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*Judgment: approved by the court for handing down
(subject to editorial corrections)**

Delivered: 06/09/2019

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

Between:

BAM CIVIL LIMITED

and

F P McCANN LIMITED

(BAM/McCANN JOINT VENTURE, EACH ACTING JOINTLY
AND ON OWN BEHALF)

Plaintiffs/Respondents;

and

THE DEPARTMENT FOR INFRASTRUCTURE
(TRANSPORT NI AS ROADS AUTHORITY WITHIN THE DEPARTMENT FOR
INFRASTRUCTURE, FORMERLY THE DEPARTMENT FOR REGIONAL
DEVELOPMENT)

Defendant/Appellant.

Before: Morgan LCJ, Stephens LJ and Deeny LJ

DEENY LJ (*delivering the judgment of the court*)

Introduction

[1] This is an appeal against two judgments of Maguire J relating to the award of contracts for extensive public works known as the York Street Interchange Project in the City of Belfast. In his judgment of 8 August 2018 the learned trial judge identified two significant errors in the assessment of the plaintiffs' submissions to this public procurement competition which were such as to affect the marking of

and, as a result, the award of the contract by the defendant/appellant (“the Department”).

[2] By a subsequent judgment of 26 October 2018 Maguire J quashed the award of the contract to the successful tenderer Graham Farrans JV, which had been a notice party before him.

[3] The Department appeals against that decision and the underlying conclusions of the judge set out in his judgment of 8 August 2018.

[4] By a respondents’ notice of 7 December 2018 the plaintiffs/respondents (“the plaintiffs”) sought an order affirming the order of the judge of 26 October 2018 and contending that the decision of the Department could be struck down for an additional reason.

[5] Mr David McMillen QC led Mr Fletcher for the Department appellant. Mr David Dunlop of counsel appeared on his own for the plaintiffs. We are grateful to counsel for their thoroughly researched and well-marshalled written and oral arguments.

[6] The court has the assistance of an impressive judgment from Maguire J. Therein he outlines the scale of the project contemplated for this well-known traffic bottleneck. It will involve the construction of approximately 5 kilometres of road; the widening and realignment of the Westlink dual carriageway with its junction at Clifton Street; the building of new interchange links providing connection with the M1, M2 and M3; the construction of four new underpasses and numerous retaining walls and the erection and widening of some 6 bridges together with additional slip roads.

[7] The Department, then called the Department for Regional Development, was the public authority responsible for awarding the contracts for these extensive public works. They were to be done by the award of three NEC3 contracts to a single tenderer. The competition was to be held under the Public Contracts Regulations 2015 (“the Regulations”). The Department opted, as advertised by it on 25 November 2015 in the Official Journal of the EU, to use the restricted procedure in accordance with Regulation 28 of the Regulations. Pursuant to that the Department invited three economic operators to submit a tender.

[8] The plaintiffs are two existing entities, BAM Civil Limited and FP McCann Ltd, which have jointly tendered for these contracts. They lost by a narrow margin to the winning tenderer, Graham Farrans JV. The plaintiff in this action the BAM McCann joint venture got a score on price of 30 points compared to 23.56 points for the winning tenderer. The assessment of the quality score gave the winning tenderer 70 points against 61.89 for the plaintiff. That led to an overall assessment score of 91.89 for the plaintiff but 93.56 for the winning tenderer. It is this narrow

margin that leads to the importance of the assessment of two relatively narrow points by the court below and this court.

[9] They lost at the award stage because, they complained, they were marked down on certain questions, unlawfully in their submission.

[10] The judge upheld two of their complaints relating to the award of the contracts. He helpfully summarised his findings at [192] of his judgment:

“[192] The court’s central findings are as follows:

- (a) As regards Question 3-01, it concludes that the EP (Evaluation Panel) in the assessment of the plaintiff’s response did not act consistently with the requirements of transparency and did not adhere to the standards referred to at paragraph [156]. In essence, the court is of the view that the EP did not apply the criteria in a way which reflected a proper appreciation of the terms in which the Question and the associated indicator were cast and which has been discussed above.
- (b) As regards Question 3-02 and indicator 4, it concludes that it should dismiss the plaintiff’s argument that the term ‘Employer’ should be interpreted in a narrow manner. In any event, the court is of the view that the EP’s assessment that the plaintiff’s response lacked detail is not assailable and is well within the margin of appreciation available to it. No manifest error, in short, has been established.
- (c) As regards Question 3-02 and Indicator 6, it finds that the EP’s assessment was manifestly in error as it is of the view that its charge that the plaintiff had not understood the unique nature of the contract as exemplified by the plaintiff’s invocation of VE in the context of phase 2 of the contract has not been established and is not sustainable.”

[11] The plaintiffs have not cross-appealed on the judge’s rejection of their argument as summarised at (b) above. With regard to their answer to question 3-01 which related to bridge construction they were only awarded 4 marks, “*very good*” for their answer against the 5 marks “*excellent*” awarded to the successful tenderer.

