to Tenderers must, notably in accordance with the Community law principle of good administration, be accompanied by an obligation to exercise that power in circumstances where clarification of a tender is clearly both practically possible and necessary (see, by analogy, Cases T-22/99 ***Rose v Commission*** [2000] ECR SC IA-27 and II-115, paragraph 56, T-182/99 ***Carvelis v Parliament*** [2001] ECR SC IA-113 and II-523, paragraphs 32 to 34; see also, more generally, Case T-231/97 ***New Europe Consulting and Brown v Commission*** [1999] ECR I-2403, paragraph 42 and Article 41 of the Charter of

> fundamental rights of the European Union, OJ 2000 C 364, p. 1, proclaimed in Nice on 7 December 2000). While the Commission's evaluation committees are not obliged to seek clarification in every case where a tender is ambiguously drafted, they have a duty to exercise a certain degree of care when considering the content of each tender. In cases where the terms of a tender itself and the surrounding circumstances known to the Commission indicate that the ambiguity probably has a simple explanation and is capable of being easily resolved, then, in principle, it is contrary to the requirements of good administration for an evaluation committee to reject the tender without exercising its power to seek clarification. A decision to reject a tender in such circumstances is liable to be vitiated by a manifest error of assessment on the part of the institution in the exercise of that power.

38. It would, moreover, be contrary to the principle of equality, to which section 19.5 of the Instructions to Tenderers in the present case makes reference, for an evaluation committee to enjoy an unfettered discretion to seek or not to seek clarification of an individual tender regardless of objective considerations and free from judicial supervision (see, by analogy, Joined Cases T-112/96 and T-115/96 ***Séché v Commission*** [1999] ECR SC IA-115 and II-623, paragraph 127). Moreover, contrary to the Commission's argument, the principle of equality did not preclude the Evaluation Committee from allowing tenderers to clarify any ambiguities in their tenders, since section 19.5 made express provision for such clarification to be sought and the Evaluation Committee was obliged to treat all tenderers in a similar manner with regard to the exercise of this power.

39. It is also relevant to recall, in the present context, that the principle of proportionality requires that measures adopted by Community institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives pursued and that where there is a choice between several appropriate measures recourse must be had to the least onerous (see, for example, Case C-157/96 ***National Farmers' Union and Others*** [1998] ECR I-2211, paragraph 60).

…

42. In those circumstances, the principle of good administration required the Evaluation Committee to resolve the resulting ambiguity by seeking clarification of the period for validity of the applicant's tender.

> 43. In addition, as regards the principle of proportionality, the Court finds that in the present case the Evaluation Committee, faced with the applicant's ambiguous tender, had a choice between two courses of action, either of which would have produced the legal certainty referred to at paragraph 34 above, namely to reject the tender outright or to seek clarification from the applicant. Given the likelihood, noted at paragraph 41 above, that the tender was indeed intended to remain valid for 90 days from 11 June 2002 until 9 September 2002 as required by section 8.1 of the Instructions to Tenderers and the fact that the applicant would have been obliged to provide within 24 hours any clarification sought so that the tender procedure as a whole would have suffered only minimal disruption and delay, the Court holds that the Evaluation Committee's decision to reject the tender without seeking clarification of its intended period of validity was clearly disproportionate and thus validated by a manifest error of assessment."

13. This principle was considered in greater detail in ***Antwerpse Bouwwerken v Commission*** (Case T-195/08, unreported). That was another challenge to the Commission, following a failure by a tenderer to put particular costs into its cost estimation summary. The court held:

> "54. It should also be noted that Article 148(3) of the Implementing Regulation empowers the institutions to contact tenderers in the event that some clarification is required in connection with a tender, or if clerical errors contained in the tender must be corrected. It follows that that provision cannot be interpreted as imposing, in the exceptional, limited circumstances which it identifies, a duty on the institutions to contact tenderers (see, by analogy, Case T-19/95 ***Adia Interim v Commission*** [1996] ECR II-321, paragraphs 43 and 44).
>
> 55. It can be otherwise only if, by virtue of the general principles of law, that power has evolved into an obligation on the part of the Commission to contact a tenderer (see, to that effect and by analogy, ***Adia interim v Commission***, paragraph 54 above, paragraph 45).
>
> 56. That is the position, inter alia, where a tender has been drafted in ambiguous terms and the circumstances of the case, of which the Commission is aware, suggest that the ambiguity probably has a simple explanation and is capable of being easily resolved. In principle, it would be contrary to the requirements of sound administration for the Commission to reject the tender in such

> circumstances without exercising its power to seek clarification. It would be contrary to the principle of equal treatment to accept that, in such circumstances, the Commission enjoys an unfettered discretion (see, to that effect, Case T-211/02 ***Tideland Signal v Commission*** [2002] ECR II-3781, paragraphs 37 and 38).
>
> 57. In addition, the principle of proportionality requires that measures adopted by the institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued, it being understood that, where there is a choice between several appropriate measures, recourse must be had to the least onerous and that the disadvantages caused must not be disproportionate to the aims pursued (Case C-157/96 ***National Farmers' Union and Others*** [1998] ECR I-2211, paragraph 60). That principle requires that, when the contracting authority is faced with an ambiguous tender and a request for clarification of the terms of the tender would be capable of ensuring legal certainty in the same way as the immediate rejection of that tender, the contracting authority must seek clarification from the tenderer concerned rather than opt purely and simply to reject the tender (see, to that effect, ***Tideland Signal v Commission***, paragraph 56 above, paragraph 43).
>
> 58. However, it is also essential, in the interests of legal certainty, that the Commission be able to ascertain precisely what a tender submitted in the course of a procurement procedure means and, in particular, to determine whether the tender complies with the conditions set out in the contract documents. Thus, where a tender is ambiguous and the Commission is not in a position to establish, quickly and efficiently, what it actually means, that institution has no choice but to reject the tender (***Tideland Signal v Commission***, paragraph 56 above, paragraph 34).
>
> …
>
> 74. It follows that the Commission was right to find that the omission of a price for Item E 9.26 in the cost estimation summary accompanying Company C's tender constituted a simple clerical error in that tender or, at the very least, an ambiguity having a simple explanation and capable of being easily resolved. In the light of the points raised in paragraphs 68 to 73 above, the obvious conclusion is that the missing price for Item E 9.26 of the cost estimation summary for Company C's tender

> cannot be different from the price bid by that undertaking for Item E 9.13 (EUR 903.69) and that it was a mere oversight that Company C did not state that price for Item E 9.26."

14. In ***SAG ELV Slovensko A.S*** [2012] 2 C.M.L.R. 36, there were two alleged failures: one that the contracting authority did not ask questions in relation to the abnormally low tender and one concerned with an alleged technical error in the bid. The general guidance starts at paragraph 40:

> "40. None the less, Article 2 of that directive does not preclude, in particular, the correction or amplification of details of a tender where appropriate, on an exceptional basis, particularly when it is clear that they require mere clarification, or to correct obvious material errors, provided that such amendment does not in reality lead to the submission of a new tender. Nor does that article preclude a provision of national legislation such as Article 42(2) of Law No 25/2006, according to which, in essence, the contracting authority may ask tenderers in writing to clarify their tender without, however, requesting or accepting any amendment to the tender.
>
> 41. In the exercise of the discretion thus enjoyed by the contracting authority, that authority must treat the various tenderers equally and fairly, in such a way that a request for clarification does not appear unduly to have favoured or disadvantaged the tenderer or tenderers to which the request was addressed, once the procedure for selection of tenders has been completed and in the light of its outcome.
>
> 42. In order to provide a useful answer to the national court, it must be added that a request for clarification of a tender may be made only after the contracting authority has looked at all the tenders (see, to that effect, ***Lombardini and Mantovani***, paragraphs 51 and 53).
>
> 43. Furthermore, that request must be sent in an equivalent manner to all undertakings which are in the same situation, unless there is an objectively verifiable ground capable of justifying different treatment of the tenderers in that regard, in particular where the tender must, in any event, in the light of other factors, be rejected.
>
> 44. In addition, that request must relate to all sections of the tender which are imprecise or which do not meet the technical requirements of the tender specifications, without the contracting authority being entitled to reject

> a tender because of the lack of clarity of a part thereof which was not covered in that request. "

15. Finally, I was referred to the more recent case of ***Archus and Gama*** (Case C-131/16, unreported) where some of the guidance in ***Slovensko*** is restated in slightly different language. In particular, paragraph 36 onwards reads as follows:

> "36. In accordance with the case-law referred to in paragraph 29 above, a request sent by the contracting authority to a tenderer to supply the declarations and documents required cannot, in principle, have any other aim than the clarification of the tender or the correction of an obvious error vitiating the tender. It cannot, therefore, permit a tenderer generally to supply declarations and documents which were required to be sent in accordance with the tender specification and which were not sent within the time limit for tenders to be submitted. Nor can it, in accordance with the case-law referred to in paragraph 31 above, result in the presentation by a tenderer of documents containing corrections where in reality they constitute a new tender.
>
> 37. In any event, the obligation which a contracting authority may have under national law, to invite tenderers to submit the declarations and documents required which they have not sent within the time limit given for the submission of offers, or to correct those declarations and documents in the event of errors, cannot be permitted except in so far as the additions or corrections made to the initial tender do not result in a substantial amendment of that tender. It is apparent from paragraph 40 of the judgment of 29 March 2012, ***SAG ELV Slovensko and Others*** (C-599/10, EU:C:2012:191) that the initial tender cannot be amended to correct obvious clerical errors other than exceptionally and where that amendment does not result, in reality, in the proposal of a new tender.
>
> 38. It is for the referring court to determine whether, in the circumstances of the main proceedings, the substitution made by Archus and Gama remained within the limits of the correction of an obvious error vitiating its tender.
>
> 39. Consequently, the answer to the first question referred is that the principle of equal treatment of economic operators set out in Article 10 of Directive 2004/17 must be interpreted as precluding, in a public procurement procedure, the contracting authority from inviting a tenderer to submit declarations or documents whose communication was required by the tender

> specification and which have not been submitted within the time limit given for the submission of tenders. On the other hand, that article does not preclude the contracting authority from inviting a tenderer to clarify a tender or to correct an obvious clerical error in that tender, on condition, however, that such an invitation is sent to all tenderers in the same situation, that all tenderers are treated equally and fairly and that that clarification or correction may not be equated with the submission of a new tender, which is for the referring court to determine."

16. During the course of his submissions, Mr Westgate sought to define in the widest terms the circumstances in which the contracting authority was obliged to seek clarification. To do that, he sought to minimise the obvious risk inherent in any process of clarification, namely the making of changes which improve the tender in question. He did this by turning the test on its head, and arguing that the default position was that changed tenders should be regarded as an acceptable norm, with the only proviso that "the change has to fundamentally alter the nature of the bid before it becomes unacceptable". He was unable to point to any authority in support of this radical proposition, and in my view it was contrary to the passages from the authorities which I have already cited. It was also a test that was unworkable in practice: how could a contracting authority sensibly decide whether an answer to a clarification question "fundamentally altered the nature of the bid" once it had received the answer, let alone when it was asking itself whether or not to ask the clarification question in the first place?

17. So what then are the applicable principles to be derived from the cases? In my view, they are these:

    (a) A duty to seek clarification of a tender will arise only in "exceptional circumstances" (***Tideland***, ***SAG***), sometimes called "limited circumstances" (***Antwerpse***).

