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Case No: HT-2022-000132
HT-2024-000035

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

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

Date: 17/04/2026

Before :

MRS JUSTICE JOANNA SMITH DBE

- -

Between :

(1) THE NEW LOTTERY COMPANY LIMITED
(2) NORTHERN & SHELL PLC

Claimants

- and -

THE GAMBLING COMMISSION

Defendant

- and -

(1) ALLWYN ENTERTAINMENT LIMITED
(2) ALLWYN INTERNATIONAL A.G. (FORMERLY KNOWN ALLWYN INTERNATIONAL A.S. AND SAZKA GROUP A.S)
(3) CAMELOT UK LOTTERIES LIMITED

Interested Parties

- -

Daniel Toledano KC, Michael Bowsher KC, Azeem Suterwalla KC, Maximilian Schlote and Khatija Hafesji (instructed by **Bryan Cave Leighton Paisner LLP**) for the **Claimants**
Sarah Hannaford KC, Rachael O'Hagan, Rose Grogan, **Barney McCay and Monty Fynn** (instructed by **Hogan Lovells International LLP**) for the **Defendant**
Mark Howard KC, Joseph Barrett KC and Malcolm Birdling (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **Interested Parties**

Hearing dates: 9, 13, 14, 16, 20, 21, 22, 23, 27, 28, 29, 30 October, 3, 4, 5, 6, 10, 11, 13, 25, 26, 27 November and 2 December 2025; 13 January 2026

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Approved Judgment

This judgment was handed down remotely at 10.30am on 17 April 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE JOANNA SMITH DBE

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Mrs Justice Joanna Smith DBE :

INTRODUCTION

1. This litigation arises out of what the Claimants describe as "the most financially significant procurement process in UK history", namely a procurement process run by the Gambling Commission ("**the Commission**") for the award of the Fourth National Lottery Licence (the "**Fourth Licence**") pursuant to section 5 of the National Lottery etc. Act 1993 ("**the NLA 1993**").

2. The First Claimant ("**TNLC**") is a company established by the Second Claimant ("**N&S PLC**") for the specific purpose of competing in the Fourth National Lottery Competition (the "**Competition**" or "**4NLC**"). The Northern & Shell group of companies ("**the N&S Group**"), under the chairmanship of Mr Richard Desmond, acquired the Express Newspapers group in 2000, Channel 5 in July 2010 and, shortly thereafter, the Health Lottery. The Health Lottery, a collection of nationally marketed local society lotteries, each contributing to health related good causes, was launched by the N&S Group in October 2011.

3. The procurement process for the Fourth Licence took place between October 2020 and March 2022. On 15 March 2022, TNLC was informed that it had been unsuccessful in obtaining the Fourth Licence and that the Commission had decided to award the Fourth Licence to the First Interested Party, the UK subsidiary of the Second Interested Party (known at that time as SAZKA Group A.S.) (together "**Allwyn**"). The Third Interested Party, the previous incumbent operator of the National Lottery ("**Camelot**"), was the reserve bidder with TNLC in third place in the Competition. Save where it is necessary to distinguish between them, I shall refer to the Interested Parties in this judgment as "**the IPs**".

4. The Claimants now make two claims against the Commission. In the first claim ("**the Process Claim**") they challenge the fairness and integrity of the Competition process and its outcome, relying upon alleged breaches by the Commission of the Concession Contracts Regulations 2016 ("**the CCR 2016**"). They contend that the Commission was in manifest error in scoring TNLC as a "Fail" in respect of important Pass/Fail elements of the Competition and that it was also in breach of obligations of transparency which caused or contributed to these erroneous scores. They contend that, but for these failures on the part of the Commission, TNLC would have passed the Pass/Fail requirements. They also contend that in light of manifest errors by the Commission in the approach taken to Pass/Fail requirements for Allwyn and Camelot, those two bidders should have failed (such that it would have been impossible for either of them to win the Competition), alternatively that had the Commission acted properly in accordance with its duties it should have disqualified both Camelot and Allwyn from the Competition. In the circumstances, the Claimants contend that TNLC would have won the Competition and they seek damages of in excess of £1 billion in compensation for lost profits. Their original claim at the outset of the trial also included an alternative allegation that TNLC lost a real chance of winning the Competition, but this is no longer pursued.

5. The Claimants' second claim ("**the Modifications Claim**"), which is said not to be dependent upon success in the Process Claim, challenges modifications which have been made to (i) the agreement between the Commission and Allwyn ("**the Enabling**

Agreement") which governs the transition to the Fourth Licence; and (ii) the Fourth Licence itself. The Claimants allege that these modifications resulted in a contract to run the National Lottery that was significantly different from that on which TNLC made its bid in the Competition. They claim that these were "substantial" amendments within the meaning of Regulation 43 of the CCR 2016 and/or that they were foreseeable to a reasonably diligent authority such that a new competition (which they refer to as "**5NLC**") should have been run for the modified contract pursuant to Regulation 43(10). The Claimants say that TNLC would have had a real chance of winning 5NLC and they seek damages for the loss of that chance (again in excess of £1 billion), together with (at least in their pleaded case) a declaration of ineffectiveness in respect of the modifications made in 2023.

6. Commensurate with the potential significance of the claim, each party was represented at trial by substantial legal teams. The Claimants were represented by Daniel Toledano KC, Michael Bowsher KC, Azeem Suterwalla KC, Maximilian Schlote and Khatija Hafesji. The Commission was represented by Sarah Hannaford KC, Rachael O'Hagan, Rose Grogan, Barney McCay and Monty Fynn. The IPs were represented by Mark Howard KC, Joseph Barrett KC and Malcolm Birdling.

7. Notwithstanding the size of the claim and the legal resources available, I observe at the outset that the Process Claim has been advanced by the Claimants in an apparently unfocused manner, leading to various of the (numerous) original issues being dropped at the outset of trial, at the outset of closing submissions and even during closing submissions by the Claimants. In many cases, the issues were not dropped until it was specifically drawn to the Claimants' attention by the court or by the other parties that they had not been addressed in the Claimants' written closing submissions or that there no longer seemed to be any viable basis on which they could be maintained. The extent of this moveable feast was regrettable and (given the legal resources available to the Claimants) inexcusable. It led to significant time being wasted by the other parties in dealing with issues which were subsequently abandoned. It also risked leaving the court with an imperfect understanding of how the case was being advanced. To describe this as surprising, given the nature and alleged value of this claim, would be an under-statement.

8. Whatever my views on the approach taken by the Claimants to the litigation (which will be best addressed in the context of arguments on costs at the consequentials hearing following this judgment), I nevertheless bear firmly in mind that the question of whether the Claimants can make out any of the remaining live issues such that they can succeed on their significantly narrowed Process Claim and on their Modifications Claim (which has survived to the close of trial largely intact) must of course be determined on the merits in the usual way.

THE NATIONAL LOTTERY

9. The National Lottery is, as its name suggests, something of a national institution, recognised the length and breadth of the country. It is operated under a licence held by the operator and it is underpinned by a statutory framework set forth in the NLA 1993 which, amongst other things, identifies its statutory purpose as being to maximise returns to good causes ("**Good Causes**"). These returns are paid by the licensee to the National Lottery Distribution Fund ("**NLDF**").

10. Since its launch in 1994, the National Lottery has raised more than £50 billion for Good Causes (distributed by 12 Distributor Bodies in the form of more than 650,000 individual awards as at June 2025), transforming lives through its contribution to communities, heritage, sports and the arts throughout the UK. It has funded a wide range of public interest activities, from large scale projects such as a contribution of £2.2 billion towards the cost of the London 2012 Olympic and Paralympic Games, to local community projects such as foodbanks and children's centres. In addition, 12% of the price of all tickets in National Lottery games is paid to HM Treasury in Lottery Duty (as at June 2025 some £21.4 billion since it began), making a significant contribution to the public purse.

11. Players must be 18 or over to participate in the National Lottery. As at the date of the Competition, roughly 12 million people were taking part in the National Lottery Lotto game and there were 8 million winners each week across all games. As at that date, this had resulted in £75 billion being awarded in prizes (as at June 2025 increased to more than £95 billion) and the creation of more than 5,700 millionaires. Retailers who sell National Lottery tickets have earned more than £8 billion in sales commissions.

12. The National Lottery is regulated by the Commission, an independent statutory body responsible for awarding the licence authorising a person to operate the National Lottery in the UK and the Isle of Man. The Commission is established as an executive non-departmental public body of the Department of Digital, Culture, Media and Sport ("**DCMS**"). It is common ground that it is a contracting authority within the meaning of the CCR 2016. Both the DCMS and the Commission have statutory duties under the NLA 1993 to uphold high standards of propriety and participant protection in the running of the National Lottery. These are set out in section 4 NLA 1993:

> "4 Overriding duties of the Secretary of State and Commission
>
> (1) The Secretary of State and (subject to any directions he may be given by the Secretary of State under section 11) the Commission shall each exercise their functions under this Part in the manner they consider the most likely to secure—
>
> (a) that the National Lottery is run, and every lottery that forms part of it is promoted, with all due propriety, and
>
> (b) that the interests of every participant in a lottery that forms part of the National Lottery are protected.
>
> (2) Subject to subsection (1), the Secretary of State and the Commission shall each in exercising those functions do their best to secure that the net proceeds of the National Lottery are as great as possible".

13. Under section 5(2) NLA 1993, only one licence can be on foot at any one time and, under section 7 NLA 1993, each licence must not exceed 15 years in duration.

14. In carrying out its function of granting a licence, the Commission must establish a process for written applications to be made, specifying the information it requires to determine whether to grant the licence, and the date by which such applications must

be submitted. Further, the Commission must not grant a licence unless satisfied that the applicant is a fit and proper person to run the National Lottery and must revoke the licence if, at any point during the licence period, it considers that the licensee is not fit and proper.

15. Running the National Lottery is highly complex and involves managing numerous operational elements, including organising games with a high degree of security and integrity, retailer management, logistics, financial management (including holding funds as part of a security trust for the benefit of players and funding distribution to Good Causes), customer support, promotion, security and game development, and design. At its heart, it is dependent upon technology for the operation of its core systems and keeping these systems up to date is a very significant expense.

16. The first three licences to operate the National Lottery (granted under section 5 NLA 1993) were held by Camelot. The third licence, awarded to Camelot on 1 February 2009 ("**the Third Licence**"), was a 10 year licence (extended after initial grant to 14 years) with a statutory long-stop date of 31 January 2024. A periodic licensing cycle has an important role in creating incentives for National Lottery technology to be refreshed and for other aspects of the National Lottery (such as the mix of games) to be upgraded. It also ensures an appropriate balance between the Commission's statutory duty to maximise returns for Good Causes and the commercial interests of the operator in running a viable business notwithstanding the very significant levels of investment required.

17. The operation of the National Lottery under Camelot involved draw-based games such as Lotto and EuroMillions together with scratchcards and online interactive Instant Win games.

THE COMPETITION

The early stages of the Competition

18. Between around July 2019 and March 2020, the Commission was involved in a period of market engagement in parallel with its work in designing the Competition and proposals for the Fourth Licence. Mr Andrew Wilson (Competition Commercial Director) was responsible for the market engagement phase, assisted by N.M. Rothschild & Sons Limited (trading as Rothschild & Co) ("**Rothschild**"), a multi-national investment bank and financial services company.

19. Mr John Tanner was appointed as Senior Responsible Owner ("**SRO**") of the Competition programme with effect from 1 July 2019, directly accountable to the Commission CEO and Board, under the oversight of the Parliamentary Under Secretary for Sport, Heritage and Tourism. As SRO, Mr Tanner had personal responsibility for delivery of the Competition programme and (amongst other things) was accountable for the delivery of its objectives and policy intent.

20. In May 2020, the timescales for the Competition were extended to account for delays arising due to the COVID-19 pandemic.

21. On 26 August 2020, the Commission published a Selection Questionnaire ("**SQ**") as the first stage of the Competition with a commencement date of 28 August 2020 and a

submission deadline of 2 October 2020. On 31 August 2020 the Commission published a notice in the Official Journal of the European Union advertising the Competition for the Fourth Licence, which was to have a duration of 10 years.

22. The purpose of the SQ was to assess whether a relevant Proposed Licensee would "possess the relevant professional and technical capacity and capability, and the financial and economic standing, to run an operation on the scale and complexity of the National Lottery". The SQ provided that it would be a condition of the Fourth Licence that the Licensee was a special purpose entity ("**SPV**") established in the UK which carried on no activities other than operating the National Lottery. Prior to submitting an SQ response, each applicant was required to return a signed copy of the Application Process Agreement ("**APA**") which detailed the terms on which applicants were able to participate in the Competition, including confidentiality provisions and terms as to access to a repository of information set up in a secure Virtual Data Room ("**VDR**") hosted by Intralinks.

23. Clause 2.8 of the SQ, entitled "Conflicts of Interest", required applicants to disclose to the Commission any conflict of interest or potential or perceived conflict of interest that may arise in connection with the Competition. Clause 5 of the SQ informed applicants that if they passed through the SQ stage they would be subject to Fit and Proper Checks "which will be a further aspect of ascertaining the suitability of the Proposed Licensee to run the National Lottery and benefit from it".

24. Each applicant was required to pass various sections at 9.1-9.8 of the SQ, including (i) propriety; (ii) financial management; and (iii) resources to support application. At the end of the SQ process, any applicant who was unsuccessful would not be invited to proceed in the Competition.

25. Seven applicants completed the SQ and, of these, five were successful in progressing to the next stage, namely International Game Technology Limited ("**IGT**"), Allwyn, Camelot, TNLC and Sisal S.p.A ("**Sisal**"). IGT did not go on to bid in the Competition because it joined forces with Camelot as a Key Subcontractor. The remaining four applicants proceeded to the next (second) stage of the Competition.

26. The outcome of the SQ stage was communicated to applicants on 26 October 2020, with the Invitation to Apply ("**ITA**") being issued to the successful applicants at the same time, together with a covering letter from Mr Wilson. In his foreword, Mr Wilson said this:

> "…our objective is to appoint a Licensee that can build on the National Lottery's legacy, find new opportunities for a sustainable and successful future, and ensure continued support for good causes and their contribution to society.
>
> We will run a fair and transparent competition, in which all interested parties are on an equal footing, so we can appoint the right operator to engage and protect participants, and run the National Lottery with integrity.
>
> The Competition has been designed to provide Applicants with the opportunity to propose innovative solutions, whilst ensuring

> that the Commission's Statutory Duties are met and the National Lottery continues to deliver significant social value, in terms of the good causes contribution as well as wider social benefit".

27. Also on 26 October 2020, the Commission issued a Transition Guidance Note, a Deed of Commitment, the Section 6 Licensing Guidance Note and the Fit and Proper Applicant Note. All applicants successful at SQ were granted access to the VDR.

The Invitation to Apply

28. The ITA set out the details of the National Lottery opportunity, together with the process and requirements associated with submitting an application and information as to how applications would be evaluated. It was accompanied by the Proposed Form of Fourth Licence setting out the detailed conditions relating to the operation of the National Lottery that applicants were required to consider when responding to the ITA. Section 1.3.1 provided that the Fourth Licence would be for a period of ten years. The Commission explained that the term of the existing Third Licence would end on 31 July 2023 and that it was intended that the Fourth Licence would start on 1 August 2023 and end on 31 July 2033. The Implementation Period was expected to commence in October 2021.

29. There can be no doubt that, through the ITA, the competing bidders were being invited to invest very substantial time, money and resources into their applications, including building a comprehensive business plan, demonstrating the criteria in respect of the Pass/Fail questions and presenting a compelling financial proposition relative to their competitors. The Claimants' pleaded bid costs of £17 million demonstrate the level of financial investment required to compete. However, the potential prize was enormous: a 10 year exclusive licence to run an internationally high profile lottery brand as an effective monopoly, worth over time in excess of £1 billion to its operator.

30. In its Introduction at Volume B, the ITA explained that the Fourth Licence represented a "step change in the approach to regulating the National Lottery" in that it was "centred on an outcomes-focused approach to regulation". Thus it was intended to "provide greater opportunity for innovation and flexibility to cope with changing future conditions". The "outcomes", set out in the Fourth Licence at Condition 1.2, were that the National Lottery would be carried on "(a) with all due propriety; (b) in a way which protects the interests of Participants; and (c)…so as to maximise the amount being paid out of the net proceeds of the National Lottery to Good Causes". The Fourth Licence therefore places responsibilities on the Licensee to achieve outcomes that are consistent with the duties set out in the NLA 1993, but does not prescribe how the Licensee should go about achieving these outcomes.

31. In addition to complying with law and regulation, the ITA explained that the Licensee "must comply with Best Practice, being the standard to be expected of an experienced and professional person doing a particular thing and seeking to secure the outcomes set out in Condition 1.2 [of the Fourth Licence]". The Commission stated that it intended to run a "fair, open and robust competition in line with its Statutory Duties and principles of public law".

32. In Volume C, the ITA set out "Process and Instructions". It explained that the ITA stage of the Competition was made up of two phases and that applicants were required

to provide a "full form of response" at both phases. This two-phase approach was designed to provide applicants with an equal opportunity to refine their Applications throughout the ITA Stage:

i) **Phase One**: involved a Phase One Response Period to allow for (amongst other things) applicant briefings, clarification questions by applicants and Commission replies (through the Jaggaer portal) and individual applicant clarification sessions. At the end of this period, the applicants submitted their Phase One bids (known as **Applications**). This was followed by the Phase One Review and Feedback Process which included applicant presentations and written feedback provided by the Commercial Team appointed by the Commission. This feedback was intended to give applicants "the opportunity to address any weaknesses, omissions, ambiguities or risks in their proposals" before submitting their Phase Two Applications. Submissions were not scored at Phase One and there was to be "no down select of Applicants" at this point.

ii) **Phase Two**: involved a Phase Two Response Period which enabled the applicants to present their Applications, refine their bids, submit clarification questions and submit updated Applications for Evaluation and scoring at the end of that stage. The applicant ranked first following Evaluation would be appointed **Preferred Applicant** by the Commission, with the next highest placed applicant being appointed as **Reserve Applicant**. The Commission would provide written confirmation to all applicants of the outcome of the Evaluation with a description of the rationale for the decision made by the Commission ("**the Outcome Notification**"). Following communication of the Outcome Notification, the Commission would observe a voluntary 10-day standstill period before confirming its Award Notification decision, resulting in execution of the Enabling Agreement which set out the responsibilities of the Incoming Licensee to implement its Application and cooperate with the Outgoing Licensee. The Enabling Agreement required the Incoming Licensee to implement its Incoming Transition Plan. A Deed of Commitment was to be executed by each applicant at the time of its Phase Two bid committing the applicant, if selected as Preferred Applicant, to procure that its Proposed Licensee execute the Enabling Agreement and a Deed of Adherence to the Cooperation Agreement (a contract provided for in the Third Licence, between the existing Licensee, the Incoming Licensee and the Commission designed to achieve an orderly handover of the National Lottery).

33. Volume C included the following:

i) At 5.4.4 applicants were informed that Fit and Proper Checks would be conducted by the Commission in parallel with the ITA Stage and that "[i]n the event of adverse findings in these checks, Applicants may be removed from the Competition at the Commission's discretion";

ii) At 6.2 applicants were reminded of the existence of the VDR;

iii) At 6.14, the Commission reserved its right "at any time, in its absolute discretion, to disqualify any Applicant that does not, in the Commission's opinion, comply with the requirements of this ITA or any other requirement of

the Commission in connection with the Competition that may from time to time be notified to the Applicant";

iv) At 6.16, the ITA repeated the guidance given by the Commission in the SQ as to the need to disclose any actual, potential or perceived conflict of interest accompanied by the individual applicant's proposed mitigating steps.

34. The approach to Evaluation was set out in Volume D, section 7, of the ITA by reference to four sections, as follows:

i) **Propriety, Protecting Participants' Interests ("PPI") and Financial Strength ("the Pass/Fail Areas")**. Under this section (which reflects the Commission's statutory duties under section 4 NLA 1993) the applicants were required "to satisfactorily demonstrate" that the National Lottery would be run "with all due propriety" and that in running the National Lottery the Proposed Licensee would protect the interests of all Participants "including protecting Participant funds" ("**PPF**"). The evaluation would also consider the Financial Strength of the Proposed Licensee which included "demonstrating that it will have sufficient resources to meet the requirements of implementation and the requirements of the Fourth Licence throughout the Fourth Licence Term". This section was designed to evaluate applicants' responses on these topics by reference to Pass/Fail criteria (to which I shall return in detail later in this judgment) and applicants were told that:

> "Applicants must meet the Pass criteria for propriety, protecting Participants' interests and financial strength. The Commission will consider the entire Application in determining a Pass/Fail result. Applications must fulfil all Pass criteria in order to be included in the final ranking of Applications following Evaluation".

ii) **Licensee's proportion of surplus**. This section was designed to evaluate the applicants' proposed Licensee Proportion of Surplus (i.e. the percentage share of the Surplus that would cover the Licensee's costs, subject to specific adjustments) relative to the lowest Licensee's Proportion of Surplus proposed by any applicant using a relative scoring mechanism. The ITA explains that:

> "The Applicant proposing the lowest Licensee's Proportion of Surplus will be awarded 100% in this area of evaluation (prior to application of the area weighting), with all other Applicants scored relative to this. This area of evaluation has a 15% weighting".

iii) **Good Causes Contribution**. This section was designed to evaluate applicants' Good Causes Contribution relative to the highest Good Causes Contribution proposed by any applicant using a relative scoring mechanism in conjunction with the Business Plan evaluation. The ITA explains that:

> "The Applicant that proposes the highest Good Causes Contribution will be awarded 100% in this area of evaluation, with all other Applicants scored relative to this. This score is

> multiplied by the Business Plan Score to calculate the combined Business Plan and Good Causes Contribution Score, prior to application of the combined area weighting. The combined areas have a weighting of 85%".

iv) **Business Plan**. This section was designed to evaluate the credibility and deliverability of applicants' responses in five identified Business Plan Areas, using a marking criteria of 0-15 for each Area (thus a total of 75 marks were available). 'Credibility' was to be evaluated "based on how likely the proposal for that Business Plan Area will meet the Proposed Good Causes Contribution". 'Deliverability' was to be evaluated based on "how the proposal for that Business Plan Area will be achieved and successfully delivered". Each Business Plan Area (namely Transition, Branding, Portfolio, Channels and Operations) carried an equal weighting. The ITA explains that:

> "Applicants will be evaluated using a relative scoring mechanism whereby their Business Plan Mark (following application of a Solution Risk Factor) will be relatively scored against the highest of all Applicant's Business Plan Marks. The Applicant that receives the highest Business Plan Mark, following application of the Solution Risk Factor, will be awarded 100% in this area of Evaluation, with all other Applicants scored relative to this. The score is then multiplied by the Good Causes Contribution Score to calculate the combined Business Plan and Good Causes Contribution Score, prior to application of the combined area weighting. The combined areas have a weighting of 85% relative to the Proposed Good Causes Contribution using a relative scoring mechanism in conjunction with the Good Causes Contribution evaluation."

35. Applicants were required to achieve a minimum mark of at least 6 out of 15 across all five Business Plan Areas and a minimum mark of at least 9 out of 15 in at least half (3 or more) of the Business Plan Areas. The ITA warns that "[a]ny Applicant who fails to achieve the minimum mark will automatically fail the Evaluation". Applicants' Good Causes Contribution proposal would only be counted if their Business Plan passed the required threshold marks.

36. The total score for an applicant was to be derived from the Licensee's Proportion of Surplus Weighted Score (15% of the Total Score) and the combined Business Plan and Good Causes Contribution Weighted Score (85% of the Total Score). The simplistic formula was therefore: Licensee's Proportion of Surplus Score + [Good Causes Contribution Score x Business Plan Score (including Solution Risk Factor)] = Total Score (assuming a Pass in the Pass/Fail Areas).

37. Applicants were required to provide a consolidated Risk Register containing "a complete and accurate explanation of each risk identified by the Applicant and how it will be mitigated". Where a risk was specific to an area of Evaluation or an individual Business Plan Area it would be considered as part of that area of Evaluation. However, where the risk was considered to be "solution-level" (i.e. it was an issue giving rise to risk "when considered in the context of two or more individual Business Plan Areas")

it would be considered as part of the Solution Risk Factor ("**SRF**"). The ITA explains that the SRF "will be used to address the impact of cross-cutting aspects of the Applicant's Business Plan". The application of a SRF was capable of reducing the Business Plan Mark by "a whole number percentage between 0-15%". The Commission had "a discretion to determine that an Applicant whose SRF is 15% will Fail the Evaluation".

38. Each applicant was also required to submit a detailed Financial Template in support of its Application alongside Supporting Financials (additional quantitative information and calculations) and Supporting Narrative (additional qualitative information and calculations) (together "**the Financial Response**"). The Financial Response was to be used as a tool to support evaluation. It included a Financial Strength Scenarios component which required responses to reflect different assumed scenarios having regard to a Base Case. This component, which was evaluated as part of financial strength on a Pass/Fail basis, was required in order to evidence that an applicant "will have sufficient funding in place throughout the Implementation Period and the Licence Term in the event that costs exceed forecasts and/or revenues fall short of forecasts".

39. Volume E of the ITA contained the Commission's Statement of Requirements, which provided an introduction to, and overview of, the requirements of the Fourth Licence and further detail on the evaluation of Applications. This Volume dealt with:

    i) Propriety at section 10 (including the need for Fit and Proper Checks to take place in parallel with the ITA Stage);

    ii) PPI at section 11;

    iii) The Good Causes Contribution at section 12, including the Incentive Mechanism, namely a financial mechanism designed to ensure that the Incoming Licensee is incentivised to maximise its Good Causes Contribution through the Fourth Licence Term by aligning Licensee profits to the same measure. Essentially this involves paying a fixed annual payment to Good Causes ("**the Fixed Contribution**") with any additional profit ("**the Surplus**") being split between the Licensee and Good Causes;

    iv) Financial Strength at section 13, including the transitional requirement that the Incoming Licensee is required to have sufficient resources to implement the Application and the Incoming Transition Plan and prepare to operate the National Lottery;

    v) PPF at section 14, including an explanation of the Fourth National Lottery Trust ("**the 4NL Trust**") which must be established to safeguard funds which are paid to the Licensee in connection with the purchase of tickets in Games; and

    vi) Branding, Channels, Portfolio, Operation, Implementation, Transition and Exit at Sections 15-19. Ancillary Activities were addressed at Section 20.

40. Volume F, entitled "Your Application", contained the specific questions that Applicants were required to respond to. The criteria in the ITA were assessed by reference to an applicant's responses. I shall return to look at these in detail when I come to address the issues in this case, but for now I note that ITA Questions 1-9 were

concerned with the Pass/Fail Areas. Relevant Questions for the purposes of these proceedings are:

i) Propriety: Questions 2 and 3 (ITA section 22.2); PPI: Questions 4 and 5 (ITA Section 22.3); PPF: Questions 6 and 7 (ITA Section 22.4); Financial Strength: Questions 8 and 9 (ITA Section 22.5);

ii) ITA Questions 10-21 which were concerned with Business Plan Areas; and

iii) ITA Questions 22-34 which were concerned with other areas, including the Risk Register (Question 26) and questions about the Financial Strength Scenarios (Questions 28-31).

41. A critical element of PPF under the Fourth Licence were the trust arrangements for the 4NL Trust in which the Participants' funds were to be protected. In brief summary, a proportion of the money generated from ticket sales is deposited into trust accounts from which prizes are paid.

42. A Short Form Trust Deed together with the Commission's Regulatory Handbook was issued alongside the ITA.

The Evaluation Team

43. There were a number of different roles within the Evaluation Team established by the Commission:

i) Evaluator: This role involved evaluating and scoring the Applications. Three Evaluators were allocated to each ITA response area, with one being appointed "Lead Evaluator". Evaluators were recruited from within the Commission and seconded from external consultancies. They prepared individual evaluation notes focused on their particular area and scored Applications individually before attending moderation sessions where their initial scores were discussed and a final score and rationale was agreed. Evaluators were given guidance on the scoring mechanism through training materials together with evaluation note templates. They were instructed not to communicate with each other (and therefore not to share their individual evaluation notes) before the moderation meeting. They fed their completed evaluation notes on each applicant through the Subject Matter Resource to the Moderator in advance of the moderation sessions.

ii) Subject Matter Resource ("**SMR**"): SMRs were recruited from within the Commission or from Ernst & Young ("**EY**"). The role varied but SMRs generally provided logistical support in terms of organising meetings and managing documents as well as acting as a point of contact for Evaluator queries. One SMR was appointed to each ITA response area. The Risk SMR, Mr Mark Hanby, had a substantive role in considering potential SRFs (in conjunction with three other SRF Evaluators).

iii) Moderator: EY provided the Moderators. Mr Wilson reviewed candidates' skills and experience and decided which individuals would be offered the role. The Moderators chaired and facilitated the discussion at the moderation

meetings, the outcome of which was captured by the scribe in the moderation notes template. This was designed to contain a consensus view in terms of strengths and weaknesses, a consensus score and a rationale with which all the Evaluators agreed. Mr Wilson or his colleague, Taj Chana, attended the moderation sessions together with legal support and a member of the Oversight Team. The final scores and the reasons for those scores were agreed during the meeting and recorded in the Moderation Agreed Outcome Rationale Sheet ("**the Moderation Rationale**"). This was reviewed by legal support before being shared with the Evaluators to ensure it continued to represent their consensus view.

iv) SRF Advisory Panel: This was a specialist panel of Evaluators whose role was to review Applications and identify risks that potentially met the criteria for an SRF. If an SRF was identified, this panel was required to evaluate that risk and arrive at a percentage deduction to account for the SRF in accordance with the ITA.

v) The Oversight Team: was appointed by the Commission and consisted of three independent commercial specialists whose role was to ensure that moderation sessions were being carried out in accordance with the agreed process.

44. Evaluators, SMRs and Moderators received general and area specific training from the Commission before Phase One including through the issue of a detailed and lengthy Evaluation Manual which identifies the objectives of the Competition from the Commission's perspective as being "to run a fair, open and robust competition" which should be transparent and allow for "genuine competition between Applicants". The Manual explains the evaluation approach in detail, including the lawful approach to evaluating Applications and how to evaluate Applications against the Pass/Fail criteria. The Manual was updated and further training was provided before the evaluation of the Phase Two Applications. It was not alleged at trial that any of the Evaluators did not have the appropriate skills, experience or qualifications for the areas they were tasked with, although an issue as to training remains.

45. During the course of the Competition, an internal process was established to enable Evaluators to raise Clarification Questions ("**ECQs**"). These would be raised through SMRs who would either direct the Evaluator to existing training material or take the ECQ to the CQ Panel, a panel consisting of Mr Wilson, members of the Commercial Team and relevant SMRs, which was also tasked with responding to Clarification Questions raised by Applicants. These were recorded and responded to in CQ trackers.

46. Owing to the fact that the Competition involved requirements linked to themes of a specialist and complex nature such as financing agreements, complex financial models and the operation of regulated fund management or trust mechanisms, the Commission recognised the need to obtain specialist input from legal and financial advisers. Hogan Lovells International LLP ("**Hogan Lovells**") were retained to provide legal advice, while Rothschild were retained to assist with financial advice.

The ITA Stage of the Competition

47. Phase One Applications were submitted on 16 April 2021.

48. Phase One Feedback was put together by the Commercial Team having regard to comments received from Evaluators on the Applications. This Feedback was then provided to each of the applicants on 16 July 2021 under cover of a letter from Mr Wilson.

49. Following Phase One, the Oversight Team was commissioned by Mr Wilson to carry out an independent review in order to identify learning points and areas for improvement at Phase Two. The results of this exercise were recorded in an Oversight Review Report dated 22 June 2021. This report stated that "[t]he combined lessons learnt at Phase One will be used to enhance the evaluation of Applications during Phase Two Evaluation".

50. During Phase Two, and consistent with its desire to put into practice "lessons learnt" from Phase One, the Commission issued a number of further Notes for Applicants. These included (in so far as relevant):

    i) The Phase Two Applicant Note and Appendices issued on 16 July 2021 ("**the July Applicant Note**") under cover of a letter from Mr Wilson of the same date. This updated applicants on the process and timeline for Phase Two together with identifying updates to the ITA and various associated documents.

    ii) Information for Applicants on Fit and Proper Checks. This document (originally issued in February 2021 and updated in October 2021) provided additional information about the Fit and Proper Checks process.

    iii) Phase Two Applicant Note: Financial Strength Materials Check issued in July 2021 ("**the Financial Strength Applicant Note**").

51. On 4 August 2021 the Commission issued an Applicant Note amending the Competition timeline. The Third Licence was now to be extended by 6 months to expire on its statutory longstop date of 31 January 2024. A further Applicant's Note dated 12 August 2021 extended the deadline for Phase Two submissions by an additional four weeks to 15 October 2021. The target date for award of the Fourth Licence was now 25 March 2022, with Licence commencement circa 22 months later on 1 February 2024.

52. TNLC attended two feedback sessions on 4 August 2021 and 7 September 2021.

53. On 15 October 2021 Allwyn, Camelot, TNLC and Sisal submitted their final Phase Two Applications. TNLC's Application made clear that TNLC was part of the N&S Group, which was "the current operator of the Health Lottery".

54. Allwyn's Application was based on a 22 month implementation period, including 3 months' contingency.

55. Between 25 October and 1 November 2021, the applicants had an opportunity to present their Applications to the Commission (presentations which each lasted for four or five hours). These presentations did not form part of the Evaluation.

56. Evaluation and moderation then took place towards the end of 2021 and in early 2022. In parallel, the SRF Evaluators considered the applicants' Risk Registers together with their Applications with a view to identifying SRFs. They concluded that none of the

risks identified by the applicants was an SRF because each one had been adequately taken into account in the Business Plan Areas considered by other Evaluators. In addition, the SRF Evaluators conducted a 'top down' review during November and December 2021 designed to identify any SRFs which had not been highlighted within the Business Plan Area Workstreams. The process was documented in two excel logs, a Working Log providing the reasons why a potential SRF was being considered and details of whether and how the risk was considered by Evaluators and an Advisory Log, which contained the Commission's reasons for determining that a potential risk did not meet the criteria to be evaluated as an SRF. SRF review meetings then took place in January 2022 and Mr Wilson also reviewed the information in the Logs. No SRFs were identified for any of the applicants, leading to the Commission concluding that the application of SRFs was not applicable to the evaluation of any applicant's Business Plan Area such that an SRF of 0% was applied to all applicants for the purposes of the score calculation.

57. Until oral closing submissions, the Claimants maintained a complaint about the Commission's approach to the evaluation of SRFs. However, in circumstances where the Claimants accept that their complaint about SRFs has no causal relevance to the Process Claim and also has no bearing on the Modifications Claim owing to the fact that the Claimants cannot say how SRFs would have been dealt with in a counterfactual world and (crucially) whether the approach to SRFs would have made any difference to the gap in scoring between Allwyn and TNLC in the context of a 5NLC, that claim has now been abandoned.

58. During the Competition, the Commission's Licensing team carried out Fit and Proper Checks to satisfy itself that all applicants and specific related entities were fit and proper persons to run, or benefit from the running of, the National Lottery. The outcome of this assessment was recorded in a report that addressed all applicants, the final version of which was dated 11 February 2022 ("**the Fit and Proper Report**"). It determined that all of the applicants were "fit and proper".

The Competition Outcome

59. Evaluation and moderation concluded by February 2022. Thereafter the Commission reported to its Board on the outcome of the Competition ("**the Outcome Report**") and recommended Allwyn, a global leader in the lottery industry with operations across seven countries, as the Preferred Applicant and Camelot as the Reserve Applicant. Both these applicants met all of the criteria in all four mandatory Pass/Fail Areas and satisfied the Business Plan Mark thresholds. The Outcome Report records that both TNLC and Sisal failed to pass all of the Pass/Fail Areas.

60. The overall scores were as follows:

    i) Allwyn: 87.18%;

    ii) Camelot: 85.67%;

    iii) Sisal: Failed one Pass/Fail Area, namely PPI/PPF;

    iv) TNLC: Failed 2 out of 3 Pass/Fail Areas, namely PPI/PPF and Financial Strength. Within these areas TNLC failed 12 Pass/Fail criteria. It is common

ground that all of these criteria needed to be passed before TNLC could even be ranked against other bidders in the Competition.

61. In light of its failures, TNLC's Application was not included in the final ranking of applicants, albeit that its bid was evaluated and (as is also common ground) its position relative to Allwyn and Camelot was as follows:

    i) Its relative score for Licensee's Proportion of Surplus would have been 96.64% (Allwyn's score was 99.14% and Camelot's was 100%);

    ii) Its Business Plan and Good Causes Contribution Weighted Score would have been 43% (Allwyn's score was 72.31% and Camelot's score was 70.67%);

    iii) Its total score would have been 57.50% (approximately 30% lower than Allwyn and Camelot's total scores).

62. The Outcome Report, which was approved by the Commission's Board on 8 March 2022, records that Phase One and Phase Two of the Competition "were carried out in accordance with the Evaluation Approach" in the ITA and that:

> "The Oversight Team provided the SRO with real-time assurance that the approach set out in the ITA and subsequent Applicant Notes was being followed and delivered in a manner consistent with delivering a fair, open and transparent competition where Applicants were treated equally".

63. In a section dealing with additional aspects relevant to the Competition, the Outcome Report states that:

> "The Commission also provided access to National Lottery data for all Applicants throughout the Competition via the Virtual Data Room (VDR), so as to ensure equality of information and provide all Applicants with the data required to compile a complete response. The VDR contained data relating to organisational, financial, contractual, operational, technology, marketing, games portfolio and sales information. Where the Commission was unable to source information reasonably requested by Applicants the Commission provided assumptions on which Applicants could base their Applications".

64. Outcome Letters were issued to applicants on 15 March 2022, at which point the 10 day voluntary stand-still period required by the CCR 2016 commenced. During this period the Commission was not permitted to announce the outcome of the Competition so as to create a window for unsuccessful applicants to consider whether to issue proceedings.

65. A document identifying the reasons for TNLC's failure in the Competition (which ran to over 72 pages) ("**the Detailed Rationale**") was provided to it on 23 March 2022.

CHALLENGES TO THE OUTCOME OF 4NLC, MODIFICATIONS TO THE ENABLING AGREEMENT AND THE PURSUIT BY TNLC OF THE CLAIMS IN THESE PROCEEDINGS

66. On 31 March 2022, Camelot issued proceedings against the Commission challenging the decision to award the Fourth Licence to Allwyn and seeking to set aside that decision. Camelot Global Lottery Solutions Limited was joined to the proceedings pursuant to an application notice dated 5 May 2022 ("**the Camelot Proceedings**").

67. On 6 April 2022, IGT, now one of Camelot's subcontractors, issued proceedings against the Commission, making a similar challenge ("**the IGT Proceedings**"). IGT's grounds of claim included allegations that Allwyn's proposals for transition to a new technology provider, Scientific Games International Limited ("**SGI**") and its new technology system ("**Symphony**") raised unacceptable risks which should have led to the Commission excluding Allwyn's Application from further consideration, or scoring it down.

68. The effect of the Camelot and IGT Proceedings was to trigger an automatic suspension on contract-making ("**the Suspension**") under Regulation 56 CCR 2016 such that the Commission was not permitted to enter into the Enabling Agreement with Allwyn until the Court ordered that the Suspension be lifted. The Commission issued an application to lift the Suspension pursuant to Regulation 57(1)(a) CCR 2016 which succeeded at first instance. However, the Court's Order of 1 July 2022 lifting the Suspension was stayed by Order of the Court of Appeal pending an appeal by Camelot and IGT, for which permission was granted.

69. On 13 April 2022, TNLC issued the Process Claim, at this stage limited to recovery of TNLC's bid costs in the alleged sum of approximately £17 million. Unlike Camelot and IGT, it did not seek to set aside the decision to award the Fourth Licence to Allwyn.

70. Shortly thereafter (and as recorded in an Order of O'Farrell J dated 17 August 2022), the Process Claim was stayed with TNLC's consent behind the Camelot and the IGT Proceedings "until judgment on liability…or any other earlier order" in those proceedings.

71. In anticipation of the Suspension being lifted after an appeal that was due to be heard by 14 September 2022, the Commission wrote to Allwyn on 2 August 2022 seeking confirmation as to whether Allwyn wanted to make any changes to the Enabling Agreement. The Commission had already decided that amendments would be necessary to reflect the new sanctions requirements as a result of the Ukraine war.

72. Allwyn responded to the Commission in a letter dated 17 August 2022. Specifically, it confirmed that its Board remained confident in its ability to deliver its transition plan assuming that the Suspension was lifted shortly after the September hearing in the Court of Appeal and subject to certain identified constraints. However, it stated that this would inevitably lead to additional costs and risk for Allwyn. It went on to identify a number of factors which it said should be taken into account by the Commission in the Enabling Agreement Confirmation Process including (i) the legal challenges which were ongoing and of uncertain duration; (ii) the conflict of interest in respect of ensuring a smooth transition arising by reason of the challenge from Camelot; (iii) the uncertain timing of the Enabling Agreement; (iv) the compression of time available to achieve

transition by 1 February 2024; and (iv) statements from Camelot's solicitors in the Camelot Proceedings that it was not confident in delivering a fully compliant transition to enable commencement of the Fourth Licence in February 2024. Accordingly, Allwyn proposed various amendments to the Enabling Agreement, together with corresponding amendments to the Cooperation Agreement. These amendments included changes to specific dates related to transition and a change in the definition of Recoverable Implementation Costs ("**RICs**"), so that Allwyn could recover costs incurred on certain transition activities which the effect of the Suspension might otherwise have prevented it from recovering.

73. In September 2022, shortly before the appeal against the Court's decision to lift the Suspension was due to be heard, Camelot and IGT withdrew their appeals to the Court of Appeal against the Order of the High Court lifting the Suspension. The Suspension was lifted on 12 September 2022 and the Commission was therefore free to enter into the Enabling Agreement with Allwyn, which it did on 16 September 2022.

74. Pursuant to the Enabling Agreement, Allwyn was required to achieve Fully Implemented Commencement ("**FIC**") to transition to the Fourth Licence by 1 February 2024, the day after the Third Licence expired on its Statutory Longstop date. The delay in entering into the Enabling Agreement had the effect of shortening the Implementation Period available to Allwyn to transition to the Fourth Licence from 22 months to 16 months.

75. Key modifications to the Enabling Agreement made at this time ("**the 2022 Modifications**") included:

    i) clarifying that Allwyn would be required to comply with any sanctions imposed after the Russian invasion of Ukraine on 24 February 2022;

    ii) amending various dates to reflect the later start date and compressed time period of the Implementation Period; and

    iii) amending the definition of RICs to include the costs which Allwyn had incurred during the automatic Suspension to implementation in anticipation of the Enabling Agreement being entered into.

76. From September 2022 onwards, transition was subject to ongoing review and scrutiny by the Commission's Incoming Transition Governance Board (a joint Commission/Allwyn Board) and the Commission's Joint Transition Governance Board (held between Camelot, Allwyn and the Commission).

77. Part of Allwyn's transition from the Third Licence to the Fourth Licence involved upgrades to technology, in particular replacing IGT's retail terminals with retail terminals provided by Scientific Games (Allwyn's technology subcontractor). This was to be completed in stages during the Implementation Period, first by installing Scientific Games software onto the IGT terminals (a process known as "**Splitting the Disk**"), then by switching the terminals from using IGT software to using Scientific Games software, and then finally replacing the IGT terminals with Scientific Games terminals. Splitting the Disk required a new commercial agreement between Allwyn and IGT because IGT was not obliged to provide this service.

78. Negotiations between IGT and Allwyn were difficult and protracted. IGT did not agree to undertake the process of Splitting the Disk for the Fourth Licence and so Allwyn could not finalise the necessary commercial agreement.

79. In February 2023, Allwyn acquired Camelot at a cost of circa £120 million. Camelot duly discontinued the Camelot Proceedings against the Commission on 16 February 2023. The IGT Proceedings continued.

80. In March 2023, Allwyn formally notified the Commission that what it saw as IGT's continued attempts to obstruct transition constituted an Implementation Issue that materially threatened Allwyn's ability to deliver transition and its Application.

81. Further to the hearing of a preliminary issue in June 2023 regarding IGT's standing to bring a claim under the CCR 2016, the Court held in a judgment handed down on 28 July 2023 that IGT (as a subcontractor and not an applicant in the Competition) lacked any cause of action under procurement law (see *IGT v Gambling Commission* [2023] EWHC 1961 (TCC)). IGT commenced an appeal but ultimately discontinued it.

82. In the meantime, between 24 March 2023 and August 2023, the Commission carried out an Implementation Review, as permitted under the terms of clause 18 of the Enabling Agreement. This was designed to assist the Commission to determine how it should progress Implementation in light of the continuing difficulties faced by Allwyn owing to the ongoing IGT Proceedings, specifically, Allwyn's difficulties in reaching an agreement with IGT. The Commission had become increasingly concerned that Allwyn would not now be able to fulfil its obligations under the Enabling Agreement and achieve FIC by 1 February 2024. Allwyn proposed a plan to address the delayed Implementation, which ultimately became known as "Plan Gemini" (also known as Plan C+).

83. On 9 July 2023, IGT's lead representative in the negotiations with Allwyn (Mr Fabio Cairoli) sadly died.

84. Between around July and September 2023, the Commission and Allwyn engaged in negotiations as to the appropriate form of an amended Enabling Agreement to reflect Plan Gemini. In a letter from the Commission to Allwyn dated 3 August 2023, the Commission expressed the view that (consistent with Plan Gemini) there was now a need to amend both the Enabling Agreement and the terms of the Fourth Licence if the Enabling Agreement was to continue.

85. The Commission's Board approved the principles for an amended Enabling Agreement and Fourth Licence at a meeting on 15 August 2023, having considered a paper prepared by Mr Tanner setting out the outcome of the Implementation Review. The paper recorded that, whilst the Commission's assessment was that a substantial cause of Allwyn's delivery issues were "matters outside [its] control" (including Allwyn's relationship with IGT and the reduced Implementation Period resulting from the Camelot Proceedings), nevertheless it was not possible to determine with certainty "the overall balance of factors which [had] contributed to those issues". The paper concluded that it would not now be possible for Allwyn to implement its full Application immediately following expiry of the Third Licence (as required by the Enabling Agreement signed in September 2022) and recommended that modifications be made to the Enabling Agreement and the Licence.

86. Allwyn and the Commission signed an updated Enabling Agreement and Licence on 25 September 2023. I shall return to the detail of the modifications ("**the September 2023 Modifications**") made in due course but, in summary, the effect of the September 2023 Modifications was to allow for Allwyn to transition into the Fourth Licence while still being required to continue to implement its complete Application as proposed during the Competition. The amendments thus permitted the Enabling Agreement and the Fourth Licence to run concurrently, thereby enabling Allwyn to transition to the Fourth Licence with "Initial Functionality" (i.e. Allwyn would operate the National Lottery on the then existing basis). "Full Functionality" (i.e. all the parts of Allwyn's implementation that it had planned to implement by the start of the Fourth Licence) was to be achieved by 29 September 2024 (or, if no longer reasonably practicable, by 28 February 2025). Various other dates and milestones were also amended and a provision was added giving the Commission the ability to extend the Fourth Licence for an additional two years.

87. In October and November 2023 correspondence ensued between the solicitors for TNLC ("**BCLP**") and Hogan Lovells, acting for the Commission, over the amendments made to the Fourth Licence. This correspondence is relevant to a time bar defence to the Modifications Claim to which I shall return later in this judgment.

88. On 12 December 2023, Allwyn and the Commission agreed to further amendments to the Enabling Agreement ("**the December 2023 Modifications**") which relate to information and confirmations that are to be provided to the Commission by Allwyn as part of its revised transition arrangements and other minor changes to wording to reflect the September 2023 Modifications.

89. On 2 January 2024, following months of negotiations with Allwyn, IGT filed a Notice of Discontinuance and the stay on TNLC's Process Claim was lifted (as of 22 January 2024) by Order dated 9 February 2024. Allwyn was finally able to conclude negotiations on an agreement with IGT to support transition.

90. On 19 January 2024, the Commission published a Contract Modification Notice in respect of the modifications. The notice (i) summarised the substance of the modifications; (ii) explained that the estimated value of the Licence was reduced by £254,000,000 compared with the estimated value at the date the Licence was entered into (i.e. from £8.187 billion to £7.933 billion), albeit that if the 2 year extension were to be granted, the value of the Licence would revert to £8.187 billion; and (iii) explained that the modifications were lawful for the purposes of the CCR 2016 because (a) they were not substantial; and (b) in any event, they were necessary as a response to the delay in implementation caused by litigation with Camelot and IGT and/or protracted and challenging negotiations regarding handover from IGT to Allwyn. The issues involving IGT were said to constitute unforeseeable circumstances under CCR 2016 Regulation 43(1)(c).

91. On 1 February 2024, the Fourth Licence, as modified, was granted to Allwyn and came into effect.

92. The Modifications Claim was commenced by TNLC on 2 February 2024.

93. On 26 June 2024 ("**the June 2024 Order**"), Waksman J ordered that the Process Claim and the Modifications Claim were to be jointly managed and that there be a Stage 1

Trial to deal with (i) breach of duty; (ii) causation; (iii) sufficiently serious breach; and (iv) whether the Claimants are entitled to any non-monetary remedies (with quantum specifically excluded). At the same time, Waksman J allowed an application by the IPs to participate at the Stage 1 Trial including "permission to file a statement of case…, evidence, make written and oral submissions and cross-examine witnesses, only insofar as the Allwyn Parties have a separate interest to [the Commission]" in respect of the issues raised in Allwyn's statement of case and any other issues to be determined at the Stage 1 Trial.

94. Following disclosure in November 2024, the Claimants amended the Process Claim significantly to expand the allegations pursued and to seek TNLC's alleged loss of profit from the Fourth Licence. This has not been particularised in the Process Claim, but the damages sought are said to be "of a similar order" to those claimed in the Modifications Claim, subject to not including two additional years at the end of the licence period (i.e. a claim of £1,317 billion less two years' profit of £136 million each = £1,045 billion). The amendments included numerous claims of manifest errors in the scoring of TNLC's, Allwyn's and Camelot's Business Plan Areas, together with a new allegation that, had its Application been scored correctly, TNLC would have won the Competition.

95. Over the course of these proceedings, the statements of case in both the Process Claim and the Modifications Claim have been the subject of numerous amendments. All references to them in this Judgment will be to the most recent versions.

ADDITIONAL RELEVANT PROCEDURAL BACKGROUND

The narrowing of TNLC's case

96. In the months before trial, and during the trial itself, including during closing submissions, there has been a considerable narrowing of the Process Claim advanced by the Claimants.

97. On 14 July 2025, the Claimants abandoned existing allegations of manifest error by the Commission in relation to the scoring of the Business Plan Areas, specifically that TNLC should have scored higher than both Allwyn and Camelot overall in relation to the 5 Business Plan Areas. This was a very significant abandonment because it was TNLC's failure in the Business Plan Areas which led to the 30% gap between its score in the Competition and the scores of Allwyn and Camelot. References to "**the gap**" in this judgment will be to this 30% gap in scores.

98. Nevertheless, at the PTR at the end of July 2025, there remained 64 live issues between the parties in the Process Claim (many of which included numerous sub-issues) running to 32 pages. There were 17 live issues in the Modifications Claim running to 8 pages.

99. On 18 September 2025, the Claimants informed the parties that they did not intend to pursue various allegations of apparent bias in the Process Claim.

100. In their opening skeleton argument for trial (mostly within footnotes) the Claimants abandoned further claims in the Process Claim, including as to alleged conflicts of interest and further allegations of apparent bias. On 7 October 2025 (during the Court's reading period), the Claimants provided revised pleadings in both the Process Claim

and the Modifications Claim together with a revised List of Issues (addressing abandonments made in the Claimants' written opening).

101. Having identified that the latest List of Issues did not capture all issues that appeared to have been abandoned by the Claimants in their opening submissions and in light of concerns raised by the Commission in their written opening submissions that it was unclear which issues remained live, the Court requested by email on 8 October 2025 (the day before the start of the trial) that the Claimants provide a further version of the List of Issues to reflect those that remained live at trial. An email was sent by BCLP later the same day containing a yet further swathe of abandonments, including serious allegations as to preferential treatment of Allwyn, the remaining allegations of apparent bias, allegations relating to lack of due diligence and individual allegations relating to various manifest errors. On the first day of trial (9 October 2025), TNLC indicated that it would produce a further revised List of Issues to reflect these abandonments, which was subsequently provided on 11 October 2025 together with a revised draft Particulars of Claim.

102. After the exchange of written closing submissions, but the day before the start of oral closing submissions, the Claimants served a yet further revised List of Issues in the Process Claim and the Modifications Claim abandoning further issues, including an allegation in the Modifications Claim that the challenged Modifications were brought about wholly or substantially by reason of Allwyn's failures to meet its obligations under the Enabling Agreement. The Court identified at the start of the Claimants' oral closing that the revised List of Issues in the Process Claim did not appear to reflect the extent of the abandonments now reflected in the Claimants' 240 page written submissions and directed that a yet further List of Issues in the Process Claim be provided the next day.

103. In accordance with this direction, BCLP provided a letter to the Court the following day identifying further issues that had now fallen away and enclosing a revised List of Issues. The abandoned issues included allegations concerning the Commission's approach to the evaluation of "Fit and Proper", yet further allegations relating to alleged conflicts of interest, a complex and substantial allegation of manifest error by the Commission in connection with the Media & Communications Protocol which had taken up a considerable amount of time in cross examination at trial, and an allegation as to the use of Camelot 3NL personnel for 4NLC. Importantly, as explained by Mr Toledano, the abandonments removed the scope for the Claimants to pursue a loss of a chance claim (a key plank of the Claimants' case up to that point) in the Process Claim.

104. On the third day of closing submissions, following further questioning as to the viability of other aspects of their case, the Claimants abandoned two issues on which they had previously relied (i) for the purposes of enabling them to "close the gap" and (ii) as being relevant to the question of whether TNLC would have had a real chance of winning a 5NLC in the counterfactual (the latter question arising in the context of the Modifications Claim). The first abandoned issue concerned the Commission's approach to the evaluation of SRFs and the second (on which there had been a significant focus during the evidence owing to allegations of untruthfulness on the part of at least one of Allwyn's witnesses) was on the approach that the Commission had taken in providing feedback to Allwyn on its Operator Share of Surplus ("**OSS**") and whether that feedback had been the catalyst for a reduction in Allwyn's OSS at Phase Two.

105. Unfortunately, this was not the end of the difficulties with identifying the Claimants' case. It became clear during oral closing submissions that the Claimants' closing skeleton argument was not entirely accurate in its characterisation of certain aspects of the Process Claim such that it remained difficult to understand what the consequences might be of findings that the Court is being invited to make by the Claimants – in particular whether the Claimants are relying on allegations in combination to establish causation. In an attempt to address this issue and provide some clarity, I required the Claimants to provide the Court with a clear exposition, which they did on the penultimate day of closing submissions in the form of a table.

106. On the last day of closing submissions the Claimants provided what I understand to be the final version of the List of Issues for the Process Claim, which abandoned a yet further issue in relation to alleged conflict of interest. At close of trial, the List of Issues for the Process Claim has reduced from 64 to 26 main issues. Where I refer to them by number in this judgment I shall refer to their original numbers, consistent with the approach adopted by the parties. I do not understand there to be a revised Particulars of Claim which reflects only these remaining issues. The List of Issues in the Modifications Claim runs at close of trial to 15 issues. It is common ground that Allwyn has a separate interest in various of these remaining issues.

107. Owing to the abandonments I have referred to above, there are now substantial swathes of evidence in the trial to which I need have no regard and in respect of which I need make no findings.

The Further Hearing

108. During closing submissions, an issue arose as to the relationship between provisions in the Enabling Agreement that permitted amendments to be made to the Fourth Licence and the CCR 2016, including a new point as to the applicability of Regulation 43(1)(a). Given the lack of sufficient time to deal with the point and the fact that the parties appeared to disagree on the relevant law, I invited the parties to provide the Court with further written submissions following the close of trial. On Monday 8 December 2025, (i) the Claimants and (ii) the Commission and the IPs (acting for these purposes together) provided Post Trial Notes. The Claimants provided a slightly updated Post Trial Note the next day.

109. From these Notes, it was clear that there was considerable disagreement between the parties on the applicable law and the real significance of the point was somewhat difficult to discern. Accordingly, I invited the parties to make further oral submissions (limited to the issues raised in their Notes) at a hearing which took place on 13 January 2026 ("**the Further Hearing**"). I am satisfied that in light of this hearing, all parties had a full opportunity to address me orally as to the law and to take me to any relevant authorities on which they wish to rely.

Unpleaded Allegations

110. The Commission and the IPs submit that in an attempt to bolster a vague, high level and unparticularised case, the Claimants have sought in submissions and in cross examination to advance new and unpleaded allegations. They contend that (i) the Claimants' unwieldy and unparticularised pleading has made it impossible for them to know what needed to be addressed by their witnesses; and (ii) the Claimants' attempts

to advance unpleaded matters at trial (without making an application to amend, notwithstanding objections made by the Commission and the IPs from time to time to topics advanced in cross-examination) would, if the Claimants were to be permitted to pursue these unpleaded allegations, give rise to significant prejudice. Indeed the IPs contend that the unfairness would be particularly acute in their case owing to the fact that their involvement at trial was circumscribed by reference to the Agreed List of Issues. The IPs contend that the matters in respect of which the Claimants went "off piste" in cross-examination include issues which, had they been pleaded and identified in the Agreed List of Issues for trial, would have given rise to a separate interest on behalf of Allwyn. In all the circumstances, the Court is invited by the Commission and by the IPs to disregard all allegations that have not been pleaded.

111. The Claimants reject this criticism, inviting me to look carefully at their pleaded case, the List of Issues (which has been tied closely to the statements of case) together with the evidence that has been served in response to that pleaded case. They submit that it is clear that the Commission and the IPs have in reality understood the case that was being advanced and come to court ready to meet that case.

112. In turn, the Claimants also allege that aspects of the case advanced by the Commission and by the IPs are unpleaded and accordingly should be disregarded by the Court.

113. I intend to deal with these allegations (which need to be considered separately and in context) as and when they arise in connection with the remaining live issues. I observe however, that the pleading of the material facts on which a claimant relies in his particulars of claim is not only required by the CPR, but is also essential to the orderly and fair conduct of a case. As Coulson LJ said in *Standard Life Assurance Ltd v Building Design Partnership Ltd* [2022] 1 WLR at [39], citing his earlier judgment in *Pantelli Associates Ltd v Corporate City Developments No 2 Ltd* [2011] PNLR 12 at [11]:

> "CPR r 16.4(1)(a) requires that a particulars of claim must include a concise statement of the facts on which the claimant relies. Thus, where the particulars of claim contain an allegation of breach of contract and/or negligence, it must be pleaded in such a way as to allow the defendant to know the case that it has to meet. The pleading needs to set out clearly what it is that the defendant failed to do that it should have done, and/or what the defendant did that it should not have done, what would have happened but for those acts or omissions, and the loss that eventuated. Those are 'the facts' relied on in support of the allegation, and are required in order that proper witness statements (and if necessary an expert's report) can be obtained by both sides which address the specific allegations made."

114. Although this observation was made in *Pantelli* in the context of a professional negligence claim, Coulson LJ made clear (at [40]) that it was not to be confined to such claims: "[t]hese are the basic ingredients of any statement of case against any defendant". Coulson LJ went on at [41] to refer to *Towler v Wills* [2010] EWHC 1209 (Comm) per Teare J at [18]):

> "18. The purpose of a pleading or statement of case is to inform the other party what the case is that is being brought against him. It is necessary that the other party understands the case which is being brought against him so that he may plead to it in response, disclose those of his documents which are relevant to that case and prepare witness statements which support his defence. If the case which is brought against him is vague or incoherent he will not, or may not, be able to do any of those things. Time and costs will, or may, be wasted if the defendant seeks to respond to a vague and incoherent case. It is also necessary for the court to understand the case which is brought so that it may fairly and expeditiously decide the case and in a manner which saves unnecessary expense. For these reasons it is necessary that a party's pleaded case is a concise and clear statement of the facts on which he relies…".

115. These observations echo useful guidance given by Mummery LJ in *Boake Allen Limited & Others v HMRC* [2006] EWCA Civ 25 at [131]:

> "While it is good sense not to be pernickety about pleadings, the basic requirement that material facts should be pleaded is there for a good reason, so that the other side can respond to the pleaded case by way of admission or denial of facts, thereby defining the issues for decision for the benefit of the parties and the court. Proper pleading of the material facts is essential for the orderly progress of the case and for its sound determination. The definition of the issues has an impact on such important matters as disclosure of relevant documents and the relevant oral evidence to be adduced at trial. In my view, the fact that the nature of the grievance may be obvious to the respondent, or that the respondent can ask for further information to be supplied by the claimant are not normally valid excuses for a claimant's failure to formulate and serve a properly pleaded case setting out the material facts in support of the cause of action."

116. In so far as these authorities were focusing on pleadings produced by a claimant, it is important to point out that similar principles apply also to a defendant. Thus in *Al Rawi v Security Service* [2010] EWCA Civ 482; [2010] 4 ALL ER 559 at [18] per Lord Neuberger MR:

> "a civil claim should be conducted on the basis that a party is entitled to know, normally through a statement of case, the essentials of its opponent's case in advance, so that the trial can be fairly conducted and, in particular, the parties can properly prepare their respective evidence and arguments at trial".

117. Nevertheless, it is also true (as the Claimants submit) that there is scope for the Court to permit a departure at trial from a formally defined case where it is just to do so (*Huseyin Ali v Dinc* [2022] EWCA Civ 34, per Birss LJ at [25]). However, I do not read this as a general license either to depart from the basic pleading requirements identified above, or to circumvent the close scrutiny that would be applied by the Court

to any application to make a late amendment at trial (see for example, on amendments *Kawasaki Kisen Kaisha Limited v James Kemball Limited* [2021] EWCA Civ 3 per Popplewell LJ at [17] and [18] and on late amendments *Steenbok Newco 10 Sarl v Formal Holdings Ltd* [2024] EWHC 1160 (Comm), per Bryan J at [8]-[31])). It will only be just to permit a departure from basic pleading requirements at trial where any such departure is consistent with the requirements of the overriding objective and does not cause prejudice to the other side. This is most unlikely to be the case where an attempt is made at trial to run an entirely new and unheralded factual case not previously foreshadowed in the pleadings.

118. I shall return later in this judgment to apply these principles in the context of the parties' various allegations of inadequate and unparticularised pleadings. For now, I should address one additional point on pleadings which arose during closing submissions.

119. The Claimants suggested that absent objections during cross-examination to matters being explored with witnesses that were outside the scope of the pleaded case, it was not permissible for a party later to complain of expansions to the pleaded case. In support of this proposition it was further suggested that if "pleading" objections had been raised during cross-examination (of the type that were raised by the Commission and the IPs in closing), there would have been scope for the Claimants to consider whether they needed to amend their statement of case.

120. I do not accept this submission and nor do I accept that this is a case in which the Commission and the IPs failed to make their position on the pleadings crystal clear. As the authorities to which I have referred above make plain, it is a fundamental principle that the scope of any civil case is defined by the pleadings. The fact that a claimant elicits evidence during cross-examination which might give rise to a new material fact does not permit it simply to rely on that material fact in closing. That must be so whether or not the opposing party objects to the approach taken during cross-examination. In the event that a claimant wishes to rely on a new material fact discovered at trial, it must make an application to amend its pleadings. It cannot avoid the need to make an application to amend by suggesting that the defendant should have raised an immediate objection. That would be to place far too high an onus on the defendant and would undermine the importance of ensuring that parties understand the case that is being advanced against them and have a proper opportunity to meet that case, just as it would undermine the smooth progress of trial and the importance of the balancing exercise that must be conducted by the Court when considering an application to amend.

121. In any event, a review of the transcript confirms that the Commission and the IPs made it abundantly clear throughout the trial (both in submissions and in cross-examination) that they objected to the Claimants running arguments which were not pleaded. For pragmatic reasons and so as to avoid the need for constant rulings on the point, I indicated that I would permit the Claimants to cross-examine witnesses as they saw fit whilst at the same time making it clear that I expected the cross-examination to be relevant to the pleaded case. I also made it clear that I expected to hear submissions in due course as to the relevance of any evidence to which objection was taken in light of the pleaded case. In advance of closing submissions, I observed that insofar as pleading objections were being made, it would be for the Claimants to satisfy the Court that the necessary facts had been pleaded. I also said that I had no intention of permitting the Claimants to advance new matters "through the back door". In this context I expressly

referred to the fact that there had been no suggestion that the Claimants wished to make an application to amend.

122. Accordingly I consider there to be no basis for any complaint by the Claimants that they have somehow been lulled into a false sense of security over whether or not a formal application to amend might be required. Indeed prior to closing submissions, the Claimants appeared to acknowledge that they must stick to their pleaded case:

> "MR SUTERWALLA: If, my Lady, evidence has been given in a witness statement and that evidence has been tested and evidence has come out from a witness's own mouth in respect of the evidence in a witness statement, that clearly is relevant evidence that can be relied upon.
>
> MRS JUSTICE JOANNA SMITH: Not if it doesn't go to a pleaded issue.
>
> MR SUTERWALLA: Well, my Lady, obviously it has to be relevant to an issue in the proceedings, which obviously is -- and the pleadings are the basis for that, and we would not seek to be relying upon something which has not been pleaded at all, of course. So we accept that, my Lady, yes."

Disclosure from the IPs

123. In their written closing submissions, the Claimants criticised the lack of disclosure by the IPs, asserting that they had "refused to provide anything other than very limited disclosure despite their wide ranging participation rights in the Proceedings and the obvious procedural need for the same". In so far as this suggested an obligation on the IPs to provide disclosure, this criticism was neither fair nor justified, as I understood Mr Toledano fairly to accept in his oral closing submissions.

124. The IPs are not parties to the proceedings and have no automatic disclosure obligations. However, they agreed to provide documents referred to in their statement of case in so far as those documents had not been disclosed by the Commission. The Claimants then sought specific disclosure from the IPs (citing both CPR r.31.12 which governs specific disclosure by a party and CPR r.31.17 which governs non-party disclosure). By an Order made by Sir Vivian Ramsey on 1 May 2025 (amended on 12 May 2025) the Court required the IPs to disclose any known adverse documents falling within specific identified categories. Some aspects of this Order were agreed. In relation to disputed parts, including in respect of so-called 'Category 5 documents' relating to the delay in the transition of the Fourth Licence to Allwyn, the Judge explained in his judgment ([2025] EWHC 1710 (TCC) at [70]) that if the IPs wished to provide witness statements for trial in support of the factual allegations pleaded in their statement of case then (for that purpose) they were to be treated as parties to the proceedings under CPR r.31.12 and must exhibit to those witness statements any known adverse documents having made enquiries of the relevant people. There was no requirement for Allwyn to undertake electronic searches. The Judge explained at [93] that, alternatively, he would have made a similar order under CPR r.31.17.

125. In the event, the IPs did serve witness statements addressing the factual case set forth in their pleadings, including as to the reasons for the delay in the transition of the Fourth Licence to Allwyn. However, they disclosed no adverse documents, explaining in a witness statement from Mr Willits that no such documents had been identified. This was queried by BCLP in letters dated 23 June 2025 and 21 July 2025, but the IPs, through their solicitors Quinn Emanuel, rejected any suggestion of non-compliance with the Order in a letter of 28 July 2025. In the event, the Claimants chose not to cross examine Mr Willits at trial, leaving his evidence unchallenged.

126. In the circumstances, it does not seem to me that any criticism may be levelled at the IPs for an absence of disclosure, just as it could not be suggested (and was not) that the Court could properly draw any adverse inference. If the Claimants had wished to test the IPs' witness evidence by reference to documents which had not already been disclosed by the Commission, and if they were dissatisfied with the approach adopted to disclosure by the IPs, then, as Mr Toledano fairly accepted, it was open to the Claimants to make a further application for specific disclosure, whether under CPR r.31.12 or r.31.17. They did not do so.

Confidentiality

127. On the first day of trial the Court made a Confidentiality Order continuing existing arrangements for a confidentiality regime at the request of the parties for the purposes of protecting confidential information disclosed in these proceedings. The existence of this regime meant that (in some cases) evidence on which the parties relied at trial was designated "Tier One" or "Tier Two" Confidential Information. I made it clear to the parties, however, that as much of the trial as possible must be in public in order to secure the proper administration of justice.

128. During the course of trial, de-designations were made by various of the parties such that it was possible for all witnesses to be cross-examined in open court. I am most grateful to the parties for their cooperation in this regard.

129. I do not understand there to be any objection to this judgment being published in its entirety.

WITNESSES

TNLC's Witnesses

130. TNLC served witness statements from 3 witnesses for the trial, each of whom attended to give evidence.

131. The Commission complains that "substantial proportions" of TNLC's witness statements are not relevant or admissible and/or do not comply with PD57AC. Specifically the Commission submits that, in their statements, TNLC's witnesses (i) seek to advance their subjective disagreement with the Evaluation and the reasons for the scores, together with providing commentary on the Commission's scoring documents; and (ii) seek to give evidence as to their interpretation of the ITA and other instructions given to applicants. I was not invited to determine this issue before the relevant witnesses gave evidence, but the Commission made clear that they did not intend to cross examine on aspects of TNLC's witnesses' statements which they

considered to be irrelevant or inadmissible. The Claimants did not criticise this approach in closing, and I consider it to have been an entirely proportionate and sensible approach to adopt.

132. Evidence falling within the first category (subjective disagreements and commentary) is (as Fraser J, as he then was, recognised in *Bechtel Ltd v High Speed Two (HS2) Ltd* [2021] EWHC 458 (TCC) (***Bechtel***) at [136]):

> "…inadmissible; or at the very least, if not technically inadmissible, of such marginal relevance to the issues as to play an extraordinarily limited role in assisting resolution of this case…just because [a bidder's] witness thinks that the evaluation of a particular question was too low for [the bidder's] answer and/or too high for [the winning bidder's] answer, does not advance the case appreciably."

133. Further, evidence falling within the second category (interpretation of the ITA and other documents) is also irrelevant and/or inadmissible and/or not in compliance with PD 57AC. Interpretation of tender documents is a matter for the Court to consider on the basis of the understanding of the reasonably well-informed and diligent tenderer ("**the RWIND tenderer**") and not the views of a losing bidder: see *Healthcare at Home v Common Services Agency* [2014] UKSC 49 at [12] and [26]-[27] ("***Healthcare at Home***") and *Bechtel* at [139]:

> "A tenderer's subjective understanding of the terms, meaning or effect of the ITT will not be legally relevant, given the concept of the RWIND tenderer. A claimant's witnesses will have their own views on how its own bid should have been evaluated. These personnel are also likely to have personal qualitative views about their competitors' bids too. However, these matters will not, usually, be of primary relevance."

134. For present purposes there is no need for me to try to determine whether each of the numerous complaints made in Hogan Lovells' letters dated 22 and 29 September 2025 about the Claimants' witness statements (rejected in BCLP's letter of 1 October 2025) are well-founded, although I have no doubt that some are. Equally, there is no need for me to identify where BCLP is right that specific evidence is designed only to contextualise the actions TNLC took at the time. There is also no need for me to determine whether similar criticisms made by BCLP in their letter of 1 October 2025 of the Commission's evidence are justified.

135. Instead, I intend to focus on the available evidence in relation to each remaining issue and to consider the weight to be attached to that evidence, always bearing in mind the principles identified in *Bechtel* and *Healthcare at Home*. I did not understand any of the parties to object to such an approach.

Mr Richard Martin

136. Mr Martin provided two witness statements for trial. He is Group Commercial Director of N&S PLC and a director of TNLC. He managed the acquisition by the N&S Group of the Health Lottery in February 2011 and oversaw its launch in October of the same

year. In mid-2019 he became involved in early discussions relating to the proposed Competition and thereafter he oversaw N&S PLC's involvement in the tender process for the 4NLC. His role was (broadly) to set the strategy for the bid and to understand and manage the process from N&S PLC's point of view, including managing the bid team to ensure that they delivered a bid capable of winning the Competition and managing the costs of the bid process.

137. I found Mr Martin to be a straightforward witness who was doing his best to assist the court.

Mr John Mills

138. Mr Mills provided two witness statements for trial. He has served as the Non-Executive Chairman of TNLC since June 2020, albeit that TNLC has not been active since early 2022 save for the purposes of pursuing these proceedings. For a short period prior to his appointment to this role, he was a member of a small team within N&S PLC which was preparing the ground for N&S PLC to compete in the 4NLC bid. Mr Mills had no detailed involvement in procurement processes prior to his involvement with 4NLC, albeit that in his long career as a civil servant (spanning the period between 1974 and 2007) and in his role as chairman of the governing body of an independent school in London he had exposure to several projects that involved a procurement process.

139. In his initial role as Bid Chairman and thereafter as Non-Executive Director of TNLC, Mr Mills exercised a general oversight role in relation to bid preparation with his principal focus being on the Business Plan Areas of the bid. He also led the Claimants' interactions with the Commission during the period of the Competition, attending all meetings with the Commission and drafting most of the Claimants' written communications with the Commission.

140. I did not find Mr Mills to be an entirely straightforward witness. He was prone to give very long answers to questions which frequently failed to address the specific question posed of him and it was necessary to warn him on a number of occasions of the need to answer the question that had been put to him. It also became clear that he was concerned to "play down" any negative observations made by himself or members of the bid team about (amongst other things) feedback they had received from the Commission. This led to him seeking to "explain" the meaning of communications apparently in order to put a more positive spin on them. On occasion it also led to him inviting the Court to ignore the plain meaning of the words in the bid documents and the feedback that TNLC had received.

141. In the circumstances, while much of Mr Mills' evidence was not of central importance to the issues in this case, I consider that, where it is relevant, I must treat it with caution, testing it against the available contemporaneous documents and any other relevant evidence in so far as is necessary.

Ms Mandie Taylor

142. Ms Taylor provided two witness statements for trial. Between January 2020 and March 2022, she served as Head of Finance of TNLC. Between 1997 and September 2014, Ms Taylor worked for Camelot, the then incumbent operator of the National Lottery, during the first, second and third National Lottery Licences.

143. In her role as Head of Finance at TNLC, Ms Taylor was responsible for the main financial model behind the bid, with support from PWC who were instructed as one of TNLC's external advisers.

144. Ms Taylor was plainly a straightforward witness who was at all times doing her best to assist the Court.

The Commission's witnesses

145. The Commission called evidence from 10 witnesses at trial. These witnesses were cross-examined by various members of TNLC's team. A few were also cross-examined by Mr Howard on behalf of the IPs.

Mr Andrew Wilson

146. Mr Wilson provided three witness statements for the trial. Between September 2019 and the end of March 2023 he was the Commercial Director at the Commission. In this role he was responsible for instructing the Competition commercial team to work on the commercial strategy and evaluation approach (which covered the SQ stage as well as the ITA stage). The commercial team was part of the wider 4NLC team which was led by Mr Tanner. Mr Wilson was involved in the review and approval of recommendations made by others regarding the rejection or approval of potential SRFs raised during Phase Two of the Competition and took part in the commercial assurance process which involved attending some of the Business Plan Area moderation meetings. Towards the end of the Competition he oversaw the production of the Detailed Rationale documents, the Board Outcome Report and the Outcome Letters to applicants.

147. Owing to a health condition, Mr Wilson attended the trial remotely and a detailed protocol was agreed for his cross-examination which involved shorter days and regular breaks. He was also provided with many, but not all, of the documents to which he was taken in cross-examination in advance. Owing to his central involvement in the Competition on behalf of the Commission, Mr Wilson was cross-examined over 5 days. Unusually he was cross-examined by two separate members of the Claimants' counsel team, an approach which was agreed to by the Commission but which should have been canvassed at the PTR in order to obtain the Court's permission. Such an approach is often capable of being oppressive and it should certainly not be regarded as the norm in the Business and Property Courts.

148. Throughout this lengthy (and, quite obviously, exhausting) cross-examination, Mr Wilson came across as an invariably careful and straightforward witness. He often showed an impressive knowledge and recall of the detail of the Competition and he frequently made appropriate concessions without hesitation when required to do so. From time to time it was clear that he could not grasp what was being put to him, that he needed to re-read documents before he could answer questions on them or that he had answered too quickly and that, on reflection, his answer was different. However, given the obvious strains caused by his health condition, this was not surprising. I have no doubt whatever that Mr Wilson was doing his best to assist the Court (in very difficult and trying circumstances).

Mr John Tanner

149. Mr Tanner provided two witness statements for the trial. He joined the Commission on 1 July 2019 as an Executive Director of the Commission and was SRO. He was responsible for the programme ("**the Programme**") for delivery of the Competition to award the Fourth Licence and for oversight of the implementation of the successful application. He remains personally accountable both for the ongoing delivery of that Programme and to Parliamentary Select Committees for the implementation of the Commission's strategy and policy in the project. As SRO, Mr Tanner was responsible for various of the project teams that made up the Programme, including the teams that worked on (i) the policy and design of the Fourth Licence and the Competition; (ii) the evaluation of applications in the Competition; (iii) the transition from the Third Licence to the Fourth Licence; and (iv) the oversight and assurance of Allwyn's implementation (as Preferred Applicant).

150. During the cross-examination by TNLC of Mr Tanner, the Commission disclosed some new documents not previously provided to the other parties. This was extremely unfortunate because it meant that certain points had been put to Mr Tanner in cross-examination (and accepted by him) on a wrong basis. Upon this issue being raised, Mr Toledano very properly accepted that, in light of the new documents, his cross-examination had indeed proceeded on a wrong basis and he corrected the position in his further cross-examination of Mr Tanner. Mr Tanner was then cross-examined by Mr Howard for the IPs and his attention was drawn to further matters which it was suggested should have been brought to his attention during his cross-examination by TNLC. In light of this cross-examination, Mr Tanner changed some important aspects of the evidence he had given in answer to his cross-examination by TNLC.

151. During his lengthy oral evidence, Mr Tanner struck me as an honest and entirely straightforward witness. He was often concerned to ensure that he had the context of any particular question and he took care to read the materials that were being put to him. In the circumstances, his preparedness to make numerous concessions against the Commission's interests, including concessions which set him at odds with various things that he had said in his witness statement, only highlighted the seriousness with which he approached the giving of his oral evidence and his understanding of the importance of being as accurate as possible in the answers that he gave. Although he was led during the cross-examination by the IPs into resiling from some of those concessions, I have no doubt that he did so honestly after proper consideration of the new points that were being made to him.

Ms Bryony Sheldon

152. Ms Sheldon provided two witness statements for the trial. She is a Director for Policy Implementation and Evaluation at the Commission and undertook the role of lead Evaluator during the Competition in relation to PPI. Although her evidence was sometimes a little confused and she did not always have a very clear recollection of specific documents or of the detail of the task with which she was involved (including – and perhaps unsurprisingly – when she was asked about entirely new points not previously foreshadowed in the pleadings), I have no doubt that she was doing her best to give accurate evidence.

Ms Sarah Jones

153. Ms Jones provided two witness statements for trial. She is a Chartered Accountant who now works for the Commission as a Senior Financial Performance Manager. During the Competition, Ms Jones undertook the role of lead Evaluator for Financial Strength for Phase One and lead Evaluator dealing with the Financial Strength Question 8 evaluation area for Phase Two. Prior to this, Ms Jones had already been working for the Commission as a financial specialist on the 3NL Regulation team.

154. Although she had refreshed her memory of the documents prior to giving evidence, Ms Jones did not always have a clear recollection of specific events or discussions that had taken place at the time of evaluation and moderation. Nevertheless, I have no doubt that she was doing her best to assist the Court.

Mr Chris Ellerbeck

155. Mr Ellerbeck provided two statements for trial. He is a Strategy and Insight Manager at the Commission. He was initially involved in the Competition as part of the Shadow Games Assessment in December 2020 and January 2021 and thereafter he became lead Evaluator for the Portfolio Business Plan Area for Phase One and Phase Two of the Competition.

156. Mr Ellerbeck was a confident, clear and straightforward witness whose evidence I have no difficulty in accepting.

Ms Caroline Severne

157. Ms Severne provided two witness statements for trial. She is a Chartered Global Management Accountant and acted as a Financial Strength Evaluator in Phases One and Two of the Competition, focusing specifically on Financial Strength Question 9.

158. Ms Severne was a somewhat erratic witness, at times appearing to remember clearly the role she had undertaken during the Competition and at other times appearing confused. Under cross-examination by Mr Suterwalla for TNLC, she sometimes appeared to be both strong-minded and deliberately obtuse and she occasionally exhibited a misplaced confidence in her own recollection. By contrast, when cross-examined by Mr Howard for the IPs (largely through the use of open questions) she appeared lucid and familiar with the evaluation task that she had undertaken. Overall I formed the view that although it was probably not always reliable, her evidence was not ultimately intended to be unhelpful to the Court. However, I shall need to consider it with care, as necessary, by reference to other available evidence.

Mr Mark Hanby

159. Mr Hanby provided one witness statement for trial. He is a partner at EY. From March 2019 onwards he led the EY team that supported the Commission's Commercial team which was responsible for the design and delivery of the Competition. From September 2019, he reported to Mr Wilson. During Phase One of the Competition, Mr Hanby was a moderator for the Transition area of the applicants' Business Plans. In Phase Two, he was selected by the Commission to perform two roles: first as a Moderator for the Technology section of the Operations Business Plan Area and the Participant Protection

(Pass/Fail) element of the Evaluation, and second as the Risk SMR, supporting the SRF component of the Evaluation process.

160. Mr Hanby was cross-examined only in respect of his involvement in, and knowledge of, the process of identifying SRFs. His evidence in response to this cross-examination appeared to me to be clear and consistent, albeit that it is for the most part no longer relevant. I have no hesitation in concluding that he was doing his best to assist the Court.

Mr Jonathan Tuchner

161. Mr Tuchner provided two witness statements for the trial. Since November 2017, he has been the Director of the National Lottery Promotions Unit ("**the NLPU**"), an organisation which raises public awareness of the Good Causes that the National Lottery funds. In this role he interacts with the operator of the National Lottery "almost on a daily basis". Mr Tuchner acted as lead Evaluator during the Competition in the Branding Business Plan Area, and, during that time, he temporarily stood down from his role as Director of the NLPU.

162. Mr Tuchner was cross-examined solely on the issue of conflict of interest. He appeared to me to be an entirely straightforward witness who was doing his best to assist the Court. The issue which concerned him fell away during closing submissions.

Mr Michael Reid

163. Mr Reid provided two statements in the trial. He carried out various consulting roles between 2020 and 2022, including for the Commission. During the Competition, he acted as an Evaluator in relation to Operations (Operating Model), a Business Plan Area and PPF.

164. Mr Reid was a straightforward witness who was plainly doing his best to assist the Court.

Ms Eleanor Pugh-Stanley

165. Ms Pugh-Stanley provided one witness statement for the trial. Since March 2019 she has been an Anti-Money Laundering Manager at the Commission. Ms Pugh-Stanley acted as an Evaluator in respect of Propriety during the Competition.

166. Although slightly non-plussed by the questions posed in cross-examination, I formed the view that Ms Pugh-Stanley was plainly trying her best to assist the Court.

Other witnesses

167. In addition, the Commission relies upon:

i) statements from two witnesses whose evidence was not challenged in circumstances where the issues covered in their evidence were said by TNLC to have been challenged in respect of other witnesses such that it was not necessary to address the same points again.

ii) Statements from six witnesses who were not required to give evidence and whose evidence was therefore not challenged.