With regard to question 3.02 they were marked down for referring to Value Engineering (VE). I will turn to each of these issues in turn.

The law

[12] The law relating to public procurement in the European Union has evolved over the last quarter of a century. The judge quoted extensively from leading authorities both domestically and in the European Court of Justice. We think it unnecessary to repeat all that he set out. A key passage is to be found in the judgment of the ECJ in *Commission v Netherlands* (Case C 368/10) [2012] 3 Cmlr 234.

“109. The principle of transparency implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the notice or contract documents so that, firstly, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and, secondly, the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the relevant contract (see, *inter alia*, Case C-496/99 P *Commission v CAS Succhi di Frutta* [2004] ECR I-3801).

110. As the Advocate General stated in point 146 of her opinion, it must be held that the requirements relating to compliance with the ‘criteria of sustainability of purchases and socially responsible business’ and the obligation to ‘contribute to improving the sustainability of the coffee market and to environmentally, socially and economically responsible coffee production’ are not so clear, precise and unequivocal as to enable all reasonably informed tenderers exercising ordinary care to be completely sure what the criteria governing those requirements are. The same applies, and all the more so, in relation to the requirement addressed to tenderers that they state in their tender ‘in what way [they] fulfil’ those criteria or ‘in what way [they] contribute’ to the goals sought by the contracting authority with regard to the contract and to coffee production, without precisely indicating to them what information they must provide.

111. Therefore, by requiring tenderers, in the specifications at issue, to comply with ‘the criteria of

sustainable purchasing and socially responsible business', to 'contribute to improving the sustainability of the coffee market and to environmentally, socially and economically responsible coffee production' and to state in their tender 'in what way [they] fulfil' those criteria or 'in what way [they] contribute' to the goals sought by the contracting authority with regard to the contract and to coffee production, the province of North Holland established a clause which does not comply with the obligation of transparency provided for in Article 2 of Directive 2004/18."

[13] This decision was quoted with approval by Lord Reed in the decision of the Supreme Court in *Health Care at Home Limited v The Commons Services Agency (Scotland)* [2014] UKSC 49.

[14] These issues have been considered by this court on several previous occasions. In *Clinton v Department of Employment and Learning and Others* [2012] NICA 48 Girvan LJ, delivering the judgment of the court said the following:

"[22] Tenderers must be in a position of equality both when they formulate their tenders and when their tenders are being assessed by the adjudicating authority. Award criteria must not give public authorities unrestricted freedom of choice as to the awarding of contracts. The principle of equal treatment implies an obligation of transparency in order to enable compliance with it to be verified. The criteria must be clearly stated (SIAC Construction Limited v Mayo County Council [2001] ECR I-7725 C-19-11) paragraphs 33, 34, 37, 41 and 45.) The award of public contracts is subject to respect for the principles of the Treaty and the principles deriving therefrom including the principle of proportionality (see recital 2 of the Directive).

[23] The principle of proportionality requires that measures adopted do not exceed the limits of what is appropriate and necessary in order to achieve the objectives sought. Where there is a choice between several appropriate measures recourse must be had to the least onerous (Tideland Signal v European Commission [2002] All ER (EC) 272. The principle of proportionality is capable of applying to the implementation of the terms of a procurement

process (J B Leadbitter and Co Ltd v Devon County Council [2009] EWHC Ch 930 paragraph 55).

[26] The appropriate test to be applied on the question whether a criterion is clear and transparent is that stated by the European Court of Justice in SIAC Construction v Mayo County Council [2002] All ER (EC) 272. The award criterion has to be formulated in such a way as to allow all reasonably well informed and normally diligent tenderers to interpret them in the same way. The obligation of transparency also means that the adjudicating authority has to interpret the award criteria in the same way throughout the entire procedure.

[27] If an authority has not complied with its obligations as to equality, transparency and objectivity then there is no scope for the authority to have a margin of appreciation as to the extent to which it will or will not comply with its obligations. In relation to matters of judgment for assessment the authority does have a margin of appreciation so that the courts should only disturb the authority's decision where it has committed a manifest error. The word *manifest* does not require any exaggerated description of obviousness. Manifest error arises in a case where an error has clearly been made (see Morgan J in Lionel Apparel Systems Limited v Firebuy Limited [2007] EWHC Ch 2179.) In J B Leadbitter and Co Ltd v Devon County Council [2009] EWHC Ch 903 David Richard J stated that: "The court must respect (the authority's) area of judgment and will not intervene unless the decision is unjustifiable. This is the meaning of manifest error in this context." He pointed out that in Tideland Signal v The EC stated that the Commission's decision to reject the tender without first seeking clarification in that case "was clearly disproportionate and thus vitiated by a manifest error." Thus acting in a manner which in the circumstances is disproportionate constitutes a manifest error."