    (b) Such a duty may arise where a tender is "ambiguous", but it will not do so in every case where a tender is ambiguous (***Tideland***)

    (c) It will only arise "where the terms of a tender itself and the surrounding circumstances known to [the contracting authority] indicate that the ambiguity probably has a simple explanation and is capable of being easily resolved" (***Tideland***).

    (d) Such a duty may also arise where there is a "simple clerical error" (***Antwerpse***) or "when it is clear that [the details of a tender] require mere clarification, or to correct obvious material errors" (***SAG***). This would appear to be the same as the "serious manifest error" referred to in ***Adia***. It is not necessary for the error to be "clerical" (whatever that might mean) but it must be "simple", "material", "serious" and "manifest".

    (e) The duty will not arise where any amendment or clarification provided post-tender would "in reality lead to the submission of a new tender" (***SAG***). The

contracting authority "cannot permit a tenderer generally to supply declarations and documents which will require to be sent in accordance with the tender specification and which were not sent…" (***Archus***).

(f) There is no authority to support Mr Westgate's submission that 'the change generated by a request for clarification would have to fundamentally alter the nature of the bid before it becomes unacceptable'. I consider that this proposition is contrary to the cases I have cited and is unworkable in practice.

18. In my view, this reading of the cases and this summary are consistent with the decision of the Court of Appeal in Northern Ireland in ***William Clinton v Department for Employment and Learning and Another*** [2012] NICA 48 where, at paragraph 62, and commenting on ***Tideland***, the Court of Appeal said:

> "[62]. ***Tideland*** requires the court to have regard to (a) the terms of a tender itself, and (b) the surrounding circumstances known to the client, (c) the client has to be satisfied that there is an "ambiguity", (d) the ambiguity probably has to have a simple explanation, and (e) the ambiguity is capable of being easily resolved. However, whilst on one view that might be interpreted as giving a court a wide power to require the client to give an unsuccessful tenderer a further opportunity to mend its hand, the circumstances in ***Tideland*** were exceptional, and it must be doubted whether the ECJ intended this to be interpreted in as generous a fashion as the trial judge's decision necessarily involves. Were the Department to provide an opportunity to a tenderer to remedy insufficient evidence by providing additional information, where the information would amount to a new tender that opportunity offends against the principle in ***SAG ELV***."

It follows from the previous paragraphs of this Judgment that I respectfully agree with that approach.

2.3 Equal Treatment

19. I have already referred to the principle of equal treatment set out paragraph 38 of the decision in ***Tideland*** (paragraph 12 above)

20. Also of relevance is the decision in ***Fabricom SA v Belgian State*** [2005] 2 C.M.L.R. 25. That was a rather different sort of case concerning a clash between Belgian domestic law and the wider principles of public procurement. However, the court set down a very general definition of equal treatment in paragraph 27 as follows:

> "Furthermore, it is settled case law that the principle of equal treatment requires the comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified."

2.4 The English Authorities Arising Out Of This Procurement

21. I was referred to six reported decisions arising out of the defendant's 2010 legal aid procurement, the very exercise with which this case is concerned. The challenges in those six cases were based on a variety of grounds, including some which are the same as, or very similar, to the claimant's challenge in this case. They all failed.

22. ***Azam & Co Solicitors v Legal Service Commission*** [2010] EWCA Civ. 1194, was a missed deadline case. The challenge was rejected by the Court of Appeal. Both Pill and Rimer LJJ expressly endorsed the approach in ***Leadbitter*** set out in paragraph 8 above. At paragraph 37 of his judgment, Pill LJ noted that, if Azam had been granted the extension of time they sought, there was a potential prejudice to other tenderers.

23. In ***J R Jones Solicitors v Legal Services Commission*** [2010] EWHC 3671 (Ch) HHJ Purle QC (sitting as a High Court Judge) was dealing with a challenge based on the fact that, in answer to a question in the Selection Criteria, Jones had ticked the wrong box. The challenge was put on the basis of ***Tideland***, but was rejected. Judge Purle noted, at paragraph 46 of his judgment, that if the defendant had had to correct an obvious mistake in this context, they would then have had to review all other cases so as to ensure equality of treatment, and that this would have been impractical and disproportionate.

24. In addition, at paragraph 69 of his judgment, Judge Purle pointed out that the applicants had had an equal opportunity to participate, "but, through their own error, have not taken full advantage of that opportunity. That is a sadly regrettable outcome, but I do not think that LSC can be criticised for having applied the conditions of the tender. On the contrary, they would have exposed themselves to criticism had they acted otherwise. At all events, their decision to apply the conditions strictly is not manifestly wrong". In my view, the same observations could be made in the present case.

25. In ***R (Hoole) v Legal Services Commission*** [2011] EWHC 886 (Admin) Hoole had failed to answer Selection Criteria Questions 1-7. This is therefore the reported case that is closest to the present case (where the claimant failed to answer Questions 4-7). The claim was put on the basis of ***Tideland*** but was rejected by Blake J for the reasons set out at paragraph 26 of his Judgment:

> "26. Although paragraph 11.8 of the defendant's IFA gave it the right to seek additional information/clarification, I conclude that Tideland cannot assist the claimant in the present because:-
>
> i) There was no ambiguity in the bid, simply an uncompleted section of the form. Although some parts of the data required to score points might have been culled from information provided elsewhere in the bid, not all of the information that the claimant needed to supply to gain 51 points could have been so derived. The LSC could have identified that the claimant's firm was a qualified solicitor's practice based at an address in Bristol, but other information

> it had supplied elsewhere was subtly distinct from the questions asked in the selection criteria part of the form. The provision of information relevant to the selection criteria and the non-completion of that part of the application form, did not constitute an ambiguity that the defendant was bound to inquire into.
>
> ii) The exercise of the power of inquiry did not arise in circumstances where the imprecision of the tender terms or the defendant's subsequent conduct required it to exercise the power. The defendant had not caused the claimant's failure to provide the relevant material.
>
> iii) An overbroad exercise of the power to seek clarification would be contrary to the principle of equality and fair treatment of all tenderers. The CFI acknowledges this limit at [38] in Tideland and a similar emphasis has been attached to this principle in the decision of David Richards J in ***Leadbitter v Devon County Council*** [2009] EWHC 930 (Ch) at [63] to [68], approved by the Court of Appeal in ***Azam v Legal Services Commission*** [2010] EWCA Civ. 1194.
>
> iv) It would be unfair to rival tenderers for the defendant either to have allowed the claimant to amend its application by completing it, or to fill in the selection criteria on behalf of the claimant from information that might have been available to it extraneously. Paragraph 11.6 of the IFA makes clear it is the responsibility of applicants to make sure all tenders are fully and accurately completed and there is no obligation on the defendant to obtain missing information or documents. Paragraph 11.7 explains that information already provided to the LSC in a previous contract could not be used to populate the PQQ and ITT "to ensure that we can assess each tender is affair, like for like and reasonable manner". Paragraph 11.23 indicates that applicants must not amend or alter any document comprising part of their tender after the closing time and date. All tenderers would expect those rules to be consistently applied."

26. In addition, at paragraph 30, Blake J considered more widely the tension between, on the one hand, a public law duty to act fairly and, on the other, the fact of a competitive tender and an overriding duty to treat all tenders equally. At paragraph 30 he said:

> "30. In my judgment, this is the answer to the claimant's case that there was duty on the defendant to assist them make good the defects in their application. Viewed entirely from the point of view of a public law duty to act fairly, it may well be that the exercise of a discretion to grant a benefit should be based on all matters that could or should be known to the authority, and that fairness might well include a reasonable opportunity to correct obvious errors without changing the fundamental nature of the bid submitted. It is after all in the public interest that a well-qualified and experienced provider of legal services in the field of immigration should be permitted to continue in business. However, any such duty is severely circumscribed where there is a competitive tender and an over-riding duty to treat all tenderers equally. Here for reasons that were not the responsibility of the defendant, the claimant had failed to supply the information that would have lead them to being ranked in priority where there was competition for the award of NMS. Any general duty to give an applicant an opportunity to correct errors in the absence of fault by the defendant, yields to the duty to apply the rules of the competition consistently and fairly between all applicants, and not afford an individual applicant an opportunity to amend the bid and improve its prospects of success in the competition after the submission date had passed."

I respectfully agree with that analysis.

27. In ***R (Harrow Solicitors) v Legal Services Commission*** [2011] EWHC 1087 (Admin) HHJ Waksman QC (sitting as a High Court Judge) was dealing with another claim very similar to this. Harrow had answered Selection Criteria Question 5 (the question about the drop-in service session which arises in the present case) in the negative. They said this was an error because they did intend to commit to offer such a service. They argued that their answer was an obvious error, and that the defendant was obliged to seek clarification. They sought to get round what appear to me to be the obvious difficulties with this argument (the huge burden it would place on a contracting authority to clarify every applicant's failure to answer a question correctly) by saying that the duty to seek clarification would be limited to cases where the error was 'objectively verifiable'. Judge Waksman demonstrated how and why that was no answer at paragraph 33 of his judgment as follows:

> "33. It is in my judgment no answer to say that this will be avoided by limiting the required intervention to cases where the error is "objectively verifiable". If any disappointed tenderer can invoke this process (whether through an appeal or otherwise) there is a real risk that a change in the bid might occur and either way, much more investigation will take place than otherwise. All of

> this is illustrated by the present case. It is said that the error is "objectively verified" because in fact Harrow did offer drop-in centres before, but the actual question sought an expression of intent: "would the tenderer commit to offering it?" It is not necessarily an answer to point to prior experience, even though the mistake is accepted as having been made in this case. And suppose the Claimant was a tenderer who had not done drop-in sessions before, but who claimed that it had answered "No" instead of "Yes". How is this failure to express the correct intent to be judged? If the critical point was prior experience of drop-in work that approach would arguably discriminate against new tenderers."

28. In ***R (Hossacks) v Legal Service Commission*** [2012] EWCA Civ. 1203, the challenge went to the Court of Appeal. Stanley Burnton LJ set out the passages from ***Antwerpse*** and ***SAG*** to which I have previously referred at paragraphs 13 and 14 above. The challenge was again put on a ***Tideland*** basis. The appellant had not identified the location of her office for any of the 125 bids that she made and then said that this should have been the subject of a clarification request from the defendant. The Court of Appeal agreed with the judge that it was not unreasonable for the defendant not to have sought to clarify the tender, given the nature of the mistake made. There was no ambiguity in her applications, nor was there any conflict between some of the information she provided and other information available in her tender. The appeal was dismissed.

29. On the equality point, Stanley Burnton LJ said at paragraph 23:

> "In my judgment, in order to succeed on this issue, the Appellant must first point to one or more instances in which an applicant whose application was as fundamentally flawed as were hers was permitted to change its application or applications and whose application or applications was or were then accepted as compliant with the tender rules. It is only if the Appellant can show that there were such instances that the question can arise whether the Commission acted in breach of its duty to treat applicants equally and consistently when it rejected the Appellant's applications."

Counsel in the present case agreed that, to the extent that this paragraph might indicate that an application had to be 'fundamentally flawed' before other, equally fundamentally flawed comparators were looked at, it was potentially misleading. It is of course unnecessary for the underlying application to be fundamentally flawed before this principle of equal treatment is applied.

