



Neutral Citation Number: [2017] EWHC 3389 (TCC)

Case No: HT-2017-000035

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**TECHNOLOGY AND CONSTRUCTION COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 21/12/2017

**Before:**

**MRS JUSTICE O'FARRELL**

**Between:**

**MLS (OVERSEAS) LIMITED** **Claimant**  
**- and -**  
**THE SECRETARY OF STATE FOR DEFENCE** **Defendant**

**Philip Moser QC and Daisy Mackersie** (instructed by **Pinsent Masons LLP**) for the **Claimant**  
**Alan Bates and Michael Armitage** (instructed by **the Treasury Solicitor**) for the **Defendant**

Hearing dates: 23<sup>rd</sup>, 24<sup>th</sup>, 25<sup>th</sup>, 26<sup>th</sup>, 27<sup>th</sup> October 2017

**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.

.....  
**MRS JUSTICE O'FARRELL**

**Mrs Justice O'Farrell:**

1. These proceedings concern a challenge to the lawfulness of a competitive procurement process carried out by the defendant (“MoD”) in respect of a contract for global port, maritime and other logistical support services for the Royal Navy (“the Contract”). The claimant (“MLS”) is an unsuccessful tenderer in the procurement process.
2. MLS submitted a tender that was commercially compliant, offered the lowest price and was awarded the highest score in the technical evaluation. However, it received a “fail” score in respect of its response to Question 6.3, a request for evidence that a safety culture existed throughout its supply chain. As a result of the “fail” score, the tender submitted by MLS was determined to be non-compliant and was rejected in favour of the next highest tenderer, S.C.A. - Shipping Consultants Associated Ltd (“SCA”).
3. MLS’s case is that the Invitation to Tender (“the ITT”) did not state, or was ambiguous as to, the consequence of a “fail” score in respect of Question 6.3. Therefore, the MoD was not entitled automatically to reject the MLS tender for a single fail score. In rejecting the MLS tender, the MoD acted unlawfully in breach of its obligations of transparency and equal treatment. Further, the rejection of the MLS tender by the MoD was a manifest error of assessment having regard to the content of the bid and the published scoring criteria. Finally, if the MoD had a discretion to reject the MLS tender by reason of the “fail” score, it failed lawfully to exercise such discretion.
4. The MoD’s case is that the evaluators and moderator for the procurement process were entitled to conclude that the MLS tender failed to meet the minimum requirements specified in the evaluation criteria for achieving a “pass” score for Question 6.3. Although by reason of an administrative error the MoD omitted to include an express statement in the ITT that the consequence of a “fail” score would be rejection of the tender, it would have been apparent to a reasonably well-informed and normally diligent tenderer (“the Reasonable Tenderer”) from the ITT that a “fail” score for Question 6.3 would lead to automatic rejection of the tender (a mandatory rejection) or could lead to rejection of the tender (a discretionary rejection). The MoD’s exercise of its discretion to reject the MLS tender was one that was legally open to it, and was not irrational or disproportionate.

*Background*

5. MLS has provided logistical support to the MoD under an existing contract since January 2009. MLS provides port agency services in support of MoD owned and chartered vessels, and units deployed in UK commercial ports and overseas. The services include berthing and anchorage arrangements, dockside cranes, tug boats, pilots, waste disposal, potable water and fresh food. MLS appoints port agents to organise the goods and services required by a vessel in port. Essential services, such as dockside cranes, tug boats, pilots, waste disposal and potable water, are usually provided by the port and are arranged directly by the port agent. Other services, such as food supplies, are provided by third party suppliers through contracts negotiated with the port agent on behalf of MLS.

6. On 28 August 2015 the MoD sent the contract notice in respect of the Contract to the Official Journal of the European Union (“the OJEU”) and on 2 September 2015 the notice was published in the OJEU.
7. The Contract is intended to have a term of six years with two optional extensions each of two years. The contract notice stated that the value of the Contract would be between £350 million and £385 million, and the optional extension periods were valued at between £70 million and £77 million.
8. On 28 August 2015 the Dynamic Pre-qualification Questionnaire (“the DPQQ”) was published with a deadline for responses of 6 October 2015.
9. MLS, as a prospective tenderer, submitted its responses to the DPQQ on 5 October 2015.
10. On 27 November 2015 MLS was informed that it had successfully pre-qualified and would be invited to submit a tender in respect of the new contract.

*The ITT*

11. On 20 July 2016 the ITT was sent to MLS and four others. The advertised budget was between £350 million and £385 million.
12. Section A11 stated:

“The purpose of this ITT is to invite you to propose a solution / best price to meet the Authority’s requirement. This documentation explains and sets out the ...

b. instructions and conditions that govern this competition ...”
13. Section D contained the following statements, explaining the basis on which the tenders would be evaluated:

Section D1:

“The overall objective of the Tender evaluation process is to select the Tender, from the pre-qualified Tenderers, that is the Most Economically Advantageous Tender (MEAT) to the Authority. This section details how your Tender will be evaluated, the tools used to evaluate the Tender and the evaluation criteria.”

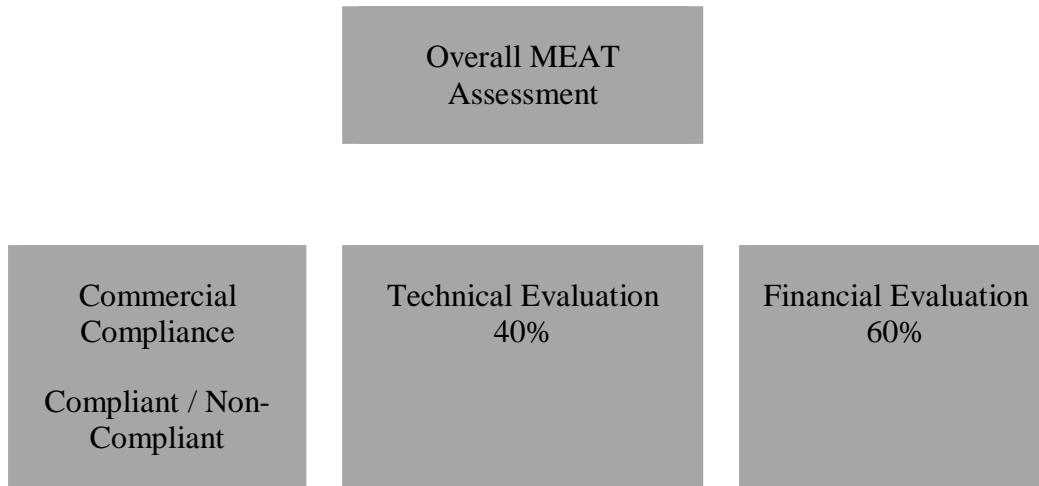
Section D4:

“...the Tenderers’ responses to this ITT will be evaluated and awarded to the Most Economically Advantageous Tender (MEAT). This combines Commercial, Technical and Financial evaluations.”