[15] The court notes that in *Smyth v Secretary of State for Communities and Local Government* [2005] EWCA Civ 174 Sales LJ said when dealing with a review of a planning dispute on environment grounds that "the relevant standard of review is the Wednesbury standard, which is substantially the same as the relevant standard

of review of “manifest error of assessment applied by the CJEU in equivalent context”; and see *Woods Building v Milton Keynes* [2015] EWHC 2011 paras [11] to [14].

[16] Counsel cited *Universale-Bau v Entsorgungsbetriebe Simmering GmbH* (Case C-470/99):

“[91] The principle of equal treatment, which underlines the directives and procedures for the award of public contracts, implies an obligation of transparency in order to enable verification that it has been complied with (see, in particular, Case C-324/98 *Tel Austria and Telefonadress* [2000] ECR I-10745, paragraph [61] and C-92/00 *HI* [2002] ECR I-5553, paragraph [45]).

[92] That obligation of transparency which is imposed on the contracting authority consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed (see *Tel Austria and Telefonadress*, cited above, at paragraph [62].

[93] It follows therefrom that the procedure for awarding a public contract must comply, at every stage, particularly that of selecting the candidates in the restricted procedure, both with the principle of the equality treatment of the potential tenderers and the principle of transparency so as to afford all equality of opportunity in formulating the terms of their applications to take part and their tenders ...”

[17] The principle of transparency, applicable throughout the European Union, requires contracts to be awarded fairly between competing economic operators on the basis of a consistent interpretation of relevant criteria (or sub-criteria) disclosed in advance to those economic operators when they tender. An aspect of the principle of transparency is the opportunity for a disappointed economic operator to test the assessment by a public authority of its tender before a court. If the court finds the authority to have made manifest error, whether by taking into account improper interpretations of the contract or improper considerations, or by failing to take into account relevant considerations or failing to apply some criteria consistently, for example, and such error is not merely peripheral or minimal but impacts on the award of the contract the court is entitled to strike down the award of the public contract.

First issue on appeal - Question 3-01

[18] Question 3-01 was entitled “Planning and Execution Construction” and was part of Section 3, Phase 2 Construction. We set out the question in full.

“Provide an outline methodology for the planning and execution of the following elements during Phase 2 Construction:

(a) Widening of the existing North Queen Street overbridge (BR-00) and A12 Westlink Road Embankment.

Your response will be evaluated on your answer to the following key indicators (additional information will not be considered):

1. Phasing of the works.
2. Construction activities in close proximity to residential housing (Little George’s Street).
3. Environmental health restrictions and working hours.
4. Traffic management requirements for the A12 Westlink.
5. Diversions of statutory undertaker apparatus and existing motorway communication equipment.
6. Measures to ensure community liaison.

(b) Construction of the new Dock Street overbridge (BR-004).

Your response will be evaluated on your answer to the following key indicators (additional information will not be considered):

1. Phasing of the works.
2. Construction activities in close proximity to the Stella Maris Hostel.

3. Environment health restrictions and working hours.
4. Traffic management requirements for maintain access to/from M2 motorway, Belfast Docks and North Belfast for the travelling public and local businesses/residents.
5. Diversions of statutory undertaker apparatus.
6. Measures to ensure community liaison.

You are recommended to compose your response in Word before copying it into the test box below, which is limited to **18,000 characters**."

[19] The trial judge dealt with question 3-01 at the section of his judgment beginning at [44]. At that stage the plaintiffs had learnt from a debrief after the award of the tenders the following information with regard to question 3-01. The debrief dealt with the first indicator at 3-01(a).

"Very good responses with all indicators adequately addressed with the majority in detail.

- (a) North Queen Street - indicator 1 - lacks detail of component steps associated with activity phasing e.g. erection of bridge beams and parapets, completion of bridge widening."

As the judge records at [53] the overall score given by the Evaluation Panel on behalf of the appellant for this question was a 4. He made the following finding. "It therefore appears to be the case that the only criticism which could give rise to a score of 4 (as against a 5) was that recorded by the EP and referred to above which relates alone to indicator 1 in connection with that part of the response dealing with North Queen Street."

[20] The relevant section of that response by the plaintiffs/respondents read as follows:

"Phasing

The new A12 West Link alignment requires widening of North Queen Street over bridge (4 metres on north side, 2.5 m on south side) and construction of a new A12 road embankment adjacent to the Titus residential interface on the scheme. Successful

delivery will require comprehensive planning and careful phasing. We will plan the whole scheme using the MS project Critical Path Method (CPM) and detailed Work Breakdown Structure (WBS) matching the Phase 2 activity schedule. It will adopt “constraint calendars” addressing all stakeholder, environmental and seasonal matters. It will be logically linked, cost and resource loaded for robustness and formative to facilitate review in Integrated Design Team (IDT) workshops. Lane occupation charges will be minimised.

