Case No: CA-2023-000194

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
TECHNOLOGY AND CONSTRUCTION COURT (KBD)

[2022] EWHC 3262 (TCC) (Waksman J)

B E T W E E N:

UNITED LEARNING TRUST

Proposed Appellant

-and-

BROMCOM COMPUTERS PLC

Proposed Respondent

REASONS FOR REFUSING PERMISSION TO APPEAL

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*References to the Core Bundle are in the form **[CB/Page]**;*
*Supplemental Bundle references are in the form **[SB/page]**.*
*Judgment references are in the form **J[page of transcript]**.*
*References to the Appellant's Skeleton Argument are in the form **ASA[para]**.*
*References to the Respondent's Para 19(1) Response Statement are in the form **RS[para]**.*

Nature of the Case

1. The claimant, Bromcom Computers ("**Bromcom"**), brought a claim challenging the procurement decision of United Learning Trust ("**UL**") alleging a breach of the Public Contracts Regulations 2015 ("**PCR"**).

2. The procurement was conducted through a competitive dialogue procedure under the PCR. The underlying contract was for the supply of cloud-based Management Information System ("**MIS"**) over a 5-year period to 57 State Academy schools with UL. The contract was valued at £2 million. After an initial bid process, two companies

made the final shortlist: Bromcom and Arbor Education Partners Limited ("**Arbor**"). Arbor already provide MIS services to 15 other schools within the UL group.

3. The final scores of the tender process were close **J[47]**: Arbor scored 874 points and Bromcom scored 864 points. Consequently, Arbor was awarded the contract.

4. In a detailed judgment covering liability and causation, Waksman J ("**the Judge"**) upheld some (but not all) of Bromcom's challenges. The Judge identified four distinct breaches of procurement law **J[392-396]**:

    a. First, there were Pricing Score breaches. These are summarised by the Judge at **J[357].** If these breaches were corrected, Arbor would have scored less: 340 rather than 376. As Bromcom's was the cheapest on either analysis, it would have scored 400 points.

    b. Second, there were 10 manifest errors in the Individual Quality scoring.

    c. Third, the averaging approached used by UL breached the principle of transparency.

    d. Fourth, there were breaches in terms of the form and timing of Arbor's submissions.

5. The Judge refused permission to appeal. As set out below, UL's grounds of appeal are directed at the first three breaches outlined above.

Grounds

6. UL seek permission to appeal on six grounds:

    a. First, the Judge erred in law in finding that it was unlawful for UL to average individual scores under the PCR. The Judge held it was only lawful for UL to use a 'consensus scoring model'.

    b. Second, the Judge erred in law in requiring that UL must not have allowed Arbor to incorporate a discount which took account of an entirely separate contract.

c. Third, the Judge was wrong in law to find that UL was under a positive duty to invite Bromcom to submit further information in relation to its technical solution to the development of a data centre link. Alternatively, this was procedurally unfair.

d. Fourth, the Judge was wrong in law to find that specific evaluator scores should be held to be manifestly erroneous and therefore increased by the Judge.

e. Fifth, the Judge's findings in respect of the 'counterfactual' and causation were wrong in law and/or procedurally unfair.

f. Sixth, the Judge's findings in respect of the sufficiently serious breach criterion were wrong in law and/or procedurally unfair.

7. Before turning to the individual grounds, I make three general points. First, I note that each ground is also presented on the basis that there was a lack of reasons for each decision. I reject that out of hand. This was a careful and cogent judgment and this repetitive complaint highlights the somewhat mechanistic nature of UL's appeal.

8. Secondly, this is an appeal from a specialist procurement judge. All the limitations and the high threshold identified in *Wheeldon Brothers Waste Ltd v Millennium Insurance Company Ltd* [2018] EWCA Civ 2403, apply here, as do the strictures against appeals based on fact from first instance judges (*Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5), let alone appeals on fact from specialist tribunals. No account of any of those principles appears to have been taken here. Instead the proposed appeal is really an attempt to argue the defence to the original claim all over again, based on an attack on findings of fact and mixed fact and law. That is illegitimate.

9. Thirdly, although I come on to deal with each Ground in detail, that should not be taken as a sign that I have, in some way, forgotten that the test is simply whether the Grounds, or any of them, have a real prospect of success. That is a relatively low threshold. But, in this sort of case, it is necessary to explain in some detail why, on a proper analysis, I consider that each of these Grounds do not have a real prospect of success.