30. Finally, there is the decision of Sue Carr J in ***R (All About Rights) v The Lord Chancellor*** [2013] EWHC 3461 (Admin). In that case it was the Tender Information Form ("TIF") that was blank. The ***Tideland*** challenge was rejected for the numerous reasons set out at paragraph 59 of the judgment:

"59. In my judgment, however, the LSC's decision to reject AAR's bid because of the submission of a blank TIF was not disproportionate :

a) this was a non-responsive tender by AAR;

b) the IFA made it abundantly clear completion of the TIF was mandatory (for example in section 4 and paragraphs 9.3, 9.4, 9.16 and 9.37) and that it was AAR's responsibility to complete the tender fully and accurately (for example in paragraph 11.11) and that tenderers could not amend or alter any part after the closing deadline (in paragraph 9.56);

c) the TIF was of fundamental importance – it was the heart of the bid, setting out amongst other things the number of NMS sought, in what area and using what staff the services were to be provided;

d) even if there were other necessary documents, including the PQQ, the TIF was singled out in the IFA as being the only "mandatory form" that had to be completed and submitted (see paragraph 9.4);

e) to have allowed submission of a completed form would have been effectively to allow submission of a new bid. This was not a situation of clarification of ambiguity or an obvious error arising out of information provided. The TIF had been submitted completely blank;

f) moreover that new bid would have improved AAR's position and disadvantaged that of others (by reducing the pool of NMS available to other bidders);

g) contrary to AAR's contention, the necessary information could not have been obtained (reasonably or at all) from other material submitted by AAR, specifically as to the number of NMS being bid for and also the address(es) from which the legal services were to be provided. As to the size of the bid, the LSC had no knowledge. As to address, whilst the LSC could have identified the address of AAR, it could not have identified whether or not any other addresses might be used. And here Mr Radnajarah did indeed wish to practise from another address, namely his home in London. Moreover, to the extent that other information was available from other documents, such documents were non-voluntary. There is at least a question

mark over whether or not information from such documents could properly have been used (see paragraph 36 of R (on the application of ***Hossacks) v LSC*** [2011] EWCA Civ 788);

h) following on from g), it was not clear that remedy would be "quick and easy". The LSC did not know if AAR had in fact completed the TIF and just failed to submit it, or whether the TIF had been completely overlooked. Before me, Mr Nadarajah could not say whether the completed TIF put in evidence had been completed before or after submission of his bid;

i) the mistake could not be attributed to any fault on the part of the LSC (or indeed to any outside factor). The fact that there may have been only limited fault on the part of AAR is irrelevant – see paragraph 40 of Ministeriet for Forskning, Innovation og iderergaende Uddannelser (supra);

j) to have allowed further submission would have jeopardised implementation and increased the administrative burden in a high volume process, as well as give rise to the risk of abuse;

k) the potentially "harsh economic consequences" for AAR (to adopt the words of Richards J in Leadbitter (supra)) should not induce the court to accommodate a failure by AAR to comply with an obviously mandatory requirement of the bid."

31. Carr J also had some important observations to make about the breadth or otherwise of any proper pool of comparators in a case of this sort. I deal with that point separately in **Section 9** below.

32. As I have said, all six of these challenges to the legal aid procurement process of 2009-2010 failed. The courts consistently applied the principles which I have noted in **Sections 2.1-2.3** above. Moreover, the courts in these cases rejected arguments which, four years after the last of them, the claimant in this case was endeavouring to resurrect.

3. THE RELEVANT FACTS

3.1 The Information For Applicants ("IFA")

33. The IFA was a lengthy document. It is unnecessary to set it all out here. However, there are some important parts of the document, and those are set out below.

34. Section 9 was called "How to respond to an ITT ("Invitation to Tender"). Paragraph 9.1 made plain that the response would be in two stages: the PQQ and then the tender itself. The tender would be in three parts: the Tender Information Form ("TIF"); the

Essential Criteria (which had already been described in some details in paragraphs 7.17-7.29); and the Selection Criteria (which had already been described in some detail in paragraphs 7.30-7.33). It also drew the distinction between the "organisation" (i.e. the applicant firm) and the different offices within that organisation that might be bidding. The paragraph stressed that, whilst the PQQ could be completed on behalf of the organisation, the other information, including the Selection Criteria, had to be completed for each office within the organisation.

35. Paragraph 9.2 required the applicant to identify how many future cases (called "New Matter Starts" or NMS) were being bid for, and set a maximum of 150 NMS per full-time equivalent staff member. The same paragraph also envisaged a difference between the position at the time of the tender and the staffing levels when the contract began on 1 October 2010, because it said:

> "● You do not need to have employed all Caseworkers and Supervisors by the date you submit your response to the ITT but you must have recruited all staff 8 weeks before the contract start date."

36. Paragraphs 9.8-9.14 dealt with the pre-Qualification Questionnaire ("PQQ"). This was the first stage of the tender process. Those sections set out the experience required. Sections 9.11-9.14 provided:

> "9.11. Answers to these questions will be assessed on a pass/fail basis. If an Applicant Organisation fails any question, we will reject their application.
>
> 9.12. The requirement to have the required experience, and not to have any mandatory grounds for rejection, are absolute and we will reject any application that does not meet our requirements. Other questions provide an opportunity to set out exceptional circumstances where an Applicant Organisation considers that they cannot meet the requirements but that exceptional circumstances apply which mean that they can meet our required standard even though they cannot give the appropriate answer to our question. For example, a new organisation would not be able to give confirmation that it had professional indemnity insurance in place, but could explain that this was the reason, and we would then decide that in these circumstances it met our overall requirement to have appropriate workplace insurance.
>
> 9.13. Where exceptional circumstances are given in a PQQ response, we will undertake an assessment of these to establish whether we would be willing to contract with the Applicant Organisation.
>
> 9.14 The PQQ also asks for information about financial sustainability. This information is not assessed,

> although we may use the financial sustainability information to inform future contract management. You should complete and attach the relevant Applicant Information Form (Private Sector or Not for Profit as appropriate)."

37. Paragraph 9.18 repeated that each ITT comprised of three sections: the TIF; the Essential Criteria; and the Selection Criteria. The following paragraphs relevant to the TIF were:

> "9.20 We require Applicant Organisations to submit the following information, which will form part of the tender, about each individual Office from which they are intending to deliver a presence in an Access Point:
>
> - Matter Starts that organisations are bidding to be delivered from that Office (Section 1)
> - Whether they would like an allocation for tolerance work (see 10.18 below) (Section 1)
> - Any existing LSC account number for the Office (Section 2)
> - Office address (Section 2)
> - Information about staff that will deliver the Immigration Services from that Office (Section 4)
>
> …
>
> 9.22 The information given in Section 4 should relate to the hours and the roles of staff delivering work at that particular Office. For example, if a FTE member of staff will work half their time in one Office and half in another, Applicants should enter their details in the forms for each Office, giving their time as 17.5 hours (half a full FTE week of at least 35 hours) in both cases. The form will automatically calculate the FTE of every staff member for whom details are provided based on the number of hours per week entered."

38. In respect of the Essential Criteria, the relevant paragraphs were:

> "9.28 All the questions in this section require an answer of Yes or No.
>
> 9.29 One of the Essential Criteria relates to an Applicant Organisation's Immigration Supervisors. There is a facility in the right hand side of the screen (Buyer Attachments) to download the Immigration Supervisor Self Declaration Form.
>
> 9.30 This form should be downloaded and completed with details of each Immigration Supervisor who is currently in post at the Office(s) that an Applicant is tendering to

> deliver services from as part of their tender. It should then be uploaded with the response.
>
> 9.31 If an Applicant Organisation does not currently have a Supervisor in post then they must confirm and provide us with an Immigration Supervisor Self Declaration Form once this individual is recruited and in any event at least 8 weeks before the contract start date."

39. In respect of the Selection Criteria, which is particularly relevant to the challenge in this case, paragraph 9.34 said:

> "9.34 The Selection Criteria are set out in detail at the top of the page. The options for each Selection Criterion are then summarised and presented in a series of drop down fields against each Access Point. Applicant Organisations should select the appropriate options listed alongside the Access Point in which they want to bid. All fields should be completed (including the number of Matter Starts they are bidding for and the Office post code) for each of the Office(s) (Permanent or Part Time Presence) from which an Applicant Organisation wishes to deliver Immigration Services, based on the services an organisation intends to deliver from that Office – the Individual Bid."

40. These paragraphs concerning the Selection Criteria had to be read in the light of paragraphs 7.32 and 7.33 of the IFA which said:

> "7.32. Each ITT will set out the Selection Criteria that will be applied, these will include the ability (from 1 October 2010) to offer:
>
> - The best access to an Authorised Litigator
> - Drop-in Service Sessions
> - The best access to an Immigration Supervisor
> - A Level 3 accredited Caseworker
> - A Permanent Presence (non-London areas only)
>
> 7.33. In addition, we will prefer Applicants that can demonstrate to us a higher level of confidence of their ability to deliver Immigration Services from 1 October 2010 based on:
>
> - Experience of operating services in the geographical area tendered for

- Experience of delivering legal services to clients

- Having a lower percentage of Caseworkers to recruit to deliver the services tendered for"

41. Section 10 of the IFA was entitled 'How Will Tenders be Assessed and Matter Starts Awarded?' The relevant paragraphs of that section were as follows:

> "**Selection Criteria**
>
> 10.9 Selection Criteria will only be applied when the total volume of Matter Starts tendered for in an Access Point by those passing the Essential Criteria is greater than the Matter Starts available in an Access Point.
>
> 10.10 If we are not able to cater for all these Applicant Organisations' Individual Bids for Matter Starts, the Selection Criteria relevant to the ITT will be applied.
>
> 10.11 Selection Criteria will be considered against each Individual Bid at Access Point level. This means that Individual Bids in an Access Point from Offices from the same organisation will be considered separately and are in competition with each other. For the avoidance of doubt, Individual scores from individual Offices within the same organisation will not be added together or aggregated
>
> 10.12 Set out in Annex B is an outline of the Selection Criteria and how it will be scored. Each answer to a question is allocated a certain number of points. A higher number of points will be awarded to those Individual Bids that demonstrate a better fit with our requirements.
>
> 10.13 We will total up the points awarded for each Individual Bid. Individual Bids will then be ranked against each other. The higher the number of total points awarded, the higher the ranking.
>
> 10.14 Once we have ranked all Individual Bids we will first award Matter Starts to the Individual Bid(s) ranked the highest and continue down the rankings until all available Matter Starts at the Access Point level have been allocated."

42. Section 11 was entitled 'Conditions of Tender'. Amongst those conditions were these:

> "11.6. It is the responsibility of Applicant Organisations to make sure that their tenders are fully and accurately

completed and accompanied by the appropriate documents. We are under no obligation to contact Applicant Organisations to clarify their tenders or to obtain missing information or documents, and tenders which are incomplete may not be considered. It is Applicant Organisations' responsibility to obtain at their own expense all additional information necessary for the preparation of their tender.

11.7. Applicant Organisations are required to reply to all the questions on the PQQ and ITT, even if you have previously provided this information or if you think we are already aware of it (e.g. if you hold an existing contract with us). This is to ensure that we can assess each tender in a fair, like-for-like and reasonable manner.

11.8. We may request Applicant Organisations to give additional information/clarification at any time during the tender process. Applicant Organisations should be prepared to provide additional information and/or clarify any aspect of their tender with us. We reserve the right to validate any part of your tender and information subsequently given to us.

…

11.23. Applicant Organisations must not amend or alter any document comprising part of their tender after the closing time and date set out in paragraph 11.2.