Section D5:

“The Authority will be evaluating the Tender using the MEAT method. This is a comparative score and the scoring method is worked out using the ratio and calculation below. The optimum is the highest technical score and lowest price, this together would get the highest total score. If you had the highest technical score but your price was double that of the lowest priced compliant Tender, this would receive a lower total score.”

Figure 1:



Section D6:

“The Authority will use the AWARD evaluation tool for the evaluation of the Commercial and Technical elements of the tender. Financial evaluation will not be conducted through the utilisation of the AWARD tool and will be in accordance with Appendix 3 to this Section D and/or in line with instructions at Section E via tender board submission. It is the Authority’s intention to evaluate all Tenderer’s responses as follows:

- A. Commercial Compliance and Financial Evaluation: Commercial compliance will be conducted in accordance with Appendix 1 to this Section D. This will result in a compliant / non-compliant assessment. Financial Evaluation will evaluate firm prices of Tenderers responses in accordance with Appendix 3 to this Section D.
- B. Technical Evaluation: This will be conducted in accordance with Appendix 2 to this Section D.”

Section D7:

“The “Winning Tenderer” will be selected based on a MEAT assessment. This will require a compliant result on Commercial Compliance, obtain the minimum requirement where annotated for Technical Evaluations and have the highest combined scores from the Technical and Financial evaluations as set out in this Section D.”

Section D12:

“Each Management Plan/Schedule submitted by the Tenderers shall provide full details of the Tenderers’ solutions/methodology and should not merely provide, or support, responses to the related evaluation criteria.”

Section D13:

“Tenderers will be required to state: ‘what’ the proposed solution is to the required activity; and ‘how’ they will implement the solution. This will enable the Authority’s evaluators to test the Tenderers’ understanding of the requirement, providing assurance that they are competent to deliver the required contract deliverables. The ‘how’ will enable the Authority’s Technical evaluators to evaluate the level of risk for an activity.”

Section D22:

“The ‘Winning Tenderer’s’ bid will offer the highest combined technical and financial score, based on the MEAT evaluation of all Tenderers’ proposals for the requirement...”

14. Section D25 contained an explanation as to how the MEAT assessment would be carried out:

“The MEAT assessment will be conducted as follows:

**A. Evaluation of the Technical Tender (40 percent of the award criteria):**

The evaluations of the Technical Criteria will be carried out by Subject Matter Experts (SME) for the requirement and the contract management proposition, utilising the AWARD tool. A consolidated moderation exercise will be conducted by a senior Military representative (not below the rank of Commander) of the primary customer, or Civil Servant equivalent at C1/SO1 grade. The outputs of this exercise will determine the score for the technical evaluation in accordance with Appendix 2 to Section D of DEFFORM 47.

**B. Evaluation of the Commercial/Financial Tender (60 percent of the award criteria):**

- i. Commercial: There is a compliant/non-compliant assessment on matters of commercial compliance in accordance with Enclosure 1 to Appendix 1 to this Section D.
- ii. Financial: In accordance with Enclosures 1 to 3 to Appendix 3 of this Section D.

**C. Winning Tenderer:** The Winning Tenderer will require a “compliant” result for the commercial evaluation and have the highest combined Technical and Financial score following evaluation.”

15. Appendix 1 to Section D set out the evaluation process in respect of the commercial evaluation:

“D1.2 Commercial evaluation of the Tenders will not result in a weighted score. The evaluation will result in an overall commercial compliant/non-compliant assessment.

...

D1.5 If the Tenderer is judged to have satisfied all Commercial requirements throughout, the Tender shall be assessed commercially as “Compliant.”

...

D1.6 Within the Commercial element of the Tender, the Tenderer is required to provide the requisite Management Plans as detailed in the Commercial Compliancy Matrix at Enclosure 1 to this Appendix 1 to Section D. The Commercial evaluators will consider two questions:

- A. Have the required schedules been completed?
- B. Are the schedules in accordance with the Terms and Conditions?

Commercial evaluators may pass concerns to the Technical evaluation team who will undertake a robust assessment within the technical evaluation process as appropriate.

D1.7 Commercial Compliancy will be assessed on AWARD...

16. Enclosure 1 to Appendix 1 to Section D contained the Commercial Compliancy Matrix:

D1.8 ... *Tenderers must indicate their compliancy against each section of this ITT by annotating “Compliant” or “Non-Compliant” both in AWARD and on a returned hard copy of this Commercial Compliancy Matrix ...*

*A ‘Compliant’ response is measured by the Tenderer’s agreement that they have accepted each section or paragraph, and where required they agree that they are fully compliant with the contents and have provided the relevant information. The compliancy matrix is not an evaluation of the contents of the tenderer’s response.*

*Any Tenderer’s comments that represent a qualification against the acceptance may deem the tender non compliant ... ”*

17. Appendix 2 to Section D set out the evaluation process in respect of the technical evaluation:

“D2.1 The Technical Evaluation will be conducted by testing the following aspects of the Technical Tender:

- A. **Capability:** This will examine the credibility of the Tender in response to the requirement and assess understanding of requirements, capacity, flexibility, implementation, mobilisation and resilience of the tenderer;
- B. **Customer Relationship:** This will examine the proposals in relation to interfacing, knowledge sharing, and relationship management;
- C. **Supply Chain Management:** This will examine the tenderer’s approach as detailed with proposed Methodology plans and suggested improvement through innovation and its implementation;
- D. **Value for Money:** This will examine the tenderer’s methodology for ensuring best value for money across the services to be provided under any resultant contract;
- E. **Safety:** This will examine the Safety Management Plan provided specifically for the

Port, Maritime and Other Logistical Support Services tender;

- F. Quality Management:** This will examine the Quality Management Plan provided specifically for the Port, Maritime and Other Logistical Support Services tender.

