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Case No. HT-2017-000169

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 27 July 2018

Before

The Honourable Mr Justice Fraser

Between

SRCL LIMITED

Claimant

and

THE NATIONAL HEALTH SERVICE COMMISSIONING BOARD (also known as NHS ENGLAND)

Defendant

Jason Coppel QC (instructed by Bevan Brittan LLP) for the Claimant
Rhodri Williams QC (instructed by Hill Dickinson LLP) for the Defendant

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Hearing dates: 11, 12, 13, 18 and 25 June, and 27 July 2018

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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 HONOURABLE MR JUSTICE FRASER

Mr Justice Fraser:

I Introduction

1. This Introduction is an outline summary. The Claimant, SRCL Ltd ("SRCL") is a provider of healthcare waste and compliance services within the United Kingdom. It provides a variety of services to a number of different customers, but relevant to these proceedings is the provision of clinical waste disposal services to the National Health Service ("the NHS"). The National Health Service Commissioning Board (which is also known as NHS England) is a non-departmental Government body, which was established by the National Health Service Act 2006. It is responsible for allocating funding to Clinical Commissioning Groups so as to enable those groups to commission health-related services, and for funding contracts. These include those the subject matter of these proceedings, namely for the collection and disposal of clinical waste produced by General Practitioners (or GPs) and pharmacies across England. I shall refer to the Defendant as NHSE, as that is how it was referred to in these proceedings.

2. NHSE is a "contracting authority" for the purposes of the Public Contracts Regulations 2015 (SI 2015/102) ("PCR 2015"). These regulations implement Directive 2014/24/EU on public procurement ("the Directive"), which also repealed the earlier relevant Directive 2004/18/EC. NHSE is obliged by law to observe the requirements upon such authorities in the PCR 2015 in terms of how it places these contracts with different economic operators. In general terms, this means observing the principles of EU law, and open competitions must be held prior to entering into such contracts. Those competitions must be conducted in accordance with the principles of transparency, fairness and equality of treatment between the different bidders. These particular proceedings concern a procurement dispute whereby SRCL challenges the outcome of an auction held in April 2017 by NHSE for the provision of clinical waste services to GPs and pharmacies in Cumbria and the North East of England. This was a competition for what is called a "Call-Off" contract for services that were covered by a Framework Agreement. SRCL was one of five commercial operators that had been appointed by NHSE under the tender process for the Framework Agreement. However, that appointment merely entitled them to enter into what are called "mini-competitions" for Call Off contracts for services.

3. The Framework Agreement covered the whole of England, and different Call Off competitions (or as they were sometimes called in the evidence, mini-competitions) covered different parts of the country. Each was designated with a different Wave number, starting with Wave 1. Within each Wave there were different lots. The auction for the contract the subject of these proceedings was for Wave 6 and was held on 26 April 2017, for Cumbria and the North East of England. The purpose of the auctions held for the different Waves was for NHSE to obtain lower prices through more effective competition. SRCL was the main incumbent provider of these services, but was unsuccessful in the auction for Wave 6 and did not bid anywhere nearly low enough to win the auction. This was for reasons that are explained in more detail below. The index to this judgment is as follows:

4. Proceedings were issued by SRCL on 30 June 2017. There are three broad areas of contention between the parties in this litigation. SRCL maintains that the winning bid, and the under-bid (which means the next lowest bid), were both abnormally low tenders. SRCL also maintains that the way that the costs of complying with the Transfer of Undertakings and Protection of Employment Regulations 2006 ("TUPE") were dealt with by NHSE in the competition for Wave 6, notified to the bidders prior to the auction itself, was unlawful. NHSE take issues with both of those grounds of challenge, and also relies upon limitation, as the proceedings were issued by SRCL outside of the 30 day period imposed by Regulation 92(1) of the PCR 2015. There is also a dispute about when time in this case should start to run for the purposes of Regulation 92(1), but SRCL maintains that there are good grounds present for the necessary extension of time under Regulation 92(4) of the PCR 2015 in any event.

5. On 27 October 2017 Jefford J ordered a split trial, with liability and causation to be determined first, and that trial was set down to take place on 30 April 2018. The circumstances in which that trial did not take place were rather ironic, given the Defendant is effectively part of the NHS, and delay to the trial would inevitably cause delay to resolution of the issue of whether the automatic suspension preventing NHSE from entering into what is supposed to be a money-saving contract should be lifted. The main witness for SRCL was given, by the NHS, a date for an operation, having been on an NHS waiting list. That date fell during the trial. Accordingly the parties agreed to delay the trial so that this appointment could be kept, and associated time for recovery could occur. The trial was not therefore conducted until 11 June 2018, which was the first available date after the original trial date.

6. The auction process was administered by the Crown Commercial Service, and was conducted online and is therefore also called an e-auction. It was also what is called a reverse auction, which is one where the bidders reduce their price in turn with the aim of being the lowest bid, and winning both the auction and thereby the contract. This

particular auction was for Cumbria and the North East, and was called Wave 6. The issue of proceedings acted automatically to suspend the auction process for this particular Wave, but NHSE suspended the whole auction process for all remaining Waves after the claim form was issued. Therefore only Waves 1 to 5 have led to the award of Call Off contracts. SRCL had won some of those other lots in Waves 1 to 5. The winning bidder in the auction for Wave 6 was Healthcare Environmental Services Ltd ("HES"). The next lowest bid was from Sharpsmart Ltd ("Sharpsmart").

7. SRCL took only a very limited part in the auction for Wave 6, choosing no longer to bid after its own particular pre-determined level had been reached. This was a decision that had been taken by SRCL prior to the auction, and is explained further below. Immediately following the auction itself, SRCL set out its objections to NHSE in a letter from its solicitors dated 27 April 2017. The thrust of the complaint was that the winning bid was an abnormally low tender, but the decision makers at SRCL appeared to have decided in advance of knowing what the winning bid was, that this was the complaint that was going to be made in respect of the outcome of the auction. NHSE did not accept the winning bid was abnormally low, but agreed (after some pressure had been applied by SRCL in correspondence) to conduct an investigation. This was undertaken (by Mr Smith, who gave evidence before me) and this concluded that there were no grounds for considering that the winning bid was an abnormally low tender. There was a substantial amount of correspondence between the solicitors acting for the parties during this period, and their contents are relied upon by both parties as justifying their respective cases on limitation. Proceedings were issued by SRCL on 30 June 2017.

8. One further point about the auctions both for this Wave, and the previous five Waves, is that they were for what was called a "basket" of representative services. This was set out in what was called (during proceedings) the closing FRT. The procurement for the Framework Agreement itself had required the different bidders to bid both on price, and quality. Both parts of those bids were evaluated, and had a different percentage attributed to them in the evaluation stage. If successful the bidders were added to the Framework and were entitled to participate in the auctions. The price aspect of the Framework tender bids included the attribution of different rates, or prices, by each bidder for the disposal of a vast number of different types of clinical waste. Disposal of clinical waste is governed by strict regulations and not all different types require the same method of disposal; some are more hazardous than others. Such waste would be collected by the GP surgeries and pharmacies in different sized containers, and bags, and accordingly collected from there by the successful bidders in those containers, and then disposed of. Different colours are used for different levels of hazard. The most hazardous waste requires incineration. For each Wave, NHSE chose a representative selection of different types and quantities of waste. However, the underlying data concerning the existing services that were being provided by the incumbents was also provided to the bidders. This data included a very high level of detail of what types of waste were actually being collected and disposed of prior to the auction.

9. The non-inclusion of any particular item, for example, in the representative basket in Wave 6 did not mean that no waste of that type would require disposal during the currency of the contract by the winning bidder. Equally, if a number of particular bins of a particular type was included in the representative basket for the auction, this did not mean that only that number of those types of bins would be collected during the

contract term. If a particular type of bin was not included at all in the basket, this meant that the winning bidder would be entitled to charge its Framework Agreement price for that type of waste, in respect of the quantity in fact collected. If a particular type *was* included in the representative basket, the winning bidder would be entitled to charge for the actual number of that type in fact collected. The rate paid for this would however be the rate provided by the winning bidder in the auction breakdown or FRT. Although certain information had to be provided by the bidders in advance of the auction, when bidding in the Wave auction itself, each bidder would bid a single (and simple) lump sum for the whole representative basket. If successful, the winning bidder would then submit to NHSE a document called the Closing FRT, which would show how its overall winning bid was calculated, with specific prices for specific items that were in the basket. For items that were in the basket, that bidder would only be entitled to charge that lower Wave 6 rate in the Closing FRT for disposal of items of that type during the contract services.

10. In this way, the Framework Agreement prices acted as an upper ceiling on what that bidder could charge for a particular item, but if it had bid a lower rate (or to be more accurate, a lump sum made up of a lower rate) in the auction because that item was in the representative basket, it could only charge that lower rate if it won the contract for that Wave. The FRT included the requirement of overheads ("OH") and profit (together, "OHP"). An FRT only had to be submitted to NHSE by the winning bidder(s) for each Wave. Accordingly, therefore, the winning bid for Wave 6 does not represent the *total* amount that HES would in fact be paid for that work following contract award. The amount HES would be paid each year would depend upon two factors. Firstly, the quantity and type of clinical waste in fact collected from all the GPs and pharmacies in Cumbria and the North East, and disposed of by HES. Secondly, the rates for each type of waste collected, those rates being as included in the Closing FRT (if the item was in the basket) or the Framework Agreement rates (for those items that were not). This method of performing the auction therefore had two distinct advantages. Firstly, it allowed NHSE to compare the prices of the different bidders on the same, representative, basis. Secondly, it allowed a degree of commercial flexibility on the part of the different bidders in terms of how each of them chose to structure their own bids (or perhaps more accurately, how their own bid levels were made up in terms of rates for different component elements).

11. Finally, the way that the auctions were conducted was as follows. For Waves 1 to 5 the duration was a working day, but for Wave 6 this was reduced to four hours. This was because the decision makers involved had to be present at their computers (for the online auction) during the whole process, and some bidders objected to a full day being required for this. Each bidder would be online, with the relevant senior management in a room at their particular offices. The bidding would start, a bid would be made, and after an initial period, 5 minute periods were imposed. If no lower bid was made within a 5 minute period after a previous bid, then that previous bid would become the winning bid. There was a procedure for what would happen at the end of the bidding period if the auction was still going on, but that is not relevant for present purposes. The management personnel of each bidder would be required to make fast decisions, and the bidding would usually be what was termed in the evidence as "quite aggressive". Eventually the lowest figure would be reached that any of the participating bidders were prepared to bid for the representative basket of services. In this auction for Wave 6, the final bid by HES was £310,000. The next lowest bidder was £313,000,

from Sharpsmart. SRCL submitted only one bid early in the auction, of £479,999, and then stopped bidding.

II The Public Contracts Regulations 2015

12. The most relevant regulations in PCR 2015 are as follows:

18.- Principles of procurement

(1) Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

(2) The design of the procurement shall not be made with the intention of excluding it from the scope of this Part or of artificially narrowing competition.

(3) For that purpose, competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.

69.- Abnormally low tenders

(1) Contracting authorities shall require tenderers to explain the price or costs proposed in the tender where tenders appear to be abnormally low in relation to the works, supplies or services.

(2) The explanations given in accordance with paragraph (1) may in particular relate to-
(a) the economics of the manufacturing process, of the services provided or of the construction method;
(b) the technical solutions chosen or any exceptionally favourable conditions available to the tenderer for the supply of the products or services or for the execution of work;
(c) the originality of the work, supplies or services proposed by the tenderer;
(d) compliance with applicable obligations referred to in regulation 56(2)
(e) compliance with obligations referred to in regulation 71;
(f) the possibility of the tenderer obtaining State aid.

(3) The contracting authority shall assess the information provided by consulting the tenderer.

(4) The contracting authority may only reject the tender where the evidence supplied does not satisfactorily account for the low level of price or costs proposed, taking into account the elements referred to in paragraph (2).

(5) The contracting authority shall reject the tender where it has established that the tender is abnormally low because it does not comply with applicable obligations referred to in regulation 56(2).

92.- General time limits for starting proceedings

(1) This regulation limits the time within which proceedings may be started where the proceedings do not seek a declaration of ineffectiveness.

(2) Subject to paragraphs (3) to (5), such proceedings must be started within 30 days beginning with the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen.

(3) Paragraph (2) does not require proceedings to be started before the end of any of the following periods:-
(a) where the proceedings relate to a decision which is sent to the economic operator by facsimile or electronic means, 10 days beginning with-
(i) the day after the date on which the decision is sent, if the decision is accompanied by a summary of the reasons for a decision;
(ii) if the decision is not so accompanied, the day after the date on which the economic operator is informed of a summary of those reasons;
(b) where the proceedings relate to a decision which is sent to the economic operator by other means, whichever of the following period ends first:-
(i) 15 days beginning with the day after the date on which the decision is sent, if the decision is accompanied by a summary of the reasons for the decision;
(ii) 10 days beginning with-
(aa) the day after the date on which the decision is received, if the decision is accompanied by a summary of the reasons for the decision; or
(bb) if the decision is not so accompanied, the day after the date on which the economic operator is informed of a summary of those reasons;
(c) where sub-paragraphs (a) and (b) do not apply but the decision is published, 10 days beginning with the day on which the decision is published.

(4) Subject to paragraph (5), the Court may extend the time limits imposed by this regulation (but not any of the limits imposed by regulation 93) where the Court considers that there is a good reason for doing so.

(5) The Court must not exercise its power under paragraph (4) so as to permit proceedings to be started more than 3 months after the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen.

(6) For the purposes of this regulations, proceedings are to be regarded as started when the claim form is issued.

13. Regulation 56(2), referred to in Regulation 69(2) and 69(5), is a general principle and relates to a contracting authority not awarding a contract to a tenderer submitting the most economically advantageous tender where the contracting authority has established that the tender does not comply with applicable legal requirements. These are stated in the regulation as being "in the fields of environmental, social and labour law established by EU law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X to the Public Contracts Directive as amended from time to time".

14. The concept of an "abnormally low tender" is central to the operation and applicability of Regulation 69. SRCL argues that the tenders both of HES, and Sharpsmart, in the Wave 6 auction were abnormally low. Although it maintains it had no obligation to do so, NHSE instituted an investigation into the HES tender in any event after receipt of solicitor's correspondence sent by Bevan Brittan LLP, and this investigation was performed by Mr Smith. This concluded that the HES tender did not have the

appearance of, and was not, abnormally low. SRCL was not satisfied with that and issued these proceedings.

III The Agreed Issues

15. These were provided by the parties prior to the evidence being called, and distilled the issues between them on the pleadings into the necessary issues to resolve the differences between them. I have retained the headings used.

16. The Agreed Issues are as follows. The references to the pleadings were in the agreed list.

Treatment of TUPE

Issue 1. Did the Defendant encourage bidders to submit prices on the basis that the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") would not apply and, if so, did the Defendant act unlawfully in so doing? (Particulars of Claim §27; Defence §25)

Regulation 69 PCR

Issue 2. Did the Defendant act in breach of reg. 69(1) of the Public Contracts Regulations 2015 ("**PCR**") by failing to require the lowest priced bidder ("**HES**") to explain the prices proposed in its winning bid in the Wave 6 eAuction ("**a reg. 69 explanation**") (Particulars of Claim §28; Defence §26)?

Issue 3. If so, would the outcome of a reg. 69 explanation by HES have been that the Defendant would in fact have rejected HES's bid or would have been required by law to do so (Particulars of Claim §§29, 31; Defence §§27, 29 - 31)?

Issue 4. If so, would the Defendant have been required to seek a reg. 69 explanation from the second-placed bidder ("**Sharpsmart**") (Particulars of Claim §29; Defence §27)?

Issue 5. If so, would the outcome of that reg. 69 explanation by Sharpsmart have been that the Defendant would in fact have rejected Sharpsmart's bid or would have been required by law to do so (Particulars of Claim §§29, 31; Defence §§27, 29 - 31)?

Other illegality arising out of acceptance of winning price

Issue 6. Did the Defendant act unlawfully by accepting the bid of HES in circumstances where the price tendered by HES was abnormally low and/or unsustainable and/or likely to prevent HES from fulfilling its commitments made in the quality section of the tender evaluation of the ITT (Particulars of Claim §30; Defence §§28)?

Issue 7. If so, had the Defendant acted lawfully in this regard, would it have rejected the bid of HES and also that of Sharpsmart and awarded the contracts to the Claimant (Particulars of Claim §31; Defence §§29 – 31)?

Limitation

Issue 8. Did the Claimant commence proceedings, in respect of the breaches alleged, or any of them, within the 30-day limitation period under Regulation 92(2) of the PCR?

Issue 9. If not, should an extension of time be granted pursuant to Regulation 92(4) of the PCR (Defence, §§ 2 – 8; Reply §3)?

IV The New Allegations

17. Notwithstanding this clear and agreed list of issues, on the last day of evidence Mr Coppel began to advance a case that went to criticisms by SRCL of the use of reverse e-auction(s) by NHSE in the manner adopted for all of Waves 1 to 6, maintaining that this was done in breach of Regulation 35. This was no part of SRCL's pleaded case – it was contained nowhere in the Particulars of Claim – nor was it contained in any of the Agreed Issues. It was not included in SRCL's written opening either.

18. This led to consideration with counsel of the correct approach to arguing issues in litigation such as this. Mr Coppel strongly rejected any suggestion that specific breaches of Regulation 35 ought to have appeared in any of the documents to which I have referred. The specialist courts are reluctant to decide cases on technical pleading points; such points are sometimes referred to as "mere pleading points". However, in this instance, this is not a technical pleading point. Breaches of Regulation 35 are substantial, and new, criticisms by SRCL of the way that the procurement was conducted. I therefore indicated to Mr Coppel that if these new points were to be advanced, an amendment would have to be drafted to the Particulars of Claim and any application to amend would be dealt with on the next court day in the trial, which was 25 June 2018. The fact that this was the day for delivery of oral closing submissions would, perhaps obviously, be a factor relevant to such an application, but would not be solely determinative of it. Mr Williams for NHSE objected to SRCL raising these new complaints at all, indicating that he and NHSE would have called different evidence had these allegations been live ones during the trial. I indicated that all of the relevant matters would be dealt with upon any application by SRCL to amend its pleading.

19. Mr Coppel decided not to apply to amend SRCL's pleading. This was no doubt sensible, given his prospects on any such application would have had certain notable features, and not in such an application's favour. Apart from matters such as prejudice to NHSE and an inability to deal with the allegations in their evidence, because no one at NHSE or their advisers knew breaches of Regulation 35 were being advanced by SRCL, there were substantial limitation issues. This is because of the particularly strict time limits for procurement cases under PCR 2015. Regulation 92(2) requires proceedings to be commenced within 30 days beginning with the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen. The first e auction was for Wave 1 and was announced on 19 August 2016. The ITT and supporting documents for that Wave would therefore have been distributed to Framework bidders before that. SRCL may have lost its chance to complain about the auction breaching Regulation 35 one month after that, somewhat before the end of 2016. Ms Dransfield's evidence was that each of the Waves "followed a fairly standard format" and in my judgment there were strong arguments available to NHSE that the correct date for time starting to run for these allegations was the date that the documents were distributed for Wave 1, namely August 2016.

20. Even if I am wrong about that and the complaints were seen as being solely related to Wave 6, the ITT and supporting documents for that Wave were distributed to the potential bidders in March 2017. The date of the actual notification to the potential bidders that there would be a Wave 6 auction was 9 March 2017, according to Ms

Dransfield's evidence in paragraph 105 of her witness statement. Therefore, taking the later date, the very latest date that time could start to run for the purposes of Regulation 92(2) was some 15 months before these points were raised by Mr Coppel. If the date for Wave 1 were the correct starting date, the period is about 22 months before they were raised in this trial.

21. However, not daunted by these factors, or by his decision not to apply to amend the Particulars of Claim, Mr Coppel decided he could argue these points complaining of breaches of Regulation 35 by NHSE in any event. He did so by including them in paragraph 100 of SRCL's written closing submissions. When this point was explored, he submitted that they arose directly out of the Defence. It is necessary to deal with this point in some detail, due to the degree of reliance placed upon it by SRCL, and the potential for SRCL to conclude (wrongly) that valid arguments against NHSE were being shut out by the court on pleading technicalities. In paragraph 26 of the Defence, NHSE denied that the bid by HES was abnormally low, and denied breaches of Regulation 69. In the course of doing so, NHSE pleaded as follows in relation to the conclusion that the HES' tender did not appear to NHSE to be abnormally low:
"26(b) This conclusion was supported, among other things, by the fact that the winning tenderer's price was arrived at as a result of a competitive reverse eAuction process conducted in accordance with regulation 35 of the 2015 Regulations and which was actively participated in by at least two tenderers whose lowest and final bids were within 1% of each other."

22. That paragraph was specifically pleaded to by SRCL in the Reply in paragraph 15(2):
"15(2) Contrary to sub-paragraph (b), it is denied that the fact that prices were submitted during a competitive reverse eAuction process provided any support for a conclusion that the winning tender was not abnormally low".

23. This plainly does not raise any complaint by SRCL that there were breaches of Regulation 35 in the e auction process. Rather to the contrary, it pleads, in relation to an express averment that the auction process was conducted in accordance with Regulation 35, that NHSE cannot rely upon that fact. Breaches of Regulation 35 were plainly not pleaded by SRCL.