Ground 1: The Averaging of Scores

Judgment

10. Bromcom argued that UL should not have averaged the scores: that there should have been a moderation discussion at which an agreed single score (out of 5) would be determined.

11. The Judge found the following facts: the average scores were computed prior to the moderation meeting **J[162],** and remained unchanged after that meeting. This meant that no reasons were given for those average scores and, moreover, that there was no debate about reaching a scores via consensus.

12. The Judge found that this moderation meeting "*was meant to be a discussion leading to a consensus, not an adoption of pre-produced average scores"* **J[163].** The Judge dealt with the evidence of Ms Wood (UL's procurement consultant) at **J[164]** who stated that averaging was a "*widespread practice*". The Judge rejected the suggestion that this evidence assisted his analysis, because these were "*very general statements*". There was equally no evidence that moderation discussions had taken place **J[165].** The Judge accepted Bromcom's analysis that the use of averaging was a breach of UL's obligation to act transparently and give reasons for the scores which it had made **J[169].**

13. Regarding the case law, the Judge particularly relied on Stuart-Smith's J decision in *Lancs Care NHS v Lancs County Council* [2018] EWHC 1598 where he held that where a contracting authority cannot explain why it awarded the scores it did, it "*fails the most basic standards of transparency".* UL submitted that *Lancs Care* was irrelevant because the published evaluation methodology provided for consensus scoring. The Judge rejected this submission because Stuart-Smith J did not decide *Lancs Care* on that basis: instead it turned on the contracting authority's failure to articulate sufficient reasons.

14. The core of the Judge's reasoning on this point can be found at **J[181]:**

> "181. It is correct that there is no provision in the PCR that there needs to be an attempt through moderation to reach a consensus score. Equally there is no provision outlawing the use of averaging. But this misses the point. Inherent in the requirement for the contracting authority to give reasons for what, in the end, were its scores, is the

> undertaking of a process that can yield such reasons and this, in a context where in the usual case, there will be a number of evaluators who produce different individual scores. That process necessarily involves some form of moderated discussion which leads to agreement as to the overall scores (with or without dissent) for which the essential reasons can then be articulated. That duty may not require the contracting authority to delve into every granular detail of the discussion, but it must at least be in a position to say why a tenderer has scored, for example 3, not 4 (going beyond what the definition of each score is) and not merely that it has so scored. It is hard to see how a contracting authority which does not even produce a note which attempts to undertake that exercise has complied with its duty of transparency." (emphasis added)

Judge's reasons for refusing permission

15. The Judge considered he was "*well-entitled"* to conclude that there was in effect no reasoned decision by UL on the relevant Appendix scoring. The Judge considered there was no 'margin of appreciation' in the contracting authority setting the scoring system and that he had considered (and rejected) the evidence of UL's procurement consultant, Ms Wood.

Appellant's submissions

16. UL argue that the Judge took a "*novel, far-reaching"* approach that they claim is "*entirely unsupported by existing authority"* and is contrary to the whole scheme of the PCR 2015 **ASA[12]**. Instead, UL assert that contracting authorities are given a wide margin of appreciation in how they choose to structure their evaluation methodology, provided it is not *Wednesbury* unreasonable. UL state that the Judge's reasoning essentially meant there was only one way for an evaluation to be lawful (providing a score reached by consensus with a reason) even where this is not directly supported by authorities.

17. Instead, UL submit that the method of evaluation is "*quintessentially an issue for the discretionary judgment of the contracting authority"* **ASA[16]**. Further, UL hired a procurement consultant who advised them that averaging is a widely used methodology under the PCR. UL provided this evidence in the court below which they note was not challenged by Bromcom.

Respondent's RS

18. Bromcom make the simple point that the use of averaging was impermissible because it did not calculate the scores on the basis stated in the ITT. Contracting authorities cannot, after the event, revise the way in which they evaluate submitted bids **RS[3].**

19. Further, they say that the use of an averaging technique is flawed because it means the contracting authority could not give reasons for the final scores. The use of an averaging method could not be reconciled with the reasons given by individual evaluators, and many of those reasons may be mutually inconsistent.

Conclusion

20. I refuse permission for this ground of appeal. In my view, the Judge was not extending the previous authorities by deciding that a mechanistic averaging methodology cannot be used to give a 'reasoned decision' as required by the PCR 2015.