### **Evaluation Methodology**

D2.2 The Authority's technical evaluation team will comprise of SMEs from the primary customer as well as SMEs who will evaluate specific areas such as Quality and Insurance. This team will review the evidence in the tender and evaluate it against the requirements set out in the ITT and the Assessment Criteria at Enclosure 1 to this Appendix 2 to Section D. Evaluation will consider the Tenderers' proposals for delivery of the requirements, supported by appropriate management plans.

D2.3 In the evaluation process the Authority SMEs will individually evaluate the responses using the scoring guidance for each question and award the appropriate mark.

**D2.4 The Authority will reject any Tender if any response achieves an assessment of lower than 'Good Confidence' in accordance with the evaluation criteria.**

...

D2.6 Moderation of the technical evaluation will follow the individual SME evaluations ... The moderator's score will be the final technical Authority score.

...

D2.8 Tenderers should note the Scoring Guidance in the Technical Criteria attached at Enclosure 1 to this Appendix 2 to Section D."

18. Appendix 2 contained an example technical evaluation table at Figure 2, which showed the weighting and scores available, up to a possible score of 100%, for the following questions:
- i) Question 1 – Capability;



- ii) Question 2 – Customer Relationship;
- iii) Question 3 – Supply Chain Management;
- iv) Question 4 – Value for Money; and
- v) Question 5 – Insurance.

The technical evaluation for Question 6 – Safety and Quality Management was not included.

- 19. Enclosure 1 to Appendix 2 contained the technical criteria, scoring guidance and weighting breakdown for Questions 1 to 5. The scoring guidance for each sub-question set out the criteria required for a score of “High Confidence”, “Good Confidence”, “Concerns” or “Unacceptable”.
- 20. The summary box for Question 6 did not contain the same weighting and potential scores as for Questions 1 to 5 but was as follows:

<b>6</b>	<b>Safety and Quality Management</b>	<b>Score</b>
6.1	Management Plan	Pass/Fail
6.2	Food Safety Management Plan	Pass/Fail
6.3	Safety at Work	Pass/Fail

- 21. Question 6.3 – Safety at Work was in the following terms:

“Describe in your response to Schedule 16 (Contractor’s Management Plan) how you will ensure that a safe working culture is promoted and practised throughout your supply chain in the delivery of this contract.”

- 22. The scoring guidance for Question 6.3 was as follows:

Score	
Pass	In the Authority’s opinion all of the following statements are true: 1. The tenderer has provided appropriate safety management process.

	<ol style="list-style-type: none"><li>2. The tenderer has provided sufficient evidence that a safety culture exists throughout the supply chain.</li><li>3. The tenderer has described the means by which the safety culture is tested.</li></ol>
Fail	<p>In the Authority's opinion the tenderer has failed to provide the following evidence:</p> <ol style="list-style-type: none"><li>1. An appropriate safety management process.</li><li>2. A safety culture exists throughout the supply chain.</li><li>3. A safety culture is tested.</li></ol>

23. Appendix 3 to Section D explained how the financial evaluation, which constituted 60% of the overall award decision, would be undertaken:

Section D3.3.3

"Each Tenderer will be ranked in a table from lowest to highest total Contract Management Price. The percentage difference between the lowest priced Tender and each of the other Tenders will be calculated. Any tendered price that, in the opinion of the Authority, is unrealistically low may be rejected and deemed non-compliant."

Section D3.3.4

"The percentage difference will be reversed out of 100 and this will determine the percentage of total Contract Management Price element each Tenderer will receive. The lowest priced compliant Tenderer will be awarded the maximum financial score of 60 (which equates to 100% of the pricing evaluation). The remaining Tenderers will receive a score that equals the percentage difference between their combined price ... and the lowest compliant Tenderer's combined price."

Section D3.3.5

"Non-compliant Tenderers that have been excluded will not feature in the price evaluation. The score for any Tender that has a combined total price that is over 100% greater than that of the lowest compliant Tender will be adjusted to 0 (zero)."

24. Appendix 4 to Section D explained how the combined evaluation would be undertaken:

"D4.1 In accordance with D22 above the Authority will evaluate and award the contract to the Most Economically

Advantageous Tender (MEAT) that is deemed to be both Commercially and Technically compliant.”

25. Worked examples of the financial and technical evaluations were set out in tables in Appendix 4. The financial evaluation table showed the lowest priced tenderer with a maximum score of 60 and the other compliant tenderers scored by reference to the percentage difference between their price and the lowest price. The tender that was deemed to be technically non-compliant was not considered further and the tender that was more than 100% greater than the lowest price was adjusted to zero. The technical evaluation table showed the tenderers ranked in order, with the top score of 100% giving rise to a maximum score of 40 for that tenderer. The combined financial and technical results table showed the scores combined to give a maximum total score of 100 and the overall ranking of the tenders. The technically non-compliant tender did not receive a ranked or scored result.
26. Section F contained the conditions of tendering, including the following reservations of right by the MoD to:
  - “a. seek clarification or additional documents in respect of a Tenderer’s submission;  
  
...
  - c. disqualify any tenderer that does not submit a compliant Tender in accordance with the instructions in this ITT;
  - d. disqualify any Tenderer that is guilty of misrepresentation in relation to its Tender, expression of interest, the dynamic Pre-Qualification Questionnaire (PQQ) or the tender process ...”
27. In summary, the ITT indicated that there would be a three-part evaluation of the tenders:
  - i) The commercial evaluation would be a “compliant / non-compliant” assessment, based on completion of the Commercial Compliancy Matrix, completion of the required schedules and acceptance of the commercial terms and conditions, but would not include an evaluation of the contents of the tenderer’s response.
  - ii) The technical evaluation was worth 40% of the overall score. Each of Questions 1 to 5 would be marked against the identified criteria, with a score of “high confidence”, “good confidence”, “concerns” or “unacceptable” for each sub-question. A score of lower than “good confidence” for any response would result in rejection of the tender. Question 6 was not included in the overall score and each sub-question would be marked as a “fail” or “pass”.