…

11.30. Without prejudice to any warranties given, the rules of the tender process (including application and selection rules) contained in this IFA are not legally binding and no contract is formed between the Applicant Organisation and the LSC. However, the relevant parts of your tender will form part of any contract subsequently awarded and under clause 18.1 (b) of the Contract Standard Terms providers warrant the accuracy of information in their tender.

11.31. If an Applicant Organisation changes its status or any material element of its tender including management, proposed sub-contractors or Key Personnel between submitting its tender and being awarded a contract, we must be informed of this as soon as possible in writing. We reserve the right (depending on the nature and effect of the change in status) to revoke any contract award

made and may request the new Applicant Organisation (post-change) to submit a fresh tender."

43. Annex A set out the Essential Criteria. Annex B dealt with the Selection Criteria and the scoring. In relation to the London bids, which differed slightly from those bids being sought elsewhere in the country, the relevant parts of Annex B were as follows:

Question 4:

"Preference will be given to Applicant Organisations who currently employ at least one Caseworker who is accredited to IAAS Level 3 (advanced Caseworker) or has received acknowledgement from the Law Society of receipt of an application to become accredited at this level	Marked out of 5 Points will be awarded to an Individual Bid as follows: - The Applicant Organisation currently employs a Caseworker who is accredited to IAAS Level 3 (5 points) - The Applicant Organisation currently employs a Caseworker who has received acknowledgement from the Law Society of receipt of an application to become accredited at IAAS Level 3 (1 point) - The Applicant Organisations does not employ an IAAS Level 3 accredited caseworker (0 points)"

Question 5:

"Preference will be given to Applicant Organisations that will commit to deliver at least one regular and advertised Drop-in Service Session per week that is available to Immigration clients from the Office related to the Individual Bid	Marked out of 2 - Able to deliver at least one Drop-in Service Session per week from the Office related to the Individual Bid (2 points) - Unable to deliver at least one Drop-in Service Session per week from the Office related to the Individual Bid (0 points)"

Question 6:

"Preference will be given to those Applicant Organisations who employ an Authorised Litigator based and regularly working from their Office in the Access Point for a greater number of days per week	Marked out of 5 Points will be awarded to an Individual Bid as follows: - The Applicant Organisation will employ an Authorised Litigator based and regularly working from the Office in the Access Point for at

	least 3 days per week (5 points) - The Applicant Organisation will employ an Authorised Litigator based and regularly working from the Office in the Access Point between 1-2 days per week (3 points) - The Applicant Organisation will employ an Authorised Litigator based and regularly working from the Office in the Access Point less than 1 day per week (1 point)"

Question 7:

"Preference will be given to those Applicant Organisations who will employ an Immigration Supervisor based and regularly working from the Office related to the Individual Bid for a greater proportion of time that that Office is open	Marked out of 8 Points will be awarded to an Individual Bid as follows: - The Applicant Organisation employs an Immigration Supervisor who will be based and regularly working from the Office in the Access Point 100% of the time (8 points) - The Applicant Organisation employs an Immigration Supervisor who will be based and regularly working from the Office in the Access Point 80 - 99% of the time (5 points) - The Applicant Organisation employs an Immigration Supervisor who will be based and regularly working from the Office in the Access Point 60 - 79% of the time (3 points) - The Applicant Organisation employs an Immigration Supervisor who will be based and regularly working from the Office in the Access Point 50 - 59% of the time (2 points) - The Applicant Organisation employs an Immigration Supervisor who will be based and regularly working from the Office in the Access Point less than 50% of the time

	(0 points)"

3.2 The Claimant's Tender

44. The claimant completed the PQQ and no issues arose upon it. The claimant then completed the main tender documents electronically. The claimant's TIF said that the claimant currently employed six members of staff. Mr Ahmed Hersi was a supervisor and an authorised litigator at accreditation level 2. Ms Bahar Ata was shown as a case worker who was not an authorised litigator. She was also at accreditation level 2. The other four members of staff were case workers at accreditation level of Level 1 (including probation level).

45. In respect of the first three questions in the Selection Criteria, the claimant's tender indicated the following answers:

a) Question 1/Current Delivery Arrangements

These were said to be "currently open and operating".

b) Question 2/Experience of Delivering Legal Services

This was answered: "35 immigration cases includes prep".

c) Question 3/Caseworkers Needed to Recruit

The answer was "less than 25%".

46. Pausing there I note that, in relation to Questions 1, 2 and 3 of the Selection Criteria, the claimant's answers scored the maximum of 18 points.

47. The remaining 4 questions within the Selection Criteria were those foreshadowed in Annex B (set out in full at paragraph 43 above). Question 4 was whether the claimant employed a level 3 case worker; Question 5 was whether the claimant was able to offer a regular drop-in session per week; Question 6 concerned the days per week that an authorised litigator would be based and regularly working from the office; and Question 7 was the percentage time that the supervisor would be based and regularly working from the office.

48. In respect of each of those questions, the claimant left the relevant answer box blank. The IFA had made plain that there were 20 points for those questions (5 points for Question 4; 2 points for Question 5; 5 points for Question 6; and 8 points for Question 7). Because it had not answered any of those questions, the claimant firm was not given any points for any of those four questions. In consequence, the claimant scored a total of only 18 points out of a possible 38 points, and so failed to secure a contract.

3.3 The Claimant's Appeal

49. On 28 June 2010, the defendant informed the claimant that it had been unsuccessful. The appraisal showed where the claimant had got zero points. On 6 July 2010, the claimant appealed, alleging:

> "We believe computer malfunction or technical glitch on the part of the LSC was responsible for the decision not to award at least 33 points and a contract to Hersi & Co solicitors."

The appeal thus sought to blame the defendant for an unspecified technical error that the claimant alleged had occurred at the evaluation stage.

50. On 5 August 2010, the defendant sent the claimant its response to the appeal. The appeal was refused in these terms:

> "**Decision:**
>
> Having reviewed the original tender response I am satisfied that the score of 18 was correct based on the information submitted by the Applicant.
>
> I am satisfied that the Information for Applicants (IFA) comprehensively detailed the actions required for an Applicant Organisation to submit its tender response. I am also satisfied that the consequences of failure to complete a tender response accurately are equally clear.
>
> The purpose of the Terms and Conditions of Tender is to ensure that Applicant Organisations are dealt with consistently and fairly. The LSC is bound to comply with the Public Procurement Regulations 2006 which also require the LSC to treat tenderers fairly and consistently.
>
> As indicated above, I am satisfied that the Applicant was awarded the correct score for this criteria based on its tender response. The Applicant, in the letter of appeal, has now stated that there was an error in its response to Selection Criteria questions caused by a computer malfunction or technical glitch on the part of the LSC.
>
> The only technical issues relating to the TIF forms related solely to Applicant Organisations' ability to complete Tender Information Forms (TIFs) and not to the LSC's ability to read the TIFs submitted. This means that the LSC was able to read all the information submitted by the Applicant with its tender on 16 January 2010 and I have seen a copy of the TIF submitted as part of that tender which does not include the additional information referred to by the Applicant in its appeal.
>
> I regard the ground on which the Applicant's appeal is based as an attempt to amend its tender. I do not believe that it would be appropriate to allow an appeal which could have that effect.
>
> I consider that the tender rules, as set out above, are very clear that it is the Applicant's responsibility to submit an accurate

> tender. The LSC is entitled to assess tenders on the basis of the information directly provided by the Applicant and rely on it and is under no obligation to seek clarification."

51. In these judicial review proceedings, the claimant was not permitted to pursue the alleged "technical glitch" on the part of the defendant. As far as I have seen, there was never a shred of evidence to support such an allegation. No explanation was ever given for how and why this allegation was advanced in the first place. At the very least, the raising of this unsubstantiated assertion could be seen as an example of the typical knee-jerk response of the failed bidder, blaming the contracting authority, come what may (an approach Mr Westgate was still pursuing in his submissions in reply); at worst, it was an assertion which the claimant knew or ought to have known was untrue.

52. Now the claimant alleges that the information that was left blank in answer to each of Questions 5-7 of the Selection Criteria was already known to the defendant or was apparent from other parts of its tender. It is said that the defendant should therefore have either asked the claimant to clarify the non-answers, or answered the questions itself. There are also wider complaints made by reference to the defendant's treatment of other parts of other tenders which are not obviously connected to the specific criticisms made in respect of the treatment of the claimant's non-answers to Questions 5-7.

3.4 The Evidence

53. There are 4 witness statements from the claimant's principal, Mr Ahmed Hersi. There were also 5 witness statements from the person at the defendant responsible for this procurement, Ms Melena Ward. Whilst useful as background, I did not find any of these statements to be determinative of the issues I have to decide, which may explain why there was no cross-examination upon their contents. However, for completeness, I should add that, contrary to Mr Westgate's submissions, I did not read Ms Ward's evidence as demonstrating a procurement process that was incoherent or haphazard. On the contrary, given the size of the exercise that was being undertaken, I consider that the process was generally handled in a coherent and principled way.

54. The evidence of particular relevance to this challenge was set out by Ms Ward in her statement of 23 September 2011 (in the ***All About Rights*** case) as follows:

> "36. When we came to assess the tenders, we found that a large number of applicants had made very fundamental and basic mistakes. For example, omitting to provide responses to selection criteria questions and not checking that before the tender deadline. This was not apparent to my team or the LSC until after the immigration tender closed and we began to assess the tenders submitted. Paragraph 10.1 of the immigration IFA explained that "*Responses submitted by Applicant Organisations will not be opened until after the deadline has passed.*" As it transpired, there were also a number of bidders who whilst their tenders were fully

complete, alleged on appeal that they had supplied the incorrect answers to the questions in the tender.

…

39. A general theme with the clarifications we sought in the immigration tender exercise was simply to be able to understand a tender properly where inconsistent information had been given in relation to whether it met our minimum requirements or the volume of work bid for so that we could properly assess it and allocate it the proper number of matter starts. The conditions of tender (at section 11 of the immigration IFA) did not deal with circumstances where we were unable to assess a tender because of inconsistent information in the tender. Consequently, we decided that in order to assess an immigration tender which had conflicting or inconsistent information relating to the essential criteria or the volume of work bid for we should contact the applicant and ask it to confirm which their correct response was.

40. The LSC took a more flexible approach to clarification of PQQ responses, as the answers given could not have provided an advantage over other bidders, as the PQQ merely allowed a bidder to be considered for a contract. The circumstances in which we clarified selection criteria were limited and are set out within my witness statement, but we did not clarify any selection criteria where no answer had been given at all to the criterion, even if there was information elsewhere in the tender related to these issues.

41. Where we were able to accurately validate an applicant's response to the selection criteria against details in the TIF we did so (in all civil tender exercises this could be undertaken only in relation to the proportion of staff to recruit except in the immigration and family tender exercises where it could additionally be undertaken in relation to whether a staff member had been named as having the Level of accreditation claimed in the corresponding selection criterion response).