WBS codes will include geographic and phased references. Activity durations will be based on conservative output rates. Time risk allowances within each phase will ensure achievement of key dates.

These works will follow the Traffic Management (TM) phases presented in the Environment Statement: Ph1- preparation: erect side hoardings and acoustic fencing. Site clearance for A12 embankments. Remove McGurk’s Bar Memorial. SU diversions, route A. Realign North Queen Street southbound (SB).

Bh2 - Northbound (NB) widening: temporary piling platforms and sheet piling to abutments, NB east and NB west. Demolish wing walls. Construction: abutment extension; RW01; EB01. Demolish and extend BR01 NB deck and parapets. Reinstatement of NB footpaths and steps.

Bh3 - SB widening: temporary piling platforms and sheet piling to abutments, SB east and SB west. Demolish wing walls. Construct abutment extension; RW02; EB02. Re-profile embankments A12 SB west. Demolish and extend BR01 SB deck and parapets. Reinstatement of SB footpaths. Ph.4 - completion: under croft, decorative panels and theme lighting reinstate/re-site McGurk’s Bar Memorial if/as required.”

The judge considered the competing arguments of the parties with regard to the marking of question 3-01 and the evidence of the parties witnesses with relation to this matter with great care between para [73] and [125] of his judgment.

[21] The thrust of the plaintiff's complaint was that the opening words of question 3-01 were clear, as set out above. "Provide an outline methodology for the planning and execution of the following elements during Phase 2 construction." [Emphasis added]. The plaintiffs contended that they had provided an outline methodology and should not be marked down for not providing details that had not been sought. Furthermore, they argued that having heard the evidence of the different members of the Evaluation Panel those persons themselves were unclear as to what the question meant and were therefore in breach of the requirement of transparency which was acknowledged to be an essential part of the duty of the respondent.

[22] The defendant's response was that the marking by the Panel was within their judgment as experienced personnel who identified an absence of sufficient detail in the response of BAM to allow it to receive the mark of 5.

[23] The assessment by the lower court of these competing arguments and the evidence which it had heard is to be found at paras [147] to [162] of the judgment of the court. Maguire J did not consider the question itself unlawful as the phrase outline methodology was one which should not present difficulty as "it seems clear that what is being called for is a broad or perhaps general statement as opposed to a statement which seeks to cover every aspect or go into every detail" [151]. The judge went on to consider the matter with great care and expressed his view in detail, in particular paras [159]-[160] to which we will return in due course. He concluded that there had been a failure on the part of the Evaluation Panel to discharge its obligation of transparency in interpreting the award criteria in the same way throughout the entire procedure.

[24] In its written arguments the appellant Department acknowledged that some of the background facts were complex and the contractual mechanisms not straightforward.

[25] The Department contended that this was a pure marking challenge and relied on the following passage from the judgment of Morgan J in *Lion Apparel v Firebuy* [2007] EWHC 2179 (Ch).

"36. If the Authority has not complied with its obligations as to equality, transparency or objectivity, then there is no scope for the Authority to have a 'margin of appreciation' as to the extent to which it will, or will not, comply with its obligations,

37. In relation to matters of judgment, or assessment, the Authority does have a margin of appreciation so that the court should only disturb the Authority's decision where it has committed a 'manifest error.'

38. When referring to 'manifest' error, the word 'manifest' does not require any exaggerated description of obviousness. A case of 'manifest error' is a case where an error has clearly been made."

That description of manifest error is consistent with earlier authorities on the use of that word and phrase. We observe that it does not preclude an application of the maxim *de minimis non curat lex* – the law is not concerned with trifles. An error that was merely minimal may be overlooked. Cf *McLaughlin and Harvey Limited v DFP* [2008] NIQB 9 at [26]; *Pratt Contractors Limited v Transit New Zealand* [2003] UKPC 83 at para. 49, per Lord Hoffman.

[26] The Department contends that an assessment of this kind will inevitably be subjective to some degree. It pointed out that the scoring matrix sent to the tenderers as part of the quality submission, while repeating the use of the phrase outline methodology, also said that an excellent mark ie five would indicate that all indicators had been addressed in detail in the response.

[27] Their submissions emphasised that the Panel was made up of "highly qualified, highly experienced civil engineers. The Panel is entitled to its margin of appreciation." That of course must be seen in the context of the very citation from *Lion Apparel* which the appellant relied on. The appellant's argument criticised in detail the conclusions of the judge as summarised at para [159] of his judgment including reference to the witness statement of a Mr Pentland and the witness statement of Mr Crawley. The written submissions did not address, however, the judge's own comments on the actual oral evidence of the members of the Evaluation Panel who gave evidence before. That point is made by Mr Dunlop who lays stress on the judge's findings of fact about the actual marking of the questionnaire and the tender in the light of the oral evidence of the witnesses which he had heard over a number of days. He addressed that in his detail in his written submissions and, to the extent requested by the court in his oral response to the appellant.