21. I consider that it is not reasonably arguable that *Lancs Care* was decided on the basis that the contracting authority had failed to comply with the evaluative process they had set for themselves in the tender documentation. I agree with the Judge that it is not clear from *Lancs Care* that the tender documentation differed significantly from the present case – it simply referred to the scores being "evaluated and scored" (para. 17 of *Lancs Care*). This is very similar to the language used in the current tender document: "*Proposals will be evaluated by the Trust's MIS Dialogue Panel"*, see **CB Tab 9, p.17.**

22. I agree that, as Stuart-Smith J said at [59], the amount of detail a contracting authority evaluator is required to provide "*may vary from contract to contract, depending on all the circumstances relevant to the contract in question"*. But that is self-evident, and cannot detract from the general principle that he outlined in *Lancs Care*, namely that a contracting authority should be able to justify the reasons for a given score.

23. So I agree with the Judge in the present case that "*Inherent in the requirement for a contracting authority to give reasons for what, in the end, were its scores, is the undertaking of a process that can yield such reasons"* **J[181].** Providing a simple averaged score, calculated on a simple mathematical basis without discussion, makes it impossible for such reasons to be given by a contracting authority.

24. As articulated by the Judge, the averaging in this case was a purely mathematical exercise. There had been no moderated discussion between the evaluators. I cannot see how it is possible to argue, as UL do at **ASA[13-16],** that the reasons given for a final averaged score are those contained within the numbers that are averaged. That is an explanation for the numbers going into the exercise, but not an explanation for the all-

important final score awarded. An average score, by definition, involves a combination of numerical values, and the conflicting reasons for those values cannot simply be combined as the reason for the final score. The list of reasons that back up an averaged value is likely to be contradictory and difficult to make sense of, given that the full range of values contributed to that average value. Furthermore, I note that this way of doing it was not advertised in the Invitation to Continue Dialogue document ("**ITCD**").

25. Finally, I reject as wholly unarguable the Appellant's submission that averaging in procurement is 'widespread' practice and therefore should have been permitted. The Judge considered the evidence of Ms Wood on this point and rejected it. I can see no reason to challenge that finding of fact. Moreover, the evidence was far too generalised to be of assistance on the specific issue before the judge.

Ground 2: Should an (Incumbent) Bidder be Allowed to Include a Discount on a Separate Contract?

Judgment

26. As Arbor was an incumbent provider of MIS services for 15 of UL's schools, part of the current tender proposal included a discount of 45% on its services because of the scale of the schools they were operating in (assuming they were successful). On this issue, the Judge found that Arbor were entitled to include such a discount in their tender proposal **J[157].** However, the Judge found the position was different in relation to the rebate. The rebate was a saving on a separate, existing contract for the 15 schools **J[142].** The Judge found that UL could not take into account these savings as it is "*all about a reduction in price under a different contract"* **J[160].**

Judge's reasons for refusing permission

27. The Judge was content that he correctly applied PCR Regulation 67(2) and (5) correctly and that there was no scope for a margin of appreciation in relation to the duty of equal treatment.

Appellant's submissions

28. The Appellant says that it is irrelevant to look at the reasons why a bidder applied a discount to their submitted price for the present tender **ASA[25].** It is submitted that the discounts applied by a prospective tenderer are simply an "*output of the particular*

characteristics or each bidder's pre-existing business" **ASA[26].** It is added that Regulation 67 is irrelevant and that there is no issue of 'incumbency' advantage. The Appellant also submits that the case law on incumbency only relates to one of the bidder's being the direct predecessor to the contract in question.

Respondent's RS

29. The Respondent submits that a price tendered in relation to Contract A can only relate to the subject matter to be delivered under Contract A. An incumbent provider under Contract B cannot seek to leverage its incumbency by offering a discount that is wholly irrelevant to Contract A, **RS[4].**

Conclusion

30. I refuse permission on ground 2. One of the core principles of procurement law is to ensure equal treatment between tendering parties. This principle is of heightened importance where one of the tendering parties is an incumbent provider. A tenderer cannot offer a price advantage in respect of a completely separate contract (potentially subject to a completely separate tender procedure). That is the antithesis of equal treatment.

31. I consider that the Appellant is clearly wrong to try and suggest the issues of incumbent advantage do not arise in this case. Arbor was providing the MIS services to 15 schools within the Trust and sought to extend their current operation if successful with the current tender. Moreover, the Judge was clearly sensitive to the subtleties of addressing an incumbent advantage. Whilst he upheld Bromcom's challenge on the Arbor's existing contract rebate, he dismissed the challenge that Arbor could apply a 45% discount due to the economies of scale it would enjoy if it was successful in the current tender. That was measured and fair. It is not susceptible to an appeal.