- iii) The financial evaluation was worth 60% of the overall score. The maximum score of 60 would be awarded for the lowest price and the other tenders would be marked based on the difference in value from the lowest price. Non-compliant tenders would not be scored and tenders that were more than 100% above the lowest price would receive a score of 0.
28. The ITT provided that the Contract would be awarded to the tenderer who was compliant in the commercial evaluation, achieved the annotated minimum requirements in the technical evaluation, and obtained the highest combined scores in the financial and technical evaluation.
29. On 4 August 2016 a tenderer's conference was held for the five qualifying bidders from the DPQQ stage.
30. In August and September 2016, the tenderers raised clarification queries to which the MoD provided responses, including a response to query 11 concerning Question 6.3 – Safety at Work:

“The purpose of the question is to test and ensure that the PMLSSC provider will practise and promote a safe working culture throughout its supply chain. Your response to the question must demonstrate that any proposal from you describes how it is to be tested throughout the duration of the contract.”

*The tender*

31. On 21 September 2016, MLS submitted its tender.
32. The technical response by MLS included the following response to Question 3 – Supply Chain:

“The Supply Chain Management section (Section 4) of our response to Schedule 16 (Contractor's Management Plan), describes MLS' approach to the management of its supply chain...

MLS has extensive, global experience in managing our supply chain to support local, regional and global service delivery. The primary element of our supply chain is our network of port agents around the world...”

33. In response to Question 6.3 – Safety at Work, MLS stated:

“Our response to Schedule 16 (Contractor's Management Plan) describes how we will ensure that a safe working culture is promoted and practised throughout our supply chain in the delivery of this contract.”

34. Schedule 16 contained the Contractor's Management Plan. Section 4 of Schedule 16 described the MLS supply chain:

"MLS is contracted by its Defence customers to provide port agency and logistics services. MLS executes these duties via its global network of port agents (MLS local representatives) ...

MLS utilises independent port agencies to support the work with all our navy / defence customers. The business relationship between MLS and these local port agents is a simple and straightforward Prime/Agent relationship. All of our local port agents are independent businesses, either headquartered or with established offices in their respective ports...

We select our local port agents based upon many criteria, including their proven honesty, integrity, financial stability and capability, ISO and other appropriate certifications / insurances and performance records, knowledge of detailed requirements and protocols, established professional relations with local authorities, and their general ability to "get things done" meeting and exceeding our contractual obligations.

MLS enforces very strict criteria for accrediting them; educating them on our quality standards, and monitoring their performance against compliance with those standards. New port agents are given all the training they require, including hands on support during the first port visits handled in the areas and training in the Standard Operating Procedures. ...

Contractual arrangements with our local port agent, service providers and suppliers are carefully negotiated to ensure that responsibilities and expectations are very clearly defined. We have linked our Port Agency Agreements and Operations Procedures Manual (OPM) to each other in order that we may flow down key obligations from our contractual requirements to the local port agents."

35. At section 4.4 of Schedule 16 MLS produced a supply chain map, depicting the organisational arrangements set out above.
36. Section 6 of Schedule 16 contained the Safety, Health, Environment and Fire ("SHEF") Management Plan:

"MLS has long established SHEF policies as set out in its Health and Safety Manual ... Annex C...

The manual sets out MLS policy with respect to safety, health and the environment; and the current organisation and arrangements for achieving the policy within the Company as required by:

- Health and Safety at Work, etc. Act 1974, section 2,
- Management of health and Safety at Work Regulations 1999 Regulation 3
- Subsequent Health and Safety Acts, regulations and EU Directives.

We will adopt a planned and systematic approach to SHEF policy implementation on the PLMSS contract. As with all our business, our aim is to minimise the risks created by work activities, products and/or services. We also have put in place policies and procedures to monitor performance and adopt continual improvement in SHEF performance. ...

Our standard approach employs the following key elements which will be applied under the PLMSCC contract from the outset

...

- Ensure suppliers and service providers are aware of SHEF obligations under the contract and have suitable policies and plans in place (see 6.7 below) ...
- Continually review both the application of SHEF policies throughout the contract and amend practice or policy (under MLS' continual improvement process) to ensure both the health and safety of employees and all individuals involved in MLS operations and activities...

MLS utilises independent port agencies to support our work with all our navy / defence customers. The business relationship between MLS and these local port agents is a simple and straightforward Prime/Agent relationship...

MLS management selects its port agency network based on core competencies that include:

- Knowledge of detailed requirements and protocols

...

- Appropriate certifications, e.g. ISO 9001, ISO14001

...

We ensure that representatives receive training on and have read, understand our policies, quality standards and work methods defined in Standard Operating Procedures...

We continually monitor the competency of Representatives based on KPIs, performance data and compliance with requirements...

As these companies have ISO certifications; are licensed and reputable; they will perform in compliance to the local port / naval base regulations ...”

37. Section 9 of Schedule 16 set out MLS’s approach to risk management:

“MLS adopts a planned and systematic approach to risk management ...

Key to the success of this approach is our operating philosophy of developing collaborative working relationships with our Defence customers, local port agents, and suppliers/service providers. We have linked our Port Agency Agreements and Operations Procedures Manual (OPM) to each other in order that flow-down our contractual obligations to the local port agents...

Risks may be identified, and mitigations proposed, by MLS, its customers and its local port agents. At the start of any contract or service delivery we ensure alignment of plans and policy with all parties which includes risk management.”

38. The SHEF & Security Manual included the following statements:

“To achieve high Health & Safety standards our organisation will be structured and operated so as to enable our Health & Safety policy to be put into effective practice. We appreciate that this will be helped by the creation of a positive culture, which secures involvement and participation at all levels. We recognise that this will need to be sustained by effective communications and the promotion of competence that enables all our employees to make a responsible and informed contribution to Health & Safety issues. We understand that the visible and active leadership by senior managers is necessary to develop and maintain effective and functional Health & Safety management...

We will adopt a planned and systematic approach to policy implementation...Performance standards will be established and performance measured against these. Specific actions needed to promote a positive Health & Safety culture and to eliminate and control risks will be identified...

Health and Safety is recognised as the most important responsibility that the company has towards its employees and all others affected by the company’s working. All management as part of their employment are committed to the pursuance of

progressive improvements in health and safety performance through good controls, communications and encouragement, ensuring that a positive health and safety culture is promoted and developed.”

*The evaluation process*

39. The MoD evaluators for Question 6.3 were Beverley Waskett, project manager for the Contract, and Cathryn Valentyne, quality assurance representative. On 26 September 2016, they each marked the MLS tender as “fail” in respect of the safety at work question and entered the following reasons for the mark:

“Beverley Waskett ...