168. Falling into the first category were statements from:

i) *Mr Rhodes*: since June 2021, interim Chief Executive Officer and, since June 2022, permanent CEO of the Commission, responsible for running the Commission and leading the executive team. Mr Rhodes is also the Accounting Officer and (since July 2023) he has been a Commissioner, which means that he is a voting member of the Board. In his statement, Mr Rhodes explains that he became involved with the Competition in the last 7-8 months, during which time, Mr Tanner reported to him. He is involved in the oversight of transition and Implementation and he sits on the 4NL Programme Board.

ii) *Mr Smart*: a qualified Chartered Accountant and independent consultant on fraud, forensic accounting and business ethics. In January 2020 he was appointed to the role of SRF Evaluator, taking the lead on the Resilience risk area, which included Propriety. During Phase Two of the Competition he attended a number of Moderation meetings on Propriety.

169. Falling into the second category were statements from:

i) *Brad Enright*: Director of Strategy at the Commission. Mr Enright had no direct role in the Competition or direct access to information about the Competition. His witness statement deals with issues which are no longer of any direct relevance to the live issues in the case.

ii) *Jamie Wall*: Senior Manager in International Regulatory Partnerships at the Commission. Mr Wall was an Evaluator for the Channels Business Plan Area during both phases of the Competition. In his first statement, Mr Wall deals in detail with the Evaluation process and the Moderation process at Phase Two, including in relation to each of the individual applicants. In his second witness statement, Mr Wall addresses a particular proposal made by TNLC in its application.

iii) *Louise Notley*: Senior Specialist for Bingo and Lotteries. Ms Notley was involved in reviewing the market overview report prepared by LEK and provided by the Commission to applicants in the Competition. She also acted as an Evaluator for the Shadow Games Assessment. For the most part, Ms Notley's witness statement deals with issues that are no longer relevant to the live issues in the case.

iv) *Peter Brown*: an independent consultant to the Commission who acted as lead Evaluator for the Transition Business Plan Area in Phase One and Phase Two of the Competition. In his witness statement Mr Brown deals in detail with the Evaluation process and the Moderation process at Phase Two, including in relation to each of the individual applicants. Mr Brown also deals briefly with his approach to SRFs in connection with Allwyn's application.

v) *Sarah Gardner*: Deputy Chief Executive Officer of the Commission and member of the Executive Committee, reporting to the Commission's CEO, Mr

Andrew Rhodes. Save that she was acting Chief Executive of the Commission between March 2021 and June 2021 and save that she attended the Board meeting in February 2022 at which the Board discussed the award of the Fourth Licence, Ms Gardner had very little involvement in the Competition and was not involved in the Programme that was established for the purposes of running the Competition. She was responsible for regulating the Third Licence until the transition to the Fourth Licence and is now responsible for regulating the Fourth Licence. For the most part, Ms Gardner's witness statement deals with issues which are no longer relevant to the remaining live issues in the case.

vi) *Simon Tait*: Lead Evaluator during Phase Two of the Competition for the technology part of the Operations Business Plan Area. In his witness statement Mr Tait deals in detail with the Evaluation process and the Moderation process at Phase Two, including in relation to each of the individual applicants.

The Interested Parties' Witnesses

170. The IPs called three witnesses to be cross-examined at trial. Two of those witnesses (Mr Kleinhampl and Mr Dlouhý) were provided with the assistance of an interpreter as a precautionary measure. However, their English was fluent and they did not need to resort to her assistance. As I have mentioned, the IPs also relied on the unchallenged evidence of Mr Harry Willits, who was not required for cross-examination at trial.

Mr David Kleinhampl

171. Mr Kleinhampl provided two witness statements for trial. He also relied upon a witness statement provided by him in connection with the Camelot and IGT Proceedings. He is Investment Director at Allwyn Services Czech Republic a.s., which is a subsidiary of the Second Interested Party. Mr Kleinhampl was a member of Allwyn's Competition bid team between the end of 2018 and 2021, focusing on the financial part of Allwyn's bid. He reported to Mr Alastair Ruxton. After that he worked nearly full time on post-bid management and implementation of Allwyn's bid until June 2023 (serving as interim Chief Financial Officer for AEL between January and June 2023).

172. With the exception of his evidence about the difficulties encountered by Allwyn in the period prior to entering into the Fourth Licence (which is not challenged), very little of Mr Kleinhampl's evidence remains relevant to the outstanding issues at trial.

Mr Štěpán Dlouhý

173. Mr Dlouhý provided one witness statement for trial. He also relied upon a witness statement provided by him in connection with the Camelot and IGT Proceedings. Since 2016 he has been the Chief Investment Officer of Allwyn, where he is responsible for its investments and strategic development.

174. I formed the view that Mr Dlouhý was a straightforward witness who was at all times doing his best to assist the Court.

Mr Alastair Ruxton

175. Mr Ruxton made two witness statements for the trial. He was employed by Sazka Group UK Limited in June 2020 to act as Allwyn's Bid Director, with responsibility for the overall project management of the bid. In that role he had regular contact with Mr Wilson and Mr Tanner at the Commission. Following the Outcome Notification on 15 March 2022 he became the Corporate Services Director in April 2022.

176. Once again, with the exception of his evidence about the difficulties encountered by Allwyn in the period prior to entering into the Fourth Licence (which is not challenged), very little of Mr Ruxton's evidence remains relevant to the outstanding issues following the trial.

APPROACH TO THE EVIDENCE

177. Owing to the time that has passed since the Competition and the complexity of the evaluation process, both the Claimants and the IPs suggested that the Court should have regard to the well-known guidance in *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2020] 1 CLC 428 (Comm) per Leggatt J (as he then was) who made various observations as to the fallibility of human recollection, before concluding at [22] that:

> "…the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth".

178. Although none of the parties referred to it, the Court of Appeal considered this question again in *Martin v Kogan* [2020] FSR 3. Given the slightly more nuanced approach taken by the Court of Appeal, it is important that I set out what Floyd LJ said at [88]:

> "*Gestmin* is not to be taken as laying down any general principle for the assessment of evidence. It is one of a line of distinguished judicial observations that emphasise the fallibility of human memory and the need to assess witness evidence in its proper place alongside contemporaneous documentary evidence and evidence upon which undoubted or probable reliance can be placed….But a proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact

> based upon all of the evidence. Heuristics or mental short cuts are no substitute for this essential judicial function."

179. The present case is not a commercial case involving abundant documentation, but it is a case in which the relevant documents are of the utmost importance. The best evidence of an applicant's bid is inevitably to be found in its Application document. The best evidence of the consensus reasons for the Evaluators' decisions at moderation are the Moderation Notes. In this regard I agree with the observations of Fraser J in *Bechtel* at [138] to the effect that:

> "…in circumstances where (as here) so much depends on the particular evaluation by the contracting authority of the claimant's bid – and sometimes (again as here) on the evaluation of the winning tenderer's bid – a great amount of the documents speak for themselves. The most important areas are usually as follows. The terms of the competition contained in the ITT; the scoring methodology; the detailed contents of the bids themselves; the records of the evaluations and the way that the procurement was conducted."

180. As mentioned above, the Court has of course heard evidence from a number of Evaluators who have been cross-examined at length by the Claimants. I reject a submission made by the Claimants in closing to the effect that if, during his or her oral evidence, an Evaluator was unable to give any explanation of what was meant by a particular finding in the Moderation Notes that "does lend itself to an error having been made". In my judgment, to conclude as much would be to fall into an error similar to that identified by Leggatt J in the final sentence of the citation from *Gestmin* to which I refer above. It is no more a fallacy to suppose that the recollection of a confident and apparently truthful witness is necessarily reliable than to suppose that because a witness is confused or has forgotten events which occurred some time ago, a manifest error must have been made. Confusion or lack of recall as to the reasoning of the Evaluators might of course be relevant to that question, but it is most unlikely to provide a complete answer. I note that the Claimants appeared to accept in their written submissions that it is in fact unsurprising that the Evaluators did not have a clear recollection of events "given the complex and technical nature of the areas which they evaluated and the fact that the moderations took place approximately 4 years ago". I agree. The Claimants did not explain how this acknowledgement could be squared with the submission I refer to at the beginning of this paragraph.

181. When considering the evidence relating to the issues in this case, it seems to me that I must evaluate the entirety of the available evidence, testing the witness evidence against contemporaneous documents and looking carefully at the context in which the witness gave that evidence – which might (if appropriate) include the nature of the questions posed in cross-examination and the extent to which the witness was being asked to address hitherto unheralded issues for which he or she was not prepared. I do not read *Gestmin* as disapproving of such an approach and, to my mind, it is the only approach to be taken to a case of this sort, consistent with the guidance in *Martin v Kogan*.

THE PROCESS CLAIM: ISSUES

182. By the end of closing submissions, the Claimants had accepted that to win the Process Claim they must now establish that (but for the alleged breaches by the Commission): (i) TNLC would have passed every one of the 12 Pass/Fail Areas in respect of which it was failed during the Competition; and (ii) that both Allwyn and Camelot would have been removed from the picture, either because they would each have failed in one or more Pass/Fail Areas, or because they would have been disqualified from the Competition. This is the inevitable consequence of the narrowing of the Claimants' case to which I have referred above. If the Claimants fail to convince the Court of the existence of a manifest error in relation to only one of the 'Fails' in the 12 Pass/Fail Areas, then the Process Claim will fail. If the Claimants cannot establish that both Allwyn and Camelot should have been removed from the Competition then the Process Claim will fail. The Process Claim in its final form thus represents a very significant challenge for the Claimants.

183. No doubt for this reason, it was suggested in closing submissions by Mr Howard that the Claimants' decision to lead with the Modifications Claim in oral closings was a tacit acknowledgement that their case now depends upon that claim. In circumstances where, however, the Process Claim remains live (albeit in a slimmed down form) and has been robustly argued by the Claimants in closing submissions, this is not a conclusion that it would be appropriate for me to draw absent proper analysis. I must look carefully at the Process Claim to see whether, notwithstanding the high hurdle they have to surmount, the Claimants have made out their case on the evidence at trial.

184. Against that background and in summary only, the remaining issues for the Court on the Process Claim are broadly:

i) **Alleged Pass/Fail Areas relating to TNLC**

a) **PPI**: Whether the Commission determined 5 specific reasons for failure falling within the topic of PPI in manifest error such that it was wrong to determine that TNLC's bid should fail in respect of PPI **(Issue 47**). The general topic of PPI also includes:

i) whether the Fail outcome in PPI did not accurately reflect the comments made by Evaluators (**Issue 48**); and

ii) whether (in relation to each of the 5 specific reasons for failure on which the Claimants rely) the 'Fail' items can be overturned by reason of the application by the Commission of 4 undisclosed criteria in breach of the obligation of transparency **(Issue 45(a), (b), (c) and (f)**) and/or a failure on 4 separate alleged occasions to provide adequate feedback at the end of Phase One (**Issue 25(a)(ii)-(v) and Issue 26**). Although in written closings the Claimants appeared to suggest that they needed to establish the undisclosed criteria in combination with the feedback points to establish that TNLC would have passed PPI, they subsequently clarified their position in the table provided on the penultimate day of the trial designed to show the inter-relationship between manifest error, undisclosed criteria and inadequate feedback.

Essentially they now say that each of the 'Fail' items can be overturned by reason of an "'AND' or an 'OR' combination across manifest error, undisclosed criteria and feedback".

b) **PPF**: Whether the Commission determined 4 specific reasons for failure falling within the topic of PPF in manifest error such that it was wrong to determine that TNLC's bid should fail in respect of PPF (**Issue 50**). This topic also includes whether the Fail outcome was in error because it did not accurately reflect the contents of TNLC's Application (**Issue 49**).

c) **Financial Strength**: Whether the Commission determined 7 specific reasons for failure (5 in respect of ITA Question 8 and 2 in respect of ITA Question 9) in manifest error such that it was wrong to determine that TNLC's bid should fail in respect of Financial Strength (**Issue 52**). This topic also includes:

i) whether the Commission erroneously took into account factors that were also present in the applications of Allwyn and Camelot, neither of whom failed (**Issue 53**); and

ii) whether (in respect of 1 of the specific reasons given for failure of Question 9 on which the Claimants rely) the 'Fail' items can be overturned by reason of a failure (in breach of transparency obligations) to provide adequate feedback at the end of Phase One (**Issue 25(a)(vi) and Issue 26**).

d) The above areas are to be considered against the background of a remaining allegation that the Commission's Evaluators were insufficiently trained to carry out their work in 4NLC, so as to ensure compliance by the Commission with its obligations of equal treatment and transparency and so as to avoid manifest errors (**Issues 2 and 3**).

ii) **Alleged Pass/Fail Areas relating to Allwyn**

a) **Financial Strength**: Whether the Commission determined 2 specific issues in manifest error such that it was wrong to determine that Allwyn's bid passed in respect of Financial Strength (**Issue 56**).

b) **PPI:** Whether the Commission determined 2 specific issues in manifest error such that it was wrong to determine that Allwyn's bid passed in respect of PPI (**Issue 58**).

c) **Propriety:** Whether the Commission determined 1 specific issue in manifest error such that it was wrong to determine that Allwyn's bid passed in respect of Propriety (**Issue 59**).

iii) **Alleged Grounds to Disqualify Allwyn:**

a) **Conflict of Interest relating to Rothschild:**

i) Whether the Commission failed to identify and/or failed to take adequate steps to prevent or resolve the appearance of a conflict of interest in breach of Regulation 35 CCR 2016 and/or its obligations of transparency and equal treatment (**Issue 6**) by reason of the involvement in the Competition of Rothschild;

ii) Whether Allwyn should have notified the Commission of the existence of a perceived conflict in respect of Rothschild and propose mitigating steps (**Issue 7**);

iii) What the nature of Rothschild's role in the Competition was (**Issue 8**); and

iv) Whether the allegations at issues 6 and 7 are time barred (**Issue 9**).

iv) **Alleged Pass/Fail Areas relating to Camelot**

a) **Propriety**: Whether the Commission determined 1 specific issue in manifest error such that it was wrong to determine that Camelot's bid passed in respect of Propriety (**Issue 60**).

b) **Financial Strength**: Whether the Commission determined 1 specific issue in manifest error such that it was wrong to determine that Camelot's bid passed in respect of Financial Strength (**Issue 62**). This topic also includes whether the Commission made a manifest error in treating certain factors relating to TNLC's funding arrangements as a reason to fail TNLC, but not treating these same matters which existed in Camelot's submission as a reason to fail Camelot (**Issue 63**)

v) **Alleged Grounds to disqualify Camelot:**

a) **Incumbency advantage**

i) Whether the Commission took sufficient steps to minimise or eliminate any unfair advantage to Camelot and, if not, whether it was in breach of equal treatment and the requirement to maintain a level playing field (**Issue 23(a)(c) and (e)**);

ii) Whether Camelot should have been excluded from 4NLC (**Issue 23(f)**); and

iii) Whether the allegations raised in Issue 23 are time barred (**Issue 24**).

vi) **Causation**

a) Would the Claimants have won 4NLC (**Issue 64**) such that the Claimants are entitled to the profits they would have earned from the Fourth Licence;

b) Are any breaches of the Commission's obligations sufficiently serious (**Issue 65**); and

c) Do the Claimants have standing to bring the Process Claim, i.e. are they economic operators who have suffered loss and damage in circumstances where they no longer challenge the Business Plan Areas (**Issue 1A**). In the final List of Issues, this issue includes the words "or risk suffering loss and damage". However, given that it is accepted that the Claimants can no longer pursue their claim for loss of a chance, these words appear to have been left in Issue 1A in error.

185. There remain two live issues, albeit that it is difficult to understand where they fit in the context of the Process Claim and it is not suggested that they have any causal link to the Claimants' claim for damages. Issues 25(b) and 26 are concerned with whether the Outcome Rationale identified weaknesses in TNLC's Business Plan responses in 3 respects which were not highlighted in the Phase One Feedback and which amounted to breach of the Commission's transparency obligations. I shall return to this in due course.

THE LEGAL FRAMEWORK: THE PROCESS CLAIM

Introduction

186. It is worth bearing in mind from the outset the background rationale for rules relating to public procurement. This was recently succinctly identified by Coulson LJ in *Optima Health v Secretary of State for Work and Pensions* [2025] EWCA Civ 127 at [59] and [60] ("***Optima***"), as follows:

> "[59]…it is necessary to start with how and why it is that the EU, and now the UK, have detailed rules relating to public procurement. They are designed to ensure healthy and effective competition (see *Archus and Gama v Polskie Gornictwo Naftlowe SA* EU:C:2017:358 (" *Archus* ") at [25]) and so that there is a proper evaluation of the tenders submitted (see *R (Harrow Solicitors and Advocates) v Legal Services Commission* [2011] EWHC 1087 (Admin); [2011] PTSR D 49 ("*Harrow Solicitors*") at [31]). The rules are designed to avoid the kind of unfair and capricious decision-making such as occurred in one of the earliest domestic procurement cases, *Harmon CFEM Facades (UK) Ltd v Corporate Officer of the House of Commons* [1999] 10 WLUK 904"
>
> [60] The rules which have grown up around public procurement, such as the principle of equal treatment and the principle of transparency, exist to serve the purposes noted in the previous paragraph. They are not (and must never be allowed to become) an end in themselves, just as those rules should not be applied in a formulaic and unrealistic way".

The Concession Contracts Regulations 2016

187. It is common ground that:

i) the Fourth Licence is a "concession contract" within the meaning of Regulation 3 CCR 2016;

ii) the Commission is a "contracting authority" within the meaning of Regulation 4 CCR 2016; and

iii) TNLC is an "economic operator" as defined in Regulation 2(1) CCR 2016.

188. Regulation 8(1) CCR 2016 sets out the core duties imposed on the conduct of concession contracts procurements:

> "(1) Contracting authorities…shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.
>
> (2) The design of the concession contract award procedure…shall not be made with the intention of excluding it from the scope of these Regulations or of unduly favouring or disadvantaging certain economic operators or certain works, supplies or services.
>
> (3) During the concession contract award procedure, contracting authorities…shall not provide information in a discriminatory manner which may give some candidates or tenderers an advantage over others.
>
> (4) Contracting authorities…shall aim to ensure the transparency of the concession contract award procedure and of the performance of the contract, while complying with regulation 28".

189. Unlike the Public Contracts Regulations 2015 ("**PCR 2015**") and the Utilities Contracts Regulations 2016 ("**UCR 2016**"), which set out prescribed procedures, the CCR 2016 (which implement Directive 2014/23/EU ("**the Directive**") on the award of concession contracts) provide the contracting authority with more freedom to organise the procedure leading to the choice of the concessionaire. No separate issue on the Directive arises in this case following the UK's departure from the European Union after Brexit and it is common ground that it may be considered where appropriate when construing the CCR 2016, which constitute retained law. I note that its recitals (at (1) and (68)) contemplate the need for "an adequate, balanced and flexible legal framework for the award of concessions" and recognise that because "[c]oncessions are usually long-term, complex arrangements where the concessionaire assumes responsibilities and risks traditionally borne by the contracting authorities…and normally falling within their remit", contracting authorities "should be allowed considerable flexibility to define and organise the procedure leading to the choice of concessionaire" – always subject to compliance with the Directive and the principles of transparency and equal treatment.

190. This flexibility is reflected in Regulation 30 CCR 2016 which provides that:

> "The contracting authority…shall have the freedom to organise the procedure leading to the choice of concessionaire subject to compliance with these Regulations".

191. Pursuant to Regulation 50 CCR 2016, a contracting authority owes a duty to an economic operator from the United Kingdom to comply with CCR 2016. A breach of such duty "is actionable by any economic operator which, in consequence, suffers, or risks suffering, loss or damage" (Regulation 52(1)). Proceedings for that purpose must be started in the High Court (Regulation 52(2)).

Intervention by the Court: the 'manifest error' test

192. The Court's role in a public procurement challenge of this type has been explained in a number of well-known cases, including *BY Development Ltd v Covent Garden Market Authority* [2012] 145 Con LR 102 ("***BY Development***"), per Coulson J (as he then was) at [8]-[11]; *Willmott Dixon Partnership Ltd v Hammersmith & Fulham LBC* ("***Willmott Dixon***") [2014] EWHC 3191 (TCC) per Mr Recorder Acton Davis QC at [78]-[84] and [157]-[159]; *Woods Building Services v Milton Keynes* [2015] EWHC 2011 (TCC) ("***Woods***") per Coulson J at [14]; *Stagecoach East Midlands Trains Ltd v Secretary of State for Transport* [2020] EWHC 1568 (TCC) ("***Stagecoach***") per Stuart-Smith J (as he then was) at [62]-[65]; *Bechtel* at [13] and [19]-[25] and *Siemens v HS2* [2023] EWHC 2768 (TCC) ("***Siemens***") per O'Farrell J at [142]-[146].

193. The Court's role is confined to review. It involves the exercise of what has sometimes been described as a 'supervisory jurisdiction'; i.e. a jurisdiction to supervise the process undertaken by the contracting authority and to review whether proper procedures and the basic principles underlying the relevant Regulations have been respected. However, even this function is limited. The Court is reviewing the decision of the contracting authority solely to determine whether that decision is vitiated by a manifest error (i.e. an error that has clearly been made) or a misuse of powers, and to ensure that the contracting authority did not clearly exceed the bounds of its discretion. In other words, the Court is applying a test which is very similar to, if not the same as, the *Wednesbury* test of irrationality applicable in domestic judicial review proceedings (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 ALL ER 680, [1948] 1 KB 223).

194. As the authorities make clear, in carrying out its role, the Court should not undertake a comprehensive review of the tender evaluation process, and neither should it substitute its own view as to the merits or otherwise of the rival bids for that already reached by the contracting authority. Aside from the fact that the Court is quite obviously poorly placed to do this (not having the institutional and practical competence and experience of the contracting authority), it would be wrong for it to trespass on the jurisdiction given by Parliament to the contracting authority to exercise a broad discretionary judgment as to the outcome of the public procurement process. It is inherent in the exercise of such an evaluative judgment that a range of reasonable views will usually be available. Absent a manifest error or other breach of the principles of fairness, equal treatment and transparency, it would be anomalous and contrary to the public interest if the Court could be persuaded by a losing tenderer, acting with the benefit of hindsight and following a process of forensic scrutiny which is only found in 'heavy' contested

litigation, to re-evaluate the different bids and to adopt a different view or judgment from that taken by the authority. There is "no judicial remedy for subjective dissatisfaction at losing a procurement competition" (*Bechtel* at [258]).

195. It is for this reason that, as Fraser J observed in *Bechtel* at [25], a court faced with challenges to the contracting authority's evaluative judgment will apply a "suitable recognition of the institutional competence" of those charged with the decision making process, paying appropriate regard to their margin of discretion in respect of matters falling within their subjective professional judgment. A manifest error will not be established merely because, on mature reflection with the benefit of hindsight, a different decision might have been arrived at.

196. It is also clear from the available authorities that a manifest error in the reasoning that contributed to a decision that is challenged or a score that is awarded does not necessarily mean that the decision or the score is itself manifestly erroneous. What must be demonstrated (the onus being on the disappointed tenderer) is that the decision that was made, or the score that was given, was in manifest error (see *J Varney & Sons Waste Management Ltd v Hertfordshire County Council* [2010] EWHC 1404 (QB) per Flaux J (as he then was) at [193]).

197. As to the meaning of "manifest error", it is not necessary to import an additional requirement that the error must be "fundamental", though "it must be of sufficient materiality to justify the Court's intervention" (*Stagecoach* at [65])). In *Lion Apparel* [2007] EWHC 2179 (Ch) at [38], Morgan J said simply that "A case of manifest error is a case where an error has clearly been made". In *Gibraltar Gaming and Betting Association Ltd v Secretary of State for Culture, Media and Sport & Ors* [2014] EWHC 3236 (Admin) at [100], Green J (as he then was) considered the meaning of the word 'manifest', observing, however, that definitions are "helpful only to a degree. What has to be '*manifest'* is the inappropriateness of a measure". An error will be manifest:

> "when (assuming it is proven) it goes to the heart of the impugned measure and would make a real difference to the outcome".

198. In *Siemens* (at [146]) the Court applied these legal principles and identified that the approach to be adopted in respect of the scoring challenge in that case was as follows:

> "(i) The tender documents must be construed objectively on the basis of the standard of the RWIND tenderer.
>
> (ii) The court must consider whether the assessment criteria and tender process set out in the tender documents were applied objectively, uniformly, without discrimination or consideration of undisclosed criteria, and in a proportionate manner to all tenderers.
>
> (iii) The court must consider whether there was any manifest error in the tender evaluation exercise, such as a failure to consider all relevant matters, consideration of irrelevant matters, or a decision that is irrational in that it is outside the range of reasonable conclusions open to the utility.

> (iv) The court must not substitute its own assessment for that of the contracting utility. Its role is limited to a review of the process to determine whether the published rules of the procurement were followed in compliance with the regulations".

199. I respectfully agree and will apply the same approach here.

Equal Treatment

200. In general terms, the purpose of the requirement for equal treatment is to ensure the development of effective competition leading to the selection of the best bid. As Coulson LJ observed in *Optima* at [61], the definition of equal treatment can be found in *Fabricom SA v Belgian State* (Case C-2103) ("***Fabricom***") [2005] ECR i/1559:

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

201. Although the Claimants' position in opening appeared to be that the principle of equal treatment was strict and involved no margin of discretion, they had significantly softened their stance by the time of closing. Indeed I now understand it to be common ground that the principle of equal treatment is not hard edged and that the two-stage framework identified in *Fabricom* (of comparability on the one hand and objective justification on the other) attracts, at each stage, a significant margin of discretion (see *R (Rotherham Metropolitan Borough Council) v Secretary of State for Business Innovation and Skills* [2015] UKSC 6 ("***Rotherham***") per Lord Sumption at [25]-[27])).

202. Lord Sumption pointed out in these passages that the two limbs of the framework "will often overlap" and he cited with approval Lord Hoffmann's observation in *R (Carson) v Secretary of State for Work and Pensions* [2006] 1 AC 173 to the effect that dividing the reasoning into two stages is "artificial" and that "[t]here is a single question: is there enough of a relevant difference between X and Y to justify different treatment?". At [28], Lord Sumption observed that the answer to this question, on the facts of that case (where the relevant regulation called for a complex policy judgment based on a broad range of factors), "may ultimately be one for the court, but the nature of the question requires a particularly wide margin of judgment to be allowed to the decision maker". However, the extent of the margin of appreciation will always depend on the particular circumstances of the individual case, or, as the Claimants put it, the particular context of each allegation (see *Ryhurst Limited v Whittington Health NHS Trust* [2020] EWHC 448 (TCC) ("***Ryhurst***") per HHJ Stephen Davis sitting as a High Court Judge at [41]). In this case the Commission contends, and I agree, that it has a wide margin of appreciation on matters of equal treatment given (a) the complexity of the Competition and (b) the wide range of relevant factors and interests involved.

203. The need for flexibility in this context was explained in *Optima* at [62] as follows:

> "Stuart-Smith J (as he then was) explained in *Stagecoach East Midlands Trains Ltd & Ors v SoS for Transport & Ors* [2020] EWHC 1568 (TCC); 1919 Con LR 176…that the exercise of discretion at various stages in any public procurement was

> capable of engaging and infringing the principles of equal treatment and transparency (see [41]). The terms of any ItT may preclude the exercise of an independent discretion and mandate an outcome; if not the discretion was subject to principled limits and may not be exercised on an unlimited, capricious or arbitrary basis (see [44]).”

204. It is only once a failure to confer equal treatment has been established (whether because the difference in treatment falls outside the margin of discretion or is considered to be ‘arbitrary or excessive’ (see *Stagecoach* at [26])) that the contracting authority has no further margin of appreciation.

205. The principle of equal treatment cannot be relied upon to found complaints which seek to compare the contracting authority’s treatment on one aspect of an unsuccessful tenderer’s response with its treatment of an entirely different area of other tenderers’ responses. It does not “embrace an analytical exercise based on wholly different parts of the tender from those on which the claim is founded” (see *R (Hersi & Co Solicitors) v Lord Chancellor* [2018] PTSR 850 (“***Hersi***”) per Coulson J at [110]-[117]).

206. The equal treatment principle (including non-discrimination and transparency) requires the contracting authority to act in the evaluation in accordance with the published terms of its decision-making procedure for assessing bids (see *Energysolutions EU Ltd v Nuclear Decommissioning Authority* [2016] EWHC 1988 (TCC) per Fraser J at [255]). The contracting authority may not subsequently change one of the essential conditions for the award if it may have enabled tenderers to submit a substantially different tender (see *Stagecoach* at [28]).

Transparency

207. Although a freestanding obligation in itself, transparency is the inevitable corollary of the principle of equal treatment because it is transparency which enables compliance with the principle of equal treatment to be verified (*Bechtel* at [305]). For tenderers to apply on an equal footing they must be in a position of equality both when they formulate their tenders and when those tenders are being assessed. This requires clarity in advance over what they must and must not do in providing a compliant bid. As Coulson LJ observed in *Optima* at [61]:

> It has been said that “the purpose underlying the principle of transparency, which is a corollary of the principle of equality, is essentially to ensure that any interested operator must take the decision to tender for contracts on the basis of all the relevant information and to preclude any risk of favouritism or arbitrariness on the part of the licensing authority”: see *Stanley International Betting Ltd* (ECLI:EU:CD:2018:1026) (19 December 2018) at [57].

208. As I have already mentioned, to facilitate a determination of whether the invitation to tender is sufficiently clear to enable tenderers to interpret it in the same way, so ensuring equality of treatment, the Court applies the yardstick of the reasonably well informed and normally diligent tenderer (“**the RWIND tenderer**”), as explained in detail by the Supreme Court in *Healthcare at Home*. This is an objective standard which does not

depend on evidence of the actual or subjective ability of particular tenderers to interpret award criteria in a uniform manner.

209. Describing this principle in *Optima* Coulson LJ said this at [33]:

> "The rules of any public procurement competition must be drawn up in a "clear, precise and unequivocal manner" so that tenderers can be "completely sure" of how they are going to be applied: see *Healthcare at Home Ltd v The Common Services Agency* [2014] UKSC 49 at [15], citing *Commission v The Netherlands* (C-368/10) [2013] All ER (EC) 804. Although disputes as to the meaning of a provision in the ItT are, in one sense, a matter of construction, the issue is not what the ItT meant, but whether its meaning would be clear to any RWIND tenderer: see [27] of *Healthcare at Home*. Lord Reed there made clear that, whilst evidence may be necessary a) to enable the court to put itself into the position of the RWIND tenderer (such as evidence about technical terms), and b) about the context in which the document has to be construed, the question could not be determined by such evidence, because it depended on the application of a legal test. It was, he said, suitable for objective determination".

210. The award criteria and their weightings are key factors which the contracting authority will take into account when evaluating the bids and which must therefore be clearly and unequivocally disclosed to tenderers. However, it is not necessary for every consideration that may be taken into account by the contracting authority when evaluating tenders to be spelled out in advance. The principle of transparency only requires a contracting authority to provide such information as is required "to ensure that the basic principles, of equality (and non-discrimination) and transparency, are not infringed" (see *J Varney & Sons Waste Management Ltd v Hertfordshire County Council* [2011] LGR 770 per Stanley Burnton LJ at [49]-[50] and *Willmott Dixon* at [140]: "…it is clearly unnecessary for a contracting authority to spell out anything and everything which will improve a bid if it is included, and will lose credit if it is omitted").

211. In *eVigilo* ECLI:EU:C:2015: 166, the CJEU emphasised (at [56]) that in considering whether there has been any breach of transparency, an important consideration will be whether the bidder sought clarification.

Proportionality

212. I did not understand it to be controversial that the principle of proportionality requires that measures adopted by contracting authorities or utilities "do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued" and that, "where there is a choice between several appropriate measures, recourse must be had to the least onerous" (Case T-195/08 *Antwerpse Bouwerken v Commission* [2009] at [57]). The Court recognised in *Bechtel* (at [312]-[313]) that one of the purposes of proportionality is to balance (and help limit) procedural burdens. The principle is not hard edged and includes a margin of discretion, the degree of that

margin depending, as in the case of the equal treatment obligation, on the nature of the decision in question (see *Ryhurst* at [46]-[49]).

The Approach to disqualifying/excluding a tender on grounds of non-compliance with tender rules

213. In *MLS (Overseas) Ltd v The Secretary of State for Defence* [2017] EWHC 3389 (TCC), at [64]-[80], O'Farrell J explained that an authority will only be entitled to disqualify a tenderer for non-compliance with a tender rule if the authority has clearly and unequivocally stated the rule and explained that disqualification will be the consequence of non-compliance (and has made expressly clear whether disqualification will be mandatory or discretionary).

THE UNDISCLOSED CRITERIA AND INADEQUATE FEEDBACK ALLEGATIONS

214. Although, as I have explained above when dealing with the Issues, these allegations are intended to be supportive of the allegations of manifest error in relation to the Pass/Fail Areas, they arise in respect of factual events which fall before the Evaluations as a matter of chronology. It was for this reason that the Claimants addressed them first in their written closing submissions on the Process Claim and I shall adopt the same approach. In doing so, however, I note that, in closing, there was some degree of overlap in the parties' submissions between the topics of undisclosed criteria, inadequate feedback and manifest error. I have endeavoured to keep them separate, but it is inevitable that I shall have to cross-refer to findings made on one topic when dealing with another.

215. The vast majority of the issues arising under this heading concern TNLC's Application in relation to PPI. In looking at these issues, it is worth starting with the criteria that the ITA required an Applicant to demonstrate if it was to be awarded a 'Pass' for PPI. Relevantly, these included (at 8.2):

> - "The Applicant has satisfied the Commission that the Proposed Licensee will do everything it can to ensure that the interests of every Participant in the National Lottery are protected ["**the First PPI Criterion**"].
>
> - …
>
> - The Applicant's responses are relevant to the questions asked and deal comprehensively with each of the issues and/or subheadings under that topic ["**the Third PPI Criterion**"].
>
> - The Applicant's responses are aligned to relevant best practice and/or Commission guidance, or propose equivalent measures to the satisfaction of the Commission ["**the Fourth PPI Criterion**"].
>
> - …

- Where relevant, the Applicant's Business Plan and overall ITA submission is aligned with their response under this section of the ITA. There is nothing in the Applicant's Business Plan or any other part of their ITA submission that is non-compliant with the Commission's Statutory Duty to ensure that the interests of every Participant in the Lottery are protected ["**the Sixth PPI Criterion**"]."

Inadequate Feedback

216. The Introduction to the Process at section 5.1 of the ITA explained the two phase process that would be followed by the Commission in the Competition and stated that Applicants would be provided with feedback after Phase One in relation to their Phase One Applications "so that they may have the opportunity to address any weaknesses, omissions, ambiguities or risks in their proposals before submitting their Phase Two Applications". Under the heading "written feedback", section 5.3.4 said this:

> "Written feedback
>
> Each Applicant will be provided with feedback in the form of a single written document. Applicants will not be provided scores as part of this feedback and there will be no down select of Applicants. The Commission will provide feedback to Applicants on the Business Plan and Pass/Fail elements of their Application. **The Commission may identify any weaknesses, omissions, ambiguities or risks relating to specific applications and will highlight where an aspect of any Applicant's response might result in a 'Fail' at Phase Two**. In all cases, feedback will be tied back to the formal evaluation criteria and will not provide any relative comparison to any other Application received by the Commission" (**emphasis added**).

217. The Commission provided all applicants with Phase One Feedback. TNLC's feedback was provided on 16 July 2021 and covered the Pass/Fail Areas and the Business Plan Areas. It was provided under cover of a letter which confirmed that the Commission had "focussed on identifying any specific or material weaknesses, omissions, ambiguities or risks relating to Applications and highlighted where an aspect of any Applicant's response might result in a 'Fail' at Phase Two". The letter pointed out (amongst other things) that:

> "The feedback provided is not exhaustive. Therefore the fact that the feedback may not address a particular aspect of your Application should not be taken to mean that you cannot, or should not, further consider/develop that aspect for the purposes of submitting your best Application"

and

> "At Phase Two, the Commission may take into account in its evaluation of your Phase Two Application additional points which have not been mentioned in this feedback".

218. TNLC's feedback (including the covering letter) ran to 96 pages of detailed feedback. It was summarised at a high level in the letter as follows:

> "The Commission has reviewed your Phase One Application and feedback has been provided based on the information provided in your Application. **The quantity of feedback is reflective of the review we have completed and the level of content you have provided** and should not necessarily be considered a negative view of your Application. It is for you to determine what you wish to amend or uplift to provide your response for Phase Two.
>
> In summary, your Phase One Application is **missing detail and evidence in many areas**. Your Application appears to be based on a solution in which **many key components remain underdeveloped at this stage**. If these areas are not addressed in your Phase Two Application, the resulting lack of certainty is likely to undermine confidence in your Application when it is considered afresh by evaluators at Phase Two.
>
> The Applicant's response relies heavily on the wholesale adoption of Third Licence systems, policies and procedures, at least in the early years of the Licence, but the Applicant does not address the differences between the Third and Fourth Licences. Systems, policies and procedures which are fit for purpose for the Third Licence may not be appropriate for, or meet the requirements of, the Fourth Licence" (**emphasis added**).

219. TNLC's complaints in relation to the Phase One Feedback fall within two main categories:

i) first, allegations that the Commission failed to provide it with adequate Phase One Feedback in relation to matters for which it was subsequently failed (as evidenced by the Detailed Rationale) as part of the Commission's evaluation of TNLC's PPI (Questions 4 and 5) and Financial Strength (Question 9) responses (**Issues 25(a)(i)-(vi)**); and

ii) second, allegations that the Commission failed to provide it with adequate Phase One feedback in relation to the weaknesses which were subsequently identified by the Commission in its evaluation of TNLC's Business Plan responses (**Issues 25(b)(iv)-(vi)**).

The required scope of the Phase One Feedback

220. A preliminary issue arising between the parties is the scope of the Commission's commitment in respect of the provision of feedback at Phase One. The Claimants contend that the RWIND tenderer would understand from the wording of section 5.3 of

the ITA ("*will highlight*") that the Commission was committing to provide feedback on **any** weakness, omission, ambiguity or risk which **might** result in a Fail at Phase Two. They contend that the threshold was deliberately set low and the parameters set wide for the circumstances in which feedback would be provided and the issues and matters that the feedback would cover. In oral closing, the Claimants accepted that section 5.3 would not be read by the RWIND tenderer as requiring the Commission to set out every weakness in the Phase One Feedback, rather it would be read as confirming a responsibility to provide feedback on any material matter that might lead to a Fail.

221. The Commission says that it was clear from the covering letter that the feedback was not exhaustive. I agree. Section 5.3.4 of the ITA does not state that every single point that might be considered to be a weakness or criticism at Phase Two would be set out in the feedback at Phase One. Looking at the covering letter and the ITA together, I consider that the RWIND tenderer would have understood the Commission's role under section 5.3.4 to involve highlighting (where possible given the information provided by the Applicant) "an aspect" of a response which might result in a Fail at Phase Two, but that it would not have considered the reference to "an aspect" to cover every last detail at any level of granularity that might be viewed as a weakness. I agree with the Commission that, although the Phase One Feedback was a crucial element of the process, the RWIND tenderer would not therefore have considered the Commission's task to be unduly onerous or to require it to identify every last point in an Application that could be considered a weakness.

222. Nevertheless I agree with the Claimants that the RWIND tenderer would have expected to be told of any material weakness on an aspect of an Application that might result in a Fail at Phase Two (always assuming the Application to include sufficient detail to enable the weakness to be identified), and that it would expect that weakness to be clear from the substance of the Phase One Feedback. I also agree with the Claimants that this interpretation of the scope of the Phase One Feedback is consistent with the need for transparency and fairness (cf. *Clinton (t/a Oriel Training Services) v Department for Employment and Learning* [2012] NICA 48 at [35]), particularly where an aspect of an Application might lead to a bidder being removed from the Competition (which a fail in one of the Pass/Fail Areas had the effect of doing).

223. Mr Wilson's evidence at trial was consistent with this. When asked what the Commission meant when it said that the feedback would not be "exhaustive", Mr Wilson said this:

> "There was a natural limit to how much feedback could be provided and dealt with. The Commission was keen to give feedback on all material and important elements of applicants' Phase 1 feedback, there would undoubtedly have been minor issues that may not make it to the feedback report. We were dealing, as you know, with reports approaching 100 pages. It had to be manageable by the applicant".

224. I consider this approach to reflect the observation of Fraser J in *Bechtel* at [280] (albeit in a slightly different context) to the effect that it is not necessary "to impose a counsel of perfection upon contracting authorities" of a type that the Regulations do not require. In closing, the Claimants submitted that they were not seeking to impose a counsel of perfection in the sense that they accepted that every last detail did not need to be

identified by the Commission. In my judgment, however, as I shall go on to explain, it is clear from careful analysis that the imposition of a counsel of perfection is exactly the approach that the Claimants are in fact inviting the Court to adopt.

The nature of the feedback given by the Commission

225. Before I turn to consider the very specific individual complaints raised by the Claimants, I observe that, overall, the Commission provided TNLC with very substantial feedback. In relation to PPI, the covering letter identified a number of headline concerns including a lack of detail and supporting information in respect of TNLC's approach to managing underage and excessive play. The Commission also pointed out the lack of a clear baseline by which TNLC would continue to measure compliance with its Participant Protection Strategy and the success of its ability to discourage excessive play. The feedback itself, provided in tabular form, set out detailed comments by reference to "Related Evaluation Sub-Criteria" in relation to both PPI and Financial Strength.

226. Against that background, it is in my judgment unsurprising that Mr Mills accepted in cross-examination that TNLC had been given "an enormous amount of material" and "considerable feedback", that such feedback included "quite a lot" of statements that the Phase One response lacked detail and supporting information and that TNLC knew that it had "[t]ons to do" and that it "hadn't done enough on Phase 1". Mr Mills' immediate response upon receipt of the Phase One Feedback in an email of 16 July 2021 was that "on the surface it looks fairly grim", while TNLC's bid director, Mr Walker, expressed the view in an email of the same date that "there are numerous areas we need to significantly improve during Phase 2". He described some of those areas as "alarming". In an email of 22 July 2021, Ms Wendy Lawrence (said by Mr Mills to be an important plank of the TNLC bid team), described the "collective view" of the bid team in the following terms: "the GC have given us clear feedback that we have pushed that from credible into incredible territory, and that we are in danger, not only of not winning, but of failing to meet the minimum criteria".

227. In relation specifically to Financial Strength, and in addition to the high level summary referred to above, the covering letter to the feedback identified at the outset that TNLC's funding package was still "in development" and that therefore, a lack of detail in the response made it impossible "to assess if the Applicant would fully meet the requirements of Financial Strength at Phase Two, both in terms of the providers of finance and the composition of the funding package". It went on to identify a variety of areas which were not covered by TNLC's response. I did not understand the incomplete nature of TNLC's Application in this regard to be in dispute. Mr Martin confirmed in his statement that the funding package was "not materially complete" at the end of Phase One and that it was "still in development", while Mr Mills explained in his statement that the Phase One submissions "did not cover every area that we knew would need to be covered in Phase 2", identifying "the technology area" as an example.

228. Instead of submitting "a full form response" at Phase One (as required by the ITA at 5.1), TNLC made a positive decision *not* to provide detail on every aspect of its Application. In so doing, it appears to me that it forfeited the right to complain about an absence of detailed feedback in areas where its own Application lacked material detail. Mr Mills accepted in cross-examination that the Commission couldn't give feedback on proposals that it had not yet seen.

The specific complaints

229. The Claimants' specific complaints are set out in one paragraph of their PoC, as follows:

> "The information provided to the First Claimant in the Phase One Feedback did not highlight several of the features of the Application which were ultimately assessed as a Fail, including by way of example, as regards the Protection of Participants' Interests, the alleged absence of a joined-up and cohesive approach, the alleged failure to ensure the protection of every Participant, the alleged failure to comply with "Best Practice" and the First Claimant's proposed use of a marketing affiliate. In addition, the information provided in the Phase One Feedback did not highlight alleged shortcomings in, for example, the use of central monitoring processes and procedures in relation to Key Subcontractors".

230. In broad terms, the Commission contends that these points of detail have been cherry-picked, that they cannot possibly be relied upon to show that the Phase One Feedback was so deficient as to be unlawful and that where TNLC does not challenge every single reason for its failure on PPI, it is unclear in any event how these isolated points advance TNLC's claim. As to the latter point, the answer appears to be that the Claimants say that the alleged lack of appropriate Phase One Feedback, when combined with specific points made as to manifest error, should have resulted in a Pass in respect of both PPI and Financial Strength because if the Phase One Feedback had been provided, TNLC would have taken it into account, thereby strengthening its Application.

231. The parties have distilled the Claimants' pleaded case into six separate issues which I shall now address in turn.

PPI (Issue 25(a)(i))

232. Although the first issue identified on this topic is said simply to be PPI, there is no separate allegation pleaded in respect of PPI, beyond those listed in the paragraph referred to above (all of which form individual issues). There is no basis whatever for any general finding that Phase One Feedback on PPI was generally deficient, and I did not understand the Claimants to suggest during closing submissions that I should treat this issue as a 'stand-alone' point. Accordingly, I can move straight to the substantive complaints raised.

The alleged absence of a "joined up and cohesive" approach (Issue 25(a)(ii))

233. A requirement of Question 4 at section 22.3 of the ITA was the provision of a Participant Protection Strategy ("PPS") which was:

> "a joined up, cohesive strategy to protect the interests of all Participants".

234. One of the reasons given by the Commission for failing TNLC on PPI in the Detailed Rationale was that its Application "does not adequately demonstrate a joined up and

cohesive Participant Protection Strategy as required by Q4 in the ITA". This related to the Third PPI Criterion.

235. There was some debate at trial over what the words "joined up and cohesive" would mean to the RWIND tenderer. In my judgment they would have their ordinary meaning: namely that all elements of an applicant's PPS must work together effectively in a consistent and complimentary way.

236. TNLC's Phase One Feedback in relation to PPI Question 4 refers on numerous occasions over 5 ½ pages to a lack of detail, a lack of clarity, and a failure to provide supporting information. Other feedback includes: a failure to provide the rationale for a specific proposal; inconsistency in the response; a failure to identify relevant policies and procedures; issues which TNLC does not appear to have considered; an issue which is underdeveloped; a failure to acknowledge the requirements of the Licence Conditions; and a failure to provide a clear baseline by which to measure compliance with TNLC's PPS.

237. It is common ground that there is no reference in the Phase One Feedback to the lack of "a joined up, cohesive strategy". However, in my judgment, the scope and extent of this feedback is quite plainly indicative of the absence of such a strategy. I reject TNLC's submission that the only message being conveyed by the feedback (when considered as a whole) was a message about a lack of detail – that was a significant message, but it was very far from being the only message. Mr Wilson said as much in his written evidence, which was then tested in cross examination. Specifically, it was put to him that the absence of a joined up, cohesive approach needed to be spelt out if that was a criticism that might be made at Phase Two. Mr Wilson's response, with which I agree, was "I don't think so. That was apparent from the rest of the comments made in the feedback".

238. To my mind one cannot view the Phase One Feedback in isolation (focusing as TNLC does on the absence of the express words "joined up, cohesive strategy") without bearing in mind the knowledge and understanding of its recipient. TNLC was familiar with the requirement that it should present a joined up, cohesive strategy, as Mr Mills acknowledged in cross-examination. Furthermore, it was clear from his oral evidence that the real issue for TNLC was not a failure expressly to refer to a joined up and cohesive strategy but rather a fundamental disagreement with the Commission over whether TNLC's proposals in fact amounted to a joined up and cohesive strategy. This much is clearly illustrated by the following exchanges in his cross examination:

> "Q. Are you really suggesting that you didn't know for Phase 2 that you had to provide a joined up and cohesive strategy?
>
> A. We certainly knew that we had to provide a joined up and cohesive strategy and the fact that we had a lot of feedback on things that the Commission thought we had left out or not done enough detail didn't to my mind, and still doesn't to my mind, affect the proposition that we were joined up and cohesive, and I touched on that in my second witness statement.
>
> Q But you knew, didn't you, that you had to provide something joined up and cohesive?

> A. Our belief was that what we were providing was joined up and cohesive insofar as one can interpret those words."

239. TNLC relies heavily upon Mr Mills' evidence in his statement to the effect that if TNLC had been given express feedback as to the lack of a joined up and cohesive strategy such feedback "would of course have been taken into careful account in preparing the Phase 2 submissions" and TNLC would likely have sought clarification from the Commission about exactly what was meant by that criticism. However, I agree with the Commission's submissions on this point. TNLC knew perfectly well that it needed to provide a joined up and cohesive strategy and the absence of an express statement to that effect in the Phase One Feedback can have made no difference. In any event it was obvious from that feedback that the Commission did not view TNLC's strategy as joined up and cohesive. TNLC disagreed with that feedback, as Mr Mills confirmed. In the circumstances, I do not consider Mr Mills' evidence (that if TNLC had had such feedback it would have done something different) to be reliable and I reject that evidence.

240. In my judgment the allegation of inadequate feedback in respect of the lack of a joined up, cohesive strategy fails. There was in fact no deficiency in the feedback given. To find it deficient merely because the words "joined up, cohesive strategy" are not used would indeed be to require a counsel of perfection. In any event, even if the Phase One Feedback was deficient in not expressly referring to a joined up and cohesive strategy, TNLC was not prejudiced at Phase Two. It knew it needed to provide a joined up cohesive strategy and it considered that it had done so. The addition of those specific words in the Phase One Feedback would have made no difference.

241. In their closing submissions on this issue, the Claimants submitted that no definition, guidance or training had been provided to the Commission's Evaluators on the concept of a "joined up and cohesive approach" and that, in the circumstances, the Commission's Evaluators had no clear understanding of what was meant by it. This point appears to be of more relevance to the allegations of manifest error, but in any event I reject it. In my judgment, the concept of a "joined up and cohesive approach" is readily explicable and comprehensible without training or guidance. The Claimants have not established that it is a concept that was not understood by Evaluators, or indeed that it would not be well understood by the RWIND tenderer. I certainly do not agree that it would be safe to infer a lack of understanding purely because the Phase One Feedback did not expressly refer to the lack of a joined up and cohesive strategy (as I am invited to do by the Claimants).

The alleged failure to ensure the protection of every participant (Issue 25(a)(iii))

242. The First PPI Criterion required the applicant to satisfy the Commission "that the Proposed Licensee will do everything it can to ensure that the interests of every Participant in the National Lottery are protected".

243. One of the reasons given by the Commission for failing TNLC on PPI in the Detailed Rationale was that its PPS "does not adequately demonstrate how its proposed measures **will ensure** that the interests of every Participant of the National Lottery are protected" (**emphasis added**). Mr Wilson accepted at trial that this was a standalone reason for failure.

244. TNLC makes the point that the requirement is to "do everything it can to ensure", but that there is no requirement to demonstrate in response to Question 4 on PPI how an applicant's proposed measures "will ensure" the protection of the interests of every participant in the National Lottery.

245. Pausing there – this is a somewhat semantic point which (perhaps unsurprisingly) it took Mr Wilson a little while to grasp in cross examination. However, having understood the point, he accepted that there was "a subtle difference" between the wording in the ITA and the wording used in the Detailed Rationale, namely that the relevant criterion required evidence of a strategy designed to achieve a particular outcome, whereas the criticism in the Detailed Rationale was (as he put it) "a criticism about outputs". It was then put to him that the difference in the wording meant that there could have been no feedback on the specific point being made in the Detailed Rationale at Phase One:

> "Q. And the point I am putting to you, and I would suggest Mr Wilson, it is not surprising because it wasn't the -- the criterion that we looked at, there is no feedback at Phase 1 that TNLC's PPS did not adequately demonstrate measures that would ensure the interests of every participant of the National Lottery are protected. That is absent from the Phase 1 feedback?
>
> A. The Phase 1 feedback hasn't been summarised in those terms, but there are plenty of feedback points that clearly indicate there were issues with strategy which would go to that criterion".

246. The cross-examination then moved on to a different topic and Mr Wilson was not challenged on this evidence, which I accept. Looking at the Phase One Feedback, it is abundantly clear that the Commission was concerned about numerous deficiencies in TNLC's response which together meant that there was a need for TNLC to provide a great deal more detail at Phase Two if it was to satisfy the requirement that it had done everything it could to protect the interests of participants. That the Detailed Rationale uses language which does not exactly track the words of the relevant criterion is not a reason to find that there was an absence of feedback or that TNLC would have done anything different. In closing TNLC asserted that "[h]ad this feedback been provided, the evidence demonstrates that TNLC would have taken it into account and passed in respect of this point", but it provided no references to any such evidence and I reject this submission. Mr Mills' evidence in his witness statement certainly does not descend into detail about how this would have been achieved.

247. There is nothing in TNLC's case on this issue and in my judgment this allegation fails.

The alleged failure to comply with 'Best Practice' (Issue 25(a)(iv))

248. The Fourth PPI Criterion is relevant to this allegation. Further, Section 11.2.1 of the ITA identified as a requirement in connection with PPI that:

> "The Licensee must maintain its Participant Protection Strategy throughout the Fourth Licence Term, ensuring ongoing alignment to Best Practice, which is currently considered to include the National Strategy to Reduce Gambling Harms".

249. Best Practice was defined at 3.2 of the ITA and in Condition 4.3 of the Fourth Licence by reference to the standard to be expected of an experienced and professional person:

> "4.3 In addition to complying with law and regulation, the Licensee must comply, and must ensure that any Licensee Subsidiary complies, with Best Practice, being the standard to be expected of an experienced and professional person doing a particular thing and seeking to secure the outcomes in Condition 1.2".

250. Conditions 4.4-4.5 of the Fourth Licence went on to say this:

> "This means (among other things) that where the Commission or any other UK government or UK public authority or any recognised industry body:
>
> (a) issues a code of practice or guidelines containing requirements which must be followed with regard to the undertaking of an activity, the Licensee and any Licensee Subsidiary must comply with those requirements if it undertakes that activity;
>
> (b) issues a code of practice or guidelines containing recommendations with regard to the undertaking of an activity, the Licensee and any Licensee Subsidiary must have regard to those recommendations if it undertakes that activity; and
>
> (c) publishes generally accepted standards for the undertaking of an activity or performance of any asset (Recognised Standards), the Licensee and any Licensee Subsidiary must do everything it can to achieve those Recognised Standards and to obtain any certifications or approvals necessary in order to demonstrate that the Recognised Standards have been achieved.
>
> 4.5 The Licensee must adopt and implement strategies, policies, processes and procedures to ensure that it, and any Licensee Subsidiary, complies with Best Practice. All such strategies, policies, processes and procedures must be approved by the Compliance and Risk Management Committee. In order to approve those strategies, policies, processes and procedures, that Committee must be satisfied that they will ensure that the Licensee complies with Best Practice".

251. In the Detailed Rationale, the Commission identified that TNLC's PPI Question 4 response "does not adequately demonstrate how its proposed approach to preventing underage play and not encouraging excessive play would align with Best Practice (Licence Condition 4.3)".

252. As pleaded, the Claimants' complaint appears to be that there was a failure to provide feedback to the effect that the Claimants' Phase One Application did not comply with Best Practice. There are no particulars in the pleading going beyond this bald assertion

and no attempt to link it to anything specific. As a general assertion it is manifestly incorrect; as Mr Wilson says in his statement, the Phase One Feedback makes "multiple references to Best Practice".

253. The Phase One Feedback on PPI expressly says that:

i) "The Applicant's response does not explicitly link Executive remuneration with ensuring best practice…";

ii) "The Applicant's response [on preventing underage play] refers to best practice but provides no detail of what best practice is and the desired outcomes as a result";

iii) "The Applicant's response does not provide detail about the accessibility of the National Lottery website, or the Applicant's adherence to best practice in this area";

iv) "While the Applicant's response [on use of data] refers to policies and procedures being in accordance with best practice, no specific policies or procedures are identified".

254. As articulated in closing and as put to the Commission's witnesses, the Claimants' real complaint appears to be both narrow and unpleaded. They complain that in relation specifically to excessive play, the Phase One Feedback made no reference to Best Practice. Setting aside the pleading point for a moment, it is certainly the case that, as Mr Wilson frankly acknowledged in cross-examination, the section of the Phase One Feedback dealing with "[n]ot encouraging excessive play" makes no direct reference to Best Practice (although there is such a reference in relation to underage play). However, as Mr Wilson also pointed out, that section includes "a considerable amount of feedback" on the weaknesses in TNLC's Application on this topic, including numerous references to a failure to provide "substantive detail" or "supporting information". I tend to the view that it is (again) a counsel of perfection to require the Commission to provide feedback on alignment with Best Practice when wholly inadequate information has been provided as to TNLC's approach to reducing excessive play – a rather more fundamental problem.

255. In any event, it is clear from Mr Mills' evidence that TNLC well knew that its responses on all aspects of PPI needed to align with Best Practice, that TNLC had "determined to adopt a professional approach" and that it appreciated that the relevant codes of practice were "complicated and we had to be on top of them". Mr Mills accepted in cross-examination that TNLC knew that it had to provide more detail generally of the Best Practice that it said applied and that a casual reference to Best Practice was not enough: "you had to explain what was in the codes of practice". This is also clear from a contemporaneous email sent by Mr Mills to his team on 4 August 2021:

> "…we should not just insert 'casual' references to things like ISO 27001, WLA-SCS or ASA Codes of Practice and presume that that fits the bill. We must look more precisely at what specific aspects of such things impact on what we shall be doing. This is actually quite a tall order".

256. In my judgment, this narrow point on which the Claimants now rely should have been pleaded if it was to be advanced. However, even if it had been pleaded, I do not consider that it would have been successful. While there was no reference to Best Practice in connection with excessive play in the Phase One Feedback, TNLC's Application lacked relevant detail. Further and in any event, TNLC knew of the importance of showing that all aspects of its PPI response aligned with Best Practice and that the feedback was not exhaustive. There is no basis whatever for the suggestion in the Claimants' closing that if a reference to Best Practice had been made in connection with the Commission's feedback on excessive play "TNLC would have incorporated it and passed in respect of this point". I was not given any evidence reference in support of this proposition, and I note that Mr Mills' evidence in his witness statement certainly does not go this far.

257. I reject the Claimants' case on this issue.

TNLC's use of a marketing affiliate (Issue 25(a)(v))

258. The Detailed Rationale stated that in respect of TNLC's Phase Two Question 4 response:

> "The Applicant proposes to use an affiliate for marketing (Q11, p.26, Section 11.3.2). However, the Applicant does not adequately demonstrate how it would address any Participant protection risks related to affiliate activities so as to ensure that its advertising and marketing is not detrimental to Participant's interests, consistent with Licence Condition 10.1".

259. The Commission accepts that feedback to this effect was not given in the Phase One Feedback on PPI, but it makes two points. First it says (by reference to the evidence of Mr Wilson) that TNLC was told in the Phase One Feedback that it needed to provide more detail about the risks associated with its proposed marketing affiliate in the feedback given in respect of TNLC's response to Channels (Question 11) and Portfolio (Question 13). Specifically it was told that key commercial risks and mitigations under Question 11 included that:

> "The Applicant provides risk mitigations without substance or explanation of how it will work to achieve its goal, for example the Applicant suggests a mitigation of "an Affiliate process and programme for on-boarding" without further clarification as to what this is"

and that its response under Question 13 on the mix of games that it was proposing:

> "…lacks detail about its relationships with online acquisition partners or affiliates".

260. In oral closing, the Commission pointed to the Sixth PPI Criterion and submitted that this made it clear that the overall Business Plan and ITA submission had to be aligned with any response in respect of PPI. Further the Commission observes that the feedback on which the Claimants rely expressly refers to the answer to Question 11.

261. Mr Wilson fairly accepted in cross-examination that TNLC could not have been expected to appreciate from the feedback in respect of Question 4 that a criticism was being made in similar terms to the criticism subsequently set out in the Detailed Rationale (namely over the use of a marketing affiliate in the context of PPI). However, as the Commission correctly points out, the criticism in the Detailed Rationale expressly referred to TNLC's answer to Question 11 (in respect of which Phase One Feedback as to the lack of detail in respect of the use of affiliates had been provided).

262. Second, the Commission says that, as Mr Wilson explained, the Commission provided as much feedback as was possible in the circumstances given that TNLC's marketing affiliate proposal lacked detail such that the ability of the Evaluators to provide more detailed feedback was affected. Specifically, Mr Wilson observed in his evidence that the feedback under Question 13 highlights "that there was a lack of detail in this area which would have affected the evaluator's ability to highlight any deficiencies at Phase 1". I accept this evidence.

263. I reject the Claimants' case on this issue. In my judgment Phase One Feedback on the use of affiliates was provided to TNLC under Questions 11 and 13. The Sixth PPI Criterion informed Applicants that Evaluators would be looking across the entirety of the Business Plan and the Application in respect of compliance with the requirements of PPI. The Detailed Rationale mentioned a failure under Question 4 but expressly tied it to TNLC's response to Question 11. I can see no genuine basis for any complaint on the part of the Claimants that inadequate feedback was provided.

The use of central monitoring processes and procedures in relation to Key Subcontractors (Issue 25(a)(vi))

264. This allegation arises in respect of Question 9 of the ITA pursuant to which the applicant was required to "demonstrate the financial standing of [its] supply chain and describe how [it] will ensure that supply chain disruption risks are minimised during the Fourth Licence Term".

265. An applicant's response to this question was required to include: "[t]he processes, procedures and controls in place for each Key Subcontractor to ensure that they are sufficiently financially resilient in the event of supply chain disruptions…". The ITA went on to state that:

> "As part of your response to the question above, you should provide evidence on processes, procedures and controls in place to ensure that your Key Subcontractors individually and collectively will have sufficient financial strength in the event of supply chain disruptions".

266. TNLC's Phase One Feedback stated (both in the covering letter and, later, under Question 9) that "[t]he Applicant's response does not clearly describe the Applicant's processes, procedures and controls associated with assessing and monitoring the financial strength of its supply chain".

267. A reason provided by the Commission in the Detailed Rationale for TNLC's "Fail" in respect of Financial Strength was that:

> "…it does not adequately demonstrate how it would use central monitoring processes and procedures and controls in relation to Key Subcontractors".

268. As became apparent during the cross-examination of Mr Wilson, the Claimants' point on this was another semantic one. They contend that there is a difference between the Phase One Feedback which focused on the need to "describe" the relevant processes, procedures and controls and the Detailed Rationale which points out a failure "to demonstrate" how processes, procedures and controls would be used. However, this case appears to me to be unsustainable on the evidence.

269. The following exchange took place between Mr Suterwalla and Mr Wilson during cross-examination:

> "MR SUTERWALLA: And the point I'm putting to you, Mr Wilson, is that the feedback in respect of this point in the detailed rationale is different to the feedback given to TNLC at Phase 1.
>
> A. I'd accept that, yes.
>
> Q. Yes, that's the point and the simple point is, that this feedback at Phase 2 should have been given at Phase 1; do you accept that?
>
> A. No, I think it would be very difficult to have given that feedback at Phase 1 because at Phase 1 the feedback was that the applicant hadn't clearly described…".

270. I accept Mr Wilson's evidence on this. TNLC was told in the Phase One feedback that it needed "to describe" (or provide more detail/information) in relation to processes, procedures and controls. In circumstances where TNLC's response on Financial Strength was underdeveloped and it had not sufficiently described its proposed processes, procedures and controls, it is very difficult to see (as Mr Wilson says) that any more detailed feedback could or should have been given. I reject the suggestion that the Commission should or could have provided feedback on processes, procedures and controls which had not yet been properly articulated by TNLC.

271. In their written closing submissions the Claimants sought to run an entirely new case to the effect that the Phase One Feedback omitted to refer to a failure to demonstrate TNLC's "organisation structure" (a point raised in the Detailed Rationale to the effect that "[w]hile the Applicant sets out its general approach to managing supply chain risk, it has not adequately described its procurement policy, procedures and associated organisation structure").

272. However, although this case was said in closing to be "more significant" than the Claimants' original case on this issue, it was not put to Mr Wilson and it is not pleaded. It appears to have arisen out of answers given by Ms Severne in her cross-examination. Absent any prior warning of this case or any attempt to seek to amend to plead this new case, I do not consider it fair or just to permit the Claimants to advance it. In any event, it is again very difficult to see how TNLC could expect detailed feedback covering all possible grounds ultimately relied upon at Phase Two to support a "Fail" in

circumstances where its Application on Financial Strength was underdeveloped at Phase One.

273. The Claimants' case on this issue fails.

Phase One Feedback on TNLC's Business Plan responses (Issue 25(b))

274. The Claimants contend that the Detailed Rationale identified weaknesses in TNLC's Business Plan responses which were not highlighted in the Phase One Feedback. However, as I understood their submissions in closing, the only continuing relevance of this allegation is that the Claimants wish to rely upon it in the Modifications Claim in support of their argument that they would have taken steps to improve their bid in a counterfactual 5NLC and that there was a real chance that they would have won a 5NLC. Mr Toledano submitted that although the "feedback points" in relation to the Business Plan Areas "won't make up the gap" nevertheless "that doesn't mean that they don't close some of the gap" and in that case "the gap in its entirety is not a reliable starting point for 5NL".

275. The problem for the Claimants with this approach is that there has been no attempt to plead such a case in connection with the Modifications Claim and I cannot see how, on ordinary pleading principles, it would be appropriate for me to permit the Claimants to advance a completely unpleaded case in that, entirely separate, claim. Even if I am wrong about that and ought to consider the point because it has been pleaded and argued in connection with the Process Claim, I consider there to be nothing whatever in this allegation.

276. First, this is because the Claimants only criticise a very small proportion of the reasons given by the Commission for TNLC's low scores on the Business Plan Areas. They do not make out any case as to what TNLC's scores would have been had they been given the feedback they say should have been given and nor do they provide any assistance as to how the Court could legitimately conclude that "the gap" could or would have been narrowed for the purposes of a 5NLC to any particular extent. The Claimants' case on this (which is put no higher than that success on these allegations would "suggest" that the gap could have been narrowed in a 5NLC) simply does not go far enough.

277. Second, on the available evidence, there is nothing in the Claimants' complaints in any event; as I explain below, I consider that appropriate feedback was provided in respect of each of the areas in which complaint is made and that the various points raised by the Claimants were, or should have been, well understood by TNLC.

278. I turn then to consider the three complaints pursued by the Claimants.

Cannibalisation (Issue 25(b)(iv))

279. One of the reasons given in the Detailed Rationale justifying TNLC's mark of 9 out of 15 for its Question 13 Portfolio Business Plan Area response was that it had not considered "the potential effects of cannibalisation across the entirety of its portfolio". The term cannibalisation is used in connection with lotteries to refer to the effect of the introduction of a new game on an existing game: players move to the new game, thereby reducing the number of players continuing to play the original game.

280. The Claimants accept that the Phase One Feedback identified that TNLC had provided only "limited analysis of cannibalisation effects", but they say that, in context, this was a reference only to cannibalisation in connection with the introduction of Powerball, EuroMillions and EuroMillions Multiplier. It was not, they say, a reference to the need for TNLC to consider cannibalisation across the entire portfolio of its proposed games. Their pleaded case is to the effect that the Phase One Feedback should have highlighted this weakness across the entire portfolio. This is supported by evidence from Mr Mills to the effect that he did not understand the Phase One Feedback to apply to the entirety of the portfolio.

281. I reject this case for the following main reasons:

i) I consider that it was clear on any sensible reading of the Phase One Feedback (and the RWIND tenderer would certainly have understood) that in the Phase One Feedback the Commission was raising a concern about cannibalisation effects across the entirety of TNLC's portfolio. The specific point made in the feedback (including in the covering letter) was that:

> "The Applicant sets out highly ambitious growth forecasts across games including EuroMillions, Thunderball, EuroMillions Multiplier and Powerball, however it provides limited analysis of cannibalisation effects or how the Applicant will achieve such growth for all games in parallel".

ii) Objectively, this is quite clearly a general statement about growth forecasts "across games" (i.e. all games in the portfolio). Some examples of games are then given. The subsequent reference to "limited analysis of cannibalisation effects" and to how the applicant will "achieve such growth for all games in parallel" is clearly a reference back to the entire portfolio identified at the outset of the sentence.

iii) This analysis is supported by the clear evidence of Mr Ellerbeck, an Evaluator for Question 13, Portfolio, which I accept, to the effect that this passage is "absolutely" concerned with cannibalisation across the entire portfolio:

> "Q. So this is referring obviously, Mr Ellerbeck, to cannibalisation effects, do you see that?
>
> A. Yes
>
> Q. And separately it's referring to growth for all games in parallel. Do you see that?
>
> A. Well it's a combination really; because one affects the other…
>
> Q. And this bullet here does not refer to a need for the applicants to carry out analysis of cannibalisation effects across the entire portfolio?
>
> A. Yes it does, yes, absolutely…".

iv) Mr Ellerbeck accepted that subsequent references to cannibalisation in the Phase One Feedback were referring to specific games, but his evidence was that people with lottery experience would understand that whenever a new game is introduced it is necessary to look "at the holistic view of your portfolio".

v) The Claimants seek to rely on a concession made by Mr Wilson during his evidence to the effect that the Phase One Feedback identified above did not refer to cannibalisation across the entire portfolio but that it referred only to "those components in the portfolio", i.e. the specific games mentioned in the feedback. However, this was Mr Wilson's immediate response on the point when he was first taken to it. When Mr Suterwalla returned to the point a second time, Mr Wilson gave a different answer, observing that the feedback was "talking about cannibalisation across the portfolio surely". In my view, having regard to all of the available evidence and to an objective reading of the feedback, Mr Wilson's initial reaction was mistaken and this second answer, which arose in the context of a more considered look at the relevant feedback, is to be preferred. Indeed, his second answer is also consistent with evidence in his witness statement to the effect that the feedback was in relation to cannibalisation "across a wide span of the portfolio" owing to the reference to "multiple games on a non-exhaustive basis".

vi) Indeed, the evidence shows (and I find) that TNLC well understood the need to address cannibalisation effects across its whole portfolio. Mr Mills' evidence in his witness statement was to the effect that a review of the Phase One Feedback had confirmed his recollection that the Commission provided no feedback about the effects of cannibalisation across the entirety of the portfolio. However, this recollection was plainly unreliable. Under cross-examination, Mr Mills explained (contrary to his statement) that in July 2021 he "probably wasn't entirely sure" whether the feedback required further analysis of cannibalisation across the whole portfolio or not ("…*the sentence from the feedback…actually has two clauses and they might be linked, they might not be linked…*"). However, this newly asserted lack of certainty did not fit with other parts of his oral evidence from which it appeared clear that TNLC well understood that it had to address the limited analysis of cannibalisation <u>across the board</u>. Specifically, Mr Mills accepted that "[t]he feedback was that the analysis was limited and in my book that means you have to do a bit more". He and Ms Hannaford then had the following exchange:

> "Q. You understood, Mr Mills, didn't you, that you had to set out detail -- from the Phase 1 feedback that you had to set out detail at Phase 2 about cannibalisation across your portfolio?
>
> A. We were cognisant of that phrase "limited analysis" of cannibalisation, which is repeated there, and so as soon as we saw that and just taken it on board, we set about tackling it and dealing with it in time for Phase 2…"

Mr Mills made no attempt here to qualify his evidence by reference to specific games.

vii) The contemporaneous documentary evidence supports this picture. In an internal email dated 17 July 2021 (in which he commented on the Phase One Feedback) Mr Mills identified a number of what he regarded as "big ticket things", including "[h]ighly ambitious growth forecasts across games but limited analysis of cannibalisation…". He did not tie this statement to any specific games (as TNLC now seeks to do) but appears to have understood the feedback to be a more general statement relating to all games. In an internal slide deck of 21 July 2021, TNLC's "limited analysis of cannibalisation" was identified as an area in respect of which TNLC needed to provide "a deeper level of evidence" at Phase Two.

viii) In closing, the Claimants invited the court to prefer the evidence of Mr Mills and Mr Wilson over that of Mr Ellerbeck without a full analysis of that evidence, albeit now putting their case no higher than that "**it was unclear** that TNLC was being asked by the Phase One Feedback to consider cannibalisation across the entire portfolio" (emphasis added). For all the reasons set forth above, I reject this case.

Lottery Extras (Issue 25(b)(v))

282. One of the reasons why TNLC received a mark of 9 out of 15 for its Channels Business Plan Area response was that the Commission concluded in the Detailed Rationale that TNLC had not adequately demonstrated "how the Lottery Extras Scheme would work e.g. the mechanics of redeeming rewards". The Claimants' pleaded case is that the Phase One Feedback failed to highlight this specific issue.

283. I reject that case, not least because the Claimants made no attempt to make any submissions on the pleaded point in closing. None of their witnesses gave any evidence as to why the feedback provided was deficient.

284. As Mr Wilson pointed out in his statement, TNLC was made aware that a lack of detail about how the proposed Lottery Extras Scheme would work was a matter for which it could be marked down in the feedback at Phase One, which stated that:

> "The Applicant proposes a scheme called "Lottery Extras" which includes second chance draws that provide non-winners with a free additional chance to win for National Lottery Scratchcards or DBGs. However, it is not clear from the Applicant's response if online players would also receive this second chance. This approach could be a potential risk to the scheme and the National Lottery Brand. The Applicant has also not provided clarity on how it will ensure compliance Licence Condition 8.7".

285. In my judgment there is accordingly no basis for the pleaded complaint.

286. In cross-examination of Mr Wilson and in closing submissions, the Claimants sought to develop a new and unpleaded point by reference to a different weakness identified in the Detailed Rationale in response to Question 4 (PPI) to the effect that "[t]he Applicant refers to encouraging known play ('Lottery Extras') (Q4, p.14, Section 4.3.5) but does not include targets for converting anonymous play, the details of the rewards,

or detail on how it intends to use this specific data to prevent excessive play". The Claimants' new case was that no feedback had been provided at Phase One as to concerns about the introduction of Lottery Extras impacting upon PPI requirements. I note that this case was advanced without any acknowledgement that it was in any way inconsistent with the pleaded case.

287. I reject the attempt to make out this new case through cross-examination and in closing submissions. Mr Wilson had been given no opportunity to consider this case in advance of preparing his statement, the Claimants' witnesses had not addressed it, and at all times during the trial (including in their closing submissions) the Commission focused (as it was entitled to do) only on the pleaded case.

288. The Claimants rely on the fact that when he was asked about the new point, Mr Wilson said in cross-examination that the feedback in the Detailed Rationale was "building on additional points", but they do not focus on the fact that he went on to qualify that answer by saying that "[w]hat we can't tell, of course, is what additional information the Evaluators had in front of them in respect of the applicant's Phase 2 submission in this area". The Claimants made no attempt to address this latter point.

289. In the circumstances, even assuming that I had been prepared to permit this new point, I would also have dismissed it on the grounds that it was clear from the Phase One Feedback that further information was required as to how Lottery Extras would work and that, absent an understanding as to what further information was in fact provided by TNLC at Phase Two, it would be unfair to criticise the appearance of more detailed observations on Lottery Extras in the Detailed Rationale. I am certainly not in a position to determine on balance that the Phase One Feedback on Lottery Extras was inadequate.

Long Term Location Strategy

290. One of the reasons why TNLC received a mark of 3 for its Operational (Operating Model) Business Plan Area response was because (as explained in the Detailed Rationale) the Commission considered that TNLC had "not finalised its long-term location strategy which leaves its operating model unclear beyond Year 2 and risks significant staff turnover". The Claimants allege that this was not a point that was highlighted at Phase One.

291. The Commission accepts that no specific feedback was given at Phase One on the failure to finalise location strategy, but they point to the fact that in its Phase One Application TNLC set out its "current proposal" whilst at the same time making it clear that "[t]he location strategy will be refined in due course". Mr Wilson's evidence in his statement (which I accept) is that "[h]ad they not said in their submission at Phase One that they were still working on the location strategy, they would have been criticised for not having one, but there was no point in providing specific feedback on this, as they had already said "the location strategy will be refined in due course" – they implied they were going to deal with this before making their Phase Two submission. They didn't, so we criticised it at that point".

292. Mr Martin acknowledged in cross examination that TNLC had not provided any timeframe in its Phase One Application for the refinement of the location strategy and, in the circumstances, the approach taken by the Commission, as explained by Mr

Wilson, appears to me to be entirely reasonable. Against that background I do not consider that the Commission can be criticised for not providing feedback.

293. In cross-examination, Mr Wilson fairly accepted that information had been provided by TNLC as to its "current proposal", i.e. as to different sites and locations, albeit that he pointed out that there was an issue about the level of detail. It was then put to him that the point made in the Detailed Rationale about not finalising a long-term strategy "could have been made on the back of" the information in the Phase One Application. Mr Wilson responded "[i]t wasn't summarised in that way, no, that's correct".

294. I am not clear as to what Mr Wilson meant by this and the cross-examination then moved to another topic. However, I do not take from this answer that Mr Wilson was changing the evidence he had given in his witness statement, and it was not suggested to him that he was. Importantly it was never suggested to him that the Commission was wrong to understand from the wording of the Phase One Application that the location strategy would be refined in the Phase Two Application. In my judgment that is the end of the matter. I reject the Claimants' case that, in all the circumstances, there was an obligation to provide feedback at Phase One as to the failure to finalise the location strategy.

Conclusion on Phase One Feedback

295. I reject the Claimants' case that the Commission's Phase One Feedback was deficient as alleged, whether in respect of Pass/Fail Areas or in respect of Business Plan Areas. Accordingly I also find that there has been no breach by the Commission, individually or cumulatively, of the principle of transparency (**Issue 26**).

Undisclosed Criteria

296. It is common ground that the ITA must be clear, that it must set out the Competition requirements and that applicants must be able to understand what they are required to address in their bids. Ms Sheldon confirmed in her evidence that "clarity is absolutely crucial". It would be a breach of the principle of transparency if TNLC's bid had been assessed by reference to a criterion which had not been made known to applicants. However, the Commission denies that it applied any undisclosed criteria. By way of overarching comment, it asserts that the Claimants have relied on a series of selective extracts from various parts of the Detailed Rationale which constitute some, but not all, of the reasons why TNLC failed to pass PPI.

297. I turn first to the four specific complaints of undisclosed assessment criteria raised by the Claimants in respect of PPI, each of which is identified in the sub-headings set out below. In doing so it is worth observing that both the Claimants and the Commission were at times guilty of straying into the territory of subjective evidence in relation to this issue. I have dealt with that evidence below, but I have determined each complaint by reference to the RWIND tenderer test.

Risks of unaffordable levels of play (Issue 45(a))

298. The Particulars of Claim plead that:

> "[t]he Application has been assessed as a Fail on grounds including that it failed to adequately address the risks of "unaffordable levels of play". This is not a criterion set out in the requirements of the ITA or other documents".

299. Although this plea is brief, I do not understand the Commission to allege that it is unparticularised or that they cannot understand it. The allegation arises in respect of the First PPI Criterion. Mr Wilson dealt with the pleaded allegation in his first witness statement. Both Mr Wilson and Ms Sheldon were cross-examined on the point.

300. In their closing submissions, the Claimants assert that:

i) The Commission's reasoning for failing TNLC on Question 4 (PPI) in the Detailed Rationale includes a failure to demonstrate:

> "how it proposes to:- address risks of unaffordable levels of play or excessive play; - monitor whether Participants are playing excessively and/or at unaffordable levels of play;- address any instances of excessive play and/or unaffordable levels of play";

ii) However, "*it is common ground*" that "there was no express reference in the ITA…nor in the 4NL Licence to the concept of unaffordable levels of play";

iii) It is clear from the oral evidence of various of the Commission's witnesses that no internal training or guidance had been provided to Evaluators on this concept of unaffordable levels of play; and

iv) Mr Wilson confirmed in his evidence that "excessive" and "unaffordable" play were distinct concepts. Ms Sheldon accepted in her evidence that "unaffordable" play "is not a defined term or referenced in that applicants must address this specific point".

301. Accordingly, the Claimants say simply that the risk of unaffordable levels of play, taken into account by the Evaluators and included in the Detailed Rationale as a reason for failure in respect of PPI, was an undisclosed criteria.

302. On close analysis of the evidence, I reject this case for the following main reasons.

303. Section 11 of Volume E of the ITA deals with PPI. Section 11.1 of the ITA sets out the context for the requirements that follow at 11.2. Specifically it says this:

> "Whilst the Commission does not seek to provide a prescriptive definition of those whose interests are particularly at risk (and therefore are likely to be in particular need of protection), Applicants should note that they are likely to include (but are not limited to):
>
> Vulnerable Participants which is likely to include people who gamble more than they want to, **people who gamble beyond their means** and people who may not be able to make informed or balanced decisions about gambling due to, for example,

> mental health, a learning disability or substance abuse relating to alcohol or drugs. Vulnerability may be long-lasting or temporary.
>
> Problem gamblers, meaning gamblers who experience severe or serious levels of harm. Problem gambling occurs when someone gambles to a degree that compromises, disrupts or damages family, personal or recreational pursuits…
>
> However, Applicants should also note that Participants may experience harm from excessive play without meeting all the clinical criteria to diagnose problem gambling. Gambling may have an adverse impact on the health and wellbeing of individuals, families, communities and society. Effects can include loss of employment, **debt**, crime, breakdown of relationships and deterioration of physical and mental health" (**emphasis added**).

304. Pausing there, although the Claimants are right to say that there is no express reference to unaffordable levels of play, to my mind the references to "people who gamble beyond their means" and to the effects of gambling which include "debt" are plainly (and would be understood by the RWIND tenderer as being) references to the concept of unaffordable gambling.

305. The Statement of Requirements for Applicants in respect of PPI is then set out at section 11.2. The Licensee must "do everything it can to ensure that the interests of every person who plays, engages with or is exposed to the National Lottery are protected". This reflects the overriding duty at section 8.1 of the Proposed Form of Fourth Licence provided to Applicants and cross-referenced in Question 4 (PPI) of the ITA. In my judgment, these requirements would be read by the RWIND tenderer in their proper context. Specifically, they would be seen against the background of the categories of participant that the Commission has identified as being "particularly at risk".

306. In cross-examination, Ms Sheldon was shown section 11.2 of the ITA and it was put to her that there is no reference to unaffordable play. She responded that there was not "a specific reference to it" but she went on to say (in evidence that was not referred to by the Claimants in closing) that unaffordable play "is a component of—a recognised component of excessive play, with reference to Best Practice". I accept this evidence. In so far as Ms Sheldon appears to have accepted that Applicants did not need to address the concept of unaffordable play (and the transcript is not entirely clear), such acceptance is inconsistent with her clear evidence that unaffordable play is a recognised component of excessive play. Furthermore, Mr Wilson expressed a similar view when he said that unaffordable and excessive play were "linked in some cases".

307. Ms Sheldon also observed in cross-examination that she thought unaffordable play was "also mentioned in the Regulatory Handbook". She was right about that, as was clarified during her re-examination. The Regulatory Handbook includes a section entitled "Not encouraging excessive play" at sections 11.12-11.15. Section 11.15 explains that "we may have particular regard to any specific socio-demographic groups that, based on relevant evidence, may be more vulnerable or susceptible to excessive play". A footnote identifies Vulnerable Participants as "likely to include people who

gamble more than they want to [and] people who gamble beyond their means…". Ms Sheldon confirmed in re-examination that this was what she was thinking of when she referred to the Regulatory Handbook.