Ground 3: UL was Under a Duty to Require Bromcom to Submit Further Information

Judgment

32. At **J[230]** the Judge held that UL "*should have sought clarification from Bromcom"* to understand what model of push/pull system they were proposing to connect to the data warehouse. This was in contrast to Arbor's proposal, which UL already knew about

(because it was already set up). Consequently, there was a "*manifest error and a failure to treat the bidders equally"*.

33. This was because of the Judge's findings of fact at **J[96].** He found that UL were in some doubt as to whether a data warehouse push solution was included in Bromcom's tender price. It was Bromcom's case at trial that it was, but UL never sought clarification of this. Consequently, the Judge held it was a manifest error for UL to add £4,405 to Bromcom's proposal to reflect the absence of information. The Judge decided this on the basis of manifest error, and/or unfairness, and/or to neutralise Arbor's incumbent advantage **J[97-98].**

Judge's reasons for refusing permission

34. The Judge considered there was no error of law and he was entitled to find that UL acted unlawfully in finding that clarification was needed from Bromcom but failing to take steps to obtain this. By doing so, UL's approach "*clearly exceeded any margin of appreciation".*

Appellant's submissions

35. UL focus on the facts of Bromcom's tender submission, stating that their Appendix B response simply proposed a less favourable solution than Arbor's. The Appellant first takes a pleading point: Bromcom did not complain that UL was in breach of its duty to issue a clarification request **ASA[40]**. Second, the Appellant submits that the PCR 2015 does not, except in exceptional circumstances, impost a duty on a contracting authority to invite bidders to submit further information to improve their score **ASA[44]**. Further, the Judge does not explain how a failure of UL to seek clarification from Bromcom would be *Wednesbury* irrational **ASA[47]**.

Respondent's RS

36. Bromcom submit that the Judge's findings here flowed from the findings of fact as to what a RWIND[1] tenderer would have understood the Appendix B to mean. For an appeal court to address this point would inevitably require detailed analysis of the

[1] A reasonably well-informed and diligent tenderer

witness statements and oral evidence. The Judge's conclusion does not come close to being without rational foundation: **RS[5].**

Conclusion

37. I refuse permission on this ground, which I consider to be hopeless.

38. First, I do not consider the pleading point gives rise to a reasonably arguable ground of appeal. The Appendix B complaint was clearly part of Bromcom's challenge to the Price Adjustment Issues: see paragraph 40, 41A of Bromcom's Particulars of Claim (**CB/148)**. In any event, pleading points can not be taken on appeal unless the party taking it insisted that the judge give a ruling on the issue at the trial so that, if it was refused, an application to amend could be made: see *Hawksworth v Chief Constable of Staffordshire* [2012] EWCA Civ 293. That did not happen here.

39. Second this is not a point of law but a challenge to the facts as found by the Judge. That is not open to UL: see *Wheeldon* and *Fage v Chobani*.

40. In addition, the Appellant's second submission on this ground (see paragraph 35 above) misses the point. The Judge was not saying that Bromcom had to be given a second chance to "*improve their score".* Instead, this was a matter of equal treatment between the parties. The Judge found on the facts that Arbor had provided detail of their warehouse push solution as they were the incumbent operator **J[96]**, whilst UL resolved their doubt as to the meaning of Bromcom's bid by adding on extra costs rather than seeking clarification. The Judge found, at **J[96]**, that if such clarification had been sought, UL would have been told that Bromcom's data warehouse push solution would have been at no extra charge. The Judge was quite entitled to conclude this was a breach of the principle of equal treatment: indeed, it is impossible to reach any other conclusion.

41. Moreover, even if the Judge had been wrong about the unfairness/manifest error argument, he reached the same conclusion on the basis of neutralising an incumbent advantage: **J[98].** This is not the subject of an appeal.

Ground 4: Challenges to Individual Evaluator Scores

Judgement

42. Part of Bromcom's case was that some of the scores given by evaluators contained 'manifest errors' and should be corrected. The Judge addressed UL's objections to this attack at **J[215-216].** The Judge upheld some of Bromcom's complaints and proceeded to adjust the scores accordingly:

Appendix A – Managing Change at School Level

a. Ms McKay

   Increased Bromcom's score from 3 to 4 as Ms MsKay misunderstood Bromcom's approach to third-party software bolt-ons **J[223].** The Judge both identified the error and considered whether the error was material (concluding it was at **J[224]**).

b. Mr Richardson

   Increased Bromcom's score from 3 to 4 as Mr Richardson misunderstood UL's own requirements from the bidders **J[226].**

Appendix B – Data Flow to Central Office

c. Mr Wilson

   Increased Bromcom's score from 3 to 4 as Mr Wilson misunderstood that Bromcom was offering a 'push' solution to the data warehouse **J[232].**

d. Mr Sharman

   Increased Bromcom's score from 3 to 5 **J[236].**

e. Ms Dzioba

   Increased Bromcom's score from 4.5 to 5 **J[244].** The Judge found Arbor (awarded a 5) only received this because they were the incumbent.