The tenderer response has not demonstrated sufficient evidence that safety culture exists throughout the supply chain on a global scale.”

“Cath Valentyne ...

Very limited or no evidence of safety culture throughout the supply chain. Health & Safety at Work Act 1974 underpins the SHEF manual but doesn't cover a global scope with no reference to local or regional requirements or flow down of contract requirements for a health & safety culture.”

40. The moderator for the technical evaluation was Commander Mark Hardwick, a logistics officer in the Royal Navy. On 14 October 2016 he marked the MLS tender as “fail” in respect of the safety at work question and gave the following reasons for the mark:

“Given the potential seriousness of this assessment I have spoken to both evaluators independently and searched all of the documentation provided, both in the electronic and manuscript formats. Whilst, on current performance, I do not believe that MLS present safety concerns, I can only assess their potential to operate the PMLSSC safely through the evidence provided in the company's tender submission. To that end, and despite the company having a detailed SHEF policy, I have failed to find any tangible link that demonstrates how this policy is passed down through all levels of the global supply chain nor can I find any reference to safety standards nor the promotion of a safety culture within the company's supplier selection processes. Given these factors, and despite my own belief that MLS is not unsafe, I do not have any evidential means to award a pass for this requirement.”

41. On 17 October 2016 the MoD sent an email to MLS, asking for clarification, namely, where in the tender submission the response to Question 6.3 could be found. MLS replied by return, identifying the SHEF Management Plan and SHEF Manual as the relevant documents. Following a further request for the specific pages relied on, MLS



replied on 20 October 2016, indicating that all pages in the identified documents were relied on as the response to Question 6.3.

42. On 17 October 2016, Commander Hardwick updated his entry in the evaluation system, confirming the “fail” score.
43. On 27 October 2016 the tender review panel for the Contract held a meeting, chaired by Thomas O’Gorman, Head of Defence Commercial, Royal Navy, to discuss the draft tender evaluation report that had been prepared by the project team. All four tenders were commercially compliant and financially affordable. Two of the tenders failed to achieve the minimum score of “good confidence” against the technical criteria and were deemed non-compliant. The minutes of the meeting record that the “fail” mark given to one of the tenderers was discussed. It was noted that the “fail” mark was material and could not be overlooked given the importance to the MOD of safety through the supply chain. The draft tender evaluation report was approved, and it was confirmed that SCA was the winning tenderer and should be awarded the Contract.
44. Following the meeting, the project team prepared the Main Gate Business Case, seeking approval from the Investment Approvals Committee (“the Committee”) for the award of the Contract to SCA.
45. On 13 January 2017 Captain Tim Ferns produced a report, explaining the importance of a safe working culture to the Royal Navy and the decision to mark the MLS response to Question 6.3 as a “fail”, stating:

“Many of the services described in the SOR require the service provider to use plant, machinery and vehicles or tools on board or in close proximity to ships and our personnel, engaging in potentially hazardous activities ... Even the provision of food and water has serious health and safety concerns ... The RN must ensure that appropriate health and safety precautions are known, understood and adhered to by all those with whom we work. This obligation cannot be delegated or transferred. A ship or submarine visiting a port must be able to trust the contractor to be using appropriate HS&EP practices but there is no possible way for the ship to assure this themselves, prior to their arrival. Accordingly, the PMLSSC deliberately seeks to place a requirement on the prime contractor to ensure that their sub-contractors are able to meet the standards required, to mitigate this risk...

MLS’s response fails to provide sufficient evidence that they promote, maintain, or test their company’s safe working practices through the supply chain to the point of service delivery by a sub-contractor to the ship in port. Their response in Schedule 16 Annex C does give detail of how this is managed for their own direct employees and contractors visiting their sites but does not expand on this. Accordingly, the evaluators had insufficient evidence, and therefore no confidence, that the actual delivery of goods and services

would be conducted in accordance with the mandated HS&EP policies...

Amongst the tenders that were assessed as a pass on this section, all identified a governance process in their own organisation. Two of the tenderers identified personal responsibilities, demonstrated an understanding of UK legislation, highlighted the appointment of a competent advisor as a safety manager and outlined a process of inspections, investigations and reporting on safety culture with their sub-contractors...

In contrast, MLS provided some salient general points on the issues but, in the opinion of the evaluators, they lacked sufficient detail specifically relating to evidence that a safety culture exists throughout their supply chain..."

46. Also on 13 January 2017, Mr O’Gorman prepared a written recommendation to the Head of Commercial. Having referred to the evaluation process and the Fern report, he stated:

“On that basis the decision of the Tender Evaluation Panel meeting was that the fail score was upheld. In reaching this conclusion the Tender Evaluation Panel were aware of the serious impact of this score and were mindful of the fact that the only compliant bid was slightly more expensive but within the affordability criteria and achieved a slightly lower technical evaluation score but was still fully compliant.”

Mr O’Gorman recommended that, to the extent that the Committee had any discretion as to whether to reject the MLS tender because of its fail score on Question 6.3, the Committee should exercise its discretion to reject the tender.

#### *The decision*

47. The MLS tender was compliant as against the commercial evaluation criteria. MLS offered the lowest price in the financial evaluation, achieving the maximum score of 60%. MLS achieved the highest percentage score in the technical evaluation with a mark of 34.2% (against a possible 40%). However, MLS was given a “fail” score against its response to Question 6.3.
48. The winning tenderer, SCA, submitted a commercially compliant tender but achieved a lower technical score of 30.4% and lower financial score of 56.26% when compared with MLS.
49. On 24 January 2017 the MoD made a decision to approve the Main Gate Business Case, thereby rejecting the MLS tender and awarding the Contract to SCA (“the Decision”).
50. By letter dated 25 January 2017 the MoD informed MLS of the Decision:

“This letter notifies you of the MOD’s decision to award the contract to SCA – Shipping Consultants Associated Ltd (the “Winning Tenderer”) ...

The contract award criteria are based on the Most Economically Advantageous Tender (MEAT), which required all 3 of the following elements:

- a. a fully compliant response to the commercial Compliance Matrix.
- b. a Technical submission, with the potential to achieve up to 40% of the overall MEAT calculation and as detailed in the ITT, was subject to:
  - i. obtaining the minimum of “Good Confidence”
  - ii. obtaining a pass mark question 6 which was scored as pass/fail.
- c. a Financial submission with the potential to achieve up to 60% of the overall MEAT calculation...