Consideration - Question 3-01

[28] The finding of the trial judge related to this ground of quashing the award now appealed by the Department is set out at paras [159] to [160] of his judgment. The judge asked himself whether the evaluation panel had interpreted the award criteria in the same way throughout the procedure.

"[159] The court has reason to be concerned that this may not have been so, for a number of reasons:

- (i) First of all, there is something of a vacuum in the evidence as to how the EP went about its task in terms of its function of interpretation of what it was searching for when addressing the

responses received. In particular, there is clear evidence that none of the EP's members discussed the issue or sought to ensure that there was any form of consensus as to the approach to be taken or how the language of the question or the associated indicator was to be viewed for the purpose in hand. Indeed it was notable that those who gave evidence on behalf of the defendant on this aspect all appeared wedded to a denial that anything other than the language of the question and the relevant indicator was considered.

- (ii) Secondly, whether as a result of the situation just described or otherwise, the members of the EP appear to have restricted themselves in their assessments to an expressed concern that the plaintiff's answer lacked detail and so could not receive the top mark in conformity with the scoring interpretation table. This state of affairs has troubled the court as it appears to betoken a situation in which the EP has approached its assessment not by applying its mind to the issues of degree implicit in the language used in the question and indicator but has instead allowed its deliberations to be dictated by a question related only to the level of detail provided. Such an outlook, in the court's view, is not faithful to the meaning which the court has already viewed as central to the question (as discussed above) which included the important rider that the language used, on a correct interpretation, cannot reasonably be viewed as requiring that every detail of a complex construction task is to be provided by the tenderer.
- (iii) Thirdly, the above state of affairs begets still further difficulties when the matter is analysed from the point of view of the consistency of the EP's approach to assessment across the tendering process. Individual criticisms of particular incidents of alleged omission to provide detail risk becoming almost arbitrary in their effect when detached from any related consideration of core issues which have not

been adequately attended to by the tenderer with the result that, advertently or inadvertently, the outcome is that the contracting authority appears to be operating as if it had an unrestricted freedom of choice.

- (iv) Fourthly, evidence that the risk above may have been in play can be easily found in this case in the paltry nature of the note taking by panel members; the terse explanations found in the de-brief provided; and in the way in which some witnesses in the course of giving evidence or *via* the production of a pre-prepared statement, introduced new examples of the plaintiff's alleged omission to provide the detail required by the terms of the competition. The net effect was that a myriad of such examples accumulated as each of the defendant's witnesses gave evidence, unaccompanied by associated evidence that in fact the matters referred to had been discussed or even raised at the time before the EP or were other than 'off the cuff' recollections, nowhere documented at the time.
- (v) Fifthly, the court was unable to discern from those who gave evidence for the defendant any recognition that there would be occasions where an omission to provide detail on a point would have no real importance to the assessment process when placed in due context, for example, where the omission related to an inconsequential issue.

[160] The court in this area of the case is left with substantial misgivings as to whether the EP in fact did apply the criteria contained in question 3-01 and its associated indicator in a way which was consistent with the requirements of transparency, as discussed hereinabove. In these circumstances it concludes that there has been a failure on the part of the EP in respect of this aspect of the competition."

[29] These conclusions were based on the judge's findings of fact having heard from a number of witnesses. These included Mr John Crawley for the plaintiffs who had 34 years' experience of engineering projects; Mr Michael Megarry for the

Department, a chartered civil engineer; Mr Stephen Pollock, ditto; Mr Colin Pentland ditto; Ms Roisin Wilson a procurement officer with the Department and Mr John McBride.

[30] The judge noted inconsistencies in the evidence of the Department's witnesses. Thus, Mr Michael Megarry was critical of the failure to have referred to aspects of the use of cranes in the context of operations to extend the bridge. But as the judge pointed out in cross-examination neither that issue nor related issues were referred to in Mr Megarry's written statement of evidence nor in the debrief material.

[31] Furthermore, one has to ask how the use of cranes to lift bridge beams into place, see [1] or [7], could really be required by "outline methodology." Further matters that Mr Megarry, the judge was told, thought important were the "length of time that hoarding be up; how this might affect deliveries; the removal of scrub planting at embankments ..." Again as implicit or explicit in the judge's findings these are hardly matters for outline methodology.

[32] The judge notes at [111] that this witness's notetaking had been "very limited" and at [159] (iv) he refers to 'the paltry nature' of the notetaking. In *McLaughlin and Harvey Limited v Department of Finance and Personnel* [No. 2] op cit at [54] the court adverted to an earlier Evaluation Panel dealing with a tender which had kept no notes of its deliberations. Nevertheless, the Chairman asserted firmly that extra marks had been awarded to the plaintiff for a particular matter. The court said:

"It is difficult to see how he can be confident about that, or how the court can be confident about his recollection of eight months before, when he had no notes of a process that was taking place over a period of two months and involved a considerable number of tender submissions each of which is being marked not only on foot of the ten categories BO1 to EO2 but also on foot of the complex sub-weightings and sub-criteria which he and his colleagues had developed."