Appendix C – Service Transfer and programme management

f. Ms Viner

Increased Bromcom's score from 3 to 4 **J[246].** Ms Viner wrongly took into account Covid as a reason for marking Bromcom down and penalising them for 'starting too soon'.

Appendix F – Integration with Third Party Products

g. Ms Letts
Increased Bromcom's score from 2 to 3 as she had not fully read Bromcom's proposal **J[254].**

h. Mr Holmes
Increased Bromcom's score from 4 to 5 as he misunderstood the flexibility Bromcom could offer (which he stated as a reason for marking them down).

43. Bromcom submitted that Mr Holmes' scores in relation to Appendix F should be altered. The Judge found Mr Holmes made an error, but decided that the score should not be changed **J[256].**

Judge's reasons for refusing permission

44. The Judge considered he was well-entitled to adjust the individual evaluator scores where he had identified a manifest error. Indeed, this approach is supported by authorities: *Woods v Milton Keynes* [2015] EWHC 2011.[2]

Appellant's submissions

45. First the Appellant takes another pleading point: UL contend that some of the adjusted scores were not part of Bromcom's pleaded case **ASA[52]**. Consequently, it was procedurally unfair for the Judge to engage with them as UL was unable to provide evidence as to what the scores would have been. UL also submits that the Judge did not fully engage with the authorities on dealing with manifest errors in evaluator scores (specifically *Woods* and *Varney & Sons Waste Management Ltd v Hertfordshire County Council* [2010] EWHC 1404 (QB)) **ASA[58]**. Moreover, the presence of a wider range of scores by different evaluators indicates that the adjusted scores could not have been irrational.

[2] I note the Judge misquotes the reference as a Court of Appeal authority: it is in fact a High Court decision.

Respondent's RS

46. The Respondent characterises this challenge as "*hopeless"*: these were findings based the Judge making findings in respect of live oral evidence from the evaluators themselves. The Judge was clearly aware that he was looking for 'manifest errors', all of which were pleaded by Bromcom. This approach is in line with the procurement authorities, **RS[6].**

Conclusion

47. I would refuse permission on this ground. I agree that it is hopeless. First, it is an illegitimate attack on the judge's findings of fact: see paragraph 8 above.

48. Second, I do not think that the Appellant's pleading point has any prospect of success. I agree with the Judge that there was an opportunity for UL to address these criticisms in re-examination and that the Judge was entitled to address the manifest errors as they arose in the evidence. Again the *Hawksworth* point arises.

49. Third, the Judge is correct to say that the court can, after identifying a 'manifest error' in the evaluator scores, insert its own scores into the evaluation process. This process was carried out in similar procurement challenges: *Energy SolutionsEU Ltd v Nuclear Decommissioning Authority* [2016] EWHC 1988 (TCC); *Woods Building Services v Milton Keynes* [2015] EWHC 2011 (TCC). The Judge did not refer to them expressly, but that does not mean that he failed to adopt the correct legal approach. The Judge looked at the evaluator scores in issue and considered the reasons why those scores were given. Where there was a clear mistake in the reasoning behind those scores, he made appropriate adjustments. As set out above, with the exception of Mr Sharman's score for Appendix B, these adjustments were only by 1 point each time.

50. I am entirely satisfied that the Judge assessed each challenge on the facts of the live oral evidence given by the evaluators. He was entitled to make adjustments where a manifest error was made and this was material to the score awarded. On that latter point, the Judge was clearly aware of this need for materiality as he declined to adjust the score of Mr Holmes in relation to Appendix F (see para. 8 above).

51. Accordingly, I conclude that Ground 4 has no prospect of success.

Ground 5: Causation

Judgment

52. From **J[355]** the Judge considers the counterfactual position as if UL had conducted the procurement process without the breaches identified. In other words, he considered whether Bromcom established causation for their loss. The Judge did that in some considerable detail and concluded that Bromcom would have been the successful tenderer.