Please note, that your tender submission would have been successful had it not been scored a FAIL for the Technical Question 6.3...”

### *Proceedings*

51. On 26 January 2017 MLS indicated that it wished to challenge the Decision.
52. On 13 February 2017 MLS commenced these proceedings. The following relief is sought:
  - i) A declaration that the MoD has acted unlawfully.
  - ii) An order declaring that MLS’s tender was the most economically advantageous tender and amending the Decision to provide for the award of the Contract to MLS.
  - iii) Alternatively, an order setting aside the Decision and requiring the MoD to complete its evaluation lawfully, rationally and in compliance with the terms of the ITT.
  - iv) Alternatively, an order that the MoD should re-run the procurement.
  - v) Further, or alternatively, damages.
53. The award of the Contract was automatically suspended as a result of the challenge by MLS.

54. On 12 May 2017 the court ordered an expedited hearing of this matter, limited to liability. Pending the outcome of the proceedings, the MoD has agreed to continue MLS's current contract.

*Legislative framework and relevant principles*

55. It is common ground that this procurement was subject to the Defence and Security Public Contracts Regulations 2011, as amended ("the Regulations"). The Regulations must be interpreted by reference to EU Directive 2009/81/EC; in particular, the principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency in respect of the award of contracts.

56. Regulation 17 provides that a contracting authority using the restricted tendering procedure (as in this case) must include in the ITT:

"(d) the relative weighting of criteria for the award of the contract or, where appropriate, the descending order of importance for such criteria, if this information was not specified in the contract notice ..."

57. Regulation 31 provides that the criteria for the award of a contract include:

"(1) ...a contracting authority shall award a contract on the basis of the offer which –

- (a) is the most economically advantageous from the point of view of the contracting authority; or
- (b) offers the lowest price...

(3) Where a contracting authority intends to award a contract on the basis of the offer which is the most economically advantageous it shall state the weighting which it gives to each of the criteria chosen in the contract notice or contract documents...

(5) Where, in the opinion of the contracting authority, it is not possible to provide weightings for the criteria referred to in paragraph (3) on objective grounds, the contracting authority shall indicate the criteria in descending order of importance in the contract notice or contract documents."

58. The MoD was required to conduct the procurement in accordance with obligations of transparency, equality of treatment, procedural fairness, good administration and proportionality. Any decision was required to be rational and free from manifest error.

59. The principle of transparency was explained by the European Court of Justice in *SIAC Construction Ltd v County Council of the County of Mayo* (Case C-19/00) [2001] ECR I-7725 and by the Supreme Court in *Healthcare at Home Ltd v The Common Services Agency (Scotland)* [2014] UKSC 49 at paragraph [8]:

“... [In the Mayo case] the Court explained what the legal principle of transparency meant in the context of invitations to tender for public contracts: the award criteria must be formulated in such a way as to allow all RWIND tenderers to interpret them in the same way. That requirement set a legal standard: the question was not whether it had been proved that all actual or potential tenderers had in fact interpreted the criteria in the same way, but whether the court considered that the criteria were sufficiently clear to permit of uniform interpretation by all RWIND tenderers.”

60. The test is an objective one, based on an interpretation of the relevant documents, taking account of all the circumstances of the particular case: *Healthcare* at paragraphs [14] and [26].

61. In *SAG ELV Slovensko* (Case C-599/10) [2012] ECR I-10873, the European Court of Justice explained at paragraphs [36]-[41] that contracting authorities cannot ask clarification questions that involve negotiation with any tenderer on a confidential basis, or that unduly favour or disadvantage the tenderer to whom the clarification was addressed. However, that does not preclude [40]:

“... the correction, or amplification of details of a tender where appropriate, on an exceptional basis, particularly when it is clear they require mere clarification, or to correct obvious material errors, provided that such amendment does not in reality lead to the submission of a new tender.”

62. A contracting authority must comply with the decision-making procedure set out in the procurement documents: *Energy Solutions EU Ltd v Nuclear Decommissioning Authority* [2016] EWHC 1988 (TCC) per Fraser J at paragraph [255]:

“The principles of equal treatment, non-discrimination and transparency require a contracting authority that has adopted a decision-making procedure for assessing bids to comply with it once it has begun to do so. A different way of expressing the same principle is to state that a contracting authority that has set rules for that procedure must follow them, applying those rules in the same way to the different bidders. Changing the decision-making procedure during the process of assessment risks arbitrariness and favouritism, a risk that it is the purpose of such requirements to avoid. In *C-226/09 Commission v Ireland* [2010] ECR I-11807 the weighting was altered after tenders had been submitted and after an initial review of those tenders had been performed. This was held to be conduct that was not consistent with the principle of equal treatment and the obligation of transparency.”

63. The court will not substitute its own decision for that of the contracting authority. Provided that the obligations of transparency and equal treatment have been satisfied, the court will only interfere with the decision of a contracting authority where there has been a manifest error, such as, where there has been a failure to consider all

relevant matters (or consideration of irrelevant matters), or the decision is irrational in that it is outside the range of reasonable conclusions open to it: *Lion Apparel Systems v Firebuy* [2007] EWHC 2179 (Ch.) per Morgan J at paragraphs [34]-[38]; *Woods Building Services v Milton Keynes Council* [2015] EWHC 2011 (TCC) per Coulson J at paragraphs [11]-[17]; *Energy Solutions* (above) per Fraser J at paragraphs [274]-[276].