[33] That would echo and support the caution expressed by the judge here as to the lack of consistency and transparency in the assessment of this tender given "the paltry nature of the notetaking by Panel members" and "the terse explanations found in the debrief provided and in the way in which some witnesses in the course of giving evidence via the production of a pre-prepared statement, introduced new examples of the plaintiff's alleged omission to provide the detailed required by the terms of the competition."

[34] Mr McMillan for the Department faces the difficulty that this is an assessment by a judge who heard these witnesses at length. Changes of recollection will tend to undermine the reliability of the assertions being made by the witness. An assessment by the judge who actually heard the witnesses will not be lightly set aside by this court. Mr McMillan is unable to point to any manifest error on the part of the trial judge in his assessment but rather tended to ignore this section of the judge's judgment.

[35] The judge, with regard to Mr Stephen Pollock, also on the Panel, found him to be unclear about what was actually discussed at the Panel. That witness, in the absence of notetaking acknowledged it was difficult for him to remember precisely what had been discussed given the passage of time.

[36] Mr Dunlop for the respondent referred to trial bundle 2/7/858, a transcript of the evidence provided for this court which showed that notes were being made by Ms Wilson on a computer terminal while the assessment was being carried on but these were then deleted. The judge did not have the assistance of a transcript for the writing of the judgment but we do have. Mr Dunlop draws attention to the following matters to be found at [865] to [868] of trial bundle 2/7:

“Maguire J: There must therefore be some basis upon which it is decided what the mark will be, and some process by which the mark comes to be in existence. That's all I am asking him about, and there seems to be enormous difficulty getting a straight answer as to how this happens.

Mr McMillen: Well, my Lord, it is the scoring, the witness has said enough times, it is the scoring framework.

Maguire J: I am going to ask you this as my last time trying to get you to give me a straight answer to this question. If you can't give it that's fine. ...

Answer: Well, when he had finished looking at the indicators, as I said, I would certainly have read the interpretation table and indicated which box was appropriate, depending on the number of adequate and number of detailed answers. Then, whatever box that it was appropriate, (sic), on the right

hand side of the table, it would have had the score between 1 to 5. And that would have been the score that we - I would propose to use

Maguire J: Well that is totally meaningless to me ..."

[37] The transcript also discloses that Mr Pollock himself admitted to having been "muddled" in his memory in his evidence. Mr Pollock took issue with Mr Megarry's reference to an "outline methodology" as being "skeletal."

[38] Passages are quoted from the evidence of Mr Pentland a further member of the Panel. He introduced the issue of the new Ulster University being constructed nearby and felt the plaintiff could have addressed it although there was absolutely no reference to it in the tender documents. Nor, had it been referred to by Mr Pentland in his witness statement, nor by Messrs Megarry and Pollock.

Conclusion on Question 3-01

[39] Suffice it to say that examination of the transcript bears out the impression first formed ie that the judge was entitled to conclude that the Evaluation Panel had failed to mark question 3-01 in a clear, consistent and transparent fashion as required by the authorities. We conclude that his decision is unimpeachable in that regard.

Second issue on appeal - Question 3-02, Indicator 6

[40] As set out at [10] of this judgment the judge found that the Evaluation Panel's assessment of this section of the plaintiffs' tender at 3-02 Indicator 6 was "manifestly in error as it [the court] is of the view that its charge that the plaintiff had not understood the unique nature of the contract as exemplified by the plaintiffs invocation of VE [value engineering] in the context of phase 2 of the contract has not been established and is not sustainable."

[41] Counsel summarised the appellant Department's appeal from the finding on this ground at [9] of their skeleton argument:

"On question 3-02, Indicator 6, the appellant says that the learned judge ignored the clear wording of the tender documents and the proposed contract that expressly excluded the use of value engineering at phase 2 of the works. He decided that, as value engineering may be generally be used in NEC contracts when it comes to changes to the works, this

meant that the Panel was wrong to criticise the respondents for relying on value engineer (sic)."

[42] Question 2 of the quality assessment document, relating, again, to phase 2 construction had the heading "Contract Management." It reads as follows:

"Demonstrate how your organisation including relevant sub-contractors and suppliers will deliver a quality product and comply with a contractual requirement (i.e. employer's requirements, specification etc) in the delivery and management of the phase 2 works."

[43] Seven indicators then followed. The one in which the plaintiff was marked down was number 6: "Management of change control and early warning of compensation events." It contributed to an overall marking for the plaintiff of only 3 for question two i.e. constituting a good answer rather than very good or excellent.

[44] The plaintiff's response to Indicator 6 we set out in full.