24. Further, such breaches, or even any issues which related to breaches of Regulation 35, were not contained in the List of Agreed Issues either. Before I turn to the relevance of that however, I must deal with another area in which Mr Coppel sought to run a new argument, also unheralded on the pleadings, in closing submissions.

25. The Managing Director of the winning bidder, HES, is Mr Pettigrew who is Scottish, and the company has an incineration facility in Scotland. It is a pyrolysis plant, which is explained further when I deal with the evidence of Mr Pettigrew below. Mr Pettigrew told the court that it is the only one in operation in the United Kingdom, and it is licensed by the Scottish Environment Protection Agency. He may have meant that it is the only one in operation in the United Kingdom for the disposal of clinical waste, but for present purposes such a fine distinction does not matter. Due to certain matters being devolved, it is the Scottish agency, rather than the Environment Agency in England, which is responsible for regulating and licensing such matters in Scotland.

26. Mr Coppel sought to run an argument in closing submissions that pyrolysis is not a permissible way for HES to dispose of hazardous clinical waste under the Framework Agreement in any event. He submitted that "pyrolysis is not approved by the Environment Agency as a means of disposing of incineration-only clinical waste." He submitted that the Framework Agreement ITT required that "The supplier will ensure that wastes pertinent to this contract are treated in accordance with methodologies that are authorised by the Environment Agency" and because the plant was in Scotland, and used pyrolysis, this meant that HES was not treating the clinical waste in the required way. He expressly stated that waste "is not being incinerated at all, it is being treated by pyrolysis" and drew a strained definition of those two terms, to the effect that pyrolysis and incineration were mutually exclusive terms. This conclusion was invited by means of construction of one document, entitled "Safe Management of Healthcare Waste", where a list of definitions was given and pyrolysis had a separate paragraph to incineration. That document was contained in the specification for the Framework Agreement.

27. He did however accept, as any sensible person would, that because HES' plant was situated in Scotland, it would or could *never* be authorised by the Environment Agency, but would only ever be authorised by the Scottish equivalent, namely the Scottish Environment Protection Agency. This submission amounted to one that HES' process of dealing with the waste was not approved by means of regulation. The response to this was 'No.....what I am saying is it is not within "Safe Management of Healthcare Waste"'. He confirmed that he was "inviting the inference that pyrolysis is not incineration for the purposes of the Regulations".

28. This point is, in my judgment, a thoroughly bad one for the following reasons:
1. There is no place for such an inference. If this is a serious point, it would require some evidence to support it. There was none. I am not prepared to decide this case on an unpleaded inference that pyrolysis is not incineration.
2. The argument is entirely circular. The Environment Agency in England would only ever be asked to approve pyrolysis if someone constructed a pyrolysis plant in England. Given this one was constructed in Scotland, its approval by the Scottish equivalent of the Environment Agency must be equivalent to an approval given by the Environment Agency in England, and I find that it is equivalent.
3. The United Kingdom is a member state of the European Union. There are no regulatory restrictions relied upon by SRCL to demonstrate that HES are not permitted to transport waste from Northern England to Scotland for treatment. Ms Dransfield's written evidence was that NHSE "ought not to have consented to HES exporting waste from England and re-consigning it at the border for treatment in Scotland using methods which are not authorised by the" Environment Agency, but this complaint formed no part of the pleaded issues against NHSE in these proceedings. There is, in any case, no border between England and Scotland.
4. Given this point was not pleaded, NHSE was deprived of the ability to call evidence of their own properly to deal with or meet it. In the circumstances of this case, it would be fundamentally unfair to decide this case on the basis of such an unpleaded point. This is more than a "mere pleading point". That phrase is often used to describe an overly technical and intricate analysis of the text of a pleading to shut out reliance by the other party upon a genuine point at issue in the case. This is a point of fundamental fairness, and this legal argument is nowhere heralded on the pleadings. NHSE simply had no ability to deal with it.

5. Such direct evidence as there was on the point was not in favour of the argument raised by SRCL in any event. Mr Pettigrew's direct evidence was that incineration of clinical waste by pyrolysis at the HES facility in Scotland was permitted by the regulations. Ms Dransfield's oral evidence in cross-examination was "I don't know". Her written evidence in her 1st witness statement was that HES "holds a permit for a pyrolysis plant in Scotland at which waste identified as incineration-only waste could be treated"; her main complaint in that part of her statement was that the plant was "not yet fully operational and [Scottish Environment Protection Agency] sanctioned". Later in that statement she stated that SRCL's "understanding is that HES' plant in Scotland has obtained a permit to incinerate waste...." This evidence points directly to the opposite conclusion to the one for which Mr Coppel contends, namely that one cannot incinerate such waste in a pyrolysis plant. SRCL called no direct evidence in support of Mr Coppel's argument that pyrolysis was not permitted as an approved method of disposing of such waste.

6. Simply in terms of scientific analysis, pyrolysis and combustion are both methods of achieving extremely high temperatures. The Environmental Protection Act 1990 requires parties disposing of waste to have a waste management licence. I consider it likely that the facility in Scotland has a particular type or types of licence. HES identified to NHSE in its tender for the Framework Agreement that the plant in Scotland was one of the facilities that would be used by HES for incineration. That tender by HES was positively evaluated by NHSE, although that identification of location of facilities was not scored. However, HES identified that to NHSE that it would be using the pyrolysis plant in Scotland in its tender, and I consider that I am entitled to rely upon that as prima facie evidence that the use of the pyrolysis plant in Scotland is regulatory compliant in terms of disposal of clinical waste. It is highly unlikely that NHSE simply ignored that part of HES' tender for the Framework Agreement, as regulatory compliance is an important part of the disposal of such waste.

7. Prior to the trial, SRCL obtained a copy of a letter dated 27 February 2017 from HES to an NHS body regarding an attempt by Mr Pettigrew to obtain a higher price for incineration on an existing contract for the Northern Consortium, a group of NHS Trusts situated in Northern England. This led to an application for disclosure by SRCL of a particular part of the Framework tender by HES, which I granted but only in part, namely one page. That page disclosed as a result showed that HES clearly identified to NHSE the proposed use of the Scottish facility in its tender for the Framework Agreement. That document was provided to SRCL on the second day of evidence, 12 June 2018. Even putting the matter at the most favourable to SRCL, namely taking this date as the first date upon which SRCL had the necessary knowledge about use of the pyrolysis plant in Scotland (a highly unlikely scenario), the 30 day period under Regulation 95(2) expired on 12 July 2018.

7. This point was not even identified in SRCL's written opening submissions. It was only raised as a legal submission in closing submissions.

8. Perhaps inevitably, this point or issue was nowhere contained in the List of Agreed Issues either.

29. In my judgment therefore, SRCL cannot rely upon this argument. Due to the nature of disagreement between the parties about the status of the List of Agreed Issues, and the fact that this has an effect upon both the Regulation 35 and pyrolysis points, I will now address that further.

The importance and function of Lists of Agreed Issues

30. A List of Agreed Issues is a vital tool in modern litigation, not only in the specialist courts, but in the High Court generally. Mr Coppel stated that

"Plainly what the agreed list of issues for the trial is intended to do is to distil the claims into a manageable list of issues for the court. Are those the only issues which you have to determine? Well no...."

It was then suggested that breaches of Regulation 35 arose within Issue 2. They plainly do not. That Agreed Issue expressly dealt with breaches of Regulation 69; the heading is "Regulation 69" and the Agreed Issue poses the question "Did the Defendant act in breach of regulation 69(1) of the Public Contracts Regulations 2015?" It cannot be sensibly argued that breaches of a different nature under a different regulation entirely are included within Issue 2.

31. In my judgment, such an approach is simply untenable and I reject it. As Longmore LJ recently stated in ***Scicluna v Zippy Stitch Ltd*** [2018] EWCA Civ 1320:

"14. Ever since the Woolf reforms, parties in the High Court have been required to agree lists of issues formulating the points which need to be determined by the judge. That list of issues then constitutes the road map by which the judge is to navigate his or her way to a just determination of the case. Employment tribunals encourage parties to agree a list of issues for just that reason and, if advocates are retained on both sides, it is right and proper for a list of issues to be prepared.

15. In paragraphs 32-33 of ***Land Rover v Short*** (2011) UKEAT/0496/10/RN Langstaff J approved the submission of counsel that:-

"it was trite law that it was the function of an Employment Tribunal to determine the claims which the claimant had actually brought, rather than the claims which he might have brought and that accordingly the claimant was limited to the complaints set out in the agreed list of issues."

So likewise must the respondent be limited to the defences set out in the agreed list of issues.

16. In similar vein, Mummery LJ in ***Parekh v London Borough of Brent*** [2012] EWCA Civ 1630 (with whom Patten LJ and Foskett J agreed) said:-

"31. A list of issues is a useful case management tool developed by the tribunal to bring some semblance of order, structure and clarity to proceedings in which the requirements of formal pleadings are minimised. The list is usually the agreed outcome of discussions between the parties or their representatives and the employment judge. If the list of issues is agreed, then that will, as a general rule, limit the issues at the substantive hearing to those in the list: see ***Land Rover v Short*** at [30] to [33]."

17. Professional advocates were retained in the present case and agreed the list of issues which was given to the employment judge (so we were told) on the morning of the hearing. The judge was, therefore, entitled to proceed on the basis that the only issue in relation to the claim for unauthorised deduction from wages and breach of contract was whether there was an agreement that the claimant be paid a salary. Having decided that there was such an agreement, she not unnaturally upheld the contract claim as being outstanding on termination. She never dealt with any argument that nothing was outstanding because the company could not afford to pay the claimant's salary and still less with any argument that, even if the company could not afford to pay it, it was necessary to imply a term that, nevertheless, the company

was obliged to pay once the employment had come to an end. These issues were never said to be issues which the judge needed to decide."

(emphasis added in [14])

32. Although both ***Land Rover v Short*** and ***Parekh v London Borough of Brent*** involved employment proceedings, these principles are not confined to employment proceedings and are of wide application. The dicta at [14] make it clear that the High Court requires such a list in order to "formulate the points which need to be determined by the judge". Mr Coppel's approach is rather different, and would have the status of a single list of agreed issues as merely a sub-set in a wider list of issues, with those other issues necessary for determination floating about uncrystallised. That is contrary to principle, and I also consider it contrary to the overriding objective in CPR Part 1.

33. Paragraph 14.2.2 of the Technology and Construction Court Guide (2nd edition, updated 9 February 2015) makes clear that the issues that require to be resolved at the trial have to be identified before the Pre-Trial Review. The key or main issues have to be identified by that stage, which is a number of weeks before the trial, and the status of this list is explained at 14.4.1 and 14.4.2 of the Guide. Conventionally, at the Pre-Trial Review, a date is ordered for the final Agreed List to be lodged with the court (with alternative versions of some issues if not all of them can be finally agreed). Whether this occurs prior to the start of the trial or not, by the commencement of the trial the parties are expected to have a single set of Agreed Issues. This was done in this case. This accords with general common sense; the widely accepted practice in the Technology and Construction Court; and the dicta of the Court of Appeal in ***Scicluna v Zippy Stitch Ltd.***

34. It is therefore, in my judgment, wholly wrong for any party (and particularly one in complex litigation such as this) to approach the List of Agreed Issues as "are those the only issues which you have to determine? Well no…..". A party for forensic reasons may decide that there are other issues with more prospects of success as a trial unfolds, but that is not a good reason to add additional issues without notification to the other party, or the court, without agreement or discussion and at a stage too late for them to be properly dealt with in terms of evidence. Issues on the List of Agreed Issues *are* the only issues which the court has to determine. Issues can be added if necessary by agreement, or upon amendment of a pleading, which is something that is done in accordance with the CPR. I consider that the List of Agreed Issues in this case accurately and sensibly distilled all the issues on the pleadings into a single set of issues, which represented those that required determination at the trial.

35. The fact that neither of the two areas of recent contention raised by SRCL – breaches of Regulation 35, and an allegation that HES was not permitted to dispose of hazardous waste using pyrolysis – were on the List of Agreed Issues readily demonstrates that they are precisely that – very recent. In fact, they are so recent that they emerged only towards the end of the trial itself, and were crystallised into complaints by SRCL only after all the evidence had been called. They may also have been added as an attempt to bolster what was (perhaps) seen as a weak case on the Agreed Issues. In my judgment SRCL are not entitled to rely upon either of them in these proceedings for each of the reasons identified above.

36. There is one separate final reason why the alleged breaches of Regulation 35 should not be allowed to obscure the real issues in this case. The way the breaches were formulated was as follows, in SRCL's written closing submissions:
"100. Contrary to §26(b), the eAuction process was not conducted in accordance with reg. 35. The services to be performed under the call-off contract which was under auction were only to be fixed after the auction had taken place and the contract had been awarded. The "contract price" was also to be fixed after the auction, depending on the content of the services verified with service users, and depended upon a range of prices, carried over from framework bids, which were not even sought in the auction. The lack of precision as to what bidders were bidding for contributed to bidders pricing on different bases and this resulted in a situation whereby the auction price did not reflect the actual price which HES and Sharpsmart would in fact charge for performing the basket of services set out in the FRT."

37. The allegation that HES and Sharpsmart bid on different bases is a reference to the following. The Summary FRT for Wave 6 had a figure in it for a particular type of waste, 90 litre yellow bags, which was a very high number, namely 158,384. Less infectious waste, in orange bags, had a far lower number. HES took the view that the figure for yellow bags was far too high and bore very little relation to what would in fact transpire during the contract. HES therefore bid very aggressively for this reason. Sharpsmart actually priced the yellow bag rate in their detailed financial modelling for their auction price at zero, because they concluded that there was probably a transposition error in the summary FRT and there could not possibly be that many yellow bags of that type. Mr Johnston of NHSE explained that the summary FRT had probably made a transposition error, and put the number of orange bags in the yellow bag column. However, as he explained, the other detailed data which was also provided to the bidders (based on what was actually being performed) would show any bidder the correct number of all the bags in fact collected.

38. No bidder raised any clarification of any mis-match between the Summary FRT and the underlying data which was also provided. Whether this was because there was no such mismatch; or the bidders chose not to raise it; or there was a mismatch and the bidders did not realise this, does not much matter. The important thing is that the bidders all had the same data, were all treated equally, and the ITT expressly stated that the ITT and the supplementary documents were to be read together. SRCL confirmed in a post-hearing submission communication that the spreadsheets of data were part of the Wave 6 or Call-Off ITT itself, rather than one of the supplementary documents, but given paragraph 2.2 of the Wave 6 or Call-Off ITT used the expression "ITT and supplementary documents" whether the data was within the former or the latter does not matter, in my judgment.

39. Mr Coppel relied upon a text box in the Summary FRT to justify an argument that the bidders had to bid against the information in that document, rather than the data that accompanied it in the other supplementary documents, but that submission is misplaced. The text box stated:
"Supplier Entry: The Supplier is to enter the quantity of cost base items in accordance with the Unit of Measure stated, and the Rate (£) to be applied to the quantity to generate a total cost for the Cost Base Item. The Supplier should repeat quantity and rate entries across all regions (as required to deliver the proposed service for the

quantity of bins defined for each region for these selected bin types). Note: all Programme Management and Indirect Costs are priced".
I do not accept that this text supports that submission. As a matter of construction, the entry identifies that the quantity of items, and the rates, must be used to generate a total cost. It does not mean that any particular component of the information provided takes priority over any of the other information. Paragraph 2.2 of the Call-Off ITT stated that "This ITT and any supplementary documents should be read as a standalone suite of documents." There was no hierarchy of documents or information specified by NHSE.

40. In reality, this argument was another unpleaded attack on the way that the auction was conducted, in an attempt to undermine it, regardless of the success of the attack on the TUPE and abnormally low tender issues. I reject it.

41. However, there was a further development in respect of the complaints of breaches of Regulation 35. On 10 July 2018, during the period when this draft judgment was being prepared but had not been distributed to the parties, SRCL issued a new set of proceedings against NHSE. These were given action number HT-2018-000199 ("the Second Proceedings"). They concerned the same auction, namely the one for Wave 6, and the same complaints to which I have referred above in respect of breaches of Regulation 35, which Mr Coppel had argued before me he was entitled to raise in these proceedings. The Second Proceedings obviously post-dated closing submissions. As the Judge in Charge of the TCC, all proceedings after issue are brought to my attention for allocation purposes, an internal process whereby each set of proceedings are allocated to a particular judge. This is the only reason that I became aware of them, and this occurred on 10 July 2018, the day they were issued. After three days, having received no notification from the parties about their existence (and there is no reason to suspect that they knew about the allocation process in any event) I asked both parties to address why I was not told about them, and their relevance. SRCL's answer to that was as follows in a letter dated 16 July 2018:
"During the trial, His Lordship made clear that breach of Regulation 35(5) had not been pleaded by the Claimant and was not included in the agreed list of issues [T-5/101-112]. The Claimant is therefore unsure whether His Lordship's judgment will include any consideration of whether the Wave 6 eAuction was carried out in compliance with Regulation 35(5). Given the 30 day time limit for claims of breach of the Public Contracts Regulations 2015, which would run from the day of Mr Johnston's evidence, the new claim was issued on a protective basis, and the parties have agreed to stay the proceedings pending the handing down of the judgment in the first claim. The Claimant will of course review whether or not to proceed with the new claim in the light of His Lordship's judgment.
We apologise for not specifically drawing the attention of His Lordship to the issue of the new claim. No discourtesy was intended. The new claim covers an issue which was not pleaded in the claim before His Lordship and it would only in exceptional circumstances be appropriate for a party to communicate with a Judge after a hearing and before judgment. We note, however, that His Lordship is now aware of the new claim."

42. I would have thought it was exceptional for any claimant to issue a new claim after the hearing of a trial and before judgment, having argued at length that the subject matter of that new claim was in reality part of the issues already before the court in that trial. The existence of the Second Proceedings should have been specifically drawn to my

attention by SRCL as soon as they were issued. Fortunately, and entirely coincidentally, I became aware of them in any event. I drafted [17] to [40] above prior to knowing about their existence. I remain of the view in those passages of this judgment notwithstanding the existence of the Second Proceedings. I do not know if the Second Proceedings have been issued in order to assist SRCL in some respect to argue for a continuance of the existence of the automatic suspension were SRCL's claims to be dismissed. It should be remembered that SRCL is the incumbent. However, regardless of the reason for issuing them, and the prospects of their survival post handing down this judgment, I have not heard any detailed argument about the date when SRCL had the necessary knowledge to bring a claim for breach of Regulation 35. I do not currently see how the date for the complaints alleged can depend upon the subjective evidence of Mr Johnston, but that point can await further submission in due course if necessary. It need not be dealt with in these proceedings other than by the observations I have made above.

V The SRCL witnesses

43. I heard evidence from the following people for the Claimant. Ms Lindsay Dransfield, the Commercial Director of SRCL, and Mr Jeroen van Os, who used to be SRCL's Group Finance Director but now works for ERS Transition Ltd, both gave evidence for SRCL, together with Ms Frances Musselwhite of SRCL's solicitors, Bevan Brittan LLP. All three of them were cross-examined. I deal with the circumstances concerning Ms Mussellwhite's evidence in the next section of this judgment.

Lindsay Dransfield

44. Ms Dransfield managed the bid team for SRCL and oversaw the preparation for SRCL's participation in this auction. She had also been involved in the other reverse e-auctions for the other lots in the other Waves. She was involved in high level discussions within SRCL about the effect upon SRCL's business of the prices being obtained by successful bidders in the preceding auctions – bluntly, she and SRCL felt that the figures were too low for it to be beneficial to SRCL's business in the long term. She expressed this as the prices not being sustainable in the long term. The auction process was certainly resulting in contract awards which were nowhere near the gross profit margins that SRCL had previously enjoyed in its dealings with NHSE. An SRCL document was produced in disclosure called the "Margin Calculation Model". This showed the pre-Framework revenues and profits being achieved by SRCL on the contracts from NHSE where it was the incumbent provider. For the relevant region that covers the North of England, Region A, the gross profit being achieved by SRCL was 52%. The national average gross profit margin being achieved by SRCL across the UK from NHSE was 49%. These figures were explored in cross-examination of Mr van Os, but Ms Dransfield obviously knew these figures and this had driven SRCL's opposition to approach adopted by NHSE of achieving lower prices through the e auctions.

45. These levels of gross profit appear very high. They are far, far higher than the ones SRCL found it could achieve on the contracts in which it was the winning (as in the lowest) bidder in the e auctions. They are also far higher than the ones achieved (or sought) by Sharpsmart and HES in the Wave 6 auction. To put this level of gross profit margin into some sort of financial context, the following points are notable. On the figures explored later in the evidence with Mr van Os, for Region A, NHSE paid total revenues to SRCL of £4.336 million. The gross profit achieved by SRCL was in excess of the costs of the service (a different way of saying the gross profit exceeded 50%). In

money terms, gross profit to SRCL out of these revenues paid by NHSE was £2.24 million. The costs of the service to SRCL was £2.096 million. This hardly looks like value for money for NHSE, and it is little wonder that the Framework Agreement and auction process was initiated in order to try and achieve better value for money for NHSE.