308. Question 4 at Section 22.3 of the ITA identifies section 11 of the Regulatory Handbook (amongst other sections) as being relevant to PPI and expressly informs applicants that they:

> "may wish to refer to the Regulatory Handbook for guidance on the nature of participant protection measures that the Commission may consider relevant to meeting the requirements to protect Participants' interests".

309. During the course of his cross examination by Ms Hannaford, Mr Mills was taken to the Detailed Rationale and specifically to the reference to the failure on the part of TNLC to demonstrate how it proposes to address risks of unaffordable play. The following exchange ensued:

> "Q …Now, you knew, didn't you, that you had to address the issue of those who play beyond their means?
>
> A We knew we had to address those things".

310. Mr Mills was then taken to section 11.1 of the ITA and shown the passage set out above dealing with "Vulnerable Participants". The following exchange then took place on the issue of unaffordable play:

> "Q. …So you knew from that that you needed to consider protection of those who gambled beyond their means?
>
> A. We took account of what is said here because it was said really very clearly.
>
> Q. And it was perfectly clear, wasn't it, that that was a need to address unaffordable levels of play?
>
> A. That's one aspect of it.
>
> Q. You agree with me?
>
> A. Of course".

311. To my mind, although evidencing Mr Mills' subjective understanding of the ITA (which is not legally relevant to the question of transparency), this evidence is entirely consistent with the Commission's evidence to the effect that unaffordable levels of play are generally understood to be an aspect or component of the concept of excessive play.

312. Standing back, I consider it to be plain that the RWIND tenderer would have understood from the ITA and the Regulatory Handbook that there was a need to address unaffordable levels of play and further that it would have understood this to be an aspect

of excessive play. The criteria were sufficiently clear to permit a uniform interpretation. Furthermore, that TNLC did in fact understand this means that, even if I am wrong about the understanding of the RWIND tenderer, this allegation in itself cannot have caused any loss. This causation point was canvassed by Ms Hannaford in closing submissions in response to a question from the Court, and I invited the other parties to address me if they disagreed. The Claimants did not return to the point in their reply.

313. In all the circumstances, the claim of undisclosed criteria in respect of unaffordable levels of play fails. For the sake of completeness I should add that I fail to see how the issue of training of Evaluators is relevant to the issue of transparency or the understanding of the RWIND tenderer. The Claimants did not seek to analyse the point in their closing submissions. I shall return to the question of training when I come to address the Pass/Fail Areas.

Size and structure of TNLC's proposed resources (Issue 45(b))

314. The Claimants' pleaded case is as follows:

> "The Defendant has based its decision regarding the Application on its assessment that the size and structure of the First Claimant's proposed resources have not been demonstrated to be sufficient. No such criteria regarding sufficient size and structure of organisation were disclosed to the First Claimant or discussed with the First Claimant in a timely manner or at all. Despite this, the Defendant has wrongfully taken into account concerns as to whether or not the First Claimant has sufficient resources to support the Chief Compliance Officer and other matters related to the Claimant's previous experience".

315. I did not understand the Claimants at trial to be pursuing any allegation in relation to "other matters" related to TNLC's previous experience. TNLC's complaint is that it had not understood (because the point had not been disclosed) that there was a requirement to show that it had sufficient resources to support the Chief Compliance Officer. I did not understand the Commission to take any pleading point in respect of this allegation.

316. Question 5 in section 22.3 of the ITA asked applicants to:

> "Please detail how you will implement, manage, monitor and adapt your Participant Protection Strategy to continuously uphold the Statutory Duties in a changing environment
>
> Your response should be no more than 10 pages.
>
> As a minimum, your response should include the following key elements:
>
> • Appropriate allocation of responsibility (named individual and role) for the Participant Protection Strategy and compliance with the Licensee's obligation to protect Participants' interests.

> • A plan to implement new participant protection tools, methods or procedures, covering timelines, resource requirements and mitigations against any risks related to implementation.
>
> • Processes you will adopt to monitor, evaluate, and improve the effectiveness of the Participant Protection Strategy…
>
> • Methods to maintain compliance with Condition 8 of the Fourth Licence (Protecting Participants' Interests)…"

317. It went on to say "**Please note**: you should ensure that all your projected revenues and costs of delivering associated with this proposal are captured in your Financial Template".

318. The Third PPI Criterion must be borne in mind in the context of this allegation.

319. The Detailed Rationale stated in respect of TNLC's Question 5 response:

> "The Applicant does not adequately demonstrate how the size and structure of the resources it proposes to support the Chief Compliance Officer in undertaking the activities proposed in the Applicant's Participant Protection Strategy would be sufficient".

320. The Claimants assert that under the heading "Allocation of responsibility (Named Individual and Role) for our [Participant Protection Strategy "**PPS**"] and Compliance with our Licence Obligation to Protect Participants' interests", in response to the first bullet point set out above in Question 5 of the ITA, TNLC made the following points in section 5.2 of its Phase Two Application:

    i) The named "lead person" tasked with the responsibility of implementing, managing and adapting the PPS would be David Clifton who would join TNLC as Chief Compliance Officer ("**CCO**") in March 2022, assuming TNLC was the Preferred Applicant;

    ii) The role of CCO would be one of 5 'chief' roles in the TNLC corporate structure reporting to the CEO and the Board;

    iii) Supporting Mr Clifton and reporting directly to him would be the Director of Licence and Regulatory Compliance. Reporting to the Director would be the Head of Participant Protection, along with areas such as security, data privacy and risk management;

    iv) TNLC provided further details as to measures that would be taken during the Implementation Period, including that: the Senior Leadership team would "work closely" to ensure an integrated approach to all aspects of TNLC's business; a Compliance and Risk Management Committee ("**CRMC**") would be established whose terms of reference included, on behalf of the Board, governance of, and keeping under review, TNLC's PPS and its implementation across all aspects of National Lottery operations; and that Mr Clifton would be principal adviser to the CRMC and would take the lead in advising on all aspects of the PPS;

v) TNLC also provided further details of the roles that Mr Clifton would undertake. They explained that he would work "more generally" with members of the CRMC and executive colleagues to ensure readiness at the Start Date across the range of his responsibilities.

321. At section 5.3 of its Phase Two Application (expressly dealing with the second bullet point in Question 5), TNLC stated that working groups would be set up to take responsibility for a series of initiatives designed to implement core elements of the PPS which were categorised into various "broad tasks".

322. The Claimants say that this approach is consistent with what the RWIND tenderer would have understood was required in response to Question 5; namely that bullet points 1 and 2 were separate and that the CCO was not a participant protection "tool" within the meaning of the second bullet. They say that, by contrast, the RWIND tenderer would have understood bullet point 1 of Question 14 (Operating Model) to require an applicant to set out the resources that it would be deploying, including those supporting the CCO role. Accordingly, the Claimants contend that where there was no requirement in bullet point 1 of Question 5 to set out the "resources" for the CCO, the reason relied upon by the Commission for failing TNLC for its PPI Question 5 involved the application of an undisclosed criterion.

323. Once again, I reject this case. Reading Question 5 itself and looking at the guidance on the response to Question 5 as a whole (and taking this in the context of the Third PPI Criterion), I consider that the RWIND tenderer would understand that Question 5 was seeking details as to how applicants would "implement, manage, monitor and adapt" their PPS and that this required the identification of a plan to implement "tools methods or procedures, **covering…resource requirements**" (**emphasis added**). Given that the first bullet point required the identification of one or more named individuals who would be responsible for the PPS, the RWIND tenderer would have understood that the requirement to identify "resource requirements" would require information about the resources that would be deployed to support the CCO and to make the role of (in TNLC's case) CCO effective. I do not consider that the RWIND tenderer would treat each of these bullets as a stand-alone requirement. The reference to "resource requirements" is very general and can only sensibly be read as covering <u>all</u> resource requirements for the PPS, including in relation to personnel. This had to be dealt with "comprehensively".

324. Although not relevant to the understanding of the RWIND tenderer which must be determined objectively, Ms Sheldon explained in her statement (and I accept) that the Commission had expected to see detail on the training and resources that TNLC would deploy to support the CCO role. She fairly accepted in cross-examination that the first bullet of Question 5 does not "specifically" refer to the provision of information about resources in connection with the CCO, but she went on to say that she considered the first two bullets to be "linked" such that once the individual had been named under the first bullet point, the next requirement for the Evaluator was to determine "how can we be confident that there are adequate resources to support that individual". She made the point in a slightly different way when she said "So the CCO role is important and obviously will be the person that heads this up, and the second bullet is relevant to that, in terms of delivery of it".

325. The fact that, as the Claimants contend, (i) none of these points made by Ms Sheldon is supported by the Moderation Notes in the sense that those notes simply set out the Evaluator's conclusions; and (ii) the RWIND tenderer would have had a particular understanding in relation to an entirely different Question in a different non-Pass/Fail section of the ITA, does not assist on what the RWIND tenderer would have thought in relation to Question 5.

326. In closing, the Commission pointed to Mr Mills' witness statement in which he states that TNLC set out "in detail" in its Phase Two Application its corporate and senior management structures together with how it would evaluate the human resources that would be inherited from Camelot. I agree with the Commission that it is implicit in this evidence that TNLC in fact understood what was required under Question 5 (in other words that it understood Question 5 in the same way as the RWIND tenderer would have understood it). This much is clear from Mr Mills' cross-examination, during which he confirmed that TNLC "needed to provide structure", in other words the senior governance structure in which any named individual would sit. The following exchange then took place between Ms Hannaford and Mr Mills about the second bullet point in Question 5:

> "Q. So you knew from that, didn't you, that you had to provide resource requirements?
>
> A. We did provide resource requirements."

327. Once again, while this evidence does not assist on the understanding of the RWIND tenderer, it confirms that TNLC had the same understanding of the requirements of Question 5 as the Commission and, indeed, that TNLC considered that it had satisfied those requirements in its response to Question 5 (a matter to which I shall have to return in the context of the Pass/Fail Areas). In fact, as I have determined above, both the Commission and TNLC appear, on the evidence, to have interpreted the ITA in the same way as the RWIND tenderer would have done.

328. Accordingly, I consider that the Commission did not apply undisclosed criteria in relation to resources relating to the named individual, as alleged by the Claimants. Further and in any event, this complaint cannot have any causative effect. TNLC knew, both from the terms of the ITA itself, and from feedback received at Phase One, that it needed to address the detail of its resourcing plans including as to its human resources.

Best Practice (Issue 45(c))

329. The Claimants' pleaded case is that:

> "The Defendant has based its decision regarding the Application on the basis of assessments made by reference to an undefined, undisclosed and vague concept of "Best Practice". No statement has been disclosed as to what "Best Practice" requires for the purposes of the 4NLC and statements to be made in the Application".

The Claimants go on to assert that the statements made in assessment of the Application by reference to Best Practice "are at odds with the Claimants' understanding of what Best Practice requires".

330. The Fourth PPI Criterion is relevant to this allegation. Further, Section 11.2.1 of the ITA identified as a requirement in connection with PPI that:

> "The Licensee must maintain its Participant Protection Strategy throughout the Fourth Licence Term, ensuring ongoing alignment to Best Practice, which is currently considered to include the National Strategy to Reduce Gambling Harms".

331. As mentioned above, Best Practice was defined at 3.2 of the ITA and in Condition 4.3 of the Fourth Licence by reference to the standard to be expected of an experienced and professional person. I have already set out conditions 4.4-4.5 of the Fourth Licence.

332. In the July Applicant Note, the Commission provided (amongst other things) a Licence Update, which included further explanation as to the Best Practice requirement at clauses 4.3 and 4.5 of the Fourth Licence, including that:

> "The obligations set out under Condition 4.4 are intended to relate to 'Best Practice' that is relevant to the activities of the Licensee. Conditions 4.4(a) and (b) refer to codes of practice and guidelines that apply to the Licensee only where 'it undertakes that activity'. This would include, for example, rules or guidance on consumer protection or advertising standards, when the Licensee is engaging with consumers or advertising the National Lottery".

333. The Commission issued CQ 540 on 30 July 2021 focusing on the reference to 'Relevant Government or Public Authority or any Recognised Industry Body' in Condition 4.4 of the Fourth Licence:

> "Condition 4.4 of the Fourth Licence was amended to include the concept of 'Relevant Government or Public Authority or any Recognised Industry Body. This clarifies that in addition to UK government, public authority or recognised industry bodies, there may be Best Practice issued by non-UK governments, public authority or recognised industry bodies that is relevant to the operation of the National Lottery. For example if components of the National Lottery are operated outside of the UK it may be appropriate to consider local Best Practice".

334. Given the definitions and explanations in relation to the concept of Best Practice available to applicants to which I have referred above, it is perhaps unsurprising that the Claimants' case in closing no longer focused on the allegation that the concept of Best Practice was undisclosed. Indeed, although the Claimants submitted in closing that, in his oral evidence, Mr Wilson had accepted that limited information had been provided to applicants as to the meaning of the concept of 'Best Practice', a review of his evidence clearly establishes that he did not concede anything of the sort. Instead he

explained (correctly) that the definition of Best Practice was to be found in the Fourth Licence together with the subsequent clarification provided by the Commission.

335. In my judgment it is plain from the extracts in the ITA, the Fourth Licence, the July Applicant Note and CQ 540 referred to above that the concept of Best Practice was not an undisclosed criterion, and I reject the Claimants' case to the contrary. The RWIND tenderer would have understood the concept of Best Practice having regard to Conditions 4.3-4.5 as referring to the standard to be expected of an experienced and professional person conducting the Lottery so as to secure the outcomes referred to in Condition 2.1 of the Fourth Licence. The RWIND tenderer would have understood that this included the need to refer to any relevant codes and guidelines that may set those standards.

336. This is in fact how TNLC understood the concept of Best Practice. In his first witness statement, Mr Mills confirmed that Best Practice was a defined term in the Fourth Licence. Under cross examination he accepted that he had been "completely aware that [TNLC] had to comply with best practice as defined in 4.3 and in the defined terms of the licence", that he had been aware of the July Applicant Note and that he had considered the clarification in that Note to the effect that Best Practice was to be viewed in the context of the activities of the Licensee as "a useful and sensible clarification". Mr Mills also observed that the July Applicant Note had made no change to the definition in Condition 4.3 "which [he] thought was a very realistic and appropriate and common definition of best practice". He went on to reiterate that it was a "routine and standard definition" which he had seen "in many situations" and he confirmed that he knew that in TNLC's bid it was necessary to provide details of the Best Practice that applied, what was in relevant codes of practice and the desired outcomes. Indeed, TNLC had also received Phase One Feedback on the approach to be taken to Best Practice.

337. The Claimants' case as it is now advanced is that the concept of Best Practice as it was in fact applied by the PPI Evaluators was "amorphous", without any real definition or precision, and went beyond the definition as set out in Licence Condition 4.3. This is really an allegation of manifest error to which I shall return later in this judgment.

338. In its Defence, the Commission alleged that "any challenge in relation to the use of [the term Best Practice] is time-barred as it was included in the ITA" (Issue 46). However, given the change of emphasis in the Claimants' case I do not consider this point to remain relevant. Had the Claimants continued to contend that the meaning of the phrase 'Best Practice' was undisclosed in the ITA, then the principles to which my attention was drawn by the Commission in *Mears Limited v Leeds City Council* [2011] EWHC 40 (QB) at [70] (to the effect that grounds for bringing proceedings will arise from the point at which a claimant knows or ought to know of the infringement regardless of whether there has yet been a decision to eliminate a tenderer) would be apposite. But where, as now, the Claimants' focus is on the application of the concept of Best Practice by the PPI Evaluators (of which the Claimants were only aware at the time of receipt of the Detailed Rationale), there is no basis for a determination that such case is time-barred.

References to a lack of detail in relation to TNLC's "Mystery Shopper" proposal (issue 45(f))

339. TNLC proposed a mystery shopper programme as a method of monitoring the performance of Physical Sales Locations in preventing underage and excessive play. TNLC's response to Question 4 explained that:

> "We will use a new Mystery Shopper programme (similar to that successfully used by the Health Lottery and which is used successfully by many of our large retail partners as part of Best Practice principles with respect to other age- restricted products such as alcohol and tobacco), using an independent third-party agency, which will cover broader aspects of PP-compliance alongside age verification. We have increased the budget for this activity over that spent by the OL to allow for expansion in both the number of visits and the checks completed".

340. However, Evaluators concluded, as reflected in the Detailed Rationale, that TNLC's proposal:

> "does not demonstrate the efficacy of its proposed approach as a Participant protection measure. For example, the Applicant does not include details regarding the number or prioritisation of visits, how the programme will cover both preventing underage play and not encouraging excessive play, or targets for compliance".

341. The Claimants' pleaded case complains that "the requirement for this level of detail is not set out in the requirements of the ITA".

342. Looking closely at the ITA, I do not see that this case is sustainable. Question 4 of the ITA required that an applicant's PPS "must contain a complete set of measures to protect Participants' interests", which includes "preventing underage play" and "not encouraging excessive play". This is to be seen in the context of the need to provide a response which deals comprehensively with issues and subheadings as set out in the Third PPI Criterion.

343. In my judgment, reading the ITA as a whole, these passages would have been understood by the RWIND tenderer as requiring it to set out the detail of the measures that it was proposing. In relation to a particular measure, the RWIND tenderer would also have understood that it needed to deal comprehensively with how that measure would help to prevent underage play or would ensure that it was not encouraging excessive play – in other words it needed to demonstrate the efficacy of the PPS strategy.

344. I do not consider that this requirement for detail amounted to an undisclosed criterion – the question of whether sufficient detail had been provided was then a matter for the Evaluators. I agree with the Commission that the observations in the Detailed Rationale about TNLC's mystery shopper proposal simply reflect its assessment of that proposal against the published criteria and its conclusion that TNLC's proposals lacked detail.

345. In opening submissions there seemed to be a hint that the Claimants recognised that this case on undisclosed criteria may prove difficult because they identified an alternative case, namely that "the level of detail [the Commission] referred to went beyond what was needed to demonstrate the efficacy of TNLC's PPI strategy". However, this alternative case was not pleaded and I did not detect any suggestion that it was being maintained in closing submissions.

346. Once again, and as a matter of fact, TNLC understood the need for detail in respect of its mystery shopper proposal. It had been provided with Phase One Feedback as to the need for details to be provided in respect of the mystery shopper approach and Mr Mills confirmed in his oral evidence that he was clear that TNLC needed to provide detail about the approach that would be implemented and whether it would be successful. It was his view that sufficient detail had been provided, albeit he accepted that it would have been possible to add more detail. However, he observed that "we foreswore that, partly because this wasn't the biggest issue in our bid".

Conclusion on Undisclosed Criteria

347. The Claimants' allegations of undisclosed criteria fail. None of the matters it identifies as undisclosed criterion falls into that category and I agree with the Commission's submissions in closing that TNLC has wrongly conflated the criteria in the ITA for assessing the Applications with the reasons for the scores awarded. I also agree that, even if I am wrong in my analysis of these allegations, any breach on the part of the Commission would be immaterial. This is because TNLC relies for the purposes of these allegations on only some of the many reasons why TNLC failed to meet the relevant PPI criteria. A finding of breach of one or more of these allegations (which on the Claimants' case would then require the Court to ignore any reasoning relating to the undisclosed criteria) would still leave TNLC in a position where it had failed PPI because it had failed multiple criteria in that Area for multiple reasons.

348. Further and in any event it is clear from the Claimants' evidence that in respect of each of the alleged undisclosed criterion, TNLC knew that it was required to provide the relevant information such that the Claimants can establish no causal link to any loss.

MANIFEST ERROR

Introduction

349. TNLC failed PPI/PPF and Financial Strength. TNLC failed 4 out of 6 criteria for PPI (ITA Section 8.2); 4 out of 8 criteria for PPF (ITA Section 8.2.1); and 4 out of 7 criteria for Financial Strength (ITA Section 8.3). As I have already said, a fail in any one criterion was sufficient to result in an overall fail for the Pass/Fail Area under the ITA. Compliance with the criteria was assessed by reference to an Applicant's answers PPI Questions 4 and 5; PPF Questions 6 and 7 and Financial Strength Questions 8 and 9. The Claimants allege manifest error in respect of the Commission's evaluation of each of TNLC's Fail scores.

350. The Claimants accept that the threshold for establishing a manifest error is high and that the Court will afford Evaluators a margin of discretion. However, they contend that that margin must necessarily be narrowed where, as they say occurred in this case, there was a lack of training/guidance as to how to apply the relevant criteria (at least in

respect of PPI), together with the fact that the records of the Evaluators' reasoning (in the form of the Moderation Rationale) are very limited. For present purposes, I note that the allegation of a lack of sufficient training is itself a separate issue (**Issue 2(c)**), albeit that I understand it to have significantly narrowed over the course of the trial and it is best addressed on the facts of this case in the context of the specific issues where I understand it to be prayed in aid.

351. As for the allegation of "limited records", there is no pleaded allegation based on the limited nature of the records or the absence of "verbatim" notes of the moderation meetings – points that were nevertheless put to various witnesses in cross examination. There is nothing in these points. There was no requirement in the Evaluation Manual or elsewhere for a detailed or verbatim note of the Moderation meetings and there is no legal requirement for a verbatim note to be kept. As Fraser J said in *Bechtel* at [311]:

> "…no contracting authority is required to take a verbatim note of all such moderation and evaluation sessions. There must be a sensible limit to what is required of contracting authorities in terms of recording its evaluations. The court's role is one of supervisory jurisdiction, not one of micro-managing".

352. In addition the Claimants say that the alleged lack of training/guidance explains the inability of individual Evaluators whilst giving evidence to articulate their reasoning (**Issue 2**). The Claimants appear to rely primarily upon evidence of the approach of the PPI Evaluators (specifically Ms Sheldon) to support this submission and they extrapolate from it that there was "an inconsistent application in how the criteria were applied as between the Applicants, because the **PPI evaluators** were uncertain as to when a weakness would constitute a failure, with them seemingly taking a more permissive approach to Allwyn, and a less permissive one for TNLC" (**emphasis added**). Thus, the Claimants contend that without prejudice to, and in addition, to their case on manifest errors in the PPI evaluation, "had the PPI evaluators taken the same permissive approach in how they treated weaknesses in Allwyn's PPI bid when evaluating TNLC's PPI bid, then the PPI evaluators would have passed it". I shall return to this when I come to address the allegation that Allwyn should have failed the PPI evaluation.

353. In their closing submissions for the first time, the Claimants sought to rely upon *Lancashire Care NHS Foundation Trust v Lancashire County Council* [2018] EWHC 1589 (TCC) per Stuart-Smith J at [49]-[55] in support of the proposition that if the evidence (both oral and documentary) leads to a conclusion that the Evaluators were unclear, or not agreed on, the approach they should be taking to the criteria they were applying, this would, or is very likely to have had, a direct bearing on the Evaluators then falling into error when reaching certain findings. However, while I accept that I must consider all of the evidence in the round in arriving at my decision, I approach this submission with a degree of caution. The paragraphs on which the Claimants rely in *Lancashire Care* concern a rather different point; namely an allegation of insufficient reasons. Those paragraphs refer to guidance given both by the Court of Justice and by the Supreme Court (in *Healthcare at Home*) to the effect that the reasoning followed by the public authority must be disclosed in a clear and unequivocal fashion and that any failure to explain why scores were awarded will fail the most basic standard of transparency. However, there is no pleaded allegation of insufficient reasons in the

present case. Mr Suterwalla accepted in oral closing that the present case does not fall into the same category as *Lancashire Care*.

354. Nevertheless, as Ms Hannaford points out (and despite the express disavowal on the part of the Claimants of any intention to advance a case that the Commission's conclusions were unlawful for a lack of reasons), a number of new assertions are in fact made by the Claimants in their closing written submissions to the effect that "no reasoning" or "no further reasoning" was provided, that there was an "absence of any or any sufficient reasoning" and that the Commission's reasoning "is wholly unsatisfactory". As I understood the Claimants' case, this was said to be relevant to "the evidential picture", albeit not a necessary or pleaded part of any allegation of manifest error.

355. I agree with the Commission that in this regard, the Claimants appear to be seeking to "have their cake and eat it". An allegation of inadequacy or insufficiency of reasons is a serious allegation as to lack of transparency. I do not consider it appropriate for a party who has failed to plead such an allegation to assert for the first time in closing submissions that there has been such a failure, but to seek to avoid the need to plead it by asserting that the failure is purely part of "the evidential picture". As was clear from their written closing submissions, what the Claimants were really attempting to do by raising the point was to bolster the existing pleading of manifest error. This is neither fair to the Commission, nor consistent with the overriding objective. If the Claimants had wished to rely on a lack of sufficient reasons in support of their allegations of manifest error that could and should have been pleaded. It is far too late to advance such a case for the first time in closing submissions at trial – it is not a case that the Commission could have anticipated in light of the evidence served in advance of trial or in respect of which it could be said that there is no prejudice. The Commission had no advance notice of it and no opportunity to consider how it might address such a case. Its written closing submissions (unsurprisingly) do not mention the point.

356. In general response to the Claimants' pleaded case on manifest errors, the Commission submits that the matters relied upon are unparticularised and "are no more than generalised disagreements with the scores awarded and do not disclose any manifest errors". It contends that the scores awarded were within the discretion of the Commission and that in any event, TNLC cannot possibly establish that it should have passed every Pass/Fail Area that it in fact failed at moderation. It rejects the submission that there was a lack of appropriate training or guidance or that different approaches were taken by the Evaluators to different bids.

357. Under this part of the judgment on manifest error, I shall deal also with the allegations of manifest error made by the Claimants in respect of the Commission's approach to the Applications made by both Allwyn and Camelot. So as to try to avoid duplication in so far as is possible, I shall group the Claimants' allegations together under three headings: PPI, PPF and Financial Strength.

358. The Commission relies upon the Moderation Rationale and the Detailed Rationale, which was prepared on the basis of the content of the Moderation Rationale, as evidencing its reasons for the scores awarded to each Applicant. The Commission also relies on the evidence of relevant Evaluators.

359. There were three individuals involved in the evaluation of PPI, Ms Penny Williams, Ms Julie Williams and Ms Sheldon. Only Ms Sheldon, the lead Evaluator, gave evidence.

Protecting Participants' Interests: TNLC's Application (Issues 47 and 48)

360. The requirements for PPI were set out in the ITA at section 8.2 (containing the Pass/Fail criteria), section 11 (containing an explanation of the context and requirements) and section 22.3 (containing Questions 4 and 5). These Questions were:

> "Q4: Please provide your Participant Protection Strategy
>
> "Q5: Please detail how you will implement, manage, monitor and adapt your Participant Protection Strategy to continuously uphold the Statutory Duties in a changing environment".

361. There were 6 PPI criteria in section 8.2 of the ITA which had to be "demonstrated" if an Applicant was to achieve a Pass. For present purposes I am concerned with the First, Third, Fourth and Sixth PPI Criteria, each of which was failed by TNLC. These are set out above at paragraph 215.

362. An applicant would Fail where:

> "The Applicant has failed to adequately demonstrate to the Commission their ability to deliver against one or more of the above criteria required to Pass".

363. The First PPI Criterion reflects the Fourth Licence conditions which include (at condition 8) an overriding duty on the Licensee to "do everything it can to ensure that the interests of every Participant in respect of playing, engaging with or being exposed to, the National Lottery and every Game are protected".

364. The Claimants allege manifest error in evaluating PPI in respect of 6 discrete matters (**Issues 47(a)-(f)**). The pleaded allegation in relation to each of these issues is that there has been a "determination in error" by the Commission in a specific respect, which I understand to be an allegation of manifest error in decision-making. They also allege that the "Fail" outcome in respect of PPI generally was in manifest error "because that outcome did not accurately reflect the comments made (if any) by evaluators" (**Issue 48**). I shall now deal with each of these allegations in turn.

Reliance on existing arrangements under the Third Licence (Issue 47(a))

365. As is clear from the Moderation Rationale, TNLC failed the First PPI Criterion for three reasons. The first was that:

> "The Applicant places reliance on existing arrangements under the Third Licence, potentially as an interim solution, without the Applicant having demonstrated how these arrangements satisfy the terms of the Fourth Licence. The Applicant does not adequately demonstrate how it proposes to mitigate the risk that existing arrangements under the Third Licence may not be suitable to protect the interests of every Participant under the Fourth Licence."

366. This was further explained in the Moderation Rationale under the "weaknesses section" in the following terms:

> "7. In respect of Q4
>
> The Applicant places reliance on existing arrangements under the Third Licence, potentially as an interim solution, without the Applicant having demonstrated how these arrangements satisfy the terms of the Fourth Licence. For example, the Applicant states that:
>
> • "*We will continue with the current limits and controls from the Start Date but will add to that functionality with the launch of the new core gaming system with web/app by the end of QI of Year 1 of the Licence*." (Q4, p.12, Section 4.3.3)
>
> • "*During the Implementation Period, we will review all of the policies and procedures of the Outgoing Licensee (OL) which we propose to carry over into the initial part of the Fourth Licence Period and will assess them for both (a) fitness for purpose under the Fourth Licence (recognising the differences between the Third and Fourth Licences) and (b) suitability to meet our own KPIs as referenced above. Where necessary, we will make adaptations ahead of the Start Date*." (Q4, p.6, Section 4.1.3)
>
> Based on the above, the Applicant has not adequately demonstrated how it proposes to mitigate the risk that existing arrangements under the Third Licence may not be suitable to protect the interests of every Participant under the Fourth Licence".

367. The Claimants' pleaded case is that "[t]he Defendant determined in error that [TNLC] placed reliance on existing arrangements under the Third Licence **without having adequately taken into account [TNLC's] actual proposals** in this respect" (**emphasis added**). The Claimants go on to plead that TNLC "proposed to update its proposed arrangements during the Implementation Period when further information concerning the existing arrangements was made available to it" and that this was an approach which was consistent with representations as to an acceptable approach made to it by the Commission and its advisers.

368. The Claimants' case developed substantially over the course of the trial. In opening submissions they appeared to abandon the suggestion that the Commission had not adequately taken into account TNLC's actual proposals. Instead, the Claimants now asserted that the manifest error was the Commission's finding that "TNLC's reliance upon certain 3NL arrangements meant that it had not adequately demonstrated how these would be consistent with the requirement [in the First PPI Criterion]". The pleaded case that TNLC had followed guidance provided by the Commission (which guidance had been ignored by the Commission in its Evaluation) seemed to have been abandoned.

369. In closing submissions, the Claimants' complaints, in summary, appeared to be (i) that there was no further reasoning for this Fail; (ii) that it can be inferred from Ms Sheldon's evidence that there were in fact no substantive differences between 3NL and 4NL; (iii) that the Evaluators erred because they did not actually evaluate whether TNLC's proposals (some of which carried over from 3NL) were doing everything they could to ensure that the interests of every Participant in the National Lottery were protected; (iv) that absent any contrary evidence the Court should find that the proposals made by TNLC (even if they did not show their "workings out"), were sufficient and therefore "that the [Commission] fell into clear error"; (v) that TNLC did seek to mitigate the risk of using Third Licence arrangements; and (vi) that no reasoning was provided in the Moderation Rationale for the conclusion that there was "an inadequate form of mitigation. This was therefore also a manifest error".

370. Returning for a moment to the Claimants' pleaded case, I find that (as now appears to be accepted) the Commission did not make a manifest error in concluding that TNLC had relied on existing arrangements under the Third Licence. That should really be the end of the matter. There is no application to amend to plead any alternative case and I reject the suggestion that the absence of reasons is here being legitimately used by the Claimants purely for evidential purposes. On the contrary, it appears now to be a major plank of the Claimants' case. In circumstances where there is no pleaded case of lack or insufficiency of reasons, I reject the criticisms made by the Claimants identified in the previous paragraph at (i) and (vi).

371. What of the remaining points now made by the Claimants in closing submissions? There can be little doubt that they do not form part of the Claimants' pleaded case and that (beyond addressing their understanding of the way the case had been put in opening submissions), the Commission did not deal with them in their written or oral closing, meaning that the Court has been left to work out what, if any, significance or relevance they might have – an obviously unsatisfactory and unfair position. For this reason alone I reject the Claimants' case on this issue.

372. Even assuming, however, that I am wrong to determine this point on the grounds of a failure to plead the case, on analysis I do not consider any of the Claimants' points in closing to establish a manifest error.

373. First, there is most certainly no scope for the Court to infer that there was no substantive difference between the Third Licence and the Fourth Licence (the Claimants' point (ii) above). That would be wholly inconsistent with the available evidence.

374. The Phase One Feedback expressly referred to the differences between the two Licences, including making clear that TNLC would need to explain why Third Licence policies and procedures would comply with the Fourth Licence:

> "The Applicant's response relies heavily on the wholesale adoption of Third Licence systems, policies and procedures, at least in the early years of the Licence, but the Applicant does not address the differences between the Third and Fourth Licences. Systems, policies and procedures which are fit for purpose for the Third Licence may not be appropriate for, or meet the requirements of, the Fourth Licence".

375. TNLC sought clarification on this feedback at a Clarification Meeting on 4 August 2021. In seeking that clarification, TNLC expressly acknowledged that it appreciated "the difference of approach in the Fourth Licence compared with the Third". In a response that clearly establishes that the Claimants' pleaded case (to the effect that the Commission's conclusions at Moderation were somehow at odds with guidance given to TNLC during the Competition) is misconceived, the Commission said this:

> "The nature of the Third Licence is different to the Fourth Licence in the way it is structured, some of the obligations on the Licensee are different. Those obligations may well be embodied differently in terms of process and systems design.
>
> The Applicant needs to ensure it does not assume something in the Third Licence will automatically work under the Fourth Licence. The Applicant should take the processes and systems under the context of the Fourth Licence and not assume something that is valid under the Third Licence will remain valid under the Fourth Licence. The Applicant needs to set out their response based on the 4NL operations on a case-by-case basis to assess if fit for purpose.
>
> When existing processes are to be continued into the Fourth Licence the Applicant needs to be clear how they intend to seek to improve the process, what the improvements will be in the Implementation period, and those during the Licence Term".

376. TNLC recognised the existence of differences in its Application in respect of Question 4, although (notwithstanding the content of the Phase One Feedback and the clarification provided at the meeting on 4 August 2021) it did not explain how or why its proposal to continue the existing arrangements under the Third Licence, at least during the Implementation Period, would comply with the requirements of the Fourth Licence. At 4.1.3 of its Application, it dealt with the development and refinement of the PPI Strategy during the Implementation Period saying this:

> "During the Implementation Period, we will review all of the policies and procedures of the Outgoing Licensee (OL) which we propose to carry over into the initial part of the Fourth Licence Period and will assess them for both (a) fitness for purpose under the Fourth Licence (**recognising the differences between the Third and Fourth Licences**) and (b) suitability to meet our own KPIs as referenced above. Where necessary, we will make adaptations ahead of the Start Date" (**emphasis added**).

377. Ms Sheldon's evidence was that there were "some substantive differences between the conditions" in the two Licences, although she did not identify what those were. I accept that evidence (which is consistent with the documents) and reject the Claimants' submission that her failure to point to specific differences during her evidence means that "the Court should be cautious in finding that there were in fact such differences" and that on their case "there were no such substantive differences". This submission is flatly contrary to the evidence (including the Claimants' own witness evidence) and

thus unsustainable. Mr Mills volunteered the information during his cross-examination that the main differences between the two Licences:

> "were "the Do all you can" requirement, the outcomes approach, and the requirement to adhere to best practice which was defined in the licence".

In other words, the Fourth Licence included additional obligations which meant (as was clear from the Phase One Feedback) that its requirements could not be met purely by proposing compliance with the Third Licence.

378. As to the Claimants' new case that the Commission did not actually evaluate whether TNLC's proposals satisfied the First PPI Criterion (the Claimants' point (iii) above), this submission appears to be based on oral evidence from Ms Sheldon that, while it might be possible for some Third Licence arrangements to be acceptable, "it was for applicants to demonstrate that was the case". The Claimants point to the fact that Ms Sheldon explained that the Evaluators' approach to "adequate demonstration" of the First PPI Criterion was not to decide whether or not TNLC's proposals would or would not protect the interests of every participant but rather their approach was to view the ITA as requiring an applicant to demonstrate that this was the case "and we decided that the applicant had not done that. They had not demonstrated and as a result **it may not be suitable**" (**Claimants' emphasis**). As Ms Sheldon went on to explain, the Evaluators could not "take a judgment" that the ITA requirements had been met "in the absence of the applicant evidencing that" and that "the expectation is for applicants to put forward proposals and evidence [as to] why they will meet [the requirements]".

379. I cannot see that there is anything wrong with this approach, which is entirely consistent with Ms Sheldon's written evidence to the effect that "TNLC had not shown why we should be confident that retaining Third Licence arrangements would be satisfactory to protect participants in the Fourth Licence". To my mind, Ms Sheldon's evidence simply reflects the approach set out clearly in the ITA. A failure "to demonstrate" (i.e. a failure to provide sufficient proposals and evidence) in respect of the First PPI Criterion would mean that the Applicant could not satisfy the Commission that it met the requirements of that Criterion. I cannot see that a conclusion that an applicant has failed to provide sufficient information to enable the Commission to be satisfied one way or the other involves either a failure to evaluate or a manifest error. It is certainly not a conclusion that I can second guess and nor have I been given any basis on which to do so.

380. I add that the cross-examination of Ms Sheldon focused on TNLC's proposal that it would continue with the "current limits and controls" (i.e. those under the Third Licence). The point being made by Mr Suterwalla (which now feeds into the alleged failure to conduct an actual evaluation) was that the Evaluators had not arrived at a conclusion that the existing limits and controls were unsuitable to protect the interests of every participant. As I understood it, the premise of this cross-examination was that the Commission in fact could and should have made a decision that the existing limits and controls *were* capable of satisfying the First PPI Criterion because there were no material differences between the two ("there might be certain things which…would not require evidence"). But for reasons I have already explained that premise was incorrect. Once it is clear that there are important differences between the Third and the Fourth Licences (which were well known to TNLC), it is plain that a decision to fail an

applicant because of its failure to explain how the continuation of existing limits and controls under the Third Licence will meet the requirements of the Fourth Licence falls well within the margin of discretion of the Evaluators. There is nothing irrational in arriving at a conclusion that, absent sufficient evidence, TNLC had not demonstrated the First PPI Criterion to the satisfaction of the Commission. The Commission did not fall into manifest error because it failed to take a 'leap of faith' (in Ms Sheldon's words) in the absence of evidence.

381. This bleeds into the Claimants' point that, absent contrary evidence, the Court should find that TNLC's proposals were sufficient (notwithstanding that they did not show their 'workings out') (the Claimants' point (iv)). The Claimants do not explain what they mean by not showing "their workings out" in this particular context, but I understand them to mean that even if they did not provide the evidence to support the proposition that their proposals to utilise existing arrangements under the Third Licence complied with the First PPI Criterion, nevertheless the Court should find that those proposals did in fact meet the Criterion (i.e. "were sufficient").

382. There is no proper basis on which the Court could make such a finding which is tantamount to an invitation to the Court to substitute its own view for that of the Commission. I reject the Claimants' case that it should do so.

383. There is also no proper basis on which the Court could determine that (as to the Claimants' point (v)) TNLC's Application did in fact seek to mitigate the risk of using the Third Licence arrangements. TNLC had been told that the arrangements under the Third Licence may not be sufficient to meet the requirements of the Fourth Licence and (having regard to the examples identified in point 7 of the weaknesses section of the Moderation Rationale) I cannot see that the Commission's decision that there was a failure to demonstrate how that risk would be mitigated could possibly be said to fall outside the range of reasonable conclusions.

384. Finally, I should return to the topic of training. There is no pleaded issue in relation to the general inadequacy of training – the Claimants' Particulars of Claim instead focus on specific concerns, none of which appears ultimately to be pursued. This led to the Commission submitting in closing that Issue 2(c) no longer arises.

385. However, it was the Claimants' case in closing that the Evaluators' training was inadequate because they received no guidance on the standard which would need to be met for "an adequate demonstration" of the PPI Criteria. In circumstances where Ms Sheldon accepted that Evaluators were not given a "fixed definition", the Claimants' case appeared to be that therefore each Evaluator may have had a different idea as to what the threshold would be for "adequate demonstration". The Claimants suggested that Ms Sheldon's evidence was "unclear" as to whether she and the other Evaluators specifically considered what they understood the test to mean before they went on to moderate and reach a consensus decision.

386. I reject this submission. The question of whether an applicant has provided sufficient evidence to demonstrate compliance is certainly capable of being approached differently by different Evaluators, but the purpose of moderation is to flush out and resolve any such differences. I reject any suggestion that it involved a concept that needed to be defined or that in failing to define it the Commission thereby provided Evaluators with inadequate training.

387. Further and in any event, I note that Ms Sheldon expressly confirmed during cross-examination (and I accept) that at Phase Two:

> "We had a specific discussion about the standard of evidence that we would expect applicants to demonstrate in order to be able to say whether it's a pass or fail".

388. In the circumstances I can see no scope to criticise the consensus view reached by the Evaluators at moderation. Accordingly, I also reject the Claimants' submission that there should be a "narrowing" of the margin of discretion to account for this issue. My conclusion on this point will apply to each of the issues below which raise the question of whether TNLC "adequately demonstrated" compliance with the PPI Criterion.

389. For all the reasons set out above, I reject the Claimants' pleaded case on this issue together with the allegations they advanced in their written opening, the allegations advanced in cross-examination of Ms Sheldon and the allegations made in their closing submissions. I find that there was no manifest error in the Commission's evaluation and that the Evaluators' conclusions were within their wide margin of discretion (which remains unaffected by any issue in respect of their training).

Protection of Participants' Interests and underage and excessive play (Issue 47(b))

390. As is clear from the Moderation Rationale, TNLC failed the First PPI Criterion for two further reasons. These were that:

> "The Applicant's Participant Protection Strategy does not adequately demonstrate how its proposed measures will ensure that the interests of every Participant of the National Lottery are protected"
>
> and
>
> "The Applicant's proposals in relation to excessive and underage play do not adequately demonstrate how its proposed measures would work in practice".

391. This was further explained in the Moderation Rationale under the "weaknesses section" in boxes 6 and 9 in the following terms:

> "6. In respect of Q4:
>
> The Applicant does not adequately demonstrate a joined up and cohesive Participant Protection Strategy. As a result, the Applicant does not adequately demonstrate how its proposed measures will ensure that the interests of every Participant of the National Lottery are protected" and
>
> "9. In respect of Q4:
>
> "The Applicant does not adequately demonstrate how its proposed approach to preventing underage play and not encouraging excessive play would meet Licence Condition 8.3

and Licence Condition 8.4 and would align with Best Practice (Licence Condition 4.3).

The Applicant's proposals in relation to excessive and underage play do not adequately demonstrate how its proposed measures would work in practice. For example:

Policies, processes and procedures to prevent excessive play – online/digital

- The Applicant sets out a range of simple controls designed to prevent excessive play from the Start Date (Q4, p.12, Section 4.3.3). However, the Applicant does not refer to any specific at-risk groups which would benefit from enhanced monitoring or protections and does not specify whether the proposed limits would constitute hard stops, or whether hard stops would apply at some other level.

- The Applicant does not provide a rationale for its proposed level of deposit and spend limits (Q4, p.12, Section 4.3.3) and does not state whether and, if so, how, Participants would be encouraged to set limits.

- The Applicant does not adequately demonstrate how it proposes to:

    - address risks of unaffordable levels of play or excessive play

    - monitor whether Participants are playing excessively and/or at unaffordable levels of play

    - address any instances of excessive play and/or unaffordable levels of play.

- The Applicant sets out at a high level its proposed Behaviour-Driven Player Protection approach (Q4, p13, section 4.3.3). However, it does not sufficiently explain how this would work in practice.

- The Applicant indicates that Participants who choose to 'take a break' from gambling will continue to receive marketing unless switched off in 'My Account'; however, access to 'My Account' would be blocked during the take a break period (Q4, p.12, Section 4.3.3). The Applicant's proposed approach adds friction to the process for opting out of marketing and is not consistent with current Best Practice.

Policies, processes and procedures to prevent underage and excessive play - Physical Sales Locations (PSLs):

- The Applicant proposes that its Terminals would be able to issue a message prompt on 'healthy play' in the event of a 'large' transaction and print information on what support is available, and that this action would be logged with a central system. However, there is no detail on how this measure would be deployed in practice. The Applicant does not define what constitutes a 'large transaction' and states that "*specific Games may be subject to maximum sales limits*" but provides no further details (Q4, p.ll, Section 4.3.2).

- The Applicant states that it will receive and review reports on a number of excessive play challenges recorded by Retailers (Q4, p.4, Section 4.1.2) but does not clearly demonstrate how it intends to use the data to prevent excessive play. The Applicant states that "*excessive play is not a defined metric*" (Q4, p.ll, Section 4.3.2) and does not include detail on the signs or identifiable triggers of excessive play that would prompt action by staff.

- The Applicant refers to encouraging known play ('Lottery Extras') (Q4, p.14, Section 4.3.5). but does not include targets for converting anonymous play, the details of rewards, or detail on how it intends to use this specific data to prevent excessive play.

- The Applicant proposes 'mystery shopping visits' as a method of monitoring the performance of Physical Sales Locations in preventing underage and excessive play (Q4, p.8, Section 4.2.3) but does not demonstrate the efficacy of its proposed approach as a Participant protection measure. For example, the Applicant does not include details regarding the number or prioritisation of visits, how the programme will cover both preventing underage play and not encouraging excessive play, or targets for compliance.

Self-control and self-exclusion tools:

- In relation to self-exclusion (distinct from 'taking a break'), the Applicant refers only to permanent self-exclusion and does not demonstrate consideration of self-exclusion over shorter time frames, which is not consistent with Best Practice (Q4, p.12, Section 4.3.3).

- The Applicant does not propose any measures to address self-exclusion in Physical Sales Locations".

392. The Claimants' pleaded case on this Issue is that:

> "The Defendant determined in error that the First Claimant's Participant Protection Strategy did not adequately demonstrate that the interests of every Participant would be protected or how its proposals in relation to underage or excessive play would work in practice. The First Claimant's proposals included considerable detail in this respect".

393. I pause there to note that this case was wholly unparticularised. There was no attempt to identify the "considerable detail" in TNLC's proposals on which the Claimants relied or to explain why this detail should have been enough to satisfy the First PPI Criterion or why the Commission was wrong to determine that it did not do so, particularly given the detailed reasons as set out above. I am inclined to agree with the Commission's overarching submission on this Issue that this complaint is no more than a vague and unparticularised assertion that a decision made by the Commission was wrong.

394. In their opening submissions, the Claimants sought to address the lack of particularisation by explaining why, in TNLC's view, the Commission should have concluded that TNLC had provided sufficient evidence as to how its measures relating to constraining excessive and underage play would work in practice. Specifically, the Claimants relied upon sections 4.3.2 and 4.3.3 of TNLC's Application (both concerned with not encouraging excessive play) together with evidence from Mr Mills as to specific aspects of TNLC's Application, culminating in his view that "our Phase 2 submissions included ample detail on these proposed measures". I shall deal with the points made by the Claimants in opening before turning to the (rather different) points made in closing.

395. The relevant ITA requirements included (i) the First PPI Criterion at section 8.2; and (ii) the requirement in section 22.3 under Question 4 that "as a minimum" an Applicant's PPS must contain "a complete set of measures to protect Participants' interests" and that these measures should include "preventing underage play" and "not encouraging excessive play". These reflected the requirements in Licence Conditions:

i) 8.3 which provided that "[t]he Licensee must do everything it can to prevent people who are under the Legal Age Limit from participating in the National Lottery. The Licensee must ensure that sufficient controls are in place to prevent underage play"; and

ii) 8.4 which provided that "[t]he Licensee must not encourage anyone to play the National Lottery excessively" and "must have policies, processes and procedures to prevent excessive play in the National Lottery".

396. TNLC was well aware of these requirements because it received more than two pages of Phase One Feedback on preventing underage play and not encouraging excessive play, including that TNLC's proposals lacked detail. The Phase One Feedback expressly pointed out that if areas which were missing detail and evidence were not addressed at Phase Two, "the resulting lack of certainty is likely to undermine confidence in [the] Application when it is considered afresh by evaluators at Phase Two". Furthermore, TNLC expressly referred to these requirements in its Application.

397. Notwithstanding the Phase One Feedback provided to TNLC, the Evaluators identified a variety of areas in respect of which insufficient details had been provided by TNLC (as set out above). Under cross-examination, Mr Mills acknowledged that various of the points made in the Moderation Rationale were correct: specifically that TNLC provided no rationale for the proposed level of deposit and spend limits and did not state whether and how participants would be encouraged to set limits. These concessions no doubt fed into TNLC's submission in closing that "not every point in Point 9 [of the Moderation Rationale] was flawed". They are also entirely consistent with Ms Sheldon's evidence, which I accept, that TNLC could and should have gone into more detail on the topics of underage and excessive play.

398. In their written closing submissions, the Claimants identified six additional points on the basis of which they sought to argue that "the clear preponderance" of the reasons in Box 9 of the Moderation Rationale were flawed. However, I reject this submission. Three of these points are invalid in light of findings I have made earlier in this judgment because they rely on an asserted failure to give adequate feedback (Lottery Extras) and the application of undisclosed criteria (the risk of unaffordable play and Mystery Shopping Visits), each of which I have dismissed.

399. As for the remaining points, one ignored a concession made by Mr Mills (deposit and spend limits) and the remaining two (hard stops and behaviour driven player protection) reflect only a subjective disagreement (raised by Mr Mills in his evidence) with the Commission's approach which (if valid or admissible at all) would do no more than undermine the specific reasons which are reliant upon those points (although it is not clear that the Claimants were even alleging irrationality in relation to these points). The Evaluators took the view that TNLC had not provided appropriate information and they provided a number of reasons for that, many of which are not challenged or (insofar as they were challenged) those challenges have fallen away.

400. In all the circumstances I can see no basis on which to find that the Commission has acted outside the margin of its considerable discretion in respect of this issue.

Joined Up and Cohesive Strategy and resources to support CCO (Issue 47(c))

401. The Moderation Rationale makes clear that TNLC failed the Third PPI Criterion on the following grounds:

> "The Applicant does not adequately demonstrate a joined up and cohesive Participant Protection Strategy as required by Q4 in the ITA.
>
> • The Applicant does not adequately demonstrate how the size and structure of the resources it proposes to support the Chief Compliance Officer in undertaking the activities proposed in the Applicant's Participant Protection Strategy would be sufficient".

402. As I have already mentioned earlier in this judgment, section 22.3 of the ITA (Question 4) included the requirement that Applicants provide "a joined up, cohesive strategy to protect the interests of all Participants". In the same section of the ITA, Question 5 required Applicants to provide details of the "appropriate allocation of responsibility (named individual and role) for the Participant Protection Strategy" and "a plan to

implement new participant protection tools, methods or procedures, covering timelines, resource requirements and mitigations against any risks related to implementation".

403. The Claimants' pleaded case on this issue is that "[t]he Defendant determined in error that [TNLC's] proposals did not adequately demonstrate a joined up and cohesive strategy or demonstrate sufficient resources to support the Chief Compliance Officer. [TNLC] did adequately demonstrate each of these things". In addition, the pleaded case makes a point about a lack of understanding on the part of Evaluators as to the difference between a feature of a bid which would probably be treated as a failure and one that would be treated as a weakness. I understand this latter point to be relied upon by the Claimants in connection with an allegation of inconsistency in the approach taken by the Commission to the evaluations of TNLC and Allwyn and I shall return to it later.

404. Once again, this Issue is unparticularised and simply asserts that the Commission's decision was wrong.

405. In closing submissions, the thrust of the Claimants' case on the allegation that the Commission had determined in error that TNLC's proposals did not adequately demonstrate a joined up and cohesive strategy was that (i) there was "no reasoning" in the Moderation Rationale on this point and (ii) that absent any or any sufficient reasons the Court could not be satisfied that TNLC did not submit a joined up and cohesive approach to its PPI or that there was a valid basis for the PPI Evaluators to conclude that TNLC had failed to provide adequate demonstration against this Criterion.

406. As explained earlier in this judgment, there is no pleaded case on lack, or insufficiency, of reasoning and I reject these submissions.

407. Ms Sheldon's evidence, which I accept, is to the effect that the PPI Evaluators considered that TNLC's Phase Two Application was lacking in detail, that TNLC had not adequately turned its mind to the ITA and Fourth Licence requirements, and that TNLC had attempted to defer addressing how they would meet all of the criteria at the Application stage. This thinking is evidenced by the Moderation Rationale in respect of Question 4, which sets out numerous weaknesses in Box 9. In the circumstances, I agree with the Commission that it was entirely rational for the Commission to conclude that TNLC had not adequately demonstrated a joined up and cohesive PPS and I reject the Claimants' case that this determination fell outside the scope of the Commission's discretion.

408. As to the Claimants' case that the Commission determined in error that TNLC's Application did not demonstrate sufficient resources to support the Chief Compliance Officer, I have already rejected the Claimants' case of an undisclosed criterion in respect of proposed resources. However, without prejudice to their case that there was no requirement to demonstrate resources to support the CCO, the Claimants' submission in closing was to the effect that it is clear on the face of TNLC's bid that it did in fact explain how the CCO would be supported and that the PPI Evaluators' finding to the contrary was a plain error.

409. Ms Sheldon's evidence, which I accept, is that while TNLC's Application mentioned the specific role of CCO, it did not include detail on training and resources that would be deployed to make the role effective. She explains that the expectation was that

Evaluators would see a "sensible high-level implementation plan, to show how this is going to work in practice". This expectation is plainly reflected in the reasons given for the Fail in respect of the Third PPI Criterion.

410. Under cross-examination, Ms Sheldon accepted that TNLC had provided "some details of headline roles that work with the CCO", but she maintained that an "additional level of detail of teams" was required so as to provide confidence in TNLC's ability to deliver its proposals. Ms Sheldon rejected attempts to suggest that issues of resourcing were solely matters for Question 14 and she explained that Evaluators were not permitted to cross-refer between questions and that each question should stand alone.

411. In circumstances where Question 5 required each applicant to set out resource requirements, as part of the detail as to how it would implement, manage, monitor and adapt its PPS, I reject the suggestion that the Commission acted irrationally or outside the margin of its discretion in determining that TNLC's proposal provided insufficient details as to the resources supporting the CCO. I agree with the submissions made by the Commission that the PPI Evaluators were entitled to consider that TNLC should fail as a result.

412. In their closing submissions, the Claimants sought to run a new, alternative case, namely that if Question 5 *did* require greater detail in relation to resources than had been provided for by TNLC then "had Ms Sheldon attended the moderation session for this BPA [a reference to Question 14, Operating Model], as it was intended she do, the concern would have evaporated". This was a shift from the Claimants' position in their opening submissions, to the effect that the corporate governance structure proposed in Question 2 provided adequate demonstration of resources to support the CCO. In cross-examination, Ms Sheldon accepted that had she attended the moderation in respect of the Operating Model she would "potentially" have been aware of details in relation to resources to be provided to the CCO in TNLC's bid. However, she believed that the requirement to attend the moderation for Question 14 had been changed, albeit that she could not clearly recall. I fail to see how this new case, even if it had been advanced at the outset, supports the proposition that the Commission acted in manifest error.

413. I reject the Claimants' case of manifest error in respect of this issue. In my judgment the Commission acted within the margin of its discretion.

Best Practice (Issue 47(d))

414. TNLC failed the Fourth PPI Criterion, as set forth in the Moderation Rationale, because:

> "The Applicant does not adequately demonstrate how its proposed approach to preventing underage play and not encouraging excessive play would align with Best Practice (Licence Condition 4.3)".

415. This failure is further explained in the weaknesses section in Box 9 (which is set out in paragraph 391 above), in which there are two express references to specific proposals being "not consistent with current Best Practice".

416. I have already dealt in some detail earlier in this judgment with the ITA requirements in respect of Best Practice, with the Phase One Feedback on Best Practice and with TNLC's knowledge of those requirements.

417. The Claimants' pleaded case on this issue is that "[t]he Defendant determined in error that the First Claimant's proposals did not adequately align to relevant best practice or guidance. In this respect the Applicant did so". There are no particulars to explain how TNLC's proposals in fact aligned to Best Practice or guidance, or why the Commission acted in manifest error in arriving at the decision that they did not.

418. In their written opening submissions, the Claimants sought to address the lack of particularisation by explaining that TNLC's Question 4 response made clear that (i) it would adapt (not simply adopt) the procedures and policies under the Third Licence which it was asserted were themselves "indicative of best practice"; (ii) they "as a whole" had experience through the Health Lottery; (iii) TNLC would seek accreditation from various governance bodies such as World Lottery Association and GamCare; and (iv) TNLC would comply with various codes (albeit these were not identified). The Claimants' opening submissions went on to say that "[t]hrough a combination of not properly understanding or misapplying the concept of best practice and failing to adequately consider TNLC's Q4 response, the GC made a manifest error". I note that the alleged "misapplication" of the concept of Best Practice here appears to be closely related to the allegation to which I referred earlier in this judgment that the concept of Best Practice is "amorphous" and that it was applied by the Commission without definition or precision.

419. In closing, the Claimants said very little about this allegation. They did not appear to seek to rely upon the points made in opening submissions. As far as I can see there was only one short paragraph in their written closing submissions addressed to the point (in the section dealing with Issue 47(b)) which was in the following terms: "[a]s to the criticism that TNLC's strategy did not adequately demonstrate how its proposals in relation to underage or excessive play would work in practice, the [Moderation Rationale] evidences that the PPI evaluators considered this was inter-related to their conclusion that TNLC had not adequately demonstrated how its proposals would align with Best Practice…Ms Sheldon confirmed this in her oral evidence". This paragraph then fed into the submission that "whilst not every point in [Box] 9 was flawed, the clear preponderance were" and that it followed that the Evaluators' conclusions (including that TNLC's proposals did not align with Best Practice) could not stand.

420. As was clear from this submission, the Claimants were relying upon their submissions in respect of Issue 47(b) to cover their pleaded case on Best Practice. However, for reasons I have already explained in respect of that Issue, the Claimants' case fails.

421. For the sake of completeness, I should address the other allegations that I have identified above, in case it was in fact the Claimants' intention to continue to rely upon them. In my judgment they do not add up to a manifest error. In particular:

    i) It is true that TNLC's Application on PPI included the points identified in the Claimants' written opening submissions. However, the point that the policies and procedures under the Third Licence must themselves be "indicative of best practice" was not put to Ms Sheldon. Further and in any event, I have already explained why it should have been clear to TNLC that it needed to focus on the

Fourth Licence and could not simply rely upon implementing the arrangements under the Third Licence – if it was being asserted that these arrangements were consistent with Best Practice this needed to be spelt out, as TNLC well understood – "casual references" would not suffice. The Claimants accept in their written closing that Mr Mills conceded in his oral evidence that TNLC was given Phase One Feedback to the effect that at Phase Two it had to provide more detail and explain references to relevant codes of practice.

ii) I accept Ms Sheldon's evidence in her statement (which was not challenged) that there are a wide variety of resources which applicants could take into account in support of their proposed strategy, from the wider gambling industry and other sectors. As she explained, there are European and global lottery associations and gambling sector bodies that have developed accreditations on standards that include player protection. Academics have also produced considerable research on the issues that fall within PPI. In her oral evidence, Ms Sheldon also explained that "the approach to demonstrating best practice is likely to differ for different elements of an application".

iii) In fact, TNLC's Application contained only passing reference to "relevant guidance", "relevant academic research", "the wider regulatory environment" and "up-to-date industry Best Practice". No details were provided. Nowhere did it explain how the requirements of Best Practice could be met by adopting the Third Licence arrangements. A proposal that it would secure external accreditation said no more than that this would involve "bodies such as the World Lottery Association (WLA) and GamCare". Its reliance upon the involvement of N&S PLC in the Health Lottery merely asserted that "[t]here are many parallels between the regulatory regimes for the Health Lottery and the National Lottery" without identifying what these parallels might be.

iv) Accordingly, it seems to me that the PPI Evaluators were operating well within the margin of their discretion in determining that TNLC had not provided sufficient evidence as to how it would comply with Best Practice. As Ms Sheldon said in her statement (and I accept) "[t]he point is for the applicant to evidence to a satisfactory level of detail why the arrangements would be appropriate and can be implemented and evolve effectively, so they will be and will remain fit for purpose". In her oral evidence she repeated that "we were expecting to see more detail on these points articulated, in terms of proposals…". Indeed, as the Commission submitted in closing, Mr Mills' own concerns (identified during cross-examination) that alignment with Best Practice would be a "tall order" and "challenging" were borne out by TNLC's Phase Two response on PPI.

v) Finally, I reject the Claimants' argument that the concept of Best Practice as applied by the PPI Evaluators was amorphous and imprecise (in so far as that argument was intended to be advanced in support of their case as to manifest error). This submission was made on the basis that the "distinct inference" to be drawn from Ms Sheldon's evidence was that the phrase "Best Practice" was "reached for every time she was suggesting that TNLC had not provided sufficient detail for a proposal". Thus, say the Claimants, the application of the concept was unfair and lacking in transparency. In fact, a fair reading of Ms Sheldon's evidence is that she was using the failure to provide sufficient

evidence in connection with Best Practice to explain the Evaluators' general approach to the application of the test in the ITA.

422. For all the reasons set out above, the Claimants' case on this Issue fails.

Marketing Affiliate (Issue 47(e))

423. TNLC failed the Sixth PPI Criterion for the following reason (set forth in the Moderation Rationale):

> "The Applicant proposes to use an affiliate for marketing. The Applicant does not adequately demonstrate how it would address any Participant protection risks related to affiliate activities so as to ensure that its advertising and marketing is not detrimental to Participants' interests, consistent with Licence Condition 10.1".

424. Under the heading "weaknesses" at box 11, the Moderation Rationale effectively repeats the same point, albeit making clear that TNLC's proposal to use an affiliate for marketing is included in its response to Q11 (Channels).

425. Ms Sheldon explained in her written evidence, and I accept, that it was not the PPI Evaluators' role to evaluate branding or marketing but that if there were points which they needed to be aware of which came out of other evaluation areas, they would consider them. Although she did not have a clear recollection (and there was nothing in the Moderation Rationale to assist), Ms Sheldon said in cross-examination (and I accept) that she thought that risks identified by Evaluators in other areas that might be relevant to PPI would have been passed to the PPI Evaluators for discussion during moderation. This is consistent with the Commission's overall approach to evaluation. She said that this would not have involved the PPI Evaluators being shown the whole response to Question 11 but "some information was passed to us by the SMR". Earlier in her cross-examination Ms Sheldon confirmed that she was thinking of an extract from TNLC's response to Question 11 which said this:

> "Affiliates: the inclusion of an affiliate platform into our solution is under consideration as an enabler for the sale of National Lottery games on third party sites, such as digital grocery. We have identified Income Access as a possible supplier as the leader in affiliate technology for the i-gaming industry".

426. The Claimants' pleaded case is that "[t]he Defendant determined in error that [TNLC] had not adequately demonstrated that it would ensure that its marketing affiliate would ensure that its activities were not detrimental to Participants' interests. In this respect, the Applicant did do so". No further particulars were provided.

427. In their opening submissions, the Claimants relied upon the evidence of Mr Martin that TNLC's "affiliates explanation was provided in the Channels bid response" (i.e. in response to Question 11) and that "[i]t goes without saying that if you are going to engage a marketing affiliate then you would have appropriate measures in place to ensure that suppliers complied with your general operating requirements…". Mr Martin's written evidence made no suggestion that PPI-specific risks related to TNLC's marketing affiliate proposal had been identified in its PPI response to Question 4.

428. Mr Martin's oral evidence at trial was in the same vein. He accepted that where TNLC was proposing to engage a marketing affiliate it was necessary to have "appropriate measures in place to ensure player protection", but he said those measures had been explained "in the operations section" of TNLC's Application. In fact, neither TNLC's Channels response, nor its Operations section contains an explanation of the PPI risks that arose from TNLC's proposed use of a marketing affiliate or TNLC's proposals for addressing those risks. As to Mr Martin's suggestion that "it goes without saying", I agree with the Commission that this is plainly wrong. Applicants were required to demonstrate how their proposals satisfied the requirements of the ITA and the Fourth Licence.

429. In their closing written submissions, the Claimants took a different tack. First, their focus appeared to be upon an absence of reasons for the decision of the Evaluators. As I have already explained, this is not open to them absent a properly pleaded case to this effect. Second, the Claimants relied upon the fact that TNLC's Question 4 response includes a section entitled "4.2.5 Marketing Communications" which (they now submit) expressly provides that "TNLC's marketing partners would be subject to rigorous checks". They failed to explain why this section had neither been highlighted in their opening submissions nor dealt with in the evidence of Mr Martin.

430. Section 4.2.5 includes the following:

> "In view of the wide definition of Participants in the Licence, which includes not just those who play or engage with the National Lottery but also those 'exposed' to the National Lottery (who may thus be underage or 'vulnerable' persons, howsoever defined), it is important for meeting our Licence obligations, especially to prevent underage play, that we, and our advertising and marketing partners, are careful and thoughtful about how the National Lottery is advertised and marketed across all media in the public-facing arena.
>
> • All marketing and advertising materials will be subject to an internal sign-off process for accuracy, accessibility and compliance, under the direction and oversight of the CRMC. All major new creative assets will be signed off by the CRMC itself,
>
> • All our creative agency partners will be thoroughly briefed on requisite advertising standards in compliance with the principles of brand safety and Participant safety,
>
> • It will be mandated by CRMC that all marketing communications will be compliant with the UK Code of Non-broadcast Advertising and Direct and Promotional Marketing (the CAP Code), the UK Code of Broadcast Advertising (the BCAP Code), and the UK GDPR and PECR".

431. Section 4.2.5 of TNLC's Question 4 response was raised with Ms Sheldon in cross-examination and it was suggested to her that this section was proposing "a rigorous process for signing off on marketing communications". Ms Sheldon responded that there was a difference between advertising and affiliate platforms as identified in

TNLC's response to Question 11. Ms Sheldon was then asked to look at section 4.3.4 of TNLC's Question 4 response, which is in very similar terms to part of Section 4.2.5, and it was again put to her that this made clear that marketing partners would be subject to rigorous checks. Ms Sheldon again responded that there is a difference between an affiliate that is enabling sales and "somebody that is doing marketing". She said that she did not recall the discussion in relation to affiliates very well but that she thought that the expectation was that further information should have been provided by TNLC ("there are other aspects to affiliates that would be over and above what is articulated here").

432. Although Ms Sheldon's evidence on this topic showed a lack of recall, and although I accept that the Fail in respect of Question 4 expressly arises in the context of "advertising and marketing" rather than the use of affiliate platforms to enable sales, on balance and in light of the evidence, I do not consider that it would be appropriate to infer (as the Claimants invite me to do) that the Evaluators must inevitably have fallen into error. I note that the Claimants' point about the significance of sections 4.2.5 of TNLC's response to Question 4 had never been raised prior to Ms Sheldon's cross-examination (including in TNLC's own evidence) and so Ms Sheldon was dealing with the point for the first time. It is perhaps unsurprising that she could not "convincingly" explain the thinking of the Evaluators this long after the event. However, I consider it important that while she fairly accepted that section 4.2.5 "could be relevant, in terms of having controls generally" she also continued to maintain her position that insufficient evidence had been provided. She pointed out that "this might be about the way that this was articulated and the level of detail associated with it. There could have been a disconnect in how it has been articulated in different places". I also note the reference in the Moderation Rationale to condition 10.1 of the Fourth Licence, which provides that "the Licensee must **do everything it can** to ensure that the way in which the National Lottery products are promoted, sold and made available does not damage any of the Matters to be protected…" (**emphasis added**).

433. In my judgment, it was within the margin of discretion of the PPI Evaluators to determine that insufficient detail had been provided by TNLC and accordingly there is no basis to determine that the Commission made a determination on this point in manifest error.

Fail for PPI (Issues 47(f) and 48)

434. In closing submissions, it was accepted by the Claimants that these two identified issues did not give rise to a separate breach. Instead, they submitted that drawing the strands of their submissions on Issues 47(a)-(e) together "the findings and reasons put forward by [the Commission] why it failed TNLC's Qs 4 and 5 responses have not withstood scrutiny, nor been adequately justified by [the Commission] at trial". Given the findings I have made in respect of Issues 47(a)-(e), I reject that case. The Commission made no manifest error in failing TNLC for PPI.

Protecting Participant's Interests: Allwyn's Application (Issue 58)

435. The Claimants submit that the Commission manifestly erred in awarding Allwyn a Pass for PPI. Its pleading on this point, although somewhat difficult to follow owing to the fact that it also deals in the same paragraph with Propriety, PPF and Financial Strength, is to the effect that Allwyn should have failed PPI because:

i) Evaluators raised concerns that Allwyn's "proposed deposit limits were set too high, which should have caused them to fail in relation to PPI"; and

ii) The Commission's Business Plan Evaluators raised concerns "in relation to excessive play" which "do not appear to have been reflected in the evaluation of PPI".

436. The Claimants provide no further particulars in relation to these allegations, but at trial it became apparent that the Claimants rely specifically upon two emails sent on the same day (16 November 2021) by Ms Kristina Kaku, the SMR for PPI, to (amongst others) Ms Sheldon. In the first email (timed at 11:19 am and entitled "PPI Risks from Branding" ("**the Branding Email**"), Ms Kaku identified what she described as "risks flagged from a Branding evaluator" for three of the Applicants, including Allwyn (Applicant 6). Ms Kaku stated "we can discuss these during Moderation to determine materiality". Specifically, Ms Kaku observed that Allwyn was:

> "proposing to significantly increase marketing, with a particular focus on product/game marketing, whilst also enhancing personalised and targeted messaging to customers. In addition, it is also proposing to spend significant amounts on advertising traditionally higher risk Instant (SC and IIWGs) products. This could have a player interest and reputational risk as it leads to customer fatigue and/or is seen as (or worse generates) encouraging excessive play".

437. In the second email, timed at 4:54pm, and entitled "PPI Potential Risks from Propriety – Applicant 6" ("**the Propriety Email**"), Ms Kaku identified "potential risks to PPI" which had been raised by an Evaluator in respect of Propriety. Again, she observed that "we can discuss these during Moderation to determine materiality". Specifically, Ms Kaku noted that Allwyn's Question 3 response meant that it was proposing deposit limits which, from a player protection point of view, "do seem quite high and potentially out of the affordability range for most people". Ms Kaku said she wanted to "flag this as a potential PPI issue".

438. This was a reference to Allwyn's response to Question 3 of the ITA (which fell under "Propriety"), a question which focused on the risks associated with financial crime. Under the heading "Spend Limits, higher-risk Games, payment mechanisms and higher-spending Participants", Allwyn said this:

> "higher-spending Participants, such as those spending more than £500 per month, will be subject to a 'source of funds' check by the FOFC team, also required when accounts reach a total deposit level of £2000, mitigating risk 3.06 in our consolidated Risk Register".

439. In their opening submissions, the Claimants accepted that the Moderation Rationale for PPI shows that the fact of deposit limits (i.e. the point raised in the Propriety Email) was discussed but they submitted that "crucially the appropriateness of the limits themselves was not". As for the matters raised in the Branding Email, the Claimants relied upon the content of the Moderation Rationale in support of their submission that there had been no discussion of these matters. The Claimants went on to assert that the

failure to consider these matters, properly or at all, and dismiss them as immaterial, means that Allwyn failed to demonstrate compliance with the Sixth PPI Criterion ("[t]here is nothing in the Applicant's Business Plan or any other part of their ITA submission that is non-compliant with the Commission's Statutory Duty to ensure that the interests of every Participant in the Lottery are protected"). Accordingly, they submit that there was no rational basis on which the Commission could have awarded a Pass in the PPI Evaluation to Allwyn.

440. In closing, the Claimants appeared to place reliance upon the First PPF Criterion (identified in paragraph 458 below and concerned with the Funds Protection Outcome), the Sixth PPI Criterion and the ITA requirement under Question 4 that an applicant's PPS "must contain a complete set of measures to protect Participants' interests, including… Not encouraging excessive play". They then went on to assert that Allwyn should not have passed either the First and/or the Sixth PPI Criteria (it is unclear whether the earlier reliance upon the First PPF Criterion is in error).

441. I agree with the Commission that the Claimants' pleaded case on these issues is vague and unparticularised. I also note that, even at trial, the Claimants' case has not been entirely consistent. Nevertheless, I bear in mind that Ms Sheldon was able to deal with the issues raised by the Claimants in her witness statement and that it is therefore difficult to see any prejudice to the Commission or to Allwyn in permitting the Claimants to pursue the case they sought to advance in closing. Accordingly, I decline to determine these issues on a pleading point.

442. Looking at the evidence, I accept the submissions made by the Commission and by Allwyn that there is nothing in the complaints as they are now articulated.

443. Ms Sheldon's evidence in her statement (which I accept) is that "Allwyn were fairly strong on PPI and were definitely a pass". She explains that Allwyn was "providing a level of detail which reassured me as an evaluator that they had thought through various challenges and come up with clear solutions". She recalls that there was a process "behind the scenes" to ensure that concerns raised by the Evaluators of other sections were passed to Evaluators dealing with the relevant section. She says she does not recall how the concerns raised in the Branding Email were dealt with but explains that generally "we did consider issues flagged from other evaluation areas and they were taken into account when we decided on whether the result was a pass or fail".

444. Under cross examination Ms Sheldon went further, confirming that there had been "a conversation" at moderation but that she could not remember the specifics. Having been shown the Branding Email and the Propriety Email she said this:

> "A. I'm saying that I recollect the process --
>
> Q. Yes.
>
> A. -- for going through those in turn, and that those were considered as part of moderation, so they were raised in the room and discussed. I cannot remember the specifics of all the conversation about them, just that they were considered. I take your point that they are not reflected verbatim [in the Moderation Rationale]."

445. I accept this evidence, which appears to me to fit with the probabilities. Specifically, I note from the PPI Moderation Rationale for Allwyn that the moderation took place on 17 November 2021 (the day after the Branding Email and the Propriety Email were sent by Ms Kaku). I also note that Ms Kaku was present at the moderation. I consider it most unlikely that she would not have expressly raised points she had drawn to the attention of the Evaluators the previous day in two separate emails and expressly flagged for discussion at moderation. Indeed, as explained below, there is evidence that several of Ms Kaku's PPI concerns raised on 16 November 2021 were considered at Moderation. Further, I note that the content of the Moderation Rationale demonstrates that the risks associated with excessive play were discussed; the Commission concluded that Allwyn had demonstrated its understanding of those risks and had included relevant mitigations and appropriate controls. While I accept that there is no specific reference to the marketing issues raised in the Branding Email, I consider on balance (and I find) that those issues would have been discussed and taken into account, consistent with Ms Sheldon's evidence to that effect.

446. Turning to the content of the Propriety Email, I take the same view. It is clear from the Moderation Rationale (and accepted by the Claimants) that proposed deposit limits (including the £500 deposit limit) were expressly discussed and assessed because details are set out in Box 3. I reject the Claimants' case that it should properly be inferred that "the appropriateness" of the deposit limits was not discussed. The deposit limits were set out in Box 3 to the Moderation Rationale as examples of the "appropriate controls" proposed by Allwyn. In any event, I note the content of a detailed spreadsheet entitled "Highlighted Risks from Moderation Tracker" (which shows the extent to which risks identified in one area were being flagged in other areas and then tracked to ensure that they were resolved). This spreadsheet includes confirmation that the concern flagged in the Propriety Email had been considered at the Moderation meeting. The outcome recorded says: "considered, determined to not be a risk to PPI". I note that this spreadsheet also refers to a number of other PPI risks raised by Ms Kaku on 16 November which it expressly records as having been considered. Although it is not entirely clear, it appears to me to be very likely that one of these risks was the risk identified in the Branding Email.

447. For all the reasons set out above, I do not consider there to be any proper basis for the Court to interfere with the Commission's determination that Allwyn's application for PPI was a Pass.

448. I should here return to the Claimants' allegation that there was an inconsistent application of the ITA criteria as between TNLC and Allwyn. As I have already indicated, the Claimants contend that it can be inferred from Ms Sheldon's evidence (and specifically what they say was her inability to explain why weaknesses noted against Allwyn's PPI submission did not constitute a failure) that "there was inconsistent application in how the criteria were applied as between the Applicants, because the PPI evaluators were uncertain as to when a weakness would constitute a failure with them seemingly taking a more permissive approach for Allwyn and a less permissive one for TNLC". They point to a pleading at paragraph 31.3 of their Particulars of Claim in support of this proposition.

449. The pleading on which the Claimants rely has been referred to above in connection with Issue 47(c). It asserts (essentially as an addition by way of amendments to an allegation of manifest error in relation to the Commission's finding that TNLC had not adequately

demonstrated a joined up and cohesive strategy) that various paragraphs in Ms Sheldon's witness statement demonstrate a lack of understanding by the Commission's Evaluators "of the difference between a feature of a bid which would properly be treated as a failure and one that would be treated as a weakness". The pleading goes on to assert that "[t]his lack of transparency led **here** to an inconsistent application of the evaluation criteria".

450. There is no similar allegation pleaded in relation to Allwyn's Application and no suggestion in the Claimants' pleading that particular "weaknesses" identified in respect of Allwyn's Application should have given rise to a Fail, just as there is no wide-ranging pleaded case to the effect that the Commission took a more permissive approach to Allwyn than to TNLC. Had the Claimants wished to advance such a case then I consider that it should have been properly pleaded. While the pleading references paragraphs in Ms Sheldon's witness statement which refer to "weaknesses" identified in the Moderation Rationale for both TNLC and Allwyn, it does not come close to raising the issues which the Claimants now seek to pursue.

451. However, even if I am wrong about the absence of any proper pleading, the case as now advanced is, in my judgment, unsustainable on the evidence. The paragraphs relied upon in Ms Sheldon's statement record that weaknesses were identified in respect of both TNLC and Allwyn in the respective Moderation Rationales. Ms Sheldon explains (as is clear from the content of the Moderation Rationale documents themselves) that "[t]he points we put in the boxes which recorded weaknesses of an application were not necessarily points which would give rise to a fail" and goes on to say that the weaknesses identified for Allwyn "did not meet the threshold for a fail".

452. Ms Sheldon was taken in cross-examination to the "weaknesses" section of the Allwyn Moderation Rationale, and she was asked why (notwithstanding the identified "weaknesses") Allwyn had nonetheless been awarded a Pass. There followed a long passage of cross-examination during which Ms Sheldon said she was "struggling" to remember the detail. However, she explained that the weaknesses identified in respect of Allwyn "were not so sufficiently concerning that they would amount to a fail" and that the Evaluators had taken a view as to "how material or not these are considered to be". She went on to say (in respect of a weakness identified at Box 7) that "we were satisfied that there was enough information there for it to be credible, albeit that there were some things that might need to be refined". Mr Wilson confirmed in his cross-examination that he understood that the weaknesses identified in respect of Allwyn were "not material enough to affect the award of a pass".

453. I accept Ms Sheldon's (and Mr Wilson's) evidence which is entirely consistent with the statement in the Moderation Rationale that:

> "Notwithstanding the decision to award a Pass for this Application, the Commission sets out below any weaknesses or aspects it considers would need to be addressed or considered further should this Applicant become the Incoming Licensee. The Commission considers that taking into account all the information presented in the Application, these weaknesses or aspects whether considered individually or in combination, do not result in a failure of any of the ITA criteria for protecting Participant's interests".

454. Although I understand the Claimants' point that weaknesses were identified in respect of Allwyn's Application which did not result in a Fail (whereas the weaknesses identified in respect of TNLC's Application **did** result in a Fail), it was well within the Commission's margin of discretion to weigh up the materiality of identified weaknesses and to take a view as to whether they should give rise to a Fail or not. I accept the Commission's pleaded case that where an applicant passed a Pass/Fail Question, Evaluators identified weaknesses which would need to be addressed if the applicant were to become the Licensee. The Court cannot second guess this approach or intervene to find that it was somehow flawed. It was not obviously wrong. Ms Sheldon's inability to recall the details of the process is not surprising given the complexity of the Evaluations and the time that has passed since they were carried out. In my judgment, her poor recollection thus provides no basis for an inference of inconsistent treatment. It also provides no basis for the finding that I was invited to make by the Claimants in their written closing submissions (notwithstanding the absence of any proper pleaded case to this effect) that "had the PPI evaluators taken the same permissive approach in how they treated weaknesses in Allwyn's PPI bid when evaluating TNLC's PPI bid, then the PPI evaluators would have passed it".

455. I should add that Ms Sheldon says in her statement (and I accept) that the process that the PPI Evaluators undertook to assess the Allwyn Application was "the same as that which we followed for the other applications". I did not understand this evidence to be directly challenged in cross-examination and do not consider there to be any proper basis on which I could draw any different conclusion.

PROTECTING PARTICIPANTS' FUNDS

456. Protecting Participants' Funds was addressed in section 8.2.1 of the ITA which explained that:

> "As part of protecting Participants' interests, Participants' funds must be effectively managed and protected to adequately address the risk that Participants will not be paid amounts to which they are entitled.
>
> One way in which this will be achieved is through the implementation of the 4NL Trust including through the operation by the Licensee of Funds Protection Policies and the maintenance of a Final Reserve Balance which would be available to the Trustee to discharge obligations to Participants in circumstances where the Licensee was unable to do so."

457. Section 14 of the ITA contained an explanation of the context and requirements while 22.4 identified the Questions that Applicants must answer in relation to PPF. For present purposes, only Question 7 is relevant: "Please provide your proposals to the Required Responses set out in Appendix G of the 4NL Trust Explanatory Note" ("**the Required Responses**"). The Required Responses in their updated form were located in the July Applicant Note, Appendix B, as confirmed by Mr Reid in re-examination.

458. There were 8 PPF criteria in section 8.2.1 of the ITA which had to be "demonstrated" if an Applicant was to achieve a Pass. Relevant for these purposes are the First, Sixth, Seventh and Eighth PPF Criteria:

> "The Applicant must demonstrate all of the below criteria in order to be awarded a 'Pass' for 4NL Trust, and ultimately protecting Participants' interests:
>
> • The Applicant has satisfied the Commission that the Proposed Licensee will do everything it can to ensure the Funds Protection Outcome (as defined in Condition 16.1 of the Proposed Form of Fourth Licence) is fulfilled [the "**First PPF Criterion**"].
>
> • …
>
> • The Applicant's 4NL Trust responses demonstrate that the arrangements for protection of Participant funds will fulfil the Funds Protection Outcome in all reasonable worst-case scenarios, including as a result of risks created by its portfolio of Games ["**the Sixth PPF Criterion**"].
>
> • The Applicant's 4NL Trust responses demonstrate that the Proposed Licensee and Proposed Trustee will be able to successfully operate the 4NL Trust from the Start Date of the Fourth Licence ["**the Seventh PPF Criterion**"].
>
> • The Applicant's 4NL Trust responses to the "Required Responses" set out in Appendix G of the 4NL Trust Explanatory Note and in Section 22.4 (Protecting Participant Funds) deal comprehensively with each of the issues and/or subheadings under that topic, providing appropriate evidence that they are credible and deliverable when assessed alongside the rest of their submission" ["**the Eighth PPF Criterion**"].

459. An applicant would Fail where:

> "The Applicant has failed to adequately demonstrate to the Commission their ability to deliver against one or more of the above criteria required to pass".