"CHANGE CONTROL AND EARLY WARNINGS
(EWs) OF COMPENSATION EVENTS (CE's)

Our CommM, will have lead responsibility for managing this process as follows:

CHANGE CONTROL BMJV's procedures support early problem identification review of options assessment of quality, time and cost impacts, to allow appropriate action. An internet based NEC Contract Change Management system will be used to support communications.

EARLY WARNINGS - Our CommM will notify EWs to AECOM PM as soon as he is aware of any event or anticipated event that may affect works cost, time or performance. An EW/Risk Reduction Meeting will be called to mitigate impacts, identify solutions & agree actions. Our CommM will track all changes from scope of original Target Cost and report to AECOM PM each month. When required, he will implement the NEC3 quotation process and provide a quotation promptly. A schedule will track progress of changes, status, programme effect & any resulting requests for information.

Quotations will be provided within 2 weeks (Cl 62.3 - 3 weeks) including value engineering solutions, revised programmes & alternatives options to AECOM PM. Revised quotations submitted within one week (Cl 62.4 - 3 weeks). Shorter timescales will apply if CE is on critical path. Assessment carried out jointly between AECOM and BMJV supervisors before formal submission. Changes implemented only by confirmation of AECOM (via site memo, written variation/instruction, or verbal instruction confirmed in writing). By monitoring changes schedule status, our CommM will forecast revised total of the prices and generate the outturn price for work done to date which combined with forecast for contractor's share of gain or pain, will provide out-turn forecast of the total cost. Our CommM will submit a report showing reasons for changes with monthly forecast included in the Monthly Progress Report Executive Summary." [TBAPP39/40]

A brief reference to "value engineering solutions" can be noted in the course of that answer.

[45] The trial judge dealt in detail with this issue of Indicator 6 of 3-02 at paras [147] to [149] of his judgment together with a rehearsal of the main points in the evidence at [140] to [145]. His conclusions then followed at [174] to [191].

[46] There was nothing controversial in itself about the concept of "value engineering" ie a structured and methodical process for improving the design by providing a better product for a particular price or by reducing the price. Here the criticism by the Panel of the plaintiff's use of it was based on the contention that value engineering was to be exhaustively looked at in phase 1 of the contract when the contractor is acting as consultant and designer. The appellant maintains that use of the value engineering in phase 2 was expressly prohibited by the contracts.

[47] What Indicator 6 was concerned about, as can be seen above and elaborated on by the judge, was a demonstration of the ability of the tenderer to manage change when it was necessary and give early warning of compensation events. The debrief document provided by the appellants began by saying that the answer to question 2 was a good answer with all indicators adequately addressed. But of relevance to this issue it said the following:

"Indicator 6 - lack of understanding of unique nature of this contract eg value engineering not part of Phase 2 for this contract. Some terminology used not from NEC."

The judge noted the argument of Mr Dunlop of counsel which could be summarised as saying that it was obvious that if a change was required that the changed approach should avail of the concept of value engineering just as the original design of that aspect of the contract had done so. This was supported by the evidence of Mr Crawley which is set out by the judge. The judge noted the evidence also of Mr Megarry for the Panel who emphasised the importance of value engineering at phase 1. Both he and Mr Pollock of the Panel in evidence accepted that a contractor such as the plaintiff could make suggestions where a compensation event had occurred or change was required which could result in savings for the employer but denied that this amounted to value engineering. In his submissions Mr McMillen sought to defend this attitude by saying that was value for money but he acknowledged that some might describe it as value engineering.

[48] The judge concluded, having heard the evidence of the witnesses, that the reference in the debrief document to using terms not from the NEC contract was merely peripheral criticism of little weight and could be safely set to one side. The key issue was whether the invocation of value engineering in the context of phase 2 justified the marking down of the plaintiff.

[49] An important passage in the careful assessment by Maguire J is to be found at [186]:

“It also appears to the court that the above analysis recognises the reality that, as accepted by the defendant’s witnesses in evidence, compensation events often arise long after the completion of phase 1. When they arise they can generate opportunities to improve efficiency or to reduce costs and they may augment the quality or durability of the works. To forgo these possibilities, when there is a contractual path in the context of compensation events to their achievement, should not lightly be dismissed and any assumption that VE could only be viewed as inextricably linked to consideration at phase 1 and was ruled out by the Scope of Services document at phase 2, on closer scrutiny, is not justified, as the court sees it, and fails to take into account the width and malleability of VE as a concept and its ability to arise under various guises.”

[50] The trial judge then went to conclude that this flaw in the Panel’s assessment constituted a manifest error and going beyond any margin of appreciation they might have. He found it to be unreasonable in the Wednesbury sense on the part of the Panel and therefore of the appellants.

Question 3-02/6 - Consideration

[51] It is common case that an important document in assessing this contract and the submissions made under it and their assessment is the Scope of Services document for the contract works.