46. Mr Johnston for NHSE stated in his written witness evidence that the amount of revenue paid to SRCL under the contract for the equivalent services to Wave 6 that SRCL was providing as the incumbent provider was approximately £1.2 million. He used this to demonstrate how much greater the cost to NHSE was of the incumbent contract, as SRCL's opening bid in the Wave 6 auction was £688,589. This was the bid at SRCL's framework rate. SRCL's second bid was £479,999. He considered that the SRCL bids demonstrated the vast margin being charged by SRCL as the incumbent. Even on SRCL's case as to abnormally low tenders and sufficiency of margin, this vast gulf was relied upon by NHSE. Ms Dransfield challenged this figure, and said she did not know where Mr Johnston had obtained his figures from. Her evidence was that the figure for the incumbent services paid to SRCL was lower, and she estimated £935,000 and not £1.2 million. However, that figure on her evidence is still very considerably higher than SRCL's bid in the Wave 6 auction, which is admittedly for a basket of representative services. This evidence of hers arguably made Mr Johnston's point for him, but whether it does or not, it is obvious to me that the auction process was resulting in far lower figures being obtained by SRCL for providing the services for contracts in which it was the winning bidder. Adoption of the auction process by NHSE was therefore costing SRCL quite sizeable sums of money. SRCL knew this at the time, and this became an increasing concern during the auctions for Waves 1 to 5.

47. Ms Dransfield was therefore involved in the strategy adopted by SRCL towards NHSE to try and stop the auctions being continued, and she was also involved in a decision by SRCL to try and influence NHSE in this respect. The background thinking to this within SRCL was demonstrated by the content of internal briefing slides, the contents of which I will come to in chronological sequence in the section of the judgment entitled "The Relevant Facts".

48. I found Ms Dransfield a broadly unsatisfactory witness, both in terms of the way that she gave her evidence, and its content. She avoided, for the most part, giving a straight answer to perfectly straightforward questions, and would embark upon a lengthy explanation using a vast amount of corporate-speak that glided away from the uncomfortable central point of the question that she wished to avoid. Mr Williams was, as could be expected, asking important and relevant questions, and so this meant that most of Ms Dransfield's answers were very lengthy, but avoiding actually answering what she was being asked.

49. An example which shows this follows, where Mr Williams was asking about the effectiveness of a reverse auction in achieving the lowest prices from the different tenderers. I have provided the emphasis.

> Q. [The use of reverse e-auctions] certainly wasn't challenged by you in any of those five Waves. Do you agree with me it is an effective way of ensuring <u>the lowest prices</u> are bid by the tenderer?

A. I wouldn't agree that it wasn't challenged by us, because we have discussed this with NHS England on numerous occasions. So I don't agree that it wasn't challenged by us.
Do I agree it's the most effective way of getting a lower price? It is one way of getting a lower price. There are numbers of other ways that organisations have gained value and gained lower price, rather than reverse e-auction.
Q. Well, yes, you could simply ask all of those on the framework to put in their lowest bid and the lowest bid would receive the contract. But that wouldn't guarantee, would it, that that wasn't the lowest bid that that tenderer preferred actually to put in or indeed that another tenderer, knowing that its bid was about to be undercut, might be prepared to go a bit lower. That's what I mean by it was an effective way of ensuring the lowest price. Do you agree with that?
A. No, I don't. I think there are other ways to get – to add value and to get a lower price. So, for example, the closed regime within the FRT means that it was very difficult to add any innovation into the delivery. So, for example, a lower price could be sought from a different container regime, for example, so instead of putting plastic in, you put cardboard in, and so I don't agree that it was the best way to get the price – the best price from the supplier.
Q. Well, you're mentioning quality issues there, which may be very laudable, certainly in relation to environmentally friendly approaches, but I asked you about the price. For the NHS to get the best, ie, lowest, price, how does that help?
A. Cardboard containers, my Lord, are cheaper to buy and cheaper to dispose of than plastic but weigh much heavier than plastic containers. So it's an example of how you can get a low price from the supplier base.

50. Judges do their best not to intervene during cross-examination, but occasionally this is not only justified but required, in order to move the proceedings along in time-limited proceedings. This was one of those occasions. I asked Ms Dransfield if there was an alternative method to achieving the *lowest* price amongst all four framework bidders, and if so, could she say what that was. "The lowest price" was obviously the point of the question, and not "a lower price" which was how she constantly interpreted the question that she wished to answer. There is an obvious difference between these two things. Her answer, which could and should have been given very simply in the first place, was as follows.

> A. Then the most effective way of getting the lowest price is as Mr Williams as indicated.

This method of giving evidence is completely counter-productive. It gives the court the impression that a witness is simply being evasive. Most specialist counsel, but particularly leading counsel, are sufficiently astute to realise that their question has been evaded, and will usually (and entirely properly) pursue the point, until the witness has actually answered it. It may be, because so many trials are time limited in the specialist courts, that this is precisely the reason that some witnesses adopt this technique, as the time wasted in pinning down an actual answer to a question, is time that becomes unavailable for further difficult questions. In terms of providing useful evidence to the court, it is not recommended, is entirely unhelpful, and should be strongly discouraged.

51. In terms of content, Ms Dransfield sought to downplay different aspects of SRCL's relations with NHSE that did not suit its case in these proceedings. Mr Johnston of NHSE gave evidence in his written witness statement that SRCL "was by far the largest supplier of clinical waste services to the NHS pre-Framework, which in turn had probably stymied competition. I have seen estimates that SRCL was the incumbent provider across 80% of the country". She was asked about this figure in supplementary evidence in chief, and said the figure of 80% was wrong. However, she said she did not know what the correct percentage figure was, and she would not proffer an alternative figure. I find it difficult to accept that she does not know at least approximately the percentage provided by SRCL. As the Commercial Director of SRCL she must have a broad idea of this figure in relation to a major customer. She referred the court to a graphic in her witness statement, but all that showed was the geographic location of the SRCL facilities, and again, was not the answer to Mr Johnston's point. Her evidence on this was wholly off the point raised by Mr Johnston.

52. She also sought to raise serious questions about the propriety of the business practices of HES in particular, by way of innuendo and based on no proper evidence whatsoever. For example, as explained above, HES operates a waste disposal facility in Scotland. This uses pyrolysis. This is the thermal decomposition of materials at elevated temperatures in an inert atmosphere. By way of background, it is the method by which (for example) coal becomes coke. A great number of different types of clinical waste generally require incineration. Bidders would either incinerate clinical waste at incineration facilities owned or operated by others (paying what is called the "gate price" per tonne) or at a facility owned or operated by themselves. SRCL owns its own incineration plants. These use combustion, which use oxygen, and this process is also known as burning (or as Mr Williams put it, with flame).

53. Ms Dransfield obliquely tried to suggest that pyrolysis (as a process) was not approved by the Environment Agency in England, as though there were something amiss about HES transporting clinical waste to its facility in Scotland and incinerating it at its own plant there using pyrolysis, rather than combustion, the method used by SRCL at its facilities in England. This point was pursued in cross-examination of Mr Pettigrew by Mr Coppel for SRCL. Ms Dransfield's evidence in her cross-examination was as follows:

> Q. You can incinerate using pyrolysis?
> A. You can, but that is not an -- accepted and tested
> within England by the Environment Agency.
> MR JUSTICE FRASER: It isn't?
> A. No, my Lord.
> MR JUSTICE FRASER: So in England you do have to incinerate
> it with flame?
> MR WILLIAMS: So you accept it is available in Scotland?
> A. It is available in Scotland, but Scotland have
> a different set of parameters for treating their waste,
> my Lord, and are subject to different regulations under
> SEPA, the Scottish Environment Protection Agency.
> Q. But it is equivalent, isn't it, because it is
> implementing the directive in relation to the disposal
> of waste?

A. I don't know, to be honest. I don't know.

54. I do not accept that there is anything in this point. One thing that this case clearly demonstrated was the extent of the fierce competition between the different companies in this particular market. It is also an extremely tightly regulated industry. If SRCL really did consider that HES was using a process in Scotland which was not permitted for waste collected in England, or was otherwise acting outside the regulations, I have no doubt that the relevant Environment Agency and/or NHSE would be receiving a solicitors' letter within an extremely short timescale, measured probably in minutes. Further, combustion and pyrolysis are each different types of thermal treatment. The criteria set out in the Validation of Treatment section in the publication by the Environment Agency entitled "Clinical Waste EPR 5.07 version 1.1" does not make any differentiation between incineration by combustion and that by pyrolysis. All Ms Dransfield's evidence can mean is that nobody has built such a plant in England, hence no permit has been applied for. Nor could one expect a plant constructed in Scotland to be approved by the Environment Agency in England. The relevant licensing body for a plant constructed in Scotland, is (unsurprisingly) the Scottish Environment Protection Agency. This is simply an example of SRCL throwing some mud in HES' direction and hoping some of it might stick.

55. There was another important area in which she demonstrated an ability to ignore pertinent facts, namely (as Mr Williams put it) relating to general allegations of over-charging by SRCL. This was of particular relevance given a central plank of SRCL's case against NHSE was that the HES and Sharpsmart tenders were both abnormally low, because they were so much lower than the bid by SRCL. Stericycle Inc, SRCL's parent company in the United States, has been engaged in litigation in the US. The filing by the parent company on Form 10-K, which is a requirement by the US Securities and Exchange Commission or SEC, identifies this for the year end 31 December 2013. Stericycle was the defendant in a class action brought in Pennsylvania in which the complaint was the imposition of "unauthorized or excessive price increases and other charges on [Stericycle's] customers in breach of our contracts and in violation of the Illinois Consumer Fraud and Deceptive Business Practices Act."

56. The SEC filing by Stericycle explains that this action was brought "in the wake of a settlement with the State of New York of an investigation under the New York False Claims Act". This was a "whistle blower" complaint under the Federal False Claims Act. Further, following the filing of the Pennsylvania class action complaint, Stericycle were served with class action complaints in Federal Courts in California, Florida, Illinois and Utah, and in the state court in California. All of these actions were transferred to the Northern District of Illinois, and Stericycle denied the allegations in each of them.

57. Ms Dransfield said that this was a "United States issue" – which it undoubtedly is – and that she had "no visibility", had no knowledge and could not comment because she did not know any details. I accept that evidence, because it concerned the parent company in the US, but what I cannot accept is her evidence that followed, when the point was put to her that there was litigation *in the UK* concerning allegations of overcharging. She accepted that there was litigation in the UK, but said it did not concern overcharging, but unpaid invoices. Her exact answer was:

Q: The allegation against you is that you were overcharging; is that right?

A. No, the allegation, as I understand it, is that there is dispute over what should be paid in relation to contracts, not overcharging.

58. After this answer, I called for a copy of the pleadings in those other proceedings, which are between the very same parties, SRCL and NHSE. In those proceedings, which are in the Queen's Bench Division of the High Court (action number HQ17X02825), SRCL claim a sum of £2.9 million approximately in respect of unpaid invoices from the NHSE. One need look no further than paragraph 2 of the Defence and Counterclaim served on behalf of NHSE to read the following:
"The Defendant's Defence is that the Claimant is not entitled to the sums claimed or all of them. The Defendant contends that the Claimant has engaged in substantial overcharging, and the levying of incorrect charges in its invoices."
(emphasis added)
Section H of the Defence and Counterclaim has an entire section headed "Extrapolated Overpayments and Overcharges". In that case, NHSE brings a counterclaim against SRCL that exceeds the invoiced sum by a sizeable margin. Contrary to what Ms Dransfield said, the central issue (or at the very least, one of the central issues) is indeed alleged overcharging by SRCL.

59. Ms Dransfield's answer to Mr Williams' question about litigation in the UK regarding overcharging was not remotely correct, and was directly inaccurate. Nor could it be said that she was taken by surprise by the question, as Mr Johnston dealt with overcharging of the NHS by SRCL in paragraph 12 of his witness statement, describing overcharging by SRCL as a "real concern". It is difficult to grasp that the Commercial Director of SRCL would not know the subject matter of litigation with such a major customer, and equally difficult to fathom why her evidence to the High Court on such a topic should be so misleading. I have no confidence that Ms Dransfield's evidence was factually accurate.

Jeroen van Os

60. Mr van Os no longer works for SRCL and is now the Finance Director of ERS Transition Ltd. At the time, he was the Group Finance Director of SRCL and oversaw the financial planning that led to the submission of the tender for a place on the Framework (which means qualifying to enter into the NHS England National Framework Agreement for Clinical Waste Services for GPs and pharmacies). He also oversaw the participation by SRCL in the auction for the call-off contract for Wave 6. He left SRCL at the end of 2017 for his new position which is at a different company.

61. He gave his evidence sensibly and accurately. The vast majority of contentious points had already been put to Ms Dransfield in any event, and in accordance with the general approach in the specialist courts were not put again. He frankly accepted sensible points that were put to him, whether they were favourable to SRCL or not, and I found his evidence of considerable assistance. He accepted that SRCL would have been prepared to go below its bottom price in Wave 1, had it needed to do so to win the auction. This is important evidence, as part of NHSE's defence to SRCL's claim is that SRCL for the Wave 6 auction deliberately changed its strategy. This point is explored further in "The Relevant Facts". I found him a useful and helpful witness, although that does not mean that I have accepted all that he had to say, and I found his evidence of assistance in resolving the issues.

Frances Mussellwhite

62. Ms Mussellwhite is a senior associate of Bevan Brittan, SRCL's solicitors, who are acting in the litigation for SRCL, and who wrote immediately on SRCL's behalf on 27 April 2017, to NHSE, the day after the auction. They acted for SRCL throughout the relevant period, leading up to the issue of the claim form on 30 June 2017 and throughout these proceedings.

63. It is very unusual for a solicitor, acting for a party in litigation, to give evidence on that party's behalf as a witness of fact, dealing with primary facts concerning substantive matters in the litigation. The circumstances in which this came to pass in this case have their origin in the confidentiality rings established by the parties and approved by the court for dealing with commercially confidential information.

64. In order therefore to summarise Ms Mussellwhite's evidence it is therefore necessary first to address the issue of witnesses within a confidentiality ring.

VI Witnesses within a Confidentiality Ring

65. The clinical waste sector in England is a highly competitive and commercially aggressive one, but the presence of confidential information is not confined to procurement competitions within such sectors. Confidential information is available and deployed in a great many, if not all, procurement competitions. Price is a major component of tendering, and evaluations of different tenders by contracting authorities will usually consider price, as well as other technical components of particular bids. Some procurement competitions do not depend on price at all (or only to a very limited extent), but confidential information is not confined simply to price. Confidential information is commercially sensitive, and is known only to the bidder, and the contracting authority which evaluates the tender. When a procurement challenge is brought by a disaffected unsuccessful bidder, there will usually be only limited information available to that unsuccessful bidder. They will know (by definition) that they have lost the tendering competition, and they will know the content of their own bid. They will not know a great deal about how their own bid was evaluated, in terms of the authority's evaluation of the different components within it, and they will know even less about their competitors' bids. They may not even know the identity of those other bidders, still less their pricing structure or other technical components (if it is a procurement competition where there are choices available to bidders regarding how the work is to be done).

66. Such information (or some of it) relating to the successful bidder is usually released prior to the issue of proceedings on a voluntary basis by the contracting authority. After issue of proceedings, the contracting authority will have to comply with its obligations in terms of disclosure under the CPR, but the way that disclosure of confidential information is dealt with has to reflect the status of that information. This is done by means of what are called "confidentiality rings". The term means a limited number of named individuals who are entitled to see the confidential information of other bidders. A party's legal team (or some members of it) and certain selected individuals are thereby permitted to view the disclosure that includes confidential information. All give undertakings, and most of these arrangements are dealt with by consent in detailed orders, approved by the court. When it comes to the giving of evidence at trial, the majority of evidence is heard in open session, consistent with the principles of open justice. Very occasionally some evidence concerns confidential information and this

requires the court to be closed not only to the public, but also to any employees or representatives who are not members of the confidentiality ring. In some judgments, parts of the actual judgment itself will deal with confidential information and this is usually included in a separate appendix to the judgment. Distribution of that appendix is similarly restricted. However, these measures are kept to a minimum.

67. In this case, there were three confidentiality rings established, one each for the confidential information of SRCL, Sharpsmart and for confidential information held by NHSE. This latter category included information from HES and other bidders for the Framework Agreement. Ms Mussellwhite was in all three confidentiality rings. There is nothing wrong with that, and given her close involvement in the litigation, it was entirely sensible and understandable that she was so included.

68. However, what is more difficult to follow is that SRCL chose to call Ms Mussellwhite as a witness of fact. She had provided three witness statements in relation to different interlocutory matters (which is entirely normal) and two witness statements in relation to substantive issues of fact in the dispute itself (which is not). She explained in her 4th witness statement that as a member of the NHSE confidentiality ring, she and the other lawyers within that ring had access to documents the contents of which they were not permitted to disclose to SRCL employees.

69. The approach adopted by SRCL in this case, namely to accept the prohibition (or lack of agreement) on the part of NHSE to the membership of the confidentiality ring for any employees or decision makers at SRCL, and call its own solicitor to give evidence about confidential matters, requires consideration of the principles that underpin the establishment of such arrangements in procurement litigation.

70. In ***Libyan Investment Authority v Société Générale SA and others*** [2015] EWHC 550 (Comm) Hamblen J (as he then was) identified the correct approach of the courts on the issue of a confidentiality ring or confidentiality club. In that case the claimant sought disclosure of certain documents in an action alleging fraud against the defendant bank and numerous other individuals and a Panamanian company. One major issue was what had become of enormous sums of money that had been paid to a defendant, and whether that defendant was corruptly assisting or acting for the Gaddafi family, who at the material time controlled Libya. The judge stated:

"20. The starting point is that each party should be allowed unrestricted access to inspect the other parties' disclosure subject to the implied undertaking that the disclosure will not be used for a collateral purpose - see CPR31.22; *Church of Scientology of California v Department of Health* [1979] 1 WLR 723 per Brandon LJ at 743F.

21. It is for the person seeking the imposition of a confidentiality club to justify any departure from the norm. In order to do so, the proponent of the confidentiality club must establish that there is a real risk, either deliberate or inadvertent, of a party using his right of inspection for a collateral purpose - see the *Church of Scientology* case at 743G.

22. Where it is demonstrated that there is such a risk, any restriction imposed should go no further than is necessary for the protection of the right in question. As the Court of Appeal stated in *Roussel UCLAF v ICI* [1990] RPC 45 at 54:
"The object to be achieved is that the applicant should have as full a degree of disclosure as will be consistent with the adequate protection of the (right)."

23. The provision of protection by the use of confidentiality rings or clubs in appropriate cases, including confidentiality clubs to which the parties' lawyers alone are admitted at least during the interlocutory stage of litigation, is well recognized – see, for example, *Al Rawi v The Security Service* [2011] UKSC 34, [2012] 1 AC 531 at [64] per Lord Dyson.

24. The basis for such orders is the court's inherent jurisdiction to regulate its own procedure in the interests of justice - see *Al Rawi* at [20] per Lord Dyson.

25. Confidentiality clubs are most typically employed in antitrust or intellectual property litigation in order to protect commercial confidences. However, the court will also depart from its usual procedural rules where it is necessary to do so in order to protect against a risk to life or limb. Indeed, the court may be required, pursuant to the positive obligation upon the United Kingdom under Article 2 ECHR, to take reasonable steps to avoid a risk to life.

26. That obligation arises where a failure by the state to act will give rise to a "real and immediate risk" to life - see in *In Re Officer L* [2011] UKHR 36, [2007] 1 WLR 2135 at [20] and [24], applying *Osman v United Kingdom* [1998] EHRR 245. "Real" means a risk which is "objectively verified". "Immediate" means a risk which is "present and continuing" - see in *In Re Officer L* at [20] per Lord Carswell.

27. The obligation also arises where a failure by the state to act will materially increase an existing threat - see *In Re Officer L* at [23] to [26].

28. In *Re C's Application for Judicial Review* [2012] NICA 47, having considered *In Re Officer L* and subsequent authorities, Girvan LJ summarised the position at follows at [43]:
"Those authorities, albeit in a different context, together with Lord Dyson's contrast between a fanciful risk and a significant risk lends support to the view that a real and immediate risk points to a risk which is neither fanciful nor trivial and which is present (or in a case such as the present will be present if a particular course of action is or is not taken)."

29. The same "real risk" test applies to engage the state's positive obligation in relation to Article 3 ECHR ("Inhuman Treatment") - see *Re C* at [33] and [38] per Girvan LJ.

30. Both *In Re Officer L* and *Re C* were cases concerning anonymity of witnesses but I accept Mr Giahmi's submission that the same requirement must as a matter of principle apply in relation to confidentiality clubs.

31. Mr Giahmi also relies on the common law in which the right to life and security of a person hold just as high a value as under the Convention – see, for example, *Blackstone Commentaries*, Book 1, chapter 1:
"Both the life and limbs of a man are of such high value in the estimation of the law of England that it pardons even homicide if committed se defendendo or in order to preserve them. Whatever is done by a man to save either life or member is looked upon as done upon the highest necessity and compulsion."

32. The common law is in some respects more flexible than the Convention. Thus, for example, an application of anonymity may succeed at common law even in the absence of objective evidence of a real risk to life on the basis that it may be unfair to name a witness or party in light of the their subjective fears - see *In Re Officer L* at [16].

33. Mr Giahmi further submits that the court should seek to prevent destruction of or damage to property, whether under Article 1 of Protocol 1 to the Convention, or at common law. Indeed, it is essentially the protection of property rights with which the court is concerned in a typical confidentially ring in the context of intellectual property litigation.