460. The First PPF Criterion required that the applicant met the Funds Protection Outcome, as expressly defined in the ITA by reference to Condition 16.1 of the Fourth Licence, which provided:

> "Overriding Duty
>
> 16.1 The Licensee must do everything it can to ensure that at all times, the Funds Protection Outcome is achieved. The '**Funds Protection Outcome**' is that at all times, and notwithstanding any insolvency or dissolution of the Licensee, or any revocation of this Licence:
>
> a) funds are available to enable Protected Obligations to be promptly discharged;
>
> b) all Protected Obligations are promptly discharged; and

> c) Lottery Monies are received, held and applied in accordance with this Licence.
>
> This Condition sets out some of the ways in which the Licensee must do this."

461. Guidance on Funds Protection was available at Appendix C to the July Applicant Note. A footnote in Appendix C addressing the terms of Condition 16 of the Fourth Licence stated that "A 'do everything it can' obligation requires the Licensee at all times to be able to satisfy the Commission that it has taken all reasonable steps and exercised all due diligence for the specified purpose".

462. There were five individuals involved in the evaluation of PPF, Martyn Smith, Mr Reid, Mark Dwyer, Patrick O'Sullivan and Hugh Brady. The latter two were Evaluators provided by Redington. Mr Reid's evidence, which I accept, is that the people in the PPF team brought "different skills and different experience".

Protecting Participants' Funds: TNLC's Application

463. TNLC failed 4 of the 8 PPF Criteria, namely the First, Sixth, Seventh and Eighth, as set out above. In each respect the Claimants allege that the Commission was in manifest error and that TNLC should have been awarded a Pass.

464. The Claimants' case (of manifest error in relation to each of the grounds for awarding a Fail) is captured in only one paragraph of the Claimants' Particulars of Claim:

> "The Defendant determined in error that the First Claimant had not adequately demonstrated that its proposals ensured that the Funds Protection Outcome would be met, that it would have sufficient reserves to ensure the Funds Protection Outcome, how it intended to operationalise the Trust Arrangements, and how its proposed reporting would enable compliance to be monitored. In this respect, the Applicant did do so".

465. The Claimants no longer seek to pursue allegations that the Detailed Rationale in respect of PPF did not reflect either TNLC's Application or comments made by the Evaluators. They also no longer seek to allege that, in moderation, Evaluators had pre-determined that the Application would fail PPF "and therefore carried out only a perfunctory review of the Application". These were serious allegations which were not formally abandoned until closing submissions.

466. The Claimants' case in relation to PPF takes a similar form to its case on PPI. It alleges (**Issue 50**) that the Commission determined four matters in error (which, had they each been scored a Pass would have led to a Pass overall on PPF). It also alleges that the Fail outcome on PPF was in error because it did not accurately reflect the contents of TNLC's Application (**Issue 49**). The Commission contends that this case is wholly unparticularised and that, as was the case with PPI, the Claimants have sought to expand upon their pleaded case at trial in ways that should not be permitted by the Court. The Commission also contends that the Claimants' case that TNLC ought to have passed PPF is "wholly untenable" owing to a deliberate choice on its part not to follow the rules of the Competition.

Funds Protection Outcome (Issue 50(a)(i))

467. Question 7(3) was in the following terms:

> "Please explain the methodology (providing supporting analysis) you used to calculate your Final Reserve Balance, in order to ensure this is sufficient to cover all liabilities to beneficiaries if enforcement action is taken."

468. The Final Reserve Balance was important because, as Mr Reid confirmed in his cross-examination, it was required to ensure that in the event of enforcement action (such as an insolvency event) the Trustee could promptly meet the Protected Obligations under the Fourth Licence.

469. TNLC's Application (under Question 7(3)) calculated its costs (in the event that the Trust was wound up) as being £23 million. TNLC proposed that it could offset "assets of at least £8.3 million from the EuroMillions Relevant Deposit", which it stated were "freely available", against this £23 million:

> "The Final Reserve Balance should be £15 million. The estimated costs are £23.0 million and there will be assets of at least £8.3 million from the EuroMillions Relevant Deposit freely available to the Trustee that can be used to offset these costs. The remaining funding requirement is therefore £14.7 million which we propose to round up to £15 million".

470. TNLC proposed that the £15 million Final Reserve Balance would be funded by a surety bond in that amount to be provided by Barclays Bank Plc and Société Générale in equal proportions.

471. As explained in the PPF Moderation Rationale, TNLC failed the First PPF Criterion because its response to Question 7(3):

> "does not adequately demonstrate that its Final Reserve Balance methodology will be sufficient to discharge Participant Obligations, for example, there is a risk that funds to be returned from EuroMillions may not be received until six months after the Enforcement event starts and the deposit may not be returned in full."

472. This point was explained later in the Moderation Rationale at Box 2 as follows:

> "In its response to Q7.3 in relation to the Final Reserve Balance the Applicant sets out that it expects the costs incurred to be £23m, and that the Applicant intends to meet this via £15m of surety bonds and the return of the EuroMillions Relevant Deposit of £8.3m (Q7.3, p.2-3, Section 7.3.2).
>
> This response does not adequately demonstrate that its Proposed Trustee will have access to the funds required to enable them to discharge Participant obligations, specifically as a result of:

> (i) the risk that funds to be returned from EuroMillions may not be received until six months after the Enforcement event starts, and
>
> (ii) the potential risk that the amount returned is less than the original £8.3m deposit (including exchange rate risk).
>
> The Applicant's response more widely to Protecting Participants' Funds and its response to the Commission's request of 'Further Clarification required on Trust balance/Reserves Q7(4)' sent 25 October 2021 did not identify any headroom within its contingency funds which could be purposed to cover any shortfall from the Applicant's expected return of the EuroMillions Relevant Deposit".

473. A further concern was raised under the "weaknesses" section to the effect that TNLC's website-only solution for claiming prizes would cause delays and would exclude Participants that do not have digital access. This was "not consistent with the Funds Protection Outcome (Licence Condition 16.1)".

474. TNLC's pleaded case for this allegation (as set out above) is limited to the allegation that the Commission "determined in error that [TNLC] had not adequately demonstrated that its proposals ensured the Funds Protection Outcome would be met". It provided no particulars of this allegation.

475. In opening, the Claimants specifically pointed to the risks identified in the two sub-paragraphs in Box 2 (set out above). The Claimants said (by reference to the evidence of Ms Taylor) that the Commission's reasoning failed to recognise that the Claimants' reliance on the EuroMillions Relevant Deposit was stated in the context of an Enforcement event involving the winding up of the Trust, which would itself take time such that the EuroMillions Relevant Deposit would not be required immediately. Therefore a delay in the return of the EuroMillions Relevant Deposit was "not a significant factor" with respect to TNLC's proposal.

476. In closing the Claimants' case was advanced on three bases. First, the Claimants assert that the PPF Evaluators fell into error because they relied upon "a combined risk" which was "on any view, a very low one", namely that (i) the £8.3 million EuroMillions Relevant Deposit would not be received until after 6 months, as opposed to within that period; and (ii) that without the £8.3 million, there would be insufficient funding "until the £8.3m was received". This reflected the argument advanced in opening.

477. Pausing there, it is difficult to see how taking a decision based on an acknowledged risk, even if it is "very low" or "not significant" (which is not something that the Court can sensibly determine) can be irrational or outside the scope of the Commission's margin of discretion. The evidence from Ms Taylor and from Mr Reid (in his statement and given orally) illustrated that there was potential for doubt over the level of risk that was to be attached to the possibility that the EuroMillions Relevant Deposit would not be available until six months after an Enforcement event such that the Trustee would not have funds to discharge Participant Obligations. Ms Taylor accepted in cross-examination that the EuroMillions Relevant Deposit may not be returned for some 6 months and that it could not be used immediately – in other words it was not "freely

available". Mr Reid accepted in cross examination that it may take time to wind up the Trust once an enforcement event (such as insolvency) occurred such that there may not be an immediate call on the funds. In re-examination he explained that "we don't actually know whether it would take two months three months, six months but the risk is if it took anything near three months, anything near six months, the trustees would not have enough money to fund all the activity by the receiver, etc. to repay all the participant obligations. So that was the risk created by having to wait for six months at least for EuroMillions to pay back that deposit". I accept this evidence and I find that the Commission's determination that there was a risk in this regard was neither unreasonable nor irrational.

478. Second, the Claimants assert that even if the PPF Evaluators acted reasonably in discounting the £8.3 million, "they were wrong to conclude that TNLC did not then identify any headroom within its contingency funds which could be used to cover any shortfall". Specifically, they now rely upon TNLC's response to Clarification Questions concerning Question 7(4) which identified that out of a headroom of £49 million, only £29.8 million would be needed to fund the Minimum Primary Reserve Balance Threshold, thereby leaving approximately £19 million to cover any shortfall. The Claimants therefore contend that it was factually incorrect for the PPF Evaluators to conclude that there was a risk arising by reason of a shortfall relating to the return of the EuroMillions Relevant Deposit.

479. This was an entirely new case only advanced for the first time in cross-examination of Mr Reid. It relies upon a new allegation that the Commission formed an erroneous conclusion in light of the available information.

480. I am not inclined to permit this unheralded attempt to expand the Claimants' case. This allegation should have been pleaded if it was to be pursued. It is not fair to a defendant to be faced with an allegation of factual inaccuracy such as this for the first time in cross-examination. The Commission did not have the opportunity to put this point to the Claimants' witnesses, as it might well have wished to do.

481. As to its merits, the Claimants cross-examined Mr Reid on the point. He was taken to a TNLC Clarification Question response which dealt with a question raised by the Commission in respect of Q7(4) (in other words a different question from the one with which this Issue is concerned). The response confirms that there was a "headroom of £49 million" in TNLC's funding arrangements, which came from two sources: £24 million in cash provided "through initial equity" and £25 million "available under an equity call arrangement up to the end of Year 3 of the Licence Period" ("**the £25m Contingency**"). Mr Reid confirmed that bearing in mind that TNLC would need to use £29.8 million to fund the Minimum Primary Reserve Balance, that would leave circa £19 million still available "at the start of the Licence period … assuming that money was not used for anything else".

482. It was put to Mr Reid that the availability of this £19 million "would meet the concern" about how TNLC would fund the £8.3 million shortfall in the event of money not being available from Euromillions, because TNLC would have £19 million "spare". However, Mr Reid responded:

> "A. I don't think -- I think that's not the case. This £49 million was about -- and this response was about its availability to be used to fund trust reserves at the start of the licence.
>
> Q. Yes.
>
> A. The issue with the 8.3 would only arise when enforcement action was taken which could be at any point during the licence term.
>
> Q. Okay.
>
> A. And therefore we did not know how much of that money would be left, it would be used for other purposes, so we did not assume it would be used for that and there was no reference in this response to any of that money being used for the final reserve balance."

483. Mr Reid accepted that the content of the Moderation Rationale (which referred to TNLC's response to "the Commission's request of 'Further Clarification required on Trust balance/Reserves Q7(4)' sent 25 October 2021") implied that the issue of headroom had been raised "and we've concluded there was nothing in particular [in the response] that would cover EuroMillions". Mr Reid was asked whether "in principle" he would accept that, while he was referring to the fact that the £25m Contingency was not going to be available after the third year of the Licence, "the funding could be replenished". He responded that "[t]he funding situation could have changed but we had nothing in the response to indicate that and nothing in the response to indicate that any funding replacement would actually be used to fund this balance difference". Mr Reid was then taken to a statement in the Clarification Response which made clear that TNLC's general account was forecast to grow from the start of the Licence period and that "as a result we would expect the additional cash to be available to provide further top ups". Mr Reid's view of this was that TNLC was clarifying that they would expect cash to be available for further top ups, but he pointed out that "again, there's no reference to actually using any of that funding for the final reserve balance". Ultimately it was his evidence, which I accept, that the point had been considered by Evaluators, that they had looked at the Clarification Response to see if it contained anything that might help and that "the consensus view was no one had identified anything that could".

484. In light of this evidence (and even if I had been prepared to permit the Claimants to run it), I would have rejected this new point. In closing the Claimants asserted that the Evaluators had "missed" the fact that there was headroom of £49 million and that, even if part of that had been used it could be "replenished". However, that submission is not supported by Mr Reid's evidence. TNLC's best point (perhaps) was that Mr Reid was mistaken when he said initially that there was nothing in the Clarification Response to indicate that the funding position might change; however, his evidence was clear that the point had been considered by reference to the Clarification Response and that there was nothing to suggest that any funding replacement would actually be used to fund the balance difference. I consider that it was within the margin of the Commission's discretion to take this view.

485. Third, and finally, the Claimants sought to advance a case by reference to the Commission's reasoning in the Moderation Rationale at Box 4, under "weaknesses" to the effect that the Commission was wrong to conclude that TNLC's "proposed website-only solution for claiming prizes could cause delays and would exclude Participants that do not have digital access". Essentially, the Claimants now allege that there is nothing in the Licence Conditions or in the ITA statement of requirements for PPI or PPF that requires an applicant to provide a physical as well as a digital method of making claims and that, accordingly, it was a manifest error for the PPF Evaluators to rely on this reason in concluding that TNLC's approach was not consistent with the Funds Protection Outcome (Licence Condition 16.1). This they say is "all the more so" in circumstances where the Funds Protection Outcome "did not have a precise definition".

486. There is nothing in the Claimants' statement of case, evidence or opening submissions even to alert the Commission to the fact that this point would be run and, once again, I am not inclined to permit it. The first time the Commission had any notice of the point was when it was put to Mr Reid in cross-examination.

487. In any event, Mr Reid explained in his evidence that TNLC's proposal was "inconsistent with the licence condition in terms of promptly discharging all participant obligations", a point on which he was not challenged. Allied to this evidence he explained that "a digital solution would reduce the complexity for participants who could use a digital solution" (the clear implication being that complexity and thus delays may be experienced where participants could not use a digital solution).

488. Condition 16.1 of the Licence requires the Licensee to "do everything it can to ensure that at all times the Funds Protection Outcome is achieved". The Funds Protection Outcome, as defined in Condition 16.1 "is that at all times…(a) funds are available to enable Protected Obligations to be promptly discharged; (b) all Protected Obligations are promptly discharged". Protected Obligations under the Licence include obligations to pay prizes. I can see no basis whatever for forming the view that the Commission was in manifest error in determining that the Applicant's proposed solution "could cause delays" and that it would not therefore be in line with Licence Condition 16.1.

489. Mr Reid did not agree with the proposition that if a physical means of claiming prizes was required under the Licence it would have been mentioned. He pointed to the obligation in the Licence "to make sure that participants are paid and paid properly and as part of protecting interests…there is an obligation there to make sure there we're not disadvantaging individuals who are unable to use digital channels in terms of getting their payments back".

490. I reject the Claimants' case that, even assuming a properly pleaded case (or any pleaded case on this point) it has established a manifest error.

Sufficient Reserves to ensure the Funds Protection Outcome (Issue 50(a)(ii))

491. TNLC failed the Sixth PPF Criterion because (as set out in the PPF Moderation Rationale) it did not:

> "adequately demonstrate that sufficient reserves would be in place to ensure that the Funds Protection Outcome is fulfilled,

> for example, the Applicant does not adequately demonstrate its ability to mitigate the potential risk of Implementation cost overrun impacting the availability of its proposed contingency fund arrangements".

492. Under the heading "weaknesses", Box 3 said this:

> "The Applicant's proposed Trust Primary Reserve Balance at the Start Date of the Licence is based around a flow of funds from the Third Licence Trust (Q7.4, p.2, Section 7.4.2). The Applicant has recognised the risk of funds not transferring and has stated it will use "prize insurance so that the guaranteed prizes can be fully funded at all times" (Q7.4, p.16, Section 7.4.5). The Applicant does not adequately demonstrate its ability to secure this insurance, including the conditions under which the policy would pay out.
>
> The Applicant provided a response to the Commission's request of 'Further Clarification required on Trust balance/Reserves Q7(4)' sent 25 October 2021 but made no reference to prize insurance and instead indicated that there is headroom in its contingency funding arrangements. This clarification response highlighted a risk of an Implementation cost overrun that could mean that the contingency funding arrangements would be insufficient to fully fund the Trust Primary Reserve Balance.
>
> Based on the above, the Applicant has not adequately demonstrated that sufficient reserves would be in place to ensure that the Funds Protection Outcome is fulfilled at the Start Date (Licence Condition 16.1) in all reasonable worst-case scenarios".

493. The Claimants' pleaded case goes no further than the assertion that the Commission determined in error that TNLC had not adequately demonstrated that it "would have sufficient reserves to ensure the Funds Protection Outcome". In opening, the Claimants sought to address the lack of particularisation in this pleading by submitting that the Commission was wrong to rely on the fact that TNLC had not referred to insurance in its Clarification Response (a point that had been trailed in the evidence of Ms Taylor). The Claimants point out that TNLC had relied upon the availability of insurance in its Application Response to Question 7(4), at 7.4.5. They say that the option of using "headroom", identified in the Question 7(4) response was intended only as an "alternative" to the solution already proposed in relation to Question 7(4) and they submit that "the potential risk of Implementation cost overrun only arises if TNLC relies solely upon the headroom in its funding arrangements, it does not arise if TNLC relies upon the availability of insurance, which was the preferred solution it indicated in its submission".

494. Ms Taylor's evidence explained that the use of insurance was proposed as a mitigation in TNLC's Application in circumstances where there was a difference of opinion over whether funds held in the Third Licence Trust would be transferred to the Fourth Licensee. The Application recorded that TNLC's "proposed mitigation if the funds do

not transfer is to put in place prize insurance so that the guaranteed prizes can be fully funded at all times".

495. In closing, however, the Claimants appeared to have abandoned this point ("*putting aside the issue of prize insurance*"). Instead they sought to advance an entirely different case to the effect that the "key aspect" of the Commission's reasoning was the risk of an "Implementation cost overrun" but that this was "not a genuine risk" identified by TNLC but rather "a hypothetical scenario that applicants were required to address as part of their Financial Strength response (i.e. Financial Scenario 3)". The Claimants submitted that "the evidence shows that PPF Evaluators did not adequately consider the content" of TNLC's Clarification Response which explained that:

> "If there were an over-run on costs during the Implementation Period, that would potentially reduce the £49 million headroom available. However, we would expect to be able to mitigate the over-run through other means, as detailed in our review of scenario 3 in Question 31. In addition, we have received interest from a number of major banks to provide asset financing arrangements – see question 8, ref 8.2.8 – which would reduce our cash outflows on terminal payments, increasing our overall cash position".

496. The complete mismatch between this new case and the case advanced in opening meant that the Commission's closing written submissions inevitably focused primarily on the submissions made by the Claimants in opening.

497. Once again it is completely unfair and inappropriate for the Commission and the Court to be presented with an entirely new case in closing submissions and I decline to permit it. The Court has no submissions from the Commission to assist on the point beyond general submissions about the evidence which might be said to relate to this issue. In any event, the point is of no merit. At its heart is the question of whether the Evaluators could properly have arrived at the view (in light of all the information they had received from TNLC) that there was a genuine risk of cost overrun. Mr Reid addressed this point in his evidence:

> "So what I'm saying, my Lady, is that, in terms of this particular aspect, as evaluators we had been presented with three or four different solutions. A transfer of funds from the third licence, which we were told would not happen, a concept of prize insurance, which was not detailed, not defined, and therefore we just didn't have enough information to deal with it, a reference in a risk register to changing the start date of games, which was another mitigation action, and then the possibility of the money available through this [a reference in context to the Clarification response], both a risk that it might not be the case due to -- due to implementation overrun. So we were looking for as much certainty as possible that that balance could be funded and what we were presented with were options which were either not detailed or had risks associated with them which concerned us."

498. I accept this evidence. It is neither irrational nor does it suggest conduct falling outside the scope of the Commission's margin of discretion. During Mr Reid's cross-examination, the Claimants appeared to rely upon an admitted failure to look at what TNLC was saying in its Question 31 (Scenario 3) response. However, Mr Reid's evidence was that "the instruction from the Gambling Commission…was we focused on the question we'd been asked. If there was a need to go and read another question, then that's not something you should take into evaluation. You should not be reading other documents". That this was the approach the Commission would take at Evaluation was made clear to all Applicants in the July Applicant Note. Mr Reid went on to accept (fairly) that if the Clarification Response "had included more information" it could have been taken into account, but it did not. Although he was then taken to the more detailed information in TNLC's Application in respect of Question 31, it was not directly put to him that if the Evaluators had taken this information into account, then they would have arrived at a different assessment in relation to risk.

499. Accordingly, I reject the Claimants' case that it was "simply irrational" for the PPF Evaluators to ignore the detail "behind" the information set out in the Clarification Response. I also reject the suggestion (which was not directly put to Mr Reid) that, had this material been considered, the PPF Evaluators would have concluded that "the risk was a limited one at most".

TNLC's Proposals to Operationalise Trust Arrangements (Issue 50(a)(iii))

500. The PPF Moderation Rationale records that TNLC failed the Seventh PPF Criterion because it did not:

> "adequately demonstrate how it intends to operationalise the Trust Arrangements, for example, it has not explained the mechanism for replenishing reserves".

501. Under "weaknesses" in Box 6, this point is repeated and expanded upon to add the words "and does not provide any rationale for using Microsoft Excel for reserve monitoring or fully demonstrate how any potential risks associated with using spreadsheets would be mitigated (Q7.7, p.2, Section 7.7.2)".

502. As with TNLC's other PPF manifest error allegations, the Claimants' pleaded case is limited to an allegation that the Commission determined in error that TNLC had "not adequately demonstrated how it intended to operationalise the Trust Arrangements". No further particulars were provided.

503. In their written opening submissions, the Claimants explained that their case was that it was "simply incorrect" to say that TNLC had provided insufficient evidence in this regard and further that, of the four Evaluators, only Mr Reid criticised (and failed) TNLC's response to Question 7(7) on this basis in his own Evaluator Note. The Claimants pointed out that TNLC's Application explained that "the finance team would use an Excel-based analysis to check whether the threshold or minimum reserve levels had been reached".

504. Save that the Claimants appeared in closing to have abandoned the allegation that Mr Reid was the only PPF Evaluator who made this point (the Evaluators were unanimous at Moderation that TNLC should fail, as Mr Reid confirmed in his evidence), they

continued to pursue the allegation that the PPF Evaluators' reasoning was wrong because, as a matter of fact, TNLC *had* explained how reserves would be replenished.

505. Setting aside the point that (again) this case was never pleaded and should not be permitted for that reason alone, there is nothing in this allegation. Mr Reid confirmed in cross-examination that the matters set out in Box 6 "are the reasons for failing the operationalisation of the trust". He accepted in cross-examination that "in the round" (looking at the Clarification Response which related to Question 7(4)), it was wrong to say that TNLC had not explained how the Primary Reserve would be replenished, but he went on to say that:

> "[i]n terms of the PPF evaluation area and questions, that would have depended on us actually identifying this particular question, this heading, which was—it was the loan repayment, and tying it into the primary reserve piece, which we did not do".

506. I understood this answer to be referring to the fact that the Clarification Response was concerned with a different issue (how any loan paid by TNLC to the Primary Reserve could be replenished and not how funds could be replenished more generally).

507. Even assuming that, as the Claimants submit in closing, Mr Reid's evidence set out above supports the proposition that the Commission made "a plain error" in its reasoning as to the lack of explanation by TNLC as to "the mechanism for replenishing reserves" (which in my judgment it does not), it is important that Mr Reid also made the point in his evidence that:

> "that was one of the specific points on operationalisation of the trust. There were other points in the weaknesses section which were relevant to that as well. So this was not the only issue in that area".

508. Another reason concerned the use of Microsoft Excel, but the Evaluators' decision on this was not challenged in the Particulars of Claim and no case was pursued in respect of this reason in closing. There is no basis on which to conclude that the overall decision to fail TNLC in respect of the Seventh PPF Criterion was manifestly in error or outside the scope of the Commission's discretion and the Claimants' cross-examination of Mr Reid did not even attempt to establish such a case. It was not suggested to Mr Reid that if the alleged error had not been made TNLC would have passed in respect of this Criterion and nor was that suggested in closing.

Monitoring Compliance (Issue 50(a)(iv))

509. As is clear from the PPF Moderation Rationale, TNLC failed the Eighth PPF Criterion on the grounds that it did not:

> "adequately demonstrate how its proposed reporting will enable compliance to be monitored. The Applicant does not adequately explain how it would manage its proposed Funds Protection Policies, for example, the Applicant has not set out its proposed ESG policy in relation to the Applicant's 4NL Trust investment framework".

510. Once again, the Claimants' pleaded case is limited to an allegation that the Commission determined in error that TNLC had "not adequately demonstrated how its proposed reporting would enable compliance to be monitored". No further particulars were provided and the Claimants' evidence did not expand further on this point.

511. The first time that the Claimants sought to explain this allegation was in their opening submissions in which they contended that "the main reason given seems to have been provided solely by Mr Reid and is not properly explained". They went on to say that "in any event, TNLC's bid submissions did adequately explain reporting and compliance".

512. In closing, the Claimants observed that the point was short. They accepted that TNLC had not set out an Environmental and Social Governance Policy ("**ESG Policy**"), but they contended that it had instead set out a "pathway to producing one", a proposition with which Mr Reid appeared to agree. They pointed to the approach taken by other PPF Evaluators to ESG Policy, as evidenced in their individual Evaluator Notes (Mr Smith did not consider it a basis to fail TNLC, Mr Dwyer did not mention ESG Policy and the Redington Evaluators (Mr O'Sullivan and Mr Brady) considered TNLC's approach to ESG Policy a sensible one). They then relied upon Mr Reid's concession that if the lack of an ESG Policy had been the "only weakness point, fail point" that it was "possible" that it would not have been a reason to fail TNLC for PPF, albeit that he added "but I can't say that for definite". He also pointed out that "describing the ESG Policy was a key…requirement of answering the question".

513. Where, however, the lack of an ESG Policy was not the only reason identified in the Moderation Rationale for the failure of TNLC on the Eighth PPF Criterion, I do not see where this takes the Claimants (even assuming it is appropriate to permit them to advance an entirely unheralded case in closing, which in my judgment it is not). As Mr Reid explained in his evidence, and I accept, the lack of an ESG Policy was "one of several areas" within PPF where TNLC "had not documented policy as requested in the question".

514. There is no basis on which I could find that the PPF Evaluators' decision to fail TNLC in respect of this criterion was in manifest error or outside the scope of the Commission's margin of discretion. I accept Mr Reid's evidence that the Evaluators carried out a thorough evaluation of TNLC's bid and were unanimous at moderation that it should fail. The Moderation Notes were approved by all Evaluators. That the Evaluators may have taken different views prior to moderation does not undermine the outcome following the moderation process.

Fail for PPF (Issues 49 and 50(b))

515. In closing I did not understand the Claimants to suggest that there was any "stand-alone" issue on PPF arising in respect of Issue 49 ("Was the fail outcome in respect of PPF in error because that outcome did not accurately reflect the contents of TNLC's Application?"). The Commission pointed out that no specific features of TNLC's Application had ever been identified and this allegation does not appear to have been put to Mr Reid (save in so far as it overlapped with the issues at Issue 50). Accordingly, for all the reasons discussed above, I find that there was no manifest error.

516. Similarly I did not understand there to be a "stand-alone" issue in respect of Issue 50(b) ("Did the Commission determine in error that TNLC's bid should fail in respect of PPF?"). Again, there was no manifest error.

517. Given my findings in relation to the pleaded issues (and indeed the unpleaded issues), there is no need for me to deal here with the Commission's submissions in closing that TNLC could never have passed PPF owing to its refusal to follow the rules of the Competition: specifically that it refused to apply a Bid Assumption set out in the July Applicant Note. I shall instead address the question of the Bid Assumption in connection with the Issues arising in respect of Financial Strength.

518. The Claimants do not suggest that either Allwyn or Camelot should have been failed on PPF.

FINANCIAL STRENGTH

519. The requirements for Financial Strength were set out in the ITA at section 8.3 (containing the Pass/Fail criteria) which explained that:

> "The financial strength of the Proposed Licensee will be tested against a range of scenarios specified by the Commission that might reasonably occur and that could raise concerns regarding the financial strength of the Proposed Licensee. These scenarios are set out in Section 23.7 (Financial Response).
>
> Applicants' responses will be evaluated holistically, based on their narrative responses to qualitative questions, the financial information Applicants provide about the Proposed Licensee and its proposed Key Subcontractors…and supporting evidence detailing equity and debt funding to be provided to the Proposed Licensee…
>
> Applicants' responses under this section will receive either a 'Pass' or a 'Fail', based on the Evaluation criteria outlined below and the outcome of the Financial Strength Scenarios. Please note that, as described in Section 8.7 (Financial Response), the Commission will carry out a separate assessment of each Applicant's Financial Response to support an assessment of the credibility and deliverability of the Applicant's proposals in the Business Plan and the Applicant's Proposed Good Causes Contribution."

520. There were 7 Financial Strength criteria in section 8.3 which had to be "demonstrated" if an Applicant was to achieve a Pass:

> "The Applicant must demonstrate all of the below criteria in order to be awarded a 'Pass' for Financial Strength:
>
> - **Sufficiency of Implementation and Transition funding**. The Applicant has demonstrated that the Proposed Licensee will have sufficient financial resources to meet the costs it

will incur in connection with Implementation and Transition under all specified scenarios ["**the First FS Criterion**"].

- **Ability to maintain solvency throughout the Fourth Licence Term**. The Applicant has demonstrated that there is no material risk that the Licensee would become insolvent during the Fourth Licence Term under any of the specified scenarios ["**the Second FS Criterion**"].

- **Conditionality of funding**. The Applicant has provided clear evidence that funding to meet the costs of operating the National Lottery and any financial commitments would be available to, and accessible by, the Proposed Licensee as required and there are no material conditions associated with funding that may result in funding delays, or that funding not being available, should the Applicant be successful ["**the Third FS Criterion**"].

- **Deliverability of funding**. The Applicant has provided clear evidence that proposed funding can be obtained and implemented and that funding providers have the financial capacity and capability to support their commitments under all specified scenarios ["**the Fourth FS Criterion**"].

- **Funding covenants**. The Applicant has demonstrated that there is no material risk to the Proposed Licensee's financial strength under any of the specified scenarios due to funding covenants not being met as per contractual obligations set out in funding agreement terms and conditions.

- **Supply chain financial strength**. The Proposed Licensee's supply chain is of sufficient financial standing that it does not cause material threat to the Proposed Licensee's ability to deliver their contractual obligations under the Fourth Licence. The Proposed Licensee and its Key Subcontractors have adequate processes, procedures and controls in place to ensure supply chain continuity and minimise any adverse impact on National Lottery operations due to any potential supply chain disruptions ["**the Sixth FS Criterion**"].

- Where relevant, the Applicant's Business Plan and overall ITA submission demonstrates alignment with the financial strength requirements. There is nothing in the Applicant's Business Plan or any other part of their ITA submission that would result in the Applicant's failure to meet the criteria outlined above. In particular, the Applicant should demonstrate due regard to the potential impact of the 4NL Trust and any potential Portfolio Volatility on the Proposed Licensee's financial strength".

521. An Applicant would Fail where:

> "The Applicant has failed to adequately demonstrate to the Commission their ability to deliver against one or more of the above criteria required to Pass".

522. Further information on Financial Strength was set out in section 13. Section 22.5 identified the Questions that Applicants were required to respond to in dealing with Financial Strength. These were:

> "Q8: Please describe your proposed financing structure and explain how it will support transition, transformation and ongoing operations and minimise any material risk, on financial grounds, that may lead to a failure to meet the obligations under the Fourth Licence, Enabling Agreement and/or Cooperation Agreement under the Base Case and/or Financial Strength Scenarios"; and
>
> "Q9: Please demonstrate the financial standing of your supply chain and describe how you will ensure that supply chain disruption risks are minimised during the Fourth Licence Term."

523. Amongst other things, Question 8 required applicants to provide with their Phase Two Applications copies of legally binding financing agreements to evidence that the applicant had sufficient finances committed and available to enable it to meet the Financial Strength requirements. Various categories of evidence to support the availability of equity funding were also required. Applicants were required to demonstrate how they would have sufficient financial resources to meet the costs they would incur in connection with Implementation and transition under all specified scenarios. The Fourth FS Criterion involved demonstrating that the proposed financing structure "is obtainable and implementable and funding providers have the financial capacity and capability to support financing commitments".

524. Responses to Question 9 were required to include a completed Key Subcontractor Financial Strength Template, the "processes, procedures and controls in place for each Key Subcontractor to ensure that they are sufficiently financially resilient in the event of supply chain disruptions" and details of any financial risks identified by the applicant which might disrupt the supply chain.

525. Section 23 of the ITA sets out guidance on an applicant's Financial Response. This was to consist of a "Base Case" (to be provided under Question 28) designed to act as "the principal forecast", together with a "Breakeven Case" (to be provided under Question 29), designed to act as "an alternative forecast in a breakeven scenario" and an "Upside Case" (to be provided under Question 30). Section 23.1 explains that the Financial Strength Scenarios (to be completed in response to Question 31) "will model the impact of decreases in revenue or increases in costs (as compared to the Base Case), on the Licensee's ability to meet its obligations under the Fourth Licence, Enabling Agreement and Cooperation Agreement". Applicants were required to complete the Financial Strength section of the ITA with reference to the outcome of these Financial Strength Scenarios.

526. Section 23.7 of the ITA set out the Financial Strength Scenarios that Applicants were required to address in their response to Question 31. It explained that:

> "The Financial Strength Scenarios are required in order to evidence that you will have sufficient funding in place throughout the Implementation Period and the Licence Term in the event that costs exceed forecasts, and/or revenues fall short of forecasts.
>
> You are not required to provide any assumptions in this section as to what may cause such scenarios to occur".

527. The Financial Strength Scenarios identified in the ITA were replaced by a new list of Financial Strength Scenarios set out in the July Applicant Note. Relevant to the Issues arising in this case was Financial Strength Scenario 3 ("**Scenario 3**"), which required applicants to demonstrate financial resilience in circumstances where "[i]nvestment costs (Implementation Costs and forecast capital expenditure throughout the Fourth Licence Term) are 50% higher than those projected in the Base Case" – in other words, as explained in TNLC's bid "all the operating costs, directors' remuneration and capital spend incurred" would be 50% higher both during the Implementation Period and throughout the Fourth Licence term.

528. The July Applicant Note and its Appendices also contained additional amendments and guidance. Yet further guidance was provided in the Financial Strength Applicant Note.

529. The three Evaluators for Question 8 were Nick Thomas, Stephen Spencer and Sarah Ann Jones. Only Ms Jones, who was the lead Evaluator, gave evidence. She explained that as part of the application process, she had identified that she would need support analysing complex financial structures and finance documentation and that, accordingly, the Commission had put in place additional support provided by Hogan Lovells and Rothschild both at Phase One and Phase Two. Ms Jones confirmed in her oral evidence (and I accept) that this, together with the applicant guidance notes, was sufficient to enable her to undertake her role. Ms Jones also raised a number of Clarification Questions on how the guidance notes should be applied.

530. The Evaluators for Question 9 were Peter Morland, Stefan Sanchez and Caroline Severne. Only Ms Severne gave evidence.

Financial Strength Question 8: TNLC's Application

531. TNLC's funding package was summarised in response to Question 8. In summary, TNLC proposed a funding package of £216 million (plus the £25m Contingency) for its Base Case. This comprised £71 million of equity financing to be provided by The New Lottery Company Holdings Limited (a wholly owned subsidiary of N&S PLC and the immediate holding company for TNLC) together with external funding of £145 million provided by Barclays, Société Générale and HSBC. These bank facilities of £145 million comprised a £120 million term loan facility and a £25 million Revolving Credit Facility ("**RCF**"). The £25m Contingency financing was available from N&S PLC through a binding equity call contract.

532. TNLC failed 3 of the 7 Financial Strength Criteria for Question 8, namely the First, Second and Third FS Criteria.

533. The Commission's reasons for failing TNLC in relation to Financial Strength are set out in the Question 8 Moderation Rationale and the Detailed Rationale. The Question 8 Moderation Rationale sets out a consensus rationale statement which first identifies the Financial Strength Criteria that TNLC has failed and then goes on to refer to a "combination of factors" which "considered together" gave rise to a material risk. Ms Jones confirmed that this was a summary of the "key reasons" for the decision to fail TNLC and she explained that this was "a holistic assessment, in terms of whether the applicant had provided sufficient evidence to demonstrate whether it could establish and maintain the financial strength of the applicant" and that "some of the factors were significant—very significant, and some were less significant, but were considered aggravating, so sort of added to the overall risk…as part of the holistic assessment". Although the Claimants sought to suggest in cross-examination that it was only the combination of factors together which gave rise to a material risk, Ms Jones rejected that suggestion, observing that "we failed it because there were a number of factors which gave rise to a material risk". I accept that evidence.

534. The Claimants allege that the Commission was in manifest error in its decision on various factors identified in the Moderation Rationale and that TNLC should have been awarded a Pass (**Issues 52(a)-(f)**). I deal with these under appropriate headings below.

TNLC's Base Case Model and assumed working capital inflows (Issue 52(a))

535. In its Question 8 response, TNLC explained that "[d]uring the Licence Period, the generation of working capital through trading activities provides the funding required for the further capital investment, which is largely delivered in years one and two of the Licence with refreshes in key areas staged throughout the Licence". Under the heading "Risk Assessment", TNLC stated that during the Licence Period the key risks that affected the sufficiency of the financing were (amongst others) "[t]he requirement to maintain working capital". TNLC's response was supported by its Financial Model.

536. As recorded in the Question 8 Moderation Rationale, the Evaluators concluded that "the Applicant's Base Case model is materially reliant on assumed working capital inflows creating a risk that the Proposed Licensee's funding will be sensitive to deviations from those assumptions" and that TNLC had not demonstrated how it would mitigate this risk. This referred back to the First FS Criterion.

537. This reason was expanded upon in Box 2 under the heading "weaknesses" as follows:

> "In Y1 the Applicant models that £145m of capital expenditure is incurred and a further £82m of capital expenditure is incurred in Y2 (Revised Model, Base Case Cover Sheet, L213, M213). The Applicant proposes to fund this out of operating cash flow, in particular, material working capital inflow in Y1 (including £155.2m in M1 of Y1. This includes the lottery duty creditor, as well as several other elements). Given the magnitude and importance of working capital movements, there is risk to the timely funding of this expenditure".

538. The Claimants' pleaded case on this issue is that:

> "The Defendant determined in error that the First Claimant's Base Case model was overly reliant on assumed working capital inflows and therefore at risk. This is manifestly incorrect, as the model has been structured based on realistic assumptions and with flex to allow for deviations from those assumptions".

539. As explained in closing, the crux of TNLC's complaint is now that the Question 8 Evaluators failed adequately to scrutinise TNLC's proposed use of working capital in order to inform themselves of (i) whether it presented a risk; and (ii) if so, the extent of that risk.

540. Ms Jones' evidence in her witness statement, which I accept, is that (as recorded in the Moderation Rationale), the Question 8 Evaluators had determined that TNLC was materially reliant on working capital inflows (in her oral evidence she explained that "materially reliant" simply meant "reliant"). Her statement then records that the funding of capital expenditure modelled for years 1 and 2 (a total of £227 million) "was dependent on the robustness and deliverability of the working capital assumptions rather than certainty of funds provided through equity or loan arrangements" and that "[g]iven the magnitude and importance of the working capital movements we concluded there was a risk to the timely funding of this expenditure". Although TNLC relied on a number of mitigations, the Evaluators concluded that it did not adequately demonstrate that these would all be available and/or deliverable in a manner compatible with the Licence.

541. Ms Jones' evidence on this topic was explored at some length during her cross-examination. Ms Jones explained, and I accept, that the Question 8 Evaluators reviewed TNLC's Base Case Model including the "further workings behind it" to ensure that they understood where the figures came from. They were aware from TNLC's Base Case Supporting Narrative that it had based its working capital assumptions on an analysis of Camelot's Annual Reports – Ms Jones confirmed her view that this was "reasonable" although she subsequently explained that there was inevitably "an element of risk" around making assumptions as to the generation of income. Ms Jones confirmed that the Question 8 Evaluators were also aware of a Clarification Question on the issue of working capital together with TNLC's response to that question (dated 17 December 2021) which Ms Jones said had been considered. Ms Jones explained that it was not the role of the Evaluators to arrive at a view as to the robustness or deliverability of TNLC's assumptions but that a cost modelling team had looked at the models (although she had no recollection of receiving their views on TNLC's Model).

542. Ms Jones was clear in her evidence that the fact that the capital expenditure was being funded through working capital inflows was the risk that Evaluators were concerned about: "working capital inflows aren't certain, in terms of when they arise". This gave rise to an "inherent risk". This was particularly so given that "the Commission's guidance was very clear about having committed funds and sources of funds being clear and deliverable" (see for example the First and Third FS Criteria). Ms Jones fairly accepted that applicants had not been told in the ITA that they could not rely upon working capital but she said that "it carries a risk, and it carries more risk than if you'd had the…loan arrangement in place or other types of fund". She pointed out (correctly) that "TNLC actually identified a risk themselves about working capital and proposed

some mitigations for dealing with that risk". It was in this context that Evaluators then looked at the mitigations that TNLC was proposing.

543. I accept Ms Jones' evidence which does not appear to me to support the conclusion that the Question 8 Evaluators acted irrationally or in error. TNLC says that it was incumbent upon the Evaluators to scrutinise (and analyse) TNLC's Model in order to reach a conclusion on whether its proposals presented a risk and, if so, the extent of the risk. I reject that suggestion. TNLC chose to make assumptions as to working capital; that these were reasonable assumptions did not mean that they did not carry risk – that will invariably be the case with assumptions, as TNLC itself recognised in its bid when it specifically identified the requirement to maintain working capital as a risk.

544. It was not irrational or erroneous to form the view that the use of working capital was more risky than other forms of funding or that, in the circumstances, the Commission needed to be satisfied that there were appropriate mitigations in place. There is no basis on which I could properly find, as the Claimants invite me to do, that there was an insufficient basis upon which to conclude that TNLC's proposals to use working capital funding presented a risk to the timely funding of capital expenditure and I decline to do so. In my judgment the Evaluators' decision fell well within the scope of the Commission's margin of discretion.

545. TNLC's suggested mitigations for the risks in its proposals were threefold: first it proposed to "flex" its dividend declarations which it said would be consistent with its dividends policy; second it proposed using the £25m Contingency; and third it suggested using asset financing "as an effective mitigation" for some of the financial risks within the funding package more generally. I shall return to these when considering Issue 52(f).

Conditionality of Debt Funding (Issue 52(b))

546. As I have identified above, TNLC's Application included a debt facility with Barclays as the lead arranger. This was dated 5 October 2021 and was described as "£145,000,000 Single currency term and revolving facilities agreement" ("**the Funding Agreement**").

547. The Question 8 Moderation Rationale identified a material risk (in respect of the Third FS Criterion) in relation to TNLC's proposed debt funding, specifically that:

> "the Applicant's proposed debt funding includes a number of conditions including change of control, representations as to compliance which could operate as "hair triggers", material adverse change and no "certain funds", individually and collectively creating a risk that the Incoming/Proposed Licensee will be unable to access and/or utilise those funds at all times when it requires them".

548. In Box 3 under the heading "weaknesses", the Moderation Rationale repeated this point as follows:

> "In addition, the conditionality attached to funding access is significant, with in particular: no 'certain funds' period; broad

> change of control provisions; 'hair trigger' Licence compliance undertakings; and Material Adverse Change provisions (Q8, Supporting Evidence, Appendix 2). On this basis, there is a risk that funding may not be available to the Licensee when required or that early repayments might be triggered during the term of the loan."

549. In their pleaded case, the Claimants alleged that this conclusion was manifestly erroneous because it was based on a mischaracterisation of "the nature of the conditions of [TNLC's] proposed debt funding". In their opening submissions, the Claimants sought to explain this further, pointing out that the relevant requirement in the Third FS Criterion was that there should be no "material conditions associated with funding". They said that the Commission had erred in regarding the conditions associated with the provision of the debt funding as "material conditions". They alleged that these conditions were in fact "customary financing conditions" and that the Evaluators had done little more than note the existence of conditions in the Funding Agreement, without giving proper consideration to whether they "were anything other than immaterial or whether there was really any prospect of those conditions being triggered so as to cause TNLC to lose access to the funds".

550. In closing, the Claimants chose largely to focus on the fact that Ms Jones had often been unable to recall the thought process undertaken during moderation in respect of the conditions. They made a couple of points about the change of control provisions, and they submitted that absent documentary evidence on the "hair triggers" point and absent proper explanations from Ms Jones, "the only viable conclusion is that this point was obviously wrong". They did not seek to suggest that the Commission had made a manifest error overall in the view it had taken as to the risks arising by reason of the conditions in TNLC's Funding Agreement.

551. Guidance on the approach that the Commission would take to conditions in Finance Agreements was provided to Applicants in Appendix A to the July Applicant Note. This guidance expressly recognised that Finance Agreements may include conditions. It went on (at paragraphs 7.4-7.8) to provide further guidance on the appropriateness of particular types of conditions and the circumstances in which these might be acceptable. Where a Finance Agreement was with an Unrelated Finance Provider who was a commercial lender, the Commission stated that any "material adverse effect" or "material adverse change" condition "may not undermine the Financial Strength Requirement", subject to (i) that condition excluding matters such as "due diligence, the operation or performance of the National Lottery, regulatory or legal change or the nature, structure or characteristics of the Applicant or Licensee" and "any reasonably foreseeable scenarios of change"; and (ii) the applicant demonstrating (including through the Implementation Contingency Protections) how it will ensure that there is "sufficient resilience to ensure that a failure to achieve a milestone will not, in any reasonably foreseeable scenario, result in the Licensee being unable to implement its Application" and "sufficient commercial incentive on the Incoming Licensee to ensure that the Licensee implements the Application".

552. Further detailed guidance on conditions in finance agreements with Unrelated Finance Providers was given to applicants in the Financial Strength Applicant Note at section 3. Amongst other things, the Commission stated that:

> "the Commission would not expect the availability of finance to be conditional upon, or in any way impacted by:
>
> …
>
> (b) any change in the ownership or control of, any direct or indirect shareholder or other related party of the Incoming Licensee, unless the Application demonstrates to the Commission's satisfaction the manner in which that is compatible with the Financial Strength Requirement being met throughout the duration of the Fourth Licence".

553. Ms Jones explained in her witness statement, and I accept, that Evaluators had concerns about TNLC's debt funding arrangements as a consequence of various conditions included in the Funding Agreement. Specifically, as set out in the Question 8 Moderation Rationale this included concerns in respect of:

i) "material adverse change" provisions. On analysis I agree with the Commission that these in fact contravene the Commission's guidance set out above. As I have said, the Claimants say nothing whatever about these provisions in their closing submission;

ii) "hair trigger" provisions (i.e. as, explained by Ms Jones, conditions which would have been triggered by "any compliance failure" including a non-material failure). The Claimants took Ms Jones to the relevant provisions in the Funding Agreement, including clause 23.4 which it was said in fact provided for materiality. However, it was clear that Ms Jones was having difficulty with the detailed provisions and, in relation to clause 23.4 she said she would "have to have advice about…that clause"); and

iii) "very broad" change of control provisions. These were not limited to change in control in the shareholding of TNLC itself but also enabled, amongst other things, Barclays' obligations under the Funding Agreement to be cancelled (and thus funding withdrawn) if the owner of the N&S Group, Mr Desmond, ceased to have control.

554. In addition, as Ms Jones explained, a "certain funds" period was important "because it restricted the number of conditions that applied during the draw down period". Accordingly the absence of such a provision was a "relevant consideration". The Claimants also made no mention of this in their closing submissions.

555. In her oral evidence Ms Jones explained, and I accept, that she had immersed herself in the detail of the conditions at the time, that she had had legal assistance and that the Evaluators had discussed the conditions in moderation. I can see nothing improper or unreasonable in Evaluators seeking legal advice in respect of the interpretation of complex legal documents and there is no pleaded case that the interpretation put on those documents was obviously wrong. Furthermore, Ms Jones rejected the suggestion that she had delegated or deferred her evaluation role to the legal advisers. I accept her evidence. Although she did not always have a clear recollection of the detail (unsurprising given the complexity of the points on conditions in the Funding Agreement, particularly the "hair trigger" provisions), I can see no basis on the evidence

to find anything other than that the Commission took a rational approach to the evaluation of conditions and that it acted well within the scope of its discretion in determining that they presented a risk. The Commission was entitled to conclude (with the benefit of legal advice) that the conditions in the Funding Agreement (or lack of provisions) might give rise to a risk of TNLC being unable to access funding and/or of its repayment obligations being triggered. Even if the Claimants are right that clause 23.4 of the Funding Agreement in fact provided for materiality (a point I need not decide), the Claimants have not even sought to make out a case in respect of the material adverse change conditions or the absence of a "certain funds" period.

556. I agree with the Commission that the question of whether the conditions were "material" within the meaning of the Third FS Criterion (raised by the Claimants in opening) was a matter of judgment for the Commission. By way of example, there is no basis on which the Court could properly find that the Q8 Evaluators were wrong to regard the change of control provisions as "broad" and it would not be appropriate for the Court to descend into the arena on this point. I also agree with the Commission that the Claimants' submissions in opening really amount to no more than subjective disagreement over the extent of the risk to be attached to these conditions.

TNLC's repayment profile and proposed mitigations (Issue 52(c))

557. The Moderation Rationale identified as a material risk that:

> "the repayment profile of the Applicant's proposed debt funding results in there being anticipated points where cash would be low or exhausted, creating a risk that the Applicant may be unable to make those repayments whilst also meeting its other obligations".

558. Under the heading "weaknesses" it also identified that:

> "The Applicant's remodelling of financing repayments indicates further pressure on funding requirements in 2025 and 2026 due to intra-month cash flows even after flexing dividend payments. (Revised Financial Template, Analysis – Scenario 3, Lines 67-80). Overall, the Application suggests a degree of risk in Scenario 3".

559. The Claimants' pleaded case is that the Commission "mischaracterised and misrepresented [TNLC's] proposed repayment profile and made the incorrect assessment that there is a risk that [TNLC] would be unable to meet its repayment obligations". In addition, the Claimants alleged that the Commission "failed adequately to take into account" TNLC's proposed mitigations.

560. Ms Jones confirmed in her oral evidence that the concern for Evaluators was that TNLC's loan arrangement needed to be repaid and that this created a "pressure point" and an "intramonth low point" which could be accommodated in the Base Case but could not be accommodated when other risks were taken into account, including in Scenario 3 where it was a "definite problem". The Claimants attempted to establish that the concern of Evaluators really only arose in relation to Scenario 3, which, without being taken to her witness statement, Ms Jones appeared to accept. However, in re-

examination, Ms Jones explained (and I accept) that the repayment profile issue (which she described as "a big bullet point") created stress points in areas other than Scenario 3.

561. This conclusion appears to me to be supported by the fact that it is clear from TNLC's own Application that there was a very real risk that it would be unable to meet its repayment obligations in Scenario 3.

562. TNLC's Question 31(b) response "Financial Strength Scenarios" says this under the heading "Sufficiency of funding during the Licence Period":

> "The cash position is negative at the end of Year 2 by £22.9 million. This is after a dividend payment in relation to the Year 1 profits which was capped at £4.7 million due to the Year 1 cash position. In these circumstances we would not pay that dividend. The mitigations we put in place to address the shortfall in cash in the implementation period may have a corresponding impact on the Year 2 position, depending on the nature of those mitigations. From Year 3 onwards the cash position is healthy".

563. In addition, the response confirms that, in this scenario ahead of mitigating actions, two of three banking covenants would not be met. The mitigating actions identified were (as accepted by Mr Martin in cross-examination) "negotiation with suppliers on costs and timings of cash flow" (i.e. trying to delay payments to suppliers), adjustment of plans, for example deferring capital expenditure programmes (i.e. deferring costs that TNLC would be incurring in developing its proposal for the National Lottery) and seeking additional finance. It was plainly well within the Commission's margin of discretion to determine that these presented a risk.

TNLC's Incorrect Treatment of the Bid Assumption (Issue 51(d))

564. Prizes payable to winners of National Lottery Games are generated by ticket sales. A proportion of the money generated from ticket sales is deposited into trust accounts from which prizes are paid. This helps to combat the volatility in prize payout that is inherent in a system which inevitably involves fluctuations in the number of players and differing prize pots. The use of these prize reserves enables the operator to build a pool of extra money for use as a buffer in the event of an unexpectedly high number of individual winners for any given game. Over time, these reserves tend to exceed the amount of money that is needed to pay out prizes, even taking account of volatility. However, they are not generally available for the operator to withdraw owing to the fact that they are regarded as belonging to the players who contributed to them through the purchase of tickets.

565. During its time operating the Third Licence, Camelot introduced Prize Reserve Trust 4 ("**PRT4**") and Prize Reserve Trust 5 ("**PRT5**") to hold reserves. Law Debenture was the trustee. Ms Taylor (who worked for Camelot before being employed by TNLC) understood that when these prize reserves were set up, "there was a strong intention" that the funds would be preserved for any subsequent operators of the National Lottery, who could then return the funds to the players via the normal operation of the games (if needed to account for game volatility) or through special prize draws (to the extent there were any 'excess' amount in the reserve). In other words, the funds in these reserves

would simply transfer to any new operator; they would not return to Camelot or be distributed to Good Causes.

566. It was on the basis of this understanding that TNLC prepared the financial aspects of its Phase One Application (including its Minimum Primary Reserve Balance ("**the MPRB**") of £29.8 million) which assumed that the balances in PRT4 and PRT5 would be available for the incoming operator (although this was not expressly stated in the Application). From an email dated 8 September 2021 from Mr Mills to the Commission, it is clear that TNLC had assumed in its financial model that the trust balances in PRT4 and PRT5 were potentially £130 million. Ms Taylor explained in her evidence that in the absence of those balances, where TNLC would potentially be taking over games which therefore did not have a prize reserve "a significant cash balance would need to be immediately available to 'seed' the prize reserve". This would be required to ensure from the outset that prize payouts for various of the existing National Lottery games (including Euromillions and Lotto) could be guaranteed.

567. The July Applicant Note explained that assets of the Third Licence Trust were held for the benefit of the beneficiaries of that Trust and would be applied for that purpose. The Commission's objective was to ensure that "obligations to Third Licence Prize winners will be paid out of Third Licence monies (and the Incoming Licensee will not have any net liability for those amounts) but, in accordance with the Third Licence Trust, Third Licence monies will not generally be available for broader Fourth Licence purposes". In other words, applicants would not "inherit any net liability for Third Licence prizes" but they would also not "inherit any "net funding" for Fourth Licence prizes". In her oral evidence, Ms Taylor explained that her understanding of this was that the incoming licensee would be able to pay off the prizes that had already been rewarded or won from the existing trust, but that they would not be inheriting PRT4 or PRT5.

568. Consistent with this, the July Applicant Note included guidance that applicants should assume in their Phase Two Applications ("**the Bid Assumption**"):

> "that:
>
> - there will be sufficient funds transferred to the Fourth Licence Trust from the Third Licence Trust to meet obligations to Participants which are assumed by the Licensee as Continuing Obligations on the Start Date. These funds must be used to discharge obligations to those Participants – they cannot be "repurposed" to fund Prizes which have been won in Games operated by the Licensee during the Fourth Licence Term; and
>
> - the Licensee will need to ensure that the relevant Lottery Accounts and Trust Accounts are sufficiently funded on and from the Start Date to meet all liabilities to the beneficiaries of the Fourth Licence Trust which will arise on and from that date. A proposal which would provide that the relevant accounts are not sufficiently funded to meet the relevant liabilities on the Start Date, but that the necessary reserves are allowed to build up over a period of time when the Licensee starts to receive revenue from

> ticket sales, would not comply with the requirements of the Licence".

569. Ms Taylor's written evidence was that, upon sight of this guidance she realised there was "an issue with the approach being proposed" by the Commission in relation to trust balance. In her oral evidence, Ms Taylor confirmed that, put another way, this was the first time she had realised that what she thought would happen to the trust balances "was not what the Commission thought". She confirmed that it "was clear" to her that the Commission thought that PRT4 and PRT5 would not transfer to the incoming Licensee. On the basis of the instructions in the July Applicant Note, TNLC would be required to fund its MPRB of £29.8 million from the outset of the Licence – it would not have the comfort of the existing reserves in PRT4 and PRT5.

570. There followed various interactions between TNLC and the Commission around the question of whether TNLC needed to apply the Bid Assumption in its Application. I shall need to return to these in a moment, but suffice to say that TNLC ultimately decided not to update its funding package to reflect the Bid Assumption. It put in its response to PPF Question 7(4) on the basis that the balances in PRT4 and PRT5 would transfer to TNLC. Specifically, it explained that "[t]here are existing funds within 3NL Trust that are due to transfer to the Next Licensee under the terms of that Trust…The receipt of these funds will provide the initial funding for the 4NL Trust Primary Reserve".

571. TNLC was asked a Clarification Question with respect to its PPF Question 7(4) response, which it answered on 1 November 2021. In summary, the Commission asked, "what alternative sources of funding or other contingency exists in the event that either no funds, or a lesser amount than expected, transfers from the 3rd Trust to the Next Licensee?". The Commission noted references in TNLC's Application to the existence of funds or funding agreements "which can be called upon to provide contingency reserves" and it asked TNLC to set out (i) the extent to which such funds could be deployed to fund trust reserves under the Fourth Licence; (ii) the extent to which such funding arrangements were anticipated to take the form of loans; and (iii) in the case of any such loan or proposed loan, details of how, when and on what terms this loan would be repaid.

572. TNLC responded that there was a headroom of £49 million in its funding arrangements, derived from £24 million in cash (provided through initial equity) and the £25m Contingency. TNLC observed that in the Base Case these funds would be available at the start of the Licence Period and "could be used to provide a loan to the Premium Reserve Trust" in their entirety in the event that no, or fewer than expected, funds were to be transferred over from 3NL. If there were an over-run on costs during the Implementation Period, that "would potentially reduce the £49 million headroom available", but TNLC expected to mitigate that overrun as described in the mitigations in respect of Scenario 3 and it said that in addition it had "received interest" from a number of major banks to provide asset funding arrangements.

573. TNLC went on to say:

> "The minimum level of funding that would be provided to the Primary Reserve would be the amount required to increase the funds transferred from the 3rd Licence in respect of game prize

> reserves balance to £29.8m, being that Minimum Primary Reserve Balance threshold. If the Primary Reserve then dropped below this threshold, additional funds would be provided from the Licensee's general account to top up the Primary Reserve. The Licensee's general account is forecast to grow from the start of the Licence period; the opening forecast position of £24 million is the lowest point. The increase comes from trading activity, including the working capital benefit of Lottery Duty. As a result, we would expect the additional cash to be available to provide further top ups".

574. TNLC also explained that funding for the Primary Reserve was to be provided in the form of a loan which would then be repaid from reserves accumulated from the prize structure. TNLC went on to say that, on average, the Primary Reserve was expected to increase by £3.6 million per week. TNLC proposed a mechanism whereby this sum would be shared, with 50% being used to repay the loan (subject to not falling below the MPRB threshold) and 50% remaining in the Primary Reserve.

575. Against this background, the Moderation Rationale identified a yet further factor giving rise to a material risk, as follows:

> "the Applicant's Base Case assumption as to the funding of opening Trust Balances is inconsistent with the Commission's bid assumption, creating a risk that the Proposed Licensee will need to fund those balances from other resources".

576. Under the heading "weaknesses" in Box 1, the following additional reasons were provided:

> "The Applicant's approach to demonstrating the funding of the anticipated reserves for the Trust does not align with the required bid assumption. The Applicant has available a £24m cash buffer subject to lender consent to reduce available cash to below £12m, pre-Licence commencement (Q8, p. 6, Section 8.5.1 (b)/Q8, Supporting Evidence, Appendix 2, p. 89, Clause 21.2) and £25m equity call proposed as the Licence Contingency Protection, and to the extent these are used to fund the Trust Fund Reserve Balance (£29.8m up to £48m) (Q7(4), Clarification Required on Contingency Reserves), these funds would not be available as contingencies for the Financial Scenarios. This creates a risk to the solvency of the Licensee and its ability to access funds when required".

577. The Claimants' pleaded case on this issue is that: "[r]egarding the funding of opening Trust balances, [the Commission] applied in error a bid assumption that the prize reserve balances from the Third Licence Trust would not transfer to the new licensee in order to form the opening balances for the Fourth Licence Trust". In its Defence, the Commission responds that the Bid Assumption was explained in the July Applicant Note and it therefore rejects the suggestion that it was applied in error.

578. In their closing submissions, the Claimants continued to maintain that the Commission was wrong to apply the Bid Assumption, essentially on the grounds that (i) on its true interpretation, the effect of the 3NL Trust Deed was that the remaining balances in PRT4 and PRT5 would transfer over to fund the trust balances in 4NL; but that in any event (ii) TNLC's Application explained that it would have sufficient funds even if the balances in PRT4 and PRT5 did not transfer (i.e. it only needed £29.8 million of headroom in its £49 million funding arrangements); and (iii) TNLC's Clarification Response of 21 November 2021 explained that these funds would be replenished and that 50% of the £3.6 million weekly increase in Primary Reserves could be used to repay the loan.

579. Notwithstanding that neither (ii) nor (iii) is pleaded, the Claimants submit that it was "a clear error" for the FS Evaluators to conclude that the MPRB of £29.8 million (assuming it had been used to fund the 4NL Trust balances) would not be available for contingencies, in circumstances where TNLC had explained in its Clarification Response that it would be replenished. Although questions were put to Ms Jones to the effect that Evaluators failed to take into account TNLC's proposal that it would put in place prize insurance, I did not understand this point to be pursued in closing submissions.

580. To address the question of whether the Bid Assumption should have been applied, I need to return to look at the detail of the interactions between the Commission and TNLC following the issue of the July Applicant Note. I note, however, that it is wholly unclear to me how this issue genuinely remains live in circumstances where the Claimants say in a footnote to their closing submissions on this issue that they no longer pursue the allegation that it was a manifest error for the Commission to find that the prize reserve balances from the 3NL Trust would not transfer to the new Licensee.

581. Notwithstanding Ms Taylor's understanding of the clear implications of the Commission's guidance as to the Bid Assumption, TNLC does not appear to have taken any steps to address the issue until 19 August 2021 when Ms Mimi Curran emailed Mr Mills (with the subject heading "Agenda for next GC call") stating that Ms Taylor had a concern about "something worrying" in the July Applicant Note, specifically that "[t]he GC appears now to be saying that the reserves that have built up in Licence 3 which are intended to transfer to the 4NL Licensee are not going to be allowed to fund prizes in the fourth licence…", and that she wanted to discuss it with the Commission.

582. This discussion took place on 7 September 2021 (nearly two months after the July Applicant Note) at a Clarification Meeting. TNLC pointed out that it considered the July Applicant Note to contradict the terms of the Third Licence "which states that these balances, which should represent reserves for future prizes, not prizes already won, do indeed transfer to the Incoming Licensee" and it requested clarification. Mr Mills followed up this request the following day (8 September 2021) with an email to Mr Wilson in which he emphasised "the materiality of the point at issue" on the grounds that TNLC had "based our financial model on the due availability" of approximately £130 million held in PRT4 and PRT5.

583. The Commission responded in a letter dated 21 September 2021, disagreeing with TNLC's interpretation of the 3NL Trust deed and saying this:

> "In light of the considerations above, our view is that no funds will transfer across from the 3rd Licence Trust in respect of PRT4 or PRT5. As such Applicants should assume they will receive no funds in respect of 3rd Licence Trust reserves, and, consistent with the assumption in Section 5 item 4 of the Phase Two Applicant Note released on 16 July, predicate their bid on having reserves in place for Day One of the 4th Licence which do not rely on any 3rd Licence Trust balance transfers, save those in respect of outstanding 3rd Licence prize liability which will be addressed in clause 14 of the Cooperation Agreement".

584. Pausing there, it was clear at this point that TNLC and the Commission had, as Ms Taylor explained, a "difference of opinion" as to the legal interpretation of the 3NL Trust Deed. However, as Ms Taylor also confirmed, it was clear from this letter that for the purposes of the Competition (consistent with the content of the July Applicant Note) the funds from PRT4 and PRT5 would *not* transfer across to the incoming Licensee.

585. Mr Mills wrote again to the Commission on 24 September 2021 saying that TNLC had taken legal advice on the issue and that it continued to disagree with the Commission's view of the interpretation of relevant clauses in the 3NL Trust Deed. Furthermore, Mr Mills suggested that the approach of the Commission in its letter of 21 September 2021 was different from its earlier guidance, including in the July Applicant Note. Mr Mills went on to say that:

> "Given the incredibly late stage in the process at which we find ourselves having to address this major issue, we shall submit our bid based on our interpretation as set out above, to which we have worked in good faith, and which is supported by our legal advice. We shall naturally flag the issue in our Risk Register, which will include suggested mitigations".

586. In my judgment, Mr Mills was wrong to suggest that the Commission's approach had changed since its July Applicant Note (as Ms Taylor accepted in cross-examination) and also therefore wrong to suggest that TNLC was having to address it at an "incredibly late stage in the process". On the contrary, TNLC had known about the Bid Assumption and its consequences for over two months, since 16 July 2021. This was pointed out by the Commission in a further letter dated 1 October 2021. Nevertheless, TNLC chose not to update its financial model to reflect the Bid Assumption, a decision which Ms Taylor confirmed was "directly contrary" to the Commission's instructions.

587. Against that background, I agree with the Commission that the FS Evaluators were plainly correct to proceed as they did. The Commission had asked Applicants to apply a Bid Assumption and Evaluators were obliged to apply it.

588. Turning to the Claimants' unpleaded point that, effectively, the Commission was wrong to conclude that TNLC would have insufficient funds in circumstances where the Bid Assumption applied, I am not inclined to permit this new case, which appears to have been developed for the first time through the cross-examination of the Commission's witnesses. However, even if I am wrong to deal with this on a pleading point, it has no merit, for the following reasons.

589. As I understand the Claimants' criticism in cross-examination of Ms Jones and in closing it is that FS Evaluators focused in the Moderation Rationale on the figure of "up to £49 million" (rather than £29.8 million) as being the minimum amount that TNLC had to find if the Bid Assumption applied and TNLC was required to fund the Trust Balances itself. Alternatively that, if they in fact focused on the £29.8 million figure as the minimum head room needed (as Ms Jones confirmed in her evidence had in fact been the case, and I accept), then "the Moderation Note does not disclose any recognition or consideration of the fact that the £29.8 million would be replenished" (a reference to the content of the Clarification Response).

590. I reject this submission which, as is clear from Ms Jones' evidence, represents a misunderstanding of the approach the Evaluators adopted. Evaluators were concerned (as appears from the Moderation Rationale) that in the Financial Strength Scenarios, the injection of funds by TNLC into opening Trust Balances would render those funds unavailable as contingencies for the Financial Strength Scenarios. As Ms Jones explained, the issue was "how these factors flow into each other" and "if scenario 3 happened, the 25 million wouldn't have been available to fund the opening trust balances". She also said that it did not matter that the Primary Reserve may be replenished on a weekly basis once TNLC started operation of 4NL, because the key issue for Evaluators was that TNLC had to "fund [the MPRB] from day 1…they had to establish the 29.8 on day 1".

591. Accordingly, I reject the suggestion that the Evaluators' determination that there was a risk to the solvency of the Licensee and its ability to access funds when required was outside the margins of the Commission's discretion or arrived at in manifest error. I shall return to the question of mitigation in respect of Issue 52(f) below.

Whether Funding proposals conflicted with the Licence (Issue 52(e))

592. Given my findings on the other issues arising under Issue 52, I need deal with this issue only briefly. I note in particular that the Claimants put their submissions on it in closing no higher than that "this reason for failing TNLC's Q8 response should be discounted/set aside".

593. It is common ground that condition 16.7 of the Fourth Licence envisaged that the enforcement of any security held over shares in the Licensee would be "subject to the prior consent of the Commission, in its absolute discretion". This was relevant to TNLC's Application because it had proposed a Debenture between TNLC and HSBC in which TNLC Holdings ("**TNLCH**") (TNLC's immediate parent company) had proposed to give security to the lending banks over the shares that TNLCH held in TNLC.

594. In a Clarification Response dated 12 December 2021, TNLC provided a detailed explanation as to why it said there was no conflict between the terms of the share charge included in the Debenture and the requirements of the Licence.

595. The Moderation Rationale said this:

> "the Applicant's debt funding includes security granted over the shares in the Licensee in a form which conflicts with the Conditions of the Licence, creating a risk that those funds will

> not actually be available to the Licensee on the basis described in the Application"
>
> and
>
> "For the purposes of the £145m loan, the Applicant has granted security over the Proposed Licensee's shares (Q8, Supporting Evidence, Security Agreement, Condition 3.2). Enforcement is not subject to the Commission's consent and therefore is not compliant with Licence Condition 16.7(p). The Commission is not currently minded to waive this Licence requirement for any Applicant. On this basis, there is a risk that the current funding package would not be available to the Applicant on the current terms".

596. The Claimants' pleaded case is that the Commission "incorrectly determined that the security granted over the shares in [TNLC] conflicts with the conditions of the Licence and creates a risk that those funds will not actually be available". This was said to have been "based on a misreading of the debt funding documents by the Defendant". No particulars were provided to explain how or why the Evaluators' approach had involved a "misreading" of the debt funding documents.

597. Under cross-examination, Ms Jones explained (in summary) that both she and the legal team had reviewed TNLC's Clarification Response and that (although she had no clear recollection of it), the legal team would have given their view as to how the conditions operated during a "deep dive session" and that the Evaluators would then have formed their own judgment based on that advice. Given the role of the legal team, I am inclined to accept that evidence, which appears to me to fit with the probabilities.

598. I have already observed that there is nothing inappropriate about the Commission obtaining legal advice on technical provisions and I add that it was always envisaged in the Evaluation Manual that legal support would be available to Evaluators. The Claimants have never advanced any form of pleaded case to suggest that the resort by the Commission and its Evaluators to legal advice was wrong or in error. No submissions were made to me orally as to the true legal position on the terms of the Debenture (and nor have the Claimants ever sought to advance such a case in their pleading) and, although the parties addressed the question of interpretation in their written submissions, I do not consider that it would be appropriate for me to determine the point. Suffice to say that I do not consider it to have been manifestly erroneous to conclude (with the benefit of legal advice) that the terms of the Debenture (even when read in conjunction with the associated Facility Agreement) conflicted with the Licence conditions.

599. In my judgment the conclusion arrived at by the Evaluators fell well within the margin of their discretion. I decline the Claimants' suggestion that I should "discount" this reason for failing TNLC's Question 8 response.

TNLC's Inadequate Mitigations (Issue 52(f))

600. The Claimants' pleaded case is that the Commission "determined in error that [TNLC's] proposed mitigations did not adequately address the risks identified by [the

Commission]. In this respect, the Applicant did do so". This pleading was both unparticularised and vague.

601. In the evidence of Mr Martin and Ms Taylor and in their opening submissions, the Claimants sought to provide particulars. They contended that TNLC's bid "effectively mitigated" the risks identified by the FS Evaluators in the FS Moderation Rationale. Specifically, the Claimants said that these mitigations involved (i) the £24 million headroom in the funding; (ii) the £25m Contingency; (iii) TNLC's ability to "flex" its dividend policy (i.e. instead of declaring dividends it could retain cash); (iv) the option of asset financing for capital expenditure; and (v) the possibility of managing costs (to avoid or reduce any cost overrun) and the means to reduce commitments (e.g. in relation to the trust balances through prize insurance). Even in the worst case (Scenario 3) of a cash shortfall of £79 million, this could be managed.

602. In closing submissions, the Claimants' position appeared to have narrowed in that they now identified only three points on which they relied: (i) the £25m Contingency; (ii) the option of asset financing; and (iii) the proposed flexing of dividends. Accordingly I shall deal only with these points in this judgment. I understand it to be accepted by the Claimants that there is no scope to pursue their former complaints in relation to the remaining mitigations.

The £25m Contingency

603. The FS Moderation Rationale explained that in relation to TNLC's proposed mitigations, it had not demonstrated how they "will adequately address the material risk" identified earlier in the Moderation Rationale. This included a failure to demonstrate to the Commission's satisfaction that, in relation to the £25m Contingency:

> "• The total level of funding is adequate given the likelihood that and range of circumstances in which additional funding may be required.
>
> • the funding is available for the full duration of the Implementation Period and Licence Term given that the legally binding commitment to provide the funding applies only for the first three years of the Licence
>
> • its ultimate parent company will have cash available to fulfil the equity call option as and when required".

604. I note that the Claimants make no criticism in their closing submissions of the second and third bullet points set forth above, which, even without the first bullet point, are therefore reasonable concerns to raise in respect of the proposal to rely upon the £25m Contingency as a mitigation.

605. As to the first bullet point, the Claimants direct my attention to Box 2 of the FS Moderation Rationale under the heading "weaknesses" which says this:

> "The Applicant identifies £25m equity call option and £80m of asset financing as potential mitigations (Financial Strength Scenarios Narrative, p. 4) to risks to the ability to fund capital

> expenditure. However, the £25m call option may have already been utilised (as described above) and the Applicant does not satisfactorily demonstrate how the asset finance would be deliverable in practice in a manner which was compatible with the trust security requirements (under Licence Condition 16.7(p))".

606. The reference here to the £25m Contingency having already been utilised is a reference to it being used to fund the Trust Balances. As I understand the Claimants' case it is (i) that where TNLC needed £29.8 million for the Trust Balances (as discussed above) and given that it had an initial cash headroom of £24 million, "the FS evaluators incorrectly concluded that all of the £25 million call option would have been utilised when considering this mitigation" and (ii) that they failed to take into account that other mitigations were proposed in respect of the Trust Balances "which would make it unlikely that the £25m call option would be needed, although it would be there as a fallback option".

607. The Commission took the view (and I find) that the problem with TNLC's reliance upon the £25m Contingency was that it was put forward as mitigation for a number of different risks, as Mr Martin accepted in his evidence. In fact, it was proposed as mitigation for four different risks, notwithstanding that the money could only be used once. These were (i) funding the Trust Balances if the Commission applied the Bid Assumption (as the Commission had confirmed that it would); (ii) cashflow during the Implementation and transition period; (iii) Scenario 3 (where the £25m Contingency was insufficient to meet the £79 million shortfall). Mr Martin accepted in his evidence that there would remain a £29.8 million shortfall in any event, a difficulty which could only be addressed if the Commission allowed TNLC to change the parameters for Scenario 3 by taking into account TNLC's statement that 50% of its costs in the Implementation period are contracted costs); and (iv) shortfalls in working capital inflows, where TNLC identified that there would be 1 month out of 120 months that it would need to take mitigating action to maintain the Anticipated Normal Balance – this would involve using the £25m Contingency "if that was the only remedy available".

608. Bidders were required to demonstrate compliance with the Financial Strength Scenarios, whilst taking into account the other risks inherent in the Base Case. As Ms Jones explained in cross-examination: "…if you had to fund the opening trust balances and use the £25 million for that, you could still have portfolio volatility after…and you wouldn't have the funding to manage that, and you could still have a problem with the working capital cash flows". This meant, as the Commission points out, that the same money could not be used more than once for risks which could occur at the same time. The Claimants' focus in closing on the use of the £25m Contingency in connection purely with the Trust Balances does not begin to address this issue and it certainly does not establish that the Commission's approach to the £25m Contingency fell outside the margin of its discretion.

609. Further and in any event, it was plainly reasonable for the Commission to take the view that the mitigations suggested in respect of the Trust Balances were not satisfactory. They included (as I have already said) deferring and negotiating payments with TNLC's suppliers and deferring capital expenditure. I agree with the Commission that this was not a sensible or realistic basis to mitigate cost overruns, particularly by a company bidding for a significant and high profile contract such as 4NL. As the Commission

points out, TNLC could not possibly know whether its suppliers would agree to proposals for different payment terms. Furthermore, non-payment of suppliers' invoices could impact on TNLC's ability to operate the Licence. I reject the Claimants' case that these proposed mitigations "would make it unlikely that the £25 million call option would be needed" just as I reject the submission that the £25m Contingency would be there as a "fall back" option. In circumstances where the £25m Contingency was being relied upon by TNLC to mitigate three other risks, the concern that it would not be available in this scenario was not manifestly wrong. While Mr Martin's evidence was that TNLC considered that "£25 million would be enough to cover all eventualities" and that the headroom in working capital would be sufficient "as a whole", the Commission was entitled to take a different view – that it did so was neither irrational nor unreasonable.

610. In my judgment, the Commission's view that the £25m Contingency was inadequate to mitigate the risks identified was within the margin of its discretion.

Asset Financing

611. TNLC's bid proposed using £80 million asset financing to mitigate the risks arising under Scenario 3. The Evaluators observed in the FS Moderation Rationale that "the Applicant does not satisfactorily demonstrate how the asset finance would be deliverable in practice in a manner which was compatible with the trust security requirements (under Licence Condition 16.7(p))".

612. The Claimants' case in closing appears to be that arriving at this conclusion *without further consideration* was in error. Specifically, they point to the fact that Ms Jones accepted during cross-examination that there could be other forms of asset licensing (such as a leasing arrangement which would not involve any security over assets) and they contend that the Commission erred in failing to explore these options with TNLC, i.e. by way of a Clarification Question.

613. In light of the way the case is now put, I do not understand the Claimants to be challenging the concerns raised by the Evaluators, which, on the evidence were plainly justified: the asset financing mitigation involved no more than preliminary proposals in the form of two non-binding letters from banks which were "indicative only". Furthermore (contrary to the Phase One Feedback) the proposal did not explain how TNLC would implement the asset financing given the restrictions on the grant of security over a Licensee's assets.

614. In my judgment, the Commission was plainly within the margin of its discretion in determining that insufficient evidence had been provided in respect of the proposal for asset finance. There was no requirement that it should seek to explore TNLC's proposals any further. TNLC provided no evidence to the Commission that they might be able to source compliant funding and there was thus no reason for the Commission to think that any further Clarification Question would achieve a more satisfactory response – at the very least it was not unreasonable for the Commission to take that view.

Flexing of Dividends

615. TNLC's response to Question 8 proposed not paying dividends in various instances, including for the purposes of managing working capital requirements in months when shortfalls were forecast. In these months, TNLC proposed that the level of the dividend would be reduced "to ensure the cash balance remains positive with a degree of headroom" and that this would obviate the need to use the £25m Contingency. Generally, TNLC explained that there was flexibility within its financial model "for each annual dividend to be removed, with the funds left to accumulate to the following year end". Mr Martin and Ms Taylor both gave evidence that this was an option to mitigate various risks within TNLC's funding package.

616. The Moderation Rationale identifies that the Evaluators' concern about the proposal to "flex" dividends was twofold: (i) "how [TNLC] will access the dividends during the term of the loan in the event that the dividends have already been paid out"; and (ii) "how it defines sufficiency of cash". This was further explained as follows:

> "However, the Applicant's dividend policy assumes all the available retained profits are declared as dividends (subject to certain criteria), sets a minimum cash balance at zero (unless unused facilities are available) and a 12-month look forward (shorter than the period required by Condition 18 of the Licence) to demonstrate affordability before dividends are paid (Q8, p. 4, Section 8.2.7) (the concept of sufficiency of cash is not defined in the response). Given that dividends are, in the first instance, paid into a blocked account in the parent company (TNLCH) during the term of the loan, where they must be held for 12 months at the discretion of the lenders (Q8, Supporting Evidence, Appendix 2, Condition 22.21), this suggests there is a risk to the ability of the Licensee in practice to adjust dividends and/or remediate liquidity pinch points."

617. The case put by the Claimants in closing on dividends appeared to amount to no more than a subjective disagreement with these detailed points, which, in my judgment, were well within the margin of discretion of the Commission. It was suggested that the concern as to the concept of sufficiency of cash "lacked substance" (albeit that the Evaluators were right to say that TNLC had not defined "sufficient cash") and that holding the dividends in a blocked account was in fact to the benefit of TNLC's lenders. However, Ms Jones explained in her evidence, and I accept, that the Evaluators' view was that even if TNLC decided not to pay dividends there was "still a degree of risk". Evaluators "wanted to understand" what TNLC were proposing, but there was not enough detail. This was a view the Evaluators were entitled to take. The points raised by the Claimants certainly do not add up to a manifest error on the part of the Commission.

618. For all the reasons set out above, I reject the Claimants' case in relation to mitigations. The FS Evaluators identified a number of risk factors in respect of Financial Strength, and they concluded that there was inadequate evidence that the mitigating factors identified by TNLC would be able to address those risks. This conclusion was within the margin of the Commission's discretion.

Conclusion on Financial Strength Q8: TNLC's Application

619. In closing, and without prejudice to its response to each of the pleaded issues, the Commission submitted that TNLC's funding package was patently under-funded and that, accordingly, TNLC's challenge to the detailed Financial Strength Question 8 "is simply fanciful".

620. I need not deal with this in any detail given the outcome of the individual issues identified above. However, I find that TNLC's bid was plainly deficient in two important respects which, in my judgment, materially affected its ability to demonstrate financial resilience and thus to pass Financial Strength:

i) first, if Scenario 3 materialised, there would be a £79 million shortfall in the Implementation Period together with a further shortfall during the Licence Period. Even after using all of the "headroom" in the funding package there would still be a shortfall of £29.8 million (and this failed to account for the fact that some of the money in the "headroom" had also been proposed by way of mitigation for other risks – as explained above). In an attempt to address this position, TNLC proposed a different scenario (claiming that Scenario 3 was not "plausible") whereby the 50% increase in costs assumed within Scenario 3 would apply only to its "non-contractual costs". However, as Ms Jones explained in her evidence, the ITA did not allow Applicants unilaterally to change the terms of the Financial Strength Scenarios. TNLC itself recognised the gravity of the failure to meet the requirements of Scenario 3 in its proposal – it acknowledged that 2 out of 3 of its bank covenants would not be met. Although TNLC proposed mitigations to try to address this situation, these were, as explained above, both unrealistic and speculative. Its proposal of additional external funding was unsupported. Notably, as the Commission points out, TNLC did not seek to mitigate the risk (as presumably it could have done) by proposing the availability of further equity from the N&S Group. There is no explanation in the Claimants' evidence for this.

ii) second, TNLC failed to apply the Bid Assumption such that TNLC had no funding in place to seed the Minimum Reserve Trust Balance of (on TNLC's calculations) £29.8 million.

621. These considerations are relevant to the Modifications Claim and I shall return to them when I come to consider what would have happened in the counterfactual scenario of a 5NLC.

Financial Strength Question 8: Allwyn's Application (Issue 56(b))

622. Allwyn's financial package consisted of a total package of £440 million comprising (i) a Parent Group (SAZKA Group a.s. ("**Sazka**")) Equity Commitment Letter ("**ECL**") of £380 million, supported by £380 million of guarantees provided by a consortium of investment grade rated banks ("**the Bank Guarantees**") and (ii) a five year commercial Revolving Credit Facility ("**RCF**") of £60 million provided by HSBC UK Bank plc. The RCF was intended as a contingency protection to provide "a liquidity buffer for working capital and capex needs". It remained undrawn in the Base Case and most of the Financial Strength Scenarios.