42. In those tender exercises where we had included objective quality standards (such as Level 3 accreditation in the immigration tender selection criteria) we validated this information with the body responsible for running that quality standard. As the immigration tender exercise was the first that we ran, and there was no express term or condition in the

> immigration IFA on assessing a tender based on the least favourable response where conflicting information was presented, where information provided by the Law Society (who run the Immigration and Asylum Accreditation Schemes) about individuals holding Level 3 accreditation conflicted with details provided in an applicant's tender, we sought clarification for applicants to evidence that the response provided to the selection criterion was correct. This was the only instance where clarification was sought in relation to selection criteria except one instance where exceptional circumstances given in response to a selection criterion question were clarified, {**M2**}.
>
> 43. In the selection criteria part of the tender, no applicant was allowed to request an improvement to an answer (or provide an answer where no answer was given) to a selection criterion after the close of the tender. Applicants had a responsibility (expressly stated in the terms and conditions of each invitation to tender) to check their applications carefully "*to make sure that [their] tender is fully and accurately completed*." *JR Jones*, for example, self-certified in its selection criteria response that it had not undertaken a number of cases in the Immigration Appeals Tribunal when, in fact, it had. There was a declaration on the tender forms which confirmed that the information given in the tender was accurate and correct. The LSC refused this appeal and the court upheld that decision."

3.5 The Shape of the Case

55. It is always as well in procurement disputes to focus on the particular complaints that are made by the challenger to see, not only whether there is anything in them, but whether a different approach by the contracting authority would have made any difference to the outcome. That is particularly important in a case like this, where there was a careful and detailed marking scheme.

56. Although I deal with it in greater detail in **Section 4** below, it is now common ground that the claimant did not employ a level 3 caseworker (Question 4). That means that, whatever its other complaints, the claimant could never have scored any points at all in relation to Question 4, which was worth 5 points. That in turn means that the maximum points that the claimant could ever have received in this competition was 33 (the 18 that it was awarded, and the 15 that the claimant says should have accrued from Questions 5, 6 and 7).

57. That is important because it is common ground that 33 points was the lowest possible score that would still have amounted to a successful bid in this competition. In other words, in these proceedings, the claimant needs to win on each of Questions 5, 6 and 7, in order to demonstrate that it had even potentially suffered a loss as a result of the defendant's alleged errors. Putting the point another way, if the claimant's case on

either Question 5 or Question 6 or Question 7 is unsuccessful, then the claimant could never have gained sufficient points to win a contract, and its claim for damages is doomed to fail.

4. QUESTION 4: THE LEVEL 3 CASEWORKER

58. As noted above, the claimant now accepts that it did not and did not intend to employ a level 3 caseworker (although that was not said expressly in the original appeal, which seemed to blame the defendant for the decision to award no points for Question 4). Although some points have been raised about the treatment of other applicants in relation to Question 4, they seem to me to be wholly irrelevant. If the defendant had gone back to the claimant to ask whether it had a level 3 caseworker, the answer would have been No, so the claimant would have scored no points in respect of this question, whatever else had happened. There could therefore never have been anything in any challenge in respect of Question 4.

59. Accordingly, as noted above, the maximum points that the claimant could ever have scored in this public procurement was 33 (the maximum of 38, less the 5 points for Question 4 of the Selection Criteria).

5. QUESTION 5: THE DROP-IN SESSION

60. The possible answers in the drop-down box were "able" or "not able" to offer this session. The claimant accepts that it did not click on either of them and instead left the answer to this question blank. However, it maintained that the defendant knew or ought to have known that it was providing a weekly drop-in session, and that therefore it should have been awarded 2 points for Question 5. I reject that submission for a number of reasons. It is wrong on the facts and misconceived in principle.

61. First, the accepted evidence was that, at the time of the tender, and at the time that the tender was evaluated, the claimant was not providing a weekly drop-in session. The claimant did not start to provide such a session until May/June 2010, which was after its tender had been evaluated. Accordingly, the blank answer to Question 5 would have been entirely in accordance with the facts: at the time of the tender, and at the time that the tender was evaluated, this was not something which the claimant provided.

62. Accordingly, the claimant was obliged to argue that, once it started to provide such a drop-in session, in about May/June 2010, the defendant should either have re-evaluated the tender unilaterally, or learning of this development (although how is not explained), it should have gone back to the claimant, to give it another chance to answer the question which it had failed to do first time round. In my view, such an argument only has to be expressed in such terms to be categorised as an affront to common sense. It ignores the clear warnings in the IFA to the effect that such a process will not happen, and also ignores the realities of a major procurement exercise like this. The argument is contrary to the principles of good administration and equal treatment. A contracting authority can never, off its own bat, act in such an ad hoc and incoherent fashion.

63. Secondly, as the IFA repeatedly set out, this is a tender for future contracts, starting in October 2010. What the defendant wanted to know was what the claimant was prepared to commit to from that date on. That was why this was a separate and particular question. If the claimant proposed to offer this service in the future, it would have been the easiest thing in the world to say so in the electronic questionnaire.

64. The detail in Annex B of the IFA (paragraph 43 above) made plain that what was being sought was a "commitment to deliver at least one regular and advertised drop-in service session per week". So even if (which it did not), the claimant offered this service at the time of the tender or the tender evaluation, that was irrelevant. The question was whether it would provide this service as part of its contractual commitment from October 2010 onwards. But no commitment was offered and it cannot be found anywhere else in the tender.

65. In those circumstances, there was no obvious or clerical error. How could there be? On the face of it, the answer to Question 4 had been left blank because the claimant did not (and did not propose to) have a level 3 caseworker. That was not an error but a correct statement of the claimant's position. The defendant was entitled to assume that, in just the same way, the answer to Question 5 had also been left blank because the claimant was not committed to providing the weekly drop-in session. At one stage, Mr Westgate went so far as to submit that the failure to answer Question 5 was "bound to be an error". On the agreed facts, when this session was not being offered at the time of the tender or at the time of the evaluation, I find that it was nothing of the kind.

66. Neither was there any ambiguity. Mr Westgate accepted that the question was not ambiguous. The claimant had to indicate a commitment in its answer and it did not do so. The defendant was therefore entitled to assume that the claimant was not providing this commitment. There was no ambiguity, because there was no other part of the tender which the blank answer to Question 5 contradicted or with which it was inconsistent.

67. Thirdly, I consider that the claimant would or should have understood what was required because of the clear terms of the IFA (in particular, paragraphs 7.32-7.33, 9.34, 10.9-10.14 and Annex B), and would or should have known what the consequences would be of their failure to answer this question (in particular paragraphs 11.6 and 11.8). The evidence from Ms Ward noted at paragraph 54 above made plain that the defendant applied the rules of the procurement exercise strictly, as it was entitled to do.

68. At one stage during his submissions, Mr Westgate said that, because the drop-down box sought a Yes or No, the defendant was "not geared up" for evaluating a blank, and that the claimant's failure to answer Question 5 meant that the defendant did not know what the claimant's answer was. This seemed part of the claimant's general approach which sought to blame the defendant (or at the least put the onus on the defendant) for matters which were, on any fair interpretation, the claimant's own fault. Given the clear words of Annex B (paragraph 43 above), I find that the non-answer could only sensibly be read as a refusal to give the necessary commitment.

69. Fourthly, if the claimant had been asked, after the event, whether or not it would be committed to providing a weekly drop-in session from October 2010, and the claimant had answered in the affirmative, then that would have been a clear and obvious improvement of the claimant's tender. The contrary is unarguable. If the question had been asked and that had been the answer, then the tender would have improved by 2 points, increasing the claimant's prospects of being a successful bidder (and thereby adversely affecting the position of other bidders). Asking a post-evaluation question, the answer to which would or might improve the tender as submitted, would have been a breach of basic procurement law. And it does not help Mr Westgate's case to argue that this was, as he called it, "a minor matter", because it was only worth 2 points. A proper tender evaluation is required to evaluate all the answers, regardless of the points that may be available for each question.

70. Still further, it appears from the evidence that the claimant's failure to answer Question 5 arose in the same or similar circumstances for 7 other tenderers. In each case, they were scored no points for Question 5, and in each case their appeal was refused. In other words, there was complete equality of treatment. I note the examples below.

(a) C Solicitors

71. The undisputed evidence is that **C** failed to answer Question 5. They appealed on the basis that the defendant knew or should have known that it was already providing a drop-in session. The appeal was rejected on the basis that, because they had not answered Question 5, it could not be said that **C** Solicitors had committed to providing a drop-in session for the period of the contract.

72. The complaint of **C** was precisely the same as that of the claimant in the present case: indeed, **C** were in a better position than the claimant because they were at least offering this session at the time of the tender and its evaluation. Their failure to answer the question was treated by the defendant in the same way as the claimant's failure. Thus, a comparison with the other applicant who had failed to answer Question 5, just as the claimant had done, demonstrated equal treatment.

(b) A

73. **A** answered Question 5 in the negative. On appeal they said that they would commit to providing such a drop-in session in the future. They scored no points and their appeal was rejected because they had not indicated the necessary commitment at the time of the tender. Similar complaints were made by **G** and **K1**. Their appeals were also rejected for the same reason.

74. Accordingly, comparison with these three other applicants, who had not committed to the drop-in session through their tender response, but said on appeal that they would, show that they were treated in the same way as the claimant. There was again no inequality.

(c) H

75. This applicant subsequently argued that, although they had answered the question in the negative, that was an obvious error and they were able to offer the weekly drop-in

session. Similar appeals were raised by **Harrow Solicitors** and **K2**. Their appeals were rejected for the same reasons noted above.

(d) Summary of Comparators

76. Based on the above comparators, it can be demonstrated that applicants who were in the same or a very similar position to the claimant in respect of Question 5 were treated in precisely the same way by the defendant. There was therefore no breach of what might be called the ***Fabricom*** principle.

77. Perhaps because he was aware of this difficulty, Mr Westgate sought to minimise this evidence by suggesting that it did not matter how the defendant had dealt with other applicants' answers to Question 5. His submission was that, because he said the defendant had not gone about the process correctly, further examples of equal treatment were "just self-perpetuating". The problem with that submission is that it elides two different issues.

78. The first question is whether the defendant was obliged to do something more than take the claimant's failure to answer Question 5 at face value. For the reasons set out above, I have concluded that it was not. The second, distinct question is whether, although the defendant did not go back to the claimant in relation to Question 5, it had dealt with other applicants differently, and had gone back to them for more information on Question 5. That involves scrutiny of how Question 5 was dealt with by the defendant in respect of other applications. This evidence shows they were dealt with in precisely the same way as the claimant.

79. Accordingly, it is wrong to say that, in some way, this comparison evidence is irrelevant. The court is only considering how the defendant dealt with the applications of these other 7 firms of solicitors because of the alleged breach of the equal treatment obligation. The evidence demonstrates beyond doubt that there was no such breach. That is therefore the answer to the second way in which the claim is put.

80. For all the reasons set out above, therefore, I conclude that the defendant made no manifest error in respect of the claimant's failure to provide an answer to Question 5. Moreover, the evidence demonstrates beyond doubt that the defendant dealt with other applicants' answers to Question 5 in the same way. For all these reasons, therefore, the complaint in respect of Question 5 fails.

81. The significance of that conclusion cannot be overstated. It follows from paragraphs 55-57 above that my rejection of the claimant's arguments on Question 5 is fatal to the entirety of the claimant's case. It means that, whatever my conclusions in respect of Questions 6 and 7, the claimant could never have gained more than 31 points, and therefore could never have been one of the successful tenderers. The remainder of this Judgment has to be read in that light.

6. QUESTION 6: DAYS PER WEEK AUTHORISED LITIGATOR WAS BASED AND WORKING FROM THE OFFICE

82. The claimant maintains that its TIF made plain that it employed an authorised litigator who was full-time and that therefore the answer to Question 6 was evident from that

part of its tender. The argument is that, when considering the claimant's non-answer to Question 6, the defendant should have read across from the TIF and either awarded it full marks there and then or, had there been any doubt about it, the defendant should have contacted the claimant for clarification.