34. The imposition of a confidentiality club and, if so, its terms, generally involves a balancing exercise. Factors relevant to the exercise of the court's discretion are likely to include:
(1) The court's assessment of the degree and severity of the identified risk and the threat posed by the inclusion or exclusion of particular individuals within the confidentiality club - see, for example, *InterDigital Technology Corporation v Nokia* [2008] EWHC 969 at [18] and [19].
(2) The inherent desirability of including at least one duly appointed representative of each party within a confidentiality club - see, for example, *Warner-Lambert v Glaxo Laboratories* [1975] RPC 354 at 359 to 361.
(3) The importance of the confidential information to the issues in the case - see *Roussel UCLAF v ICI* at [54] and *IPCom GmbH v HTC Europe* [2013] EWHC 52 (Pat) at [20].
(4) The nature of the confidential information and whether it needs to be considered by people with access to technical or expert knowledge - see *IPCom GmbH v HTC Europe* at [18].
(5) Practical considerations, such as the degree of disruption that will be caused if only part of a legal team is entitled to review, discuss and act upon the confidential information - see *Roussel UCLAF v ICI* at [54] and *InterDigital Technology Corporation v Nokia* at [7].

35. I accept, however, that if and to the extent that it is shown that an order for confidentiality is necessary because a failure to make such an order would involve the infringement of rights under Articles 2 or 3 ECHR, those rights are not outweighed by other balancing considerations since they are absolute rights. As stated in *Arlidge, Eady and Smith on Contempt of Court* at 6-128:
"Where the applicant advanced a sufficiently cogent case his Article 2 or Article 3 rights will be infringed if he is identified then there will probably be no scope for (balancing) because those rights are not qualified by

reference to the rights of others."

71. To the factors relevant to the court's discretion at [34] I would add the following:
(6) In procurement litigation, the confidential information of other parties (namely the other bidders) will usually be held by the contracting authority. Although it will not invariably be relevant to the claim by the dissatisfied bidder, it will often be relevant. No order for disclosure should be made in respect of such third party confidential information without giving that other third party the right to make representations to the court.
(7) As part of considering the balancing exercise necessary, there are a range of options or special measures available to the court which will both preserve the confidentiality of the information, and be consistent with the dissatisfied bidder's rights and the administration of justice. These issues can usually be sensibly resolved by consent.
(8) However, if consent is not possible, the court will then rule on any opposed application in this respect, particularly in relation to the identity of personnel who need to see the confidential information and may wish to give evidence in respect of it. It is not a solution to an objection by a contracting authority (or another bidder) to assume that a party's solicitor acting in the litigation should and can be called to give primary evidence of fact in that party's favour.

72. This last principle may be simply a different way of expressing what Hamblen J referred to as "the inherent desirability of including at least one duty appointed representative of each party within a confidentiality club". In that case, he was referring to a case where there were multiple defendants, and some of those parties were accepted as being entitled to see confidential material, but others were not. It is however also inherently desirable that a party is entitled to deal with evidence of fact emanating from material contained within confidential documents in the usual way by calling a witness of fact. If the only personnel who see such information are simply the barristers and solicitors instructed on the case, then the party itself is deprived of knowing the relevant factual information. In civil litigation, such an extreme situation would have to be justified by extraordinary facts. I do not consider the price per bag for disposal of a particular type of clinical waste to fall into such a category.

73. Here, NHSE objected to the widening of the confidentiality ring to include *any* suitable employee of SRCL. That matter was never brought to the attention of the court, nor was any application made. It is not unusual to have opposed applications to add personnel into confidentiality rings in procurement litigation. SRCL simply decided it could "work around" that position adopted by NHSE and call Ms Mussellwhite to give evidence of fact on the confidential material. It was, in my judgment, wrong to do so.

74. Further, and regardless of that, some of Ms Mussellwhite's evidence (namely her 5th witness statement) went directly to the issue of limitation, and whether there was any good reason for an extension of time to be granted to SRCL if its claim were held to have been started later than the 30 day period required under the regulations. On NHSE's analysis of the facts – and the findings in relation to this occur below – SRCL failed to issue proceedings within the 30 days required by Regulation 92(2). SRCL advanced an alternative claim, in the event that the claim was issued later than the 30 days required, for an extension of time under Regulation 92(4) on the grounds that there were good reasons for the court to extend the period. The main points relied upon were

the content of solicitors' letters passing between the parties in May and June 2017, and Ms Mussellwhite's evidence.

75. In my judgment, this approach by SRCL to calling its own solicitor in this respect was misconceived. The decision by SRCL regarding whether to issue proceedings or not (potentially simply as a protective measure against limitation issues) is a decision that was taken by the decision-makers at SRCL, based upon the advice they would have been receiving from their own solicitors. That advice is privileged. Ms Mussellwhite drafted the correspondence on SRCL's behalf during this period, and must have been involved in what advice was given to SRCL. It is putting Ms Mussellwhite – or any solicitor - in a very difficult position to call them as a witness of fact on such matters, effectively to justify that they had been acting correctly. Further, it also risks giving rise to a considerable conflict of interest. This type of conflict of interest is termed an "own interest conflict" in the current version of the Solicitors Regulation Authority Handbook which contains the Code of Conduct (version 19 published on 1 October 2017).

76. What is called "Indicative Behaviour" 5.6 in Chapter 5 of the Solicitors' Code of Conduct, provided by SRCL after the hearing had finished, states
"Not appearing as an advocate, or acting in litigation, if it is clear that you, or anyone within your firm, will be a called as a witness in the matter unless you are satisfied that this will not prejudice your independence as an advocate, or litigator, or the interests of your clients or the interests of justice."

77. After Ms Mussellwhite had finished giving her evidence, Mr Coppel agreed that there was no reason why a decision maker within SRCL (such as Ms Dransfield) could not have given the evidence that Ms Mussellwhite gave concerning the decision to issue proceedings, and whether there was a good reason for an extension of time under Regulation 92(4) (were that to arise). There was however some disagreement between the parties over who was to blame (if that is the right term) for the composition of the confidentiality ring(s) such that it was necessary to call Ms Mussellwhite to give factual evidence about the contents of the confidential documents.

78. There are other cases in which solicitors have been called to give evidence at trial, on behalf of the party on whose behalf they are acting in the proceedings. One example is ***Energy Solutions EU Ltd v Nuclear Decommissioning Authority*** [2016] EWHC 1988 (TCC), where just before the draft judgment was to be handed down, the solicitors acting for Energy Solutions, Freshfields Bruckhaus Deringer LLP, discovered that the Energy Solutions' witnesses had entered into agreements with Energy Solutions to be paid bonuses dependent upon the outcome of the litigation. Such agreements are contrary to public policy, and neither the existence of these agreements nor the agreements themselves had been disclosed to the NDA, nor to the court. As part of the process of dealing with this matter (explained in the judgment at [58] to [62] and [904] to [940]) evidence was adduced from the partner at Freshfields dealing with the case, and the NDA applied to cross-examine her. Energy Solutions waived privilege over certain communications between itself and Freshfields. The evidence of the partner went, not to the substantive factual issues in the case, but to the agreements with the factual witnesses in which the bonus obligations were contained, when these arrangements had been discovered by Freshfields, and the circumstances of their non-

disclosure. This is an entirely different situation, and the fact that a solicitor was called in that case to give evidence of fact does not mean that this should be done routinely.

79. The calling of Ms Mussellwhite to give the factual evidence that she did in these proceedings was highly unsatisfactory. This could have been avoided if the same evidence had been called from a director (say) of SRCL, or somebody else involved at the time. I am confident that Ms Mussellwhite gave her evidence accurately, but there is a line that ought to be preserved in terms of potential conflicts of interest. Solicitors such as Ms Mussellwhite should not be put in this position. It will only be in extremely rare circumstances that it will be necessary and/or permissible for a party in a procurement case to call its own trusted adviser to give evidence on substantive issues of fact.

80. I therefore consider it is necessary to state some basic principles about the calling of evidence in such cases to avoid this situation occurring in future cases. None of this impinges upon, or is intended to dilute, the importance of legal professional privilege, which governs matters between a solicitor and his or her own client.

81. These principles are as follows:
1. No solicitor should be called by its own client to give evidence if that is likely to give rise to a conflict of interest, or the appearance of a conflict of interest. This is enshrined in the Solicitors' Code of Conduct in any event.
2. If the membership of a confidentiality ring is restricted such that a party's own solicitor appears to be the only possible witness to give evidence of fact on matters concerning confidential information, then consideration must be given to increasing the membership of the confidentiality ring to include another person or persons to give evidence instead. If agreement cannot be reached with the other party/parties, then an application should be made to the court. The undesirability of a party's own solicitor being called as a witness of primary fact on that party's behalf will be a powerful factor which the court will take into account when considering that application.
3. In very rare circumstances it might be necessary to call a party's own solicitor to give evidence at the trial. One example is at [78] above. If that is anticipated, this should be raised with the court as soon as this becomes apparent (even if before the commencement of the trial) so that the issue of alternative witnesses can adequately be considered.

82. Ms Mussellwhite gave evidence about the subjective understanding, on the part of SRCL, of the correspondence that was received from Hill Dickinson, acting for NHSE. I do not consider this subjective interpretation of the correspondence to be of assistance. The correct approach to this correspondence is to consider whether anything within it constitutes, or supports, any good reason for extending time, if I find that time for the purposes of the Regulations started to run earlier than 30 days before the proceedings were issued. This is the approach that I adopt in the relevant section of this judgment. Further, I did not find her evidence about the contents of the confidential information to be of assistance, because I consider the whole basis of SRCL's attack on the tenders of its competitors being abnormally low to be flawed. The fact that she was called as a witness of fact, rather than another witness from within the SRCL organisation, did not therefore make any material difference to SRCL's case in these proceedings.

VII The NHSE witnesses

83. I heard evidence from the following people for the Defendant. NHSE called as witnesses Mr Geoff Johnston, an Interim Framework Manager at NHSE, as well as Mr Luke Smith, the Assurance Manager at NHSE who performed an investigation into the winning bid by HES after SRCL complained following the auction. As well as these NHSE personnel, the Defendant also called Mr Garry Pettigrew, the Managing Director of HES, and Mr Carl O'Neill, the Commercial Manager at Sharpsmart. I shall deal with them in the order in which they were called.

Garry Pettigrew

84. Mr Pettigrew is the Managing Director of HES, a company he has built up himself. He did not say this but it appears that he is also the owner of that company. He is based in Scotland and appeared under a witness summons issued by NHSE.

85. Mr Pettigrew was challenged about the way that HES had built up its tender and justified its auction bid, including whether HES had built in sufficient margin for profit and sufficient rates for some of the items. The approach of SRCL to demonstrating that the HES winning bid was an abnormally low tender was, with respect, wholly off the point. It concentrated on some isolated rates for particular items, and compared them to the rates which either SRCL had used, or the rates which SRCL said HES should itself have used. This approach entirely ignored commercial factors which each of the other bidders chose to approach in a particular way. As an example, HES has access to a pyrolysis plant in Scotland for incineration. This currently has a capacity of 8 tonnes per day. Scotland is rather closer to Cumbria and the North of England than other parts of England such as Kent. The commercial rate charged by SRCL to other companies who wish to use SRCL's older technology incineration plant – what is called in the industry the "gate rate" – is £500 or £600 per tonne. Despite the geographical advantage to HES of utilising its own capacity at its own plant advantageously located for the Wave 6 works, SRCL persisted in an approach that insisted HES could only properly price its incineration needs (and hence the total in the representative basket) using the gate rate charged by SRCL. This is simply not logical, and ignores obvious business principles. HES has this plant available already; it is not necessary to pay another entity (SRCL or anyone else) to incinerate its own waste. Further, transport costs (which are inevitably bound into the rate) are far lower, particularly if efficient collection and transport methods are used, when waste is being collected in the North of England and taken to Scotland.

86. In order to bolster this approach, it was originally put to Mr Pettigrew that the plant in Scotland was not operational and was not commissioned. When he refuted this, it was then put that the plant was not yet fully commissioned and never would be. As to the first point, there was no evidence to support such a criticism, and I accept Mr Pettigrew's evidence. I accept that the plant is currently being used. As to the second, having invested £14 million in constructing the plant, one wonders why Mr Pettigrew and HES would choose not to commission their own plant fully. Particularly when one bears in mind that the Wave 6 auction was for a contract for a fixed term, with a potential extension, for this to be a valid point at all (and even then it would probably not be a valid point) it would at the very least require the plant in Scotland not to be operational now, nor at any stage in the proposed life of the contract.

87. An associated challenge or criticism was that if HES won the contract, the waste would not be incinerated and would simply be stored or stock piled, and that HES would therefore be in breach of waste disposal regulations. There was no evidence to this effect whatsoever either, and such a suggestion was rejected by Mr Pettigrew.

88. SRCL had obtained a letter that HES had written to an NHS body in relation to another contract which was called the Northern Consortium, which is a group of NHS Trusts in the North of England. In the letter of 27 February 2018 Mr Pettigrew had sought an increase from the Northern Consortium above the contractual rate paid for incineration. This approach was rejected by the Chair of the Northern Consortium, to whom the letter was addressed, and no increase was agreed. Mr Pettigrew explained that he had sought an increase because of the unusual circumstances of that contract, which for a time had been subject to a dispute between HES and Sharpsmart, and he described it as a "an unusual situation" and said he was attempting to obtain the higher rate that was in fact being paid to Sharpsmart. I find that his explanation was wholly sensible, and I accept it. I also find that there was nothing in the fact of HES making such a request, as contained in the letter, that suggests that HES were not capable of providing the Wave 6 services on a sustainable basis at the level of the bid that won the auction. There was nothing wrong in asking for a higher rate – equally, there was nothing wrong in the Northern Consortium rejecting it. Asking for a higher rate on a different contract does not suggest that the tender sum bid by HES for the Wave 6 auction was an abnormally low tender.

89. A similarly flawed approach by SRCL to business reality was adopted on the issue of OHP. SRCL had calculated its own gross profit margin, to cover overheads and net profit, and arrived at a figure of £480,000 as its lowest bid. This was using a fixed percentage of 25% as its gross margin. This was not its approach to Waves 1 to 5, but for present purposes that point can be put to one side. Firstly, simply because SRCL wished to achieve that gross margin, does not mean that all tenderers required the same level, had the same broad amount of overheads, or required the same percentage of net profit.

90. Further, overheads fall into two broad categories. One category is fixed or central overheads. These include (for example) head office costs, and another way of describing them are overheads which are not affected by the volume of business. As an example, whether one has 20, or 50, different contracts, a head office with a central management and payroll function is required. The other category is overheads that are dependent upon (or associated with) the actual work. That is a cost incurred by a business that would fluctuate dependent upon the number of different contracts (or amount of work performed, or volume of sales). An example of this would be the cost of vehicles used for the collection of clinical waste. The number of these vehicles would be dependent upon how much clinical waste had to be collected, and from where. Buying or leasing the vehicles is an overhead, but it is not a fixed overhead. Some of HES' vehicles, which it uses for collection of its existing clinical waste, would have surplus capacity; this was what Mr Pettigrew explained. These vehicles could collect more waste, but there would be no extra cost for extra vehicles unless and until that spare capacity was used up. These are specific company matters, and it is the companies themselves that will have unique knowledge on such matters. This affects how much contribution to OHP a company will require from individual contracts. This depends upon geographical location, type of business, and many other factors.

91. To deal with these complexities of business by a sweeping "minimum overhead and profit percentage required of x%" is simply wrong. However, this was the approach adopted by SRCL to attack the HES tender. The Technology and Construction Court deals with tender breakdowns in a vast number of cases, not only procurement cases, but also in construction disputes where cost, and also overheads and profits, are directly relevant to unit rates for additional works, preliminaries, and also loss and expense claims. To approach the matter as SRCL did with Mr Pettigrew is simply to concentrate on tiny isolated areas of the HES price bid in the auction, and ignore business reality. In any event, as the letter of 27 February 2018 showed, HES already had substantial business in the North of England. Mr Pettigrew explained that the Wave 6 contract would add "a small part" to that existing far larger business. The fact that HES did not require a minimum margin of 25%, or 10%, was simply its own decision as to how it deployed whatever commercial advantages it had over its competitors so far as overheads (and for that matter too, also profit) are concerned. It did this in order to win the auction. It does not mean its tender was abnormally low.

92. Another area of arid challenge was the commercial risk taken by Mr Pettigrew regarding the volume and type of waste that had to be incinerated, and the very large number of bags provided in the FRT for waste of a particular type. Waste is colour coded dependent upon the degree of hazard and type of disposal. One particularly hazardous type of waste is colour coded yellow, and there were a very large number of bags identified in the representative basket for Wave 6. These bags were therefore called "yellow bags". The representative basket indicated, in the FRT summary for Wave 6, that there were 158,384 such bags. There were however no orange bags, denoting waste of a far less hazardous type, and of a type that did not require incineration.

93. Mr Pettigrew, using his experience of the industry, concluded that there may have been an error and the numbers for the two different types of bag were the wrong way around. In any event, he realised that it would be highly unlikely in practice there would be that many yellow bags. He took this commercial judgment into account when he was providing a rate for the yellow bags.

94. There are the following points to make about this aspect of the case. Firstly, HES would be paid for the actual number of both yellow, and orange, bags in fact collected. The representative basket was just that – representative. It was not, nor could it be, an accurate prediction of the amount and types of clinical waste that would in fact be collected over the life of the contract. It did not pretend to be such a prediction, and it was not understood by any of the tenderers to be such a prediction. In any event, the underlying data available from the incumbent providers was also provided to the bidders along with the Summary FRT.

95. Secondly, this type of commercial judgment by Mr Pettigrew and HES is exactly what tendering, whether by way of auction or otherwise, involves. If each tenderer for a project were to bid on the same basis, treating the same commercial risks in the same way, and allocating the same absolute minimum percentage of overhead and profit, then all tenders would end up (more or less) the same in financial value. Part of the business skill of any business manager involved in tendering – and Mr Pettigrew was clear that this aspect of the HES business was controlled solely by him – is to use their

commercial judgment in knowing what the commercial risks are, and correctly accommodating those risks (or pricing for them) in the tender price. This is no different in an e auction to any other tendering process.

96. SRCL sought disclosure of pre-tender internal documents prepared both by HES and Sharpsmart prior to the auction, which would show how those companies' bottom line figures (the one which they could not or would not go below in the auction) was calculated. Mr Pettigrew had not prepared any, and so none were disclosed. Sharpsmart had done so, and disclosure showed it had performed a detailed and complicated financial modelling process to arrive at its lowest figure for the Wave 6 auction, which was £317,000. As matters unfolded, Sharpsmart took the decision actually during the auction to bid a little lower than this, and its lowest bid was £313,000. It is telling in my judgment that each approach – the HES one, based substantially on Mr Pettigrew's experience and business nous, and the more sophisticated one by Sharpsmart – each arrived at a figure so very close to one another. There is less than 1% difference between the two figures. In my judgment that is powerful evidence that neither of them was abnormally low. They were commercially competitive, but that is a different matter.

97. Another area in which Mr Pettigrew's evidence was of use was the sceptical attitude with which he viewed the TUPE information provided by the incumbent, in other words by SRCL. What SRCL produced was, in my judgment, obviously misleading, and deliberately so. This was done by SRCL both to disrupt the auction process and also to put off other potential bidders from bidding. It overstated the number of employees who may transfer to the winning bidder under TUPE. It did not affect HES' approach in the auction because Mr Pettigrew realised that it was misleading, and said in evidence that he did not pay any attention to it. However, one of the Framework members, Cannon Hygiene Ltd, did not trust the information either (and wrote to NHSE about this) but chose as a result not to participate in the Wave 6 auction.

98. I found Mr Pettigrew to be a frank and helpful witness. He appeared concerned that the process of his cross-examination was being used to elicit further confidential information from him which SRCL might use in the future. No such questions were permitted. His evidence was of considerable assistance in deciding the issues in the case.

Carl O'Neill

99. Mr O'Neill used to work in the banking sector, but moved into the clinical waste industry 10 years ago. He had worked for SRCL for about three years once he moved into the industry, but was now a Commercial Manager at Sharpsmart and worked on the Framework, and also the e auctions, relevant to these proceedings.

100. I have already referred to the documents obtained from Sharpsmart on disclosure which showed their meticulous and analytical approach to working out their lowest price, below which they could not bid, for the auction for Wave 6. This was in spreadsheet form. It is notable that Mr O'Neill explained that their OHP figure could be adjusted downwards to suit the circumstances of the auction, and also that the lowest price calculated in this way was so close to the winning bid by HES.

101. Another area in which Sharpsmart adopted (unbeknown to them) a similar approach to HES was to the TUPE information made available by NHSE, but which had come from SRCL the incumbent supplier. Sharpsmart too ignored it.
"Q: So you'd got this longer list [of TUPE employees who would transfer], but you didn't believe it?
A. No. From previous experience, again; we've seen this before."

102. I asked him, at the end of his evidence, to what this referred. He explained that it related to previous experience with SRCL.
"Q: Can you just tell me what it is you're referring to?
A. Okay, sorry. There's been contracts that we have won in the past, not -- well, me personally, in other business -- in my previous career, where we have won tenders where TUPE has been applicable. SRCL have previously put forward a large number of employees associated with the contract and, when it came down to the final transfer, the figures were very different in comparison. There may have been six staff allocated to one contract which resulted in one person at the end of that process."