623. In the FS Moderation Rationale, for Allwyn, the FS Evaluators identified various matters which supported a Pass, including under the heading "Deliverability of Funding" that:

> "Although the Applicant is not itself Investment Grade, the Equity Commitment it provides is fully backed by guarantees from nine Investment Grade banks (Q8, Supporting Evidence, Appendices B-T), each of which is itself a Resilient Source of Funds (as defined in the FS Guidance Note) and provides a guarantee direct to the Licensee for the duration of the equity drawdown period.
>
> In practice, the guarantees are not expected to be drawn as the Applicant Group has substantial assets and a track record of market finance raising. The form of the equity funding to the Licensee is expected to be either a subscription of shares or share premium, but the form of funding to be injected by the ultimate parent into the Licensee's immediate parent is not specified. If the Applicant is appointed as the Preferred Applicant, its Resource Availability Statement will need to be clear on the form of equity financing which will be provided to the Incoming Licensee. However, were it to be third party debt, under the Equity Commitment Letter (Q8, Supporting Evidence, Appendix A, p.2, clause. 1.2.3), the advance of such funding would be expressly subject to Commission approval. The Applicant has not identified the sources of funds for the Equity Commitment. In the absence of the Guarantees, these uncertainties could present a material Financial Strength risk, but the existence of the issued Guarantees mitigates any Financial Strength risk which might otherwise arise".

624. The Claimants allege in their pleaded case that the Commission made a manifest error in assessing that Allwyn's response in respect of Financial Strength should be scored a Pass. Specifically they say that the Evaluators made a manifest error in:

> "failing to take account of the deficiencies in [Allwyn's] financing arrangements as part of its Financial Strength response. Evaluators ought to have taken account of the fact that [Allwyn's] equity financing commitment and supporting bank guarantees were inappropriately limited to a short duration, and the funding arrangements themselves were ambiguous and provided no certainty on the nature of the funding between debt and equity, such that serious concerns should have arisen in relation to [Allwyn's] financial strength".

625. In opening submissions, the Claimants provided further particulars, explaining that Allwyn had committed to maintaining an RCF throughout its Licence Period, but that its bank guarantees were only in place until October 2025 and the RCF expired in 2026. However, at trial the Claimants did not put any questions to Ms Jones on the subject of the duration of Allwyn's equity financing and nor did they seek to cross-examine Mr Kleinhampl on the pleaded case.

626. Instead, in closing, the Claimants advanced a different case, namely that Ms Jones' evidence had been to the effect that the guarantees were "key" (because of concerns around the ECL), but that Allwyn's evidence in respect of the guarantees was deficient. The Claimants pointed to a Note completed by "All Evaluators". Under the heading "Guarantees", it said this:

> "Not fails but practically points that the Commission may wish to consider if this applicant is successful.
>
> • It is not clear on the order which the guarantees could be called or will be reduced as the amounts under the Equity Commitment Letter are satisfied by SASKA Group s.a."

627. The Claimants say that this point "did not find its way into the Moderation [Rationale]" and that the Moderation Rationale "discloses no analysis of how the guarantees would be called in practice, and whether the uncertainty as to the order in which they would be called might delay payment or give rise to dispute". The Claimants now contend that "[w]ithout an analysis or adequate analysis of this issue, the FS evaluators were unable to satisfy themselves as to both the deliverability of the funding and the ability of Allwyn to remain solvent during [4NL]".

628. Allwyn submits (correctly) that this new case is not pleaded, that it was not explored with Allwyn's witnesses and that it is unfair to Ms Jones to criticise her evidence in respect of an issue that has never previously been identified. I agree, and I am not prepared to permit it for that reason alone. However, and in any event, there is, in my judgment, no basis on which I could properly conclude that the Commission fell into manifest error in awarding a Pass to Allwyn for Financial Strength in connection with the Fourth FS Criterion (i.e. deliverability of funding).

629. Ms Jones explains in her statement, and I accept, that (as is also clear from the Moderation Rationale), the FS Evaluators identified that the uncertainties around the nature of the funding and debt could present a material Financial Strength risk, but concluded that this was "fully mitigated by the Investment Grade bank guarantees given directly to the Licensee for the duration of the equity drawdown period". Ms Jones' evidence in cross-examination was consistent with this. She confirmed that (although the equity commitment had not been "discarded" by the Evaluators), they had relied upon the guarantees. She explained that "the guarantees…were a way which was allowed under the financial strength guidance notes to demonstrate that the provider was financially resilient to provide those funds" (a reference to Appendix A to the July Applicant Note), that if Allwyn's parent company was unable to pay then the banks were "on the hook" for the money and that they "were there to mitigate the risks that we identified with deliverability of funding".

630. Ms Jones was taken to the "All Evaluators" Note but said she could not recall the point under the heading "Guarantees". She was not questioned further on that Note. She was then taken back to the FS Moderation Rationale and it was put to her that it showed insufficient analysis of the relationship between the equity injection and the guarantees, to which she responded that Evaluators had satisfied themselves that Allwyn could draw on the guarantees if required. Finally it was put to her that absent further analysis the Evaluators could not be satisfied as to "the source of funds for Allwyn's proposal".

She responded "I think we satisfied the source of funds because it was backed by investment grade banks".

631. In light of Ms Jones' evidence, which I accept, there was no manifest error in dealing with Allwyn's financing arrangements. The "All Evaluators" Note, evidencing, as it does, a step on the way to the final decision of the Evaluators, takes matters no further and, in any event, does not record that Allwyn should fail owing to issues with its guarantees. The Moderation Rationale reflects the unanimous view of the FS Evaluators that Allwyn should Pass. Accordingly, as Allwyn submits, it was reasonable for the Commission to take the view that the guarantees were a secure element guaranteeing the availability of the required funds. There is no basis whatever for the Court to intervene. Although the Evaluators did not compare bids, I observe that Allwyn's bid was very different from TNLC's bid – it involved a funding package of twice the amount proposed by TNLC, the vast majority of which (as I have said) was backed by guarantees from investment grade banks.

Financial Strength Question 9: TNLC's Application (Issue 52(g))

632. The Sixth FS Criterion was directly relevant to the assessment of Financial Strength Question 9. It focused on whether the Applicant's supply chain "is of sufficient financial standing that it does not cause a material threat" to the delivery of the 4NL obligations. Ms Severne explained that she understood the word "material" in this context to mean "measurable, quantifiable" and that if a risk was "remote or unlikely to occur" that would not have resulted in a Fail. She also accepted that the requirement in the Sixth FS Criterion for the applicant and its proposed Subcontractor to have "adequate processes, procedures and controls in place to ensure supply chain continuity and minimise any adverse impact on National Lottery operations" did not mean that "any" adverse impact on supply would result in a Fail.

633. The rationale identified in the FS Question 9 Moderation Rationale for failing TNLC was:

> "The Applicant proposes to use Key Subcontractors (Intralot, Carrus Gaming and Leap Limited) that have a high-risk turnover ratio and / or non-prime credit ratings, which together create a risk to the overall financial strength of the supply chain. While the Applicant has set out mitigations for these suppliers, which on a standalone basis have the potential to reduce the risk, it does not adequately demonstrate sufficient financial resilience or how it would ensure that any associated supply chain disruptions would not cause an adverse impact on the National Lottery operations.
>
> 2. The Applicant considers specific risks relating to individual Key Subcontractors, but it does not adequately demonstrate how it would use central monitoring processes and procedures and controls in relation to Key Subcontractors. This creates a risk where there are suppliers with high-risk turnover ratios and non-prime credit ratings".

634. The Claimants' pleaded case identifies no express manifest error in relation to the evaluation of Question 9. Instead it asserts that the Commission determined that TNLC:

> "did not demonstrate adequately sufficient financial resilience in its supply chain, how it would guard against associated supply chain disruptions, or how it would use central monitoring processes and procedures in relation to Key Subcontractors. In this respect, the Applicant did do so".

635. I agree with the Commission that this is an inadequate pleading. It was expanded upon by the Claimants in opening with an entirely new set of allegations. In summary, the Claimants now sought to allege that the Commission's evaluation in relation to three of its Subcontractors (Intralot, Carrus and Leap) was manifestly wrong in varying respects and further that TNLC had in fact provided a full explanation of the processes, procedures and controls that would be deployed in respect of its supply chain and that its contracts with its subcontractors reflected this.

636. I have considerable sympathy for the submission made in closing by the Commission to the effect that it has been unable to deal properly with the Claimants' case on Question 9 in advance of trial, including because, had the case advanced in opening been properly pleaded, the Commission's evidence could have been directed at that case. Looking at Ms Severne's first statement, it plainly does not begin to address the points on which the Claimants now seek to rely. In her second statement, she responds to limited evidence given by Mr Martin about Intralot and to one short point made by Mr Martin in respect of central monitoring processes and procedures, but again it contains very little on the points now raised by the Claimants. To my mind this is extremely unfair and may well explain some of the difficulties encountered by Ms Severne in dealing with the cross-examination. As I have said before, it is not the way in which litigation in this Court should be conducted.

637. On this basis alone, I am inclined to dismiss the Claimants' case on this issue. Furthermore, and bearing in mind TNLC's failure to date to persuade me of the merits of any of its other allegations of manifest error, I can see no purpose in making this judgment longer than is necessary by dealing with the complex and detailed arguments advanced by the Claimants in closing over 12 pages on Question 9. This is the last of the 12 areas in respect of which the Claimants need to establish that they should have passed. Where their case has failed on every other area I cannot see that it is proportionate or necessary to deal further with this issue.

Conclusion on Financial Strength: TNLC

638. For all the reasons I have given, the Claimants have failed to establish that the Commission acted in manifest error in failing TNLC for Financial Strength. I did not understand Issue 57(h) ("the Commission determined in error that TNLC's bid should fail in respect of financial strength") to be a stand-alone issue. The Commission made no such error for all of the reasons I have given.

Financial Strength Question 9: Allwyn's Application (Issue 56(a))

639. Allwyn's Question 9 response addressed its six Key Subcontractors' financial resilience. Of these, only one was identified as "high risk", namely SGI. However,

Allwyn stated that the risks associated with SGI as a sole supplier of technology and logistics (and sole supplier of scratchcards) were mitigated by its financial resilience and its adherence to controls, processes and procedures. Amongst other things Allwyn pointed to the financial circumstances of SGI's parent company, identified the extent to which SGI's business had been resilient through economic cycles and market disruptions, and pointed to the decision to create a stand-alone lottery business, whilst at the same time noting that the stand-alone business would be a global leader.

640. In its Question 9 response, Allwyn also set out its processes, procedures and controls for financial resilience. In her evidence, Ms Severne explained that Allwyn was here "evidencing that they have a process in place to ensure that they are mitigating the risk associated with any supply chain issues and they are also describing how they will avoid the risks associated with the adoption of new subcontractor relationships, how they are going to identify roles and responsibilities in their organisation, to do the checks and balances, to make sure that the risk is reduced…in a professional and controlled fashion". I accept this evidence which appears to me to be borne out by the document. Ms Severne also explained that it was her understanding that these processes, procedures and controls would apply to SGI.

641. Also in its Question 9 response, Allwyn identified its "Licensee continuity planning" in the event of SGI sustaining financial or operational problems:

> "we would be able to replace them efficiently with one of the other major suppliers of similar services. SAZKA group has extensive experience of contracting with and integrating services with all the major alternative suppliers, including IGT, Pollard Banknote, Intralot, Playtech and Neogames. The transition time would vary depending on the scale of replacement and would be 18 to 24 months for a replacement of all services. Through its contract with us Scientific Games International has agreed to be responsible for services to support the transition to another supplier".

642. The Claimants' pleading on this point alleges that Allwyn ought to have failed Question 9 due to risks arising from its Key Subcontractor, SGI. Specifically it alleges that (i) significant risks were identified in the financial strength of Allwyn's supply chain, in particular in relation to SGI; (ii) during the course of evaluation it was identified that Allwyn was relying on a concentration of services from SGI such that there was a risk of overdependence upon that provider; (iii) Evaluators failed to take sufficient account of the plans for the divestment of SGI from its previous owner and the consequences of that for the operational and financial reliability of Allwyn's offer; (iv) Evaluators expressed concerns that the proposed mitigations were unsatisfactory; and (v) Evaluators failed to identify and take account of the fact that SGI's Symphony system (on which Allwyn's solution was based) was merely a "not yet operational concept" and that the information provided about Symphony was only a draft which had yet to be approved. This is alleged to be a "fundamental flaw in the assessment of the bid and a manifest error".

643. In closing, however, the Claimants abandoned some of these complaints (including the last one) and focused on others, namely that the Commission erred (i) in failing adequately to assess the mitigations provided; (ii) in treating SGI's credit rating as a

mitigation for its high risk turnover ratio; (iii) in concluding that SGI was sufficiently financially resilient notwithstanding the fact that it lacked a parent company guarantee; (iv) in determining that an upcoming change in ownership of SGI was not relevant to its assessment of the "strength of the parent" and the availability of support from the wider group; (v) in determining that Allwyn had adequate processes, procedures and controls in place in the absence of any evidence in Allwyn's bid of alternative supply; and (vi) in determining that Allwyn had adequate processes, procedures and controls in relation to scratchcards notwithstanding that SGI was the sole supplier and it would take 18-24 months to replace SGI's services.

644. Once again, I am inclined to the view that this fluid and ever-changing case was also unfair. Again, Ms Severne had not had the opportunity to know how the Claimants' case would be advanced or to address it in her witness statement. Furthermore, while the Commission's closing submissions on this point addressed the case made in opening, the Claimants' closing submissions came up with new and previously unheralded allegations which the Commission's closing submissions did not address. In this sense, the parties' submissions were ships passing in the night and the Court has nothing in the way of written submissions from the Commission on the detailed points that are now being pursued.

645. Once again I refuse to permit the Claimants to rove around in the evidence and come up with a new and unpleaded case in closing. It is unfair and contrary to the requirements of the overriding objective to permit them to do so. However, in this instance, because any one of the points raised in respect of Allwyn could be of significance in the context of establishing that Allwyn should have failed in the Competition, I set out below as briefly as I can my conclusions on the substance of this complaint in case I am wrong on the pleading point.

646. The Moderation Rationale shows significant analysis of the position of SGI, which is described as having a "high" risk level (a reference to its turnover ratio of 122%). Under the heading "weaknesses" is a lengthy section identifying the risks attached to the use of SGI together with various mitigations, including its prime shadow credit rating of AAA (described by Ms Severne as "excellent") "which indicates a strong historical performance", the financial standing of its parent company (£683 million in cash on its balance sheet as at 30 June 2021), the fact that its sale to Brookfield Business Partners, a large investment fund, would create a standalone lottery business "with strong recurring revenue backed by long term contracts" and was therefore "not considered to create any material supply chain risk", and the potential to obtain services from other providers such as IGT, Pollard Banknote, Intralot, Playtech and Neogames. SGI's position as the sole provider of scratchcards is identified as a concern and it is said that "a dual supply arrangement would provide more confidence" given the time it would take to replace SGI. However, the Moderation Rationale also explains that the Commission considers that the weaknesses identified (whether considered individually or in combination) "do not result in a failure of any of the ITA criteria for Financial Strength".

647. I accept Ms Severne's written evidence, which accords with the available contemporaneous documents, to the effect that there was substantial consideration of Allwyn's use of SGI as a Key Subcontractor during the moderation meeting. Ms Severne also points out that Allwyn scored well on five out of six subcontractors and the provision of financial information. Ms Severne observes that Allwyn proposed

mitigations in relation to SGI involving alternative suppliers and parent company support. Ms Severne confirmed in her evidence, and I accept, that the Moderation Rationale reflected the unanimous view of all Evaluators.

648. As I have already observed, Ms Severne's oral evidence was sometimes confused and it was clear that her recollection of the detail (certainly in the absence of sight of the contemporaneous documents) was poor. She appears to have found the questions from the Claimants particularly challenging. However, on careful reflection, I am not inclined to the view that I should therefore find that the Commission fell into error or that, as the Claimants suggest, she was "demonstrably not applying the criteria as she was required to, but instead holding applicants to standards that she herself considered to be important". This was an extremely complex area of evaluation and that process took place more than four years ago. In my judgment, the Moderation Rationale is the best record of the thinking of the Evaluators and it is clear from that record that they gave full and detailed consideration to the risks posed by SGI and to the mitigations advanced by Allwyn in respect of those risks. Ms Severne was of course not the only Evaluator. That numerous detailed criticisms can now be made in light of a lengthy and wide-ranging forensic exercise in cross-examination of a witness who was plainly struggling to recall the detail does not mean that the Commission acted in manifest error in passing Allwyn and I reject the suggestion that it did.

649. Interestingly, when she was taken to the contemporaneous documents by Mr Howard, Ms Severne provided a clear explanation of the basis for the Commission's decision-making at the time. She explained that:

> "…the fact that you have identified lots of your supply chain risks and you have provided lots of detailed mitigations and lots of evidence, per se, doesn't necessarily mean that you would be right for the job, because you may not have the processes, procedures and controls in place, or even the experience and capability to be able to run and manage the very large, high-risk supply chain that would be associated with delivering the National Lottery".

650. She also explained that Allwyn's Question 9 response was "impressive" in identifying a variety of "bespoke tests" to warn of threats to the supply chain (including those arising from SGI). She pointed out that in her view it offered evidence of "procedures and policies that would…reduce any risks associated with subcontractors themselves".

651. I accept this evidence which appears to me to be consistent with the content of the FS Moderation Rationale, in that it reflects the view taken by the Evaluators at the time. Ms Severne explained that it was her understanding that:

> "…Allwyn had demonstrated adequate supply chain financial strength by presenting its subcontractors and their ACVs, and that it had listed adequate mitigations to any of the weaknesses therein, and also that it had identified subcontractors that it might be able to use, in the event of needing to find alternatives. And that it found subcontractors and worked with subcontractors that were of sufficient financial standing, so as not to cause material threat. So in summary it demonstrated that it, Allwyn, was able

> to deliver supply chain of adequate financial strength to support the National Lottery. That was the evaluators' conclusion, based on their process".

652. As Allwyn submits, it is in my judgment clear from a detailed analysis of the contemporaneous evidence that the Commission's decision to pass Allwyn could not possibly be described as irrational or unreasonable. As Ms Severne explained, Allwyn's Application justified a pass because all but one of its Key Subcontractors passed the prescribed metrics. SGI, the sole exception, passed some but not all of those metrics. However it is clear that, after detailed investigation, the Commission concluded (entirely rationally) that this did not pose a material risk in light of SGI's good credit rating, strong historical performance, parent support, strength following a change of ownership, and the potential for services to be obtained from alternative suppliers (described by Ms Severne in her evidence as "major [providers] of software, hardware for running lotteries and gambling businesses"). That investigation included seeking clarification from Allwyn as to the change in ownership, which provided a detailed response on 5 November 2021.

653. In that response, Allwyn explained that the Scientific Games Corporation ("**SGC**") had agreed to sell its global lottery business to Brookfield Business Partners LP, a leading global alternative asset manager with over $625 billion of assets under management. However, it also pointed out that (i) the transaction was not expected to close until Q2 of 2022 (i.e. after the Outcome Notification following the Competition); and that (ii) it was possible that the transaction would not be completed at all (for example because closing conditions were not met), although the working assumption was that it would be completed. The response provided a high level analysis of the impact of the sale on Allwyn's Application, including that Allwyn was "confident" that the transaction would not have any adverse impact on its Application, that assurances had been received from SGC, that the Commitment Agreement with SGI was legally binding and unaffected by the transaction and that it was possible that the transaction might improve SGI's financial strength. The response also provided comfort on transitional arrangements and technology and operations.

654. It seems to me that the criticisms now raised by the Claimants (identified only during the course of trial) ignore the holistic approach that the Commission took to its evaluation exercise. Some mitigations identified by the Commission may have been more or less valuable in terms of the weight to be attached to them based on the available evidence, but overall, the Commission was entitled to form a view as to whether the mitigations when viewed together with all of the other available information (including the existence of appropriate processes, procedures and controls) were sufficient. The Commission took the view that they *were* sufficient and that was within its margin of discretion. There was no tension in considering the issue of parent support alongside the strength of SGI following a sale in circumstances where the sale was not certain and would not complete before Q2 2022.

655. For all the reasons set out above, there is no basis for the Court to interfere in the Commission's decision to Pass Allwyn in respect of Financial Strength Question 9.

Financial Strength Question 9: Camelot's Application (Issue 62)

656. The Claimants' pleaded case is that "Evaluators raised significant concerns relating to the financial strength of Key Subcontractors IGT and Hughes. However, these concerns were not reflected in the final moderation sheet with no further explanation provided. These weaknesses ought to have resulted in the Reserve Applicant being scored as a fail in relation to this area". This is a short and apparently discrete point about a failure to take into account specific weaknesses in the context of the evaluation.

657. That was broadly the way in which the point was advanced in the Claimants' opening submissions, the premise of the complaint being a failure to reflect significant concerns about both IGT and Hughes Network Services Ltd ("**Hughes**") in the Moderation Rationale.

658. In closing, however, the Claimants sought to advance an entirely new case based on the following allegations: (i) that the Moderation Rationale evidences an "adjustment" to Hughes' credit-rating from Ca to Baa – a manifest error because the Commission was turning a blind eye to information relevant to the risk posed by the credit rating and thus the financial standing of Hughes; (ii) that the Commission placed undue weight at Moderation (in manifest error) on Experian reports obtained by Camelot for each of its Key Subcontractors, when the ITA said nothing about the potential for Experian reports to provide satisfactory evidence in relation to subcontractors with sub-prime credit ratings; (iii) that the Commission failed (in manifest error) to consider whether Camelot had proposed adequate mitigation in the form of evidence of the processes, procedures and controls to ensure the financial resilience of Hughes in the event of supply chain disruption; (iv) that the Commission erred in not identifying the absence of evidence of an ability on the part of Camelot to source alternative supply in the event of an issue with Hughes; and (v) that the Commission erred in relying on the availability of alternative suppliers by way of mitigation. In short, the Claimants now contend that "the evidence shows that on a fair and rational application of the ITA, [the Commission] ought to have determined that Hughes was not sufficiently financially resilient to withstand market/financial disruption and Camelot did not have adequate processes, procedures and controls in place to mitigate for this specific risk". Accordingly the Claimants contend that the Commission made a manifest error in determining that Camelot should pass Question 9.

659. I am not inclined to permit this very significant and unheralded expansion to the Claimants' case. Once again, the Commission had no notice of this case and Ms Severne's witness statements (unsurprisingly) do not address these points, beyond dealing generally with the allegation that the Evaluators' concerns about Hughes should have resulted in a Fail. The Court is left in closing with written closing submissions from the Commission which deal with the pleaded case together with some additional points put to Ms Severne in cross-examination, but without any clear understanding of the way in which that cross-examination would be used in closing. The Court has no written submissions from the Commission on the detailed points now raised by the Claimants and there was insufficient time in closing submissions for the Commission to address all of the new points made against them.

660. Nonetheless, because this is a point on which the Claimants rely for the proposition that Camelot should have failed in the Competition, and in the event that I am wrong on the pleading point alone, I must do my best to deal with it.

661. The Moderation Rationale addresses the question of supply chain financial strength, saying this:

> "The Applicant provides information for its proposed twenty-nine Subcontractors as part of its response (Q9, p.5, Section 4). Eleven of its proposed Subcontractors meet the Licence definition for a Key Subcontractor. The Applicant demonstrates that nine of its eleven proposed Key Subcontractors have either a prime credit rating or equivalent level of Shadow Credit Rating. (Q9, Key Subcontractor Financial Strength Template, summary tab). With the exception of IGT UK Limited, all of the Applicant's proposed Key Subcontractors have a low-risk rating in the Annual Contract Value (ACV) to Turnover ratio test (Q9, Key Subcontractor Financial Strength Template, summary tab). IGT UK has a high-risk rating in the Annual Contract Value (ACV) to Turnover ratio test i.e. (82%). This is considered further in the weaknesses identified below.
>
> The Applicant provides up to date Financial Statements and evidence of the credit ratings issued by external rating agencies for its proposed Key Subcontractors.
>
> Based on the above, as well as mitigations in relation to IGT UK (for example, a written pledge of support from IGT plc, dual supply arrangements), the Applicant has demonstrated how the eleven Key Subcontractors are of sufficient financial standing so as to not cause a material threat to the Proposed Licensee's ability to deliver its contractual obligations under the Licence.
>
> The Applicant demonstrates how it proposes to put in place processes and procedures to identify, monitor and address material Key Subcontractors' risks during the Licence Term. It sets out its approach to Sourcing, Supply Chain Risk Management (SCRAM) and Supplier Performance Relationship Management (SPRM) processes (Q9, p.3,7-9, Section 5).
>
> The Applicant provides specific examples where risks have been identified that would be supported by the SPRM processes. The risks set out by the Applicant are substantive in number and relevance. Although the mitigations it provides are brief, the Applicant does include some relevant examples (Q9, p.9, Section 6)."

662. The Moderation Rationale goes on to say that Camelot's Risk Register demonstrates various financial and operational risks that have been considered and how its proposed policies and procedures for supplier selection, governance and management would mitigate these supply chain risks. Camelot had also provided "high level contract terms".

663. Under the heading "weaknesses" the Moderation Rationale identifies IGT and Hughes as both presenting a weakness, albeit that the Claimants now focus solely on the

approach taken by the Commission to Hughes (referred to in the Moderation Rationale as HSNL). The weaknesses in respect of Hughes are recorded as follows:

> "HSNL did not meet the Commission's requirements for a prime credit rating. HSNL is a profitable company with a non-prime shadow credit rating (Q9, Key Subcontractor Financial Strength Template, KS10 tab, E70).
>
> This is due to the quantum of its intercompany creditors. HNSL has an intercompany receivable larger than the creditor and so it has a net intercompany receivable, but the relevant receivable has been not included in the Shadow Credit Rating calculation. At an aggregate level, there is a net lending and net interest income position in 2019. Were this to be reflected in the shadow credit rating template, the rating would move to a prime rating in the Key Subcontractor Financial Strength Template.
>
> In addition, based on the 2020 published audited accounts obtained from Companies House for Hughes Network Systems Ltd, the auditors consider the company to be a going concern, indicating its ability to trade through COVID.
>
> Populating the Key Subcontractor Financial Strength Template, without adjusting for intercompany loans, gives a credit rating of non-prime (Ca). **Adjusting for this**, as outlined above, gives a shadow prime credit rating (Baa).
>
> The Experian Credit Report rating 100 out of 100 indicating it is very low risk.
>
> HSNL has a low-risk rating in the Annual Contract Value (ACV) to Turnover ratio test i.e. 20% (Q9, Key Subcontractor Financial Strength Template, KS10 tab, F25)" (**emphasis added**).

664. The final box of the Moderation Rationale (also under the heading "weaknesses") concluded that:

> "The Applicant identifies key services that it considers to be critical and for these it considers the availability of alternative suppliers or dual supply which mitigates the risk of disruption…
>
> The Applicant demonstrates the historic use of its sourcing and SCRM process as a mitigation against some of the other financial risks, for example pandemics and Brexit (Q9, p.7, Section 5.1.2) …"

665. The Moderation Rationale stated that the weaknesses were not sufficient to result in a Fail. The overall result was a Pass.

666. In her written evidence, Ms Severne explains (as is the case) that concerns the Evaluators had about Hughes were reflected in her own Evaluator Notes and in the

Moderation Rationale. She points out that Camelot scored well on nine of its eleven subcontractors and that its Application "exhaustively laid out the process, procedures and policies necessary and outlines a variety of tools to mitigate any concerns including establishing alternative supply with substitutes".

667. Camelot's Question 9 Application confirms the accuracy of Ms Severne's evidence. Camelot highlighted its "unique appreciation" gained over three Licence Terms of assessing and continuously monitoring financial standing to minimise the risk of disruption to the supply chain. Amongst other things, Camelot explained its three key processes for management of its subcontractors, its use of Supply Chain Risk Management ("**SCRM"**), together with its approach of mitigating disruption risk by managing all Subcontractors through the Supplier Performance and Relationship Management ("**SPRM"**) process. It provided a summary of the standing of each Subcontractor.

668. In the case of Hughes (a Key Subcontractor) it stated that Hughes was:

> "a profitable company whose credit scoring was assessed as 'non-prime' by the Financial Strength Template, due to the quantum of its intercompany creditors. However, HNSL has an intercompany receivable larger than the creditor and so it has a net intercompany receivable, but the receivable is not included in the Financial Strength Template calculation. HNSL is a wholly owned subsidiary; its ultimate parent is Echostar Corporation, listed on the NASDAQ, with a market capitalisation in excess of USD $2bn and for y/e 31 December 2020 EBITDA of USD $617m, Funds from Operations of USD $539m and Free Cash Flow of USD $126m, providing it with resources to support HNSL. We are aware of a number of alternative suppliers for this service in the event of a deterioration in the financial strength of HNSL or its parent group (Experian Credit Report rating 100 out of 100 (Very Low Risk)".

669. From a table setting out key metrics concerning all 29 Subcontractors, it was clear that Hughes was a "Retail Communications Network Provider" and that the value of the proposed contract was £4.6 million. Under the heading "Supply chain resilience: alternative available", Hughes was marked as "Yes", although no details were provided.

670. In her oral evidence, Ms Severne could not recall how the "adjustment" to Hughes' credit rating in the Moderation Rationale had come about, but it was not put to her in cross-examination that the Evaluators had taken the wrong approach to the identification of Hughes' credit rating, much less that the Evaluators had "turned a blind eye" to relevant information. It was also not put to her (or anyone else) that the Commission had placed undue reliance on the Experian reports or that such reliance was non-compliant with the ITA.

671. The Claimants explored with Ms Severne the content of her own Evaluator Note on the subject of Hughes. Her note identified the fact that there was "little evidence of contingency plans to ensure uninterrupted supply to the National Lottery should a Key Subcontractor fail or become insolvent" (a direct reference to the evidence requirements

of the ITA) and it also identified that Camelot had not provided evidence of its ability to "source supply from a different supplier". This, she said in her Evaluator Note, was a Fail risk for Camelot.

672. Ms Severne's observations in her Evaluator Note on this point were not dissimilar to those in the Evaluator Notes of the other two Evaluators, to which she was also taken in evidence. Mr Sanchez identified that although Camelot had referred to the availability of other suppliers "these are not detailed in the response" and he also identified that Camelot had not addressed the ITA requirement to "provide evidence". Mr Morland identified in his Evaluation Note that there was "[n]o direct evidence of mitigation through arrangements of an alternative supplier contract[s] in place, although there is a note that alternative supplier available".

673. The following exchange between Mr Suterwalla and Ms Severne then took place:

> "Q. Okay. So all three of you, the evaluators, had independently identified the same factor which ought to have resulted in a fail for Camelot?
>
> A. No.
>
> Q. Now, can we turn --
>
> A. Unless you can corroborate what you mean by: ought to have resulted in a fail, my Lady. A fail for this particular criteria, a fail for this particular subcontractor relationship, but not in aggregate a fail overall".

674. Ms Severne accepted that Camelot had not identified an alternative supplier for Hughes, but she said this about the Evaluators' conclusions in the final box of the Moderation Rationale (set out above), when it was put to her that they were inconsistent with the Evaluators' Notes on the subject of Hughes:

> "…the box in its entirety references the entirety of the supply chain risk management process, the SCRM. The key process that we were looking for suppliers to evidence, to demonstrate that they would be able to manage their way through the life of the National Lottery.
>
> So the statement at the top recognises that they can identify alternative suppliers and that they do know where to go -- where to look for dual sources of supply, and that they're then able to manage their supply chain and manage the inherent risk associated with it…So it's the two paragraphs go together in telling the story of the evaluators' confidence or giving evidence of the evaluators' confidence in the entirety of the supply chain which, as I mentioned before, is as much about their ability to manage the processes, the procedures and the controls in what is a very volatile and dangerous high-risk environment at the time".

675. In my judgment, this answer (which I accept) once again illustrates the holistic approach that Evaluators took to moderation. I bear in mind that the sole criterion with which the Question 9 Evaluators were concerned was the Sixth FS Criterion which required an assessment as to whether the Applicant's supply chain "is of sufficient financial standing that it does not cause material threat" to the ability to meet the obligations under 4NL and whether the Applicant and its Key Subcontractors "have adequate processes, procedures and controls in place to ensure supply chain continuity and minimise any adverse impact on National Lottery operations due to any potential supply chain disruptions". Consideration of the position of Hughes was only one of a large number of considerations.

676. The evaluation as a whole required a multi-faceted investigation of the proposals advanced by the applicant, the risks identified and the extent to which those risks could be mitigated. I reject the Claimants' submission that the Commission ought to have determined that Hughes was not sufficiently financially resilient to withstand market disruptions, a point that was not put to Ms Severne in cross-examination and is by no means self-evident from the information provided about Hughes in Camelot's proposal. I also reject the Claimants' submission that the Commission ought to have determined that Camelot did not have adequate processes, procedures and controls in place to mitigate the risks identified in relation to Hughes. The Evaluators were best placed to assess the processes, procedures and controls that were in place and it is clear that they considered Camelot's "historic use of its sourcing and SCRM process" to amount to mitigation. There is no basis for the Court to find that that assessment was obviously wrong, irrational or outside the margin of the Commission's discretion.

677. Finally, the Claimants submit that if the Commission had made the determinations about Hughes that they say it should have made, it would follow that "it was not open to [the Commission] to conclude that Camelot's supply chain was of sufficient financial standing to not pose a material threat to its ability to deliver on its contractual obligations". It was not put to Ms Severne that this would be the only logical outcome of a decision that the evidence in relation to Hughes was unsatisfactory and it is clear from her evidence that she would not have agreed with such a proposition. As I understood her evidence, the fact that there was no evidence of an alternative supplier in relation to Hughes was not determinative of the entire evaluation (a point I understand the Claimants to acknowledge in their closing submissions). In the circumstances I fail to see how the Claimants can succeed in their case that the Question 9 evaluation in respect of Camelot should have been scored as a Fail overall.

678. In conclusion, there is no reason to suppose on the evidence that this investigation was not carried out properly by the Evaluators or that they failed to take account of relevant information. All three Evaluators were aware of the absence of details regarding an alternative supplier for Hughes, but it is clear from the Moderation Rationale that they considered that, in light of the content of its proposal, Camelot had done enough to satisfy them as to its overall supply chain strength. There is no basis whatever for the Court to intervene in that determination. It fell within the margin of the Commission's discretion and it was not in manifest error.

Alleged Unequal Treatment (Issues 53 and 63)

679. The Claimants allege in their Particulars of Claim:

i) that "it is apparent from disclosure that, in determining that [TNLC] should fail in relation to Financial Strength, [the Commission] relied on factors that were also present in the applications of Allwyn and [Camelot] and were not taken into account in the same manner or at all" (**Issue 53**); and

ii) that Camelot's funding arrangements included several factors similar to those of TNLC "which were relied on as reasons for [TNLC] being assessed as a fail, but were not raised by evaluators in respect of [Camelot]" (**Issue 63**).

680. This is said to be a breach of the principle of equal treatment and a manifest error.

681. The Claimants provided no particulars of these allegations and (as far as I can see) did not deal with them in their written opening submissions. This led to the Commission expressing the view in their written closing submissions that (at least) issue 63 had been abandoned.

682. During the course of closing submissions, the Commission and the Court queried whether these issues remained live and it was confirmed by the Claimants' solicitors in a letter dated 26 November 2025 that they did. They identified specific paragraphs in the Claimants' written closing submissions in which they said these issues were addressed and so I shall focus on the submissions in those paragraphs in considering the issues. I observe however that, given the absence of anything in the Claimants' opening submissions, the Commission had no means of understanding how the Claimants' case on these issues was being put in advance of closing – an unfair and unsatisfactory state of affairs. Once again, it has left the Court without any written submissions from the Commission on the point.

683. Issue 53 is said to be addressed at paragraphs 191.2 and 192.3 of the Claimants' closing submissions and is now tied to the Commission's approach to the evaluation of Financial Strength Question 9. In those paragraphs the Claimants assert: (i) that the Commission treated TNLC and Camelot differently in connection with the approach it took to the provision of parent company guarantees in respect of Subcontractors; and (ii) <u>if</u> the failure by TNLC to describe the details of potential arrangements with alternative (named) suppliers was a reason to fail TNLC, then TNLC was treated differently to Camelot because Camelot received a Pass even though it had not named or otherwise identified alternative suppliers in its Application (as discussed above in relation to Hughes).

684. TNLC's Financial Strength Q9 proposal included reference to Carrus Gaming, a Key Subcontractor who was to deal with "terminals and supply of spare parts". It provided information about Carrus Gaming, including that the Carrus Group "has provided a company guarantee for Carrus Gaming (see Appendix 22)". Ms Severne's evidence was that she had accepted this as "adequate evidence" of the parent company guarantee. The Question 9 Moderation Rationale (which expressly refers to the parent company guarantee) nevertheless expressed the view that "while the Applicant has proposed some mitigations, it has not adequately demonstrated that [Carrus Group] would be of sufficient financial standing to not cause a material threat…". Ms Severne explained that the existence of the parent company guarantee was treated as a mitigation, although her evidence was somewhat unclear as to why it was not good enough as a mitigation to "move that particular subcontractor to a pass situation". However, she did observe (consistent with the evidence she gave on other issues) that "[t]here were many things

that contributed to the decision of whether or not Carrus was of sufficient financial standing; not just the one mitigation".

685. Ultimately the key point being made in cross-examination was that there had been no analysis of the parent company guarantee. This was not accepted by Ms Severne who explained that:

> "the question: who is the parent that is delivering the guarantee and what is their standing would have influenced the decision".

686. Against that background, I reject the Claimants' case that the Commission erred in "not accepting the guarantee as mitigation" – that was not the purport of Ms Severne's evidence. As she explained, and I accept, the parent company guarantee was treated as mitigation but there were many factors which played into the decision as to whether Carrus Group would be of sufficient financial standing and this was only one. To this extent there is no inconsistency of treatment with the approach that the Commission took to Camelot's sub-contractor, IGT (where the existence of a "12-month guarantee from IGT plc group" which was "also supported in the notes to IGT's audited accounts" was also treated as mitigation).

687. Ms Severne was expressly challenged on what was said to be "inconsistent standards" in relation to the treatment of these two parent company guarantees but she roundly rejected the point:

> "Q…And that's unfair, it's simply inconsistent standards; yes?
>
> A. No.
>
> Q. Okay. And would you like to explain why you say "no"?
>
> A. I say "no" because the fact is that those items had been provided, I agree with that, but the assumption is that there was a pass or a failure which was directly relating to that fact, and my point is that the moderations were done in aggregate and many different aspects were taken into consideration.
>
> So whilst there may have been one criteria which was satisfied identically for two of the applicants, it does not mean or presuppose that the way in which they were treated was not fair…".

688. As Ms Severne went on to explain, "it's to do with the context of that particular mitigation and what surrounds it". I accept this evidence which appears to me to be entirely consistent with the approach Ms Severne took throughout. Accordingly I reject the Claimants' allegation of unfair treatment in relation to parent company guarantees.

689. The second point relied upon by the Claimants under Issue 53 is effectively that a different approach was taken by the Commission to its evaluation of alternative suppliers in respect of the TNLC and the Camelot bids. However, I reject this point, which again fails to understand the complex factual evaluation involved in the Moderation. In any event, as I read the Moderation Rationale for TNLC's Question 9

response, it identifies the availability of alternative suppliers as a positive point, whilst at the same time evaluating as a weakness that "the Applicant has not described the details of potential arrangements with these suppliers". There is no suggestion that the failure to provide those details is in itself a reason to fail TNLC. In so far as Ms Severne's evidence appeared to suggest the contrary, I consider that she was clearly mistaken (she was simply wrong to say that this issue "was noted [as] grounds for failure"). Accordingly I reject the Claimants' submission that there is any inconsistency of treatment here owing to the fact that TNLC was failed and Camelot was passed. I also note that this point was ultimately prayed in aid by the Claimants to support the proposition that the Court should disregard an apparent "absence of potential arrangements" as a reason to fail TNLC. The Claimants cannot have it both ways. I agree that this was not a reason to fail TNLC but that must also mean that there was no inconsistent treatment.

690. Issue 63 is said to be addressed in one sentence at paragraph 162 of the Claimants' written closing submissions. It arises in connection with the evaluation of Financial Strength Question 8, and in particular the approach adopted by the Commission to the evaluation of change of control conditions.

691. Ms Jones was asked about the approach of the Question 8 Evaluators to Camelot's conditional funding. Ms Jones explained that Camelot's funding conditions were substantially different from TNLC's funding conditions and carried much less risk. She could not remember whether the reasoning that had applied to the Camelot bid (i.e. of considering how likely a change of control was) had also been applied to the TNLC bid, although she accepted that it should have been. In any event, she explained (and I accept) that these matters were the subject of detailed discussions including with technical advisers and during moderation.

692. In so far as the Claimants seek to advance a case in light of this evidence that the Commission in fact treated TNLC and Camelot differently (which is not in fact clear from paragraph 162 of their written closing submissions), I reject that case. I do not consider it to be an appropriate inference on the evidence. Aside from the fact that Camelot's funding conditions were plainly very different from TNLC's funding conditions, Ms Jones expressly confirmed in her witness statement that she applied the same evaluation and moderation process to TNLC as she applied to the other applicants and I accept that evidence, which was unchallenged. Her evidence in cross-examination went no further than to say that she could not recall whether the same reasoning had been applied to both TNLC and Camelot. On balance, I find that it was.

693. Further and in any event, it was not expressly put to Ms Jones that the Question 8 Evaluators had treated TNLC and Camelot differently. In the circumstances it is not now open to the Claimants to advance a case of unequal treatment on this basis.

PROPRIETY

694. The requirements for Propriety were set out in the ITA at section 8.1. Applicants were required to demonstrate how their Proposed Licensee would run the National Lottery "with all due propriety" in line with the Statutory Duties.

695. Section 10 of the ITA contained an explanation of the context and requirements, including that operating with due propriety required the Licensee "to demonstrate high

standards of corporate governance" in keeping with the UK Corporate Governance Code. Under Section 10.2, the ITA stated that "as a minimum" an applicant must (amongst other things) "establish an Audit Committee" (10.2.3) and "in order to meet the standard of Best Practice" it must have "adequate policies, procedures and controls in place to manage and mitigate money laundering risks…" (10.2.4).

696. Section 22.2 identified the Questions that Applicants must answer in relation to Propriety. For present purposes, Questions 2 and 3 are relevant:

i) **Question 2**: "Please provide an overview of your proposed corporate structure and describe how you will operate and maintain a system of corporate governance, internal control and risk management that reflects Best Practice".

ii) **Question 3**: "Please describe how you will detect, manage, prevent and report against the risks associated with financial crime, in particular money laundering and terrorist financing".

697. There were 7 Propriety criteria in section 8.1 of the ITA which had to be "demonstrated" if an Applicant was to achieve a Pass. Two are relevant for present purposes:

> "The Applicant must demonstrate all of the below criteria in order to be awarded a 'Pass' for propriety:
>
> • …
>
> • The Applicant's responses demonstrate that the Licensee will comply with applicable laws and Regulations and Directions ["**the Second Propriety Criterion**"].
>
> • …
>
> • The Applicant's responses are aligned to relevant best practice and/or Commission guidance, or propose equivalent measures to the satisfaction of the Commission ["**the Fourth Propriety Criterion**"].

698. An applicant would Fail where:

> "The Applicant has failed to adequately demonstrate to the Commission their ability to deliver against one or more of the above criteria required to Pass".

699. The guidance in section 22.2 of the ITA made clear that the response to Question 2 "…should demonstrate alignment with Condition 22 of the Fourth Licence (Ensuring Good Governance) and the application of the UK Corporate Governance Code to the environment in which the National Lottery operates". Further it identified that "as a minimum" the response to Question 2 should provide an overview of various matters, including:

> "**Audit, risk and internal control**, including how you will adopt a formalised and transparent approach to audit, risk and internal control, ensuring:

> – competency and integrity in financial and narrative reporting
>
> – fair, balanced and understandable board assessments of the Licensee's position throughout the Fourth Licence Term
>
> – appropriate procedures to manage risk and oversee the internal control network
>
> – how your Audit Committee and Compliance and Risk Management Committee will support good corporate governance".

700. Condition 22 of the Licence included provisions in relation to the UK Corporate Governance Code ("**the Code**"), as follows:

> "Corporate Governance Code
>
> 22.2 Other than in circumstances where:
>
> (a) the Licensee has obtained written consent from the Commission that a certain provision is not required to be implemented by the Licensee; or
>
> (b) the Licensee is required to comply with an alternative standard by a Condition of this Licence, the Licensee and each Licensee Subsidiary must comply with the provisions of the UK Corporate Governance Code.
>
> 22.3 For these purposes, the Licensee does not comply with Condition 22.2 by explaining its reasons for departing from the provisions of the UK Corporate Governance Code, unless it has obtained the prior written consent of the Commission to do so".

701. In a Clarification Response to a query raised in August 2021 and sent to all Applicants ("**the August CR**"), the Commission explained that:

> "Conditions 22.2 and 22.3 of the Licence require the Licensee to comply with [the Code] except where, and to the extent that, the Commission confirms in writing that the Applicant does not need to comply with the Code. The Commission accepts that there may be aspects of the Code which will not be applicable, or relevant, to the business of the Licensee, which is why the consent mechanism exists in Condition 22.3".

702. The Commission stated that Condition 22 was part of Propriety and that it would evaluate and decide whether to give its consent (to the particular departure from the Code that was being mooted by the applicant raising the question) on the basis of information provided at Phase Two. The Commission went on to say: "In order to evaluate the Applicant's response to the question at Phase 2, the Applicant will need to provide further information" and it set out what that information should include.

703. The August CR ended by making the following point:

> "The Commission will need to expressly consent to any deviation from the Code (in accordance with Condition 22.3). **This consent can not be provided by the Commission as part of the evaluation of the Application**. The Applicant will, therefore, need to provide a separate additional letter addressed to the Commission setting out this information" (**emphasis added**).

704. It was Ms Pugh-Stanley's evidence, which I accept, that the Propriety Evaluators were aware of the content of the August CR.

705. In a response to a Clarification Question issued to all Propriety Evaluators on 8 December 2025 ("**the December CR**"), the Commission advised that

> "Regarding [condition 22] if there is a realistic chance the Commission would provide consent in life it would be irrational to fail an Applicant for a technical non-compliance during…evaluation".

706. The guidance in section 22.1 of the ITA on Question 3 identified that "as a minimum" the response to Question 3 should (amongst other things):

> "Describe how you will design and implement policies, procedures and controls to manage and mitigate the identified risks and ensure that known or suspected money laundering and terrorist financing activity is identified and reported, including:
>
> – Responsibilities: including, but not limited to, appropriate allocation of responsibility for ensuring that, when appropriate, information or any other matter leading to knowledge or suspicion of money laundering or terrorist financing is properly disclosed.
>
> – Procedures: including, but not limited to, reporting mechanisms, prize pay-out procedures…".

707. The guidance further stated that:

> "The Commission considers that each of the above elements must be satisfied as part of providing the Commission with the necessary assurance that the Licensee will operate the National Lottery with all due propriety".

708. The Evaluators for Propriety were Ms Pugh-Stanley, Jenny Lythgoe and Mark Skinner. Ms Lythgoe was lead evaluator, but Ms Pugh-Stanley provided a witness statement and gave oral evidence. In addition to the training that all Evaluators received, Ms Pugh-Stanley's evidence was that she had spent a year in the licensing team "looking at corporate structures and assessing corporate documentation which was relevant to question 2". Mr Smart, the SRF Evaluator, also attended some moderation meetings for the Propriety evaluation area in order, as Ms Pugh-Stanley explained in her

evidence, to provide advice on the Code. His evidence, as I have said, was not challenged.

Propriety: Allwyn's Application (Issue 59(b))

709. The Claimants submit that the Commission made a manifest error in passing Allwyn in respect of Propriety, Question 2.

710. The Claimants' pleaded case on this Issue is as follows:

> "Each bidder was required to demonstrate high standards of governance in keeping with the UK Corporate Governance code so as to meet the Propriety requirements…Such demonstration was to be provided in response to the bid questions identified in section 22.2 of the ITA. It appears that at a meeting before submission of the Phase Two application, the Defendant told [Allwyn] that there was flexibility in compliance with the said Corporate Governance code, and that strict compliance with that code may not be practicable. Any such advice to [Allwyn] was erroneous and if it was left uncorrected and [Allwyn] was assessed on the basis of such departure from the code's requirements, the bid was assessed in error. On the basis of disclosure it appears that no such correction was made and [Allwyn] was permitted to depart from the relevant Propriety requirements".

711. However, the allegation in this paragraph as to the meeting, the advice alleged to have been given and the failure to correct that advice (albeit not expressly abandoned) was not pursued at trial. Mr Wilson, who attended the meeting referred to by the Claimants, was not cross-examined on the point and the Claimants did not mention it in their closing submissions. In the circumstances, I can see no need to deal with Issue 59(b)(ii) ("Did the Defendant inform Allwyn that [compliance with the UK Corporate Governance Code] was not a strict requirement?").

712. Instead, the Claimants sought to pursue a case which arose only in the statements of case relating to Allwyn. In Allwyn's response to the Claimants' pleading, it asserted that the Code is directed to public limited companies, that Allwyn was a private limited company, that "the tender documents and [the Commission's] practice provided for derogations to be approved as appropriate" and denied that "any of the matters raised were material and/or required any scoring down". The Claimants replied that Allwyn's obligation to comply with the Code was derived from the ITA and the terms of the proposed Licence. They asserted that "[w]hether derogations might have been appropriate and lawful, the failures by Allwyn to comply with the UK Corporate Governance Code both could and should have warranted Allwyn failing to meet the relevant Pass/Fail tests so that its tender could not succeed in the competition". No particulars of these alleged failures to comply with the Code have ever been provided.

713. It was the combination of these pleadings that appears to have been captured in Issues 59(b)(i), (iii) and (iv) which ask (in summary) whether each bidder was required to comply with the Code, whether the Commission assessed Allwyn's Propriety on the basis that it did not need to comply with the Code and, if so, whether that was lawful.

No doubt in light of these issues, Ms Pugh-Stanley addressed in one paragraph of her statement some general points relating to departures from the Code.

714. In their opening submissions, the Claimants explained for the first time that Allwyn's bid departed from the Code in that it did not adhere to the requirements for Audit and Remuneration Committees. They asserted that, absent prior authorisation from the Commission (which they said had not been given), it was a manifest error to pass Allwyn for Propriety. They pointed to Allwyn's failure to meet the Fourth Propriety Criterion relating to alignment to relevant Best Practice and/or Commission guidance.

715. In their closing submissions, the Claimants spent more than 10 pages on this issue, criticising Ms Pugh-Stanley for her oral evidence (notwithstanding that she had no express notice of the points that the Claimants intended to pursue) and making a variety of, in some cases, new (and serious) allegations.

716. Despite the submissions made by the Commission and Allwyn in closing, I am not convinced that I should determine this issue on a pleading point. The List of Issues evidences that the parties well understood that a key issue for the Claimants concerned whether the Commission had acted unlawfully in assessing Allwyn's Propriety on the basis that it was not required to comply with the Code. Both Ms Pugh-Stanley and Mr Smart dealt with the issue (albeit at a high level) in their statements, and I am not inclined to the view that the Claimants should be precluded from advancing the point at trial. I do consider, however, that their extensive criticism of Ms Pugh-Stanley's oral evidence on the grounds of her lack of recall, her allegedly inaccurate reference to documents and the fact that she raised additional points not dealt with in her witness statement, is unfair. Ms Pugh-Stanley was doing her best to respond (some four years after the event) to a searching and highly forensic cross-examination by Ms Hafesji.

717. Turning to the detail of the case as it is now put, Allwyn's Question 2 Application included a request for departure from Code provisions at Q2-4.3 in the following terms:

> "Allwyn will comply with the Code and Best Practice…to ensure robust corporate governance and that we run the National Lottery with all due propriety. As the Code is aimed at public companies, many of the Code's provisions are intended to safeguard shareholders' interests. As Allwyn will be wholly owned by SAZKA Group, which has representatives on Allwyn's board, certain Code provisions are not relevant given our shareholding structure. These include the requirements to have a fully independent Audit Committee and Remuneration Committee…We have submitted with our Application a letter (Appendix C to Question 2 – 'Derogation Letter' not part of page count) requesting the Commission's consent to departures from these Code provisions. In this letter, we explain our rationale for the derogations (in general because provisions intended to protect shareholders are unnecessary for a privately held company) and how we propose to manage any potential conflicts of interest. If the Commission does not consent to our proposed Code departures, Allwyn will take all measures necessary to comply with those provisions".

718. In support of a Pass, the Propriety Moderation Rationale identified that Allwyn "demonstrates alignment with both Licence Condition 22 and the application of the UK Corporate Governance Code to the environment in which the National Lottery operates". After setting out some evidence supporting this proposition, the Moderation Rationale went on to say this (clearly a reference to the passage set out above in Allwyn's Application):

> "However, the Applicant indicates that it intends to depart from the UK Corporate Governance Code in respect of the Audit and Remuneration Committee, and that it intends to request the Commission's consent for this departure (Provisions 24 and 32). The Commission will consider the merits of any request for consent when it is made and will have regard to the relevant considerations and information at that time
>
> The Applicant has set out the rationale and an associated risk in the Risk Register as well as an appropriate mitigation in the event that the Commission does not provide consent (Q2, p.10, Section Q2-4.3, and p.18, Section Q2-6.5) (Risk ID 2.03)".

719. The reference to "Provision 24" is a reference to Provision 24 of the Code which requires that the Board should establish an audit committee of independent non-executive directors, with a minimum membership of three, that the chair of the Board should not be a member and that "at least one member has recent and relevant financial experience".

720. It is accepted by the Claimants that, as a private limited company, not listed on the London Stock Exchange, Allwyn was not required to comply with the Code. However, the Claimants point out that condition 22 of the Licence requires compliance with the Code and that there is no scope for disapplication of the Code absent prior written consent from the Commission. They say that the effect of condition 22 is to disapply the "comply or explain principle" identified in the Code. They point to the Fourth Propriety Criterion which they contend could only be satisfied if an Applicant had demonstrated compliance with the Code or set out "equivalent measures to the satisfaction of the Commission". They rely on the August CR in support of the proposition that while the Commission could not provide consent to a derogation from the Code at the evaluation stage, bidders were nevertheless required to explain how any proposed derogation met the requirements of the ITA. They point out that Evaluators were expressly told in the December CR to consider the likelihood of a derogation being granted when evaluating applicants.

721. Thus the Claimants contend that the Propriety Evaluators were required to assess proposed derogations against the evaluation criteria, particularly where they concerned aspects of the Application which formed part of the minimum response from bidders (as was the case in relation to the audit committee). They rely on Ms Pugh-Stanley's evidence to assert that there was an unlawful failure to assess "a critical aspect of an Applicant's submission against the terms of the ITA".

722. Ms Pugh-Stanley's written evidence, which I accept, is that following discussions between the Evaluators it was agreed that Allwyn should pass for Propriety. The concerns she had expressed in her own Evaluator Notes were either addressed through

the clarification process or those discussions. She records (correctly) that as part of the Propriety evaluation "we had to assess whether applicants were aligned with the Code and, if not, to identify the risks of any departures from the Code as part of our evaluation". She then explains that:

> "Where applicants were proposing to depart from the Code, my recollection is that they needed to explain which provisions they were proposing to depart from and why, what alternative approach they were proposing and could request consent from the Commission for the proposed departure from the Code. I think that there was a derogation process whereby applicants wanting to ask for the Commission's consent to depart from the Code had to write to the Commission. As evaluators, we were not responsible for agreeing whether or not consent would be given to an applicant for any departures from the Code; that was dealt with separately by the Commission".

723. Mr Smart's unchallenged evidence explains that he recalls a "long debate" at moderation about Allwyn's proposed departure from the Code (which as I understand it involved an audit committee with a slightly different make-up from that required under Provision 24 of the Code), including "how critical or not" that departure was and whether mitigations could be put in place. He explains that the conclusion of this discussion was that "the proposed departure was not critical and the Evaluators decided that [Allwyn's] transparency regarding this point was sufficient to allow it to pass". I understand the reference to transparency to be a reference to the fact that Allwyn had set out the rationale for the proposed derogation and an associated risk in the Risk Register (as stated in the Moderation Rationale). The Evaluators plainly also identified that there were relevant mitigations because the Moderation Rationale expressly records the existence of "an appropriate mitigation in the event that the Commission does not provide consent".

724. In her oral evidence, Ms Pugh-Stanley explained that there was a flexibility regime built into the Code and that the wording of the Licence and ITA reflected that flexibility in that it recognised that there might be circumstances in which strict compliance with the Code is not practicable. Departures from the Code, with the Commission's consent, were thus allowed for in the ITA and in the Licence.

725. She also explained that the Evaluators had been told by the Commission that they should not evaluate the derogation letter (which she did not read as it was outside the page limit for the Application) as that was a separate matter for the Commission:

> "The guidance that we had been given by the 4NL commercial team was that we should review the proposal, review what was in question 2 and flag any risks to question 2 and then it would be for the Commission later, if someone was the incoming licensee, to review the actual formal request for code departures and approve or reject those as necessary".

726. Pausing there, this appears to me to be supported by the August CR, which made it clear that while an evaluation as described by Ms Pugh-Stanley and Mr Smart in their evidence would take place at Phase Two, consent to a proposed derogation could not

be provided by the Commission as part of the evaluation stage. Although the Evaluators therefore did not determine the ultimate merits of the proposed derogation, they did discuss, as Mr Smart confirms, the extent to which it was "critical" and whether there were mitigations in place.

727. Looking at the detail of Allwyn's Application (which Ms Pugh-Stanley confirmed that she had done), I find that this can only have involved a discussion of the nature of the derogation proposed, as disclosed in the Application, together with the mitigation identified in Q2-4.3. This is plainly a reference to the final sentence of Q2-4.3 set out above. The discussion must also have involved Q2-6.5, namely a section of the Application dealing specifically with the audit committee which (as Ms Pugh-Stanley explained) makes clear "what the audit committee will be doing, how they propose to do it and how often they'll be meeting and who will be on that as well [as] who will be invited to join". It also says that: "On the Start Date of the Fourth Licence Term, the Audit Committee's membership will comprise two independent non-executive directors…and one director representing SAZKA Group…who has the requisite recent and relevant experience" – this is the derogation that Allwyn seeks.

728. I also consider that it is reasonable to infer, given that Ms Pugh-Stanley had reviewed the whole proposal, that Evaluators would have had in their minds other relevant aspects of Allwyn's proposal relating to corporate governance. This is in any event clear from the evidence set out in the Moderation Rationale in respect of the conclusion that Allwyn had demonstrated alignment with Licence Condition 22 and with the Code.

729. I reject the Claimants' case that it was irrational to pass Allwyn in these circumstances. In particular (and having regard to the key points made by the Claimants in their lengthy submissions on this point):

    i) I do not read the December CR as requiring Evaluators to "evaluate" whether there was a realistic chance of the Commission providing consent to any particular derogation sought, as the Claimants contend. Aside from anything else, I do not see how Evaluators could sensibly be expected to carry out such an assessment in light of the terms of the August CR. Indeed, the August CR had made clear that the information from an Applicant supporting its derogation request was to be included in a "separate additional letter" which was not part of the Application – and thus not to be considered by the Evaluators. This is in fact the approach that Allwyn adopted, providing a separate letter (not considered by the Evaluators) which expressly cites the August CR guidance and sets out in detail its justifications for seeking a derogation from the requirements of Provision 24 of the Code, including pointing out that the Commission has waived compliance with that provision for Camelot under the Third Licence.

    ii) It was expressly put to Ms Pugh-Stanley that the December CR "says you need to make an assessment as to whether there's a realistic chance", to which her answer was:

> "It doesn't say that. It doesn't say that we needed to make that assessment, it just says that it would be irrational to fail someone if there was a realistic chance".

iii) This is consistent with Ms Pugh-Stanley's evidence that "we were told it wasn't up to us to grant those code waivers. We were looking for risks. We weren't assessing whether there was a realistic chance that they would be granted". Reviewing this in light of her written evidence (and the evidence of Mr Smart), it is plain that the Evaluators understood that they had to assess whether applicants were aligned with the Code (in accordance with the requirements of the ITA) and, if not, to identify the risks of any departures from the Code. Inherent in that process was the need also to look for mitigations to any identified risks.

iv) The Claimants criticised Ms Pugh-Stanley because they said that she had confirmed on a number of occasions in her oral evidence that she had been given specific guidance that Evaluators should not evaluate proposals to derogate from the ITA. I consider this criticism to be a mischaracterisation of Ms Pugh-Stanley's evidence. Ms Pugh-Stanley said that it was the task of the Evaluators to review the proposals (including proposals to derogate) and to flag any risks. Her evidence as to the guidance that had been provided focused on the fact that the Evaluators had received guidance (as they had) that it was not for them to determine the request for consent ("it wasn't up to us to grant those code waivers"). The August CR is clear that that is a matter for the Commission. Furthermore, the Moderation Rationale itself records this state of affairs in terms: "The Commission will consider the merits of any request for consent when it is made and will have regard to the relevant considerations and information at that time".

v) The Claimants sought to suggest that it was odd that Mr Smart made no reference to the guidance referred to by Ms Pugh-Stanley in his evidence and suggested that "if the guidance Ms Pugh-Stanley now refers to was clearly given to and understood by all evaluators at the time, it is surprising that Mr Smart has no recollection of it". This is also unfair. Mr Smart dealt in his statement at a high level with the Claimants' very general and unparticularised allegations. Importantly, as I have recorded above, he was the adviser on the Code, and (as his statement makes clear) as SRF Evaluator, he had reviewed all applicants' Risk Registers. It was his evidence that the discussions at moderation had involved considering whether compliance with the Code was "critical" – which I understand to mean evaluating the information provided by Allwyn in its bid as to the proposed derogation and considering the risks. The conclusion, as he says, was that the departure was "not critical". The Moderation Rationale itself expressly records the Evaluators' (and also, I infer, Mr Smart's) understanding that it was for the Commission to consider the merits of the request for consent.

vi) I reject the Claimants' case that Ms Pugh-Stanley accepted that she had failed to evaluate derogations against the criteria in the ITA. The evidence to which I have already referred shows plainly that this is exactly what the Evaluators in fact did. The Claimants imply in their closing submissions that Evaluators failed (as they should have done) to consider "the specific nature and extent of Allwyn's derogation from the Code extremely carefully", but I reject that submission. Aside from Mr Smart's evidence, the reference in the Moderation Rationale to Q2-6.5 of the Allwyn Question 2 Application shows that Evaluators focused specifically on a detailed section of the Application entitled "Audit

Committee" which plainly addressed the "minimum" evidence requirement in the ITA to explain "how your Audit Committee…will support good corporate governance", as well as identifying the proposed make-up of the Audit Committee. I note that the preceding section of Allwyn's application (Q2-6.4) deals with "Internal Audit" and explains the intention to appoint an Internal Audit Director who would be "independent free from interference from Allwyn's Executive team or the departments under audit". The Internal Audit Director would report directly to the Audit Committee (an arrangement that appears to be accepted by the Claimants as a "safeguard"). I infer that this section would also have been reviewed as part of the Evaluators' overall assessment of Allwyn's Question 2 Application.

vii) Importantly, the Claimants chose not to test or challenge Mr Smart's evidence. Accordingly I do not consider that it is open to them to submit (as they do in their closing submissions) that the proposed departure from the Code was "highly significant", that the existence of an independent audit committee is "the most important component of the various control mechanisms that exist", or that the Evaluators had failed to understand the nature of that departure – if this was a case they wanted to advance they should have cross-examined Mr Smart on his evidence that the Evaluators had concluded that the departure from the Code was "not critical".

viii) I reject the Claimants' attempts in closing to minimise the significance to the evaluation of Allwyn's proposal that it would "take all measures necessary to comply" with the Code if it did not receive consent from the Commission in respect of its proposed departures. The Claimants suggest that this could not have been sufficient to "adequately demonstrate" compliance with the Fourth Propriety Criterion because it provided no evidence as to what exactly would be done. In cross-examination it was suggested to Ms Pugh-Stanley that the Commission could not have known "what qualifications" any new members of the Audit Committee might have. To my mind, however, this misses the point and fails to appreciate that the requirement for evidence in the ITA must be seen in its proper context. Where the proposed derogation simply involved the make-up of a committee (and in particular the replacement of a SAZKA member with appropriate financial experience with an independent member with appropriate financial expertise), I reject the suggestion that it was irrational to have regard to a confirmation that, if necessary, Allwyn would take <u>all measures</u> necessary to comply. When the question about the qualifications of any replacement member was put to her, Ms Pugh-Stanley was very clear: "[w]e didn't know that but the applicant was saying that they would comply with the Code". A little later she explained that she "would take that to mean that they would appoint someone to that committee as required by the Code". In my judgment it was within the discretion of the Evaluators to take this view and to regard this as a mitigating factor: compliance with the Code would also mean compliance with the Fourth Propriety Criterion.

ix) Ms Pugh-Stanely said this in cross-examination: "the Code…allows for departures, the licence allows for departures, the ITA allows for departures, so it's not irrational for us to pass someone and for there still to be departures". Ms Pugh-Stanley was taken through the detail of Allwyn's Question 2 proposal

during her cross-examination by Mr Howard and the following exchange then took place:

> "Q…let's look at it today, having now been taken through the Allwyn bid, having been reminded of the terms particularly of question 2-4.3, is there any basis on which you consider you should have failed Allwyn?
>
> A. No."

730. In all the circumstances, I reject the suggestion that the Commission acted irrationally or outside the scope of its margin of discretion in scoring Allwyn as a Pass for Propriety Question 2. I consider this to deal with the points raised in Issues 59(b)(i) and (iii). Dealing specifically with issue (iv), the Commission did not act in breach of its duties of transparency, equal treatment or non-discrimination in passing Allwyn on Propriety. I observe that it is clear from Camelot's Moderation Rationale that it too identified an intention to depart from the Code in a number of respects, including Provision 24. There is no allegation of unlawful or irrational conduct in relation to this aspect of Camelot's bid.

Propriety: Camelot's Application (Issue 60)

731. The Claimants submit that the Commission made a manifest error in passing Camelot in respect of Propriety, Question 3.

732. The Claimants' pleaded case on this Issue is that the Commission made a manifest error of assessment in awarding Camelot a pass, "[i]n particular (although not exhaustively):"

> "(a) Propriety: Concerns raised by evaluators, including in relation to anti-money laundering and terrorist financing do not appear to have been considered in detail and appear to have been dropped without explanation. These concerns, individually or collectively, ought to have led to [Camelot] failing in relation to propriety".

733. In their written opening submissions, the Claimants took a different tack. They identified two possible Pass/Fail risks identified by Ms Pugh-Stanley in her own Evaluator Notes which it said she had been right to identify because they failed to meet the Second and the Fourth Propriety Criteria in the ITA. It was no longer suggested that these comments had been "dropped" without explanation. Instead, the Claimants focused only on the second comment (to the effect that there was a lack of clarity around the allocation of responsibility for the disclosure of information around money laundering and whether the proposals complied with best practice), accepting that it had been identified as a weakness in the Moderation Rationale but asserting that this in itself was a manifest error because the Fourth Propriety Criterion required the response to be aligned to relevant Best Practice.

734. This is plainly an entirely new case, previously unheralded and unpleaded. Ms Pugh-Stanley's evidence dealt only with the question of whether concerns raised by the Evaluators had not been considered in detail and had been dropped without explanation. At the time of preparing her statement she had no understanding that the focus would

be on concerns that she had raised or that it was being suggested that the manifest error was relying on one of those concerns as a weakness rather than as a reason to fail Camelot.

735. I consider that this should not be allowed. The issue that the Claimants now seek to explore has not been pleaded and it has not been included in the List of Issues. Even the Claimants observe (in a footnote to their written submissions) that Issue 60 "is not pursued in the formulation contained in the LOI". Ms Pugh-Stanley has had no notice of it and has therefore not addressed it in her evidence. Once again she is (unfairly in my judgment) the subject of considerable criticism from the Claimants, not least because it is said she had "come prepared to refer to a document" which was not referred to in her statement. But this must be seen in the context of an entirely new case being advanced for the first time in opening submissions. I fail to see how or why Ms Pugh-Stanley can be criticised for attempting to respond to that new case upon entering the witness box.

736. The Claimants suggest in closing that it was enough for them to assert in their pleading a manifest error in awarding a pass and to say "[i]n particular (although not exhaustively)". In other words, that the use of the words "although not exhaustively" somehow permits them to run any case they wish at trial. This is not the way that pleadings work. Parties are entitled to know the case they must meet at trial and the insertion of words that suggest that there may be other matters on which a party will later wish to rely is nowhere near good enough to achieve this end. Had the Claimants wished to run a different case, it was incumbent upon them to seek permission to amend from the Court.

737. Even if I am wrong on the pleading point, I would have rejected the Claimants' case on this issue in any event.

738. Under the heading "weaknesses" in the Moderation Rationale at Box 6, the Evaluators observe that "[t]he Applicant does not demonstrate who would be responsible for reporting known or suspected money laundering or terrorist financing activity". They go on to set out some extracts from Camelot's Question 3 Application including:

i) "…a nominated person is not mandatory [but] this responsibility will be allocated to the Fraud Investigation Team, which functionally reports to the CFO, with a dotted reporting line to the Chief Information Security Office"; and

ii) "The Fraud Investigation Team will consult with the Legal Team, and having done so will advise the CFO (the Executive Team member accountable for the management of financial crime) whether it is appropriate to submit a Suspicious Activity Report (SAR) or potentially a Defence against Money Laundering (DAML) to the NCA".

739. The Evaluators then say this:

> "Best Practice is that the nominated officer role should be vested in a person or persons in order to provide protection to staff where they have reported known or suspected money laundering or terrorist financing activity to that person or persons. The

> Applicant does not describe how its approach aligns with Best Practice".

740. Ms Pugh-Stanley's clear evidence, which I accept, was that she and the other Evaluators understood Camelot's Question 3 Application overall to be identifying Camelot's CFO as its nominated person. She had come to the view that this "could have been clearer" but she explained that "she was left with the impression that it would be the CFO that would be the nominated officer and that's a consensus view that we all came to". I do not consider this impression to be inconsistent with Ms Pugh-Stanley's Evaluator Note, as suggested by the Claimants and I note that the Claimants did not suggest that this impression was inconsistent with the Notes of the other Evaluators and nor did they seek to draw my attention to those notes. Ms Pugh-Stanley went on to say that she would have liked Camelot's response to be clearer but:

> "…we were left with the impression that it would be the CFO and that there weren't grounds to fail that applicant, so it could have been clearer but that's not to say that it was completely unclear".

741. I accept this evidence and I consider that this was a view that the Evaluators were entitled to reach based on the material available to them. Whilst it is true that it is difficult to see how the Moderation Rationale reflects this approach and while that has given me pause for thought (not least because of the guidance in *Gestmin*), nonetheless I do not consider Ms Pugh-Stanley to have been dissembling about this. When it was put to her at the end of her cross-examination by the Claimants that it was very clear that Camelot's response was not aligned to Best Practice and that this is in fact what had been decided by the Evaluators (contrary to Ms Pugh-Stanley's evidence) and that accordingly Camelot should have been failed, she responded "No, that's not correct". I accept that evidence. I note also that the Moderation Rationale states only that Camelot "does not describe how its approach aligns with Best Practice".

742. The Commission was acting within its margin of discretion in taking the view that it was to be inferred from the content of Camelot's Application that its nominated officer would be the CFO – the extracts from Camelot's Question 3 Application referred to in Box 6 of the Moderation Rationale point out the role of the CFO. This would meet Best Practice. Ms Pugh-Stanley explained (and I accept) that this was nevertheless listed as a weakness because it raised "areas that we would want to know more in" but she explained (consistent with the explanation in the Moderation Rationale) that "something can be a weakness and not be a fail".

743. I do not consider this to have been a manifest error.

OVERALL CONCLUSION ON THE ALLEGATIONS OF MANIFEST ERROR

744. Notwithstanding the detailed Phase One Feedback provided by the Commission, TNLC failed PPI, PPF and Financial Strength for a wide variety of reasons and they trailed far behind Allwyn and Camelot in their scores on the five Business Plan Areas. They also proposed a higher (less competitive) OSS than the other bidders. As the Commission points out, these proceedings have therefore not been brought by a bidder which lost by a small margin and TNLC has faced significant obstacles in trying to overturn its final position in the Competition. Out of deference to the Claimants' arguments I have (for

the most part) dealt with each of their (many) challenges, but, in the end, these have come to nothing.

745. For all the reasons I have given, the Claimants allegations of manifest error fail. Overall I consider that the Commission conducted a rigorous, methodical and fair process which resulted in rational conclusions which it was entitled to reach. Applicants had numerous opportunities to seek clarification and information from the Commission as to the process and evaluation criteria, including the opportunity to submit Phase One Applications for feedback. The Evaluators had a significant margin of appreciation in undertaking the scoring exercise against each Question in the ITA – and that is particularly so given the complexities of the evaluation exercise required in the Competition. Although the Claimants may disagree with decisions made by the Evaluators, there is no basis for a finding that the Evaluators failed entirely to identify relevant matters, that they relied upon matters that should have been extraneous to the ITA or that they made some other clear error in the evaluation exercise.

746. In the ordinary case, one might expect manifest error to be easy to spot, certainly once all the relevant information is available to a claimant about the decision-making process. That these Claimants have been forced to reformulate (and often to reinvent) their case at every opportunity throughout this trial, including in closing submissions, is, in my judgment, a strong indicator that there is really no basis whatever for their claim of manifest error or, indeed, therefore, for the intervention of the Court.

CONFLICT OF INTEREST

The Legal Framework:

747. Regulation 35 CCR 2016 is concerned with ensuring that Contracting Authorities take appropriate measures to prevent, identify and remedy conflicts of interest arising in the conduct of concession contract award procedures, so as to avoid any distortion of competition and to ensure the transparency of the award procedure and equal treatment of all candidates and tenderers. As the Claimants submit, this is a vital part of conducting any public procurement process.

748. Regulation 35 provides:

> "(1) Contracting authorities and utilities shall take appropriate measures…to effectively prevent, identify and remedy conflicts of interest arising in the conduct of concession contract award procedures, so as to avoid any distortion of competition and to ensure the transparency of the award procedure and the equal treatment of all candidates and tenderers.
>
> (2) The measures adopted in relation to conflicts of interest shall not go beyond what is strictly necessary to prevent a potential conflict of interest or eliminate a conflict of interest that has been identified.
>
> (3) For the purposes of this regulation, the concept of conflicts of interest shall at least cover any situation where relevant staff members have, directly or indirectly, a financial, economic or

> other personal interest which might be perceived to compromise their impartiality and independence in the context of the concession contract award procedure.
>
> (4) In paragraph (3), "relevant staff members" means staff members of the contracting authority or utility who are involved in the conduct of the concession contract award procedure or may influence the outcome of that procedure".

749. In *Counted4 Community Interest Company v Sunderland City Council* [2015] EWHC 3898 (TCC) at [32], Carr J (as she then was) observed that "other personal interest" (in the context of the similar provision in Regulation 24 UCR 2016), can be "directly or indirectly held. The phrase is very broad on its face and is clearly intended to add to the other conflicts identified". In [33], she went on to express the view that "[t]he effect of a conflict can be subtle. Nor does the fact that the process was heavily documented rule out an operating conflict".

750. Consistent with my observations earlier in this judgment, I note that Regulation 35(2) CCR 2016 is not replicated in either Regulation 24 PCR 2015 or Regulation 42 UCR 2016 (the equivalent provisions dealing with conflicts). Regulation 35(2) CCR 2016 imports what is effectively a proportionality limit on the measures that need to be adopted by a contracting authority in relation to the prevention or elimination of an identified conflict of interest.

751. The rules applicable to conflicts of interest in the specific context of UCR 2016 were considered by O'Farrell J in *Siemens* at [747]-[767]. She observed (at [748] by reference to *eVigilo Ltd v Priesgaisrines apsaugos ir gelbejimo departamentas prie Vidaus reikalu ministerijos* (Case C-538/13) EU:C:2015:166, [2015] All ER (D) 173 (Mar) at [42]–[44]) that the UCR 2016 imposed on HS2 a positive obligation to investigate, identify and remedy any conflicts of interest:

> "[44] Thus, if the unsuccessful tenderer presents objective evidence calling into question the impartiality of one of the contracting authority's experts, it is for that contracting authority to examine all the relevant circumstances having led to the adoption of the decision relating to the award of the contract in order to prevent and detect conflicts of interests and remedy them, including, where appropriate, requesting the parties to provide certain information and evidence."

752. At [749]-[752] she went on to apply by analogy the test for apparent bias at common law, namely that of the fair-minded and informed observer:

> "[749] It is common ground that the reference to any interest which might be perceived to compromise the impartiality and independence of those involved in the Procurement raises the test of the fair-minded and informed observer by analogy with the test for apparent bias at common law.
>
> [750] The common law test for apparent bias was formulated by Lord Hope (citing Lord Phillips of Worth Matravers MR in *Re*

> *Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700, [2001] ICR 564) in *Porter v Magill* [2001] UKHL 67, [2002] 1 All ER 465, [2002] 2 AC 357 at [102]:
>
> > 'The court must first ascertain all the circumstances which have a bearing on the suggestion that the [decision maker] was biased. It must then ask whether those circumstances would lead a fair minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the [decision maker] was biased.'
>
> [751] The 'fair minded and informed observer' is a person who reserves judgment until both sides of any argument are apparent, is not unduly sensitive or suspicious, and is not to be confused with the person raising the complaint of apparent bias: *Helow v Secretary of State for the Home Dept* [2008] UKHL 62, [2009] 2 All ER 1031, [2008] 1 WLR 2416 per Lord Hope at [1]–[3]; *Almazeedi v Penner* [2018] UKPC 3, [2018] 2 WLUK 600, [2018] All ER (D) 163 (Feb) at [20]; *R (on the application of Good Law Project) v Minister for the Cabinet Office* [2022] EWCA Civ 21, (2022) 200 ConLR 57, [2022] PTSR 933 at [64]–[65].
>
> [752] The fair-minded and informed observer does not act on the basis of first impressions or preconceptions but considers the evidence carefully, distinguishing between what is relevant and irrelevant, having particular regard to the specific factual circumstances: *Gillies v Secretary of State for Work and Pensions* [2006] UKHL 2, [2006] 1 All ER 731, [2006] 1 WLR 781 per Lord Hope at [17]".

753. At [753] O'Farrell J observed that the Court should have regard to admissible evidence about what actually happened in the course of the decision-making process. At [754] she concluded that:

> "As set out in *Virdi v Law Society* [2010] EWCA Civ 100, [2010] 3 All ER 653, [2010] 1 WLR 2840 at [38]:
>
> '… The ultimate question is whether the proceedings in question were and were seen to be fair. If on examination of all the relevant facts, there was no unfairness or any appearance of unfairness, there is no good reason for the imaginary observer to be used to reach a different conclusion.'"

754. I consider these observations to be equally applicable to Regulation 35 CCR 2016 and I did not understand there to be any suggestion to the contrary from the parties. I would add that "all the relevant facts" are not restricted to facts that would have been apparent at the time of the decision or to publicly available information, but include all the circumstances which have a bearing on the question of whether there was a conflict, including facts ascertained on investigation by the Court (see *Re Medicaments and related Classes of Goods* (No 2) [2001] 1 WLR 700 at [83]; *Virdi V Law Society* [2010]

EWCA Civ 100 at [47] and *R (Good Law Project) v Minister for the Cabinet Office* [2022] EWCA Civ 21 at [82] ("***Good Law***")). Furthermore, the matters to be considered include any explanation given by the decision-maker as to his or her knowledge or appreciation of the relevant circumstances, what was in his or her mind and what he or she knew or did not know. Where such an explanation is proffered, the question for the Court is whether or not the fair minded and informed observer would consider that there was "a real danger of bias notwithstanding the explanation advanced" (see *Howell and others v Lees-Millais and others* [2007] EWCA Civ 720 at [7]).

755. It is common ground that the Commission had to "take appropriate measures" pursuant to Regulation 35 CCR 2016 to prevent conflicts of interest and that Regulation 35(2) provides that these measures "shall not go beyond what is strictly necessary". It is also common ground that these words import the exercise of a margin of discretion by the Commission when deciding what measures are appropriate and what is "strictly necessary". The Regulations do not seek to regulate the minutiae of what "appropriate measures" may be or the circumstances that must be taken into account in deciding what is "strictly necessary" – these are matters for the contracting authority exercising a rational judgment in the context of the performance of its duties. The extent of the margin of discretion is wide (see *R (All the Citizens) v Secretary of State for Digital, Culture, Media and Sport* [2022] 1WLR 3748 at [60]).

756. I also did not understand it to be controversial that it is for the Claimants to establish: (i) the existence of an actual or perceived conflict of interest; (ii) that the Commission failed to take appropriate measures pursuant to Regulation 35 to identify, prevent or remedy such conflict; and (iii) that the existence of the conflict caused loss and damage to the Claimants – in other words, it affected the outcome of the Competition (see *Siemens* at [766]-[767]).

757. In closing, Mr Toledano suggested that (although it is not controversial) the principle at (iii) above does not apply to the way in which the Claimants put their case here, because that case "is all about Allwyn's failure to notify and what the GC should have done about that. It is not about the impact of the conflict on the decisions". I confess that I am not sure that the distinction that Mr Toledano was seeking to make was correct. There must be a causative link if the Claimants are to be entitled to a remedy (see Regulation 52(1) CCR 2016) and the link that I understand is alleged in this case is that the outcome of the Competition would have been different because the Commission should and would have disqualified Allwyn had it acted properly in dealing with the alleged conflict.

Rules of the Competition relating to Conflicts

758. The Commission had a Conflicts of Interest Policy ("**the COI Policy**") requiring it to ensure that all persons and/or entities (defined as a "**Person**") engaged and/or employed by the Commission relating to the Competition "comply, and procure that any persons engaged by any Person comply" with this COI Policy. It defined a conflict of interest as any situation or circumstance which "could, or could reasonably be perceived" as a problem or give "the appearance of a conflict of interest". It stated that "conflicts of interest need to be managed carefully". It required Declarations of Interests from all Persons.

759. Section 6.16 of the ITA expressly dealt with Conflicts of Interest in the following terms:

> "Any conflict of interest or potential or perceived conflict of interest that may arise in connection with the Competition (whether in relation to an Applicant, the Commission or otherwise) and including, without limitation, any issue that may result in a distortion of competition or the unequal treatment of participants in the Competition, that arises or becomes apparent at any time must be fully disclosed to the Commission through the portal as soon as such conflict or potential conflict arises or becomes apparent, accompanied by the Applicant's proposed mitigating steps".

Rothschild (Issues 6-9)

760. The Claimants allege that, in relation to the involvement of Rothschild in 4NLC, the Commission failed to take adequate steps to prevent or resolve the appearance of a conflict of interest in breach of Regulation 35 CCR 2016 and/or its obligations of transparency and/or equal treatment. Issues 6 and 7 raise numerous factual questions to be determined in the context of this main allegation. An allegation of actual conflict of interest has been withdrawn.

761. Issue 9 raises the question of whether this allegation is time-barred. I shall return to Issue 9 once I have examined the substance of the main allegation.

Rothschild's role in the Competition (Issues 6(a) and 8)

762. Rothschild was a member of the Crown Commercial Services Framework Agreement ("**the CCS Agreement**") and was awarded a contract by the Commission on 19 July 2019 for "the supply of provision of advice on and execution of specific corporate transactions" in respect of the Competition. Mr Edward Duckett was named as the Supplier's Representative with overall responsibility for the supply of the Services and signed the Contract Award letter. The Services identified in the Contract Award letter included:

> " – to oversee the project management of the 4NLC and co-ordinate the key workstreams;
>
> …
>
> - to advise and recommend on potential bidders to approach;
>
> - to assist in stimulating demand among potential bidders;
>
> …
>
> - to lead the financial model workstream;
>
> - to assist in evaluation of bids and suitability of bidders…".