*Transparency and equality of treatment*

64. MLS's case is that the MOD acted unlawfully in failing to award the Contract to MLS despite the fact that it submitted the most economically advantageous tender in accordance with the criteria set out in the ITT; alternatively, the MOD acted unlawfully in rejecting the tender based on a fail score against Question 6.3, despite the fact that it was not made clear to bidders that a pass was required in order to render the tender compliant.
65. The MOD's position is that on a proper construction of the ITT, the Reasonable Tenderer would have understood that the consequences of a fail score against Question 6.3 would be an automatic, alternatively discretionary, rejection of the bid.
66. It is common ground that the ITT did not contain an express statement that a fail score against Question 6.3 would result in automatic or potential rejection of the tender. In my judgment, on a proper construction of the ITT, it did not make clear to the Reasonable Tenderer, expressly or implicitly, that a fail score against Question 6.3 would or could result in disqualification of its tender for the following reasons.
67. Firstly, the ITT stated in Section D1 that the winning tender would be the most economically advantageous tender and set out the evaluation criteria that would be used to determine the most economically advantageous tender.
68. Section D7 stated that there was a mandatory requirement for the winning tender to be commercially compliant. Such commercial evaluation would not be based on a weighted score but would be a "compliant / non-compliant" assessment, based on completion of the Commercial Compliancy Matrix, completion of the required schedules and acceptance of the commercial terms and conditions.
69. Section D7 stated that the winning tender must obtain the minimum requirements where annotated for Technical Evaluations. The minimum requirement for each of Questions 1 to 5 in the technical evaluation methodology in Appendix 2 to Section D was a score of at least "good confidence" for any response.
70. Section D7 stated that the winning tender would have the highest combined scores from the Technical and Financial evaluations. The technical evaluation was worth 40% of the overall score calculated from the scores awarded for Questions 1 to 5 as set out in Appendix 2 to Section D. The financial evaluation was worth 60% of the overall score, calculated by reference to the lowest realistic price submitted and deviation from that base price.
71. The evaluation criteria stated to be used to determine the most economically advantageous tender did not include Question 6.

72. Secondly, the worked examples of the financial and technical evaluations set out in the tables in Appendix 4 to Section D did not indicate that a pass or fail score against any part of Question 6 would have any impact on the scores or assessments used to ascertain the winning tender as set out in Section D7.
73. Thirdly, the ITT set out in bold type the responses in a tender that would lead to rejection of the tender, such as failure to submit a commercially compliant tender or failure to achieve at least “good confidence” where indicated as a requirement in the technical evaluation. There was no clear statement in bold type that a “fail” score for any part of the response to Question 6 would lead to rejection.
74. Fourthly, although Appendix 2 to Section D explained that the responses to Question 6 would be marked “pass” or “fail”, and contained the scoring guidance against which the responses would be marked, the ITT did not set out the consequences of such scores. The ITT did not state that a “fail” score for any part, or all, of Question 6 would result in rejection of the tender. Significantly, the ITT did not indicate that a “pass” score for each part of Question 6 was a minimum standard that had to be met to make the tender technically compliant. Mr O’Gorman of the MOD was very frank in his written and oral evidence that this was a mistake. Ms Waskett formulated a draft of Section D2.4 that expressly reserved the right of the MOD to reject a tender if any one response achieved a score of “unacceptable” or “fail” but that draft did not form part of the final ITT.
75. The MOD relies on the fact that Section D2.4 stated expressly that the MOD would reject a tender if any response achieved an assessment of lower than “good confidence” in accordance with the evaluation criteria. Mr Bates submits that it was implicit in those words, and the Reasonable Tenderer would have understood, that a “fail” score for Question 6.3 would be treated as an assessment of lower than “good confidence” and lead to automatic rejection of the bid. I reject that submission. The Reasonable Tenderer would assume that there would be a difference in treatment between Questions 1 to 5 and Question 6 because the ITT identified different categories of assessment for such responses. The ITT could have stipulated that a “pass” would equate to “good confidence” but did not do so.
76. The MOD submits that the Reasonable Tenderer would have assumed that the pass/fail score against Question 6 must have some effect on the outcome of the competition and would have appreciated that a “fail” score would lead to automatic or discretionary rejection of the tender. Reliance is placed on the expert evidence of Mr Brown and Mr Lobl that “pass/fail” questions would generally give rise to automatic or discretionary rejection. However, all the examples referred to by the experts in their reports formed part of tender documents that set out the express consequences of any failure to pass the stipulated threshold. Therefore, they do not assist in ascertaining what the Reasonable Tenderer would assume in the absence of expressly stated consequences.
77. The MOD’s submission ignores the fact that, even if the Reasonable Tenderer must have assumed that a “fail” score for any part of Question 6 would have some effect, the ITT did not enable the Reasonable Tenderer to determine whether the consequence of such failure would be mandatory or discretionary rejection. If a “fail” score resulted in automatic disqualification, Question 6 would operate as a minimum threshold standard. If the right to reject were discretionary, there would be

circumstances in which a “fail” score would have no effect on assessment of the tender or would have some effect on the weighting given to other scores in the tender, falling short of outright disqualification. Without knowing whether a “fail” score would lead to mandatory or discretionary rejection, the Reasonable Tenderer would not know whether, or how, that particular criterion would be weighted in the evaluation.

78. The MOD submits it is not open to MLS to base its case on any ambiguity in the ITT because such complaint was not pleaded and would be out of time. However, that is a mischaracterisation of MLS’s case. MLS submits that it was unlawful for the MOD to reject its tender based on criteria that were not set out clearly, or at all, in the ITT.
79. For the above reasons, I find that, on a proper construction of the ITT, the Reasonable Tenderer would not understand whether or how a “fail” score against the response to Question 6.3 would, or could, result in a rejection of the tender.
80. Accordingly, the MOD acted unlawfully, in breach of its obligations of transparency and equal treatment, in applying criteria that were arbitrary or not sufficiently clear from the ITT and in rejecting MLS’s tender on that ground.

*Manifest Error*

81. MLS’s case is that the MOD was wrong to score its answer to Question 6.3 as a “fail”. Its response addressed each of the stated requirements set out in the scoring guidance in the procurement documents. Alternatively, if the MOD was unclear as to whether MLS had provided the necessary evidence, it could and should have asked for clarification, including further evidence from MLS on this question.
82. The MOD’s position is that MLS failed to provide an adequate explanation or evidence that it would ensure that a safety culture would be promoted and practised throughout its supply chain. It was not incumbent on the MOD to seek further clarification from MLS beyond the two requests made by email. Indeed, the MOD had to be careful to avoid overstepping the line and treating MLS in a more favourable way than the other tenderers.
83. Question 6.3 clearly stated that tenderers were required to provide an explanation as to how they would ensure that a safe working culture would be promoted and practised throughout the supply chain in the delivery of the contract. The scoring guidance indicated that the tenderer was expected to provide evidence to support its answer and to explain how it would satisfy the contractual requirements.
84. Ms Farhadian agreed in cross-examination that a safety culture would not be demonstrated simply by a reference to safety policies or the enforcement of safety obligations in respect of the services. She also accepted that it was necessary to demonstrate that a safety culture would be promoted and practised beyond MLS and the port agents, and through to the suppliers and sub-contractors with whom MLS did not have a direct contract.
85. MLS relied on Schedule 16 in response to Question 6.3. Schedule 16 contained a description of its supply chain (in section 4) and its safety policies (in section 6). It stated that MLS would adopt a planned and systematic approach to implementation of



its safety policies, it would ensure that suppliers and service providers were aware of MLS's safety obligations under the contract and it would monitor their performance.