103. It is an obvious way, that I find that SRCL adopted in this case, to gain a commercial advantage over a competitor (not an incumbent), for the incumbent to provide misleading information in respect of potential TUPE obligations and costs. This was done in order to lead the other bidders to believe that they had to factor in a large potential TUPE liability, and hence affect the figure that the bidder would bid in the auction – it would be higher than it otherwise would be. This tactic SRCL adopted for Wave 6 did not work on HES and it did not work on Sharpsmart. I find that SRCL attempted to influence the auction process in its favour in this manner in the Wave 6 auction. It is particularly ironic that SRCL complain of the way that TUPE was dealt with in the Call-Off ITT and the competition, given its own conduct in this regard. I found Mr O'Neill's evidence of considerable assistance.

Luke Smith

104. Mr Smith is a Fellow Chartered Public Finance Accountant who started his career in 2003, primarily delivering audits of public sector organisations. He qualified as a Chartered Public Finance Accountant in 2006 and was awarded fellowship status in 2016. He spent some time at the National Audit Office ("NAO") as an Audit Principal, and during this time was seconded by the NAO to the Food and Environment Research Agency or FERA. He left the NAO for FERA at the conclusion of that secondment, and was the Audit and Financial Control lead. He eventually became the Governance and Assurance Manager and left in 2017, joining NHSE as an Assurance Manager. He is responsible for ensuring compliant procurement and contract management operations across NHSE's commercial operations.

105. He was not involved in the procurement exercise itself or the e auctions for Waves 1 to 6. He became involved only when, after the e auction for Wave 6 had been conducted and the various complaints were raised by SRCL, he was called to a meeting in mid-May 2017. At that point SRCL was challenging the outcome of the e auction by maintaining that the winning bid of HES, and the under-bid of Sharpsmart, were both abnormally low tenders and demanding an investigation. The context in which those complaints were raised by SRCL is explained in the section "The Relevant Facts" below. Although NHSE did not accept either bid had the appearance of, or was, an abnormally low tender, and maintained it was not obliged to perform any investigation,

it decided to institute one in any event, and informed SRCL of this. Hill Dickinson also notified SRCL that the standstill period was being voluntarily extended. The standstill period is a term used to describe an interval during which the contracting authority will not enter into a contract with the winning bidder. Given that, under Regulation 95, the issue of proceedings operates as an automatic suspension, preventing a contracting authority from entering into the contract (provided under Regulation 95(1)(c) it has not already done so), extending the standstill meant that NHSE stated it would not enter into a contract with the winning bidder during that period. It does not mean, and I find that in this case it did not mean, that time did not run for the purposes of Regulation 92. The relevant entry in the letter stating that the standstill period would be extended does not assist SRCL in its argument that limitation started to run at a later period, nor does the fact that NHSE decided to perform a voluntary investigation into the HES bid.

106. Mr Smith was tasked with performing the investigation into whether the winning bid by HES had the appearance of being an abnormally low tender. He was given this role by Mr Neil Hind, a senior member of the Commercial Team at NHSE. Mr Smith did not investigate the Sharpsmart bid. He was provided with the documents that he requested in order to perform the exercise, which included all the FRTs from the other mini-competitions. He produced a report and concluded that there was no evidence of abnormal pricing by HES from the FRT it had lodged with NHSE after it had won the e auction, or by comparison with the bids lodged by other entities that had won the other e auctions for Waves 1 to 5.

107. SRCL challenged those conclusions and sought, in cross-examination of Mr Smith, to demonstrate that his investigation was insufficiently thorough; that his analysis was flawed; that he had either overlooked or failed to appreciate the significance of certain rates provided by HES; and that his conclusion was wrong. SRCL sought to show that had Mr Smith interrogated some of the rates further, he would have uncovered features that showed that HES' rates were unrealistically low and could not be sustained. This was in particular in respect of the rates for the yellow bags.

108. The longer that the challenge to Mr Smith and his exercise went on, the clearer it became that he had approached and performed the exercise with an extraordinary amount of rigour and thoroughness, and in a highly forensic and methodical fashion, and had done so in my judgment entirely without error (let alone manifest error). Indeed, based not only on the content of what he had done at the time, the way that he answered the points put to him and his ability to deal with every single one extremely competently, he seemed to me to be ideally suited in every way to have been tasked with such an investigation. It is easy to see why Mr Hind chose Mr Smith for this exercise. His conclusions were, essentially, that there was no appearance of the HES tender being an abnormally low tender. I agree with that conclusion, and accept it.

109. The approach of SRCL to demonstrating that the HES bid was abnormally low tenders was, with respect, wholly off the point. It entirely ignored commercial factors which each of those bidders chose to approach in a particular way. As an example, HES has access to a pyrolysis plant in Scotland for incineration. This currently has a capacity of 8 tonnes per day. I have identified the details of this approach at [83] above, and the different criticisms directed at Mr Pettigrew, all of which he rejected satisfactorily.

110. Mr Smith was criticised for his acceptance of what was included in the FRT submitted by HES after the auction, and for failing to interrogate HES further on the rates and other information such as the level of OHP. However, there was nothing on the information he had that warranted such further investigation, and he made accurate and correct comparisons with the information contained on the other auction FRTs, which he considered. Where the figures raised questions, he conducted further analysis. OHP was clearly included, and he confirmed this. I accept his findings in all respects.

Mr Geoff Johnston

111. Mr Johnston is an Interim Framework Manager at NHSE and he works primarily in the field of clinical waste services. He has long experience in the procurement field in different industries, and joined NHSE in November 2016. From early 2017 he has been exclusively focused on the clinical waste field due to the sheer volume of work related to this area.

112. He was not involved in establishing the Framework Agreement itself as this occurred prior to his joining NHSE. The different regions for Waves 1 to 5 were as follows.
Wave 1: Midlands and East of England
Wave 2: South (Central)
Wave 3: North (Greater Manchester)
Wave 4: North (Merseyside)
Wave 5: Kent, Surrey and Sussex

113. He did not work on Wave 1, as this occurred prior to his arrival at NHSE. He did however find himself involved in the other Waves to some degree or another, the first one for him being Wave 2, but this was by way of his observing the auction taking place from his computer screen. His involvement increased thereafter in the subsequent Waves, with his first proper involvement being Wave 3. The auctions are run using the Bravo procurement platform, and the Crown Commercial Services manage the auctions. This is a part of HM Cabinet Office.

114. I found Mr Johnston's evidence useful, and he was a helpful witness. He obviously personally considered that NHSE was paying far too much for the existing services, however I find that this subjective point of view did not detract from the accuracy of his factual evidence. Whether there are substantial grounds to justify this point of view in any event does not, in my judgment, matter for the purposes of evaluating him as a witness. He identified that even the bid submitted by SRCL was about 50% of the current cost (on SRCL's own figures) charged to NHSE for broadly the same services, and that this showed how high the current charges by SRCL were in comparison to the levels NHSE could achieve through the auction process. That is a broad rather than precise comparison, but does have some validity on the evidence in this case.

115. Mr Johnston first met Ms Dransfield in early December 2016. SRCL was concerned about low prices being necessary to win business. The concerns raised by SRCL led to a notification being issued by NHSE on the Bravo platform reminding the bidders that "whoever wins a part or all of the available business has still got to deliver the series that they are contractually committed to...." NHSE was not implacably directed at achieving the lowest possible price, regardless of sustainability of the services, and this notification demonstrates that. However, NHSE was committed to achieving greater

value for money. The auction process therefore continued. There is no reason to doubt that this was the correct decision by NHSE.

116. I found his evidence on the attempts by SRCL to disrupt the auction process particularly useful. SRCL had complained that the final communication from NHSE to all the bidders on how TUPE costs were to be dealt with in their auction prices was sent out only on the morning of the auction itself. Mr Johnston made it clear that this was, however, in response to a communication sent from SRCL very nearly at the close of business only the evening before the auction. This was a clear attempt by SRCL to derail the auction. Nor was this the first time that SRCL had raised issues about TUPE – I consider that SRCL must have decided that TUPE was a potentially fertile ground for such disruption. I address the TUPE issues further below; however, the timing of this statement by NHSE to the bidders on the morning of the auction is put into some context when one realises the communication to which it responded was sent to NHSE so late the day before. The auction had already been delayed twice by then in any event.

117. Therefore I found Mr Johnston to be useful and genuine, and although from time to time he did find himself arguing the case in response to some of Mr Coppel's disguised hypothetical questions, his evidence was of real assistance to me in resolving the issues in the case.

VIII The Relevant Facts

118. The clinical waste sector in England is a highly competitive and commercially aggressive one.

119. Although SRCL had participated in all of the previous five Waves, and won some of the contracts, SRCL was not content with the prices it was achieving. To put it bluntly, SRLC thought these prices were too low. It found itself having to bid against other highly competitive businesses who had also achieved success in being awarded Framework Contracts, and this competition was leading to lower prices being necessary in the bidding in order for SRCL to secure the contracts. There is no doubt that the lucrative business model that SRCL had previously enjoyed was no longer achievable as a result of the auction process. This was obviously a concern for SRCL. It attempted, through correspondence directly to NHSE, to persuade NHSE to abandon this approach. NHSE was not interested in doing so. NHSE took the view that it had been paying far higher than was commercially justified for the disposal of its clinical waste historically, and that it could achieve greater benefits for the public purse by conducting these auctions amongst the different bidders. Given the margins which disclosure in this case has identified were being achieved by SRCL, the point of view which NHSE held on this subject appear to be justified. However, it was an extremely contentious subject and SRCL took a very firm line in correspondence with NHSE, suggesting grave market developments if it were to continue.

120. SRCL had a quarterly business review on 15 March 2017 and decided to put a strategy in place to deal with what it saw as the continuing behaviour of NHSE, and also the dramatic fall in its revenues being experienced as a consequence of NHSE procuring this services through the auction process.

121. During the disclosure process in the litigation, SRCL was required to disclose copies of the slides (or power point presentation material) used for this meeting. These showed

that SRCL was concerned that future auctions would be held by NHSE after the end of year 1, and this would result in even lower prices, and a continuing or greater impact upon its business. In other words, even though SRCL had been successful in some of the Waves, there was a risk it would have to compete again. This was something that SRCL was anxious to avoid.

122. In order to deal with the general situation, SRCL considered its options in this strategy meeting. One slide stated under the heading "Influencing strategies to date" different lines of text, and one of them was:
"We are waiting for a compelling event to happen.
We need to create a compelling event."

123. Ms Dransfield said that this was a reference to "getting NHS England to have sensible discussions with us around, as I've described, the risks to the market and the infrastructure, and how are we going to do that." I reject that "sensible discussions" with NHSE was what was meant in the slides for this meeting by the term "a compelling event". "We need to create a compelling event" would not, in normal English, mean "we need to have sensible discussions". I find that the expression, in this case, "we need to create a compelling event" meant that SRCL decided to initiate a dispute, including potential litigation. SRCL decided no longer to participate in the e auctions on a normal commercial basis, namely bidding against the other bidders in order to win the contract if its lowest price was sufficient for it to emerge the winner. "Compelling event" meant something notable, such as litigation, or something else that would lead to NHSE abandoning its auction strategy. SRCL decided to disrupt and delay the auction process, sow as much doubt and/or confusion in the ranks of NHSE as possible, and if necessary to initiate a legal dispute with NHSE over the e auction process in order to achieve two things. These two things were adoption of a different method by NHSE to place these contracts; and through that new method, the second thing, namely less competition on price. This would restore SRCL's economic returns to a level closer to the ones before.

124. As Ms Dransfield put it "We had been through five Waves, we had lost some business and seen some impact to our numbers." SRCL wanted the business back, and they wanted their "numbers" back to pre-auction levels. Continuing competition through the auction process would not achieve this.

125. She expressed the lower prices and the auction process as a risk to SRCL's business – which it may have been – and also a "risk to the market". This demonstrates two things. Firstly, that SRCL equates its own commercial interests with the market. It is wrong to do so. It is no part of NHSE's function to fund SRCL's business, and SRCL's profitability. Secondly, it is not a risk to the market if NHSE decided to adopt a strategy to reduce the very high margins being achieved by any of the providers (including but not only SRCL) and to pay a far lower figure achieved through a competitive e auction process. The Regulations, and the Directive, do not have as one of their aims protection of the business of incumbent suppliers, or their gross profit margins.

126. There were two lawyers present at this meeting, namely SRCL's internal counsel Mr Venables, and also Mr Watt from Bevan Brittan. Given the strategy involved potential legal action, it is understandable that SRCL would want legal input as their chances of success in litigation would undoubtedly be a consideration. However, it is another

reason why Ms Mussellwhite was put in a potentially difficult position by being called as a witness of fact, and why that was unsatisfactory. Someone with whom she may have worked closely, Mr Watt, was present at a meeting where SRCL discussed and agreed its strategy.

127. The materials for the meeting show that after the exhortation in the presentation "time for action", the options for SRCL were set out. One was ""Do nothing"; another was "Wait for a catastrophe and hope it is not us". Another was "Selectively withdraw". Ms Dransfield explained that this was not adopted.

128. Other entries were "Keep price high in the Wave ..." and "benefit the competition but hurt NHSE." The term "hurt NHSE" was one which Ms Dransfield had some difficulty in explaining away. Mr Coppel was as forceful as he could be in seeking to explain that this was not the option adopted by SRCL, but I find that the intention behind that term plainly governed the approach adopted by SRCL. SRCL knew that, absent some seismic or compelling event, NHSE was set upon a course of continuing the e-auctions and having such competitions for the services of the whole of England. This was something that SRCL had decided could not be risked. The potential loss of the substantial margins enjoyed by SRCL had to be avoided.

129. There were other options or potential courses of action identified in the slides. These included "flooding the market", refusing to continue to provide the services once the incumbent contracts ended, and generally making life difficult for the NHSE. Ms Dransfield explained that the slides were "deliberately provocative" and were to stimulate discussion with her colleagues, who were sometimes too focused on operations and not sufficiently cognisant of strategy. There is no doubt that Ms Dransfield was prepared to contemplate strategic decisions that would cause damage to NHSE – as shown by the "hurt the NHS" comment – but also that she put SRCL's economic interests at the very top of her list of priorities. She cannot be criticised for doing this in a business sense; she is after all a director of SRCL. However, it does mean that a great deal of the SRCL complaints to NHSE have to be seen in this context.

130. SRCL sent NHSE a letter dated 17 March 2017, part of which was under a heading "TUPE/COSOP confusion". In this letter, SRCL made a number of allegations or complaints about how TUPE was being dealt with in the auction process. The letter stated:
"It [ie TUPE] appears to be one of the factors driving the cavalier bidding behaviour that has been seen in e Auctions to date. It may explain why in some e Auctions NHS England has received what have appeared to be abnormally low tenders."

131. This demonstrates that SRCL, rather oddly, was complaining about abnormally low tenders even though SRCL itself had succeeded on a number of e Auctions, and even though the bidding in Wave 6 had not even taken place. It is not an issue in these proceedings whether any of the bids for Waves 1 to 5 were, or appeared to be, abnormally low. Certainly the unsuccessful bidders for those Waves did not issue proceedings arguing that they were at the time, and SRCL was not complaining of abnormally low tenders in any of them, including the Waves in which it had succeeded. Further, so far as Wave 6 was concerned, SRCL could not know what level would be achieved in that auction. It was however "setting the scene" in advance for a complaint of an abnormally low tender, regardless of what the winning bid in fact was. It is also

not the case that there was, in reality, any confusion about TUPE. SRCL was attempting to create some.

132. Ms Dransfield's evidence on the change of strategy by SRCL for Wave 6 – the question had to be put a number of times before she would answer it - was eventually as follows: "MR WILLIAMS: Having participated actively in the previous five Waves, and indeed won many of the lots, including reducing your prices up to 50 per cent, why is it that all of a sudden, on the eve of the Wave 6 call-off, you suddenly start complaining about abnormally low tenders?
A. I don't know."

133. The real reason that SRCL did so was, I find, that it was setting the scene to litigate *regardless* of the outcome of the auction. This was part of its overall strategy. It knew that NHSE would continue with this approach to procurement of the services, absent some sort of seismic or compelling event. It therefore sought to create or manufacture one. It would know the regulatory mechanism within which NHSE had to operate; these are contained in the PCR 2015. As a Framework Agreement had already been entered into with each of the bidders, the only way it had at its disposal to try to interfere with the award of a contract to a winning bidder was by complaining that such a bid was abnormally low. No further evaluation of tenders would take place, now that the Framework Agreements were entered into. The only feature of the auctions was the price bidders were prepared to bid. The only way of attacking such a process was by complaining the bids were abnormally low tenders. This is therefore what SRCL prepared to do.

134. SRCL decided to establish what Ms Dransfield described as a "minimum 25 per cent margin" for its own bid, and this was done only for Wave 6. The auctions for Waves 1 to 5 had been accomplished prior to the meeting of 15 March 2017. This approach of fixing a minimum margin had not been SRCL's strategy for these earlier Waves. It was also accepted in evidence by SRCL that this change of strategy (or change of approach) was not something of which NHSE could have been aware. It was, in my judgment, an artificial way of preparing the ground for SRCL's bid to be so much higher than the winning (or other similar) bid or bids, so that an argument could be mounted that the winning (or other similar) bid was abnormally low, by comparison with the bid of SRCL. It is a strategy to which SRCL has adhered in this litigation.

135. In a letter of 27 April 2017 from SRCL's solicitors to NHSE immediately following the e auction the following was stated: "Our client calculated the lowest possible sustainable price for its delivery of this service to be £480,000 and withdrew from the eAuction when bids went below this level (our client's last bid being £479,999). Our client's approved framework pricing for this service (as validated by the Crown Commercial Services for the purpose of this eAuction) was £688,589. We understand that the winning bidder submitted a price of £310,000. This sum appears abnormally low (and in our client's view unsustainable) such that NHS England has an obligation pursuant to regulation 69(1) of the PCR to investigate."

136. The following points are notable about this letter. Firstly, it asserts that the "lowest possible sustainable price" was the one bid by SRCL in the auction. That assertion is put into context by the knowledge, now available to the court, that this price included a margin of 25%. That is, with respect to SRCL, a generous margin, somewhat above

cost. It is not generous *only* when it is considered against SRCL's far higher, historic margin of 52% for this region, or 49% as a national average. Secondly, the assertion of "abnormally low" is made against that SRCL benchmark figure. Even if, which I do not accept, the lowest sustainable price for SRCL was the one with the minimum margin of 25%, that does not mean that this was the lowest sustainable price for SRCL for a wide range of other commercial factors. The reference to the Framework pricing is irrelevant. The whole purpose of the auction process was to see how much lower than those prices the bidders were prepared to bid, competitively.

137. However, even though SRCL knew that the winning bid was £310,000 on 26 April 2017, and SRCL had formed the view that this was abnormally low, proceedings were not issued within the required period of 30 days from that date. NHSE relies upon this as a determinative factor which should lead to SRCL's case failing. It is that subject to which I now must turn.

IX Limitation/The Regulatory Time Limit for Starting Proceedings

138. Time starts to run for the purposes of the regulations once a dissatisfied tenderer has all the information (either expressly, or constructively) that is needed to know that it has a claim; ***SIAC Construction Ltd v County Council of the County of Mayo*** [2001] ECR1-7725. Although for shorthand purposes the term "limitation" is used generally when this subject is considered in procurement proceedings, the time period is not one of limitation arising under the Limitation Acts, but arises under the Regulations. Rapidity, both of issuing proceedings and having disputes resolved, is a feature of litigation concerning public procurement.

139. Procurement cases have their own separate time limits, and these are imposed by the Regulations which implement the Directive. They are very short, and deliberately so. There are good policy grounds for such an approach. In ***Jobsin Co UK PLC v Department of Health*** [2003] EWCA Civ 1241 Dyson LJ (as he then was) said, in relation to an earlier version of the Regulations:
"33... Regulation 32(4) specifies a short limitation period. That is no doubt for the good policy reason that it is in the public interest that challenges to the tender process of a public service contract should be made promptly so as to cause as little disruption and delay as possible. It is not merely because the interests of all those who have participated in the tender process have to be taken into account. It is also because there is a wider public interest in ensuring that tenders which public authorities have invited for a public project should be processed as quickly as possible. A balance has to be struck between two competing interests: the need to allow challenges to be made to an unlawful tender process, and the need to ensure that any such challenges are made expeditiously. Regulation 32(4)(b) is the result of that balancing exercise."

140. Time starts running from the date when a party has all the necessary information to know that it has a claim. This may even predate the result of the procurement competition, which is the earliest that an aggrieved tenderer will know it has been unsuccessful in the procurement. This is again different to the relevant starting date for time running under the Limitation Acts, as that is usually the accrual of a cause of action.

141. Here, there are two areas of complaint by SRCL, namely the treatment of TUPE and the issue of abnormally low tenders being submitted by HES and Sharpsmart. Each can

lead to different dates for the commencement of the 30 day period under Regulation 92(2).