763. During his evidence, Mr Wilson explained that the Services set out in the Contract Award letter were subsequently amended so as to agree a revised role and

responsibilities. Specifically, he explained that the requirement to assist in the evaluation of bids and the suitability of bidders was changed because "Rothschild weren't there to assist in the evaluation of bids" and had "no evaluation role responsibility". Instead, Mr Wilson explained that Rothschild "were there to support the Commission in the Commission's evaluation and assessment of suitability". In his witness statement, Mr Wilson said that Rothschild acted as the Commission's financial adviser, including acting as another SMR to the Financial Strength Evaluators, attending moderation meetings for Financial Strength Question 8, and answering queries so as to assist the Evaluators to understand the financial aspects of applicant's bids.

764. Although there appear to be no documents in the bundle reflecting the change in Rothschild's services identified by Mr Wilson, I accept his evidence that the change took place and that Rothschild had the slightly more limited role that he identifies in his statement. This appears to me to fit with (i) the contemporaneous documents reflecting the process of evaluation; (ii) the evidence of Ms Jones; and (iii) the evidence of Mr Tanner (which I accept) who described Rothschild as the lead financial consultants, retained in the Competition to "offer depth of experience in the supporting assessment of the overall finances and to assist the Commission with the market engagement". Mr Tanner also explained that although Rothschild were extensively involved in the process (and in fact had access, as the Commission admits in its Defence, to substantial amounts of information relating to the Competition, including the Applications), as far as he was aware they made no decisions about the content of the ITA, they never "sought to influence the scoring of Applications and they never had any other decision making role on any aspect of the Competition".

765. In light of this evidence, I find that Rothschild was not a decision maker in the Competition (**Issue 8**). Its role was, as Mr Wilson accepted, "substantial and multi-faceted" and it had an influence on evaluations only in the sense that it occupied a supporting role (which included answering Clarification Questions and facilitating discussions on Financial Strength Question 8). However, Rothschild was not involved in evaluating the Applications and it was not put to Ms Jones that Rothschild (or indeed Mr Duckett) had in fact influenced the result of the Financial Strength Q8 Evaluations in any way.

766. I did not understand the Claimants seriously to challenge this characterisation of Rothchild's role. Their case in closing was that they could not "put it as high as saying that [Rothschild] were a decision maker", but that it matters not whether Rothschild was carrying out the evaluation or was merely playing a supporting role, because in either event it could not perform its role impartially and without an appearance of bias in circumstances where it had "an ongoing advisory relationship with one or more of the bidders or had done so in the recent past".

Rothschild's relationship and/or involvement with Allwyn (Issue 6(b))

767. Mr Dlouhý confirmed in his evidence (and I accept) that he had started meeting with Rothschild in around 2015 and that since that time the main point of contact at Rothschild for Allwyn had been Mr Duckett. Prior to the Competition, Mr Dlouhý would hold "usually like two to three meetings, regular meetings per year" and Mr Dlouhý said that he knew Mr Duckett "as well as the other gaming investment bankers that were focused on the industry".

768. Towards the end of 2017, the Allwyn Group (which I shall refer to as Allwyn) was contemplating an initial public offering ("**IPO**") in order to fund its growth in its existing lottery and gaming markets in the Czech Republic, Austria, Cyprus, Greece and Italy, and to enter new markets. It is not in dispute that in a parallel process, in January 2018, Allwyn engaged Rothschild to help find potential investors to make a minority investment into Allwyn as an alternative to the IPO. Allwyn signed general Terms of Business with Rothschild ("**the 2018 Appointment**"). Mr Dlouhý explained that in the months following this engagement he had "more intense communication" with Mr Duckett than had previously been the case. Allwyn paid Rothschild something in the region of €310,000 over a six month period for its work on the 2018 Appointment, which came to an end when Allwyn decided in October 2018 to put both the IPO and the plans for a further minority investment on hold owing to, amongst other things, the volatility of the market environment.

769. Pausing there, Rothschild's involvement with Allwyn under the 2018 Appointment came to an end around 10 months prior to Rothschild's engagement by the Commission, around 22 months before the Competition was formally commenced (as confirmed by Mr Wilson) with the issue of the SQ, on 28 August 2020, and some 2 years prior to Allwyn submitting its SQ on 2 October 2020. It involved a discrete task and it did not give rise to an ongoing advisory relationship. I did not understand the Claimants to suggest that, on its own, it is sufficient to give rise in the mind of a fair minded and informed observer to any real danger of conflict. Certainly the Claimants have never identified anything specific about that engagement which might lead a fair minded and informed observer to consider that there was a real possibility of the final decision in the Competition being tainted by apparent bias or conflict.

770. In 2019, Allwyn increased its stake in OPAP, the Greek Lottery operator, by making a voluntary tender offer ("**VTO**"). This was a major transaction which Mr Dlouhý confirmed was valued at €2.1 billion. As part of this process, Allwyn retained Rothschild (headed up by Mr Duckett as "deal captain") to advise it in relation to the VTO, pursuant to an appointment letter dated 20 June 2019 ("**the 2019 Appointment**"). Rothschild's role, as described in the 2019 Appointment, involved "acting as a financial adviser to Sazka Group on the introduction of potential co-investor(s)" in connection with the potential acquisition. Mr Dlouhý explained that the role was limited to advising on the so-called "junior" part of the financing – namely €750 million – and involved the provision of various services set out in the appointment letter which Mr Dlouhý described as "the usual scope of investment banking services for a co-investment of this nature". Although the 2019 Appointment was formalised in June 2019, the work began in around April 2019. Once again, Allwyn had "more intense" communications with Mr Duckett and Rothschild during this engagement.

771. It is common ground that Rothschild had carried out all, or most of its work, by 8 July 2019, when the VTO was launched. In fact, Mr Dlouhý's evidence, which I accept, was that he could not recall any work on the part of Rothschild after that date. There is certainly no documentary evidence of any work taking place after that date.

772. The 2019 Appointment stated that Rothschild's remuneration would be on the basis of a success fee of €3 million. In addition, the letter provided for a discretionary fee of "up to €1,500,000" to be paid at the sole discretion of Allwyn based on an assessment of Rothschild's "overall contribution" to the VTO. Rothschild invoiced Allwyn on 5 September 2019 for the sum of €3.25 million because, as Mr Dlouhý said, "their work

was finished". This included both the success fee and an element of the discretionary fee which Mr Dlouhý thought must have been the subject of prior discussion with Mr Duckett. Allwyn paid this sum on 22 October 2019. Mr Dlouhý explained that Allwyn was prepared to pay part of the proposed discretionary fee because Rothschild "provided good advice and delivered good work", albeit "not stellar work". He rejected a suggestion that Allwyn's willingness to pay part of the discretionary fee was "in order to maintain a good relationship with [Rothschild] for the purpose of future potential projects" ("No, absolutely not") and pointed out that the additional amount paid to Rothschild was quite low by comparison with discretionary fees paid on other projects. I did not understand the Claimants to challenge this evidence and I accept it.

773. There is a dispute between the Claimants and the IPs as to whether Rothschild's engagement formally came to an end when the VTO was announced on 8 July 2019 or when it closed on 5 November 2019. Mr Dlouhý accepted it was the latter although the IPs contend that this acceptance was extracted on the basis of a misleading representation of the contract terms. However, I do not consider that I need make a decision on this. As a matter of fact, I have found that Rothschild ceased to carry out any further work on the VTO project after 8 July 2019. The fair minded and informed observer would recognise that, after that date, there was no ongoing advisory relationship between Rothschild and Sazka Group/Allwyn in connection with the VTO. The only contact appears to have involved discussions relating to the payment of Rothschild's invoice which, I find, did not involve Allwyn seeking to obtain any ongoing advantage or "special relationship" with Rothschild in connection with future projects.

774. Accordingly, I reject the suggestion that there was any meaningful overlap in terms of substantive work between Rothschild's engagement by Allwyn under the 2019 Appointment and Rothschild's engagement by the Commission (commencing on 19 July 2019).

775. Mr Dlouhý described a meeting that he had attended between Allwyn, Mr Wilson on behalf of the Commission and Rothschild on 1 October 2019 designed to encourage Allwyn to become interested in 4NLC. Mr Dlouhý thought that Mr Duckett had been present acting on behalf of the Commission. He did not recall any discussion about the 2019 Appointment or the fact that it had not yet formally terminated (assuming that to be correct) or that the fee had not yet been paid. He expressed the view that this was not information that needed to be provided by Allwyn to the Commission because, as at the date of the meeting, Allwyn had not decided whether to take part in the Competition. I agree. The meeting on 1 October 2019 appears to have been an exploratory meeting only at which Rothschild was acting for the Commission and actual ongoing work on the VTO between Rothschild and Allwyn had come to an end. There is no suggestion that there was any discussion at the meeting which might have engaged a duty on the part of Rothschild or Allwyn to disclose a conflict.

776. Mr Dlouhý recalled another meeting between himself and Mr Duckett over coffee in March 2020 together with (after the Covid lockdown) phone and video calls, also including other team members and sometimes involving the Commission. Mr Dlouhý described Rothschild's role at this time as marketing the Competition and talking to potentially interested parties, including Allwyn. In unchallenged evidence (which I accept) he said that these discussions focused on the process of the 4NLC and that he

did not discuss Allwyn's bid with Rothschild, whether as part of these discussions or at all.

777. Sometime in the first half of 2021, Rothschild contacted Allwyn with an investment opportunity which involved a small UK company that was developing a lottery-like product. There was a call between Rothschild and Allwyn, but Mr Dlouhý could not recall whether he had been on the call and he could not be sure whether Mr Duckett had been involved. In any event the matter appears to have gone no further. Mr Dlouhý explained that bearing in mind the timing of this call, he was certain that he had given instructions to all his team members that they should not discuss with anyone, including Rothschild, Allwyn's bid. Mr Dlouhý also said that he did not recall discussing any other opportunities with Rothschild during the Competition. I accept this evidence.

778. In the Autumn of 2021, there was a discussion between Mr Dlouhý and Mr Duckett concerning Allwyn's proposed acquisition of Scientific Games. Mr Dlouhý explained that it had been important to Allwyn to ensure that the Commission was properly informed of its plan to acquire Scientific Games, given that they were one of Allwyn's Key Subcontractors, in advance of any public announcement. Mr Dlouhý thought that it was therefore entirely proper to explain the plan to Mr Duckett, given Mr Duckett's background as an investment banker: "he understands very well how does this transaction work, and I found it appropriate to call him because I knew that he will pass the message and explain it, and there will be nothing lost in the translation in terms of the description of the transaction". He confirmed (and I accept) that the conversation involved no wider discussion of Allwyn's application or of its bid strategy. There is no evidence of any further contact between Allwyn and Rothschild in relation to the acquisition of Scientific Games.

779. Following the conclusion of 4NLC, regular meetings between Allwyn and Rothschild have resumed, just as meetings with other bankers operating in the gambling sector have taken place.

780. During the course of 4NLC it is common ground that a fund (R-Co Target 2024 High Yield) operated by Rothschild European Asset Management Practice ("**RACM**"), a separate Rothschild & Co entity based in Paris, held an investment in a bond issued by the SAZKA Group. The fund was established for third party investors, not RACM monies. This was confirmed in a letter from Simmons & Simmons on RACM's behalf on 20 January 2025. Mr Dlouhý confirmed in his evidence, and I accept, that he had not been aware of this prior to these proceedings but that his finance team had looked into it and understood that RACM was holding 2-2.5% of the €300 million total bond size. It appears from an article in the Byline Times that this investment constituted just over 2% of the Fund's net asset value.

781. It is common ground that Allwyn did not declare any conflict of interest during the Competition. It was Mr Dlouhý's firm view that there was no such conflict. The Claimants say that this was a clear breach by Allwyn of the requirements set out in section 6.16 of the ITA (set out above) and that the Commission would have been entitled to treat the failure to identify a conflict as a matter requiring disqualification under the provisions of section 6.14 ITA. I shall return to this in a moment.

Was there a Conflict of Interest by reason of Rothschild's involvement in the Competition and with Allwyn (Issue 6(c))

782. Although the Claimants' original pleaded case was that the matters set out above amounted to an actual conflict of interest, it was accepted in closing that the highest the case could be put was that they gave rise to a perceived or apparent conflict of interest.

783. In my judgment, there was not even a perceived or apparent conflict of interest within the meaning of Regulation 35 CCR 2016 for the following reasons:

i) I have already rejected the possibility of the 2018 Appointment alone giving rise to a perceived conflict of interest.

ii) The evidence establishes that the 2019 Appointment was substantively complete in early July 2019, prior to Rothschild's engagement by the Commission and over a year before Allwyn entered the Competition by submitting its SQ in the 4NLC in October 2020. Even if one takes the date of payment by Allwyn of Rothschild's invoice, that was still almost a year before Allwyn submitted its SQ. Rothschild's role in the 2019 Appointment was limited to ordinary investment banking services. Although the Claimants' pleaded case asserted that Rothschild's role "would necessarily have involved Rothschild expressing positive opinions about Allwyn's/SAZKA in general and in particular in respect of its financial strength", no such case was put to Allwyn's witnesses and I did not understand the Claimants to pursue such a case in closing.

iii) The fair minded and impartial observer, knowing all the facts, would not regard the mere involvement by Rothschild in the provision of investment banking services around a year before Allwyn's entry into the Competition as giving rise to a real possibility that the final decision in the Competition was tainted by apparent bias. The Claimants made no attempt to identify any direct or indirect financial, economic or other personal interest which might be perceived to compromise Rothschild's impartiality and independence. While I accept that the effect of conflict can be subtle, it is unlikely to be enough in a case of alleged conflict simply to assert a recent prior relationship – there must be something about the nature of that prior relationship or the interests of the parties involved that gives rise to an actual or perceived conflict. Here there is no evidence that Allwyn's relationship with Rothschild (including its relationship with Mr Duckett) went beyond the relationship it might have with any banker in the gambling sector. Allegations made by the Claimants in their original pleaded case which might have supported their case on the existence of an appearance of conflict (including in relation to the involvement of Mr Duckett) have not been pursued.

iv) The Claimants suggest that the potential conflict is "obvious" when one considers the circumstances of the meeting of 1 October 2019. They say that this meeting took place at a time when Rothschild was retained by both the Commission and Allwyn and "was looking for payment from both, including a discretionary fee which Allwyn had no obligation to pay". However, in my judgment, the fair minded and impartial observer would note that work on the 2019 Appointment had completed, discussions around the level of the discretionary fee had taken place and a final fee had already been agreed, albeit

not paid. The fair minded and impartial observer, knowing that the discretionary fee was a reflection of Rothschild's work on the project, that it was somewhat lower than might be expected and that the payment had not been made with a view to maintaining a relationship in connection with any future work, would not regard the payment of that fee as creating a real possibility of conflict. Furthermore, the fair minded and impartial observer would appreciate that the 1 October 2019 meeting was no more than an exploratory meeting with a potential bidder. The Competition was not underway, the ITA had not yet been published, and Allwyn had not yet expressed any interest in taking part. Allwyn was not in fact required to provide a conflict of interest declaration in the Competition until October 2020. I fail to see how the fair minded and impartial observer would perceive any apparent conflict in October 2019.

v) The meetings between Rothschild and Allwyn in March 2020 and thereafter were plainly meetings conducted in the context of Rothschild's attempts to interest Allwyn in taking part in the Competition. They do not evidence any ongoing commercial relationship between Allwyn and Rothschild which might compromise Rothschild's impartiality and independence in the context of the Competition. Mr Dlouhý explained in his evidence (and I accept) that other bidders had similar interactions with Rothschild – as is entirely unsurprising given the role that Rothschild was playing in marketing the Competition. Once again, I fail to see that the fair minded and impartial observer would perceive any real danger of bias by reason of these meetings.

vi) The contact between Allwyn and Rothschild in the first half of 2021 appears to have been a one off call in which Rothschild merely raised an investment opportunity – it went no further and Allwyn had put in place procedures to ensure that there would be no discussions with Rothschild about Allwyn's bid. I accept that there were none and the fair minded and reasonably impartial observer would not therefore consider this call to give rise to a real possibility that the Competition was tainted.

vii) The contact between Allwyn and Rothschild in the Autumn of 2021 is not pleaded by the Claimants. This is of importance because, as the Court of Appeal made plain in *R (Good Law Project) v Minister for the Cabinet Office* at [60], a claim to bias, actual or apparent, is a serious allegation and should be determined "by reference to the pleaded case, not least because that is the case to which evidence will be directed". Accordingly, I do not consider this to be contact on which the Claimants are entitled to rely. In any event, I agree with the Commission that it involved nothing improper or inappropriate and certainly nothing that could give rise to a perception of a conflict of interest. Allwyn wished to pass information to the Commission and chose to do that via Rothschild. It was put to Mr Tanner that if he had known about this contact at the time he would have been concerned about the nature of the relationship between Allwyn and Rothschild, to which he responded: "Well I'm not entirely sure that I would, because what I can see here is Mr Dlouhý contacting Mr Duckett with a view to giving the Commission some information. Now that seems to me perfectly legitimate". He did not accept the proposition that this is even something that he would have wanted to investigate. I consider that the fair minded and impartial observer, having access to all the facts, would not

regard this incident (assuming it had been properly pleaded) as raising any real danger of conflict or a perception of conflict.

viii) As for the investment in the SAZKA bond, the fair and impartial observer would also not consider that to give rise to any potential conflict. I agree with the IPs that the factual position (which I have set out above) is analogous to the pension fund considered in *Siemens* at [757]-[759]. The fact that Mr Tanner very fairly conceded in cross-examination that he would have wanted the Commission to assure itself on this issue had it known about it at the time does not mean that, having regard to the standards of the fair minded and impartial observer, it did in fact present a real danger of conflict or the appearance of conflict in the context of the Competition.

ix) In considering more generally the engagement between Rothschild and Allwyn, the fair minded and impartial observer would appreciate that Rothschild did not have any say over the terms of the ITA and had no final decision-making role in the Competition (as accepted by the Claimants in closing). In opening submissions, the Claimants said that the Court would need to test very carefully the Commission's assertion that Rothschild was not a decision maker (apparently recognising the significance of the point). However, following the deletion of various allegations, they seek to rely in closing, as the Commission submits, on some unspecified allegation of influence. But that is not enough. There is no evidence at all that the outcome of the Financial Strength Q8 Evaluation was in any way influenced or affected by Rothschild acting in its role as SMR and that point was not even put to Ms Jones (the witness best placed to deal with any such allegation). It seems to me that this is a very important factor to bear in mind in evaluating the Claimants' claim. It is difficult to see why the fair minded and impartial observer would think that there was a real possibility that the final decision was itself tainted by apparent bias in such circumstances and I find that he or she would not.

784. Further and in any event, even if the Commission did act in breach of Regulation 35 CCR 2016 in not taking appropriate measures to prevent, identify and remedy conflicts of interest, any such breach was not material in the sense that it would not have affected the outcome of the Competition. Rothschild was not a decision-maker, it did not evaluate any Applications, and it was not involved at all in the evaluation of PPI, or PPF (both of which TNLC failed). The Claimants have not established that they have suffered loss. That alone is sufficient to dispose of this aspect of their claim.

Should Allwyn have been disqualified? (Issue 7)

785. Given my conclusion that there was no appearance of a conflict of interest, I find that there was no reason for Allwyn to have notified the Commission of the existence of any conflict, or indeed to propose any mitigating steps. Accordingly there was also no breach of section 6.16 of the ITA.

786. In this regard I note that the ITA was not published until 26 October 2020, albeit that applicants were required to provide a conflict declaration when submitting their SQ responses by 2 October 2020. By this time, as pointed out above, it was over a year since Allwyn had been substantively engaged in an advisory relationship with Rothschild and eleven months since the final payment had been made by Allwyn to

Rothschild in relation to its work on the 2019 Appointment. It is not alleged that Rothschild had any particular knowledge about the detail of Allwyn's bid which might have led an impartial observer to express concern about the danger of conflict.

787. During the course of his cross-examination, Mr Wilson confirmed that if there was a conflict, he would have expected Allwyn to disclose it. He was then asked to assume various facts about the relationship between Allwyn and Rothschild (including that it was ongoing when the Commission engaged Rothschild) and he agreed that on the basis of those facts there was at least a perception of conflict. He was then reminded of section 6.14 of the ITA which provides the Commission with the right to disqualify an applicant for breach of the ITA and it was put to him that "had Allwyn not complied with its obligations concerning notification of conflicts" the Commission would have had a discretion to disqualify it from the Competition. He agreed with that proposition, and he went on to agree that it was "certainly possible" that "absent a sufficient explanation from Allwyn for its lack of disclosure of the situation" the Commission would have disqualified Allwyn.

788. This evidence was relied upon by the Claimants in closing but given that it was not premised on the facts as I have found them, I can place no weight on Mr Wilson's answers. I have found that there was no appearance of a conflict and nothing for Allwyn to declare.

789. Accordingly, there were no grounds on which the Commission could lawfully have disqualified Allwyn.

Did the Commission take appropriate steps to identify, manage or remedy any conflict of interest in the context of its engagement of Rothschild? (Issue 6(d))

790. In circumstances where I have found that there was no appearance of conflict, I cannot see that this issue takes matters any further. The Claimants' pleaded case is that in failing to take adequate steps to prevent or resolve a conflict of interest or apparent conflict of interest, the Commission has "undermined the integrity of the overall 4NLC process and allowed Allwyn an unfair advantage". Where there is no such conflict, this pleading does not even begin to get off the ground. Questions such as whether the Commission should have been alerted to a conflict, should have investigated a conflict, was entitled to rely on Rothschild's conflicts of interest policy and the terms of its contract, including whether the Commission should have obtained individual declarations from Rothschild employees, are no longer relevant.

791. The Claimants' only reason to pursue these issues, as is clear from their closing submissions, is to support a counterfactual case to the effect that if the Commission had carried out its own investigations it would have discovered the past engagements between Allwyn and Rothschild and "would have undoubtedly expected a disclosure from Allwyn about the …potential conflict" and that since there would have been no satisfactory explanation from Allwyn "the only rational conclusion" that the Commission could have reached was disqualification. This line of reasoning appears to me to be flawed for all the reasons I have already given.

792. In any event in case it is important, I find that:

i) Clause 41.1 of the CCS Agreement required Rothschild to:

> "take appropriate steps to ensure that neither the Supplier nor the Supplier Personnel are placed in a position where (in the reasonable opinion of the Supplier) there is or may be an actual conflict, or a potential conflict, between the pecuniary or personal interests of the Supplier or the Supplier Personnel and the duties owed to the Authority under the provisions of this Framework Agreement".

ii) Clause 41.2 of the CCS Agreement required Rothschild promptly to notify and provide reasonable particulars to the Authority of any conflict arising or that "may reasonably [have] been foreseen as arising".

iii) In a response dated 10 May 2019 to the Commission's original invitation to tender, Rothschild confirmed that:

> "in respect of the financial advisory services Rothschild & Co will provide to the Gambling Commission relating to the transaction, it has, as of the date of this response to the invitation to tender, no contractual arrangements with other companies that would in the reasonable opinion of Rothschild & Co, acting in good faith, represent a conflict of interest in relation to the transaction".

iv) It also stated that it maintained a "robust process of evaluating conflicts of interest with respect to potential and existing mandates" and that at the point of engagement it would satisfy itself that "there are no apparent conflicts of interest as a consequence of accepting the mandate". It confirmed that during the period of engagement it would review new mandates against its duties under its own conflicts of interests policy, including, where appropriate, drawing any conflicts to the attention of the Commission.

v) Rothschild never provided individual declarations and it made no formal declaration of a conflict of interest to the Commission in respect of its work in the Competition, whether as at the date of its engagement or at any time during the course of the Competition (**Issue 6(d)(i)**).

vi) The Commission was, in my judgment, entitled to rely on the declaration and assurances it received from Rothschild, and it was also entitled to rely upon Rothschild's contract for services as Lead Financial Adviser and its contractual obligations under the CCS Agreement.

vii) There is no requirement under CCR 2016 or otherwise for the Commission to obtain individual declarations from the employees of an entity which it is engaging as a professional adviser and, on balance, I accept Mr Wilson's evidence that the Commission's COI Policy did not apply to an individual company such as Rothschild that was hired as a consultant. Further I reject any suggestion that a contracting authority with the comfort of contractual assurances on conflicts from a company such as Rothschild would need to obtain individual declarations in order to comply with Regulation 35. In my judgment that would go beyond what is strictly necessary to prevent a potential conflict of

interest. That seems to me to be particularly so where Rothschild was not a decision maker.

viii) The Commission had some evidence from Rothschild in its letter of 10 May 2019 and from Allwyn in its Application which might have alerted it to the possibility of a previous relationship between Allwyn and Rothschild and, acting appropriately, Mr Tanner and Mr Wilson both took the view that enquiries should have been made into that relationship. There is no evidence to suggest that the Commission conducted any such enquiries. However, given the assurances it had from Rothschild (and the confirmation from Allwyn that there was no conflict), I do not consider there to have been any breach of CCR 2016 in failing to take that step. Even had the Commission done so, it would not have identified a conflict of interest (for all the reasons I have set out above) and it would not have needed to consider whether to exercise its discretion to disqualify Allwyn.

ix) Indeed when the Claimants raised the alleged conflict in their letter of 18 March 2022, Mr Wilson's evidence was that it was taken "very seriously". The Commission confirmed in correspondence, and I accept, that it had duly discharged its obligation with regard to conflicts of interest. I reject the Claimants' suggestion that the Court should regard this confirmation with scepticism.

Are any of the allegations in Issues 6 and 7 time-barred? (Issue 9)

793. The IPs allege that the claim in relation to conflict of interest was commenced outside the time limit prescribed by Regulation 53 CCR 2016. Regulation 53(2) makes clear that:

> "…proceedings must be started within 30 days beginning with the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen".

794. Regulation 53(6) makes clear that "proceedings are to be regarded as started when the claim form is issued".

795. Here, the claim form was issued on 13 April 2022. It is thus common ground that if the Claimants knew that they had grounds to make a claim in relation to conflicts prior to 14 March 2022, then that claim is time-barred. It is well established that time can start to run before the end of a procurement in relation to earlier breaches (see *Mears v Leeds City Council* [2011] EWHC 40 (QB) per Ramsey J at [70]).

796. A question arises as to the degree of knowledge that is sufficient to start time running. This question was addressed in *Sita UK Ltd v Greater Manchester Waste* [2011] EWCA Civ 156, where the Court of Appeal adopted the test articulated by the Judge below, as follows: "the standard ought to be a knowledge of the facts which apparently clearly indicate, though they need not absolutely prove, an infringement" (per Elias LJ at [26] and [31]; per Rimer LJ at [91]). This will not involve "great detail" because that "would be likely to run counter to the principle that challenges should be indicated swiftly and mounted swiftly" (per Mann J in *Sita UK Ltd v Greater Manchester Waste Disposal Authority* [2010] EWHC 680 (Ch) at [130]). What is needed is knowledge of material

which does more than give rise to suspicion of a breach of the Regulations but there can be requisite knowledge even if the potential claimant is far from certain of success. The Court should assess what the claimant knew, rather than being concerned with what it did not know (see *BromCom Computers Plc v United Learning Trust* [2021] EWHC 18 (TCC) at [16] and [56] ***("BromCom**"*)).

797. As for the issue of constructive knowledge (i.e. whether the claimant should have known of the relevant facts), a claimant will have constructive knowledge if, upon reasonable enquiries, it should have discovered the alleged infringement. However, the Court should be cautious not to impose too onerous a standard on tenderers who do not have actual knowledge of an infringement of the Regulations, and equally, should not require a claimant tenderer to take steps that would be regarded as unreasonable to discover the infringement (see *Matrix-SCM Limited v London Borough of Newham* [2011] EWHC 2414 (Ch) ("***Matrix-SCM Limited***") per Susan Prevezer QC sitting as a deputy High Court Judge at [13]).

798. In *Siemens Mobility Limited v High Speed Two (HS2) Limited* [2022] EWHC 2451 (TCC), ("***Siemens v HS2***") Eyre J considered the standard by which the reasonableness or unreasonableness of particular enquiries or steps is to be judged saying this (at [65]-[66]):

> "65…In *ROL Testing Ltd v Northern Ireland Water* [2015] NIQB 10 Horner J derived assistance in determining that standard from the conclusion of the Supreme Court in *Healthcare at Home Ltd v The Common Services Agency (Scotland)* [2014] UKSC 49, [2014] PTSR 1081. In that case the Supreme Court had said that a test of reasonableness was the application of a legal standard by the court. It held that in the procurement context the standard to be applied when interpreting tender documents and considering their clarity or lack of clarity was that of the notional reasonably well-informed and normally diligent tenderer. Horner J concluded that similarly constructive knowledge for the purpose of challenges to procurement decisions was to be determined by reference to the knowledge which the RWIND tenderer would have possessed in the particular circumstances (see at [12]). I agree. As Lord Reed explained in *Healthcare at Home*, at [12], "the yardstick of the RWIND tenderer is an objective standard applied by the court". It is right that the same standard be used when considering the knowledge which a potential claimant had or should have had when considering how a tenderer would interpret tender documents.
>
> 66. It follows that in considering the enquiries which reasonably should have been made and the inferences which reasonably should have been drawn regard is to be had to the approach of the RWIND tenderer. The answer will inevitably be fact-specific. Much will depend on the circumstances of the particular procurement exercise. It will be necessary amongst other matters to have regard to the subject-matter of the exercise; to the sums at stake; to the nature of the utility or other public body engaged

> in the exercise; to the nature of the potential causes of concern potentially triggering the proposed enquiries; and to the ease or difficulty with which answers can be expected to be obtained."

799. It is common ground that the Claimants knew from an early stage of 4NLC (i) Rothschild's role in the Competition; and (ii) that Allwyn was participating in the Competition, an awareness they had gained from monitoring references to Allwyn in the media. However at the heart of the dispute on limitation is the state of the Claimants' knowledge about the prior dealings between Allwyn (then SAZKA Group) and Rothschild. The IPs say that those prior dealings in relation to OPAP had been in the public domain since 2019 and they rely on two transaction announcements from that time. Both announcements state that Rothschild acted as financial adviser to Allwyn in relation to Allwyn's investment in OPAP, but they contain no other relevant details about the relationship between Rothschild and Allwyn.

800. Further, the IPs submit that the Claimants failed to provide evidence as to their state of knowledge and that it is "overwhelmingly likely" that the Claimants were aware of what was a publicly known and publicised link between Allwyn and Rothschild at an early stage of the Competition. Against that background they say it is not for a bidder wishing to challenge Rothschild's involvement in 4NLC to sit on its hands and raise the issue in correspondence only after it discovers that its bid has failed. They remind me of the words of Dyson LJ in *Jobsin.Co.UK Plc v Department of Health* [2002] 1 CMLR 44 (CA) at [38] who made clear that a tenderer in this position:

> "…faces a stark choice. He must either make his challenge or accept the validity of the process and take his chance on being successful, knowing that the other tenderers are in the same boat. In my view, it is unreasonable that he should sit on his rights and wait to see the results of the bidding process on the basis that, if he is successful he will remain quiet, but otherwise he will start proceedings".

801. The IPs also contend that adherence to this requirement is particularly important in the context of conflicts of interest where the Contracting Authority's obligation is an obligation to put in place "appropriate measures" to combat and remedy conflicts. Finally, they suggest (relying upon *BAA Ltd v Competition Commission* [2010] EWCA Civ 1097 at [50]-[52]) that where a dissatisfied party to a decision making process makes a belated allegation of bias, it is for that party to establish by evidence its unawareness of relevant information. This, they say, the Claimants have singularly failed to do.

802. The Claimants contend that the central elements of their claim only emerged after the outcome of 4NLC. One of those elements was the discovery of the OPAP transaction involving Rothschild and Allwyn. However, they do not have any evidence to say exactly when that discovery was made. That transaction was referred to by Mr Mills in a letter to the Commission of 18 March 2022 in which he asked the Commission to confirm that it had satisfied itself that no member of Rothschild's 4NL team was conflicted or could be perceived as such, because of this link. In closing, the Claimants suggested that this letter "shows that TNLC had then become aware of the bare fact of Rothschild's role in advising Allwyn" but they accepted that Mr Mills' evidence was

to the effect that someone else at TNLC (Mr Roger Walker) had obtained the information and that he did not know when that information had been discovered.

803. I reject the IPs' case that I can properly infer from this evidence that it is "overwhelmingly likely" that the Claimants had the requisite knowledge long before 14 March 2022, or indeed that I can draw any inference from the absence of Mr Walker as a witness. That leaves me with the IPs' submission on the burden of proof.

804. Subject to a point I make below as to constructive knowledge, it does not seem to me that I need to resort to the burden of proof in order to determine this issue. Looking at the Claimants' pleaded case (which must be the appropriate starting point when the Court is considering a time-bar point of this type) there is plainly a second important element to their claim, which relies upon information which it is not suggested was known to the Claimants prior to 14 March 2022. In an attachment to a letter from the Commission dated 8 April 2022, the Claimants were informed that the Commission had relied on confirmation from Rothschild that no conflicts had been identified through their own strict conflicts process. This information plainly fed directly into the Particulars of Claim, which expressly pleads the information contained in the 8 April 2022 letter and then pleads that:

> "By relying on confirmation received from Rothschild, and/or relying on Rothschild's regulated status…the Defendant has failed to take adequate steps to prevent or resolve a conflict of interest or apparent conflict of interest. In failing to do so, the Defendant has undermined the integrity of the overall 4NLC process and allowed the Preferred Applicant an unfair advantage".

805. It seems to me that, whether or not the Claimants knew about the involvement of Allwyn and Rothschild in connection with the OPAP transaction, that in itself was not sufficient to plead out this claim because it told them nothing about the way in which the Commission had dealt with any possible conflict arising from that relationship. Knowledge of a relationship would not, without more, indicate a breach of CCR 2016. It was only when the Claimants were informed that the Commission had relied on Rothschild's own confirmation that they were able to allege a failure on the part of the Commission to take adequate steps to prevent or resolve a conflict, i.e. a breach of CCR 2016. As it turns out, this claim has been unsuccessful (not least because there is no actual or apparent conflict), but the mere fact that the Claimants might have known of the existence of facts which could have given rise to a conflict does not appear to me to be enough.

806. Assuming (for present purposes) that the Claimants were aware of the involvement of Allwyn and Rothschild in connection with the OPAP transaction much earlier than March 2022, should they have discovered that the Commission had relied upon Rothschild's own confirmation in relation to conflicts through reasonable enquiry – in other words, ought they to have known that this was the case? If so, then the burden of proof will become important.

807. On balance, having regard to the enquiries which an RWIND tenderer acting reasonably would have made, I am inclined to think not.

808. The reasonableness of enquiries is a fact-specific question and applying the factors in *Siemens v HS2* at [66], the time bar defence initially appears attractive. The 4NL is a significant and extremely valuable concession contract; the potential bias of a financial adviser to the Commission is a serious cause for concern; and it would have been very easy for TNLC to have raised a query with the Commission (see by way of analogy its MCP complaints made throughout the Competition and the speed with which TNLC in fact raised the query once, on their case, they discovered the issue).

809. However although the RWIND tenderer is "reasonably well informed", it is not expected to know everything in the public domain. It is also not reasonable to expect the RWIND tenderer to allocate its resources during the Competition to searching the internet in the hope of finding potential grounds for bringing proceedings or disqualifying another applicant. The RWIND tenderer cannot be expected to make parallel enquiries in respect of all other known applicants and Commission-side employees and contractors with a view to identifying a potential conflict. That would impose an unnecessarily onerous standard on tenderers (see *Matrix-SCM Limited* at [13]).

810. Assuming for these purposes that the RWIND tenderer had discovered the OPAP press article during the Competition, it contained only a single sentence that "Rothschild & Co acted as a financial advisor to Sazka Group". The revelation of this historic, one-off engagement during the course of the Competition would not, without knowledge of further details, have caused the RWIND tenderer to leap to the conclusion that there was a conflict or that there might have been an infringement of CCR 2016 on the part of the Commission in dealing with that conflict or that it needed to start asking questions. I consider that the RWIND tenderer would have been entitled to assume that the Commission and Allwyn were abiding by the rules of the Competition and that the Commission was complying with Regulation 35. The fact that TNLC (on its own case) decided to investigate the matter after it had discovered that it was unsuccessful in the Competition does not appear to me to shed light on the RWIND tenderer's position during the course of the Competition.

811. In this context I return to the IPs' submission that it is particularly important for a tenderer not to "sit on his rights" in the context of alleged conflict of interest. I agree, but of course a tenderer can only be said to be "sitting on his rights" in circumstances where he has sufficient knowledge to make a challenge. Mere knowledge of a previous relationship between Allwyn and Rothschild (even assuming the Claimants had this knowledge) does not appear to me to be enough to establish either actual or constructive knowledge. The challenge here was made not purely on the basis of the possible existence of a conflict but also on the basis that the Commission had not acted lawfully in dealing with that conflict.

812. Accordingly I consider that (if I am wrong on the central issue of whether there was a conflict) then the IPs cannot defend that claim on the grounds that it is time-barred.

INCUMBENCY ADVANTAGE (Issues 23 and 24)

The Law

813. I did not understand the parties to be at odds as to the relevant law.

814. The principle of equal treatment does not require a contracting authority wholly to neutralise or eliminate incumbency advantage – this is for the obvious reason that any incumbent to a re-retender will invariably have an inherent advantage which has nothing to do with the conduct of the contracting authority (see Case T-10/17 *Proof IT SIA v European Institute for Gender Equality* at [187]). As the Court of Justice said in Case T-345/03 *Evropaiki Dynamiki v Commission* at [70]:

> "…the fact that an advantage may be conferred upon an existing contractor by a running-in phase is not the consequence of any conduct on the part of the contracting authority. Unless such a contractor were automatically excluded from any new call for tenders or, indeed, were forbidden from having part of the contract subcontracted to it, it is inevitable that an advantage will be conferred upon the existing contractor or the tenderer connected to that party by virtue of a subcontract, since it is inherent in any situation in which a contracting authority decides to initiate a tendering procedure for the award of a contract which has been performed, up to that point, by a single contractor. That fact constitutes, in effect, an 'inherent de facto advantage'."

815. Furthermore, as the Court pointed out in that case at [74]:

> "To accept that it is necessary to neutralise in all respects the advantages enjoyed by an existing contractor or a tenderer connected to that party by virtue of a subcontract would, moreover, have consequences that are contrary to the interests of the service of the contracting institution in that such neutralisation would entail additional cost and effort for that institution".

816. Nevertheless, in order to comply with the principle of equal treatment in this particular situation, "a balance must be struck between the interests involved" (*Evropaiki Dynamiki* at [75]) and (at [76]):

> "…in order to protect as far as possible the principle of equal treatment as between tenderers and to avoid consequences that are contrary to the interests of the service of the contracting institution, the potential advantages of the existing contractor or a tenderer connected to that party by virtue of a subcontract must none the less be neutralised, but only to the extent that it is technically easy to effect such neutralisation, where it is economically acceptable and where it does not infringe the rights of the existing contractor or the said tenderer."

817. The above principles were set out and applied in *BromCom Computers v United Learning Trust* [2022] EWHC 3263 (TCC) per Waksman J at [144]-[150].

818. Case T-211/17 *Amplexor v Commission* is an example of a case in which a contracting authority took steps to neutralise an incumbent's advantage by capping the incumbent's recoverable costs at a lower level than the costs of non-incumbent tenderers. Relevant considerations, consistent with the case law referred to above, included whether there

was an economic justification for the discrimination in the light of the principle of sound financial management, whether the measure was arbitrary or excessive, whether it infringed the rights of the existing contractor and whether it promoted healthy and effective competition.

819. In *Evropaki Dynamiki* the Court considered an argument that the European Commission had failed to adhere to the principle of equal treatment because of an alleged delay in making certain technical information available to the tenderers, with the exception of the successful tenderer. It held that, in such a case, the court must examine two questions: first "whether the unequal treatment alleged, consisting in a delay in providing the tenderers other than the successful tenderer with certain technical information, constitutes, as such, a procedural defect in that information that was in fact necessary for the preparation of the tenders was not made available to all the tenderers as soon as possible"; and second, if such a defect is established, whether "but for that defect, the procedure could have had a different outcome". The Court explained that "such a defect can constitute an infringement of the equality of opportunity of tenderers only in so far as the explanations provided by the applicant demonstrate in a plausible and sufficiently detailed manner, that the procedure could have had a different outcome as far as it was concerned".

820. Against that background, the Claimants submit that if a contracting authority seeks to take steps to mitigate an incumbent's advantage so as to achieve what it believes will be a level playing field, for example by requiring an incumbent to take certain steps and measures, then if the incumbent does not take such steps, the incumbent will have obtained an unfair advantage. If the contracting authority then fails to take any steps to address that unfair advantage it will be in breach of its equal treatment obligations. That is what the Claimants say has happened here. I shall need to consider this submission against the background of the evidence.

The VDR

821. It is common ground that the Commission recognised from the outset that Camelot had an incumbent advantage and that it should be neutralised in so far as was reasonably possible (**Issue 23(a)**), although the Claimants contend that this recognition was "only partial". Mr Tanner's unchallenged evidence was that one of the key objectives of the Competition (consistent with the Commission's intention to align with the requirements of the CCR 2016) was to provide a level playing field for both new entrants and the incumbent. This was particularly important because the Commission was operating in a situation where Camelot had been the operator of the National Lottery for nearly 30 years. Mr Tanner explained that the Commission recognised that the overall Competition would need:

> "robustly to offer other Applicants a platform on which to provide strong competition to the incumbent operator…and this would in turn drive financial and other benefits to the National Lottery".

822. One of the steps adopted by the Commission in order to achieve a level playing field involved setting up the VDR to provide information to applicants for the purposes of preparing their Applications. These documents included confidential information about the Competition together with documents derived from Camelot's operation of the

Third Licence. Access to the VDR was regulated by the terms of the Application Process Agreement ("**the APA**") and required the provision of confidentiality undertakings. TNLC signed the APA on 2 July 2020.

823. The APA required applicants not to disclose the material in the VDR outside the preparation of their Application, albeit, in the case of Camelot, there was a requirement to operate a "clean team" (essentially a Competition team that was separate from Camelot's employees working on the ongoing Third Licence). As Mr Tanner explained in his witness statement, the idea behind this was that Camelot's clean team would not receive confidential information and documents from the rest of the Camelot team other than through the VDR. This was plainly a means of seeking to neutralise, in a technically easy way, the advantage that Camelot would otherwise have had from its ongoing access to Third Licence information. As Mr Tanner said, the principle was that all documents used by the Camelot clean team would be available to all applicants in the VDR.

824. The Claimants' pleaded case is that (i) the Commission "failed to ensure or adequately to ensure that all applicants had equal access to information during the 4NLC process". Specifically they point to the redaction of documents in the VDR which had emanated from Camelot and to the delay in the production of material by Camelot and/or the fact that such material was subject to "unnecessary and limiting confidentiality provisions"; and that (ii) Camelot was able to make information available to its bid team before it was made available to other bidders. In respect of the latter, the Claimants' Reply pleads some further particulars about the sharing of information. An additional allegation as to the breach of information barriers by the use of part-time personnel working in both the clean bid team and the team working on the Third Licence has been abandoned.

825. The Commission rejects these allegations. In short, it maintains that it took adequate steps to make information available to applicants and that it acted appropriately in responding to data breaches. In closing, the Commission addressed in detail what it understood to be existing allegations in the evidence as to access to redacted documents, information about the Mystery Shopper Contract, information about the three IGT contracts in the VDR, information about the Watford Leases and an allegation about the Bid Assumption. However, as I understand the Claimants' closing submissions, they no longer seek to advance any of these points.

826. Instead, they seek to rely upon three alleged "data breaches" concerning the use by Camelot's bid team of information that should have been available only to its team working on the Third Licence. They allege a failure on the part of the Commission to act reasonably and proportionately in dealing with those breaches and in neutralising the incumbency advantage and they contend that, accordingly, Camelot obtained an unfair advantage. The Claimants' submissions can best be addressed by dealing chronologically with the alleged breaches. In doing that, it is, in my judgment, important to take account of all the relevant correspondence passing between the Commission and Camelot, as opposed to merely the letters highlighted by the Claimants in their closing submissions. It is only in this way that a full picture of events can be pieced together.

The First Data Breach

827. In advance of the launch of the Competition, on 4 December 2019, the Commission wrote to Camelot setting out the measures it considered Camelot needed to take in order to ensure a level playing field in the Competition. Amongst other things, the letter:

i) Identified Current Licence Confidential Information as "any and all information and knowledge which in any way relates to the National Lottery, of which [Camelot] are aware or directly or indirectly possess or control and which is not in the public domain";

ii) Identified Competition Confidential Information as confidential information regarding the National Lottery made available to potential applicants in the VDR and otherwise;

iii) Required Camelot not to use Current Licence Confidential Information for any purpose other than "running of the National Lottery". It should not be used "in any way in connection with the Competition except to the extent we expressly agree in writing";

iv) Permitted Camelot (if it decided to participate in the Competition) to use Competition Confidential Information for the purpose of the Competition in accordance with the terms of the APA;

v) Required Camelot to identify any Current Licence Confidential Information which was not Competition Confidential Information, but which Camelot believed may nevertheless be helpful or relevant to its participation in 4NLC: "you must (before using it) notify us of that information and provide it to us for that purpose, in which event we may designate that information, and make it available to all participants in the Competition, as Competition Confidential Information…";

vi) Made clear that the use of any Current Licence Confidential Information in connection with the Competition in any way except as Competition Confidential Information would amount to a breach of the Current Licence (which carried the risk of enforcement action), and that "to ensure the Competition is fair to all participants" would require Camelot promptly to deliver such information to the Commission which may then make it available as Competition Confidential Information;

vii) Made clear that the Commission "may also take account of any such breach in assessing whether you are a fit and proper person to operate the National Lottery and/or should otherwise be entitled to participate in the Competition";

viii) Sought written confirmation within 14 days of the measures that Camelot had or intended to establish in order to ensure compliance with the Third Licence.

828. Pausing there, the Claimants submit, and I accept, that it was clear from this letter that the Commission was concerned to address the timing advantage that Camelot might have if it made use of information before sharing it with the Commission. It was also clear that if Camelot broke the ground rules set by the Commission, disqualification (or

enforcement action in relation to the Third Licence) was a real possibility. Mr Tanner frankly accepted both of these points during his cross-examination.

829. The Claimants say that Camelot broke these ground rules repeatedly and that the first breach occurred almost immediately. They rely on the content of Camelot's reply dated 18 December 2019. In that letter, Camelot disputed the need for ground rules and suggested that the Commission's approach "would risk disadvantaging Camelot" as a prospective participant. However, it also welcomed the importance of a Competition that was "fair to all potential participants including in relation to the Confidential Information to which all such applicants should properly have access". It described the Commission's intention of ensuring access by all bidders to the VDR as a "correct priority" and an appropriate approach that was a practicable, fair and proportionate means of addressing any actual or perceived incumbency advantage. It pointed out that the Commission already had "much of" the Current Licence Confidential Information and that it was continuing to engage with the Commission on this front. However, Camelot did not accept that its use of Current Licence Confidential Information in connection with any preparations it may be making in relation to potential participation in the Competition required the Commission's consent, and it did not agree to the separation of the 3NL team and the 4NL bid team. Nevertheless, Camelot disclosed various categories of Current Licence Confidential Information which it said had been "considered by Camelot to date in the course of its work relating to Camelot's potential participation in the Competition". Camelot did not accept that "knowledge" or "know how" of Camelot staff fell within the definition of Confidential Information.

830. Mr Tanner accepted in his evidence that many of the categories of information referred to by Camelot in this letter would be critical for any potential bidder at the proposal stage and that it was clear from Camelot's letter that it had already been looking at Current Licence Confidential Information in order to inform its prospective bid. On this basis he accepted that there was already a breach of the Third Licence and that Camelot's conduct undermined the level playing field in the competition "at this stage". I observe that "at this stage" was at around the time the draft ITA was issued to the market, albeit that it did not at this time include Volume D (Evaluation including Pass/Fail criteria) or Volume F (Your Application including the Questions to be answered by Applicants). I understand this to be the First Data Breach to which the Claimants refer in their submissions.

831. The Commission responded to Camelot's letter on 23 December 2019, making it clear that its position remained as set out in its earlier letter of 4 December 2019, i.e. that Camelot must not use Current Licence Confidential Information for the purpose of the Competition unless compliant with the APA (and subject to seeking and receiving consent from the Commission). The Commission also made clear that Camelot required the Commission's consent to tender in the 4NL Competition because this was regarded as an "Ancillary Activity" under 3NL.

832. On 17 January 2020, Camelot wrote again to the Commission, directing its letter to Ms Mandy Gill, Head of Compliance. In this letter, Camelot noted the Commission's position as set out in its letter of 23 December 2019 with which it "respectfully" disagreed and it reserved its rights in the event of any future enforcement action. However, Camelot reiterated that it welcomed the Commission's desire to ensure a level playing field and therefore, "to provide the Commission with the assurances that it requires", Camelot provided further information and confirmations to the

Commission. These included lists of full time and part time Camelot staff involved in Camelot's Competition Activity. In addition, Camelot confirmed that, to support a level playing field for all potential bidders, it agreed that "all material Current Confidential Information that potential bidders need to know…must be made available to them in the Competition data room". Camelot also confirmed that it would compare a more detailed list of the categories of information provided in its letter of 18 December 2019 with the list of information that the Commission had outlined in connection with the draft ITA would need to be included in the VDR. Camelot confirmed that it would notify the Commission "if there is any information that it has or intends to use for potential bid purposes that is not on the Commission's proposed VDR list, which should be added, to ensure a level playing field" and that it would continue to notify the Commission of any further categories of Current Licence Confidential Information considered by Camelot in connection with its potential participation in the Competition. Camelot expressed its willingness to "work further" with the Commission on these issues as required and sought confirmation that the Commission was content for Camelot to proceed on the basis of the further assurances provided.

833. There appears to have been a little delay in the Commission deciding how to respond to this letter. Internal emails between 24 and 28 January 2020 show the Commission discussing how to respond. Some are privileged because of the involvement of General Counsel, but what is clear is that the Commission was taking the matter extremely seriously. In an email of 24 January 2020, Mr Tanner referred to the possible need to consider "whether exclusion from the competition follows. That would clearly be a very significant consideration".

834. The Commission responded on 3 March 2020 explaining again that it considered participation by Camelot in the Competition for the Fourth Licence to amount to Ancillary Activity under the Third Licence such that it required consent. The Commission also restated that the use of Current Licence Confidential Information by Camelot for the purposes of its bid in the Competition would require its approval. Absent any request from Camelot for approval to undertake these activities, the Commission stated that it could not give Camelot the assurances it required. The Commission went on to outline the undertakings it would require from Camelot if it were to grant an application for approval, including undertakings as to the use of Current Licence Confidential Information.

835. Camelot signed the APA on 11 March 2020 governing its access to information in the VDR.

836. On 12 March 2020, the Commission wrote to Camelot in advance of a meeting that was due to take place on 16 March 2020. The Commission stated that an issue for the meeting would be the sharing of confidential information and Camelot's obligations under the Third Licence. The Commission stated that it wished to "fully understand your perspective".

837. Following the meeting, on 20 March 2020 the Commission issued an "Advice to Conduct" letter to Camelot in respect of conditions 6.1 and 20 of the Third Licence. This letter (described by Mr Tanner as "the lowest point on the escalator of enforcement activities") explained that the Commission had considered the disclosures made by Camelot in its letters of 18 December 2019 and 17 January 2020 and confirmed its view

that Camelot needed to seek consent for Ancillary Activity and for use of confidential information in connection with the Fourth Licence Competition. The letter recorded that "[w]e have agreed that an application in relation to written consent will be made by [Camelot] by close of business on Friday 27 March". In relation to the use of Current Licence Confidential Information that had already taken place by Camelot, the letter stated that it was the Commission's view that Camelot should have sought approval for such use but that, having considered the matter, "the Commission has decided not to take formal enforcement action on this occasion". There was no further identification of the Commission's rationale for this decision.

838. On 30 March 2020, Mr Tanner wrote to Camelot on behalf of the Commission and asked it to confirm by 6 April 2020 (amongst other things) that it would not make further use of data provided by its Third Licence team to its Fourth Licence team or of any information or data derived from that data until that information had been made available in the VDR. Mr Tanner confirmed in his evidence that he sought this confirmation because he recognised that if Camelot continued to use the data "they would continue to benefit from the headstart" and that, if the Commission was to maintain or create a level playing field it needed to take action immediately.

The Second Data Breach

839. It seems that further discussions then took place between the Commission and Camelot as to its use of Current Licence Confidential Information, because on 3 April 2020, Ms Gaby Heppner-Logan of Camelot emailed Ms Gill following up on those discussions. Specifically she explained that there had been a "thorough review" of any additional confidential information or data sources to which Camelot's Competition team had had access and that "barring the potential for one or two discrete items" all of the data that had been accessed or used to date had been identified and that it was "almost all used in February and March". She categorised the data into 7 main areas and said that the Commission would be provided with consolidated source datasets for all data not previously provided falling within these 7 categories. She noted Camelot's view that "[a]ll bidders should also be free to bring their 'know how' such as knowledge, skills and experience of their own market and operations, for the benefit of planning their own bid, without disclosure to other bidders".

840. Pausing there, Mr Tanner confirmed that the 7 categories of document identified in this email were "very broad" and that he thought they would be relevant to anyone looking to prepare a bid for 4NL. I understand this to be the Second Data Breach on which the Claimants rely. An internal Commission email of 15 April 2020 suggests that this new disclosure amounted to circa 600 documents although Mr Tanner thought it was unlikely that there were two groups of 600 documents (information having earlier been provided to the Commission that the first tranche of disclosure amounted to 600 documents). I note in this regard that the 15 April 2020 email goes on to say that the Commission does not know how many documents it has received.

841. On 6 April 2020, the Commission issued a second Advice to Conduct letter, again in relation to Conditions 6.1 and 20 of the Third Licence. The letter explained that the Commission had reviewed the further disclosure provided in accordance with the 3 April 2020 email and observed that this was "additional" to the confidential document disclosure that had been notified previously and which had been dealt with by way of the first Advice to Conduct letter. The Commission said this:

> "The Commission has considered CUKL's disclosures. We are of the view that CUKL should have sought to obtain the written approval of the Commission prior to the transmission and use of the confidential information. This was set out in letters from the Commission on 23 December 2019, 3 March 2020 and 20 March 2020.
>
> The Commission has carefully considered all the circumstances in this matter, noting that this is a second disclosure of transmission of confidential information. We also note your statement that:
>
> " .... This has been a thorough review to identify any additional confidential information or data sources that the L4 team has had access to and potentially used. The depth of the review gives us a high degree of confidence that, barring the potential for one or two discrete items, all of the data or information accessed or used to date has now been identified....
>
> The Commission has therefore decided not to take formal enforcement action on this occasion".

842. The Commission explained that it had not yet formed a view as to "what does and does not constitute know-how and synthesis of data". However, it made clear that it now expected Camelot "immediately (by 10am on Tuesday 7 April 2020)" to seek the Commission's written consent under the Third Licence to participate in the Fourth Licence Competition.

843. The Claimants put to Mr Tanner in cross-examination that it was not clear from this letter why the Commission had decided not to take any further enforcement action, but Mr Tanner disagreed saying that "the Commission is saying that it's considered all the circumstances". He also pointed out, as is clear from the letter itself, that the Commission was noting assurances received from Camelot.

844. Within the timescale set by the letter of 6 April 2020, Camelot wrote to the Commission on 7 April 2020 formally applying for the Commission's written approval (for the purposes of Condition 6.1 of the Third Licence) for Camelot to undertake the activity of participating in the Competition. This was said to include the use of Current Licence Confidential Information "to the extent only that use of such Confidential Information either has been notified to the Commission before the date of this letter or is subsequently subject to the terms of this letter". On the assumption that approval would be granted by the Commission for Camelot's participation in the Competition, the letter then provided various confirmations, including as to lists of staff working on the Competition bid, the provision of Confidential Information that Camelot wished to use in its Application to the Commission so as to ensure it could be made available to all bidders, and confirmation that its Fourth Licence bid team would only access information from the VDR and not directly from Camelot's Third Licence team. Camelot further confirmed that it would put in place "the necessary systems and procedures to prevent the transmission of Confidential Information directly from [Camelot's Third Licence team] to staff deployed on a Camelot bid". Finally, Camelot agreed that, in the event that it submitted a bid, it would provide a "comprehensive

schedule" of all Confidential Information relating to the running of the National Lottery that it had relied upon in its Application.

845. The following day, 8 April 2020, Mr Tanner wrote again to Camelot noting that the deadline of 6 April 2020 identified in his letter of 30 March 2020 had passed without a response. In particular he said he was "very concerned" that no undertaking had been received from Camelot that it would stop making continued use of Third Licence data until that data was made available via the VDR. Accordingly, Mr Tanner invited a response "by no later than 17:00 hours today otherwise we are going to have to consider what steps we should take. The Commission takes very seriously its responsibility to ensure the principles of disclosure and use of information apply fairly and consistently to all potential applicants…throughout the competition". In addition, Mr Tanner confirmed his understanding that the Commission had now received copies of all "data disclosed previously". He indicated that he expected to be provided with the further data referred to in the 3 April 2020 email from Ms Heppner-Logan by close of business on 15 April 2020.

846. An internal Camelot email dated 8 April 2020 between Ms Heppner-Logan and Mr Nigel Railton (Camelot's CEO) evidences an internal discussion about this request to "stop the work of the L4 team, potentially until the VDR is launched in June". Camelot's view was that this was not appropriate given that the data used had already been provided to the Commission or "is being" provided to the Commission. Mr Tanner accepted in cross-examination that Camelot appeared to be "pushing back on a request to stop the work of the team".

847. Mr Railton wrote to the Commission in response to Mr Tanner's letter of 8 April 2020 later that same day saying this:

> "I must start by reiterating our full support for a fair competition. For many months, we have been working closely and openly, and in good faith, with the Commission on data sharing. We have provided over 600 documents requested and have been disclosing additional documents used by our L4 team, so they can be made available to all bidders by the Commission via the VDR…
>
> The use of data by our L4 team to date, has been widely known and understood by the Commission. It has also been the subject of recent reviews by the Commission's L3 compliance team, which were closed with two advice to conduct letters and no action.
>
> It therefore feels like a major shift in policy to require a commitment from us today, that there should be no further use of the data until it is made available in the VDR.
>
> The consequence of accepting this new condition is that the L4 team would no longer be able to operate, until the data is available in the VDR. I would ask you to urgently confirm when this will be.

> Due to the serious implications of having to stand down the team, I have instructed a pause in their activity for a week, giving time for you, Neil McArthur and me to have a call to agree a way forward…".

848. It appears that the "pause" in the activity of Camelot's bid team continued for a period of at least 3 weeks (referred to in an email dated 1 May 2020), while discussions continued between Camelot and the Commission.

849. On 15 April 2020, Ms Helen Venn, the Commission's Executive Director of Licensing and Compliance, sent an email to Mr Tanner on the subject of "Camelot – Confid data". She explained that she had been giving the matter thought and reviewing emails. In advance of a meeting "tomorrow" she set out some thoughts on the action that the Commission might wish to take. She noted that "points we need to cover" included following up again with Camelot "to get a full list of data" shared with its bid team, plus determining "whether some or all of this data has been shared with us". She then went on to identify some "scenario planning" to which I shall return in a moment.

850. On 17 April 2020, Mr Railton wrote to Mr Tanner suggesting that the Commission had acknowledged that a fair competition could be achieved if arrangements to safeguard the use of information by the Camelot bid team prior to its release into the VDR were put in place. Mr Tanner's subsequent email of the same day shows that he was awaiting a list of data shared with the bid team. He made clear that "[u]nderstanding what information has been shared, when and how it has been used is key to our being able to agree the arrangements necessary to support a fair and vibrant competition".

851. On 20 April 2020 Ms Heppner-Logan sent Mr Tanner an email attaching 8 data lists of information that had been shared with its Fourth Licence bid team. The email confirmed that the data on the list had already been provided to the Commission, with the exception of the data in list 8 ("Camelot L4 April Declared Consolidated Data Sources"), which was in the process of being prepared and would be provided to the Commission in late April/early May 2020. The email explained that the data in the first 7 lists had been used in late 2019/early 2020 and that the data in list 8 had been used in February/March 2020 (as summarised in the 3 April 2020 email).

852. As is clear from an internal email of 21 April 2020, the Commission carried out its own assessment of the data sensitivity and the potential benefit/use by Camelot's bid team for all the data declared. In an internal Commission email dated 23 April 2020, Mr Tanner explained to Ms Venn and Mr Wilson (amongst others) that the Commission were "actively reviewing the data which has been passed to [Camelot's] bid team to assess its potential impact on the competition and what might be required to level the playing field" observing that "[w]e can only complete that work once we know what use the bid team have made of the data and whether other applicants will have the necessary time to do the same analysis with or without adjusting the competition timeline". Mr Tanner said that consideration needed to be given to the conditions that might be imposed on a restart of Camelot's bid team. I shall return to this email again in a moment.

853. In an email dated 23 April 2020 from Camelot to the Commission, Camelot set out some level of detail as to what it had used Third Licence data for in the context of the Competition, including to assess the feasibility of the Commission's bid documents.

Mr Tanner accepted in cross-examination that this usage had potentially given Camelot a "headstart" in the Competition, albeit that the Competition documents had still not been finalised and he thought that other applicants working in the lottery industry could well have had access to similar information. He frankly accepted, however, that Camelot was not like other bidders owing to its incumbency.

854. An email from Camelot to Mr Tanner dated 29 April 2020 records that it had been agreed at that point that documents on lists 4 and 7 (identified in the 20 April 2020 email) would not be accessed by Camelot "until they are in the VDR", although Camelot could use and develop materials that its bid team had already created which may reflect information in these documents. Mr Tanner accepted that the use of such "derivative documents" continued potentially to give Camelot an incumbency advantage.

855. In a letter dated 4 May 2020, the Commission gave its consent to Camelot's participation in the Competition on the detailed undertakings provided by Camelot, including as to staff working on the Fourth Licence Application, information sharing between the Third and Fourth Licence Teams and use of the VDR. The Commission reiterated that data in lists 4 and 7 must not be used "for the purposes of developing the bid" until it was published through the VDR and sought confirmation that the "feasibility work" for which the data had been used to date was the limit of such use and that such data had not been used "in any activity to commence the preparation of any bid response". Mr Tanner robustly rejected the suggestion that there was an artificial distinction between the feasibility work and the preparation of the bid explaining that:

> "What we were trying to do was to address the issues with the data and to rebalance the playing field or level the playing field depending on how you want to use those phrases".

856. In addition to the undertakings provided by Camelot, all applicants were required to put in place ring fencing arrangements. Camelot's ring fencing arrangements were attached to a letter to the Commission dated 20 May 2020. That letter confirmed that none of the data that had been used by Camelot to date in connection with the Competition had been used in any activity to "commence the preparation of any bid response" by the Camelot bid team, in that it had not involved drafting the content of any bid that Camelot may decide to submit – that was "quite some way in the future, not least because the Competition has not formally begun and the issue of the Final ITA (which may itself then be subject to further clarification and amendment) lies quite some way in the future". Camelot confirmed its understanding that it was able to continue to use and develop derivative documents as long as this was not in connection with the preparation of any bid response.

857. Camelot's ring fencing arrangements included (amongst other things) physical separation between the Third and Fourth Licence teams, mandatory training for all Fourth Licence team members, prohibitions on contact between Third and Fourth Licence teams, specific processes for identifying information that Camelot wished to use, notifying the Commission and only using that information once it was placed in the VDR. The ring fencing arrangements also set out agreed processes for dealing with 'know how' – such 'know how' would only be made available to the Fourth Licence team once it had been evaluated for source data and any source data made available

through the VDR to all Applicants. Camelot Executives also signed personal undertakings confirming that they would comply with the ring fencing arrangements.

858. In closing, the Claimants invited the Court to look at the First and Second Data Breaches together and they submitted (without reference to all of the documents to which I have referred above) that the Commission "not only absolutely failed to mitigate the significant advantage which Camelot had obtained through the data breaches but, in fact, allowed Camelot to continue to benefit from the advantages it had improperly obtained". The Claimants submit that this appears to have happened because the Commission had, at an early stage, irrationally ruled out the prospect of disqualifying Camelot from the Competition. They go on to say that Camelot's breaches amounted to serious misconduct, gave rise to "irremediable prejudice to the level playing field" and that "the only rational outcome in these circumstances was disqualification".

859. Before I consider this submission in detail, I note that in closing, the Commission submitted that this allegation had not been pleaded. Certainly it is right to say that the Particulars of Claim make no allegation of irrational, unlawful conduct on the part of the Commission in effectively ruling out the possibility of disqualification and nor do they assert that the only rational outcome was disqualification. Once again this appears to be a development of the Claimants' case. The Claimants' Particulars of Claim goes no further than to say that the Commission failed to take "adequate steps" to ensure that other applicants were not disadvantaged by the data sharing between Camelot's Third Licence and Fourth Licence teams. It then goes on to plead that "[a]ppropriate actions would have included the Defendant disqualifying Camelot from the competition". This is rather different from an allegation that the Commission had closed its mind to the possibility of disqualification and that it was irrational to do anything other than disqualify Camelot. I consider these to be material facts which, if they were to be relied upon, should have been pleaded. The Claimants' Reply provided some additional particulars in relation to the allegation of shared information but did not remedy the inadequacies of the existing pleading in the Particulars of Claim.

860. Ms Grogan also made the point in closing that the Claimants had not put squarely to Mr Tanner in cross-examination that the Commission should have disqualified Camelot, whether at the time of the First, or Second Data Breach. As I understood Mr Toledano's submissions, he accepts that the point was not directly put, but he contends that he "did enough". Looking at the transcript with care, as I have done, I am inclined to agree with the Commission that the point was not adequately put. At no stage was it put to Mr Tanner in terms that the Commission should have disqualified Camelot, that that was the only rational approach or that it had closed its mind to that possibility. The highest the point appears to have been put by Mr Toledano was to ask whether it was "possible that the real reason that enforcement action in relation to 4NL wasn't taken" was because the Commission "wanted to keep [Camelot] in the competition because that [it] thought would be good for the Competition". Mr Tanner's response was:

> "No, although clearly a strong competition was what we were aiming for, it was one of our objectives, but if any party deserved to be removed, they would have been removed".

861. Mr Toledano did not go on to suggest that the only rational course of conduct would have been to remove Camelot.

862. These two points alone made by the Commission in closing are sufficient in my judgment to take the wind out of the Claimants' sails in relation to the First and Second Data Breach. The case that the Claimants now seek to run has not been adequately pleaded and was not put to the Commission's witnesses. Accordingly I refuse to permit it.

863. Furthermore, I reject the Claimants' submission in closing that the only evidence of the Commission's thinking at the time consists of two documents which "evidence an irrational approach to the issue". I accept Mr Tanner's evidence in his statement that, in general terms over this time, the Commission was considering whether Camelot had an advantage as an applicant and how that could be mitigated. I also accept his evidence that he had in mind the potential sanction of disqualification if any breach was serious enough (evidence which is supported by his email of 24 January 2020 in which he identified the possibility of exclusion). As for the documents on which the Claimants rely:

i) The first document relied upon is the email dated 15 April 2020 between Ms Venn and Mr Tanner referred to above. In the email (having already set out proposals designed to ensure that the seriousness of Camelot's conduct could be ascertained) Ms Venn goes on to consider the "worst case scenario" that all the documents to be placed in the VDR had been shared with Camelot's bid team. She then looks at possible "options". These are, in summary, (i) the use of Advice to Conduct letters to cover past breaches; (ii) reliance upon the APA going forward; (iii) "the above" together with obtaining further assurance as to a clean Camelot bid team; (iv) "the above" together with "an additional/different penalty for [Camelot] for the breach – and/or in addition to current approach"; and (v) open VDR earlier" (although she expressed the "personal view...that this seems too reactive"). In addition to these options (which I infer were discussed at the meeting the following day), Ms Venn points to the need to deal with "know how" documents and the latest information received from Camelot as to their proposed bid. She then observes in one line that "[n]ot having the incumbent in the competition would not be positive for the market/competition". Reading the email as a whole I reject the suggestion that this final line indicates that the Commission did not want to disqualify Camelot because that would not have been positive for the Competition or that "that was the only way in which the question was viewed" by the Commission. I tend to agree with Mr Tanner (whose evidence on this email was not referred to by the Claimants in closing) that the views expressed in this email were Ms Venn's personal views and that, in any event, "it wasn't ultimately her decision, because it's a Competition decision", by which I understood Mr Tanner to mean that it was for the team at the Commission dealing with the Competition to decide on the appropriate course of action. I reject the suggestion that this email is a reliable basis for an argument that the Commission had closed its mind to disqualifying Camelot. Further, I note that the only cross-examination of Mr Tanner on the point was this:

> "Q. And you would agree, wouldn't you, that **if it was appropriate to exclude Camelot from 4NL because of these data breaches and the headstart that they'd had**, then market considerations ought not to come into play at all; do you agree?

> A. Yes, I don't think they should have come into play if that would have been the decision" (**emphasis added**).

ii) The second document relied upon is the email from Mr Tanner dated 23 April 2020 (also referred to above). The email made the following point:

> "We have previously asked them to confirm that they are not using and will not use any of the data passed over or the products of that going forward. Although they have now, so far as we can see, confirmed that only a subset of VDR data (and potential VDR data - which we have yet to receive and will need to assess) has been shared with the bid team, I think we need to reach a more balanced view on this. We have previously sought to ensure that these requests were not interpreted as a requirement for them to stand down or reform their bid team, not least because we think that could (in advance of competition start despite the requests to sign the documents outlined above) result in the Commission facing a challenge that we are, in effect, barring them from competition".

In closing, the Claimants did not direct the Court's attention to Mr Tanner's evidence on this email in cross-examination. Mr Tanner confirmed that one of the factors in his mind at this time (which he was discussing with Hogan Lovells) was the potential for a challenge from Camelot if they had been told to change their bid team. It was then put to him that a big concern was that Camelot had to stay in the competition "at all costs", to which he responded:

> "No, I don't think that is the case because what I'm saying in that bullet point as well is that we need to take a balanced view, not that we need to act in one particular way or another, that we need to view this in the round. It was clearly very complex in terms of the nature and volume of the data, and we were trying to assess all of that and, indeed, to assess it quite quickly. As you can see, there's a very intense period of activity in this third week in April".

In light of that evidence, which I accept, there is no basis for the Claimants' submission that this email suggests that the Commission's approach at this time was "driven by a desire to avoid doing anything that might amount to disqualification" and open the Commission up to legal challenge.

864. Further and in any event, Mr Tanner's clear evidence in both his written and oral evidence, which I accept (and which is a view that the Commission was entitled to arrive at), is that disqualification would have been disproportionate:

> "it is my view that it would have been disproportionate once we had resolved and got the information and got it into the VDR for the ITA launch phase".

865. Dealing as swiftly as I can with the main planks of the Claimants' arguments, I find that:

i) The mere fact that Camelot was the incumbent and had access to data that was not available to other bidders is not on its own enough to give rise to a breach of equal treatment, as is clear from the authorities to which I have referred.

ii) Camelot's use of Third Licence data in connection with the Competition occurred in late 2019 and the Spring of 2020 – this is when the First and Second Data Breaches took place. This must be seen in context (and it is clear from the evidence that the Commission was viewing these breaches in context). The ITA was still in draft and contained no indication as to the Pass/Fail criteria or the actual questions that applicants would be required to respond to. The SQ had not been issued (it was issued on 26 August 2020) and the final version of the ITA was only published on 26 October 2020). The VDR had not yet been set up for applicants. As Mr Tanner said, at this time the Commission were:

> "working towards the launch of the selection questionnaire date as the point at which we were envisaging putting material into the VDR and at that point having it available to everyone".

iii) Camelot declared the data it had used to the Commission in the documents to which I have referred above and, although it did not initially provide a complete declaration, the Commission continued to insist that it be provided with complete information, both as to the documents that had been used and what they had been used for. As a consequence of the Commission's insistence, this was ultimately provided by Camelot.

iv) The Commission may in retrospect have acted differently (for example Mr Tanner very frankly accepted that it might have been better to tell Camelot to stop its use of data in January 2020 when that use became clear, and that earlier use of the VDR "might" have mitigated Camelot's headstart), but it is often possible in hindsight to identify how actions might have differed, particularly when those actions are the subject of a forensic process of cross-examination. That does not mean that the action taken at the time was irrational. This was quite plainly a complex situation involving a degree of resistance from Camelot. What is abundantly clear from an analysis of the chronological contemporaneous documents is that the Commission was at all times very conscious of the need to balance the interests of potential bidders with those of Camelot. Very properly, it did not simply dismiss Camelot's points about the infringement of its rights out of hand, but instead the Commission sought to engage with Camelot, robustly insisting that it provide information so that the Commission could take "a balanced view" (as Mr Tanner said in his email of 23 April 2020). This was an approach that it was entitled to adopt.

v) This goes a long way towards addressing the Claimants' submission that there was significant inaction and delay on the part of the Commission, in particular between December 2019 and March 2020. The Commission was entitled to take time to decide how best to deal with Camelot's conduct and in any event I reject the suggestion that it was "inactive" for 3 months. This does not reflect reality, as the documents show.

vi) Furthermore, it is plain that the Commission was at all times conscious of the need to take steps to address Camelot's incumbency advantage. Mr Tanner's evidence was that he considered that the Commission took steps "to mitigate [the First Data Breach] and re-level the playing field". In my judgment, this it plainly did (consistent with the need to promote healthy competition) by:

a) setting ground rules from an early stage as to the use to be made of data by Camelot;

b) requiring Third Licence Confidential Data that had been disclosed to Camelot's bid team to be identified and thence to be disclosed into the VDR;

c) insisting on 30 March 2020, and again on 8 April 2020 that Camelot needed to stop using Third Licence Confidential Data while appropriate arrangements were put in place;

d) putting in place the Ancillary Activity consent on the back of a slew of corporate undertakings from Camelot;

e) obtaining an agreement from Camelot that it would not use various categories of the Third Licence Confidential Data until the documents within those categories had gone into the VDR for all applicants to see;

f) putting in place comprehensive ring fencing arrangements and requiring executive undertakings;

g) requiring that "source data" for know how was disclosed into the VDR.

vii) The Commission was, it seems to me, entitled to take the view that, given (i) the very early stage of the Competition; (ii) Camelot's concerns as to the infringement of its rights; but (iii) Camelot's continuing engagement and agreement to take action to level the playing field, it was appropriate and proportionate to issue the first and second Advice to Conduct letters under the Third Licence rather than taking any more serious steps (including in relation to the Competition).

viii) The Claimants complain that Camelot was allowed to continue to use "derivative data" and they rely on a concession from Mr Tanner that this permitted Camelot to continue to benefit from its previous data breaches. However, I agree with the Commission that this was well within the margin of the Commission's discretion in managing Camelot's incumbency advantage and in trying to maintain a fair balance between the interests of all parties. In light of the stage of the Competition and the explanation from Camelot in its letter of 20 May 2020, I reject the Claimants' submission in closing that the Commission knew, or ought to have known, that Camelot had in fact used the data for the preparation of its bid (as opposed to in connection with its initial feasibility work). It is difficult to see how Camelot could have "prepared its bid" at this stage of the Competition and it was not irrational to accept Camelot's explanation about this.

ix) Importantly, and in any event, the Claimants have never articulated a clear case on causation. They invite the Court to draw an inference that Camelot's score was higher than it would otherwise have been had it not obtained an unfair advantage from the data breaches, or alternatively that if the Commission had acted sooner to address the data breaches, TNLC would have had more time with the materials and that it is reasonable to infer that it would have achieved a higher score. They submit that it is no answer for the Commission to say that placing the materials in the VDR in the summer of 2020 had the effect of neutralising any advantage obtained by Camelot through early access to relevant data. However I do not follow this argument. Although having early access to data may "potentially" have given Camelot something of a "headstart" over other applicants, the Claimants have never sought to explain or evidence how Camelot was advantaged by that "headstart" given that the ITA had not yet been published in its full form (none of the Commission's witnesses was cross-examined on this point). The Claimants have not identified any specific features of Camelot's Application, or the scoring, which they rely upon to establish that Camelot benefitted from early access to data and no specific advantage was put to any Commission witness in cross-examination. Of course, Camelot was in fact pipped at the post by Allwyn.

x) Furthermore, the Claimants have never explained or evidenced how other applicants have been disadvantaged. Mr Mills accepted in cross-examination that TNLC did not seek an extension of time for the submission of its application. There is no evidence to support a finding that if TNLC had had "more time with the materials" it would have received a higher score or that, overall, that would have made any difference to the outcome of the Competition. There is no pleaded case that the VDR should have been set up at an earlier date.

xi) In the circumstances there is simply no basis for the Court to draw the inferences that the Claimants suggest should be drawn (even assuming that the Claimants had properly pleaded their case and put that case to the Commission's witnesses).

xii) It is clear from the evidence that the Commission had in mind the need to assess the impact of the early use of data by Camelot and also the importance of considering "whether other applicants have the necessary time to do the same analysis with or without adjusting the competition time line" (Mr Tanner's email of 23 April 2020). Mr Tanner's evidence, which I accept, is that issues around the provision of information into the VDR were resolved by the time the ITA was issued in October 2020. He did not recall having any concerns about whether the playing field was level at this point "either as a result of any perceived head start or any lingering apprehension about ongoing VDR process issues" and no suggestion was made to him to the contrary. Mr Wilson's evidence, which was not challenged, was that the Commission carried out a check that there was nothing in Camelot's Application which could not have come from information in the VDR or publicly available information.

xiii) Under cross-examination, Mr Tanner said this (which I accept):

> "I believed then and I believe now that in uploading the data to the VDR at the time that we did, there was enough time for

> all applicants to complete their applications and to use that data"
>
> and;
>
> "…that was the decision that we took at the time that we were satisfied that against the competition timeline people would have time to deliver robust applications against the ITA with the data in the time available".

No examples of any tangible disadvantage in fact suffered by other applicants were put to Mr Tanner.

The Third Data Breach

866. The Claimants submitted in closing that if the Court does not agree that the First and Second Data Breaches met the disqualification threshold as of May 2020, then it is "evident" that disqualification was "inescapable" by the date of the Third Data Breach. Once again, this is not pleaded and it was not put to Mr Tanner, creating the same immediate difficulty for the Claimants in seeking to advance this contention. I consider that the point cannot be advanced for these reasons alone and I decline to permit it.

867. Turning to the evidence (and without prejudice to the previous paragraph), it is clear from a letter from the Commission to Camelot dated 13 August 2020 that during a Data Workstream meeting on 11 August 2020, Camelot had identified a further set of "non-data information" which it had not included in the schedules of material that had already been provided to the Commission. This included a retailer training manual that had been provided to Camelot's bid team but had not been included in the Schedule. Mr Tanner said in the letter that given the assurances received in Camelot's letter of 17 April 2020 to the effect that all confidential information disclosed to the bid team would be shared with the Commission "we are now extremely concerned that there seems to be such information outstanding that was not listed in CUKL's original List 8". Mr Tanner said that "reflecting on" the 17 April 2020 letter:

> "there was never any agreement to distinguish between data and non-data items when it came to the unauthorised disclosure of confidential information…If our understanding is correct and that there is further material which should have been included in List 8 then this "categorisation" of data is something that seems to have been developed internally (and unilaterally) within [Camelot]…with a very real risk that Camelot is not now meeting the commitments given in that letter and on the basis of which the Commission agreed the Ancillary Activity application and the various related undertakings".

868. In an internal email to Ms Gill and Ms Venn dated 19 August 2020, Ms Webb of the Commission confirmed that the Commission had now received all but one of the latest disclosed documents and had determined that they did in fact relate to data. She and her team were of the view that "this is a deliberate attempt to hide the fact that information has been shared with the L4 team and thus created an unfair advantage". Mr Tanner agreed in cross-examination that the breach was serious "albeit one that

appears to have happened at the same time as the previous breaches". He did not accept that he could form any view as to whether this was a deliberate attempt on the part of Camelot to hide its conduct because Ms Webb had set out no evidence in support of such a conclusion.

869. Indeed, in a responsive internal email dated 21 August 2020, Ms Gill was rather more circumspect, saying instead that "this latest disclosure does not accord with the content and spirit of previous comms from [Camelot]". She observed that this was the third time that this had happened and that "[t]his sort of conduct is not consistent with our expectation of the licence holder, current or future, and raises some issues around suitability". Mr Tanner confirmed that he agreed with this in that it raised in his mind "questions around suitability". He could not remember when questioned what action he took next, but it is clear from the documents that he wrote to Camelot on 25 August 2020 (in conjunction with Ms Venn) asking for clarifications in relation to a letter of 17 August 2020 from Camelot explaining its position and saying that this was required to enable the Commission to assess its next steps. The letter ended:

> "The Commission recognises the challenges that are currently presented by COVID-19, and that [Camelot] has expressed regret that these documents were not provided sooner. These issues are however of concern to the Commission. We will of course carefully consider information provided in response to the requests above, and in light of that information consider whether it is appropriate to take regulatory action against [Camelot] in relation to the matters set out in our letter of 14 August 2020 (sic) or any other matter".

870. On 27 August 2020, by email, Camelot confirmed that transfer of the "final 9 files" to the Commission data share system had taken place.

871. Camelot provided a detailed 9 page response to the Commission's concerns on 2 September 2020, saying at the outset:

> "We would again like to provide assurance that Camelot remains committed to a fair and open competition for all and continues to act in good faith, in a complex and evolving environment which has been further complicated by the unprecedented requirement for our teams to work and communicate remotely due to Covid-19. We have always sought to be considered and transparent throughout, and certainly with no intention to mislead. We very much regret if the Commission has been left with any perception that we have not been transparent, and we strongly believe any misunderstanding to be the result of the complex subject matter and unprecedented remote working arrangements. I believe that this is also evidenced throughout our wide-ranging and extensive engagement, as well as agreeing to a set of data-sharing undertakings and making various declarations related to data and confidential information".

872. It was not suggested to Mr Tanner (or any of the Commission's witnesses) that the proper (and only) reaction to Camelot's Third Data Breach was disqualification, or that

that should have been the reaction following receipt of the 2 September 2020 letter. Accordingly, while it is true that there is no evidence as to how the Commission dealt with the Third Data Breach (in light of Camelot's explanation of 2 September 2020), it is not open to the Claimants to contend that the only appropriate course of action would have been to disqualify Camelot.

873. The Claimants contend that the paper trail as to the Commission's thinking goes cold at this point and that this is consistent with the Commission having "essentially discounted any serious consideration of disqualifying Camelot". I reject the invitation that I should draw such an inference. I bear in mind that all of the missing data was provided by Camelot to the Commission and that there is no suggestion that there were any ongoing issues. I cannot see that it would be appropriate in the circumstances to determine (as I am invited to do) that the only rational response on the part of the Commission was to disqualify Camelot (notwithstanding the content of the 2 September 2020 letter, which was not even referred to in the Claimants' closing submissions). Not only was this not put to Mr Tanner, but it was also not suggested to him that there was anything about the category of documents that were being disclosed late that caused additional disadvantage to other Applicants.

874. The Commission was dealing with a balancing exercise. By the time of the opening of the Competition, there appears to have been no concern around the disclosure of documents or the use of the VDR. The Commission had ensured that all data now disclosed by Camelot had been included in the VDR. I repeat the points I have already made. The Claimants have failed to establish that the Competition could have had a different outcome but for the late provision of information into the VDR.