83. The defendant argued that what was required in answer to Question 6 were details of the claimant's time commitment in respect of the authorised litigator; the amount of time he or she was based and working from the particular office from 1 October 2010 onwards. It was for that reason that there were three options in the drop-down box for Question 6, which carried different points: if the commitment was for at least three days a week, that was the appropriate box and 5 points were available; if the commitment was between one to two days per week then that was the appropriate box and 3 points were available; and if it was less than one day a week then that was the box to click on and only 1 point was available. The defendant says that the claimant's failure to identify any time commitment in its answer to Question 6 meant that no points could be awarded and no question of clarification arose.

84. I consider that, again, the answer to this issue is crystal clear. For a number of reasons, I find that the defendant's approach to Question 6 was right or, at the very least, it did not demonstrate a manifest error. The reasons for that conclusion are set out below.

85. First, as already noted, I consider that the defendant is right to say that what Question 6 was seeking to do was to obtain a particular commitment from the applicant in respect of the amount of time that the authorised litigator was going to be "based and working from" the particular office. Clearly, a commitment to more time based and working from the office led to more points and therefore led to a greater chance that the tender would be accepted. Conversely, no commitment at all would score no points, and obviously have a detrimental effect on the prospects of the applicant's success in the competition.

86. The defendant knew, or must be taken to have known, that the possible answers (and the points they would generate) in the drop-down box were clear, so would also have known the risks it ran in not answering this question. This was not a case where the defendant was in any way at fault for the failure.

87. Secondly, I agree with the defendant that the answer to Question 6 could not be culled from the TIF. The TIF was setting out the details of the claimant's organisation at the time of the tender in early 2010. What the Selection Criteria wanted was the commitment that the applicants were prepared to make in order to obtain the future work being tendered, to come into effect from October 2010 onwards. Those commitments may have reflected the applicant's current organisation and staff levels, but equally they may have necessitated modifications in staffing levels and type, to allow the applicant to undertake this future work. Thus it is wrong to say that the defendant should have "read across" from the information in the TIF. That was dealing with a different question.

88. Although the claimant's answer to the TIF showed that it had an authorised litigator, the TIF did not address the particular issue raised by Question 6. As Annex B of the IFA made clear, Question 6 was aimed at identifying an authorised litigator who was "based and regularly working from" the office identified in the bid. The bidders

could identify more than one office so what mattered to the defendant, and where the defendant expressly said that preference would be given, was the extent to which that authorised litigator was based and regularly working from the office. It was for that reason that the amount of time that the litigator was based and regularly working from the office would be reflected in the points awarded.

89. Accordingly, the fact that the claimant had said in the TIF that it was employing an authorised litigator was nothing to the point. What mattered was how much time that authorised litigator was based and regularly working from the office. That was a specific question, seeking a particular commitment, and the claimant wholly failed to answer it. The defendant could not have filled in answers to Question 6 from the information in the TIF.

90. A specific answer to the claimant's case on Question 6 can also be found in paragraph 24 of Ms Ward's statement of 27 September 2011. She said:

> "Although the staff details provided in the TIF indicated that Supervisors and Authorised Litigators would be delivering services from the Claimant's office, it did not contain details of the time they would be was based and regularly working from that office. A number of organisations operate flexible working arrangements which might mean that staff work remotely and would not necessarily be present at he office five days per week. We therefore had no way of ascertaining from the TIF the correct position in relation to the Claimant."

I accept that evidence. I reject Mr Westgate's submission that, somehow, the argument about working from home only occurred to the defendant part way through these proceedings. The importance of having an authorised litigator based and regularly working from the office was apparent from Annex B and, as noted in paragraph 102 below, arose in answer to another challenge in 2010.

91. Thirdly, I consider that the claimant's non-answer was neither an ambiguity nor a clerical or obvious error. It is accepted by Mr Westgate that the question was not ambiguous. The non-answer was not ambiguous because it did not clash with anything else in the tender. As I have said, the TIF went to the claimant's present position, whilst Selection Criteria Question 6 went to its commitment to providing an authorised litigator based and working from each office for a minimum period for the future. The present staff position was set out in the TIF but the commitment for the future and the amount of time at the office was not provided. That was not an ambiguous answer.

92. During his reply Mr Westgate referred, for the first time, to a screen shot of the drop-down box for the TIF, which he said indicated that this too was seeking staffing information for the future. That is not my reading of the words used in the box (which was not in court bundle), which "requests information about each individual Office from which you are tendering". More significantly, there can be no doubt that, when read as a whole, the IFA made quite clear that the TIF was dealing with the present position, whilst Questions 6 and 7 went to the future commitment. In any event, even if the drop-down box in the TIF did go to "staff that will deliver the service", it still

did not address the number of days per week the authorised litigator would be based and regularly working from the office, which was the point of Question 6.

93. Neither could or should the defendant have viewed the non-answer to Question 6 as a clerical or manifest error. The defendant was quite entitled to treat the non-answer as a statement by the claimant that, at least at the time of the tender, the claimant was not prepared to make any commitment as to the days per week that an authorised litigator was based and regularly working from the office.

94. Fourthly, I repeat the observation at paragraph 67 above in respect of Question 5. The claimant was wholly responsible for the failure to answer Question 6, and the defendant treated that failure strictly in accordance with the rules set out in the IFA (and in particular paragraphs 11.6 and 11.8). They were entitled so to do.

95. Fifthly, it seems to me that, even if the defendant had been tempted to go back to the claimant on Question 6, it would have quickly realised that such a course of action was impossible because, if it had done so, it would simply have been giving the claimant a unilateral opportunity to improve its tender. If the claimant had been given a second chance to answer the question, it now says that it would have been committed to providing an authorised litigator based and regularly working from the office for at least three days per week. That would have been a new commitment, never given before, and would have given the claimant 5 points in circumstances where, prior to that, it was not entitled to any points.

96. Thus any clarification process would have led to an improvement in the claimant's tender in a way that was quite contrary to the principles of procurement law as set out above. Eventually, Mr Westgate accepted this proposition, at least in part, when he expressly agreed that "other tenderers would suffer detriment" if the defendant had done what the claimant says that it should have done. It would not have been permissible for the defendant to have acted in this way.

97. Furthermore, I consider that there is authority for that proposition directly in point. In ***Hoole***, the solicitors had provided a largely blank answer to all the Selection Criteria questions, including Questions 6 and 7. They were therefore in a very similar position to the claimant in the present case. Their claim for judicial review was refused. Blake J said:

> "An overbroad exercise of the power to seek clarification would be contrary to the principle of equality and fair treatment of all tenderers.
>
> It would be unfair to rival tenderers for the defendant either to have allowed the claimant to amend its application by completing it, or to fill in the selection criteria on behalf of the claimant from information that might have been available to it extraneously."

98. That seems to me to be a complete answer to the claimant's claim in the present case in respect of Question 6. Although Mr Westgate argued that this meant that an applicant giving an incorrect answer might be better off than an applicant who does not fill in an answer at all (because clarification might be sought in the first case but

not the second), I do not think that that arises on these facts (because no clarifications were sought of any applicant in relation to Question 6). In addition, depending on the facts, that would not in my view be a surprising result: an incorrect answer may require clarification, whilst a failure to answer will usually be equated with a simple negative.

99. As to the alleged breach of the equality principle, the uncontested evidence was that the defendant treated applicants who had failed to answer Question 6 in precisely the same way as they treated the claimant. I set out examples below.

(a) Anthony Louca

100. This applicant did not answer Question 6. It subsequently argued, just as the claimant argues here, that it was clear from the TIF that there was an authorised litigator working 35 hours per week at the office. Its appeal was rejected. Very similar points were made by **R** and **C**. Those appeals were also rejected on the same grounds. I have dealt with the position of **Hoole & Co** above, where the same argument was rejected by Blake J.

101. Thus, each of these 4 firms was in the same position as the claimant, because they had failed to answer Question 6. They were all treated in just the same way by the defendant. On any consideration of the equal treatment obligation therefore, it could not possibly be said that the defendant was in breach.

102. Before leaving **Louca**, I should add that this firm took their argument, that the information sought by Question 6 was already in the TIF, into a claim for judicial review. Permission to bring that claim was refused. One of the grounds for refusal by Stephen Morris QC (as he then was), was his express endorsement of paragraph 34 of the summary grounds of resistance in that case: that, by asking Question 6, the defendant was entitled to know whether the authorised litigator would be based and regularly working from the office rather than working from home. Mr Taylor was right to say, therefore, that this showed that: a) contrary to the claimant's case, this point was not an afterthought, but had been expressly raised in the grounds of resistance in the Louca claim as long ago as 30 November 2010; and that b) the claimant therefore knew that its own argument on Question 6 had already been considered and rejected by the Administrative Court in both ***Hoole*** and in **Louca**'s claim.

(b) I

103. This applicant answered the question in the negative but subsequently said that this was an error and that they actually employed three authorised litigators. Their appeal was rejected. **W** was in the same position and again their appeal was rejected. Again, similar circumstances involving other applicants' answers to Question 6 were treated in the same way and there was no breach of the equal treatment principle.

104. For the reasons set out above, therefore, I reject the claimant's case in respect of Question 6. The information that was sought could not be culled from the TIF. The failure to answer the question was not an ambiguity or an obvious/clerical error. The defendant was entitled to read that as a statement by the claimant that it would not provide any particular commitment as to the days the authorised litigator was based

and regularly working from the office. The defendant was not obliged to go back to the claimant to seek clarification of its non-answer, and any such attempt was likely to have led to an impermissible improvement in the tender. There was no breach of the equality principle. On the contrary, the defendant treated the claimant in precisely the same way as it treated all other applicants in the same or similar position.

7. QUESTION 7: PERCENTAGE OF TIME SUPERVISOR BASED AND REGULARLY WORKING FROM OFFICE

105. I can deal with this very shortly. Precisely the same reasoning and conclusions arise in respect of Question 7 (the amount of time the supervisor was "based and regularly working from" the office) as are set out in **Section 6** above (the amount of time the authorised litigator was "based and regularly working from" the office). So for Question 7, **Section 6** should therefore be read as referring to the supervisor rather than the authorised litigator. Everything else is the same, and the claim therefore fails for the same reasons.

8. SUMMARY ON MERITS OF CLAIMANT'S SPECIFIC CLAIMS

106. For the reasons set out in **Sections 5, 6 and 7** above, each of the claimant's specific claims in respect of Questions 5, 6 and 7 fail. Since failure on just one of them is fatal to the entirety of the claimant's case, that ought to be the end of this procurement challenge. However, to my surprise, the claimant embarked on a separate and broadly-based attack on how the defendant dealt with other parts of the tenders of numerous other applicants, so as to allege a wider breach of the equality principle. I am therefore obliged to address that element of the claimant's case.

9. THE CLAIMANT'S COMPARATORS

9.1 General

107. The claimant's case on comparators could not have been more broadly based. It purported to make comparisons with the treatment of over 120 different applicants in this competition, regardless of whether they were ultimately successful or not. The treatment of those applications is relied on, not in respect of that part of the claimant's tender which failed to attract any points (namely Questions 5-7 of the Selection Criteria) but on numerous other elements of the tender applications, irrespective of how the claimant's own tender was treated on those elements.