[52] Para 1.1.8.4 pithily summarises the nature of the two phases under the contract documents:

“In phase 2, the consultant will become the contractor and accept full responsibility for the target design and will develop it into a detailed design for construction.”

Para 1.2 is entitled “The Employers Objectives - Risk Reduction - Value Engineering.” The following sentence occurs at 1.2.1.2. “This shall be achieved by incorporating the ethos of risk reduction/value engineering in phase 1.” The consultant is required to develop a value engineering registered during phase 1 and to co-operate in the development of proposals to achieve those objectives “during phase 1.”

[53] The appellants laid stress in particular on a subsequent clause in the Scope of Services document. Section 4 was entitled “Schedule of Deliverables.” 4.2 is headed “Value Engineering Register.” It reads as follows.

“4.2.1 The Value Engineering Register, Revision 1 shall be that register submitted by the consultant with the phase 2 outline works plan detailed in paragraphs 4.6 within 8 weeks of the contract date. The Value Engineering Register shall thereafter be developed by the consultant as part of the risk reduction/value engineering process detailed in paragraph 1.2.

4.2.2 There shall be no provision for value engineering in phase 2.”

[54] The appellants therefore sought to argue that it was a flaw in the tender of the plaintiff to make any reference to value engineering. But that overlooked the nature of this contractual process. For example, in 2.04 headed “Value Engineering” the appellants begin as follows:

“Please describe your approach to value engineering and driving efficiencies throughout the contract in collaboration with the employer and the employer’s agent.” [Underlining added]

This seems a sensible statement to make. The plaintiffs acted consistently with it in pointing out that value engineering would be employed by them if they were going to have to make changes to deal with compensation events. If some part of the phase 1 design proves to be incapable of implementation, for whatever reason, whether through unforeseen natural factors or an error on someone's part, a new design will have to be drawn up for the changed aspect of the scheme. The contractor is expressly asked at question 3-02/6 to address the management of such change. If the contractual document at 2.04 urges the contractor to address value engineering "throughout the contract" it would be proper, indeed necessary, for the contractor to address such in putting forward a new design for some aspect of the scheme, if change is required. The Panel was misdirecting itself in marking down the plaintiff's tender merely because of a reference to value engineering, in this particular context.

[55] The fact that there was no provision or consideration to be paid for work on value engineering outside phase 1 does not preclude a tenderer from taking that aspect or matters into account when confronted with a necessary change in the contract.

[56] The NEC3 contract does not define the term "value engineering." Mr Dunlop says it should not be described with capital letters because it is a generalised concept. There are however descriptions of it in the contractual documents which differ from the American definition put forward by the appellant before this court.

[57] The sentence at 4.2.2 relied on by the appellants appears under the rubric of a value engineering register. It does not justify an interpretation of a complete prohibition on any relevance of value engineering when addressing necessary changes in phase 2 of the contract.

[58] The plaintiffs also point out that the NEC3 option C contract is intended to govern the contractual relations between the parties at phase 2. The contract data are carefully defined at trial bundle A 27/540 and do not include the Scope of Services document on which the appellant relies. Therefore as an additional argument the plaintiffs submit that even if this court was against them on the interpretation of the Scope of Services document it would not be binding on an interpretation of the treatment of the phase 2 part of the tender.

[59] Furthermore, having obtained a transcript of evidence the respondents point out that at trial bundle 1/6/783 the principal witness for the Panel acknowledged in cross-examination that Clause "63.11 allows the opportunity for value engineering, I don't deny that ..." He nevertheless felt that they had to explicitly exclude it.

[60] Counsel for the appellants had sought to rely on Clause Z24 of the Special Terms which stated: "Value engineering: is not applicable to phase 2." But Mr Dunlop pointed out that this special clause had not been included in this contract but that the appellants had relied on the standard clauses.

[61] We have taken into account all other submissions but we are satisfied that the trial judge arrived at the correct conclusion here. It was a manifest error on the part of the panel to mark down the plaintiff because of the reference to value engineering. In the context of the management of change and dealing with compensation events that was a relevant consideration, in public law terms, to be referred to by the tenderer and the panel was in error in marking them down on that basis.

Conclusion

[62] We therefore uphold both the grounds on which the judge found the award of the contract to be unlawful. In those circumstances we need not address the additional grounds relied on by the plaintiff/ respondents in counsel's submissions. We would just add this. It may well seem regrettable that a much needed and very important piece of road improvement has been delayed because the panel evaluating the two tenders made two quite narrow errors in their assessment. However, those two narrow errors, it is agreed, were enough to alter the award of the contract between the plaintiffs and the previously successful tenderer; see [8] above. The plaintiffs were comfortably ahead on the issue of cost ie their price was lower, but that was allocated only 30% of the total marks. The evaluation, which we have found to be flawed, was allocated 70% of the marks.