Conclusion on Incumbency Advantage

875. In all the circumstances I reject the Claimants' case that there was any breach of CCR 2016 by the Commission in dealing with Camelot's incumbency advantage. Given Camelot's status as operator of the Third National Lottery it was not "technically easy" to neutralise the advantage it inevitably already had by reason of its knowledge of its own operations. However, I consider the Commission to have taken appropriate, proportionate and reasonable steps in all the circumstances to ensure equal treatment. Even if it could be argued that there was a defect in its conduct arising by reason of Camelot gaining a headstart over other bidders through its early access to data (including the data disclosed in August 2020), there is no evidence that, but for that defect, there would have been any different outcome (see *Europaki Dynamiki*). Given that I have dismissed TNLC's claim of manifest error, its suggestion that there is somehow a real chance that, without its incumbency advantage, Camelot would have scored lower than TNLC, is fanciful.

876. The Claimants submit that their case on incumbency advantage is a reason why the Court should not approach what would have happened in a 5NLC (for the purposes of the Modifications Claim) on the basis that TNLC's lower score in 4NLC is a safe or reliable starting point or on the basis that the gap between its score and the higher scoring bids in that competition was as significant as might otherwise appear. In light of the analysis set out above, I reject that submission.

877. Finally, Issue 24 requires me to consider whether the allegations as to Incumbency advantage are time-barred. Looking carefully at the pleadings, it is not clear to me that

the Commission's pleaded limitation defence concerns the only remaining allegation of incumbency advantage that has been pursued at trial. The Commission's Defence does not plead that the paragraph in the Particulars of Claim in which this allegation is made (namely 26.2(aa)) is time-barred and it is not clear that its general plea that the second sentence of paragraph 26.2 of the Particulars of Claim is time-barred in fact relates also to 26.2(aa). The evidence on which the Commission relies in closing is expressly concerned with redactions and does not touch on information sharing. Given this lack of clarity, the conclusion I have reached on Issue 23 and the absence of any detailed submissions on the point in closing, I decline to address it further.

CAUSATION/CONSEQUENCES/STANDING (ISSUES 64/65 and 1A/3)

878. The Claimants have failed to establish any aspect of the Process Claim. In my judgment, the Commission reached a lawful and objectively justifiable outcome. There are no grounds for the Court to find that the Commission did not assess tenders on an equal basis (**Issue 3**).

879. Accordingly, the Claimants have failed to establish that TNLC had any real chance of winning the Competition. The Claimants are therefore not economic operators who have suffered or risk suffering loss and damage (**Issue 1A**).

880. There is accordingly no need to consider the causation issues arising in issue 64. There will be no need for a quantum hearing in this claim. Issue 65 (whether any breaches were sufficiently serious) falls away.

CONCLUSION ON THE PROCESS CLAIM

881. For all the reasons set out above, the Process Claim is dismissed.

THE MODIFICATIONS CLAIM

882. It is common ground that the 2022 Modifications (relating to RICs) and the September 2023 Modifications (together referred to as "**the Challenged Modifications**") required a new concession contract award procedure in accordance with CCR 2016 Regulation 43(10) unless they fell within one of the two gateways relied upon by the Commission in its Modification Notice. These gateways are (i) modifications that are not "substantial" (Reg 43(1)(e) and 43(9)) and (ii) modifications which have been brought about by circumstances which a diligent contracting authority could not have foreseen (Reg 43(1)(c)).

883. The Claimants' case is that neither of these gateways applies:

i) On the subject of foreseeability, they contend that, at all material times, the Commission understood it to be near certain that a disappointed applicant such as Camelot would bring a claim and understood the risk that such litigation would cause an uncontainable delay to implementation. Furthermore they say that the Commission knew that Allwyn's bid depended upon a new IGT contract which it had taken no steps to put in place and that the Commission was aware of the risks of a third party (such as IGT) commencing legal proceedings. They say that it was obvious that IGT and Camelot had no incentive to cooperate with Allwyn (beyond doing what they were obliged to do) and that this was all plainly

foreseeable. The Claimants contend that the Commission was "burying its collective head in the sand".

ii) On the subject of the nature of the Challenged Modifications, the Claimants contend that they were substantial: they saved Allwyn from the consequences of its inability to do what the Enabling Agreement had required it to do, namely implement its Application by the Start Date. Furthermore, and critically, the 2023 Modifications "rewarded" Allwyn with a conditional 2 year licence extension. Accordingly, they submit that the economic balance of the Enabling Agreement/Licence has shifted in Allwyn's favour (Reg 43(9)(c)); alternatively that if 4NLC had been conducted on the basis of the Modified Enabling Agreement and Licence there might have been a different outcome (Reg 43(9)(b)(ii)).

884. If they are right on this score, then the Claimants contend that by agreeing to the Challenged Modifications without running a fresh 5NLC, the Commission is in breach of the CCR 2016. They claim damages based on what they say is the (only) relevant counterfactual, namely what would have happened in a 5NLC. They submit that it does not matter that TNLC failed in the 4NLC and that the outcome of the Process Claim is also not determinative because "[a]rmed with the [Detailed Rationale] and the knowledge of other bidders' good causes contribution and OSS, TNLC would have had a real and substantial chance of winning such a competition".

885. The Commission and the IPs reject the Claimants' case on Modifications. In short, they say that the Challenged Modifications were a response to delays experienced by Allwyn and that they fall within one or both of the relevant gateways in the CCR 2016. Even if the Claimants could show that a 5NLC should have been carried out, they say that TNLC had no chance whatever of winning it. Thus TNLC has suffered no loss by reason of the decision to put in place the Challenged Modifications and is not entitled to any of the remedies sought.

THE ISSUES IN THE MODIFICATIONS CLAIM

886. There have been some changes to the Claimants' case as it was advanced before trial, but a number of the issues identified in the List of Issues for the Modifications Claim remain the same. These are (in summary) set out below and retain their original numbering:

(i) What were the Challenged Modifications? (**Issue 1**);

(ii) Are the Challenged Modifications (collectively or individually) substantial within the meaning of Regulation 43(9) of CCRs 2016 (**Issue 3**);

(iii) Was the need for the Challenged Modifications necessitated in whole or in part by the circumstances relied on by the Commission and by Allwyn and, if so, could those circumstances have been foreseen by a reasonably diligent contracting authority? (**Issues 4, 5, 6 and 8**).

(iv) Has the Commission acted in breach of the CCR 2016 in making and implementing the Challenged Modifications? (**Issue 9**)

(v) What are the consequences of breach? (**Issues 10-12**):

(vi) Did the time limit for bringing a claim other than for a declaration of ineffectiveness commence on or after 5 January 2024? (**Issue 13**);

(vii) Non-monetary remedies (**Issues 14-17**).

887. As for issues that are no longer advanced, I record that at the outset of the trial and until delivery of written closing submissions, Issue 7 remained live, namely whether the need for the Challenged Modifications was brought about "wholly or substantially by Allwyn's failures to meet its obligations under the Enabling Agreement". The Claimants' pleaded case states that these failures were "repeated and persistent". Unsurprisingly, this allegation was taken seriously by the IPs and was addressed at length by Mr Willits and by Mr Kleinhampl on behalf of the IPs in their witness statements. In the event (but without any express abandonment of the allegation) the Claimants did not attempt to run this case at trial. They did not put their pleaded case on the cause of the delays to Mr Tanner, and they did not seek to challenge Mr Willits' evidence. When cross-examining Mr Kleinhampl and Mr Ruxton, Mr Toledano did not ask any questions at all about the Challenged Modifications.

888. In their written closing, the Claimants submitted (somewhat weakly) that Allwyn's "own flaws as regards transition" contributed to the delays that necessitated the Challenged Modifications. However, they also said this: "[t]he Court need not resolve Issue 7…".

889. I agree with the IPs that it is most unsatisfactory in the circumstances of this case, where Allwyn's alleged failures have been pleaded and pursued to trial, for the Court to be invited to make no resolution on the point. The Claimants had every opportunity to advance their pleaded case but chose not to do so. The apparent attempt to keep it alive whilst at the same time indicating that it need not be resolved is inappropriate. Once the Claimants had decided that Issue 7 would not be pursued with the IPs witnesses, that Issue should, in all fairness, have been abandoned.

890. The correct course for the Court, as it seems to me, is to accept the IPs' unchallenged evidence as to the cause of the Challenged Modifications and to determine Issue 7 against the Claimants. Accordingly, I find that the need for the Challenged Modifications was not brought about "wholly or substantially" by any failures on the part of Allwyn. The Claimants' challenge to their lawfulness thus falls to be determined on the basis that the Challenged Modifications were caused by the litigation brought by Camelot and IGT and by the obstruction on the part of IGT in respect of transition. I shall return to make necessary findings of fact on this in a moment.

891. Although the List of Issues continues to record that the Court is required to determine whether the Claimants are entitled to a declaration of ineffectiveness in respect of the

Challenged Modifications and also raises a question as to the time limit for bringing such a claim, the Claimants' position in closing was that they were not "pressing for a declaration of ineffectiveness". The Commission's evidence on overriding reasons of general interest was not challenged at all (**Issue 16**). Instead the Claimants suggest that an appropriate remedy for breach would be contract shortening.

THE LEGAL FRAMEWORK: MODIFICATIONS CLAIM

892. Regulation 43 of CCR 2016 makes provision for the modification of concession contracts during their term. I set out below relevant parts of Regulation 43 in which I have also emboldened those provisions on which the parties specifically seek to rely:

> "43. Modification of concession contracts during their term
>
> **(1) Concession contracts may be modified without a new concession contract award procedure in accordance with these Regulations in any of the following cases**—
>
> (a) where the modifications, irrespective of their monetary value, have been provided for in the initial concession documents in clear, precise and unequivocal review clauses, which may include value revision clauses or options, provided that such clauses—
>
> (i) state the scope and nature of possible modifications or options as well as the conditions under which they may be used, and
>
> (ii) do not provide for modifications or options that would alter the overall nature of the concession contract;
>
> …
>
> **(c) where all of the following conditions are fulfilled—**
>
> **(i) the need for modification has been brought about by circumstances which a diligent contracting authority or utility could not have foreseen,**
>
> (ii) the modification does not alter the overall nature of the concession contract,
>
> (iii) in the case of a concession contract awarded by a contracting authority, any increase in value does not exceed 50% of the value of the original concession contract;
>
> …
>
> **(e) where the modifications, irrespective of their value, are not substantial within the meaning of paragraph (9);**
>
> …

> **(9) A modification of a concession contract during its term shall be considered substantial for the purposes of paragraph (1)(e), where one or more of the following conditions is met**—
>
> (a) the modification renders the concession contract materially different in character from the one initially concluded;
>
> **(b) the modification introduces conditions which, had they been part of the initial concession contract award procedure, would have**—
>
> (i) allowed for the admission of other applicants than those originally selected,
>
> **(ii) allowed for the acceptance of a tender other than that originally accepted**, or
>
> (iii) attracted additional participants in the concession contract award procedure;
>
> **(c) the modification changes the economic balance of the concession contract in favour of the concessionaire in a manner which was not provided for in the initial concession contract**;
>
> (d) the modification extends the scope of the concession contract considerably;
>
> (e) a new concessionaire replaces the one to which the contracting authority or utility had initially awarded the concession contract in cases other than those provided for in paragraph (1)(d).
>
> **(10) A new concession contract award procedure in accordance with these Regulations shall be required for modifications of the provisions of a concession contract during its term other than those provided for in this regulation**".

893. As became clear during the course of the trial, the parties are not in agreement as to the approach to be adopted to various aspects of Regulation 43. In particular I understand the following matters to be in issue: (i) the date on which the Court should assess foreseeability under regulation 43(1)(c)(i); (ii) whether the specific and particular factual causes of the modifications, including their nature and magnitude, need to be foreseen under Regulation 43(1)(c)(i); (iii) the burden of proof to be applied under Regulation 43(9)(b)(ii); and (iv) the scope of the admissible evidence when considering whether a modification is unlawful under Regulation 43(9). Falling within this latter point is a dispute as to the approach the Court should take to the contractual comparison exercise between the original and modified contracts when considering the question of change in economic balance under Regulation 43(9)(c). I shall deal with each of these disputed legal issues in turn.

The date of the foreseeability assessment under Regulation 43(1)(c)(i) (Issue 6)

894. On the question of the date on which the Court should assess foreseeability under Regulation 43(1)(c)(i), the Commission and the IPs submit that the date of publication of the tender documents is the appropriate date. The Claimants say that they can establish the necessary foreseeability on any date the Court may choose, but they suggest that the concession award decision (in September 2022) is the appropriate date because the Challenged Modifications are modifications to the Enabling Agreement entered into on 16 September 2022, pursuant to the concession award decision dated 15 September 2022. The Claimants say that the only other possible relevant date is the date of the Outcome Notification on 15 March 2022, observing that ordinarily nothing would turn on the difference between notification of outcome and award but pointing out that here, owing to the Suspension, there is a 6 month delay between the two dates.

895. There appears to be no English authority on this point, and the wording of Regulation 43(1)(c)(i) provides no real assistance. All parties referred me to the Directive, Recital (76) which begins with the sentence "Contracting authorities and contracting entities can be faced with external circumstances that they could not foresee **when they awarded the concession**, in particular when the performance of the concession covers a long period" (**emphasis added**). The Claimants acknowledge that the term "award" is not clearly defined in the Directive but they say this sentence puts the matter beyond doubt. They refer me (to similar effect) to *Case C-683/22 Adusbef* at [63]:

> "it is apparent from recital 76 of Directive 2014/23 that point (c) of the first subparagraph of Article 43(1) of that directive is intended to confer on contracting authorities and contracting entities a certain discretion to adapt the concession to external circumstances that they could not foresee when they awarded the concession".

896. The IPs (with whom the Commission agrees) rely upon a later passage in Recital 76 which they say makes clear that the focus is in fact on what was foreseeable to the contracting authority at the time the tender documents were published:

> "The notion of unforeseeable circumstances refers to circumstances that could not have been predicted despite reasonably diligent preparation of the initial award by the contracting authority or contracting entity, taking into account its available means, the nature and characteristics of the specific project, good practices in the field in question and the need to ensure an appropriate relationship between the resources spent in preparing the award and its foreseeable value".

897. On balance, I prefer the Claimants' submissions and consider that in the ordinary course the appropriate vantage point for the assessment of foreseeability will be the date of the award of the Concession Contract. I consider this to be tolerably clear from the first sentence of Recital 76 of the Directive. Furthermore, given that (as the IPs submit) the principal purpose of the modifications rules (as explained by the CJEU in *Pressetext Nachrichtenagentur GmbH v Republik Österreich (Bund)* (Case C-454/06) [2008] Bus LR D118 ("***Pressetext***")) is to prevent contracting authorities from undermining the integrity of public procurement procedures by making changes to public contracts *after*

the contract has been awarded, it appears to me to make good practical sense to test the issue of foreseeability as at the moment the contracting authority awards the contract (rather than at some earlier point before the authority has had to commit (finally) to its terms).

898. I do not consider the passage on which the IPs rely to undermine this analysis. I do not read that passage as indicating that the key date for the assessment is the date of publication of the tender documents but rather as providing guidance on the notion of unforeseeable circumstances. To rephrase it slightly, circumstances will only be unforeseeable where, despite reasonably diligent preparation of the initial award (taking into account the factors identified), those circumstances could not have been predicted. This is not an observation on the timing at which the assessment is to be made, but on the standard of preparation that is to be expected of a contracting authority before it can assert that the circumstances could not have been predicted.

899. Given that neither the Commission nor the IPs sought to argue in favour of the possible alternative date of March 2022 (i.e. the Outcome Notification), I see no reason to consider it further and decline to do so. The relevant date, in my judgment, is September 2022.

What needs to be foreseen under Regulation 43(1)(c)(i)?

900. On the second question as to what it is that needs to be foreseen, the IPs submit that the relevant legal question is whether the specific and particular cause(s) of the modifications, including (in particular) the nature and magnitude of any relevant factual matters, should have been foreseen. They also say that where there is a combination of circumstances, that combination must be foreseen. They rely upon *Salt International Ltd v Scottish Ministers* 2016 SLT 82 ("***Salt International***"), a case in which it was alleged that there had been a breach of the Public Contracts (Scotland) Regulations 2006 ("***the 2006 Regulation***") (a predecessor provision of Regulation 32 of the PCR 2015 – see *Good Law* at [36]) which permit the use of a negotiated procedure without the need to seek new tenders pursuant to prescribed procedures when the time limits in the prescribed procedures cannot be met:

> "(but only if it is strictly necessary) for reasons of extreme urgency brought about by events unforeseeable by, and not attributable to, the contracting authority".

901. The Court of Session upheld the findings of the commercial judge (amongst others) that the need to purchase larger than anticipated quantities of de-icing salt had arisen in a situation of extreme urgency and had been brought about due to the severity and prolonged nature of the winter weather in Scotland during "winter 1" which had not been forecast and was unforeseeable.

902. I am bound to say that I do not consider this case to be of any real assistance. Aside from the fact that the provisions of the 2006 Regulation are plainly different from those with which I am concerned (not least because of the requirement for extreme urgency), I doubt whether its approach to foreseeability provides a basis for articulating the relevant legal question in the terms identified by the IPs. It seems to me that (as described by the Court of Session) the case was determined on its own, very particular, facts: essentially the unexpected climate conditions were unforeseeable. The Court of

Session refers to facts which might have pointed in a different direction (at [47]) but concludes that the judge was entitled to reach the decision he did on the evidence.

903. The wording of Regulation 43(1)(c)(i) is (perhaps deceptively) straightforward. Whether it is applicable must (as the Claimants submit) be determined on the facts of the particular case before the Court. The question to be decided is whether the need for modifications was brought about by "circumstances which a diligent contracting authority or utility could not have foreseen". Although this begs a question as to how one is to interpret the concept of "circumstances" and, specifically, whether it is to be interpreted in a very granular fashion, requiring all aspects of the "circumstances" to have been foreseen (including their magnitude and extent), I do not consider that I am assisted in determining this question by *Salt International*. Rather, as it seems to me, the correct approach is to consider the question of foreseeability when I come to look at the facts.

The standard of proof under Regulation 43(9)(b)(ii)

904. On the third question of the burden of proof to be applied when considering Regulation 43(9)(b)(ii), it is common ground that the burden of proof rests with the Claimants. However, the battle lines are drawn over what is required to satisfy that burden. Must it be satisfied on the balance of probabilities (as the Commission and the IPs contend) or by reference to "real prospects" (as the Claimants contend)? Each side relies on authorities which appear to point in different directions.

905. In a nutshell, the Claimants contend that the "would have allowed for" language in Regulation 43(9)(b)(ii) indicates that the Court is required to determine only whether there is a real prospect that the modifications might have led to the acceptance of a different tender response. They accept that (on the authorities) the wording of Regulation 43(9)(b)(iii) requires an assessment on the balance of probabilities (and have abandoned their case on 43(9)(b)(iii) because they accept that, on the evidence, they cannot satisfy that standard) but, nevertheless, they say that there is good reason to adopt the real prospect test in relation to Regulation 43(9)(b)(ii), namely that, in the relevant hypothetical, the bids (from the Claimants but also from third party bidders) would have, or might have, been different. Thus (they submit) requiring proof to the balance of probabilities would create too high a burden. They say that support for this approach may be found in the judgment of Waksman J in *James Waste Management LLP v Essex County Council* [2023] EWHC 1157 (TCC) ("***James Waste***").

906. The Commission and the IPs, on the other hand, point to the natural and ordinary meaning of the words "would have", to the Claimants' concession that these words in the context of Regulation 43(9)(b)(iii) require proof on the balance of probabilities and to the need for consistency of interpretation. They pray in aid the decision in *Pressetext* and the judgment of Andrews J (as she then was) in *Edenred UK Group v HM Treasury* [2015] EWHC 90 (QB) ("***Edenred***").

907. I prefer the submissions of the IPs and the Commission on this point, essentially for the following reasons.

908. The opening words of Regulation 43(9)(b) refer to the introduction by modification of conditions which "would have" resulted in one of three possible outcomes then identified in sub-paragraphs (i)-(iii). The natural and ordinary meaning of the words

"would have" supports the conclusion that the applicable burden of proof is the balance of probabilities.

909. Further support may be found for this interpretation in *Edenred*. Andrews J was concerned with the question of whether there had been a material variation to an existing public contract. At [103] she referred to *Pressetext*, observing that a variation is material under EU law principles as explained in *Pressetext* (at [35]-[37] of the decision) if it meets one of three criteria, including (at [35]) that the change:

> "introduces conditions which, had they been part of the initial award procedure 'would have allowed for the admission of tenderers other than those initially admitted or would have allowed for the acceptance of a tender other than the one initially accepted".

910. Pausing there, although couched in the language of "material" variation (which it is common ground is not materially different from a "substantial" variation), these are almost exactly the same considerations identified in Regulation 43(9)(b)(i) and (ii) and the language "would have allowed for" is the same. Andrews J then went on to consider whether the amendment in that case extended the scope of the services to be provided under the existing contract, finding that it did not. However, if she was wrong about that (and there had been a variation to the services to be provided from those that had been advertised) she held that the variation was not material because it met none of the characteristics of a material variation identified in *Pressetext*. At [119] she explained that the amendments did not "introduce conditions into the Outsourcing Contract which, had they been part of the initial award procedure, 'would have allowed for the admission of tenderers other than those initially admitted or would have allowed for the acceptance of a tender other than the one initially accepted'". She then went on in the same paragraph to say this:

> "It is worth noting that the language used by the CJEU in Pressetext is "<u>would</u> have allowed for" not "<u>might</u> have allowed for". If the services in the Amendment Agreement to support the delivery of childcare accounts had been expressly included in the initial award procedure, would this have allowed for the admission of any other bidder, or for the acceptance of a tender by someone other than Atos, or attracted additional participants in the bidding process? In my judgment it would not, because it would not have widened the range of potential bidders beyond those who expressed an interest in the first place" (<u>emphasis in the original</u>).

911. I agree with the IPs that in this passage Andrews J made plain that "would" in this context means that the assessment is to be on the balance of probabilities when considering (in that case) material modifications. This is further explained at [123]:

> "…in my judgment the examples of material variation given by the CJEU have to be interpreted as examples of scenarios in which, in substance, a new contract has been concluded, unfairly conferring a competitive advantage on the existing contractor over someone else who would have participated in the process.

> **There would be no such unfairness, and no distortion of competition, if no-one else would have bid or if the complainant's putative bid would never have got off the ground**, which is the case here" (**emphasis added**).

912. Although *Edenred* went to the Court of Appeal and then the Supreme Court, this particular question did not arise again for consideration.

913. The IPs submit that Andrews J was correct on this point and should be followed unless the Court is persuaded that she is manifestly wrong. I am not so persuaded.

914. The point was considered again by Waksman J in *James Waste*. He was concerned with the PCR 2015 and was required to consider (amongst other things) whether a modification to a contract for the management of waste was substantial for the purposes of Regulation 72(8)(b)(ii) of the PCR 2015, a provision that is in exactly similar terms to those of Regulation 43(9)(b)(ii) CCR 2016. The arguments before him as to the burden of proof mirrored the arguments in this case. In arriving at his conclusion, Waksman J considered the judgment in *Edenred* at some length, together with a judgment of Lang J in *R (on the application of Gottlieb) v Winchester City Council* [2015] EWHC 231 (Admin) ("***Gottlieb***"), which I should consider before returning to the analysis in *James Waste*.

915. In *Gottlieb*, Lang J was concerned with the question of whether modifications to a public contract were so substantial as to require a new procurement procedure. It was common ground that this should be determined by reference to case law, which she did, examining both *Pressetext* and *Edenred*. In paragraph [59] she referred to the three examples of material variation identified in *Pressetext* at [35]-[37].

916. At [69], and in the context of considering whether it was necessary to identify a particular named bidder, Lang J concluded that the task for the Court was to apply *Pressetext* and that:

> "the Claimant has to satisfy the court, on the balance of probabilities, that a realistic hypothetical bidder would have applied for the contract, had it been advertised, but he is not required to identify actual potential bidders".

917. Returning to *James Waste*, Waksman J noted (at [130]) that neither *Edenred* nor *Gottlieb* was concerned with "this limb of regulation 72(8)(b)" – i.e. sub-paragraph (ii). Instead, he said that they had been dealing with sub-paragraph (i) or (iii) which concerned the introduction of other tenderers who had not originally bid (similar to CCR 2016 Regulation 43(9)(b)(i) and (iii)). He observed that both cases were in the pre PCR 2015 *Pressetext* world, "though only just". Waksman J then set out various extracts from the judgment in *Edenred* (which did not include paragraph [119] referred to above) before explaining that he did not consider Andrews J's observations to amount to a finding that the expression "would have allowed for" in [35] of the judgment in *Pressetext* meant "would have entailed". At [141] he agreed, however, that in [69] of *Gottlieb*, "Lang J was saying that what had to be shown was that another bidder **would have come forward, not might have come forward**, and the 'realistic' qualification was about the nature of their bid, not the prospect of them bidding"

(**emphasis added**). He then went on to say this (distinguishing the circumstances with which he was concerned from the analysis in [69] of *Gottlieb*):

> "That analysis works in the context of other tenderers, but it does not necessarily translate into the proposition that where it is a question of a different tender being accepted (from a tenderer who did bid), what must be shown is that the other tenderer would have won. I think that goes too far, not least because it would mean that it had to be shown, or found by the court at any rate, that the other tenderer would have achieved the highest score, on the basis of what would now be a different bid i e one that addressed the putative contract as modified".

918. This reasoning caused him to conclude at [142] that:

> "It seems to me that JW is correct here to say that the test in regulation 72(8)(b)(ii) is whether there was a real prospect that the other tenderer would now have won. Real as opposed to fanciful, much as in the sense of CPR Pt 24. That formulation of the test pays appropriate heed to the principal of protecting against real not hypothetical distortion of competition, but without creating too high a burden".

919. With the greatest of respect to Waksman J, I cannot agree with this reasoning (which, as the IPs pointed out, is strictly *obiter* and so has a lower degree of persuasive force) for a number of reasons:

i) First, I cannot see how the concept of a "real prospect" (whether in the CPR Part 24 sense or otherwise) can be extracted from, or read into, the words with which Waksman J was dealing in that case, and with which I am dealing now in Regulation 43(9)(b)(ii) CCR 2016. There is nothing in the wording to suggest that the standard of proof is "real prospect". I disagree with the Claimants that the use of the words "would have allowed for" somehow imports the concept of "real prospect" (and indeed that was not identified as the basis for the decision in *James Waste*). In my judgment these words require the Court to determine whether the circumstance identified in sub-paragraph (ii) would have transpired in the counterfactual – that is to be determined by reference to the balance of probabilities. True it is that in the relevant hypothetical (involving the modification) all bids would have been different; but the question for the Court on the natural and ordinary meaning of the words used in sub-paragraph (ii) is whether the modifications would have changed the outcome in that they "would have allowed for the acceptance of a tender other than that originally accepted". If so, then a failure to engage in a new concession award procedure would leave the existing contractor in a position of competitive advantage, thereby distorting the competition. That is a question to be determined on the balance of probabilities.

ii) Second, there is also nothing in the words of the provision to indicate that the standard of proof differs between Regulation 43(9)(b) sub-paragraphs (ii) and (iii). If Waksman J's analysis were right, it would mean that the interpretation of the words "would have" for the purposes of Regulation 43(9)(b)(iii) is

different from the interpretation of the words "would have" as used in connection with Regulation 43(9)(b)(ii). I consider that this would be a surprising result. As the IPs point out, the same legislative word or phrase cannot be interpreted as having two materially different meanings in the context of a single provision. Indeed, legislative words are presumed to be used consistently throughout the relevant piece of legislation, save where there is a clear indication to the contrary (see *Bunyan v Fridays Ltd* [2025] 1 WLR 4112 (CA) per Lewison LJ at [49]).

iii) Third, the Claimants have not advanced a principled reason as to why the standard of proof should differ as between sub-paragraphs (ii) and (iii) of Regulation 43(9)(b). I do not consider that the words "allowed for" constitute a clear (or indeed any) indication that sub-paragraph (ii) should be treated differently and I also disagree with the Claimants that those words import the concept of "balance of probabilities as to whether there is a realistic chance". This is a way of putting the point that was adopted, but not explained, by Waksman J in [159] *James Waste* when he said: "Looked at overall, it is quite impossible for me to conclude on the balance of probabilities…that there is a real prospect that AC would have won this putative counterfactual procurement".

iv) Fourth, I am not persuaded that the fact that a determination as to what would have happened in the counterfactual may be difficult, or may impose "too high a burden" is a reason to depart from the clear wording of the Regulation.

v) Fifth, I am inclined to disagree with Waksman J over the significance of the observations of Andrews J in *Edenred*. Although I accept that strictly her observations at [119] and [123] were *obiter*, they appear to me to make crystal clear her views as to the importance of the language that had been used by the Court in *Pressetext* (language now replicated in Regulation 43 CCR 2016), namely "would have allowed for" not "might have allowed for". She plainly referred to the concepts in both limbs (ii) and (iii) of Regulation 43(9)(b). Her observations in [123] explain the need to go beyond the hypothetical or possible into the realms of what "would" have happened. I respectfully agree with those observations and consider that this reasoning is equally applicable in the present case. I note that in *Bechtel*, Fraser J had no difficulty in applying the (exactly similar) straightforward language in Regulation 88(7)(b)(ii) UCR 2016 at [503] ("…the changes, had they been part of the original ITT, would not have allowed for the acceptance of a tender other than that accepted…BBVS would have been the winning bidder if these dates had been included originally, on the terms of the ITT as drafted and the tenders as evaluated").

vi) Sixth, in so far as may be necessary, I consider the decision of Waksman J in *James Waste* on this point to be plainly wrong.

920. For all the reasons set out above, I therefore consider that the standard of proof to be applied in respect of the wording of Regulation 43(9)(b)(ii) is on the balance of probabilities.

The approach to evidence when considering Regulation 43(9)(c)

921. It is common ground that when considering whether a modification is substantial pursuant to Regulation 43(9)(c), the Court is required to (i) compare "the contract as originally entered into, and the contract as it would exist after the amendment" (*Edenred* at [35], albeit in the context of whether a variation was "material"); and (ii) have regard to the original contract as a whole. In *James Waste* at [166], Waksman J considered there to be "no other way that one can consider what the economic balance is between the parties and which is now to be putatively changed". I agree. He observed that this was consistent with the focus on material difference in character and extension of scope of the contract in PCR 2015 Regulation 72(8)(a) and (b) – i.e. the equivalent provisions to CCR 2016 Regulation 43(9)(a) and (b). He went on to say that, accordingly, the Court must also have regard to the impact of the modifications on the contract as a whole (*James Waste* at [185] and [187]).

922. The substantiality of a modification must be demonstrated by evidence, and the Claimants bear the burden of proof (*Edenred* at [125] and [128]).

923. The Commission and the IPs say that an analysis of the original contract, or indeed a comparison between the original contract and the modified contract, should not be the end of the story. They contend that the Court is entitled to take into account wider circumstances, including the reasons for the modifications and the "factual context" pertaining at the time of the modifications. By way of example, they say that where modifications are required to address a delay, the fact and circumstances of the delay are relevant to the question of whether the economic balance has changed. To take into account the additional time required prior to the contract start date, but not the reason for it, would (they say) be wholly artificial.

924. In support of this proposition, the Commission and the IPs pray in aid various passages from the judgment of Fraser J in *Bechtel*. On the subject of delays to start dates, he said this:

> "492…Given the nature of utilities projects, such as HS2 (the scale of which is obvious) or the London Underground one (in that case it was a 30-year project) it would be far from sensible if, having selected the winning bidder, the utility was not permitted to negotiate, agree, discuss or make changes with that economic operator. As long as the process that leads to the winning bidder being identified is fair, transparent, treats the bidders equally and complies with the regulatory requirements, then once that winner is chosen, the utility is not bound strictly to contract only on the specific details contained in the tender. The opposite conclusion would make utilities projects unmanageable. Consider, as an example, start dates. Delays are caused by any number of factors. If the start date of a project is moved back by, say, six months, I do not interpret the regulations as requiring a further procurement competition to be undertaken reflecting that change. There is no distortion to the competitive process by permitting such negotiation, and I find that the regulations permit this. If this were not permitted, a change of

> dates would require a new competition. Such a conclusion would be somewhat lacking in any common sense or logic".
>
> and
>
> "508. Finally on this issue, if Bechtel were right in its construction of the Regulations, this would give any bidder with sufficiently deep pockets, who was sufficiently motivated, an extraordinarily powerful weapon in its arsenal where procurement competitions for complex contracts are involved. By issuing proceedings, the automatic suspension could potentially cause delay to a contract award. By reason of that delay, changes to dates such as possessions and contract commencement would inevitably be caused. Yet delay to such dates could (if Bechtel were right), even if anticipated and expressly provided for in the ITT, still lead to a conclusion that the competition had to be rerun. If Bechtel were right, changes of the nature such as those to the Contract Data in this case could potentially be further relied upon by a losing bidder to argue that the procurement competition it had already lost, should be abandoned and re-run in any event. Even without delay caused by the automatic suspension, infrastructure projects often suffer delay. Any delays suffered prior to contract award could potentially undo the entire result of any major procurement, if Bechtel's interpretations of the Regulations are correct. I do not consider UCR 2016 imposes such restrictions upon utilities, such that the changes to the contract data that occurred in this case must, or ought to, lead to the conclusion that another procurement competition must be conducted. I find that the changes to the contract data that occurred in this case are permitted both within the terms of the ITT itself, and by reason of the negotiated procedure under reg 47 being used by HS2".

925. The Commission and the IPs say that these observations were made in the context of a finding that the modifications in that case were not substantial within the meaning of Regulation 88 UCR 2016 (the analogous provision to Regulation 43 CCR 2016) and that Fraser J was making a point of principle which applies equally to Regulation 43 and the issues in this case.

926. By contrast the Claimants contend that the focus of the analysis must be on the effect of the modifications on the contract and that this requires a simple comparison between the economic balance of the modified contract and the economic balance of the original contract. They say that any other approach is not supported by the wording of the Regulations and would effectively make a nonsense of the comparison exercise. They contend that *Bechtel* does not assist, essentially because Fraser J was dealing with different Regulations and very different facts.

927. Regulation 43(9)(c) requires a consideration of whether the modification "changes the economic balance" of the contract in a manner not provided for in the original contract. While there is no doubt that this requires a comparison between the contract in its original and modified forms, the real question is what, if any, factors beyond the simple

comparison are relevant to the question of whether the economic balance has been changed? The wording of Regulation 43(9)(c) provides no real assistance on this point.

928. Returning to *Bechtel*, I am inclined to agree with the Claimants that the judgment of Fraser J must be considered with some care. He was dealing with a situation in which, after having selected the winning bidder and prior to entering into the contract, the contract start date was changed to account for delays caused by a standstill and then an automatic suspension. As is clear from [485] of the judgment, Fraser J was concerned with the negotiated procedure allowed for by Regulation 47 UCR 2016. He accepted a submission (recorded at [486]) from the defendant that this procedure permitted "considerable flexibility" for utilities "to negotiate, clarify and finalise the terms of the contract or the project itself with the preferred bidder, once that bidder is selected". At [491] he accordingly observed that "[t]he use of the word 'negotiated' in the regulation would suggest that such a point is somewhat compelling; utilities are given very wide scope in terms of negotiation. The wording of the regulation is demonstrably wider than that of its counterpart in the Public Contracts Regulations, namely reg 29, which is a competitive procedure with negotiation". His observations at [492], relied upon by the Commission and the IPs, appear to have been made in this context and were plainly focused on the nature of utilities projects. They were not made in the context of a consideration of Regulation 88 UCR 2016 (i.e. the "substantial" test); his consideration of that test does not begin until [497] of the judgment.

929. When Fraser J does turn to consider that test, much of his focus is on Regulation 88(1)(a) (the equivalent to Regulation 43(1)(a) CCR 2016) which is concerned with modifications that have been provided for in the initial procurement documents. He finds (at [502]) that the modifications with which he is concerned were expressly permitted both by the terms of the ITT (and that any RWIND tenderer would have understood this) and by Regulation 88(1)(a). He also finds that none of the modifications (which were concerned with changes to key dates necessitated by a delay to the contract start date) changed the economic balance of the contract (albeit without any analysis as the point does not seem to have been the focus of the submissions). However, at [503] he expresses the view that a qualification to an existing contract provision that had been put forward by Bechtel in its tender, namely a proposal to delete a clause (requiring it to agree to build a super-hub station for a specified Incentive Target sum and by a Programme Target date, or at least bear the commercial risk for failing to do so) and to replace it with a new clause (under which Bechtel would bear very little risk if the station was not built for the Incentive Target or to the Programme Target), if it had been accepted by the defendant, was "precisely the sort of modification that *would* have changed the economic balance of the contract". In that case, the claimant would have had to conduct a new competition because such a change would have distorted competition ([504]) in that "one bidder (Bechtel) would have been bidding against a markedly different contractual undertaking than the other bidders".

930. Pausing there, while there is no doubt that the factual circumstances of the case before Fraser J were, in a number of respects, different from those that arise in this case, nonetheless I consider there to be relevant analogies that can be drawn:

    i) The flexibility that he identified as being applicable in the context of the UCR 2016 is also a feature of the CCR 2016. This is clear from the Recitals to the Directive: at (1) which refers to the aim of "[a]n adequate, balanced and flexible legal framework for the award of concessions"; at (2) which identifies the need

for the rules of the legislative framework to be "clear and simple", to "duly reflect the specificity of concessions as compared to public contracts" and to "not create an excessive amount of bureaucracy"; and at (68) which provides that:

> "Concessions are usually long-term, complex arrangements where the concessionaire assumes responsibilities and risks traditionally borne by the contracting authorities and contracting entities and normally falling within their remit. For that reason, subject to compliance with this Directive and with the principles of transparency and equal treatment, contracting authorities and contracting entities should be allowed considerable flexibility to define and organise the procedure leading to the choice of concessionaire".

ii) This flexibility is reflected in Regulation 30 CCR 2016 which provides that:

> "The contracting authority or utility shall have the freedom to organise the procedure leading to the choice of concessionaire subject to compliance with these Regulations".

Ultimately I did not understand the general proposition that CCR 2016 provides for flexibility to be in dispute.

iii) Against that background, I have no doubt that it is also true to say, in the context of the CCR 2016, that "[a]s long as the process that leads to the winning bidder being identified is fair, transparent, treats the bidders equally and complies with the regulatory requirements, then once that winner is chosen, the [contracting authority] is not bound strictly to contract only on the specific details contained in the tender" (see *Bechtel* at [492]). That much is of course clear from the provisions of Regulation 43 which permits the modification of concession contracts in specific circumstances.

931. Does the judgment in *Bechtel* assist on the issue in dispute between the parties as to the admissibility of evidence as to factual context? In my judgment, on close analysis, it does. Although Fraser J's observation to the effect that "delays are caused by any number of factors" in the context of his observations about the movement of start dates in [492] is not obviously an indication that he considers those "factors" to be relevant to the assessment of whether a modification is "substantial" for the purposes of Regulation 88 UCR 2016 (owing to the fact that, as I have said, he is dealing with a different issue in that paragraph), he returns to the point again in [504]. Here he is expressly dealing with the economic balance, and it is in this context that he says that Bechtel's proposed qualification to the contract terms would have distorted competition but that:

> "[t]he changes made by HS2 in this instant case to the Contract Data, including the changed dates, and the consequent changes to the MRS, did not. They are changes to details that simply refine matters, and **for the most part, simply arise as a result of the passage of time**. It took longer to award and conclude the contract than anticipated when the ITT was drafted, and so

> changes to the Contract Data were necessary" (**emphasis added**).

932. Fraser J makes a similar point at [505] when he says

> "Regulation 88 does not assist Bechtel…The changes…are not substantial, nor are they material. The changes required to the dates were, **partly, necessary because of the imposition of the automatic suspension imposed by Bechtel issuing proceedings**" (**emphasis added**).

933. On balance, I tend to agree with the Commission and the IPs that these observations suggest that surrounding circumstances may be relevant to (and admissible in connection with) the assessment of economic balance. At a minimum, Fraser J appears here to be viewing as relevant the reasons for modifications to a contract which arise in the context of a delayed start date. Given the exactly similar wording of the Regulations, I cannot see why these observations should not apply equally to CCR 2016 and I consider that I should follow this approach. I do not consider there to be any basis for distinguishing *Bechtel* on this point, as the Claimants sought to do, on the grounds that it was concerned with changes made after the contract award but before the contract was entered into (unlike the present case where the modifications, with the exception of the 2022 Modifications, were made after the Enabling Agreement was signed). As the Claimants accepted in closing, Fraser J dealt squarely with Regulation 88 UCR 2016, which, as I have said, is directly analogous to Regulation 43 CCR 2016; there is no basis to suppose that his reasoning on that would have been any different had the modifications been effected post-contract. As Mr Barrett pointed out, once an award has been made, a contracting authority is subject to the same constraints on its ability to change the contract as would apply once the contract is signed (see *Case C-496/99 Commission v CAS Succhi di Frutta* ECLI:EU:C:2004:236 at [115]-[117]).

934. I am fortified in this view by the approach taken by Waksman J to the issue of economic balance in *James Waste*. He was concerned with specific features of modifications relating to gate fees and to a guaranteed mileage provision. He pointed out at [162] that the contractor "was not agreeing to do nothing in return for these provisions" (the clear implication being that one has to look at the whole package of modifications). At [163], with reference to *Edenred*, he referred to the fact that a change in economic balance was to be decided by reference to existing terms (the contractual charging mechanism for the modifications in *Edenred* being the same as in the original contract). However, at [164] he explained that on the facts before him, the change in gate fees were not such that the original remunerative scheme under the contract could be applied and he said that in such cases, there was force in the suggestion that "reasonable compensation" was "the appropriate yardstick by which to judge a price increase". At [165] he said this:

> "Further, if the original contractual mechanism could have been used without more, but is altered in some way (again, the case here with the guaranteed minimum mileage), I do not accept that without more, this must mean that the economic balance question is to be resolved against the authority. **There must surely be a consideration of whether the change is itself justified, and again, a useful yardstick would be reasonable**

> **compensation.** That is pertinent, especially where, as here, one is not talking about an amount to permeate throughout the original contract but rather a very short- term and a very small "one off" addition, to the original contract" (**emphasis added**).

935. I read this as a clear acknowledgment of the likely relevance of the reasons for a change. Indeed, later in the judgment (at [182]), when dealing with the guaranteed mileage provision, Waksman J asks rhetorically: "But the question is whether in reasonable commercial terms it can be justified". He then goes on to consider the factual context in which the modification was made together with its "impact…on the contract as a whole".

936. Standing back, I consider this approach to be unsurprising in light of the legislative purpose of the modifications provisions in CCR 2016. Put simply, that purpose is to prevent a contracting authority affording the successful bidder unequal and therefore unlawful treatment by making changes after the award decision which (i) would have affected the outcome of the procurement if they had been incorporated into the original contract terms; or (ii) give the successful bidder a better commercial deal than the one it agreed to accept in its bid. I consider that it is important to keep that purpose in mind when interpreting the Regulations, and I also consider that such an approach is entirely consistent with the observations of Coulson LJ in *Optima* at [59]-[60] (to which I referred earlier in this judgment) to the effect that the rules around public procurement "are not (and must never be allowed to become) an end in themselves, just as those rules should not be applied in a formulaic or unrealistic way".

937. I agree with the IPs that it is no part of the purpose of procurement law generally, or the modifications rules in particular, to prevent contracting authorities from taking reasonable steps to address external circumstances that are outside the control of the economic operator performing the contract or render the administration and delivery of large complex public contracts and projects unmanageable or impracticably onerous. Of course, modifications to a concession contract must fall within one or more of the gateways in Regulation 43 CCR 2016 if a new concession contract award procedure is to be avoided and those gateways are to be interpreted narrowly (*Edenred (UK Group) Limited v HM Treasury* [2015] UKSC 45 ("***Edenred (UKSC)***") at [28]). But it is also clear that the Regulations must be applied in a realistic way. In my judgment, requiring the Court to close its eyes to the circumstances in which a modification came to be made, as the Claimants would have it do, is the antithesis of this. As Waksman J pointed out in *James Waste* (at [139)], in similar vein, procurement rules "are designed to protect against real and not hypothetical distortion of competition". Whether or not there is a real distortion of competition is best addressed by considering the modifications in their factual context rather than in a vacuum.

938. Returning to *Bechtel*, the practical, realistic approach is plainly the approach that Fraser J was taking at [508], as the Claimants accepted in oral closing. Bechtel was arguing in that case that Regulation 88 UCR 2016 did not even permit changes to contract dates necessitated by delay (notwithstanding that those changes were expressly provided for in the ITT). It is unsurprising that Fraser J expressed his opposition to that proposition in such clear terms, explaining that if Bechtel were right "any delays suffered prior to contract award could potentially undo the entire result of any major procurement".

939. Of course, the Claimants are right to say that every modification must be assessed on its own facts by reference to the requirements of Regulation 43, and that where there has been a delay, the approach that the Court takes to modifications designed to change the start date may not be the same as the approach that the Court takes to modifications of an entirely different nature, even though the latter may also have been prompted by an underlying contractual delay. Nevertheless, whatever the modifications with which the Court is concerned, I consider that evidence as to the factual context of those modifications will be admissible in the overall consideration of "substantiality" under Regulation 43(9)(c), and that is the approach I shall take in considering the modifications in this case.

940. Before I move away from this legal issue, I should address a related point that arose in the parties' post-trial notes and was developed in submissions made at the Further Hearing. Although there appears to have been a degree of misunderstanding between the parties as to the nature of the point (not assisted by the Commission and the IPs going somewhat "off piste", as Ms Hannaford put it, in their joint note), I eventually understood the issue between them to boil down to how the Court should approach the relevance of existing contract provisions which might be said to permit modifications when it is assessing the question of economic balance under Regulation 43(9)(c).

941. The Commission and the IPs say this is entirely straightforward. The Court must compare the contract terms before and after the modifications from the objective perspective of the RWIND tenderer. They submit that if a variation similar to that effected by a particular modification was provided for in the original contract, then the modification cannot be regarded as affecting the economic balance.

942. Unfortunately, the Claimants' position on this point was both confused and inconsistent. At various points during the Further Hearing the Claimants submitted that in carrying out the assessment of relevant existing clauses for the purposes of the economic balance analysis, the Court is required to test those clauses for unlawfulness against Regulation 43, first to determine whether they provided for substantial modifications and, second, if they did, to determine whether they were nevertheless capable of getting through the Regulation 43(1)(a) gateway – a question which raises the spectre of whether the existing contract provisions are clear, precise and unequivocal review clauses.

943. I found this to be a puzzling submission and, in so far as it was maintained throughout the Further Hearing (and in the end it appeared to be), I reject it. Aside from the fact that it is neither practical nor realistic, I can see no basis on the wording of Regulation 43 to suppose that it is correct. Regulation 43(9)(c) does not suggest that existing provisions of the contract must be assessed for lawfulness under Regulation 43(1)(a) before the anticipated comparison for the purposes of the economic balance test can be undertaken. If the draftsman had intended such an approach it is to be expected that she would have said so. Regulations 43(1)(a) and 43(1)(e) are stand-alone gateways and Regulation 43(9)(c) is to be considered in connection with the substantiality gateway in 43(1)(e). I reject the suggestion that it is appropriate to apply the requirement for clarity and precision and/or to become involved in determining whether existing provisions in the contract are "review clauses" when conducting the substantiality assessment pursuant to regulation 43(1)(e) and 43(9)(c). I agree with Mr Barrett that the tests in 43(1)(e) and 43(1)(a) require a sequential analysis and that

43(1)(a) is a subsequent test to be applied if 43(1)(e) fails. This sequential approach was eventually accepted by Mr Suterwalla as reflecting the appropriate analysis.

944. That these gateways have nothing whatever to do with each other receives support from the decision of the Supreme Court in *Edenred (UKSC)*. The Supreme Court was not concerned with Regulation 43(9)(c). It was expressly considering regulation 72(8)(d) PCR 2015 (which came into force after the decision of Andrews J in *Edenred*, but prior to the matter reaching the Supreme Court). Regulation 72(8)(d) PCR 2015 is a directly analogous provision to Regulation 43(9)(d) - another factor that may be relied upon in connection with the argument that the modification was substantial, the question being for these purposes whether the modification "extends the scope of the contract …considerably". However, as with Regulation 43(9)(c) the focus is on the contract terms. At [36], Lord Hodge (giving the judgment of the Court) said this:

> "I do not accept that one should read the prohibition from modifying a contract to encompass services not initially covered as banning the modification of a public contract which extends the contracted services beyond the level of services provided at the time of the initial contract if the advertised initial contract and related procurement documents envisaged such expansion of services, committed the economic operator to undertake them and required it to have the resources to do so. The court must look to the OJEU notice and the other procurement documents, including the contract contained in the ITT, to ascertain the nature, scale and scope of the operational services that the Atos contract was set up to provide. In short, the question is whether the services were covered by the contract resulting from the procurement between 2011 and 2013, **including its provisions for amendment of the contract**. Were it otherwise, it is difficult to see how a Government department or other public body could outsource services that were essential to support its own operations and accommodate the occurrence of events and the changes of policy that are part of public life…the focus must be on the particular contract" (**emphasis added**).

945. There is no suggestion in this passage that existing provisions for amendment of the contract which are being viewed in the context of considering substantiality should be tested for lawfulness. The Claimants' submission to the contrary would risk entangling the substantiality assessment in an overly complicated, unrealistic analysis which cannot have been what was intended on the clear words of the provisions.

946. At another point during the Further Hearing, Mr Suterwalla appeared to agree that I should approach the contract comparison exercise by reference to the perspective of the RWIND tenderer, a submission which fits with an earlier submission he had made that the procurement regime is designed to ensure that contracts are not operated and exercised in a manner which could not have been anticipated by reasonable bidders. However, after further reflection he corrected the Claimants' position, suggesting that what was required instead was "a combination…of… an objective analysis of what the contract permits under those clauses combined with the reality of what could be done given Allwyn's circumstances". He went on to submit that such an assessment is in fact now impossible in the absence of evidence and that any attempt by the Court to

carry out such an assessment would be highly prejudicial to the Claimants owing to the fact that they were not previously aware that this point was being run.

947. In my judgment the submissions of the Commission and the IPs are plainly to be preferred. The natural and ordinary meaning of the words in Regulation 43(9)(c) is to the effect that if the relevant modification was provided for in the initial concession contract then the change is not one which alters the economic balance. The Court must take an objective and common sense approach to that analysis. The purpose of the provision, as Mr Barrett submitted, is to ensure that modifications can safely be made without a new competition where they merely reflect relevant contractual provisions that have always been present in the contract (including variations that have been permitted) – provisions that have been fairly advertised to all bidders and provisions which all bidders have had an opportunity to take into account in their tenders. In such circumstances there can be no unfairness or distortion of competition by reason of a later modification to similar effect – even if the available contractual machinery is not used to implement that modification. The corollary of this is that the only proper way to conduct the contractual comparison is by reference to the objective standard of the RWIND tenderer. Although he was not specifically addressing the economic balance, I note that at [502] in *Bechtel*, Fraser J had no compunction in viewing existing provisions in the ITT through the lens of the RWIND tenderer. I agree with the IPs that subjective factual witness evidence on the question of what could have been done under a particular contractual provision is inadmissible and of no assistance to the Court.

WHAT ARE THE CHALLENGED MODIFICATIONS? (ISSUE 1)

948. In their closing written submissions, the Claimants stated that they were challenging the following modifications:

i) **2-year Extension**: The Fourth Licence (like the Third Licence) was for a Term of 10 years. Clause 3.3-3.6 of the original Competition version of the Fourth Licence provided for a total extension to the Term of no more than 24 months exercisable at the Commission's discretion where it considered such an extension "appropriate for the purposes of the Next Competition". The 2023 Modifications introduced new clauses 3.7 and 3.8 under the heading "Extension Review" which gave the Commission the ability to extend the Fourth Licence (including at the request of the Licensee) for an additional two years:

> "3.7 The Commission will consider whether to extend the Term (an "Extension Review"):
>
> (a) in the six months prior to the end of Licence Year 6; or
>
> (b) earlier during Licence Year 5 or Licence Year 6, if requested to do so by the Licensee.
>
> 3.8 Following the Extension Review, provided that the Commission is satisfied that the existence and period of such an extension would not be inconsistent with the Commission's statutory duties and legal obligations, having taken into account all relevant factors including the extent to which:

> (a) the Licensee has complied with the Enabling Agreement from 25 September 2023 and Full Implementation has been achieved in accordance with the Enabling Agreement on or before 1 February 2026;
>
> (b) the Licensee's obligations under this Licence are being met, and the Licensee is, and has been, in compliance with this Licence; and
>
> (c) in running the National Lottery under this Licence, the Licensee has done everything it can to maximise Good Causes Contributions,
>
> the Term of the Licence shall be extended by a period of two years or such lesser period as the Commission may determine".

ii) **Extension of Implementation Period and Initial Functionality**: Pursuant to clause 3.1 of the original Enabling Agreement, the Incoming Licensee was required to comply with its Application (i.e. achieve Fully Implemented Commencement) by the Start Date of the Fourth Licence (i.e. 1 February 2024). The 2023 Modifications introduced a new clause 4 entitled "Implementation of the Application". This permitted Allwyn to run the National Lottery "with effect from the Start Date on the same basis (in all material respects) as operated by the Outgoing Licensee in the 12 months prior to the Start Date" (clause 4.1(a)). This was defined as "Initial Functionality". Clause 4.1(b) made clear that Allwyn was required to achieve Full Functionality by the Delayed Date (which was 29 September 2024 but with an option to extend that date to no later than 28 February 2025). This was referred to as Delayed FIC (i.e. Delayed Fully Implemented Commencement). Clause 4.4 also made provision for a "Backstop Date" of 1 February 2026, which Allwyn could request in the event of further delays caused by the replacement of the core gaming systems and terminals to apply where Allwyn was unable to meet Delayed FIC by reason of delays caused by IGT. Allwyn obtained the extension to 28 February 2025. Mr Tanner explained in his statement that enabling Allwyn to transition with Initial Functionality ensured that there would be no gap or interregnum upon the expiry of the Third Licence. He confirmed in his oral evidence that the effective extension to the Implementation Period granted by this Modification was 8 months on top of the 22 months originally envisaged in the ITA (i.e. starting in September 2022 and ending on 28 February 2025).

iii) **RICs**: as identified earlier in this judgment, RICs are costs which the Incoming Licensee incurs during Implementation. They are recoverable under the terms of the Licence in so far as they are reasonably and properly incurred. Clause 31.1(a) of the original Enabling Agreement provided that RICs were costs "actually incurred, or accrued with respect to activities undertaken, **during the Implementation Period** by the Incoming Licensee" (**emphasis added**). The 2022 Modification provided that, in addition to costs incurred during the Implementation Period (now defined as the Initial Implementation Period), RICs included costs "actually incurred, or accrued with respect to activities undertaken by the Incoming Licensee **during the period from the date of the Outcome Notification to the date of this Agreement**" (**emphasis added**).

This enabled Allwyn to recover the costs it had incurred prior to signing the Enabling Agreement in September 2022, amounting to circa £13 million.

iv) **First Year Committed Games**: applicants were required to set out details of the "First Year Committed Games" in their Applications (defined in the Licence as "Games which the Licensee proposed to launch during Licence Year 1"). Clause 11.1 of the Competition version of the Enabling Agreement identified the Incoming Licensee's commitment to provide First Year Committed Games during the first Licence Year of the Term. Clause 26.2 of the Competition version of the Licence required the Licensee to ensure that "before the start of Licence Year 2" the National Lottery included the First Year Committed Games. The 2023 Modifications removed the concept of First Year Committed Games from the Licence, replacing it with "Initial Committed Games". Clause 11 of the Enabling Agreement was amended to remove the reference to First Year Committed Games and include instead "Initial Committed Games". These had to be applied for "during the first two Licence Years of the Term". Clause 26.2 of the Licence was modified to reflect this, requiring the Licensee to ensure that "before the start of Licence Year 3" the National Lottery would include the Initial Committed Games. Allwyn was thus given an additional year in which to implement what had originally been referred to as "First Year Committed Games".

v) **Cap on the Commission's Costs**: Under clause 29.6(c) of the Competition version of the Enabling Agreement, the Incoming Licensee was liable to reimburse the Commission in respect of costs reasonably incurred by the Commission in connection with Outstanding Implementation Steps. These costs were not capped. The 2023 Modifications provided that Allwyn would continue to offer an indemnity in respect of such costs but that they would now be paid to Good Causes and would be subject to a cap.

vi) **Waivers**: The 2023 Modifications added the words in bold at clause 2.4(b) of the Enabling Agreement:

> "as part of Implementation, as required by clause 3.1, must adopt and implement all strategies, processes, policies and procedures in sufficient time to ensure that it will run the National Lottery on and from the Start Date in compliance with the New Licence **(subject to any waivers or dispensations which may be granted by the Commission)**, including, where required by the New Licence, by reference to the Commission's Regulatory Handbook and any applicable guidance or codes of practice published by the Commission…." (**emphasis added**).

An exactly similar amendment was also made to clause 3.1. There was no provision in the original Enabling Agreement for the grant of waivers or dispensations in respect of the Licence.

vii) **Key Subcontractors**: As part of the amendment to clause 4 of the Enabling Agreement, the 2023 Modifications made new provision for the potential that Allwyn might enter into a "new forward-looking arrangement" with the Historic Technology Provider (i.e. IGT). There was no similar provision in the original

> Competition version of the Enabling Agreement which simply required Allwyn to implement its bid (which meant using Scientific Games for the provision of gaming technology).

949. In the Claimants' pleading there was also a reference to "[e]xtending other key dates and milestones" albeit that was not mentioned in closing. In the final revised List of Issues, the Claimants crossed out issues which involved the "Key Subcontractors" modification and the "waivers" modification, leaving the Commission to assume in its closing submissions that these had been abandoned altogether and were no longer challenged. I did not understand this assumption to be disputed by the Claimants in their reply (or at the Further Hearing) and, accordingly, I shall not address these issues further in this judgment.

950. Given the position on the pleadings and the most up to date List of Issues, I therefore understand modifications (i), (ii), (iii), (iv) and (v) above to be challenged. I also understand from the focus of the Claimants' written submissions that the 2 year extension is "the critical point", albeit that this was qualified in oral submissions by reference to the 2 year extension and the extension of the Implementation Period, which were described as "the most important [modifications]". In light of this indication, the Commission chose to deal only with these two modifications in their oral closing. The IPs focused largely upon the 2 year extension which they described as "the only candidate for the modifications case". I shall accordingly begin my analysis with the 2 year extension and the extension to the Implementation Period modifications, but, as they remain live, I shall also need to deal briefly with the remaining modifications identified in (iii), (iv) and (v) above. These modifications were also discussed at the Further Hearing in January 2026.

RELEVANT CONTRACTUAL PROVISIONS IN THE ORIGINAL CONTRACT

951. I have already held that for the purposes of the "substantiality" analysis it is relevant to consider the whole of the existing contract. Key provisions to which I am referred by the IPs and the Commission are clauses 29, 32.5 and 32.6.

952. Clause 29 is entitled "Fully or Partially Implemented Commencement". Clause 29.1 defines the meaning of Fully Implemented Commencement which means that:

> "In its sole discretion, the Commission is satisfied that:
>
> (a) the Incoming Licensee has fully implemented its Incoming Transition Plan;
>
> (b) all obligations under this Agreement which are required to be fulfilled or complied with by the Incoming Licensee before the Start Date have been fulfilled or complied with;
>
> (c) the Incoming Licensee is otherwise ready to Start, as contemplated by the Application and the New Licence, on and from the Start Date; and
>
> (d) allowing the Incoming Licensee to Start on and from the Start Date will not damage any Matter to be Protected."

953. Clause 29.2 makes provision for the possibility that the Incoming Licensee may be unable to achieve Fully Implemented Commencement. Under clause 29.2, if the Incoming Licensee becomes aware that it may not achieve Fully Implemented Commencement it must immediately notify the Commission and provide various details in writing including details of how Fully Implemented Commencement may not be achieved, a statement of the steps that would be outstanding if the Commission were to permit only Partially Implemented Commencement at the Start Date and an assessment of the impact of such non-achievement on the operation of the National Lottery. Clause 29.6 provides that:

> "If, on the Final Readiness Date:
>
> (a) having considered the Outstanding Implementation Steps proposed by the Incoming Licensee in accordance with clause 29.2(b), the Commission has identified certain Outstanding Implementation Steps which must be taken by the Incoming Licensee before Fully Implemented Commencement can be achieved, including a timetable within which the Outstanding Implementation Steps must be completed by the Incoming Licensee;
>
> (b) the Commission considers (in its absolute discretion) that it is appropriate to proceed to Start notwithstanding the existence of those Outstanding Implementation Steps; and
>
> (c) the Incoming Licensee has provided an undertaking (in a form satisfactory to the Commission) to promptly reimburse the Commission in respect of all costs reasonably incurred by the Commission:
>
> (i) in connection with monitoring, assessing and taking all other actions in connection with the Outstanding Implementation Steps; and
>
> (ii) otherwise, as a result of the fact that the Incoming Licensee has proceeded to Start notwithstanding the existence of the Outstanding Implementation Steps,
>
> (such costs to be treated as Excluded Costs under the New Licence) ("Commission OIS Costs"),
>
> the Commission will:
>
> (iii) confirm in writing that Partially Implemented Commencement shall take place on the Start Date and the New Licence shall Start as contemplated by, and subject to, Condition 26.4 of the New Licence; and
>
> (iv) specify the Completion Date".

954. Pursuant to clause 29.7, if the Commission confirms that the New Licence shall start under clause 29.6, "the Commission shall grant the New Licence to the Incoming Licensee with effect from the Start Date". Under clause 29.8, the Incoming Licensee must enter into "any document or take any other action required in order to complete the Outstanding Implementation Steps promptly" following the date of the written confirmation provided by the Commission pursuant to clause 29.6.

955. Clauses 32.5 and 32.6 fall under the heading "Remedies and Termination". They are in the following terms:

> "32.5 Without prejudice to clauses 32.1 to 32.4, if the Incoming Licensee is, or appears to be, in breach of this Agreement, the Commission may, in its absolute discretion take any or all of the following steps where it considers that to be appropriate:
>
> (a) grant the Incoming Licensee relief from any or all of its obligations under this Agreement, including by extending deadlines provided under this Agreement or the Incoming Transition Plan; and
>
> (b) make an adjustment to the Estimated Implementation Costs in order to enable the Incoming Licensee to recover additional costs under Schedule 5 of the New Licence.
>
> 32.6 In considering how to enforce its remedies under this Agreement, or whether to take any steps pursuant to clause 32.5, the Commission shall:
>
> (a) wherever reasonably practicable and appropriate ensure that the matter at issue is considered by the Incoming Transition Governance Board, which shall be required to consider whether any alternative resolution of the issue may be appropriate, before the Commission enforces any remedies;
>
> (b) consider any representations or evidence provided by the Incoming Licensee to the Commission regarding the cause, materiality and effect of any breach or apparent breach of this Agreement; and
>
> (c) take account of the cause of any actual or apparent breach by the Incoming Licensee of this Agreement and, in particular, whether that breach has been caused or contributed to by the Outgoing Licensee or a matter, fact or circumstance outside the control of the Incoming Licensee."

956. Schedule 1 to the Enabling Agreement provides that:

i) "Partially Implemented Commencement" means:

> "as at a specified date and under the Enabling Agreement, the Commission has confirmed to the Licensee that the Incoming

> Transition Plan has been implemented, and the Licensee's obligations under the Enabling Agreement have been fulfilled, in a manner which the Commission is satisfied that it is appropriate to proceed to Start but that certain specified steps (Outstanding Implementation Steps) need to be taken before the Fully Implemented Commencement has been achieved"

ii) "Start" means:

> "this Licence coming into effect and the Licensee commencing operation of the National Lottery in accordance with this Licence".

957. In summary, therefore, from the date that the Enabling Agreement was published to all applicants in the Competition in its original (unmodified) form, and on the date that it was originally signed by Allwyn, the Enabling Agreement provided that, in the event of a breach "caused or contributed to by [Camelot] or a matter, fact or circumstance outside the control of [Allwyn]" this could lead to (i) the timetable, and deadlines, for the performance of Allwyn's obligations under the Enabling Agreement (including the Incoming Transition Plan) being extended; (ii) Allwyn being granted relief from its obligations under the Enabling Agreement; (c) Allwyn being entitled to recover additional implementation costs; and/or (d) the Licence being entered into, pursuant to Partially Implemented Commencement, notwithstanding that the Incoming Transition Plan had not been completed.

958. I shall return in a moment to consider the relevance of these provisions in the context of the economic balance assessment under Regulation 43(9)(c) CCR 2016.

THE FACTUAL CONTEXT OF THE MODIFICATIONS

959. The key factual matter requiring consideration under this head is the cause of the Challenged Modifications (Issue 4(b)-(c)).

960. Given the Claimants' failure at trial to advance their pleaded case that the Challenged Modifications were necessitated by Allwyn's failures to meet its obligations under the Enabling Agreement (which I have discussed above), and my consequent dismissal of that case, one might have thought that the question of causation could be readily and swiftly resolved. However, two disputed issues still remain. The first is a not unimportant pleading point raised by the IPs, to which I shall return in a moment. The second is a dispute (which itself arises in connection with the pleading point) over which of the factors that occurred in advance of the Challenged Modifications was actually causative. The IPs and the Commission contend that there was a combination of factors, including the Camelot and IGT Proceedings and a protracted campaign of obstruction by IGT. The Claimants' primary case is now consistent with this. However, for the first time in closing the Claimants sought to advance an alternative case that the Camelot Proceedings caused such significant delay to implementation that the need for the Challenged Modifications would have arisen <u>even without</u> the other matters relied upon by the IPs and the Commission. The significance of this latter dispute of course is that there is a real issue between the parties as to whether the cause of the modifications was foreseeable for the purposes of Regulation 43(1)(c).

961. As to the pleading point raised by the IPs, they contend that the Claimants' pleaded case attributes the sole (or at least substantial) cause of the Modifications to Allwyn's alleged failures alone. They point to paragraphs 40A-40E of the Claimants' Particulars of Claim in which the Claimants expressly plead that the Challenged Modifications were not necessitated by the factors set out in the Modification Notice (i.e. the Camelot and IGT litigation and the "protracted and challenging negotiations" regarding handover from IGT to Allwyn). Instead they say in terms that the Challenged Modifications were necessitated by Allwyn's failures. They plead a number of "examples" of those failures and then at paragraph 40D they say this:

> "It is apparent from disclosure that a number of the Challenged Modifications (including but not limited to the 2-year extension to the Licence Period) arose as a result of late requests from Allwyn at a point when they could not be attributable to anything other than commercial negotiations and Allwyn seeking to extract the most advantageous deal it could from the Defendant".

962. At paragraph 40E, the Claimants assert that in August 2023, the Commission and Allwyn agreed the adoption of a "no blame" approach "in order to facilitate what appear to have become difficult commercial negotiations between the parties". They go on to aver that "this 'no blame' approach resulted in the parties effectively agreeing to blame IGT and the litigation for the Modifications, rather than attribute responsibility where it should have in fact fallen" (a clear reference to Allwyn).

963. Against the background of this (unamended pleading) the IPs say in the strongest terms that the Claimants' alternative case in closing (that the effective cause of the modifications was in reality the Camelot Proceedings only) is nothing short of a *volte face*, that it is unpleaded and that it was not even advanced in cross-examination. They point out that the extensive unchallenged evidence from the Allwyn witnesses is that the Challenged Modifications were caused by the combined effect of the Camelot and IGT Proceedings, together with obstruction from those entities and that if the point had been pleaded, they would have wished to lead evidence dealing with the question of why one could not regard the Camelot litigation as "the real cause of the delay".

964. I am inclined to agree with the IPs on this point. The Claimants seem to have been trying to re-position their case in closing so as to provide a fall back in the event they fail on their primary position. However, this is quite simply not the way that litigation is conducted in this Court. One only has to ask whether it is acceptable for a defendant to be facing an entirely new case on causation in closing, notwithstanding a failure to alert the defendant to it previously, to appreciate that it cannot be either fair or consistent with the requirements of the overriding objective. The Commission and the IPs have had no prior notice of this case, no chance to prepare to meet it (whether by way of witness evidence or in submissions) and there was little if any cross-examination by the Claimants on the point. The Commission and the IPs should not be bounced into dealing with it in the dying light of the final days of trial.

965. Accordingly, in my judgment, it is not open to the Claimants to advance a case that the only effective cause of the Challenged Modifications was the Camelot Proceedings, and I accept the IPs' submissions that the foreseeability issue under Regulation 43(1)(c) now only falls to be considered by reference to the various causes of the Challenged Modifications as explained in the evidence of Mr Willits, Mr Kleinhampl and Mr

Ruxton. That evidence was unchallenged and I accept that it is the best available evidence of the causes of the Modifications. I do not intend to set it out at length, but I find on the basis of that evidence that:

i) Once the Camelot and IGT Proceedings had been commenced, the Suspension and the risk of relief being granted in those proceedings setting aside the award decision prevented Allwyn and the Commission from entering into the Enabling Agreement. Camelot and IGT were plainly pursuing legal action with a view to undermining Allwyn's 4NLC win and that created an inherently adversarial relationship, meaning that there was no initial cooperation between Allwyn and Camelot. Allwyn also received no cooperation from IGT.

ii) The Suspension required Allwyn to put many of its plans on hold. Anything it chose to do at that point to prepare for the Fourth Licence was at its own risk. The uncertainty significantly disincentivised commercial counterparties and new employees engaging with and entering into contracts with Allwyn. This meant that Allwyn was not able to recruit all the people it needed for transition.

iii) Nonetheless, during the period after the Suspension, Allwyn in fact took steps that it was not obliged to take in order to make progress on transition. From April 2022 it funded the Preferred Applicant Plan at a cost to itself of circa £13.3 million.

iv) By August 2022, Allwyn was advising the Commission (in a letter dated 17 August 2022) that if the transition timetable contemplated in its Application was to be maintained, it would be highly dependent upon "additional and accelerated co-operation from the outgoing Licensee and its key suppliers" and that the Preferred Applicant Plan was not, and could not be, equivalent to commencing the process of transition itself. As set out above, this did not happen.

v) It was against this background that Allwyn and the Commission entered into the initial version of the Enabling Agreement in September 2022. They also agreed on the RICs Modification.

vi) Camelot continued to litigate against the Commission even after the Suspension was lifted. Mr Willits says that Camelot sought to do the minimum necessary to persuade the Commission that it was helping to facilitate an orderly transition and that Allwyn did not start to receive even low levels of cooperation from Camelot until after the Allwyn group acquired the entirety of Camelot's business in February 2023. He describes the working relationship with Camelot for the purposes of transition as "at best difficult and often fractious". He says that Allwyn's Incoming Transition Plan could not be properly developed without Camelot and IGT's cooperation, but Camelot found ways to delay requests for information, data or access. It also refused to provide information about its security measures. Mr Kleinhampl's evidence is to like effect. He says that "people did not seem interested to help Allwyn", that "we were simply missing the starting point for what we would be working from for the technological transition" and that Camelot's failure to provide access to data "had a knock on effect on Allwyn's ability to design and test data migration, one of the essential elements of transition". Eventually to try to mitigate these issues, the Allwyn group acquired Camelot in February 2023. Mr Ruxton

explains that the intention was to de-risk transition by fast tracking the date on which the Camelot team would join the Allwyn Group, which otherwise would not have been until the Licence Start Date on 1 February 2024. However, owing to the need to keep 3NL and 4NL operations separate and the difficulty in arranging secondments from Camelot to Allwyn, it still took some time before knowledge could be shared between Camelot and Allwyn.

vii) Allwyn did not receive any meaningful cooperation from IGT while the IGT Proceedings were on foot, notwithstanding that it needed technical cooperation in order to transfer data across and to migrate all the existing National Lottery systems to new systems fit for the purpose of 4NL, consistent with its Application. Mr Kleinhampl describes this as one of the most important elements of transition. This was an enormous and challenging task and there was no ability on the part of the Commission to ensure cooperation from IGT. Mr Willits explains that IGT had no interest in cooperating given its claims in the IGT Proceedings. This continued to be the case even after the acquisition of Camelot by Allwyn. IGT continued to press forward with its litigation even after Camelot withdrew its claim in February 2023.

viii) When negotiations did get under way between Allwyn and IGT in October 2022, they progressed slowly and the real discussions did not begin until the Spring of 2023. Mr Willits explains that even then, IGT only offered a physical solution for transition involving the use of USB sticks that needed to be manually loaded onto each of the over 40,000 individual terminals for the National Lottery across the country. This was a more cumbersome and less effective approach than a remote solution. IGT also insisted on an extension to their contract of two years together with a wide-ranging indemnity to implement their alternative solution so that they would bear no responsibility in the event of any issues arising with any aspect of the transition plan.

ix) Allwyn developed Plan Gemini to reflect the delay in delivery by Allwyn of transition after the first 12 months following Outcome Notification, contemplating an updated timeline for the implementation of technology upgrades, which was still contingent on resolving the IGT situation and obtaining their effective support.

x) From September 2022 onwards, transition was subject to ongoing review. On 22 February 2023 the Commission wrote to Allwyn referring to ongoing concerns about IGT and in March 2023, Allwyn formally notified the Commission that the IGT issues were an Implementation Issue, that they threatened Allwyn's ability to deliver transition and its Application. This prompted the Commission's Implementation Review.

xi) I have dealt with the Commission's 4NL Implementation Review Outcome report (presented at a Board meeting on 15 August 2023) earlier in this judgment, but in summary, it assessed that a substantial cause of Allwyn's delivery issues were matters outside its control (including the ongoing litigation and the difficult relationship with IGT). Mr Tanner was cross-examined on the basis that it was "impossible" to tell what the true causes of the delay were, but that ignores the conclusions of this report and the explanation in the Modifications Notice as to the primary causes of delay. It also ignores Allwyn's

unchallenged evidence. It was not put to Mr Tanner that the report was inaccurate.

xii) The 2023 Modifications were entered into in September 2023. At around the same time, Allwyn was able to agree a solution with IGT, on the basis of the manual approach described above (following a short hiatus between July and September 2023 following the death of IGT's CEO).

xiii) Even after an agreement was signed between Allwyn and IGT, the problems Allwyn had encountered with IGT were not immediately resolved. Mr Willits explains that the agreement facilitated next steps but that it still took time to develop Allwyn's planning, to determine how best to deploy IGT's USB sticks to over 40,000 existing terminals and to address all other technical challenges in relation to transition. Thus "[s]igning the IGT agreement was just one step in facilitating a hugely complex process".

xiv) Mr Willits' unchallenged evidence is that Allwyn was always going to face challenges as an incoming Licensee taking over from Camelot, the operator of the National Lottery for 30 years. However, those challenges were significantly increased by reason of the delays and obstacles Allwyn faced arising from external factors including the 4NLC litigation and from non-cooperation from Camelot and IGT.

966. I therefore accept that (in general terms) the need for the Challenged Modifications came about owing to a combination of the hostile litigation pursued by Camelot and IGT with a view to impugning the integrity and deliverability of Allwyn's Application, together with the lack of cooperation by Camelot and IGT and the lengthy and difficult period of negotiations between Allwyn and IGT. I find that IGT (unsurprisingly) chose to take a commercial approach to the negotiation of a new agreement with Allwyn designed to achieve a result that was in its own interests. I find that these factors fundamentally undermined Allwyn's ability effectively to progress transition, leading to very substantial delay, increased costs and loss of revenue for Good Causes and for Allwyn. I also find that (again in general terms) the Challenged Modifications would almost certainly have been required irrespective of the identity of the successful bidder (unless that bidder had been Camelot).

967. On the subject of the increase in costs to Allwyn by reason of this combination of factors, I find on the evidence (again unchallenged) that Allwyn (i) purchased Camelot at a cost of £120 million; (ii) spent some £50 million extending IGT's contractual arrangements relating to the National Lottery; (iii) incurred (as Mr Kleinhampl confirms) very significant additional Implementation costs; and (iv) has suffered very significant reductions in the revenue realised from the Fourth Licence due to the fact that its measures designed to increase revenue generation have not yet been fully implemented – this has also impacted on the contribution to Good Causes.

968. For reasons I have already explained at length, I agree with the IPs and the Commission that this factual context should not be ignored when it comes to a consideration of the economic balance under Regulation 43(9)(c).

ARE THE CHALLENGED MODIFICATIONS SUBSTANTIAL WITHIN THE MEANING OF EITHER REGULATION 43(9)(b)(ii) or 43(9)(c)? (Issue 3)

Regulation 43(9)(b)(ii)

969. Bearing in mind my decisions above on the law, the Claimants bear the burden of establishing (on the balance of probabilities) that the Challenged Modifications would have allowed for the acceptance of a tender other than that originally accepted. It is common ground that when considering this hypothetical procurement the Court will consider the effect of the modifications at the time of the original competition and not the date that the modifications were made (*James Waste* at [143]-[146]).

970. In closing, the Claimants abandoned the case they had advanced throughout trial that the Challenged Modifications would have allowed another bidder to come forward under Regulation 43(9)(b)(iii). This is because (as I have said above) they accept that the correct standard of proof in relation to this limb is the balance of probabilities and they accept that they cannot meet that standard.

971. As I understood their case on Reg 43(9(b)(ii) in closing, it is wholly dependent upon the Court accepting that the correct standard of proof is "real prospect". Having made submissions on the facts, the Claimants conclude in their written closing as follows:

> "…the Court cannot dismiss the chances of a different outcome as fanciful. The modifications that were made meant that all applicants would have changed their financial models. And because a tiny change in the numbers would have caused a different outcome, there was a real prospect of Camelot, not Allwyn, winning 4NLC".

972. Given that I have rejected the Claimants' case on the standard of proof, I must therefore also reject their case on Regulation 43(9)(b)(ii). I find that the Claimants have not established on the balance of probabilities that the modifications introduced conditions which, had they been part of the initial concessions contract award procedure, would have allowed for the acceptance of a tender other than that originally accepted. That is really the end of the matter. However, in case I am wrong as to the standard of proof, I should briefly make the following points:

i) As I understand the Claimants' case in closing, it abandons any attempt to rely upon there being a real prospect of TNLC winning a modified 4NLC. That is clear from the assertion that (i) financial models would have looked very different in a modified 4NLC; and (ii) accordingly there was a real prospect that Camelot would have made up the small difference which separated it from Allwyn.

ii) The IPs contend that the Claimants have no pleaded case in respect of Camelot being successful in this counterfactual (rather than Allwyn). I reject that contention. Although it is true that the Claimants' Particulars of Claim do not specifically identify Camelot and could certainly be described as unparticularised, they do refer in general terms to the fact that the "bidders" would have been affected in various ways by the Challenged Modifications had they been included in the original contract. Although the Claimants' opening

skeleton did not specifically identify Camelot, it too referred in general terms to the "bidders". Camelot was one of the bidders and I do not consider it unreasonable or unfair to permit the Claimants to advance a case based on a different outcome involving Camelot as the successful bidder.

iii) However, even assuming the correct test to be "real prospect of success", the Court would expect to see evidence relating to Camelot's bid to support the existence of a "real" as opposed to a fanciful chance. I do not consider it to be sufficient simply to assert in general terms that all applicants would have changed their financial models in order to deal with the longer implementation period, or that "reasonable bidders" would have taken the potential for there to be a two year extension into account in their financial modelling (as the Claimants do in closing). There is no evidence at all to indicate how Camelot's bid might have changed given the potential two year extension and the Claimants' closing submissions go no further than to say that "[d]ifferent bidders would have made different judgments", but that the likelihood of any bidder ignoring the prospect of a two year extension is "low". However, they have no evidence whatever as to what Camelot would have done and do not even point to any evidence from which I can draw any inference as to what Camelot might have done. I agree with the IPs that there is no evidence to support a finding that there is a real prospect that, in a modified 4NLC, Camelot (and not Allwyn) would have been identified as the successful Applicant.

iv) I bear in mind that Allwyn proposed the highest level of contributions to Good Causes and achieved the highest aggregate score in the Competition. While it is true that Camelot achieved a better score in relation to the Business Plan Areas, the Claimants have given me no reason to think that the contributions to Good Causes from the bidders would have changed in this counterfactual or that there is any particular reason (beyond pure speculation) why Camelot would have overtaken Allwyn's aggregate score. The fact that Mr Wilson accepted in cross-examination that "a relatively small increase" in Camelot's contribution to Good Causes or a "relatively small reduction" in Allwyn's contribution to Good Causes would have changed the outcome (without something more) does not appear to me to take matters further. When Mr Wilson was being cross-examined on the point, it was put to him that the bids might have been structured differently or that the financials contained within the bids would have been different, but (as Mr Wilson remarked) that involves "hypotheticals".

v) There is no evidence before the Court to indicate that in a modified 4NLC there is a real prospect that the financials in Camelot and Allwyn's respective bids would have been different in such a way as to leave Camelot in a winning position, or, more specifically that Camelot would (or even might) have submitted a higher Good Causes Contribution figure than Allwyn as a result of the Challenged Modifications. No such suggestion was made to either Mr Wilson or Mr Tanner.

vi) Looking at the individual modifications, I note that in the context of the 2 year extension modification (described by the Claimants as "critical"), Mr Wilson's evidence (which I accept) is that he would expect any reasonable applicant would be seeking to engineer their financial model to deliver the returns they were expecting in the guaranteed (10 year) period of the Licence. His

unchallenged evidence was that the additional 2 year extension period would have been treated in the same way as the existing 2 year contingency period – financial templates would have been required to deal with it, but those financial templates were only evaluated for the implementation period and the ten year Licence term. I cannot see why the effect of this on Camelot would have been different from its effect on all other bidders so as to improve only Camelot's position in the Competition and I have no basis on which to find a real prospect that only Camelot's bid would have been improved.

vii) In the context of the delayed implementation modification and the First Year Committed Games modification, TNLC has not advanced any case that Camelot's implementation plans would have been changed in a manner that was capable of affecting the scores awarded or that Camelot's Application more generally would have been different and there is no basis on which I could find a real prospect of these things happening.

viii) I asked Mr Toledano in closing submissions to explain his case as to the basis on which the Court could find that any of the Challenged Modifications actually would have changed the position such that Camelot would have won, to which he responded that he could not identify any specific point that the Claimants say would have been different. He fairly accepted that the furthest the Claimants could take this argument is to say that the bids and the financial models that the bids relied upon would or might have looked different. But in my judgment, that the bids might have looked different is not sufficient to establish a real prospect that Camelot would have prevailed in the Competition.

ix) In all the circumstances, I reject the Claimants' case that there is a real prospect that Camelot would have won the Competition (even assuming that to be the right test). Looking at the List of Issues, I do not consider there to be any need for me to address some of the sub-issues identified under Issue 3. In the draft of this judgment circulated prior to hand down, I requested that if any of the parties considered that I am wrong about this and that any other issue needed to be determined in this Judgment, they should draw that to my attention. None of the parties suggested that I needed to address anything further.

Regulation 43(9)(c)

973. I turn then to consider the question of whether the Challenged Modifications change the economic balance of the concession contract. As I understand the Claimants' submissions, this requires me to look at each of the Challenged Modifications, together with looking at the total package of modifications and the Enabling Agreement and Licence as a whole. For reasons I have explained, I intend to do this against the background of the events that precipitated the need for the Challenged Modifications to which I have referred above. However, I need first to address two additional points canvassed in closing submissions (i) as to the meaning of the concept of economic balance for the purposes of this Regulation; and (ii) as to the Claimants' suggestion that the Court should make a "real world" comparison.