108. Thus, there were comparisons drawn with how the defendant treated the PQQs of other applicants, even though that was an earlier stage of the tender process and was a part of the process which the claimant completed satisfactorily. Comparisons were also made with how the defendant dealt with, for example, Question 3 of the Selection Criteria, despite the fact that this was a question which the claimant answered properly and for which the claimant received full marks.

109. This comparison exercise saw, as part of the trial bundle, the delivery to the TCC of 19 lever arch files containing the relevant comparison material. The Scott Schedule, which had been ordered to be provided well in advance of the trial, to try and ensure that there was a proper focus on the relevant comparators, was delayed and not provided until the morning of the last sitting day before the trial.

110. In my view this entire comparison exercise was misconceived. I reject the submission that the way in which other tenderers were treated on other parts of their tender was capable of providing applicable comparators, in order to assess whether or not there had been equal treatment of the claimant in respect of the part of their tender that mattered, namely the non-answers to Questions 4-7 inclusive. There are three reasons for that view.

111. First, it is wrong in principle. There is no European or English authority in which it has been held that the duty of equal treatment would necessitate or encompass the sort of comparison exercise that has been attempted here. It is impossible to read into the use of the expression "comparable situation" in ***Fabricom*** a willingness to embrace an analytical exercise based on wholly different parts of the tender from those on which the claim is founded. Mr Westgate fairly conceded that there was no authority for the broad comparison exercise he wished to do.

112. The use of the word "comparable" cannot be taken too far. In order to be a proper comparison, the relevant treatment of another tenderer by the contracting authority must be the treatment that that tenderer received in respect of the questions/answers which the aggrieved party has put in issue. So in this case, if it could have been shown that, for example, other tenderers were allowed to amend their answer to Question 5, having originally left it blank, then the claimant would have had a good case that they had been treated in a different way in a comparable situation. But to suggest, as Mr Westgate does, that in some way the fact that the defendant asked some other applicants for more information on (for example) one part of their PQQ, in circumstances where no issue arises on the claimant's own PQQ, is to elevate the comparison exercise to ridiculous and disproportionate heights. Such matters cannot provide a proper or meaningful comparison within the confines of a 'manifest error' challenge.

113. Secondly, it is wholly unworkable in practice. If the claimant's approach was right in principle, it is no exaggeration to say that the public procurement process would grind to a halt. It would mean that the contracting authority would have to provide details and disclosure to every aggrieved bidder in respect of its treatment of every other applicant on every aspect of those applicants' tenders, regardless of the specific challenge raised by the complainant. In this case there were over 400 such applicants. Such a result would impose wholly unworkable burdens on the contracting authority. In my judgment, it is as far removed from the public procurement case law and the Public Contract Regulations as it is possible to get.

114. Thirdly, in a case where the underlying complaint is that the contracting authority did not get back to the tenderer to seek clarification or to correct an alleged error, a comparison exercise based on other parts of other tenders is a meaningless exercise. In this case, what the claimant has done is to identify various situations in which, in respect of other parts of other tenders, the defendant sought further clarification. But what, one asks rhetorically, does that have to do with the claimant's case? How does that help? The answer is that it does not.

115. Let us assume, for the sake of argument, that there was another part of the tender information, or even the PQQ, on which clarifications were sought by the defendant from other applicants. Assume also that the court concluded that those clarifications should not have been sought. Such a finding could not possibly avail the claimant: it

would be a finding of potential breach that was unrelated to the claimant's own case. I put that to Mr Westgate during the course of his submissions because it seemed to me that the exercise was futile because two wrongs did not make a right. I was subsequently shown a passage in the judgment of Sur Carr J in ***All About Rights*** in which she made just the same point in precisely the same terms.

116. Accordingly, the claimant's comparison marathon became an exercise in futility. First, the claimant had to identify how other parts of other tenders had been treated by the defendant. Then they had to argue that, where the defendant had called for further information or clarification of those other parts, this was *not* a breach of the tender procurement rules (because if it had been, the comparison was no use to them), but was somehow permissible and appropriate, in order finally to be able to argue that, on a comparison basis, their own failure to answer Questions 5-7 was unfairly treated (despite the fact that they had been treated in the same way as everyone else in respect of those questions).

117. In my view, the claimant's comparison exercise was misconceived and could not (and did not) demonstrate a relevant failure to comply with the equality principle.

9.2 Other Decisions

118. Further and in any event, many of the comparators relied on by the claimant as part of their exercise have already been rejected as appropriate comparators.

119. Thus, in ***Hoole***, some of the points taken by the claimant involved a consideration of other elements of other tenders, including the PQQ. At paragraph 31 of his judgment, Blake J rejected that case, and held that the PQQ was irrelevant. I agree.

120. Similarly, wider points of comparison were raised in ***Harrow***. They were rejected by HHJ Waksman QC: see paragraph 58 of his judgment. Again, I agree.

121. Most significantly of all, there are the detailed findings at paragraphs 65-73 of the judgment of Sue Carr J in ***All About Rights***. At paragraph 66 she reached the same conclusion that I have, to the effect that it was wrong to treat all participants in all of the tender exercises as comparators. At paragraphs 69 and 70 she concluded that the appropriate comparators were not all those who tendered but just those who tendered with a blank TIF (that being the point in issue in that case). I have already indicated that I agree with that whole approach.

122. Moreover, at paragraph 71 of her judgment, she then went on to set out in detail why various tenders failed because they were not comparable. Although the bid in that case had been in respect of the mental health element of the legal aid work, the points raised unsuccessfully by the claimant in ***All About Rights***, and rejected at paragraph 71 of Sue Carr J's judgment, are the same or very similar to the points that the claimant raises in the present case.

123. Accordingly, I consider that my rejection of the claimant's comparators – both generally and specifically – is consistent with other High Court decisions arising out of the same legal aid procurement exercise in 2010. No reason was proffered as to how or why I should depart from the views previously expressed by those judges and

I decline to do so. On the contrary, I consider that my conclusions are entirely in line with the views previously expressed in these other reported decisions.

124. My views in **Section 9.1** and **9.2** are enough to reject the claimant's broad case on comparators in full. However, for the avoidance of doubt, I should go on and address, as briefly as possible, the detail of the 10 categories of comparators.

9.3 Specific Categories

9.3.1 Category 1: Answers to Question 3

125. The claimant's complaint is that 49 applicants had their answers to Question 3 modified, which therefore improved their tender. During the hearing we looked at one, **M1**, as an example. The claimant argues that this is a comparable situation to its own.

126. I reject that submission. The TIF sought information as to numbers of staff and numbers of vacancies and therefore automatically generated a figure for the percentage of vacancies. Where the answer to Question 3 was blank or was different from that automatic calculation, the inconsistency was flagged up by the defendant's software and the answer to Question 3 was modified.

127. The critical point for present purposes is that, contrary to the claimant's submissions, this was not some form of clarification process. The modification did not require the defendant to go back to the tenderers to seek clarification, or allow them to come with advantageous figures not previously mentioned. Instead, where there were errors or inconsistencies within the tender documents themselves, those were automatically picked up by the computer software, which generated the correct answer for Question 3. That is a completely different situation to the claimant's failure to answer Questions 5-7 and the defendant's decision not to seek clarification.

128. In reply, Mr Westgate suggested that it was "sophistry" to distinguish between automatic modifications and attempts to seek clarification from applicants. I disagree: the claimant's whole case is based on the defendant's obligation to seek post-tender clarification. A modification to a particular answer, carried out automatically and in accordance with the express tender rules, is very different in principle to a unilateral communication with an applicant post-tender seeking clarification.

9.3.2 Category 2: Level 3 Caseworker

129. The claimant said that, in respect of 26 applicants, the answers given to Question 4 were then corrected by the defendant. The claimant says that the same should have happened to them in respect of Questions 5, 6 and 7.

130. I reject that case. What happened was that those applicants who employed (or said that they employed) a level 3 caseworker indicated that in answer to Question 4. However, the defendant needed to verify that the answer was correct, and so they checked with the Law Society's records. Again, this was something that the defendant had indicated might happen: see paragraph 11.8 of the IFA. Having obtained that verification, where there was an ambiguity or inconsistency (17 cases), the defendant went back to the relevant applicants to seek clarification. In all but one of those cases,

the applicant had been wrong and the points originally awarded to them were then deducted. In the 9 other cases, where level 3 accreditation had been claimed but there was no named level 3 caseworker in the applicant's staff details, there was no clarification process, and no points were awarded.

131. In my view, Mr Taylor was right to say that this was an example of the defendant exercising its right to validate claims made in the Selection Criteria response which generally led to a decrease in the score. It is consistent with Ms Ward's overall approach, as noted in paragraph 54 above. It was wholly different to the defendant's treatment of the claimant's wholesale failure to answer Questions 5-7.

132. Before going on to Categories 3-10 I note that, having addressed and rejected the arguments in respect of Categories 1 and 2, I have dealt with the only two of the claimant's Categories that arise under the Selection Criteria. So even if I have taken too restrictive an approach in **Sections 9.1 and 9.2** above, I consider that Categories 3-10 are on any view irrelevant and part of a wholly disproportionate exercise. On the basis of the failure of the case on Categories 3-10, the claimant's comparison case must fail.

9.3.3 Category 3: Figures on NMS Bid

133. The claimant said that the defendant sought clarification from 25 firms as a result of inconsistencies/ambiguities in the numbers of NMS for which they were bidding. It says that the same ought therefore to have been done as a result of its failure to answer Questions 5-7.

134. I reject that submission. The number of NMS being bid for appeared in the tenders twice. It was in the TIF, but it was (or should have been) in the answers to the Selection Criteria as well. Ms Ward's evidence was that, where there was a mismatch between the numbers stated in the TIF, and the numbers stated in answer to the Selection Criteria, applicants were contacted to confirm which figure was correct.

135. That seems to me to be entirely in accordance with the principles which I have outlined in **Section 2.2** above. In these cases, two different figures could be found in two different parts of an applicant's tender. There was therefore an ambiguity. It was easy enough to confirm with the 25 applicants which the correct figure was. That is what I would have expected in a properly run procurement exercise. That was wholly different to the claimant's situation. They had failed to answer Questions 5, 6 and 7, so there was no question of any ambiguity.

136. Furthermore, although I have found that going back on Questions 5-7 would have given the claimant the opportunity to improve its bid, that could not have happened for the 25 applicants in Category 3, because all they were doing was identifying which of two figures previously given was in fact the correct one. They could not improve the bid by giving a higher number than the numbers provided in the original tender.

9.3.4 Category 4: Ratio of NMS Bid For to Staff Too High

137. The claimant said that the defendant amended 17 bids as a result of other information, which demonstrated that the ratio of the number of NMS bid when compared to the

numbers of staff was too high. They said that the defendant should similarly have clarified the position with them and allowed them to amend their answers to Questions 5-7.

138. I reject that submission. Paragraph 10.7 of the IFA set out the capacity cap calculation and warned any applicants which bid above their cap, which was itself based on staffing levels, that their bids would be automatically reduced. This was important: it was to ensure that contracts were not awarded to firms who did not have the staff to carry them out.

139. Again, contrary to the claimant's submission, no post-tender clarifications were sought from the applicants concerned. Instead this automatic modification, which had been clearly set out in the IFA, was performed by the defendant's software. It was therefore a wholly different situation to the claimant's failure to answers Questions 5-7.