142. After the auction, SRCL sought to persuade NHSE that the winning bid was, or appeared to be, abnormally low. NHSE did not agree. Time limits for issuing proceedings in procurement challenges are tight, and deliberately so. Correspondence to and fro between parties and/or their solicitors during this period is not unusual. NHSE did not agree that it was obliged to investigate the HES bid. It did not agree that either the HES or the next bid in value, namely that of Sharpsmart, was or appeared to be abnormally low. In a letter of 17 May 2017 SRCL's solicitors stated that proceedings would be issued on 19 May 2017 unless confirmation was received by 10.00am on that date that an investigation would be instigated by NHSE into the HES tender. In a letter of 19 May 2017 NHSE agreed to carry out an investigation. The terms of that letter are heavily relied upon by SRCL as constituting a good reason, should I find that proceedings were issued by it outside the 30 day limit in the Regulations, for an extension of time. That letter stated that NHSE did not agree it should have abandoned the decision to award the contract to the winning bidder, or that NHSE was in breach of Regulation 69(1), nor that the tender from the winning bidder appeared to be abnormally low. It continued:
"In the interests of attempting to avoid unnecessary litigation our client will
a) Carry out the requested investigation;
b) Within 2 working days of the completion of that investigation, provide [SRCL] with an explanation of the steps taken in the conduct of that investigation and of the information requested from the two lowest bidders; and
c) In the event that our client's decision is not to reject one or both of the two lowest bids, our client will wait for a period of 5 working days following the provision of the information in point (b) above prior to entering into the contract with the winning bidder.
Please confirm that on the basis of the above you will not issue proceedings on Friday 19 May 2017 or at any time prior to being provided with the information in point (b) above."

143. What then occurred was Mr Smith was instructed to perform his investigation, and did so. The results of that were sent to SRCL's solicitors under cover of a letter from NHSE's solicitors dated 13 June 2017. That letter made clear that NHSE rejected the suggestion that the winning bid was abnormally low. It also stated that the investigation was done voluntarily and "in the interests of attempting to avoid unnecessary litigation". It stated that the matters raised by SRCL in the letter of 17 May 2017 had now been adequately addressed and accordingly NHSE would now wait for a 5 working day period from the date of the letter "before proceeding with arrangements to enter into the contract with the winning bidder." 13 June 2017 was a Tuesday. Discounting the day the letter would have been received, a period of five working days would expire on 20 June 2017 (the fifth day) or 21 June 2017. Proceedings were not issued until 30 June 2017.

144. Given the auction itself took place on 26 April 2017, the time under Regulation 92(2) is 30 days beginning with the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen. The latest date for that can only have been the date of the auction so far as the complaints of an abnormally low tender by HES and/or Sharpsmart is or are concerned. Indeed, SRCL's entire attack

on the auction was on the basis that it was won by an abnormally low bid. That knowledge came, without doubt, on the date of the auction itself. This period therefore expired on 25 May 2017, as the date of the auction is expressly counted within the 30 days. Regulation 92(2) "such proceedings must be started within 30 days beginning with the date when" the bidder knew, or ought to have known, it had a claim. If a time limit expires on a weekend, Regulation 2(4) provides that it expires on the next working day. However, there are different potential dates for the commencement of time running for the complaints regarding TUPE.

145. My findings are as follows.
(1) SRCL first knew, or ought to have known, that there were (on its own case) grounds for starting the proceedings in relation to the treatment of TUPE on 17 March 2017, when the Call-Off ITT and associated documents for Wave 6 were issued to bidders. 30 days from this expired on 17 April 2017 due to Regulation 2(4), as the 30 period would otherwise expire on a weekend. I say "on its own case" because I find that there were no such grounds in any event.
(2) Even if that is wrong, then the very latest date upon which time started to run regarding the treatment of TUPE by bidders was the date of the last notification on the TUPE issue, which was the morning of the auction itself. That was 26 April 2017, and therefore the 30 day period expired on 25 May 2017.
(3) The date that SRCL first knew or ought to have known that there were grounds for starting the proceedings in relation to the allegedly abnormally low tender was also the date of the auction, 26 April 2017. 30 days from this expired on 25 May 2017.

146. I therefore conclude that the proceedings were issued outside the period of 30 days imposed by Regulation 92(2). The only way that the outcome of these proceedings would not be determined by the expiry of the time limit would be if I granted an extension of time under Regulation 92(4) and if the date for knowledge on the part of SRCL was later than 30 March 2017. This is because the maximum extension that can be given is three months.

147. On my finding at [145](1), the necessary extension of time for the TUPE complaints is more than 3 months before 30 June 2017. Accordingly, no extension is possible and these claims are out of time.

148. However, in case that is wrong, and in any event because the abnormally low tender complaints arose a period of fewer than 3 months before 30 June 2017, I will consider "good reason" for both the TUPE and the abnormally low complaints.

149. A potential defendant will rarely invite the issuing of proceedings against itself. Informing a potential claimant that there are no grounds for issuing proceedings, and urging that party not to do so, does not in my judgment constitute a good reason for extending time under Regulation 92(4). "Good reason" should, ordinarily, relate to some factor that has an effect upon the ability of a claimant to issue. This is the approach adopted by Akenhead J in the case of ***Mermec UK Ltd v Network Rail Infrastructure Ltd*** [2011] EWHC 1847 (TCC). In that case, proceedings were served later than the three month time limit. This was fatal to the claim, and in considering whether to grant an extension of time Akenhead J stated:

"23. The main remaining issue is whether or not there is some good or arguable reason why there should be an extension of time in effect to bring the service of the Claim on 30 December 2010 within time. I do not consider there is any such reason:
(a) There is no explanation from Mermec as to why the Claim could not have been drafted let alone served weeks before it was served.
(b) It is perhaps unhelpful to try to give some exhaustive list of the grounds upon which extensions should be granted but such grounds would include factors which prevent service of the Claim within time which are beyond the control of the claimant; these could include illness or detention of the relevant personnel. There must however be a good reason and none is advanced by the Claimant in this case.
(c) It is said that the delay was only some six or seven days and that there should be an extension for such an insignificant period because it is a relatively short delay. However, there is no point in having a three-month period if what it means is three months plus a further relatively random short period."

150. That passage was the subject of comment by Jefford J in ***Perinatal Institute v Healthcare Quality Improvement Partnership*** [2017] EWHC 1867 (TCC). The judge described the test for an extension of time as "not...a particularly onerous test" and stated that it did not require exceptional circumstances. In that case, on those facts, she granted an extension. I agree that exceptional circumstances are not required; the phrase in the Regulation itself is "good reason". In ***Perinatal*** the case concerned an amendment to bring new grounds, and the judge found at [41] "....that there was, in reality, no delay on [the Claimant's] part in advancing its claim, and that time passed simply in bringing the matter before the Court for an adequate hearing". That is not the case in these proceedings. Further, I do not consider that introducing the concept of whether the test is onerous or not is helpful. Regulation 92(4) clearly uses the test "good reason". There must be a good reason. Akenhead J stated that the reason must relate to the failure to issue within the time required. Examples were given in [23] in ***Mermec*** at (b).

151. Mr Coppel relies upon the fact that NHSE agreed, under the threat of proceedings from SRCL, to perform an investigation into the winning tender. This does not start time running afresh. SRCL had all the necessary information for the purpose of bringing proceedings as at the date of the auction. Further, the exhortation to SRCL in the same letter by NHSE's solicitors not to issue proceedings, because these were not justified, does not operate as a good reason either. If this sort of discussion between solicitors in pre-action correspondence could have the effect contended for by SRCL in this case, solicitors would become extremely reluctant to write anything to one another. Further, there is nothing in any of that correspondence that in my judgment constitutes a good reason for granting SRCL an extension of time. In particular, the letter to which I refer in [142] above does not contain anything, in my judgment, that would constitute a good reason for an extension of time.

152. SRCL also sought to rely upon ***R v Commissioner for Local Administration ex parte Croydon London BC*** [1989] 1 All ER 1033, a decision of the Divisional Court. That case concerned an application for judicial review by the Croydon LBC and an education committee of a report made by the Commissioner on an investigation into a complaint made by the parents of a child. In that report the Commissioner found the complainant had suffered injustice by reason of maladministration of the education committee. On the question of delay in issuing proceedings, Woolf LJ (as he then was)

dismissed an argument for the Commissioner that the Council could and should have brought the judicial review proceedings as soon as the jurisdiction of the Commissioner to conduct the investigation was disputed, and not waited for the report to be produced. Woolf LJ stated (at 1046G):

"While in the public law field, it is essential that the courts should scrutinise with care any delay in making an application and a litigant who does delay in making an application is always at risk, the provisions of RSC Ord 53, r4 and s.31(6) of the Supreme Court Act 1981 are not intended to be applied in a technical manner. As long as no prejudice is caused, which is my view of the position here, the courts will not rely on those provisions to deprive a litigant who has behaved sensibly and reasonably of relief to which he is otherwise entitled."

153. This authority does not assist SRCL. It does not concern the Regulations. The courts approach to the time limits imposed in judicial review cases, both under the older relevant provision in RSC Ord 53 and now CPR Part 54.5(1)(a) and (b), are well known. Prejudice is relevant under those provisions. It is not the same approach under Regulation 92(2) and 92(4). The time limits are strict, and intentionally so. They are there to be observed, and rapidity is important in procurement cases. The wording of Regulation 92(4) is clear. The court "may extend the time limits imposed by this regulation (but not any of the limits imposed by regulation 93) where the Court considers that there is a good reason for doing so." In terms of judicial review generally, and factors that may be considered, a more recent case than ***Croydon*** (not cited to me) is the summary in ***Matrix-SCM Limited v LB Newham*** [2011] EWHC 2414 at [16] of the views of the Divisional Court (Moses LJ and Beatson J) in ***Law Society of England and Wales v LSC*** [2010] 2555 (Admin). There, relevant considerations were stated to include (a) the importance of the issues in question (b) the strength of the claim (c) whether a challenge at an earlier stage would have been premature, the extent to which the impact of the infringement is unclear and the claimant's knowledge of the infringement, and (d) the existence of prejudice to the defendant, third parties and good administration. I do not consider this to be an exhaustive list.

154. In my judgment, the following principles apply where an extension of time is sought under Regulation 92(4):

(1) There must be a good reason for extending time.

(2) One of the matters that the court will consider is whether there was a good reason for the claimant not issuing within the time required, such as an illness or something out of the claimant's control which prevented the claimant from doing so.

(3) It would be unwise to list or seek to limit in advance what factors should be considered to have relative weight to one another in that exercise.

(4) The court will take a broad approach in all the circumstances of the particular case.

(5) The categories are not closed or exhaustively listed in the cases. Lack of prejudice to the defendant is not a determinative factor.

155. I do not consider lack of prejudice to the contracting authority to be relevant at all in this particular case. Firstly, prejudice can take many different forms, and delay alone can constitute prejudice. Further, there are other features relevant to public policy which are integral to these strict time limits, which apply in any procurement case. They are the ones identified in ***Jobsin v Department of Health***, and constitute the wider

public interest. Turning to all the circumstances of this particular case, rapidity is particularly important. NHSE was attempting to reduce the cost to it of supplying these services, and the bidding in this case (even the sole bid submitted in the auction by SRCL) shows quite how high the gross profit margin was on the provision of these services by the incumbent. I consider that to be a relevant factor of this case which makes it particularly important that challenges to this procurement exercise be brought within the strict time limits. In my judgment, this militates against an extension of time. However, even were I to perform the exercise of considering whether there was a good reason for SRCL's failure to issue within time, and entirely ignore the subject matter of the procurement and the reasons for it being required, I would in any event conclude that there is no good reason to extend time in this case.

156. I consider that the time limits contained in the Regulations are there for a reason, and they are to be observed. Here, there is no adequate explanation as to why SRCL was unable to do so; it simply chose not to do so. The fact that NHSE instituted its own investigation is not a good reason; there is no reason why a claim form could not be issued on a protective basis pending the outcome of that process. To be entitled to consideration of an extension from the 30 day limit in Regulation 92(2) (but always subject to the three month overall limit in Regulation 92(5)) the claimant must have a good reason. I find that there is no good reason in this case and therefore the claim fails for this reason alone.

157. It is not difficult to issue a claim form within time. The judgment of Jackson LJ in ***Chandra v Brook North*** [2013] EWCA Civ 1559, which concerned an appeal from amendments allowed at first instance that did not arise out of the same facts as the original claim, is notable in this respect. Although it is not a procurement case, I consider the dicta to be of wide application. He stated:
"[69] This leads on to a separate and important point. If a claimant applies for permission to amend and the amendment arguably adds a new claim which is statute barred, then the claimant should take steps to protect itself. The obvious step is to issue separate proceedings in respect of the new claim. This will have the advantage of stopping the limitation clock on the date of the new claim form. If permission to amend is granted, then the second action can be allowed to lapse. If permission to amend is refused, the claimant can pursue his new claim in the second action. The two actions will probably be consolidated and the question of limitation can be determined at trial." (emphasis added)

158. This dicta applies to a prudent course when the process of seeking to amend an existing claim might cause further delay. It is not for the court to give advice to litigants, but similar comments apply to litigants who consider they may have a procurement claim. It is not unusual in procurement cases to have more than one claim form issued in respect of the same procurement competition. Often there will be three different claim forms, sometimes four, and very occasionally more than that. This is a well known and practised approach in procurement cases. Sometimes new information (for example on how an evaluation was performed) becomes available to a claimant on disclosure, and another claim form is issued on the basis of that new information. The only disadvantage to a claim is the incurring of the fee charged to issue a claim, which most litigants would usually wish to avoid. However, the wish to avoid incurring an issue fee is not a good reason within the terms of Regulation 92(4). The same approach of issuing a protective claim form can be adopted if a litigant feels it has the necessary

knowledge in advance of the procurement exercise being completed, or here, in advance of the auction being conducted. SRCL took the view (or at least expressed itself in these terms in its pre-auction letters) that NHSE was dealing with TUPE in an unlawful fashion for Wave 6. The risk of the 30 day period beginning to run prior the auction being held was an obvious one. SRCL allowed that period to elapse without issuing a claim form, for no good reason.

159. That risk could have been brought to an end by the issue of a claim form. If a subsequent claim form were to prove necessary after the auction, then so be it – there would simply be two claim forms dealing with the same Call-Off competition.

160. The same approach applies to the complaints made by SRCL that NHSE had accepted an abnormally low tender and that the bids of both HES and Sharpsmart should be rejected for that reason. SRCL knew that this had occurred on the day of the auction – indeed, they had specifically engineered their bid at an artificially high level as I have found, but that is beside the point for present purposes. The 30 days started running then. It would have been entirely reasonable, sensible and prudent to have issued a claim form within that period to stop time running. A stay in that action could have been agreed with NHSE, and the approval of the court sought for such a course of action. That is often done in procurement cases.

161. I have carefully analysed the inter-solicitor correspondence in the period from the auction being held to the issue of proceedings over two months later on 30 June 2017. There is nothing in that correspondence that constitutes a good reason, in my judgment, nor is there anything in it to justify SRCL deciding it need not issue a claim form. The NHSE, through its solicitors, were adamant that there had been no breach of the regulations, and that the winning tender was not abnormally low. This approach was consistent, and was entirely justified, and as Mr Johnston said, the winning bid was "of the same order" as those which had been obtained in the other auctions for Waves 1 to 5, including winning bids from SRCL itself. I do not consider that the fact that the NHSE, in order to avoid having to face expensive and pointless litigation, agreed to perform an investigation in any event re-sets the clock for the purposes of Regulation 92(2) nor does it constitute a good reason for an extension. Even if it did, and even after the results of the investigation were provided to SRCL, it still waited until 30 June 2017 to issue. That was not even done promptly or swiftly.

162. The failure by SRCL to issue proceedings within the time required by Regulation 92(2) means that NHSE succeed on this ground in any event. However, in case I am wrong about that, I will consider the merits of the challenges brought by SRCL.

X Abnormally low tenders

163. The duty upon contracting authorities in respect of abnormally low tenders is now contained in regulation 69(1) of the 2015 Regulations, which implements Article 69(1) of the Directive. This states as follows:

"(1) Contracting authorities shall require tenderers to explain the price or costs proposed in the tender where tenders appear to be abnormally low in relation to the work, supplies or services".
(emphasis added)

164. There then follow a number of specific duties which arise if and when the contracting authority considers that a tender may be abnormally low and decides to investigate it by requesting an explanation from the tenderer concerned.

165. NHSE submits that the duty under Regulation 69(1) only arises, however, when two conditions are fulfilled. Firstly, when it appears to the contracting authority that a tender appears to be abnormally low and if that is met, when it is considering rejecting that tender for that reason. The authority upon which NHSE relies is the judgment of Flaux J (as he then was) in ***J. Varney & Sons Waste Management Ltd-v-Hertfordshire County Council*** [2010] EWHC 1404 (QB), which itself referred to the earlier decision of Arnold J in ***Morrison Facilities Services Ltd.-v-Norwich City Council*** [2010] EWHC 487 (Ch).

166. In ***J. Varney & Sons,*** Flaux J held at [156] to [159]:

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

[157] Either way, there is nothing in either provision to support the contention that there is a general duty owed by the authority to investigate so-called "suspect" tenders which appear abnormally low. Nothing in the European Court decisions to which Arnold J. refers dictates a different conclusion. Having heard full argument on the point at trial I am quite satisfied that neither the Directive nor the Regulations imposes a duty to investigate so-called suspect tenders generally.

[158] It follows that, on the correct interpretation of both the Directive and the Regulation (save in the case of Fourways where the Council did consider the tender abnormally low and was contemplating rejecting the tender at least in part if not totally), the Council was not under a duty generally to investigate so-called "suspect" tenders in circumstances where the Council had no intention of rejecting those tenders. In my judgement, this aspect of Varney's complaint that the Council was in breach of duty in failing to investigate the tenders other than Fourways falls at the first hurdle.

[159] Furthermore, I consider that there is another fundamental obstacle to Varney's case that the Council was in breach of duty in failing to investigate the other tenders. Although regulation 30(6) talks in the abstract of an offer which is abnormally low, the Directive refers to tenders which "appear to be abnormally low", which makes sense as a reference to what "appears" to the relevant authority. In the circumstances, it seems to me that the duty for which Varney contends could only arise where the Council either knows or suspects that the tender in question is abnormally low. Leaving Fourways out of account, it is quite clear on the evidence of Mr. Shaw and

Mr. King (which I accept) that neither of them actually knew or suspected that the other tenders were abnormally low."

167. There is another aspect of this that must also be considered. Is the test of appearance of being abnormally low a subjective or objective one? SRCL's approach is that the matter should be approached objectively; on the other hand, NHSE submits that it is the subjective understanding of the contracting authority that matters. Another way of phrasing the same point is whether the contracting authority's judgment on whether or not a tender is abnormally low is subject to the same scrutiny of the court concerning whether it is "manifestly erroneous", the approach adopted in evaluation. Is it a case where the court substitutes its own judgment, or is manifest error required? The case most often cited in support of the principle that the court will only interfere in matters of judgment on evaluation if they are manifestly erroneous is ***Lion Apparel Systems v Firebuy Ltd*** [2007] EWHC 2179 (Ch), and there is a succinct statement of the principles that apply general in the judgment of Coulson J (as he then was) ***Woods Building Services v Milton Keynes Council*** [2015] EWHC 2011 (TCC) at [5] to [12].

168. In support of the subjective conclusion as to whether a tender has the appearance of being abnormally low, NHSE points to certain passages of the judgment of Flaux J in ***Varney*** such as the following one:

> "[160] [It was contended in cross-examination of Mr. Shaw and Mr. King and in submissions] that the Council ought to have known or suspected that the other tenders were abnormally low. He submitted that it was a manifest error to have accepted tenders which the Council should have recognised as unsustainable. Alternatively, he submitted that there was a duty to reject such tenders. In terms of what is the correct test in law I am firmly of the view that the duty for which Varney contends (even if, contrary to the decision I have already indicated, such a duty could arise) cannot arise save in the case where the relevant authority actually knows or suspects that a tender is abnormally low. What it is contended an authority ought to have known or suspected, but did not know or suspect, is not sufficient to impose the duty for which Varney contends. Were it otherwise, an authority would have to investigate all tenders in detail to satisfy itself of the economic viability of each tender, an unrealistic and onerous burden."
> (emphasis added)

169. However, this decision was made under the Public Contracts Regulations 2006 ("PCR 2006"), and not the PCR 2015. What was article 30(6) PCR 2006 had provided: "*If an offer for a public contract is abnormally low the contracting authority may reject that offer but only if it has....*" requested an explanation and so on (emphasis added). This Regulation implemented Directive 2004/18/EC Article 55(1) which stated "*If, for a given contract, tenders appear to be abnormally low in relation to the goods, works or services, the contracting authority shall, before it may reject those tenders, request in writing details of the constituent elements of the tender which it considers relevant*". It can therefore be seen that there is something of a difference in wording between the Regulations and the Directive at that time, and the later version.

170. SRCL submitted that the language of that earlier iteration did not support the conclusion reached by Flaux J in ***Varney,*** but in any event the CJEU subsequently expressed the duty in general terms which were not restricted to a proposed decision to

reject. This is said by SRCL to be clear from a passage in C-599/10 ***SAG ELV Slovensko*** [2012] ECR I-10873 where at [28] it was stated:
"*.... the European Union legislature intended to require the awarding authority to examine the details of tenders which are abnormally low, and for that purpose obliges it to request the tenderer to furnish the necessary explanations to prove that those tenders are genuine*".

171. The case cited by SRCL does not support that conclusion in my judgment. In that case, the issue was both abnormally low tenders and tenders rejected for lack of compliance with specifications, but without requests for clarification. The contracting authority (which was in the State of Slovakia) had sought clarification of abnormally low prices in two tenders. The responses were considered inadequate and these two tenderers were excluded. The questions referred to the court were (so far as relevant to this case) "the Court was required to understand the questions referred to it, taken as a whole, as seeking to ascertain to what extent contracting authorities, when they took the view (in a restricted public procurement procedure) that the tender submitted by a tenderer was abnormally low or imprecise or did not meet the technical requirements of the tender specifications, may or must seek clarification form the tenderer concerned, having regard to arts 2 and 55 of Directive 200/18" (at [H10]).