86. Schedule 16 referred to the need to create a positive safety culture which secured involvement and participation at all levels but did not give any details as to how it would achieve this. Mr Rowland of eXceeding Limited, whose company provided procurement consultancy services, accepted that Schedule 16 could have spelt out in more detail how MLS would ensure adequate risk and safety controls were achieved. Ms Farhadian explained in cross-examination that she assumed that the parties could discuss how MLS would ensure implementation of its health and safety policies after contract award.
87. MLS suggested that the fact that its management plan satisfied the requirement for commercial compliance was evidence that it satisfied the technical requirements for the bid. However, paragraphs D1.6 and D1.8 of Appendix 1 to Section 6 were clear that commercial compliance did not involve any evaluation of the contents of the tenderer's response. Therefore, MLS could not rely on commercial compliance to demonstrate satisfaction of the technical requirements.
88. No valid criticism can be made of the evaluation process. Ms Waskett and Ms Valentyne carried out separate assessments, using the criteria and scoring guidance in the ITT, and recorded independently their reasons for marking Question 6.3 as a "fail". The fact that Ms Waskett also gave MLS a "fail" score on another question, contrary to the marks awarded by others, doesn't come close to establishing bias on her part.
89. Commander Hardwick explained that, as part of his moderating exercise, he spoke to Ms Waskett and Ms Valentyne independently and carried out a review of the documentation relied on by MLS. He accepted in cross-examination that the Schedule 16 documentation explained the MLS supply chain, MLS's health and safety policies, and identified an intention to flow the health and safety requirements down to the port agents and other suppliers. However, he concluded that those references did not fully engage with and answer Question 6.3.
90. The MOD offered MLS two opportunities to clarify where in the tender documentation could be found the answer to Question 6.3. It was not incumbent on the MOD to go further and invite MLS to provide additional details not included in the bid documentation. There may be circumstances in which correction or amplification of tender details should be invited, to avoid a disproportionate penalty being imposed on a tenderer for a mistake. However, this was not a case of mere clarification or correction of an obvious, material error. To address the inadequacies identified by the MOD, MLS would have been required to provide additional evidence to support its bid. There is a risk that the submission of additional evidence could be characterised as a fresh tender, giving rise to a claim by the other tenderers of unfair advantage. In those circumstances, there was no obligation on the MOD to offer MLS an opportunity to submit further details.
91. It is not for this court to determine what conclusion it would have reached had it carried out the evaluation and/or moderation exercises, or reviewed the tender evaluation report and/or recommendation to the Committee. The evaluation of MLS's tender by the MOD, including MLS's response to Question 6.3, was based on a

consideration of all relevant matters, did not take into account any irrelevant considerations, and was rational. It was within the range of reasonable conclusions that could be reached on an assessment of Question 6.3. It was not obviously wrong.

92. MLS has failed to establish that there was any manifest error in the MOD's assessment and evaluation of the response to Question 6.3.

*Exercise of discretion*

93. Given my finding in relation to the unlawfulness of the decision set out in paragraph 80 for breach of the obligations of transparency and equality of treatment, the exercise of any discretion by the MOD does not arise. However, for the sake of completeness, having heard evidence and submissions on this point, I address it below.
94. MLS's case is that, if the MOD had discretion to reject a tender for a single fail score, it failed to exercise its discretion lawfully. MLS submits that there was no evidence as to the basis on which the MOD actually decided to reject its bid. The evidence of Ms Waskett and Mr O'Gorman was that demonstration of a safety culture throughout the supply chain was a material issue. There was never any prospect of the MOD deciding to allow MLS to remain in the competition having failed to satisfy the Question 6.3 criteria. Therefore, in reality, the MOD did not exercise any discretion in deciding to reject the MLS tender.
95. MLS's alternative submission is that any exercise of discretion by the MOD was irrational and disproportionate. The MOD should have considered alternative solutions, such as offering all tenderers the opportunity to make further submissions on Question 6.3. The MOD should have taken into account MLS's unblemished safety record and the fact that it would have been the highest placed bidder but for the "fail" score against Question 6.3. In the light of those factors, the MOD should have considered inviting further clarification from MLS.
96. The MOD's position is that, although achieving a safety culture throughout the supply chain was important to the Royal Navy, it was not the only factor considered when exercising its discretion to reject MLS's tender. The MOD considered other factors, such as the capability of the next ranked tenderer to provide the services required under the Contract, and the relative difference in scores achieved by MLS and SCA aside from the response to Question 6.3. A broad discretion is afforded to contracting authorities in relation to such decisions which involve questions of evaluative judgement. There is no basis for MLS's submission that any exercise of discretion by the MOD was irrational and disproportionate.
97. When reviewing the exercise of discretion and any decision of an organisation operating a tiered decision-making process, it is necessary to consider all the factors taken into account, or disregarded, throughout that process. The tender evaluation report, the minutes of the meetings, the report by Captain Tim Ferns and the recommendation to the Committee show that the MOD recognised the significance of the "fail" score for MLS and gave anxious scrutiny to the tender and the importance of the safety question to the Royal Navy. There was a genuine exercise of any discretion by the MOD. The nature of the deficiency in MLS's response to Question 6.3 was considered; in particular, whether it was a technical or substantive "fail". There was also consideration given to a comparison between the next-ranked tender

and MLS on the other evaluation scores. I find that there was a genuine weighing up of all relevant factors by the MOD in deciding to exercise any discretion to reject the MLS tender.

98. Rejection of MLS's tender would have been one of the reasonable available options taking into account the above factors. It would not have been open to the MOD to base its decision on MLS's safety record as that did not form part of the criteria set out in the ITT. For the reasons set out above, it would not have been appropriate for the MOD to seek further evidence or submissions from MLS by way of further clarification as that would have amounted to unequal treatment in favour of MLS. Therefore, I reject MLS's submission that any exercise of discretion by the MOD was irrational and disproportionate.

*Conclusion*

99. For the reasons set out above, MLS is entitled to a declaration that the MOD has acted unlawfully.