9.3.5 Category 5: Incorrect Address

140. One applicant entered an incorrect address. The defendant sought clarification of this and an amendment was made. That was, so it seems to me, very similar to the situation in ***Tideland***. It has nothing to whatsoever to do with the claimant's failure to answer Questions 5-7.

9.3.6 Category 6: Failure to Enter Staff Details

141. The claimant said that 4 applicants were allowed to amend their application in respect of staff details where that part of the TIF which had not been filled in. Two examples were considered in detail during Mr Westgate's submissions. The claimant argued that was the sort of opportunity that it should have been offered in respect of its failure to answer Questions 5-7.

142. Although Mr Westgate spent some time on this category, it seems to me that it was a wholly different situation to the claimant's failure to answer Questions 5-7. What happened here was that the 4 applicants had identified particular staffing levels when answering Essential Criteria and Selection Criteria questions. However, some of them had left blanks in the TIF, which gave rise to an ambiguity on the face of the tender documents. That ambiguity could be and was easily corrected by the seeking of clarification. Again, that did not lead to an improved bid, because the applicants had already indicated what staff levels they would provide in other parts of the tender and they could not change or improve that information.

143. I was taken to the applications of one firm, **SR**, who had filled out a TIF for Northamptonshire which was ambiguous in this way (because it contradicted other information in their tender), and where clarification was sought. Notwithstanding the clarification that was subsequently provided, their bid was unsuccessful. In addition, the same firm failed to provide any TIF at all for Bedfordshire, even though a Selection Criteria response had been provided. A clarification was sought but none was provided. That tender too was unsuccessful.

144. The consideration of this sort of grinding detail, in respect of unsuccessful bids from other applicants for other (non-London) work, by reference to elements of the tender

which were not the subject of the claimant's own complaints, demonstrated all too clearly that what the claimant was attempting to achieve was an impermissible review by the court of the whole 2009/2010 legal aid procurement process, regardless of the specific challenge actually made.

9.3.7 Category 7: Entering an Address Outside the Correct Procurement Area

145. The claimant said that 3 applicants had entered an address that was not in the correct procurement area and that the defendant had sought clarification from them and allowed the applications to be amended. The documentation relating to one applicant in particular (**K3**) was studied in some detail.

146. Again, what happened here was that there was an inconsistency between the information provided in the TIF and the answers to the Selection Criteria response. That was an inconsistency which could be easily corrected; it seems to me that the correction was wholly in accordance with the ***Tideland*** principle; and it was again unrelated to the claimant's situation.

9.3.8 Category 8: Confirmed Peer Review Score

147. For 5 applicants, the defendant amended the score in respect of the confirmed peer review. The claimant says that the same approach was applicable to its own failure to answer Questions 5-7.

148. I reject that submission. There was no question of any clarification being sought from the 5 applicants in question. The evidence of Ms Ward was that some applicants had failed to understand the meaning of "confirmed" peer review, which was a very specific type of peer review operated by the defendant. The 5 applicants had indicated that they had such a peer review when in fact they did not. That error was corrected by the defendant by checking its own database and making the necessary correction. Again, that was not a situation comparable to that of the claimant.

9.3.9 Category 9: A Late PQQ

149. 2 applicants provided their PQQ late. For the reason that I have already given, I regard this alleged comparison as hopeless. It has already been ruled as hopeless by Blake J in ***Hoole***. In my view, it should never have been raised.

9.3.10 Category 10: Exceptional Circumstances

150. Again, this related to the PQQ. These were subsequently amended in 7 cases as a result of 'exceptional circumstances'. That was expressly allowed for under the IFA. That again can have nothing whatsoever to do with the claimant's situation under Questions 5-7, where the IFA did not contain a similar exception and instead warned that the defendant would not seek "to obtain missing information" (paragraph 11.8).

9.3.11 Summary

151. Accordingly, even if (which I do not accept) the claimant's comparators are open to them as a matter of principle, I reject them on the facts. They are just not comparable situations. The long and the short of the position here was that the claimant had failed to answer Questions 5-7 and everyone else who had failed to answer those questions

was treated in precisely the same way by the defendant. The case that raised the treatment of other applicants by reference to other elements of their tenders was irrelevant, disproportionate and futile.

10. DAMAGES

152. On the first day of the trial, which had been set down to deal with all issues of liability and damages, Mr Westgate asked me to rule that the trial be concerned with liability only, with damages being left over to another date. I said that, given that this case had started seven years ago, it was an extraordinary thing for the court to be asked, on the first day of trial, and for the first time, to put off any consideration of damages. I indicated, however that, if this was an agreed course, I would not interfere.

153. I was not told during the trial that this course of action had been agreed; indeed, Mr Taylor had made some strong points about quantum in his written opening. After I had provided the parties with a copy of this Judgment in draft, which dealt with certain points of principle in connection with the damages claim, I was told that an agreement had been reached between the parties outside court just before the start of the trial, although this was 'subject to the court's determination'.

154. This is obviously an unfortunate situation and I have considered it carefully. It seems to me that it would be contrary to the overriding objective to leave unanswered the principal issues on damages, provided of course that the claimant would not be prejudiced by my doing so. In my view, the claimant cannot be prejudiced by the observations that follow, because all the points I make arise out of the claimant's own evidence.

155. First, it should be stressed that, but for the existence of what the claimant must have considered to be an arguable claim for damages, there would have been no purpose or point to these proceedings in the first place. The proceedings were not conducted with sufficient speed to have had any effect upon the procurement exercise itself, so this was always a claim for damages only.

156. Secondly, the damages claim was pleaded by leading and junior counsel (who did not appear at the trial). It is extremely terse. Paragraphs 34 and 35 of the Amended Grounds of Claim allege:

> "34. The claimant's turnover for publically funded cases in the year und eth contract that ended in 2010 was £390,000 from 175 matter starts: £2,228.57 per matter start.
>
> 35. The 2010 contracts ran from November 2010 to April 2013, a period of just over two years and four months (2.3 years).
>
> 36. The claimant therefore estimates its lost income at £2,228.57 x 850 x 2.33 = £4,413,685.71, at least 50% of which would have been profit."

157. Thirdly, the only evidence in support of that claim for over £2.2 million can be found in the fourth witness statement of Mr Ahmed Hersi dated 9 August 2013. At paragraph 17 he said:

> "Hersi & Co bid for 850 cases. It was expecting to earn about £2300.00 from each case. Therefore, the loss to Hersi & Co is approximately £1.95 a year. For a contract duration of 2.33 years that would be £4.5 million. This is to be reduced by the fact that not all of it would have been profit. And further to be reduced by the fact that not every firm got what it bid for."

There was no other witness evidence in support of the damages claim. In addition, no documentation of any sort has been disclosed to make good any of the component figures within the claim.

158. With considerable understatement, Mr Westgate described the evidence referred to above as "concise". Given that there was no other evidence on damages, I would describe it in a rather different way: in my view, it was wholly inadequate to support the pleaded damages claim. Thus, there was no evidence before the court at the time of the trial which could have supported any special damages claim whatsoever. There was therefore nothing for the court to adjourn to a later date.

159. On receipt of the draft judgment, Mr Westgate complained that, if the claimant had known that damages were going to be dealt with, Mr Hersi could have given oral evidence and been cross-examined. That is incorrect for a variety of reasons: not only had the parties agreed well in advance of the trial (and therefore in advance of the conditional agreement) that there would be no oral evidence, but the absence of any detail and any documents to support any of the claimed figures would have been fatal to the damages claim in any event. Mr Hersi could not have given oral evidence in chief on any matter that went beyond his (inadequate) witness statement, so there would have been no need for Mr Taylor to cross-examine him, and nothing to cross-examine him on.

11. THE PROCEDURAL HISTORY

160. I said at paragraph 3 above that I would return to the procedural history. That is for two reasons. First, it seems to me that the delays in this case were inexcusable; secondly, and more importantly for this purpose, I consider that the claimant's conduct of this case was wholly unsatisfactory. It cannot be right that in the modern age, a case of this kind can be allowed to take seven years to get to trial.

161. These judicial review proceedings began in November 2010 in the Administrative Court. The claim was attached to, and then uncoupled from, a number of the other cases arising out of the legal aid procurement exercise to which I have referred. Although this is a regular practice in the Administrative Court, in my experience it often causes more trouble than it is worth. I note that, in the end, none of the seven reported cases involving this public procurement were dealt with or heard together.

162. The issue of permission in this case was not dealt with until March 2013, two and a half years after the proceedings began. Even then, Blake J refused permission to bring these proceedings on all grounds except inequality of treatment and the

Tideland principle, but he did not grant permission on those grounds either. Instead, he adjourned the permission hearing until after disclosure.

163. A PTR was held in July 2013 and the court made an "unless" order requiring the claimant to file amended proceedings by 2 August 2013. The claimant failed to provide its amended pleading by that date. On one view, the claim should have been struck out then because of the failure to comply with the "unless" order. It appears that no-one even raised that possibility.

164. Thereafter, the claimant did nothing for almost 3 years. In February 2016 the defendant sought to strike out the proceedings. On 2 March 2016, following the hearing of that application in the Administrative Court, the claim was not struck out, although the reasons for that are not clear from the papers I have. Permission to bring judicial review proceedings was granted on that occasion, almost six years *after* the claim had been commenced. Again, I do not understand how such a delay was permitted to arise. The case was then transferred to the TCC.

165. At the PTR in July 2017, O'Farrell J ordered that a Scott Schedule of the claimant's comparators be provided by 11 September 2017. The claimant had to provide the relevant information first. It failed to do so. In the end, the Scott Schedule was not provided until 12 October, rendering it all but useless, because neither party had been able to refer to it in their written openings.

166. At the PTR, the claimant was ordered to prepare a trial bundle by 25 September 2017. Again, it failed to do so. Much of that work was instead done by the defendant. Because there was no Scott Schedule, the original trial bundle included the 19 files said to be relevant to the claimant's comparison exercise.

167. To compound matters, the claimant's opening should have been provided by 2 October 2017. It was not provided then, although the defendant did provide a helpful opening that far in advance of the trial. The date was subsequently re-jigged by the parties to 12 October 2017, but the claimant's opening was not provided to the court on that date either. In fact, a copy of it had to be obtained by my clerk from defendant's counsel on 13 October 2017, the last day before the trial. This was despite the fact that my clerk had sought the claimant's opening earlier in the week, so everyone knew that the court was keen to see it as soon as possible.

168. In my view this litigation has been conducted in an abysmally slow and haphazard fashion. No regard has been had to the orders of the court, or to the CPR (which contrary to the belief in some quarters, applies to the Administrative Court just as it applies to all other parts of the High Court). The claimant has been in breach of both court orders and the rules. I very much hope that no case ever comes to trial in the TCC again with a 6 year procedural history.

12. CONCLUSIONS AND CONSEQUENTIAL MATTERS

169. For the reasons set out in **Sections 4-8** above, the claimant's claim for judicial review fails at every level.

170. For the reasons set out in **Section 9** above, the claimant's wider case on equality fails in principle; fails because of other decisions which I follow; and fails on an analysis of the specific comparisons drawn.

171. For the reasons set out in **Section 10** above, I consider that the damages claim could never have been made out on the evidence provided by the claimant.

172. For the reasons set out in **Section 11** above, I consider that this claim has been conducted in an abysmally slow and haphazard fashion.

173. It will be important to have a hearing either at the handing down of this Judgment or, if that is inconvenient to counsel, as soon as possible thereafter, in order to deal with consequential matters, including the question of costs and the basis of their assessment.