172. It can therefore be seen that the issue before the court on that occasion was not precisely whether a contracting authority had to seek clarification of an abnormally low tender *only* if it was considering rejecting that tender. Indeed, this can be readily seen from [H12] which summarises [27] to [29] of the judgment. This states expressly:
"Under art.55 of the Directive, if, for a given contract, tenders appeared to be abnormally low in relation to the goods, works or services, the contracting authority was required before it may reject those tenders to "request in writing details of the constituent elements of the tender which it considers relevant".
(emphasis added).
The question of clarification prior to rejection is clear from the wording of article 30(6) PCR 2006 which expressly stated: "*If an offer for a public contract is abnormally low the contracting authority may reject that offer but only if it has.....*" (emphasis added).

173. Even if I am wrong about that, the decision in ***Slovensko*** was given without an Advocate General's Opinion, and has been subject to academic criticism. Professor Arrowsmith described the reasoning as "brief and fallacious" at 7-254 of ***The Law of Public and Utilities Procurement: Regulation in the EU and the UK*** (3rd ed. 2018) Sweet & Maxwell. I deal with the status of her views below at [180] to [182].

174. The decision of Flaux J in *Varney* was consistent with a number of European authorities, such as that of the General Court in case ***T-4/01 Renco Spa-v-Council*** (Directive 93/37/EEC) (on the previous iteration of the Directive) and case ***TQ3 Travel Solutions Belgium SA-v-Commission*** (Financial Regulation based on Directive 92/50/EEC). It has also since been followed in Northern Ireland in ***Resource (NI) Ltd v Ulster University*** (on the same PCR 2006) and in England and Wales in ***NATS (Services) Ltd v Gatwick Airport Ltd*** [2014] EWHC 3728 (TCC) a decision of Akenhead J on the Utilities Contracts Regulations 2006.

175. This decision of Flaux J (as he then was) did not however agree with that of Arnold J in ***Morrison Facilities Services Ltd.-v-Norwich City Council*** [2010] EWHC 487 (Ch).

In that case, Arnold J had found that there was a duty to investigate, whether the intention of the contracting authority was to reject the apparently abnormally low tender or not.

176. I would, absent the change of wording between the two versions of the Regulations, have preferred and followed the judgment of Flaux J in ***Varney*** to that of Arnold J in ***Morrison***. This is for the following reasons:

1. I consider that it is plainly right on the wording of the Regulations then in force and the Directive. The phrase "*may reject that offer but only*" in the Regulations and the phrase "*before it may reject those tenders*" in the Directive are there for a reason. The reasoning of Flaux J gives these phrases their natural meaning.
2. The case of ***Varney*** is later in time than that of ***Morrison***. This is a relevant consideration when two judgments from courts of co-ordinate jurisdiction are inconsistent. This is clear from the judgment of Lord Neuberger in ***Willers v Joyce (No.2)*** [2016] UKSC 44 at [9] where he said:

"So far as the High Court is concerned, puisne judges are not technically bound by decisions of their peers, but they should generally follow a decision of a court of co-ordinate jurisdiction unless there is a powerful reason for not doing so. And, where a first instance judge is faced with a point on which there are two previous inconsistent decisions from judges of co-ordinate jurisdiction, then the second of those decisions should be followed in the absence of cogent reasons to the contrary: see ***Patel v Secretary of State for the Home Department*** [2013] 1 WLR 63 at [59]".

3. Finally, there are other associated reasons for preferring ***Varney***. Although ***Varney*** is a first instance decision, Flaux J is no longer a first-instance judge. Further, although ***Varney*** went to the Court of Appeal (and that judgment is at [2011] EWCA Civ 708), the passages to which I have referred above were not the subject of that appeal.

177. However, the 2015 Regulations and the later version of the Directive are no longer the same as the wording of the ones under consideration in ***Varney*** or ***Morrison***. They also have practically no difference in phraseology between Regulation and Directive. The relevant EU provision for dealing with abnormally low tenders is now contained in Article 69(1) of Directive 2014/24/EU which provides:

"Contracting authorities shall require economic operators to explain the price or costs proposed in the tender <u>where tenders appear to be abnormally low</u> in relation to the works, supplies or services."

(emphasis added)

178. This has been implemented in this jurisdiction by Regulation 69(1) of the PCR 2015 which has almost identical wording to the Article. The expression "before it may reject those tenders" no longer appears either in the Article or in the implementing Regulation.

179. There are therefore the following two points that arise for consideration. They are:

1. Does the change in wording between the PCR 2006 and PCR 2015 mean that the contracting authority is now under a duty to investigate tenders that appear abnormally low, or does this arise only (as on the previous wording of the Regulation and earlier Directive considered in ***Varney***) when the contracting authority wishes to reject such a tender?
2. Does the court, when it is considering a challenge to a contracting authority's conclusion of whether a tender appears to be abnormally low, substitute its own

objective view for that of the authority, or is the question whether the authority's conclusion is manifestly erroneous?

180. It is relevant at this point to deal with the standing of the views of academics in this jurisdiction. Professor Arrowsmith is a noted academic on procurement law. Her text book is the leading academic authority in this field. During closing submission there was some debate about the extent to which academic views are to be relied upon in the 21st century courts of England and Wales. The historic common law convention was that academic views could only be cited as authority in courts if the author was dead, and if the work in question had achieved a level of respectability in any event. There was also, perhaps, a third requirement (although it could be seen as a subset of the second) that the author themselves had to have been either a judge or practitioner. Professor Arrowsmith is very much alive, and has a high reputation as an academic in the field of procurement law. I am indebted to Mr Coppel for drawing to my attention the text of a lecture given by Lord Neuberger in July 2012 at the Max Planck Institute when he was Master of the Rolls. The title was "Judges and Professors – Ships passing in the night?" and in it he also considered some interesting reasons proposed over the years for the common law rule (or hostility) to academic views.

181. The paper available of this lecture is highly interesting, and does include discussion of what may have been a compelling reason for the rule or convention. A dead author cannot change their mind. Although Lord Neuberger was not convinced that this was a good reason, it does have the merit of certainty. If Professor John or Jane Doe (as an American might call him or her) could be an authority for proposition X whilst alive, and then in later (and perhaps more reflective) years became convinced of proposition Y (contrary to proposition X), how could they be authority for either? The conclusion of Lord Neuberger is clear however – the convention has now been eroded, and there is a dialogue between judges and academics to the benefit of all. Textbooks of living authors are regularly cited in court – they do not have the same status as judgments under the doctrine of stare decisis, but they are persuasive and the views of an academic such as Professor Arrowsmith do have weight in this arena. I have previously cited her work in other judgments, for example in ***EnergySolutions EU Ltd v Nuclear Development Authority*** [2016] EWHC 1988 (TCC) at [237].

182. Her views are highly persuasive. She refers to the current version of the Regulations and Directive in this respect as the "Codification of Slovensko". The best summary of her views is at 7-267 where she states:
"The 2014 Public Procurement Directive deals with abnormally low tenders in Art.69. Unfortunately, this provision does not take the opportunity offered by the new directive to clear up the uncertainty over the issue of whether there is generally a duty, or merely a power, to reject a tender that presents a certain risk of non-completion. Rather, it compounds the confusion that currently exists.
In this respect the 2014 directive simply writes into legislation the statement in *Slovensko* that there is a duty to investigate an abnormally low tender, without limiting this to the situation in which the contracting authority wishes to reject the tender".

She also identifies, entirely correctly in my view, that the context of the provisions and the language of the recitals contains indications that there is no duty to reject simply because there is an unacceptable risk of performance, but merely a power to reject. She postulates three potential interpretations of Article 69.

183. These are identified at 7-268:

1. A duty to investigate in all cases, and a duty to reject when a tender presents an unacceptable risk of default.

2. A general duty to investigate but no general duty to reject tenders based on risk of non-performance. That duty only exists as expressly stated in Article 69, namely non-compliance with certain legislation in the specified fields of environmental and social legislation. She describes this second potential interpretation as to be preferred to the first.

3. This is that "although the language of the duty to investigation is no longer expressly limited to the case in which the authority wishes to reject a tender, such a limit is to be implied in light of the purpose for which the provision was originally introduced, and that – as with the second interpretation – there is no duty to reject any tender, except under the explicit duty to reject tenders that are abnormally low because of failure to comply with the specified social and environmental legislation". However, she states that this interpretation "may be difficult to justify" in light of the changes to the language of the provision and the fact that the change appeared to be a response to the ***Slovensko*** ruling.

184. It should be noted that the ***Slovensko*** ruling was made between the time of the Commission's original proposal for the later version of the Directive, and its adoption. Professor Arrowsmith identifies that the duty to investigate was added at a late stage to the Directive and without proper consideration of its implication.

185. I consider that the correct answer to the first point in [183] above, and which of the three alternative interpretations is the correct one, can be discerned in the following way. The starting point is to consider the matter purposively. The Regulations exist in order to give effect to the EU principles of equivalent treatment, fairness and transparency and to encourage open competition for the supply of services by contracting authorities in member states, which benefits society by leading to economic provision of those services. A tender cannot be the most *economically advantageous* tender (what is sometimes referred to as a MEAT tender) if it is abnormally low. It is not economically advantageous to have a tender price so low that there is a realistic and substantial risk of non-performance by the tenderer (or unlawful performance, in the sense that the tenderer can only comply with the terms contracted for by breaching other legal obligations such as payment of the minimum wage or observance of other regulations), or that low price is achieved as a result of unlawful state aid. The concepts of a tender being "economically advantageous" or "abnormally low" are mutually exclusive.

186. By definition, the concept of whether a tender is abnormally low only arises in the context of consideration of whether that tender should be accepted.

187. Further, the obligations imposed upon a contracting authority – which is a public body -- must be proportionate and reasonable. These too are also principles of EU law. If, in the process of considering which is the most economically advantageous tender, a contracting authority considers that one or more of the tenders is or are abnormally low, that conclusion must be tested or investigated. Such testing, or investigation, does not arise in the abstract. It arises as part of the fair and transparent process whereby all tenderers are treated equally. A tenderer might have a perfectly reasonable and feasible

explanation for its tender, which was so much lower than its competitors. This explanation may never see the light of day unless the explanation is sought from the tenderer.

188. It would be unreasonable and disproportionate to impose upon a contracting authority such a duty in the abstract. Firstly, it would require that authority to form its own free-standing view of what would, or could, constitute abnormally low. There would be potential situations (such as here) where all the tenders in a particularly low and narrow grouping would stand out, in distinction to the highest one. Would this mean that the duty imposed upon the contracting authority would be to investigate all the tenders, save the highest one? Adoption of Professor Arrowsmith's first alternative, a duty to investigate all such tenders, and a duty to reject, would create an entirely separate and secondary round of investigation in many (if not all) cases. That cannot have been the intention either of the Directive or the implementing Regulations. The first alternative can be safely rejected.

189. Nor do I consider the second alternative to be the correct one. If there were a general duty to investigate, this would suffer from the same objections as the first alternative in terms of the added (and potentially disproportionate) burden upon contracting authorities. Further, if that general duty went hand in hand with a discretion whether tenders should be rejected based on the risk of non-performance (which is the only sensible way of interpreting the lack of a general duty to reject tenders based on risk of non-performance) then that would introduce the risk of arbitrariness into a process designed to avoid precisely that. Why should a particular tenderer, considered to have submitted an abnormally low tender, have that tender rejected on those grounds (after explanation by the tenderer), whereas another tenderer, who had also submitted an abnormally low tender, could have that tender accepted?

190. It is axiomatic that the contracting authority must treat all tenderers equally. There is a general duty to reject, but this duty only exists as expressly stated in Article 69, namely non-compliance with certain legislation in the specified fields of environmental and social legislation. The lack of express statement of such a duty in respect of all abnormally low tenders is telling, and in my judgment justifies the conclusion that there is no such general duty. It is made clear when one considers the wording of Recital 103 to the Directive, which states "Where the tenderer cannot provide a sufficient explanation [for an abnormally low tender] the contracting authority should be entitled to reject the tender. Rejection should be mandatory in cases where the contracting authority has established that the abnormally low price or costs proposed results from non-compliance with mandatory Union law or national law comparable with it in the fields of social, labour or environmental law or international labour law provisions".

191. The expression "should be entitled to reject" cannot be equated with an obligation to reject, contained in the term "rejection should be mandatory in cases where....." The recital states that rejection should be mandatory in certain cases. It therefore follows that it cannot be mandatory in *all* cases. If there is no express obligation to reject such tenders, there is no sensible reason to impose upon contracting authorities such as NHSE a duty to seek explanations in all cases either.

192. The Regulations have to be interpreted in accordance with the Directive. This was plainly in the mind of draftsman when Regulation 69(4) was drafted, as this states:

"The contracting authority may only reject the tender where the evidence supplied does not satisfactorily account for the low level of price or costs proposed."
(emphasis added)

193. I consider that there is no basis for imposing a general duty to investigate such tenders in all cases. If, in any particular competition, the contracting authority considers that a particular tender has the appearance of being abnormally low, *and* the contracting authority considers that the tender should be rejected for that reason, there is a duty upon the contracting authority to require the tenderer to explain its prices. Absent a satisfactory explanation, it is obliged to reject that tender as expressly stated in Article 69, namely non-compliance with certain legislation in the specified fields of environmental and social legislation. Otherwise, it is entitled to reject it if the evidence does not satisfactorily account for the low level of price, but it is not required to do so.

194. This is the third of Professor Arrowsmith's alternatives and in my judgment it is the correct one. It therefore follows, and I find, that the relevant provisions of PCR 2006 and PCR 2015 are to be interpreted in the same way as one another, and ***Varney*** remains good law.

195. I appreciate that this means that the change of wording between the two iterations of the Directive has no practical effect for these purposes. However, as Professor Arrowsmith postulated in her third alternative at [183] above, the limitation upon the duty to seek an explanation is implicit in the purpose of the provision.

196. Given my view on the effect of the previous version of the regulations and Directive, my conclusion remains the same even under the different wording of the PCR 2015. The later regulations do not mandate a different approach.

197. I also consider that the court's function in a challenge such as this one is not to substitute its own view for that of the contracting authority on whether a tender has the appearance of being abnormally low. The correct approach, which I consider to be entirely consistent with the approach of the courts to procurement challenges generally and the principles summarised in ***Woods v Milton Keynes,*** is only to interfere in cases where the contracting authority has been manifestly erroneous. The courts, in so many cases over the years in this field, have made it clear that their function is not to reconsider and remark every evaluation of each tender in which a challenge is brought. In matters of judgment, the contracting authority has a margin of appreciation. In matters of evaluation, only manifestly erroneous conclusions or scores will be reconsidered. This approach has its parallel in other public law fields, for example decisions of Ministers. In general terms in judicial review, the test the court applies is not whether it agrees with the decision of the Minister in question, but rather, whether the decision was reached lawfully by taking account of all relevant matters, and not taking into account irrelevant ones.

198. SRCL also relies upon some judgments of the CJEU to justify a submission that it is open to an unsuccessful bidder to complain that an authority has not properly discharged its duty to investigate and then reject an abnormally low tender. This is said to have been the factual position in C-568/13 ***Data Medical Service*** ECLI:EU:T:2014:2466. That case concerned an earlier version of the Directive, and the competition concerned a contract for processing data for external quality control in

relation to medicinal products. The Directive in question was 92/50/EEC, the predecessor to the 2004 Directive. A University hospital, called the Azienda, won the procurement with a price 59% lower than that of Data Medical Service, the next lowest tender. One issue was whether as a public entity which had as its exclusive purpose the management of the public hospital in Florence, the Azienda could bid at all. Proceedings in Italy were stayed and the Consiglio di Stato referred two questions to the CJEU for determination, which are identified at [29] in the judgment. The second question was whether EU law on public procurement permitted the Azienda, which received public funding on a permanent basis and was directly contracted to provide a public service, could derive from that situation a decisive competitive advantage over competitors, as demonstrated by the size of the discount offered in that case.

199. The answer to that question at [51] was that national legislation was not precluded by EU law from allowing a public hospital from participating in a tendering procedure to submit a tender which could not be matched by competitors as a result of the public funding received. The Court also stated "However, in the course of the examination of the abnormally low character of a tender on the basis of Article 37 of that Directive, the contracting authority may take into consideration the existence of public funding which such an entity receives in the light of the option to reject that tender."

200. This case does not assist SRCL on the issues in this case.

201. Nor do the other judgments in what were rightly described as a series of the General Court assist SRCL either. These judgments were ones in which challenges were entertained by unsuccessful bidders to the decisions of EU institutions not to reject tenders on abnormally low grounds, and included T-392/15 ***European Dynamics*** ECLI:EU:T:2017:462; T-90/14 ***Secolux*** ECLI:EU:T:2015:772 (in French only, although an unofficial translation was provided) and T-74/15 ***European Dynamics Luxembourg*** ECLI:EU:T:2017:55.

202. SRCL submitted that the PCR 2015 impose a duty upon contracting authorities to investigate and consider whether a tender may be abnormally low before accepting it (my emphasis). That was said to require the seeking of explanations for its tender price from the bidder in question where, upon initial examination, a tender appears abnormally low. I reject that interpretation of the Regulations for the reasons explained above.

203. The law in this area is therefore, in my judgment, clear. The principles set out in out in ***NATS (Services) Ltd-v-Gatwick Airport Ltd*** at [27] are also therefore still of application, notwithstanding they were set out in relation to the earlier version of the Regulations and the earlier Directive. In particular, the Regulations do not require the contracting authority to determine whether each tender it receives has the appearance of being abnormally low. What they do is address the scope of the contracting authority's obligations if the authority does determine that a particular tender is abnormally low. If that occurs, the authority may reject it, but it has to give the tenderer the opportunity to explain or justify it.

204. There is no definition of what the words "abnormally low" mean. However, the expression must encompass a bid which is low (almost invariably lower than the other

tenders) and the bid must be beyond and below the range of anything which might legitimately be considered to be normal in the context of the particular procurement.

205. A contracting authority has a discretion as to what test it uses for identifying what may be an abnormally low tender and an "anomaly threshold", such as a comparison of the consistency with other tenders, is a perfectly permissible approach as a matter of EU law. This was the approach adopted in ***Varney*** and was entirely permissible in that case. I consider such an approach to remain permissible.

206. There is one further passage set out in in ***NATS*** which I wish to emphasise. This contains statements that remain of wide application and I cannot improve upon them:

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

207. I consider that courts should be very slow to interpret the Regulations implementing the Directive as imposing some wide ranging obligation on the contracting authority to determine whether there is or might be an abnormally low tender. A second level of investigation, either before or after an evaluation, is not required as a matter of course or routine. The obligation, such as it is and in the circumstances that I have explained, only arises in the circumstances identified above and even then only after a conclusion has been reached by the contracting authority that a bid has the appearance of being abnormally low. Secondly, the concept of considering whether there is independently some "manifest error" on the part of a contracting authority in failing to appreciate that there was or might have been an abnormally low tender shows that, in the majority of cases, the conclusion of the contracting authority will be given substantial weight by the court. Going further, as SRCL seek to do in this case, risks placing an impossible burden on contracting authorities, and stifling true commercial competition. As Akenhead J stated in ***NATS***, particularly for an economic operator attempting to break into a market or increase its market share, attractively low pricing may be the only way that this can be done. If the courts interfere unduly with this operation of market forces, the advantages and aims of open and fair competition will be lost.

208. Turning therefore to the facts of this case, I consider that there was nothing in the change of wording of the Directive and Regulation 69 that imposes a positive

obligation upon NHSE in this case to investigate any allegedly abnormally low tender. The first step is to consider whether there was anything in the HES tender that suggested it was abnormally low. In my judgment, there was not. The winning tender in the bid for Wave 6 was in the same region as all the other winning bids in the other five Waves, including (somewhat ironically) the winning bids of SRCL itself, before it changed its strategy and imposed its own artificial margin of minimum of 25%.

209. The fact that the Sharpsmart bid, compiled in a very different way, and using different considerations and economic business factors, was so very close to the bid of HES, is a highly relevant consideration but is not determinative. Even in the absence of a correspondingly similar bid from a competitor, my conclusions on the HES bid would be the same. In order to be clear, not only do I not consider that the conclusion by NHSE on this matter is free from manifest error, but I consider it was the correct conclusion in any event.

210. SRCL cannot get around this insurmountable obstacle. In my judgment, the claim brought by SRCL in relation to an allegedly abnormally low tender falls at this hurdle. The different factors set out at [20] in ***NATS*** were obviously relevant so far as HES was concerned, as were the other features listed by Mr Pettigrew when he was cross-examined. HES has other contracts in the same geographical area, and he explained that if he had a 30 ton vehicle doing collections in any event for other contracts, the additional cost of collecting extra clinical waste for the Wave 6 contract was very much reduced. This sort of obvious commercial point would affect the HES price very considerably, and was not considered at all by SRCL. Another factor was HES has a waste disposal facility in Scotland. Thus, economic considerations to HES' advantage for the Wave 6 competition (which would not apply to the same degree if the contract were for such services in, say, Cornwall) also applied.