Judge's reasons for refusing permission

53. The Judge considered there was no error of law because however causation was approached, the findings on liability meant it was inevitable that the outcome would be different. Even on the basis of the Price Scoring breaches the outcome would be changed **J[355-365].**

Appellant's submissions

54. The Appellant argues that the counter-factual calculation embarked on by the Judge includes the same averaging methodology which he held was unlawful **ASA[66]**. UL submit that this same methodology cannot be used in the counter-factual as the correct approach (i.e. using a consensus evaluation) may have yielded the same preferred bidder. Consequently, the claim must fail for a lack of causation.

Respondent's RS

55. The Respondent submits that each of the Price Scoring and Quality Scoring breaches alone was sufficient to alter the outcome of the procurement exercise. This reflects that the competition was very close. Indeed, on the Judge's findings of breaches, Bromcom would have been successfully by a significant margin. Even if the Judge was wrong on the averaging methodology, Bromcom still would have succeeded, **RS[7]**.

Conclusion

56. I would refuse permission on Ground 5. This is again an illegitimate attack on the judge's findings of fact. The Appellant does not explain how, precisely, the Judge's approach is "wrong in law". It wasn't.

57. Second, this is not a case where, even after the breaches were taken into account, Bromcom was still not the overall winner of the competition. The Judge was clear that based on his findings Bromcom would have been the successful party, and by some margin (see the two counterfactual tables at **J[359]** and **J[361]**).

58. Third, whilst it is true that the Judge was using the averaged data to assess the counterfactual position, as a matter of common sense it is unclear what alternative data he could have used. It would clearly be disproportionate to require UL to embark on a whole rescoring exercise without using averages (a point he acknowledges at **J[363]** which is describes as "*impossible"*). The Appellant does not state how this exercise should have been conducted. Further, if the Appellant was correct on this ground in my view this would be akin to allowing a party in breach to benefit from its wrong. This reaffirms my view that there is no merit in this ground.

Ground 6: The Findings of a Sufficiently Serious Breach were Wrong

Judgment

59. The Judge carefully set out the case law on the 'sufficiently serious' test at **J[369-387].** He traced the development of the 8-factor test devised by Lord Clyde in *R (Factortame) v Secretary of State* [2000] 1 AC 524 and discussed in a very recent case dealing with the same issue: *Braceurself v NHS England* [2022] EWHC 2348 (TCC).

60. The Judge methodically went through the eight steps and also stood back an weighed up all the factors **J[423].** He reached the conclusion that there were numerous breaches by UL, indicating this was a 'sufficiently serious' instance of breaches. Nor does the Judge suggest this was a particularly finely balanced exercise: *"There were, in truth, no real factors in favour of UL such that the outcome of the sufficiently serious analysis should be in its favour"* **J[424].**

Judge's reasons for refusing permission

61. The Judge considered this was a standard application of the 8-factor test leading to a conclusion he was well-entitled to reach.

Appellant's submissions

62. The Appellant submits that if any of the preceding grounds succeed, the question of seriousness threshold would have to be revisited. Further, UL contend that the Judge took no or insufficient account of the fact that the grounds of challenge are "*novel in law"*, the margin of appreciation and that the evaluation was conducted at the height of the Covid-19 pandemic, **ASA[71].**

Respondent's RS

63. This was a mixed question of fact and law which the Judge was well-equipped to address in light of his findings of breach. He was entitled to set this against the wider context in which the procurement took place and discerns no error of law in his analysis, **RS[8].**

Conclusion

64. I would refuse permission on Ground 6. First, UL have not been successful on any of the other Grounds.

65. Second, as to the 'freestanding' argument, the threshold of establishing a 'sufficiently serious' breach is a well-settled area of procurement law, assisted by multiple appellate court authorities which the Judge carefully considered. In my view, there can be no criticism of the Judge's summary of the law in this area. His application of these principles to the facts is equally unassailable: he had made findings of multiple breaches, found this would have led to the contract being awarded to Bromcom (and by some significant margin) and was careful in delineating which of the *Factortame* eight factors he considered was supportive of Bromcom's case or neutral. A challenge to this exercise has no reasonable prospect of success.

66. In my view, it was the first of these eight factors ("*The Importance of the Principle which has been breached")* which strongly indicated that the seriousness threshold had been reached.

Conclusion

67. Finally, do any of the proposed grounds raise points of wider importance such as to provide some other compelling reason to grant permission to appeal? In my view, they do not. Like most procurement challenges, this was a fact-sensitive exercise. Permission to appeal is therefore refused.