211. SRCL's attack on the HES tender price to demonstrate it was abnormally low focused on rates for particular types of waste, the "gate rate" SRCL charged to customers using SRCL's incineration facilities – which HES did not intend to use and would not be paying - and whether HES would be receiving sufficient profit (the concept of "sufficient" being one peculiarly directed to SRCL's subjective view of what profit HES ought to recover in this respect).

212. The latter point, as argued by SRCL, ignored two important factors. Firstly, HES was trying to improve its market share. It has done well in this respect in the last 15 years and wished to continue to do this. Secondly, this contract was for a 1 year term. As Akenhead J stated at [20] in ***NATS:***
"One needs to consider how, commercially, a tenderer, which is not the incumbent provider or not the market leader, will ever get a contract unless it puts in attractively low prices."

213. I find that neither the HES nor Sharpsmart tenders appeared to be abnormally low.

214. Further, and in any event, and even though there was no obligation upon NHSE to perform the investigation demanded by SRCL, NHSE did investigate the tender of HES. I find that the conclusions of Mr Smith in this respect are unimpeachable. His conclusion in his report stated:

"Due to the inclusion of direct and indirect overheads, unit costs which do not appear to be abnormally low and a profit margin included in the bid there is no evidence that the service provision will be fundamentally impacted by the cost of the HES bid."
Mr Smith performed his investigation correctly, considering all relevant matters and not considering any irrelevant matters, and he also came to the correct conclusion. I find that the HES winning tender did not have the appearance of being abnormally low, nor was it abnormally low. There was nothing in the HES bid to suggest that it was unsustainable and/or likely to prevent HES from fulfilling its commitments made in the quality section of the tender evaluation of the ITT. There is nothing in any of the different points relied upon by SRCL in this respect.

215. In T-74/15, the General Court acknowledged that the claimant was entitled to challenge the Commission's tender award decision on the grounds that the winning bid was abnormally low and noted that where such a challenge was made, the authority was obliged to explain why it did not consider the winning bid to be abnormally low (§49):
".. In order to provide a sufficient statement of reasons for that aspect of the selected tender, the contracting authority must set out the reasoning on the basis of which, on the one hand, it concluded that, because of its principally financial characteristics, such an offer complied with the national legislation of the country in which the services were to be carried out in respect of the remuneration of staff, contribution to the social security scheme and compliance with occupational safety and health standards and, on the other, it determined that the proposed price included all the costs arising from the technical aspects of the selected tender."

I do not however consider that this is any authority at all for imposing the wide-ranging burden uNHSE in this case to justify how or why HES could or would provide the service economically.

216. I would go further in this case and say that the whole attack by SRCL on the outcome of the Wave 6 auction, and the complaints that the winning bid (and that of Sharpsmart) were abnormally low, have been contrived by SRCL. The likelihood is that had SRCL behaved as it had in Waves 1 to 5, its own bid would not have been markedly dissimilar from those of its two competitors. SRCL took a conscious decision not to bid on a commercial basis to win the contract for Wave 6, but fix its margin at an artificially high figure of 25%, and try to engineer a situation where the other bids were far lower than its own, in order to justify an attack on the outcome of the auction using the "abnormally low tender" approach.

217. These proceedings have had the effect of suspending the award of the Wave 6 call-off contract, with the consequent continuing supply of the services by SRCL on the rather more profitable basis of a 52% margin. This state of affairs has continued for over one year, and longer than otherwise would have been the case due to the lack of availability of one of SRCL's witnesses for the trial on 30 April 2018. It has also had the consequential effect upon NHSE that it suspended *all* of its Call-Off contract auctions for Waves 7 and onwards. Whether this was a consideration in SRCL creating what it termed in its own strategy meeting of March 2017 a "compelling event" is not known. It will however have been a commercial side-effect beneficial to SRCL, whether by accident or design.

XI How TUPE was dealt with

218. This area of challenge by SRCL can be dealt with far more simply. The correct starting point is to consider the terms of the Framework Agreement and the Call-Off ITT for Wave 6 itself. These identify the rules of the competition. These must be observed by NHSE, and also must be applied in accordance with the principles to which I have already referred; ***EnergySolutions EU Ltd v Nuclear Development Authority*** [2016] EWHC 1988 (TCC) at [235] to [243]. These principles apply equally under the PCR 2015 as they do under the PCR 2006, which were the ones in issue in that case.

219. In general terms only, TUPE operates in such a way that employees who were employed by an incumbent *may* transfer across to a successful bidder, if that bidder was not the incumbent provider, on the basis of the legislation. If that successful bidder did not require (say) five employees who had been previously employed with the incumbent and who had transferred across to it, and the successful bidder wished to make them redundant, then the successful bidder would be the entity responsible for the redundancy costs. Such employees would still be entitled to their redundancy rights (length of service and so on) that had accrued with the incumbent. In other words, the employees would not be prejudiced by the transfer of undertaking from the incumbent to the successful bidder. That is a very brief outline of what TUPE is. The relevant regulations are the Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI2006 No.2246).

220. The Framework Agreement stated as follows in section 4:

"4. Call-Off Rules

4.1 A Participating Authority [ie NHSE] may run a Competition and issue a Call-Off ITT on its own behalf (in respect of its own requirements) and/or on behalf of other Participating Authorities (in respect of such other Participating Authorities' requirements)

4.2 Participating Authorities shall, when running a Competition, issue a Call-Off ITT to each of the suppliers who have been appointed to the Framework Agreement save that Participating Authorities shall not be obliged to issue a Call-Off ITT to the Suppliers where the Suppliers have indicated in their response to the Framework ITT that they are not capable of performing the relevant Statement of Requirements.

4.3 The Suppliers may conduct a Competition to award a Call-Off Contract by issue of a Call-Off ITT under this Framework Agreement either:

4.3.1 on its own behalf (provided that it is a Participating Authority); or

4.3.2 on behalf of one or more Participating Authorities;

(including in both cases for the avoidance of doubt where the Suppliers are or include a commissioning support unit of NHS England) provided that effective measures are implemented and maintained that manage and remove any potential conflict of interest which may arise in relation to or out of the conduct of such Competition. Such steps shall include, but not be limited to, the Supplier's ensuring that they do not themselves participate in the relevant Competition.

4.4 A Statement of Requirements may only relate to Services failing within a single Lot under the Framework Agreement.

4.5 Participating Authorities and Suppliers shall comply with the obligations and expectations of the Cabinet Office Statement of Practice "Staff Transfers in the Public Sector" (as amended) ("COSOP") and Fair Deal for Staff Pensions (2013).

4.6 The transfer of staff in connection with the award of Call-Off Contracts shall be governed by TUPE, or, if TUPE is considered not to apply in any particular circumstances, by COSOP. In line with the principles of TUPE, the terms and

conditions (including continuity of service) of transferring staff shall be protected and staff must be treated no less favourably than had TUPE applied.
4.7 As provided for by COSOP, neither Participating Authorities nor the Suppliers shall orchestrate a non-TUPE situation."

221. The document referred to in paragraph 4.5, namely the Cabinet Office Statement of Practice "Staff Transfers in the Public Sector" (as amended) ("COSOP") essentially imposes on public bodies the requirement to deal with transfers in a responsible way. In other words, public bodies should not artificially engineer or be parties to situations that avoid TUPE. If TUPE does not apply, then COSOP does or should. The document starts with three "Guiding Principles", namely that the Government is committed to the public sector being a good employer; modernisation of public services is pragmatic, and may result in the private sector being used; and staff are entitled to clarity and certainty, and staff involved "in all such transfers are treated fairly and consistently and their rights respected".

222. The Call-Off ITT stated specifically the following:
"2. IMPORTANT INFORMATION
2.2 This ITT and any supplementary documents should be read as a standalone suite of documents. Subsequent documents may be published and will form part of this ITT if required.
2.5 This ITT is made available in good faith and is not intended to provide the basis of any investment decision or recommendation. Nothing in this ITT is or should be relied on as a promise or representation. No warranty is given as to the accuracy or completeness of the information contained in it and any liability or any inaccuracy or incompleteness is therefore expressly disclaimed by NHS England and its advisers."
And in section 6 TUPE was dealt with specifically:
"6. TUPE AND PENSIONS
NHS England does not anticipate that TUPE will apply to transfer staff from any existing service provider to any bidder. However NHS England is not in a position to give any warranty in respect of TUPE and bidders should rely on their own assessment of the likelihood that TUPE might apply".
(Emphasis added)

223. I consider these terms to be most clear. NHSE expressly did not warrant the accuracy of any information at all within the ITT. It also stated that it anticipated that TUPE would not apply. However, bidders were clearly told that it was for them to make their own assessment of whether TUPE might apply or not. In other words, and in commercial terms, it was for each bidder to consider itself how to price the risks of TUPE applying and increasing that bidder's costs for its tender bids. There is nothing in those statements in the ITT that are either inconsistent with TUPE, or inconsistent with COSOP.

224. SRCL wrote a letter to Kevin Bates of NHSE dated 17 March 2017 in which various complaints were made. At that point the auction for Wave 6 was due to take place on 31 March 2017. The letter called for a suspension of the auction process, and as part of achieving that end raised concerns about TUPE, alleging inconsistency and lack of clarity "in the Framework documents" regarding TUPE. The letter stated:
"We do not understand how NHS England expects TUPE costs and liabilities to be treated in the call-offs, or why TUPE data is not sought and provided to bidders in each

call-off. It seems to us that TUPE will apply to some extent in every transfer of incumbency pursuant to a call-off, whether or not the various parties wish it to."

225. Whether TUPE did, or did not apply, to any transfer of staff that may take place is a matter of law. In my judgment, there was no lack of clarity at all. However, SRCL managed to run this argument and, effectively, cause concern at NHSE. The auction was delayed and TUPE data was sought. Clarifications about TUPE were issued by NHSE, stating that "TUPE costs would be "treated outside of the [Wave 6] further competition process and therefore do not require factoring in when bidding" in the auction. Objections to this communication then continued from SRCL, stating that this would be unlawful post-auction negotiation with a successful bidder and was not permitted.

226. This saga led to the final clarification coming from NHSE on the morning of the auction itself. This stated the following, inter alia:
"To establish whether there are potential TUPE risks we have contacted all framework suppliers plus any incumbent suppliers that we have been made aware of. As a result of our investigations we have concluded that, to the best of our knowledge, there are no further TUPE risks other than those disclosed. However, as previously stated we cannot warrant the TUPE information provided and nor have we carried out any form of validation of that information. Bidders must form their own opinions in relation to this information, based upon their own experience.
Actual TUPE transfer details will need to be clarified between incumbent and successor in accordance with the rules within the TUPE legislation post-completion of the auction. However, there will be no change to the agreed auction price as part of this process. Where additional costs are incurred by the successor as a result of any TUPE transfers taking place in accordance with TUPE legislation, such costs will be borne by the successor. This is the basis upon which each bidder should price the services and participate in the auction. As the TUPE clarification process is just clarification and has no impact upon price or other contract terms it will not result in any material change to the call-off contract terms post contract award."
(Emphasis added)

227. The term "such costs will be borne by the successor" – which clearly means that any TUPE costs would have to be borne by the winning bidder – is most clear. NHSE made this clear prior to the auction, to all of the bidders. It was for each bidder to decide how, if at all, it wanted to approach potential TUPE liabilities. That was a commercial decision for each of them.

228. SRCL's case on TUPE is best summarised from paragraph 27 of the Particulars of Claim. It is alleged that, in breach of its obligations under the Regulations, NHSE:
"encouraged bidders to submit prices on the basis that TUPE would not apply so as to transfer relevant staff of the Claimant to an incoming bidder on their existing pay and other terms and conditions of employment and informed bidders that they need not take into account the impact of TUPE obligations in the prices submitted".
The pleading continues that:
"The result of that conduct was to put the Claimant at a disadvantage in the competition for the contracts in that only the Claimant's prices took into account the true cost of employing staff to perform the contracts."

229. I consider this plea by SRCL to be unarguable. Firstly, as set out above and as clearly shown from the Framework Agreement and the Call-Off ITT, NHSE did not do what SRCL says it did, and did not encourage bidders to submit prices on the basis that TUPE would not apply. NHSE did no such thing. The Call-Off ITT for Wave 6 was entirely clear. Secondly, NHSE did not tell bidders that they "need not take into account the impact of TUPE obligations in the prices" they submitted in the auction. NHSE stated that any TUPE costs would be borne by the successful bidder. This is entirely different to how SRCL portray, in the Particulars of Claim, the approach to TUPE.

230. Thirdly, far from putting SRCL at a disadvantage over TUPE, if anything SRCL engineered for itself an advantage on this issue. After SRCL raised the TUPE issue, NHSE sought information from the incumbents about existing staff and their involvement with the services in the region to which Wave 6 related. SRCL obviously had such information in any event as the incumbent – were it to win in the auction, SRCL would incur no or limited TUPE costs as it employed these staff already. SRCL took this opportunity to produce misleading information about the extent of staff transfers that would occur. This was potentially to overstate the extent (and hence cost) of TUPE liabilities that a winning bidder would inherit. This had the desired effect in at least one case, because Cannon Hygiene (a Framework Agreement tenderer) decided not to participate at all in the Wave 6 auction, specifically due to the content of the TUPE information provided by SRCL.

231. This tactic by SRCL did not succeed with either HES or Sharpsmart, however, as each of these companies were wise to such tactics and simply did not believe what SRCL produced. As Mr O'Neill of Sharpsmart said in his evidence "we've seen this before". There is nothing in the Call-Off ITT, or the communications from NHSE on TUPE prior to the auction being held, that was unlawful in respect of TUPE, or that failed to comply with either TUPE and/or COSOP. The bidders were all told that any TUPE costs would have to be borne by the successful bidder outside of the prices bid in the auction. That was entirely clear and proper.

232. Therefore, I would dismiss the challenge brought by SRCL in respect of TUPE in any event, regardless of my findings on limitation.

XII Answers to Agreed Issues

233. The Answers to the Agreed Issues are therefore as follows:

Treatment of TUPE

234. Issue 1. Did the Defendant encourage bidders to submit prices on the basis that the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") would not apply and, if so, did the Defendant act unlawfully in so doing?
Answer: No, it did not. NHSE did not act unlawfully in respect of TUPE.

Regulation 69 PCR

235. Issue 2. Did the Defendant act in breach of reg. 69(1) of the Public Contracts Regulations 2015 by failing to require the lowest priced bidder ("**HES**") to explain the prices proposed in its winning bid in the Wave 6 eAuction?
Answer: No, it did not.

236. Issue 3. If so, would the outcome of a reg. 69 explanation by HES have been that the Defendant would in fact have rejected HES's bid or would have been required by law to do so?
Answer: This does not arise. However, if it did, the answer to this issue would be No. The tender bid by HES which won the auction was not abnormally low, and any further explanation by HES would have further demonstrated that. Even if it were, NHSE would not have been required to reject the bid as a matter of law. Rejection is not mandatory for an abnormally low bid save for the circumstances set out in Regulation 69(5).

237. Issue 4. If so, would the Defendant have been required to seek a reg. 69 explanation from the second-placed bidder Sharpsmart?
Answer: This does not arise. However, on the evidence before the court, the lowest bid that was submitted by Sharpsmart did not have the appearance of being abnormally low either, nor was it abnormally low.

238. Issue 5. If so, would the outcome of that reg. 69 explanation by Sharpsmart have been that the Defendant would in fact have rejected Sharpsmart's bid or would have been required by law to do so?
Answer: This does not arise. However, if it did, the answer to this issue would be No. The Sharpsmart bid was not abnormally low, and any further explanation would have further demonstrated that. The scope of NHSE's obligations in law are the same as under Issue 3.

Other illegality arising out of acceptance of winning price

239. Issue 6. Did the Defendant act unlawfully by accepting the bid of HES in circumstances where the price tendered by HES was abnormally low and/or unsustainable and/or likely to prevent HES from fulfilling its commitments made in the quality section of the tender evaluation of the ITT?
Answer: The price tendered by HES was not abnormally low and/or unsustainable and/or likely to prevent HES from fulfilling its commitments made in the quality section of the tender evaluation of the ITT. NHSE did not act unlawfully by accepting the HES bid.

240. Issue 7. If so, had the Defendant acted lawfully in this regard, would it have rejected the bid of HES and also that of Sharpsmart and awarded the contracts to the Claimant?
Answer: This does not arise. NHSE did act lawfully in conducting the auction, and accepting the HES bid.

Limitation

241. Issue 8. Did the Claimant commence proceedings, in respect of the breaches alleged, or any of them, within the 30-day limitation period under Regulation 92(2) of the PCR?
Answer: No, it did not.

242. Issue 9. If not, should an extension of time be granted pursuant to Regulation 92(4) of the PCR?
Answer: No, an extension of time should not be granted. There is no good reason to do so.

XIII Conclusion

243. It can therefore be seen that, even absent my findings on limitation, the claim brought by SRCL would fail. I have considered the merits of SRCL's challenges in any event because the mechanism and approach adopted by NHSE for Wave 6 (for example regarding TUPE) may be adopted for future auctions. It would be regrettable if, having heard full argument in the trial in these proceedings, there were no relevant findings on the substantive issues.

244. Given my findings on this trial dealing with liability and causation there is no remnant of the claim to proceed to a hearing on relief and quantum, and so, apart from consequential matters such as costs, these proceedings will now come to an end.

245. There is one other further matter that arose after the draft judgment was distributed to the parties on 20 July 2018 for the usual suggested typographical corrections. SRCL submitted that the text of the judgment contained reference to SRCLs own confidential matters, and requested that these be included not in the body of the judgment (which would be publicly available), but be instead removed and included in a confidential appendix and therefore kept secret. I invited written submissions on this point, and also heard oral submissions on the day identified for handing down the judgment, namely 27 July 2018, prior to handing this judgment down. [245] to [250] were not therefore included in the draft judgment but have been added after that hearing.

246. The confidential information which SRCL sought to have removed from the draft judgment was the size of its gross profit margin on the incumbent contract and its revenue, together with the slides which set out its thinking, and led to its strategy, concerning the Wave 6 auction.

247. I refused the application to remove these matters and instead include this information in a confidential appendix. Dealing with the two matters separately and in reverse order (the slides, and the financial information), the reasons for refusing the application are as follows. The main point relied upon by SRCL was that these matters were within a confidentiality ring initially, that open justice could be achieved by using a confidential appendix, and (in respect of the financial information) such information was "classically confidential".

248. So far as the confidentiality point is concerned, those arrangements were reached by agreement between SRCL and NHSE (and included in a consent order) but that does not mean that the court cannot properly consider the nature of the information itself, and whether it ought to be included within the judgment or removed. That is a matter for the court, regardless of the arrangements reached on disclosure by the parties.

249. The slides do not contain "classically confidential" information at all, as Mr Coppel recognises, although he argued that SRCL's competitors could be assisted by their contents. In particular, Mr Coppel sought to have the direct quotes removed from the judgment, such as 'create a compelling event' and 'hurt the NHS'. There is nothing remotely confidential in these slides, or in the quotes. SRCL can only be seeking to have such material removed to hide from public view the discussions and sentiments held at that company in relation to the auction process, and their wish to disrupt it. To put this material in a confidential appendix known only to the parties might spare any corporate blushes at SRCL, but would be clearly inconsistent with the principle of open justice. Further, I reject the submission that there is anything in the content of the slides

that could or would assist SRCL's competitors. It is well known that SRCL have brought these proceedings and the auction process is currently suspended. There is nothing in the slides that, in my judgment, qualifies as confidential information at all.

250. So far as the financial information is concerned, this is potentially confidential information in that it concerns financial information of the incumbent contract, and in particular the very sizeable gross margin being achieved by SRCL. It is however included only in the most general and high level terms. The information included in this judgment in that respect is not detailed confidential information such as rate per item, or other properly commercially sensitive matters. The headline information included cannot assist SRCL's competitors. Mr Coppel makes no distinction between historical figures and the gross profit margin sought by SRCL in the Wave 6 auction. NHSE's evidence in the trial was that a decision had already been taken to use the Framework Agreement to obtain better value across the whole country for the disposal of clinical waste. The historic performance of SRCL to date validates that decision, but SRCL's business is not in any way affected by the very general details included in the judgment (in particular at [45]) being made public.

251. In any event, the main thrust of SRCL's attack on the NHSE procurement process was that the winning bid by HES, and the next best bid of Sharpsmart, were abnormally low tenders. This attack was, in large part if not exclusively, based on how much lower these bids were than SRCL's own bid. That was proposed as a benchmark. That bid could only, on SRCL's case, be seen as competitive because the gross profit margin included within it was so much lower than its existing gross profit margin. Further, the very sizeable gross profit margin currently being achieved by SRCL on the incumbent contract is integral to its whole strategy of bidding (or more accurately, not bidding competitively) in the Wave 6 auction, and attempting to persuade or prevent NHSE from holding such auctions. The existing gross profit margin of both SRCL and other incumbents is what drove NHSE to initiate the Framework Agreement and the auction process for services across England in the first place. SRCL's existing margin as incumbent cannot in any way assist its competitors in future auctions for these or other services.

252. Open justice would not be served by putting such matters in a confidential appendix. If anything, it would be damaged.

253. Also, and importantly, this judgment would make very little sense if such matters were completely excised from the judgment. The central thread would be entirely missing. I also consider it to be in the public interest that such matters are included. Any possible disadvantage to SRCL as a result – and I find there would be none in any event – is clearly outweighed both by the principle of open justice, and also by the public interest in the existing arrangements enjoyed by SRCL as incumbent.