974. As to the first point, Regulation 43(9)(c) requires a consideration of whether the modification "changes the economic balance in favour of the concessionaire" in a manner not provided for in the original contract. In my judgment this plainly means

that there must be a change in the balance of risk or reward under the contract, in the sense that the balance is weighted more heavily in favour of the concessionaire than would otherwise have been the case. It is not enough simply to look at the advantage that the concessionaire might gain from one or more of the modifications; one must look at the whole contract to see whether there is anything that must be factored into the other side of the equation and whether the overall economic weighting of the contract remains the same. This is certainly the approach that was taken in *Edenred* (at [134]-[136]) and in *James Waste* (at [166]).

975. In *Edenred*, the addition of £133 million of new services (leading to an increase in net profit for the contractor on the new services being provided) did not give rise to any change in the economic balance because the profit margin on the additional services remained consistent with that provided for in the original contract. As the judge said at [139]:

> "Atos does not stand to gain any greater financial advantage from providing the supporting services for childcare accounts under the proposed Amendment Agreement than it does under the main Outsourcing Contract".

976. In *James Waste* the gate fee provided for by the amendments in respect of the additional services was said by the claimant to be excessive and uncommercial. The judge rejected this argument on the grounds that the gate fee was reasonable compensation and so not such as to "shift" the economic balance.

977. As to the second point, the Claimants submitted in closing that if the Court were to accept the contextual/real world approach as being appropriate in considering the question of economic balance, it must compare the original contract and the modified contract (in particular the modifications relating to implementation) in "the real world". As I understood this submission, the Claimants sought to rely upon the proposition that "but for" the Challenged Modifications relating to implementation, Allwyn would not have been granted the Licence at all, essentially because "Allwyn was not on course to deliver its transition plan".

978. In my judgment, however, this argument is not open to the Claimants where they are no longer pursuing their pleaded case that the delays which necessitated the Challenged Modifications were caused by Allwyn. In light of the abandonment of that case, there can be no allegation of fault against Allwyn and no suggestion that it would never have been able to deliver its transition plan (even if the delays caused by Camelot and IGT had not occurred). Allwyn was unable to deliver its implementation plan <u>because</u> of those delays. As Mr Kleinhampl said in his unchallenged evidence, the modifications partially compensated for the adverse cumulative impact of factors outside Allwyn's control so as to ensure that the transition and start of the Licence could be achievable.

979. In connection with this submission, the Claimants relied upon an admission in cross-examination from Mr Tanner to the effect that, absent the Challenged Modifications, the Commission would not have awarded the Fourth Licence to Allwyn. However, looking at this in context, Mr Tanner was very plainly referring to the options that were available to the Commission in light of the delays (as discussed at the Board Meeting on 7 December 2023), which included, as Mr Tanner said, terminating the Enabling Agreement.

980. I shall begin my analysis of the individual Challenged Modifications with the 2 year extension modification as that is said by the Claimants to be "the critical point".

2 Year Extension modification

981. It is not suggested by the IPs or the Commission that this Modification was reflected in, or consistent with, any existing terms in the Enabling Agreement, or indeed that it would have been possible to extend the Enabling Agreement for an additional 2 years under the terms of clauses 32.5 or 32.6.

982. The 15 August 2023 Board Paper presented to the Commission's Board attached an Appendix which identified the proposed modifications and explained their purpose. In respect of the 2 year extension modification, the Board Paper explains that:

> "Implementation delay, originating to a substantial part, in the litigation and the issues with IGT, will almost inevitably inhibit expected growth of the NL's profits (from which Good Causes contributions and Allwyn's return on investment derive) and so mean the NL will perform less well than anticipated at Application stage and there will be less time following the making of investment (which is shared by Allwyn and Good Causes) to earn a return on that investment,
>
> • An extension could well help to alleviate these impacts and get the Fourth Licence in the round closer to what was originally envisaged".

983. I find that, accordingly, the 2 year extension modification was directly responsive to the significant disruption and delay caused by the Camelot and IGT Proceedings and the lack of cooperation on the part of those parties. I also find that this modification seeks to mitigate (by a possible extension of the Term) against the substantially reduced revenue and contribution to Good Causes that Allwyn and the Commission were likely to experience under 4NL owing to these factors, and it is to be seen in that context. It is not a gratuitous extension permitting Allwyn to benefit outright from a longer contract term than that available to the other bidders at the time of the Competition, nor is it a modification that responds to any blameworthy conduct on the part of Allwyn.

984. In closing, the Claimants assert that the value of a "guaranteed 2-year extension to Allwyn is undeniable" but, in my judgment, this submission ignores the factual context and is, in a number of material respects, inaccurate. It is clear from clause 3.8 of the modified Fourth Licence that the Commission may only permit an extension where such an extension would not be inconsistent with the Commission's statutory duties and legal obligations, having taken into account the factors set out in clause 3.8(a)-(c). While there is no doubt that this extension provision is different from the existing provisions at clauses 3.3-3.6 (as Messrs Tanner and Wilson both accepted), and while the factors in clause 3.8(a)-(c) are within Allwyn's control, looking at the wording of clause 3.8, neither the fact of an extension, nor the period of any extension is guaranteed. There is no presumption in the Fourth Licence that an extension will be granted or that, if granted, the extension will be for any particular period (subject to the fact it can be for no longer than 2 years). As Mr Tanner explained in cross-examination:

> "…clearly, licensees have in the past not necessarily complied fully with their obligations. So there is the prospect or potential that the conditions will not be met. I don't think it follows that just because those are matters which the operator needs to comply with, as it were, that it will comply and therefore in some way there's a presumption that the licence extension is granted".

985. The conditions in clause 3.8 include that the Commission must be satisfied that such an extension is in the interests of Good Causes, a feature which highlights the Commission's objective in permitting this modification, as explained by Mr Tanner (and reflected in the Board Paper to which I have referred above). The Commission was concerned to make provision for the potential to increase returns to Good Causes in circumstances where the prospect for growth in returns to Good Causes anticipated under the Fourth Licence would now exist for a shorter period than was originally anticipated. While it may be the case that (if an extension were to be granted under clause 3.8) Allwyn would increase its operating profit in numerical terms, that ignores the impact of the delays and Allwyn's increased costs (to which I have referred above), just as it ignores the fact that, on the other side of the equation, the Contribution to Good Causes would also increase commensurately.

986. This modification has no effect on the financial mechanisms of the contract (Good Causes Contribution, share of Surplus, the recovery of costs) and Allwyn is not receiving a larger share of the Surplus than it would have done under the Competition version of the Enabling Agreement and Fourth Licence. There is no change to the way in which Allwyn's share of the Surplus is calculated under the Licence. In the circumstances, I agree with the IPs and the Commission that there is no change in the economic balance in favour of Allwyn and the Claimants' case that the value to Allwyn of this modification is "undeniable" (together with the implication that the potential for additional value necessarily points to a change in the economic balance) is misconceived.

987. Further, and in so far as may be necessary, I also reject the Claimants' submissions in closing (without the benefit of any pleading or evidence, expert or otherwise) that Allwyn's total profit for two extra years under the Licence would be £381 million, but that a "modest" discount should be applied to this to take account of the fact that the 2 year extension is not guaranteed.

988. The Claimants' pleaded case says no more than that:

> "the additional time granted to Allwyn by the Challenged Modifications, both in terms of a permitted delay in implementation, and the potential for a two year extension to the Licence…substantially impacts the economic balance in allowing Allwyn to delay expenditure on key costs and to recoup the considerable up-front sunk costs over a longer period and thereby improve its IRR".

989. The Claimants did not explain why they should be permitted to advance an entirely new unpleaded case that this modification would enable Allwyn to recover a substantial sum by way of additional profit or how the Court could arrive at any such "modest" discount, even assuming it accepted what is no more than an assertion in closing submissions as

to the profit that Allwyn might make in the event of a two year extension. Mr Toledano addressed the point in his reply by accepting that the pleading could have been "more expansive" but by maintaining that it was sufficient. I am afraid that I disagree. In my judgment it would not be consistent with the overriding objective to permit the Claimants to advance such a case, and I reject their attempt to do so.

990. Further and in any event, I agree with the IPs that these submissions also miss the point. In the event of a two year extension being granted, Allwyn will certainly have the opportunity to earn additional revenue or profit, but the way in which its share of the Surplus is calculated will not change. Accordingly, this in itself is not enough to establish a change in the economic balance between Allwyn and the Commission (see *Edenred* and *James Waste*).

991. Further (albeit not essential to the point) the Claimants' new calculations ignore both the significantly increased costs and expenditure incurred by Allwyn as a consequence of delays outside its control, and the significant reduction to the revenues generated under the Fourth Licence over its term for both Good Causes and Allwyn as a consequence of these delays.

992. Standing back, and applying the approach adopted by Fraser J in *Bechtel*, I cannot see that this is the sort of modification that would distort competition. This is a modification that arises by reason of the delay and disruption referred to above. That the modification has been made does not mean that Allwyn was bidding against a markedly different contractual scenario than the other bidders. As the Commission points out, Mr Martin confirmed that he had not modelled the impact of a 2 year delay on TNLC's Application and so there is no evidence from TNLC as to what would have changed in its Application had it been bidding on the basis that there was potential for an extension of up to 2 years to the contract term. In this context I repeat what I said above in relation to Regulation 43(9)(b)(ii): if this provision had been included in the contract from the outset I have been given no reason to suppose that it would have been capable of affecting the outcome of the Competition.

Implementation extension/Initial Functionality modification

993. In respect of the extension of the Implementation timetable and the concession that Allwyn need only reach Initial Functionality at the start date and delay Fully Implemented Commencement to a later date, the Board Paper of 15 August 2023 explains that the modification:

> "Recognises it is now impossible for Allwyn to implement Full Functionality by 01.02.24. Given the delays to date, September 2024 may now be impossible and it is possible IGT acting unreasonably might cause extended delay, but commits Allwyn to deliver in full as soon as possible and by a backstop. The backstop is fixed on the basis of the maximum extension of subcontracts under 3NL (i.e. two years from 3NL expiry)."

994. Accordingly I find that this modification was also directly responsive to, and required by, the significant disruption and delay I have already identified.

995. The IPs and the Commission point to the provisions of clauses 29, 32.5 and 32.6 of the Enabling Agreement and contend that this modification amounts to no more, in substance, than what could have been achieved by the exercise of these existing provisions which entitled the Commission to allow Partially Implemented Commencement and to award an extension of time. They say these provisions were an integral feature of the original contract that was advertised to all bidders. Accordingly, having regard to these provisions, this modification cannot possibly be said to alter the economic balance under the contract.

996. I have already found that this comparison between the modified and existing contracts is the correct approach under Regulation 43, but the Claimants make an additional point. They (very belatedly) submit that the IPs and the Commission have never pleaded their reliance upon these existing provisions of the contract or raised these provisions during the course of the trial, and so are precluded from relying upon them now. Mr Toledano raised the point in his oral reply at the end of the trial and Mr Suterwalla returned to it at the additional hearing.

997. On close analysis, I reject the Claimants' contention that I cannot have regard to the existing provisions of the Enabling Agreement at clauses 29, 32.5 and 32.6 in considering the issue of economic balance for the following reasons:

i) There has always been an issue on the pleadings as to whether the Challenged Modifications were "substantial" or not, and specifically whether they changed the economic balance pursuant to Regulation 43(9)(c). The burden of establishing this is on the Claimants.

ii) It has always been common ground that, as a matter of law, the Court must have regard to all of the terms of the existing contract in making the comparison between the original and the modified contract.

iii) The Commission expressly referred in its Defence (and again in its opening submissions at trial) to "the principle of Partially Implemented Commencement included in the Competition Version" of the Enabling Agreement, a reference which can only have been to clause 29 of the Competition version of the Enabling Agreement.

iv) In the Commission's "Legal Points of Difference" document provided part way through the trial, it submitted that the relevant exercise for the Court is to consider the Challenged Modifications in their entirety against the entirety of the original Enabling Agreement and Fourth Licence, which it then went on to say in a footnote "includes consideration of the remedies available and/or the Commission's discretion in relation to breaches or apparent breaches of the Enabling Agreement". In this context, and in response to a point made by the Claimants in cross-examination, the Commission referred to clauses 32.5 and 32.6 which it said provided a discretion to extend time if a breach was caused or contributed to by the Outgoing Licensee or by a matter, fact or circumstances outside the control of the Incoming Licensee.

v) Despite these references (and despite the clear wording of Regulation 43), the Claimants did not apparently focus on the potential significance of these provisions, either prior to, or during, the trial. They did not choose to ask about

any of the existing provisions of the contract in cross-examination with a view to exploring this issue, and they did not address the existing provisions of the contract in their written closing submissions. When cross-examining Mr Tanner, the Claimants suggested that the Implementation extension modification changed the economic balance because 'but for' this modification, the Commission would have been required to terminate the Enabling Agreement – but this quite obviously ignored the provisions of clauses 29 and 32.

998. I agree with the Commission and IPs that, having regard to the provisions of the existing Enabling Agreement, this modification does not change the economic balance. Clause 32 permitted extensions of time where delays were caused which were outside the Incoming Licensee's control. Pursuant to clause 29, the Commission and Allwyn could have agreed Partially Implemented Commencement which would have enabled Allwyn to be granted the Fourth Licence subject to completion of any Outstanding Implementation Steps. That this was possible was known to all applicants. However, the process under clause 29 did not provide for express contractual deadlines for completion of Outstanding Implementation Steps. In agreeing the Implementation extension modification, as Mr Rhodes explained in his statement, the Commission put in place a contractual mechanism to hold Allwyn to account, with clear timeframes for Implementation. This change was therefore, in part, directed at *improving* the Commission's position under the Enabling Agreement.

999. Further and in any event, even without having regard to the contractual provisions in the original Enabling Agreement, the Claimants have not begun to establish a change in the economic balance, looking at the contract as a whole. Instead of focusing on the wording of Regulation 43(9)(c) and thus the need to have regard to what was "provided for in the initial concession contract", their only focus when dealing with this modification was on the suggested advantage that Allwyn received by reason of being permitted to "run 4NL on a 3NL basis", which they asserted cannot have been "anything other than profitable". But this is not the correct test. It ignores the wording of the Regulation and it fails to address the balance as between the Commission and Allwyn.

1000. As the Commission submits, there is in fact no evidence that Allwyn stands to benefit financially from the changes in the Implementation timetable or that those changes have altered the economic balance of the contract. As Mr Tanner's evidence confirms, Allwyn has spent more than anticipated on Implementation and will thus bear the costs of financing (which are not recoverable by Allwyn under the Enabling Agreement and the Fourth Licence) for longer than anticipated. Mr Kleinhampl's unchallenged evidence is to similar effect. Mr Tanner pointed out that under the modified contract there would be a delay to the recovery of implementation costs (which cannot be recovered until Fully Implemented Commencement). Mr Tanner's acknowledgement that Allwyn could use revenue earnt during Implementation to fund Implementation "provided it made a profit that enabled it to offset its implementation costs", does not therefore establish a change in the economic balance.

1001. The Claimants contend that by gaining an extra 8 months on top of the original 22 months for Implementation, Allwyn obtained some additional flexibility to plan Implementation "as best suited it" and that "the added time and flexibility in and of itself is the valuable benefit". But in my judgment a change of this type, which is designed to deal with a serious contract delay causing acknowledged issues with the Licensee's ability to implement its Application by the Start Date, does not (without

more) alter the economic balance. Indeed, the Claimants could extract no more from Mr Tanner in cross-examination than the acknowledgement that, in looking at this modification, there is "a balance" because some things are to Allwyn's advantage and some things might be to its disadvantage.

1002. Once again this is also not the sort of change (in all the circumstances) which distorts competition.

First Year Committed Games modification

1003. The Claimants said no more about this modification in their written closing than that it "mirror[s] the point about implementation".

1004. As with the Implementation extension modification, there is nothing in the Claimants' case on the First Year Committed Games modification. As Mr Tanner explained in his evidence (and I find), the shifting date for Full Functionality merely caused the requirement for First Year Committed Games to shift to the first year after the date of Full Functionality (being in the first two years of the Licence). This was a time shift, not a shift of any substance, again designed to address the impact of the delays caused by Camelot and IGT. Furthermore, although not essential to my decision, Applicants were always permitted to change the portfolio of First Year Committed Games if they chose to do so under the change provisions of the Fourth Licence.

1005. It was put to Mr Tanner during cross-examination that, by making this change, the risk of regulatory action and penalties which would otherwise have been associated with failing to meet the deadline for First Year Committed Games had been removed, to which he responded: "No, I don't agree…the amended provision in the Licence which makes a breach of the EA a breach of the Licence if they fail to deliver those games by the date [mean that] the Commission is able to take enforcement action under the licence against them". Although there had been a time shift of one year, "the same risk occurs". When it was put to him that spreading costs over two years rather than one was "advantageous from the perspective of the operator", he said that this was "a theoretical possibility" but that he did not know how Allwyn's development costs, particularly for new games, were spread "across the piece". Mr Kleinhampl's unchallenged evidence was that the delay to Allwyn's introduction of new games in the first year of the licence did not benefit Allwyn from an economic perspective. He explained (and I accept) that this was because "delaying the introduction of these games delayed growth in the National Lottery revenues with obvious consequences, including for Allwyn".

1006. There is no evidence to support a change of economic balance in respect of this modification.

RICs modification

1007. In closing, the Claimants' case on this had reduced to two short sentences: "[b]ut for the modifications, Allwyn could never recover some £13m of RICs which it incurred pre-EA 22. Self-evidently, this is an advantage to Allwyn".

1008. Again, this case fails to consider the issue of economic balance, focusing solely on the potential for Allwyn to recover additional monies. It also ignores the factual context in

which this modification was made (and again I find that it was responsive to, and required by, the Camelot and IGT Proceedings and the conduct of those companies) together with the continuing (and unchanged) requirement for Allwyn to demonstrate that the costs (a) relate to transition, and (b) are reasonably, properly and efficiently incurred.

1009. The commercial balance struck by the unmodified Enabling Agreement was that properly recoverable Implementation costs incurred after signing the Enabling Agreement (which, as set out in the ITA, was expected to occur within a month of the Outcome Notification) should be recoverable. The Suspension inevitably delayed entry into the Enabling Agreement, but Allwyn "started early", incurring Implementation costs during the Suspension period at its own risk in an attempt to ready itself for the start of the Licence. Mr Tanner confirmed in his oral evidence (and I accept) that Allwyn's costs incurred during this time, (i.e. between March 2022 and September 2022) would have been incurred during Implementation in any event.

1010. Thus, it is not the case that the RICs modification enabled Allwyn to recover costs that it could never have recovered under the original Enabling Agreement. The extent to which Allwyn can recover its RICs is unchanged: there is no scope for it to recover more RICs than it would otherwise have done; payment of RICs remains spread across the lifetime of the Licence after Fully Implemented Commencement has occurred; and there is no reduction in the requirements and controls to be met if RICs are to be recovered.

1011. I agree with the IPs and the Commission that, on proper analysis, this modification gives effect to and/or reflects the economic balance struck by the original Enabling Agreement, namely that legitimate Implementation costs incurred after contract award should in principle be recoverable. It makes no change to that balance in favour of Allwyn.

1012. Further, although not necessary to my decision, this modification also gives effect to or reflects the terms of clauses 32.5 and 32.6 of the Enabling Agreement.

1013. In fact, pursuant to the modifications (and owing to the fact that Fully Implemented Commencement was postponed by the modifications and now required completion of Terminal Roll-Out as well as completion of Full Functionality), Allwyn had to wait longer to recover RICs than it would have done under the original Enabling Agreement. Mr Tanner confirmed (and I accept) that Allwyn had to wait an additional 11 months to recover RICs (i.e. from the date of Full Implementation on 28 February 2025 to Terminal Roll Out on 1 February 2026). This meant that it had to bear potentially unrecoverable financing costs for a longer period of time.

Cap on the Commission's Costs modification

1014. The Claimants' case on this in closing was simply that "the cap on additional GC costs provides Allwyn with additional certainty". It is not clear how or why it is said that additional certainty necessarily alters the economic balance.

1015. Once again, there is nothing in this point. The cap on the Commission's costs limits Allwyn's costs exposure for the changed Implementation timetable to the level of costs which the Commission assessed as reasonable. As the IPs submit, it mitigated, to a

limited extent, the uncertain additional exposure to increased liability arising by reason of the Camelot and IGT Proceedings and their generally uncooperative conduct and it was directly responsive to those events. The cap was calculated on the basis of a reasonable estimate of the Commission's costs and is contingent upon Allwyn meeting deadlines in the Enabling Agreement. As Mr Tanner explained (and I accept), the costs were "capped on the basis of the Commission's best estimate at that point of the increased costs related to the dates that Allwyn was committing to deliver on".

1016. I reject the submission that this modification effected a change in the economic balance. Although not necessary to my decision, I also note that this modification gives effect to or reflects the terms of clauses 32.5 and 32.6 and Schedule 1 of the Enabling Agreement.

The Contract as a Whole

1017. Standing back and having regard to the Challenged Modifications as a whole, I reject the submission that overall they "clearly favour Allwyn" or that Allwyn is "better off" as the Claimants contend or that, on its own, that is the correct analysis. In fact, as the Commission points out in closing, the value of the Fourth Licence has decreased by circa £250 million (as is clear from the Modifications Notice) and Allwyn's costs have significantly increased by reason of the delays to transition. As the IPs' witnesses have explained in unchallenged evidence, Allwyn is in a worse position because it has not yet been able to start to recoup the costs of transition.

1018. Furthermore, it is artificial and unrealistic to consider only the modifications to the Enabling Agreement and Licence which appear to have favoured Allwyn without also considering whether there are other modifications designed to ensure that the economic balance remains the same. As the Commission points out:

i) The modified Enabling Agreement imposes a new obligation on Allwyn to implement Terminal Roll Out (i.e. the roll out of new retail terminals) before 31 December 2025, and in any event by no later than 1 February 2026. Under the Competition version of the Enabling Agreement there was no deadline by which Terminal Roll-Out had to be achieved.

ii) Clause 26.4 of the Licence was amended by the 2023 Modifications to provide that the Licensee must "comply with the terms of the Enabling Agreement until its expiry in accordance with its terms", thereby enabling a breach of the Enabling Agreement to be treated as a breach of the Licence.

iii) There are now clear contractual deadlines for achieving Full Functionality.

iv) RICs can only be recovered after achievement of Full Functionality and Terminal Roll Out.

1019. The Claimants acknowledge that these modifications are 'negative' from the perspective of Allwyn (accepting in their closing submissions that the higher financing costs that Allwyn might incur by reason of delayed recovery of RICs could be as much as £110 million over 10 years) but they say they "wither" in the face of the 2 year extension which provides Allwyn with "a good chance of earning at least £371m", whereas "all that is really on the minus side is some extra financing costs". However,

for all the reasons I have given, this is not only a mischaracterisation of the advantages to Allwyn of the 2 year extension Modification but (in so far as the Claimants seek to place a value to Allwyn on that modification) this also represents pure speculation, unsupported by any firm evidence or pleaded case. It also misses the point for reasons I have already explained.

1020. I find that the Claimants have not established that the Challenged Modifications change the economic balance of the concession contract in favour of Allwyn "in a manner which was not provided for in the initial concession contract".

Conclusion on whether the Challenged Modifications are "substantial"

1021. For all the reasons set out above, I find that the Challenged Modifications are not substantial and thus fall within the gateway at Regulation 43(1)(e). The Commission was entitled to make the Challenged Modifications without a new concession contract award procedure. If I am right about that, then the Modifications Claim fails. However, in case I am wrong, I should go on to consider whether the Challenged Modifications were also permitted (without a new contract award procedure) by Regulation 43(1)(c).

WERE THE CHALLENGED MODIFICATIONS FORESEEABLE SO AS TO FALL WITHIN REGULATION 43(1)(c)? (Issues 4-8)

1022. I now turn to the question of whether the need for the Modifications has been "brought about by circumstances which a diligent contracting authority or utility could not have foreseen" pursuant to Regulation 43(1)(c)(i). It is common ground that the remaining conditions in Regulation 43(1)(c)(ii) and (iii) are fulfilled in the circumstances of this case.

1023. I have already made findings as to the combination of factors which caused the delays to Allwyn's implementation and thus necessitated the Challenged Modifications. These were the Camelot and IGT Proceedings, the lack of cooperation by Camelot and IGT in their dealings with Allwyn, including the negotiations between Allwyn and IGT regarding handover (Issue 4(b) and (c)). I have also held that, as a matter of law, the date on which foreseeability is to be assessed is the date of the award (i.e. September 2022). It is therefore relevant to consider factors that were known to the Commission up to this date in order to determine what (acting diligently) it could, or should, have foreseen.

1024. The Claimants say that each of the factors identified above was foreseen, that the Commission knew that it would be sued following the Competition and that it could or should have anticipated that litigation would undermine its attempts at Implementation. The Commission and the IPs, on the other hand submit that the Commission could not reasonably have foreseen that IGT would pursue an unprecedented legal challenge and that it would also engage in an uncommercial, reputation damaging, campaign of obstruction for as long as it did in relation to a public concession contract and project with the profile of the National Lottery.

1025. It is common ground that the Commission was aware from the outset of the Competition that there was a risk of a legal challenge from a disgruntled applicant.

1026. Early in the Competition, on 1 December 2020, Mr Tanner prepared a paper for Board Consideration entitled "4NLC: Risk and Contingency During Competition and Implementation" ("**the Risk Paper**"). Amongst other things, the Risk Paper considered "current and future risks to the Competition timeline and delivery of a successful outcome, the mitigation and the available contingencies", recognising that "[s]ince its inception the Programme has always been working within a limited and constrained time contingency", namely the 15 year limit to 3NL and the availability of only two six month extension periods to the Third Licence. One such contingency being considered at this stage was the invocation of the second extension available under the Third Licence (the first extension having already been "consumed" to address the challenges presented by the COVID-19 pandemic).

1027. The Risk Paper identified the potential for the Commission to receive challenges in the Courts (referring specifically to Judicial Review), either during the Competition or following the award. Mr Tanner accepted in cross-examination that the Commission's assessment at the time was that, if it occurred, a legal challenge "would be not containable within a second Third Licence extension", that it might stop or seriously hinder the transition period until the litigation was resolved, and that the Commission had received advice that Judicial Review proceedings might take up to one year to be resolved.

1028. The Risk Paper was subsequently updated by Mr Tanner on 14 May 2021. He identified the risk of an automatic suspension (in CCR 2016 proceedings) or an injunction (in Judicial Review proceedings) and consequently the risk that the minimum Implementation Period of 19 months identified by the Commission "would be breached".

1029. By October 2021, the Commission had invoked the second extension to the Third Licence to 31 January 2024 taking it to its 15 year statutory limit (as is clear from a paper entitled "4NLC Contingency Planning and Actions as at 20/10/2021" ("**the October 2021 Paper**")). This paper assessed a legal challenge as "Likely to Occur" and "not containable within current timetable". It identified the two "most likely" forms of challenge as a CCR 2016 challenge and a Judicial Review claim. It also noted the possibility of a claim being made "by more than one party" – I note that this is not confined to "applicants".

1030. By November 2021, as is clear from a Slide Deck dated 5 November 2021, the Commission was focused on how it could avoid an interregnum between 3NL and 4NL which might occur in the event of litigation. By February 2022 (in a paper prepared for HM Treasury ("**the Treasury Paper**")) the Commission was estimating the likelihood of a legal challenge at 80-90%, with the likelihood of that challenge crystallising in 2023 at 95%. Mr Tanner accepted that at this point in time, the Commission was "near certain" that there was going to be a legal challenge and that it expected that challenge to result in substantial, serious and risky litigation which would have the potential to disrupt, and to delay the start of, Implementation. As is clear from the Commission's Defence, it included a small provisional sum in respect of its own initial legal costs in its Full Business Case for the Competition.

1031. Against that background, I find that the risk of litigation was foreseen or foreseeable by a diligent authority from the very outset of the Competition (including, if I am wrong as to the date for foreseeability, from the date of publication of the tender documents).

The Commission's understanding of the level of risk appears to have changed over the course of the Competition, but I find that at all times the risk of litigation from an applicant or applicants in the Competition together with the potential for there to be an automatic suspension was foreseen as likely to occur. The Commission knew from the outset that there was a limited period in which the transition from 3NL to 4NL could be made and foresaw that in the event litigation were to occur it had the potential to impact the 22 month period available for Implementation of 4NL and to put the Start Date at risk.

1032. It is no doubt for these reasons that the Commission did not rely upon the Camelot Proceedings as being unforeseeable in the Modifications Notice or in its Defence.

1033. In the Modifications Notice, the Commission said this:

> "It was unforeseeable that IGT, a subcontractor to the incumbent, would start proceedings against the Commission in circumstances in which subcontractors do not have a cause of action under the Regulations, that IGT would continue proceedings once Camelot withdrew its proceedings on 16 February 2023 and/or that negotiations with IGT would be so protracted and challenging in circumstances in which, in addition to its existing subcontract, IGT had undertaken to the Commission in July 2021 to enter into good faith negotiations with the incoming licensee with a view to agreeing transitional services, software and support during the transition phase and for up to 2 years thereafter and its reasonable fees and costs".

1034. The Commission and the IPs continued at trial to maintain the same stance. An additional point about the death of IGT's representative in the Summer of 2023 was made by both but, at most, this caused a few weeks' delay at a time when the delays had occurred and the need for the modifications had already arisen. Mr Tanner accepted that by March 2023 the Commission appreciated that Allwyn would not be able to implement in full by February 2024. Accordingly, I do not consider this to be a factor in itself that is, in my judgment, capable of shifting the dial.

1035. On balance, I am inclined to disagree with the Commission and the IPs that the factors identified in the Modifications Notice were unforeseeable. Of course, central to the determination of this issue is the question of whether a diligent contracting authority must foresee the precise identity of the legal challenger, together with the precise nature of the challenge (a point I have already foreshadowed). I was not provided with any assistance on this point (beyond the decision in *Salt International* to which I have already referred), but I agree with the Claimants that restricting the concept of foreseeability for these purposes (i) to the precise identity or line of business (in this case "sub-contractor") of the non-applicant bringing the litigation, and (ii) to a particular type of litigation, goes too far.

1036. It was clear from Mr Tanner's evidence (and from the Risk Paper prepared in May 2021 together with the October 2021 Paper), and I find, that the Commission was aware of the possibility that a non-applicant might bring a legal challenge albeit that it thought it more likely that this would be pursued by way of Judicial Review. This much is admitted by the Commission in its Defence. I note that under the heading "Standing to

bring a claim", the October 2021 Paper stated that "[a] JR claim could be brought by someone other than one of the applicants - whereas this would be unlikely for a CCR challenge".

1037. However, the Commission says that it was not considering a challenge by a subcontractor. When Mr Tanner was asked which "non-applicants" the Commission had in mind in the May 2021 Risk Paper, he could not recollect, but I agree with the Claimants that someone at the Commission had identified the potential for non-applicants to bring proceedings (as the contemporaneous documents show) and that, amongst the likely candidates must be subcontractors (notwithstanding Mr Tanner's evidence that he did not think he had had a conversation about the potential for subcontractors to challenge the award).

1038. Indeed, I agree with the Claimants that litigation by non-applicants (including subcontractors) could and should have been foreseen by a reasonably diligent public authority from the outset, not least because of the size and significance of the Competition. Furthermore, although not necessary to my analysis, I am inclined to agree with the Claimants that litigation by IGT itself should have been foreseen by a reasonably diligent authority. IGT was Camelot's subcontractor in 3NL, a proposed applicant in 4NL (having participated at the SQ stage) and then Camelot's partner in 4NL from Phase One onwards – it was identified as a Key Subcontractor in Camelot's Phase One and Phase Two Applications. It plainly had a great deal to lose in the Competition if the Fourth Licence was awarded to anyone other than Camelot. Mr Tanner accepted that IGT would lose business in that scenario and the following exchange then took place between him and Mr Toledano:

> "Q. All right. Considering that to be so, wasn't it, in a sense, obvious that there was a risk that a subcontractor like IGT might bring a legal challenge, whether by judicial review or by any other option, given that the outcome could have business implications for them as well?
>
> A. I think -- well, yes but…"

1039. Mr Tanner then referred back to the advice that was paraphrased in the Risk Paper "which was that it was possible in JR but unlikely in CCR". He went on to say that the risk of such a challenge had, however, never been considered. Given the content of the Risk Paper and the October 2021 Paper referred to above, I consider that Mr Tanner was mistaken about this. I find that (i) the Risk Paper and the October 2021 Paper evidence the fact that the Commission was receiving advice about, and considering, the potential for litigation by non-applicants; and that, accordingly, (ii) the potential for such litigation (including by a subcontractor such as IGT with business to lose) was, or should have been, foreseeable to a diligent authority from the outset, even if it could not have identified the precise route such litigation would take (or thought it more likely that it would be in one form rather than another).

1040. The IPs and the Commission say that the IGT legal proceedings were complex, detailed and very heavily contested, and that the legal costs amounted to many millions of pounds. I accept this as a fact, but I reject the notion that, in general terms, a reasonable contracting authority would not have foreseen something of this sort, not only from a disgruntled applicant, but also from a non-applicant. Given what was at stake, any

proceedings commenced against the Commission were always likely to be hard-fought, wide-ranging and expensive. The Commission was plainly alive to this fact, as the October 2021 Paper and the Treasury Paper make plain, and as Mr Tanner admitted. The October 2021 Paper considers in some detail the types of challenge potentially available together with noting that an "[i]nitial action plan for pre-litigation work has been drawn up", which it is said needed to be "developed and costed"; the latter includes a suggested figure of £4 million for legal costs.

1041. The IPs and the Commission also submit that a reasonable contracting authority would not have expected that "IGT would have engaged in a strategy of pursuing that legal challenge, seeking to trigger and maintain the suspension in its favour (without offering a cross-undertaking in damages) and/or continuing to pursue its legal challenges even after Camelot had withdrawn its claim…" However, once again, I consider this to go too far. Once it is established that a diligent authority could and should have foreseen substantial, serious and hard fought litigation by a non-applicant (which it seems to me here was inevitably going to involve an attempt to suspend the award, as the Commission in fact foresaw), I do not consider it to be necessary also to establish that the Commission could and should have foreseen the particular strategy adopted by the challenger or, indeed, the duration of its challenge. Once litigation is on foot in a case such as this it is always likely to be hostile and its ultimate aim is almost invariably to disrupt, obstruct, and (where possible) prevent the award of the contract to the successful bidder (see *IGT v Gambling Commission* [2023] EWHC 1961 (TCC) ("***IGT v Gambling Commission***") per Coulson LJ at [129]). In my judgment that this will be the aim of any legal challenge in whatever form is quite obviously foreseeable to a reasonably diligent authority and should have been foreseeable from the outset of the Competition. That the Commission could not foresee exactly how the litigation would progress, or that IGT would continue its litigation after Camelot discontinued its claim does not appear to me to matter.

1042. The IPs contend that it was not foreseeable that a non-applicant such as IGT would bring a challenge under the CCR 2016 in circumstances where there was (and is) no decision from either the EU or the English Courts to support the proposition that IGT had a cause of action under the CCR 2016 in respect of the award of the Fourth Licence. They point out that in dismissing IGT's claims, Coulson LJ held that IGT lacked any standing whatsoever under the CCR 2016 to bring a legal challenge to the award of the Licence. However, aside from the fact that I reject the suggestion that the precise nature of the challenge must be foreseen if the overall challenge is to be "foreseeable", I agree with the Claimants that this submission cannot help but be infected by hindsight. In *Camelot UK Lotteries Ltd v the Gambling Commission* [2022] EWHC 1664 (TCC), O'Farrell J determined (at [60]-[78]) that the question of standing of the IGT Claimants raised a serious issue to be tried. The standing issue was then litigated as a preliminary issue in July 2023, more than a year into the litigation, and took up 3 days of court time. Coulson LJ's judgment on the preliminary issue is 48 pages long and addresses five separate questions (*IGT v Gambling Commission*). I note that at [173] he declines to address the scope of any public law claim that IGT may have had.

1043. Finally, the IPs and the Commission contend that IGT's conduct during the transition was unforeseeable, particularly in circumstances where IGT had signed a good faith undertaking ("**the Undertaking**") in favour of the Commission in connection with 4NLC. The IPs rely upon what they described as a "concerted strategy of obstruction

in respect of transition", although I go no further than the findings I have made above as to the nature of the difficulties.

1044. The essence of the Undertaking for present purposes, as Mr Tanner accepted during his evidence, was that IGT committed to entering into:

> "good faith negotiations with the incoming licensee with a view to agreeing the transitional services, software and support which the incoming Lottery Licensee reasonably requires and which IGT can reasonably provide during the transition phase".

1045. Nevertheless, certainly if one takes the date of award as the relevant date (as I have determined is the right approach), I consider that the Commission (acting diligently) should and could have foreseen that negotiations between Allwyn and IGT would be both protracted and difficult. In particular:

i) The Commission knew that Allwyn's implementation involved "splitting the disk", requiring it to put Scientific Games software on IGT's terminals. This required a new agreement between IGT and Allwyn because it was not covered by IGT's obligations under 3NL. Mr Tanner acknowledged as much in his statement and confirmed it again during cross-examination. The Commission knew that there was no such agreement in place.

ii) Mr Tanner accepted in cross-examination that the Commission knew that Allwyn's Implementation depended upon cooperation from both Camelot and its subcontractors.

iii) The Undertaking was no more than a commitment to negotiate in good faith. Mr Tanner accepted in cross-examination that it was still necessary for Allwyn to come to an agreement with IGT and that "the Commission…can't force the parties to enter into an agreement to do something". The Commission had no power to assist Allwyn in this regard. Mr Tanner also accepted that it would be his expectation that in arriving at a commercial agreement of this sort, there would be discussions about services, costs and fees and that such discussions would take place in circumstances where IGT would be losing its contract and that both Allwyn and IGT would be approaching those negotiations on a commercial basis.

iv) Mr Tanner accepted that Camelot's appointment as Reserve Applicant meant that Camelot and IGT had an incentive not to go beyond any obligations they had in relation to cooperating on the transition with Allwyn (and indeed the same would have applied with any other Incoming Licensee other than Camelot). This would have been apparent to a reasonably diligent contracting authority as at the date of the award.

v) Allwyn's witness evidence about the negotiations with IGT does not go so far as to suggest that it was breaching the Undertaking – only that it was negotiating hard in its own commercial interests.

vi) During his cross-examination, the following exchange took place between Mr Tanner and Mr Toledano:

> "Q…so just during the competition you know that you're dealing with a bidder who requires this more ambitious shift from IGT to Scientific Games, you know that they haven't told you that they've already got everything in place vis-à-vis a commercial agreement, so if you were thinking about what would have to happen to get such a commercial agreement in place between IGT and Allwyn in the context of a transition, and bearing in mind that IGT would be in a situation where it was losing what had been its role in relation to the National Lottery, my suggestion to you is that it was eminently predictable that any negotiation between IGT and Allwyn would be a difficult and challenging negotiation.
>
> A. **Yes, I think that's a reasonable scenario to map out**, although, as I say, at various points Allwyn referenced their wider commercial relationships with IGT, which would have been commercial relationships which were in place throughout all of this period, and that being a strength and a factor which gave them confidence in their ability to reach an agreement" (**emphasis added**).

In context, the reference by Mr Tanner to Allwyn's wider commercial relationship with IGT appears to be a reference to information obtained during the post 4NLC period. Allwyn's bid did not contain an explanation or reliance on a wider relationship.

vii) Furthermore, it is clear from the 4 August 2023 Board Paper that the Commission thought that Allwyn should have foreseen "the challenges" in reaching an agreement with IGT. Mr Tanner accepted that it followed that the Commission could also have foreseen this:

> "Q. What I'm saying to you is that just as they could have foreseen the challenges in reaching an agreement with IGT, the Commission could also have foreseen those challenges, whether you judge that as at the time of March 2022 or September 2022 doesn't really matter, the Commission could also have foreseen the challenges because you knew that there would have to be a commercial negotiation and that each side would look after its own commercial interests in that negotiation, and that against the background of Camelot no longer being the successful party and IGT not being the subcontractor, this would not be an easy process?
>
> A. Yes, I think that flows from the points that I made earlier".

viii) I do not consider Mr Tanner's evidence that he would expect both Camelot and IGT to behave in a commercially rational manner to undermine this admission. A commercially rational negotiation in the circumstances of this case might very well have been protracted and difficult.

Conclusion on Foreseeability

1046. For all the reasons set out above, I agree with the Claimants that (at least in general terms) each of the matters relied upon by the Commission and by the IPs as having given rise to delays which caused the need for the Challenged Modifications could have been foreseen by a diligent contracting authority as at the date of the award. Once it is accepted that these various matters could each have been foreseen, I consider it to be unrealistic and unnecessary to require a consideration of whether they could have been foreseen in combination. In my judgment it is enough that the Commission did foresee (or, acting diligently ought to have foreseen) each of those factors occurring.

1047. Standing back, I should return briefly to the concept of "foreseeable circumstances". While this concept must be considered having regard to the facts of the particular case that is before the Court, it must also be approached realistically (see *Optima*), always bearing in mind that the focus in Regulation 43(1)(c) is on circumstances that the diligent contracting authority "could not have foreseen" (rather than on circumstances it could have foreseen). It certainly cannot be said that the Commission (acting as a diligent authority) could not have foreseen that one or more of the relevant circumstances in this case would occur. The idea that an authority could slip through this gateway (which is of course a derogation from the rules intended to ensure fair and effective competition in the field of public contracts) by focusing on an increasingly granular description of those "circumstances", and/or the need for any particular combination of circumstances or their extent or magnitude to have been foreseen, appears to me to be contrary to the requirement that the gateways should be interpreted narrowly (see *Edenred* (*UKSC*) at [28]), just as it is neither practical nor realistic. That cannot have been the intention of this provision.

1048. Accordingly, I consider that the Commission cannot rely upon the gateway in Regulation 43(1)(c). Although there appear to be some issues in the List of Issues under this topic which I have not dealt with, I do not consider in light of this finding that they need to be addressed. Once again, I asked the parties upon circulation of the draft judgment to indicate whether they considered there to be any additional issues that needed to be addressed. None was identified.

1049. If I am wrong as to the date on which foreseeability is to be assessed, and the correct date is the date on which the tender documents were published (as the Commission and the IPs contend), then I find that although the Camelot Proceedings and litigation by a non-party such as IGT was foreseeable, the challenges involved in the negotiations between IGT and Allwyn were not. This would also mean that one of the combination of factors which led to the delays was also not foreseeable. Absent any case on the part of the Claimants as to the "critical path", I consider that this would enable the Commission to pass through the gateway in Regulation 43(1)(c).

BREACH (Issue 9)

1050. Given my finding that the Challenged Modifications were not substantial, I find that the Commission was entitled to make those modifications without a new concession award procedure. Accordingly, I find that there was no breach of Regulation 43(10) by reason of the Commission not having undertaken a new award procedure.

1051. Although an issue remained in the List of Issues following trial as to whether the Commission had breached its obligation of equal treatment, non-discrimination or transparency under the CCR 2016 in making and implementing the Challenged Modifications, it is clear from the Claimants' closing submissions that this issue "does not arise". I need address it no further.

CAUSATION/STANDING/CONSEQUENCES

1052. Given my decision that there has been no breach, the Claimants have not established that they have standing to bring a claim under Regulation 52; they cannot show that they have suffered, or risk suffering, loss or damage.

1053. Further and in any event, even if I am wrong and the Commission has in fact acted in breach of Regulation 43, I consider that the Claimants' case on causation is unsustainable.

1054. A breach of duty is actionable under Regulation 52 of 2016 CCR where any economic operator "suffers or risks suffering, loss or damage". Where a bidder wishes to claim damages, it must therefore show that the breach has caused loss and damage. This may be done by showing that, but for the breach, the bidder would have won the contract. Alternatively, it may be done by showing that the bidder has lost the chance of winning the contract (see *Ocean Outdoor UK Limited v The London Borough of Hammersmith and Fulham* [2019] EWCA Civ 1642 ("***Ocean Outdoor***") per Coulson LJ at [89]).

1055. It is common ground between all parties that loss of a chance is the correct approach here. It is also common ground that the question of what the Claimants would have done in the relevant counterfactual situation must be proved by them on the balance of probabilities, whereas to the extent that an alleged beneficial outcome depends upon what other third parties would have done, this depends upon a loss of a chance evaluation (see *Perry v Raleys Solicitors* [2020] AC 352 at [20]). The loss of a chance evaluation requires the Claimants to establish that there was a real or substantial, rather than a speculative, chance that the third party would have acted so as to confer the benefit to the Claimants (see *Allied Maples Group v Simmons & Simmons* [1995] 1 WLR 1602). The failure to satisfy the balance of probabilities requirement as to what a claimant would have done will result in failure – in other words that requirement "gives rise to an all or nothing outcome in the usual way" (*Perry v Raleys Solicitors* at [23]).

1056. The Claimants contend that the correct counterfactual is a hypothetical 5NLC, i.e. a new competition undertaken by reference to the modified agreements. From the written closing submissions, this appears to be common ground as between the Claimants and the Commission (which also points out by reference to *Edenred* at [150]-[160] that the relevant hypothetical scenario is a new competition taking place as at the date when the relevant amendments were made – I did not understand the Claimants to disagree). It is also common ground between the Claimants and the Commission that the Claimants need to show that, as a result of the breach, TNLC lost a real or significant, as opposed to fanciful, chance of winning a new competition (see *James Waste* at [156] and *Edenred* at [142]: "[a] real prospect means just that; it does not mean more than 50% and previous cases have encompassed awards of damages where the lost chance has been evaluated as low as 17%").

1057. There remains a dispute over what percentage chance must be shown in order to establish a "real prospect" (i.e. the minimum threshold), but, as will become clear, I do not need to make any decision about that.

1058. The IPs contend for a different counterfactual. They invite the Court to consider "what would realistically have occurred instead if the modifications had not been made". They contend that the Claimants are required to prove on the balance of probabilities what the Commission would have done in the counterfactual world. They submit that the evidence "and rudimentary common sense" make clear that in the relevant counterfactual the Commission would not have made a decision to terminate the Enabling Agreement and conduct a fresh competition, rather it would have exercised its pre-existing contractual powers under clauses 29, 32.5 and 32.6 of the Enabling Agreement and/or it would have entered into lawful modifications.

1059. The Claimants object to Allwyn's submissions on causation on a number of levels. First they say that this is not pleaded by Allwyn, second that in fact Allwyn has no separate interest in this point and so should not be permitted to advance it; and third that it is not a point that the Commission has chosen to make or serve any evidence in respect of – the Commission's evidence has been prepared on the basis that a 5NLC would have occurred.

1060. On reflection, I am not inclined to consider this dispute at length, not least because there is no need for me to do so given that I consider there to be no realistic prospect that TNLC would have won a 5NLC. However, if it had been necessary for me to rule on the matter:

i) I would have rejected the Claimants' submission that Allwyn has no separate interest in this point (owing to the fact that the issue of causation goes to the standing of the Claimants to sue – see *IGT v Gambling Commission* [2024] Costs LR 125 – and that Allwyn's separate interest was in fact reflected in the List of Issues at 10, 11 and 15). As I understand the Claimants' closing submissions, this is in fact now conceded; but

ii) I would have agreed with the Claimants that this is not a point that can be taken at trial by the IPs without a proper pleading. I do not consider the plea that "[t]he Claimants have no entitlement to a declaration of ineffectiveness…because:…any alleged breach by the Defendant did not cause the Claimants to suffer (and/or risk suffering) loss or damage" to be remotely sufficient. Unsurprisingly that plea did not cause the parties to identify a separate issue in the List of Issues as to whether the Commission would have conducted a 5NLC or would have done something else and nor did it result in the Commission calling any evidence to address anything other than the possibility of a 5NLC. If a party wishes to rely upon a particular counterfactual, I consider it to be incumbent upon that party to identify that counterfactual in its pleading so as to warn the opposing party of the case it intends to advance at trial. Absent a proper pleading, I consider that it would be unfair and contrary to the overriding objective to permit the IPs now to advance this case.

1061. Returning then to the agreed position as between the Claimants and the Commission, the only counterfactual that I need consider is a hypothetical 5NLC. Even in that context an issue potentially arises as to the correct burden of proof in respect of the

Commission's evaluation of a TNLC Application in a 5NLC. In other words, whether the Claimants are required to establish on the balance of probabilities that the Commission (as defendant) would have evaluated TNLC's bid in each Pass/Fail Area as a Pass (as the IPs submit), or whether it is only necessary for the Claimants to establish that there was a real or substantial chance of that (as the Claimants submit). I was referred to various authorities on the point, but it does not appear to me to be necessary to decide it and none of the parties really focused on the point in the context of this counterfactual. If the Claimants can establish on balance that in a 5NLC they would have been able satisfactorily to address each of the twelve separate reasons for failure in 4NLC, then it must follow (even assuming that the case against the Commission as defendant must be established on the balance of probabilities) that, on balance, the Commission would have evaluated TNLC's bid in each Pass/Fail Area as a Pass. The only question then is whether there is a real or substantial chance that TNLC would have won the competition. This is the approach I propose to adopt.

1062. Although (as the Claimants point out) the relevant dates for the Court's assessment are September 2022 (for the RICs Modification) and September/December 2023 for the remaining Modifications, it has not been suggested that it makes any difference which of these dates is adopted by the Court. Accordingly, as suggested by the Claimants, I shall work on the basis that a 5NLC would have occurred in or around September 2023.

1063. It was common ground in closing that a 5NLC would have been run in materially the same way as 4NLC. Mr Wilson's unchallenged evidence was that there would have been no reason to change the approach to Pass/Fail or to BPAs. As he explained, 4NLC was aligned to the nature of the Licence including the importance of the Pass/Fail areas. Thus a new competition would have been "very similar" and would have incorporated the same Pass/Fail areas. Mr Tanner's evidence was to like effect.

1064. In such a scenario, I accept Mr Martin's evidence that N&S PLC would have sought to re-bid via TNLC and that TNLC would have entered 5NLC. By September 2023, Camelot had been acquired by Allwyn and so would not have submitted a separate bid. As the Claimants acknowledge, there is plainly a real or substantial chance that Allwyn would have rebid (a likelihood that led to the Claimants in their opening submissions accepting that their loss of a chance should be assessed at 50% to account for the 50% chance that Allwyn would have won). On Mr Wilson's evidence, which I accept, there is also a real or substantial chance that Sisal, IGT and Virgin would be possible applicants. Although the Claimants suggest that it is possible that Sugal & Damani, the Indian Lottery operator, might have bid, it is clear from Mr Wilson's evidence that Sugal & Damani did not respond to the SQ in the 4NLC because they wanted to influence the operating model in a way that was not in line with the Commission's requirements. There is no reason to suppose that the position would have been any different in a 5NLC.

1065. I reject the Claimants' submission that TNLC would have had a real and substantial chance of winning a 5NLC. In a 5NLC, TNLC would have had to overcome each of the numerous deficiencies which led to it failing over half of the different mandatory requirements in the Pass/Fail Areas and the magnitude of the gap in the aggregate scoring in the Competition. However, the Claimants have not advanced cogent evidence as to how they would have put themselves into a position to do this. Indeed, in their closing submissions they go no further than to invite the Court to conclude that there is a real and substantial chance that TNLC could have overcome the issues with its bid at

4NLC. But this is not the right test. The Claimants must establish that, on balance, they would have been able satisfactorily to address the deficiencies identified by the Commission in the 4NLC and that, having done so, there was then a real and substantial chance of them winning a 5NLC. In my judgment, they cannot do that on their own evidence.

1066. Mr Mills' evidence on this subject goes no further than an assertion that TNLC acted on the Phase 1 Feedback and that "if the competition were run again, with TNLC having the understanding gained from 4NLC, we would of course take advantage of that knowledge to perform significantly better". This is no more than an assertion which does not begin to show that, on balance, TNLC would have overcome all the deficiencies in its bid at 4NLC. Furthermore, the Claimants accepted in their opening submissions that on a 5NLC all applicants who had been previously involved would be submitting revised and improved bids. It is not enough for TNLC to assert that it would have performed significantly better in a 5NLC, it needs to establish on balance that it would have been able to overcome the issues identified in the 4NLC so as to give it a real and substantial chance of succeeding in a 5NLC against the other likely bidders.

1067. Mr Martin's evidence in his second statement is to the effect that the Detailed Rationale would have acted as another round of feedback, highlighting areas for improvement or further discussion with the Commission. He gives only one example, namely the topic of the Bid Assumption. However, as the IPs point out, and somewhat astonishingly, he does not say that TNLC would have accepted what it was being told by the Commission as to the Bid Assumption. Instead, he says that TNLC's primary strategy would remain (as it was in 4NLC) one of seeking to persuade the Defendant that it should be entitled to ignore the Bid Assumption. Given that this strategy failed in 4NLC I find that it would also have failed in 5NLC. This would then have required TNLC to come up with additional funding which Mr Martin identifies as between £29.8 million and £48 million. However, as to this, he goes no further than to "comment" that these amounts are "easily within the N&S Group's resources". He does not say that the N&S Group would in fact have been willing to commit this level of funding in September 2023 and nor does he point to any evidence that might have supported such a proposition. Further, he also does not say that the alternative he postulates (prize winners insurance) would have been available to TNLC. Again, it is not enough for him to assert that this issue would not have been an insurmountable hurdle without proper evidence as to what it is said TNLC would in fact have done in the counterfactual to address it.

1068. In his third statement, Mr Martin says that, in a 5NLC, TNLC would have had the benefit of the Phase One Feedback, albeit he accepts that this would also have applied to any other applicant with previous involvement and accordingly I regard this as (at best) a neutral point. Mr Martin also says that in a new competition, TNLC would have carefully engaged with, and where necessary, addressed any criticisms made in 4NLC. While no doubt Mr Martin believes in general terms that this would have been the case, and while I accept that, no doubt, as the Claimants contend, they would have sought to improve their bid (not least by reference to the Outcome Notification Letter and the Detailed Rationale), Mr Martin's evidence is insufficient to satisfy the requirement that the Claimants establish on balance that TNLC would have been able to address all of the issues that caused it to fail the 4NLC. Although Mr Wilson accepted that TNLC had adopted "lots of aspects of the Phase One Feedback", TNLC certainly did not adequately address all of the feedback it received at Phase One in the 4NLC (Mr

Wilson's clear evidence was that there were "elements" of the Phase One Feedback which were not taken into account and I have made various findings to like effect in the Process Claim). I see no reason to think that TNLC would have taken a different approach in a 5NLC. I reject the suggestion that, on balance, TNLC would therefore have addressed all of the relevant feedback in a 5NLC.

1069. I note in this regard that in written closing submissions the Claimants made various broad assertions as to what the Claimants "would" have done, including that they "would do what they could to try to win", that all the reasons in the Phase One feedback "would have been addressed" and that TNLC "would have done its utmost to address the points in the [Detailed Rationale]". However, I am not satisfied that these assertions are in reality borne out by the available evidence. That TNLC did not address all of the issues of which it had been made aware in 4NLC provides no comfort that it would have altered its approach (or even that it would have been able to alter its approach) in a 5NLC.

1070. Focusing for these purposes only on some key Pass/Fail areas, I agree with the IPs and the Commission that there is no satisfactory evidence to support the proposition that TNLC would materially have improved its funding position – a key deficiency in its bid in the 4NLC which has never been adequately explained. Mr Martin's relevant evidence is that on a re-bid TNLC would need to have looked at the detail of the financial model "to see where else we could give additional comfort" and that it "could" have increased the value and duration of the equity call option to the required levels. However, when it comes to what the Claimants would have done to achieve this he says only that:

> "The N&S Group is extremely well resourced, with significant funds and assets at its disposal for quick deployment. This was an extremely lucrative contract and the N&S Group would have been highly motivated to allocate more resources to secure that contract, had it been considered necessary".

1071. I do not consider this high level and general statement to be anywhere close to sufficient to establish that TNLC would have taken the necessary steps in or around September 2023 to demonstrate that they had the ability to maintain solvency throughout the Licence term, and that there were no material conditions associated with funding that may result in funding delays or funding not being available (see the second and third Financial Strength Criteria). This is particularly so in circumstances where Mr Martin accepted in cross-examination that the Claimants were aware at the time they submitted their Phase Two Application in 4NLC that their proposal of only contingent equity funding of £25 million together with a minimum cash balance of £5 million left a potential funding shortfall in their bid, but that additional funding from the N&S Group was not made available. I accept Mr Wilson's evidence that TNLC had sufficient time in which to address this issue in 4NLC, but it did not do so. I also agree with him that it is difficult to see that TNLC would have been able to secure funding in a 5NLC when they were apparently unwilling or unable to do so in 4NLC.

1072. As I have already found, the Claimants' failure to put additional money into its 4NLC bid left TNLC relying upon the single £25m Contingency pot to cover four separate and independent contingencies. I do not regard Mr Martin's assertion that during 4NLC "there was no finite limit on the amount of money that N&S would put in" as credible

in circumstances where the N&S Group did not in fact devote sufficient funding to TNLC's 4NLC Application. Accordingly, Mr Martin's evidence that on a rebid, having had feedback, if "we needed to put more funding in, we would be very prepared to do that" rings hollow. It is not borne out by what happened on 4NLC. The Claimants have not begun to satisfy me that, on balance, a similar issue with funding would not have occurred again in a 5NLC. I am inclined to agree with the IPs that it is telling that TNLC's Group Commercial Director apparently felt unable to provide anything more than vague assertions as to theoretical possibilities.

1073. Indeed there is nothing before the Court to indicate that TNLC would have improved, or would even have been in a theoretical position to improve, its funding position in the event of a 5NLC (an issue that affects both its approach to Financial Strength and PPF). Importantly, the Claimants have failed to provide any evidence capable of establishing on balance that they would have been in a position to commit an increased level of funding (the N&S Group having made a loss of approximately £91.7 million for the year ending 31 December 2022, as is clear from the accounts), and that they would in fact have offered such funding notwithstanding their unwillingness (or inability) to do so in 4NLC. That the N&S Group 2023 accounts show (as the Claimants point out) that their consolidated balance sheet had net assets of £389 million does not seem to me to be sufficient (without more). The Claimants assert in their closing submissions that the majority of these assets were "highly liquid", but I have no evidence about that, just as I have no evidence that the Claimants would have liquidated (some of) these assets in order to ensure an increased level of funding in a 5NLC. The directors' report for that year shows a profit before tax of only £15.8 million. There is simply no evidence whatever to assist the Court on what it should make of the N&S Group accounts and there is also no evidence from the N&S Group's "ultimate controlling party", Mr Desmond, as to what his intentions would have been and whether the N&S Group or N&S PLC would have been prepared significantly to increase the funding to TNLC for a 5NLC. The Claimants have also failed to provide any evidence to show that (if it had been necessary) they could and would have obtained the necessary increase in funding from elsewhere. Mr Martin's assertion that, had the Claimants believed that the Commission would have considered the funding package to be unacceptable, they "**could** have made a number of changes" is simply not enough. It does not begin to address why, when the Claimants were aware of shortfalls in their funding at 4NLC, no N&S Group funding was forthcoming to address those shortfalls.

1074. For these reasons alone, I consider that TNLC has failed to establish, on the balance of probabilities, that it would have taken the necessary steps to pass the Financial Strength criteria in a hypothetical 5NLC, much less how they would have done so. I do not need to go on to address other Financial Strength criteria.

1075. In respect of PPI, TNLC's failure was, as Mr Wilson points out in his statement, a consequence of its failure to engage with what the 4NLC in fact required operators to deliver. Instead, it relied upon continuing the 3NL mode of operation. Mr Martin's evidence does not go further than to say that TNLC would have responded to the feedback in the Detailed Rationale "appropriately" and "provided more detail". Once again, in my judgment, this is little more than assertion and the fact that Mr Wilson accepted that TNLC would certainly have benefited from the feedback in the Detailed Rationale in relation to PPI does not take the Claimants across the line. Mr Martin makes no attempt to engage with the nature of the detail that would have been required

and it is clear from the evidence in his second statement that in a 5NLC, TNLC would have used its work on the original Competition as a "starting point from which to develop a clear roadmap" on how to make a winning bid. This provides no real indication as to how (or even whether) the issues in relation to PPI would or could have been addressed. I note that in their written closing submissions the Claimants go no further than to say that "TNLC might very well have been able to build successfully on its existing bid". But this is not enough to satisfy the burden of showing on balance that they would have been able to put themselves into a position to pass PPI.

1076. Further, I am inclined to agree with the Commission and Allwyn that PPI was an area in which TNLC was quite obviously let down by the lack of expertise of their bid team. Mr Mills was appointed as TNLC's bid director, but his relevant experience was very limited. Neither of the other two members of the senior bid team, Mr Martin and Mr Sanderson, had experience of running a lottery, much less an operation such as the National Lottery. In 4NLC the Claimants were reliant upon buying in external expertise on short term contracts, including Mr Bruce (formerly CEO of "Gamble Aware"). However, even having done that, the evidence shows that the Claimants chose to ignore his advice in relation to the approach of relying on 3NL systems and he subsequently resigned. This resulted in the Claimants having to make a further external hire in the form of Mr David Clifton a matter of weeks before the Phase Two submission. There is no evidence whatever from the Claimants that they have developed any additional expertise in this area, that they would have been able to obtain appropriate expertise in the event of a 5NLC, or that they would have been more inclined in a 5NLC to listen to the advice they were given. The Group's only lottery operation (the Health Lottery) is on a much smaller scale, has been consistently losing money and has never made a profit. Mr Mills did not even consider it worth consulting the Health Lottery team when putting together the 4NLC bid and there is no suggestion it would have been consulted for a 5NLC bid.

1077. Again, I consider that the Claimants' evidence has not established on balance that they would have taken the steps necessary to achieve a pass in respect of PPI. I take the same view in relation to PPF, where, as Mr Wilson explains in his evidence, TNLC's ability to achieve a Pass was dependent upon it making material improvements in its funding offer. For reasons I have already explained, the Claimants have not satisfied me that, on balance, they would have done this.

1078. Further, I reject the Claimants' case that the outcome of 4NLC is an unreliable predictor of the outcome of a 5NLC. As articulated in the Claimants' written closing submissions, that case depends on two arguments, first that the 4NLC was not run properly for all the reasons identified in the Process Claim. However, I have rejected that case in the Process Claim. Second, the Claimants contend that "obviously" TNLC would have improved its BPA part of the bid in a 5NLC and that even its 4NLC BPA score might not be a "losing score" in 5NLC. The trouble with this contention is that there is simply no evidence whatever from the Claimants dealing with the BPAs, or how they would have been able to address the very significant gap that existed in the 4NLC in a 5NLC. The Claimants say that it is not known what the content of a bid from Allwyn might be and they point out that everyone's bid would have been different such that "the gap in 4NLC is not as relevant as suggested to 5NLC". However, the Claimants do not have any evidence to show that they would have overcome the gap. During the course of the trial the Claimants spent a considerable amount of time

addressing issues which they said were relevant to establishing that the gap could be closed – but those issues have been abandoned.

1079. In an attempt to "narrow the gap" in closing, the Claimants suggested that in the hypothetical of a 5NLC, Allwyn "would not be on the front foot" because a 5NLC would have been conducted in circumstances where Allwyn was "unable to do what it said it would do" and that Allwyn would have faced an uphill struggle in persuading the Commission on the Transition BPA. The Claimants continued to try to rely, in this context, on a suggestion that Allwyn was at least "partly responsible" for this situation. However, for all the reasons I have already given, this argument is not open to the Claimants and I reject it. A 5NLC would have been occurring in circumstances where Allwyn was unable to carry out its obligations under the Enabling Agreement owing to the factors identified above. It would have been participating in the 5NLC with the benefit of (i) insight it had gained into the operations of the National Lottery in the months leading up to the decision to run a 5NLC; (ii) having acquired Camelot and its staff and expertise; and (iii) the feedback provided by the Commission to both Allwyn and Camelot. Aside from the fact that Allwyn is the world leader in conducting lotteries, it would also have been the incumbent on a 5NLC. I consider that it would have been better placed to succeed in a 5NLC than it had been in the 4NLC. Against that background I consider it to be fanciful to think that TNLC would have closed the gap between itself and Allwyn on a 5NLC.

1080. Finally, I agree with the IPs that it is incumbent upon a claimant seeking to establish an entitlement to an award of damages in a case such as this to establish by clear, precise, and cogent evidence the steps that it would have taken in the counterfactual together with how those steps would have been sufficient to remedy the defects which caused it to fail previously. It is only with the benefit of such evidence that the Court would then be in a position to find that such a claimant had a realistic chance of success in the hypothetical competition. Bare assertions that steps could have been taken are insufficient. The Claimants have failed to come close to the evidence that would be required.

1081. Even if I were looking at the evidence solely through the prism of loss of a chance, I agree with the IPs and the Commission that the number of contingencies on which the chance depends, the lack of evidence enabling me to find that the Claimants were likely to achieve a pass in each of the mandatory Pass/Fail areas and the enormous gap between TNLC and Allwyn at 4NLC, not to mention the relative experience and resources of the two, leads me to the conclusion that it is fanciful to suppose that TNLC would have won a 5NLC. This is not a case where there is a close comparison between the successful bid of Allwyn and the unsuccessful bid of TNLC and nor is it a case where it can be shown that some illegality in the tender process may have contributed to the rejection of the losing bid.

1082. However one approaches causation in this case, I am inclined to agree with the IPs that this case is, like that considered by Coulson LJ in *Ocean Outdoor* at [93]:

> "a paradigm example of where damages – even calculated by reference to the loss of a chance principle – would never have been recoverable".

1083. Accordingly, the Claimants have failed to establish that, even had there been a breach of the Regulations, they have suffered any recoverable loss. This also means that they have failed to establish that they are economic operators with sufficient standing to bring their claims.

1084. Accordingly, the Claimants are not entitled to a declaration of ineffectiveness in respect of the 2023 Challenged Modifications (**Issue 15**), even assuming that they still seek such a declaration. In circumstances where they indicated in closing that they were not "pushing for ineffectiveness", there is thus no need for me to make this judgment any longer than it already is by addressing Issues 15 and 16 any further. The Claimants have no standing. They are also not entitled to any other relief, including a contract shortening order which they appeared to be seeking for the first time only in their opening submissions and which (had it been necessary to do so) I would have rejected.

1085. Given my conclusions, there is also no need for me to consider the question of whether there has been a sufficiently serious breach (**Issue 17**).

LIMITATION (Issue 13)

1086. There remains only one further issue with which I must deal, if only to ensure that I have made appropriate findings. That issue is whether the time limit for bringing the Modifications Claim (other than for a declaration of ineffectiveness) commenced on or after 5 January 2024.

1087. I have already set out the relevant law earlier in this judgment. The relevant limitation period for a damages claim is 30 days from the date when the economic operator knew or ought to have known that grounds for starting the proceedings had arisen (Regulation 53(2) CCR 2016).

1088. The Commission contends that the Claimants had sufficient information to start proceedings more than 30 days prior to the issue of the Modifications Claim on 2 February 2024 (i.e. prior to 5 January 2024, when the Claimants say they were in fact in a position for the first time to understand whether or not they had a claim). To determine this question, I must consider the chronology with some care. I am grateful to the Claimants for producing an exhaustive chronology of relevant events.

1089. On 17 October 2023, an article in the Financial Times referred to the fact that "plans to replace the lottery's 40,000 retail terminals and to overhaul its digital products would be delayed 'by at least half a year'", that the transfer to Scientific Games would be "deferred" by at least 6 months and that there had been a "slower-than-expected handover process". This caused the Claimants to begin making enquiries.

1090. On 23 October 2023, the Claimants' solicitors, BCLP, wrote to the Commission's solicitors, Hogan Lovells, referencing the FT article and seeking information as to whether any changes to the Enabling Agreement or the Fourth Licence had been agreed, whether Allwyn had made any Change Proposals under the Enabling Agreement, and whether the Commission had issued any Implementation Directions to Allwyn.

1091. In a response dated 26 October 2023, Hogan Lovells referred to the impact of the Suspension on Implementation and stated that, against that background, the Commission had made changes to the Enabling Agreement and the Fourth Licence to

secure Implementation of Allwyn's Application and to ensure delivery against its statutory objectives. On 3 November 2023, BCLP responded noting the confirmation that changes had been made to both the Enabling Agreement and the Fourth Licence. It went on to say that the Claimants were "concerned to ensure that the changes agreed in respect of both the Enabling Agreements and the Fourth Licence have been carried out in accordance with Regulation 43" CCR 2016 and asked for confirmation as to what changes had been made, and the date on which those changes had been made. BCLP also asked to be directed to any Modification Notices published in respect of the changes.

1092. On 21 November 2023, Hogan Lovells provided a substantive response. The letter was marked with the words "contains confidential information (Tier One)", a reference to an existing confidentiality regime ("**TCRO**") involving Camelot, IGT, Allwyn, the Commission and the Claimants, established on 1 August 2023 which set up a two tier system for viewing witness statements and statements of case from the Camelot and IGT Proceedings. Tier One confidential information could be viewed by external lawyers, while Tier Two confidential information could be viewed by a single in-house lawyer. In fact, the Claimants have no in-house lawyers and I accept that, accordingly, this letter was only seen by BCLP at this time.

1093. The 21 November 2023 letter provided the following detail about the September 2023 Modifications:

> "In September 2023, when the impact of the matters described at paragraph 5 above had become clearer, changes were made to the EA and Licence to provide that some elements of Allwyn's Application could be implemented over an extended period of time whilst ensuring that the Licence will start as planned on 1 February 2024. In summary, it was agreed that Allwyn will take over the Licence on 1 February 2024 by providing an enhanced version of the current service, and deliver the remainder of the commitments in its Application by no later than 28 February 2025 and imposing a backstop date for Allwyn to complete the roll-out of all in store terminals and related technology described in Allwyn's Application by 31 December 2025. In light of this arrangement, changes were made so that (i) Allwyn can only recover its associated implementation costs once it has delivered the commitments in its full Application and (ii) a cap applies (based on the realistic maximum assessment by the Commission) to the amount of associated additional costs recoverable by the Commission from Allwyn. Express provision has also been made enabling the Commission to extend 4NL following a review, no earlier than Licence Year 5, for up to two years provided that the extension is not inconsistent with the Commission's statutory duties and legal obligations".

1094. Later on the same day, BCLP sent an email to Hogan Lovells asking for an explanation as to the basis on which confidentiality was claimed under the TCRO and making clear that it would be necessary for BCLP to take instructions on the letter but that this was impossible at present. BCLP asked for a redacted copy.

1095. On 24 November 2023, Hogan Lovells responded saying that they were awaiting confirmation from Allwyn as to the extent of the Confidential Information contained in the 21 November letter. The letter went on to note BCLP's observation about the need for instructions but observed that:

> "it is open to TNLC to use the mechanisms in the TCRO to request the introduction of a TCRO Tier Two Relevant Person and/or request release of the information (into Tier Two or outside the ring) if you consider this necessary and appropriate in the circumstances".

1096. It is common ground that TNLC did not attempt to follow up on this suggestion.

1097. On 29 November 2023, Hogan Lovells provided a redacted version of the 21 November letter. The key paragraph to which I have referred above now looked like this:

> "In September 2023, when the impact of the matters described at paragraph 5 above had become clearer, changes were made to the EA and Licence to provide that some elements of Allwyn's Application could be implemented over an extended period of time whilst ensuring that the Licence will start as planned on 1 February 2024. In summary, it was agreed that Allwyn will take over the Licence on 1 February 2024.
>
> Express provision has also been made enabling the Commission to extend 4NL following a review, no earlier than Licence Year 5, for up to two years provided that the extension is not inconsistent with the Commission's statutory duties and legal obligations".

1098. The section in the middle of this paragraph had been redacted. The covering letter stated that Allwyn had asserted the redacted part to constitute confidential information.

1099. BCLP shared the 21 November letter in its redacted form with the Claimants on 30 November 2023.

1100. On 6 December 2023, BCLP wrote to Hogan Lovells at some length. Amongst other things it (i) asserted that if the Commission had modified either the Enabling Agreement or the Licence in breach of Regulation 43, "this is by definition a new directly-awarded contract and is not covered by the original competition, that [the Claimants] ought to have had the opportunity to bid for"; (ii) pointed out that only limited information as to changes made to the Enabling Agreement and Licence had been provided, that no cogent rationale for the changes had been provided and that the nature of the modifications had not been identified "in a manner that allows our clients to assess their materiality"; (iii) observed that it was not credible to portray a legal challenge to the outcome of 4NLC as unforeseeable; (iv) sought an explanation as to why it had been necessary to amend the Licence to provide for an extension; (v) complained that the letter had provided no means for the Claimants to make their own assessment as to whether the modifications were substantial; and (vi) asked for all changes to be identified in full "so that [the Claimants] can assess the materiality of such changes and, by consequence, any claim it may have". The letter concluded by saying that the

questions posed had been raised because the Claimants were "concerned that they may have additional causes of action arising from amendments to the EA and Licence".

1101. On 14 December 2023, Hogan Lovells sent to BCLP copies of the modified Enabling Agreement and Licence. Confidentiality was asserted and so redacted versions were provided. By email on 15 December 2023, Hogan Lovells asserted Tier 1 Confidentiality over all the agreements in their entirety on the basis that Allwyn intended to designate some of the information as confidential. As at this time it seems that the Claimants had not been provided with the redacted versions, and once they were designated confidential the Claimants could not see them.

1102. On 4 January 2024, BCLP emailed Hogan Lovells asking for the agreements in redacted form. On 5 January 2024, Hogan Lovells sent a letter to BCLP enclosing non-confidential versions of the modified agreements which they said could now be treated as released from the TCRO.

1103. The Commission and the IPs contend that it is clear from the documents that were available to the Claimants by 29 November 2023 that TNLC knew (i) that Allwyn would not implement its Application in full by the Start Date; (ii) that the change to Scientific Games would be delayed; (iii) that (as Mr Martin conceded) changes had been made to provide that some elements of Allwyn's Application could be implemented over an extended period of time; and (iv) that (as Mr Martin also conceded) express provision had been made enabling the Commission to extend the Fourth Licence, following a review, for up to two years. If this information was not enough they also submit (i) that TNLC could have requested amendments to the TCRO to enable a member of the business to view the 21 November 2023 letter in unredacted form but that it chose not to do so; and (ii) that TNLC's lawyers had sight of the unredacted 21 November letter and the amended agreements in the TCRO from 14 December 2023. They contend that it is entirely routine in procurement litigation for lawyers to take instructions from clients on the basis of information within a Confidentiality Ring for the purposes of bringing and pursuing litigation. Thus they say the Claimants knew enough from the redacted summary in the 21 November letter together with their lawyers' knowledge of the detail of the modifications themselves by 14 December 2023 at the latest. The damages claim is therefore out of time.

1104. The Claimants firmly reject this characterisation of events. They deny that the content of the FT article and the 21 November letter (received by TNLC in redacted form on 29 November) provided sufficient information, they reject the suggestion that BCLP's knowledge as their solicitor can be "merged" with their knowledge in circumstances where BCLP was not allowed to tell them the relevant information, and they say that there is nothing in the argument that they should have sought to re-designate the redacted text in the 21 November letter as Tier Two: they had no in house lawyer and this process would never have completed before 5 January 2024 in any event. They submit that they made reasonable enquiries through BCLP and that it was only on 5 January 2024, when they had sight of the unredacted modified agreements, that they had sufficient information to know that grounds for starting proceedings had arisen.

1105. In my judgment, while the Claimants certainly did not have access to complete information about all of the Modifications in the redacted 21 November 2023 letter, they were specifically informed that a provision had been agreed enabling a 2 year extension – the very modification which the Claimants have relied upon as "critical" in

its own right. Given the way in which the Claimants have advanced their case as to the 2 year extension modification at this trial, it is very difficult to see why the information contained in the redacted version of the 21 November letter was not sufficient to provide the Claimants with the essential facts required to justify taking proceedings. That the Claimants had not seen the exact provision and did not know when the extension review might take place, who could insist on the extension or how the provision would operate does not appear to me to be significant. Equally the fact that they may not have had enough to draft a fully and comprehensively particularised statement of claim does not matter.

1106. The Claimants were of course already aware of the existing provisions of the Licence and they knew the essential facts – that express provision had been made to extend the term of the Licence by up to 2 years. That knowledge is enough in my judgment clearly to indicate the existence of a cause of action.

1107. I gain considerable comfort that this must be so from reviewing the Claimants' pleaded case in relation to the modifications. Focusing specifically on the 2 year extension modification, their Particulars of Claim does little more than plead that this modification allowed for "an extension of the Licence by an additional two years" and that it is "substantial" within the meaning of Regulation 43(9) CCR 2016. It goes on to consider this modification (together with the delays to implementation, about which the Claimants were also aware in general terms as set out above) and pleads that if the modification had been incorporated in the original contracts for 4NLC:

> "…there is a real prospect that a different outcome may have been reached. In particular:
>
> "(i) the financial models submitted by bidders would necessarily have been different to allow for the permitted delays in implementation and potential 2-year extension of the Licence term (in addition to the further 2 year contingency extension, which was incorporated into the Licence during the course of the 4NLC) which would have allowed other bidders to delay significant expenditure and provide for the recoupment of up-front sunk costs over a longer period, with consequent positive impacts on their internal rate of return ("IRR"). Furthermore, the Claimants aver that the financial models for all bidders would have been predicated on a higher Good Causes Contribution and Surplus during the later years of the Licence period, such that the possibility of an additional 2-year extension and the ability to delay significant expenditure would have a non-linear effect on the financial modelling and IRR for bidders;
>
> (ii) bidders would have been able to significantly modify their business plans to allow for the possibility of a delay of over one year to the implementation of their solutions and to allow for the possibility of continuing the solutions from the Third Licence for a temporary period for up to two years (including the delay in expenditure and consequent impact on IRR that this would entail). In this respect, the First Claimant's Application in the 4NLC was criticised in feedback for proposing to continue some

> aspects of the Third Licence operations for an interim period following the award of the Licence".

1108. There is then a later plea about the change in economic balance in terms I have already set out above but will repeat for ease here:

> "the additional time granted to Allwyn by the Challenged Modifications, both in terms of a permitted delay in implementation, and the potential for a two year extension to the Licence (as summarised at paragraph 22(b)(i)-(ii) above) substantially impacts the economic balance in allowing Allwyn to delay expenditure on key costs and to recoup the considerable up-front sunk costs over a longer period and thereby improve its IRR;…"

1109. In light of this pleaded case, it is difficult to see what more the Claimants needed to know to understand the existence of the cause of action in respect of the potential for the 2 year extension. While the Claimants are right to say that the modifications must now be considered as a package and must be assessed having regard to their impact on the contract as a whole, I cannot see that there is anything in this pleading as to the 2 year extension modification that could not have been pleaded after sight of the redacted letter on 29 November 2023. Furthermore, the fact that the Claimants plainly did not know the detail of the other Challenged Modifications does not affect the date on which time starts to run for the purposes of the Regulation, as is clear from the Court of Appeal's decision in *Sita UK Ltd v Greater Manchester Waste Authority* per Elias LJ at [89]:

> "I am satisfied, as was the judge below, that time does not start afresh where what is being relied upon to start time running again is a further breach of the same duty, whether it in fact occurred before or after the breaches already known".

1110. I note that this is entirely consistent with the proposition in *Bromcom* (set out above at paragraph 796) that the Court should assess what the claimant knew, rather than being concerned with what it did not know.

1111. Accordingly, I find that the Claimants had actual knowledge sufficient clearly to indicate an infringement when they saw the letter of 21 November 2023 in redacted form on 29 November 2023. Time thus began to run on that date and the Modifications Claim is out of time.

1112. In those circumstances, I need not deal at any length with any of the other arguments advanced by the parties. However, if I am wrong as to the date of relevant knowledge, then the Commission and IPs would not have persuaded me that the Claimants were fixed with the knowledge of their lawyers such that by 14 December 2023 they had access to information as to the full detail of the modifications and were in a position to know that they had grounds to start proceedings.

1113. The relevant information was released into a Confidentiality Ring to which the Claimants did not have access. There is no authority for the proposition that in such a case the knowledge of the Claimants' solicitors is to be attributed to the Claimants, and

such a proposition appears to me to be both commercially unrealistic and contrary to common sense. It is also extremely unattractive when it is an argument that is made by the party which was insisting on confidentiality in the first place – that this was because the Commission was seeking to protect Allwyn's confidentiality does not appear to me to affect the analysis.

1114. I asked Mr Toledano during closing submissions why BCLP could not simply have advised their clients that they needed to commence proceedings given the content of the information that was available to them in the TCRO, to which he responded that there is a distinction between a lawyer advising a client to commence proceedings on the one hand and the question of whether, in such circumstances, the client itself in fact has sufficient information and knowledge so as to start the clock running. On reflection, I tend to agree. I do not know whether it is common practice in procurement cases for lawyers to operate on the basis of instructions from clients that if confidential information available only to those lawyers suggests that there are grounds for bringing a claim then they should issue a claim. But that is not really the issue. The real question is whether the lawyer's knowledge can be attributed to the client, or put another way, whether the client has constructive knowledge by reason of his lawyer's access to the TCRO. In my judgment there is no such attribution and the client has no such constructive knowledge.

1115. Mr Barrett took me to the case of *Oracle Security Services Limited v Barts Health NHS Trust and Place Group Limited* [2024] EWHC 1201 (TCC) ("***Oracle***") in which Mr Andrew Mitchell KC, sitting as a DHCJ, expressed an *obiter* view that there was no reason on the facts of that case (where the solicitor had been instructed to obtain and receive relevant information) why the knowledge of the claimant's solicitor that there were grounds to bring proceedings should not be attributed to the claimant company for the purposes of Regulation 92(2) of the PCR 2015 (the equivalent regulation to 53(2) CCR 2016).

1116. However, *Oracle* was not a case in which the relevant information had been released into a confidentiality ring to which only the solicitor had access. I find it difficult to see how the knowledge of the solicitor can be attributed to the client in circumstances where the client is expressly prohibited from seeing the information to which the solicitor has access. How can the solicitor be the *alter ego* of the client for these purposes? While I accept that the principle of rapidity is a key aspect of procurement law which underpins the provisions in the Regulations dealing with limitation, and while it is therefore a useful principle to have in mind when considering submissions on limitation (see *Oracle* at [32]), I do not consider that, in the circumstances of this case, it requires the Court to find that information which the Claimants were expressly precluded from seeing and which the Commission understood and intended they would *not* see was nevertheless known to them by reason of it being known to their solicitors.

1117. Furthermore (and assuming that it is common in the TCC for solicitors to be instructed to issue proceedings even in circumstances where their client has not had access to the relevant information) I have no evidence as to the nature and scope of any such delegation of authority to BCLP.

1118. Finally, I would not have accepted the argument that efforts should have been made to de-designate the confidentiality of the 21 November 2023 letter and the modified agreements. Aside from the fact that the Claimants had no in-house lawyer such that a

de-designation to Tier Two would have been of no practical assistance, I am inclined to agree with the Claimants that it is most unlikely that any de-designation process would have happened any quicker than the process that was in fact undertaken of determining that the documents could be released from the Confidentiality Ring and seen by the Claimants on 5 January 2024.

Conclusion on Limitation

1119. For the reasons I have given I find that the Modifications Claim for damages is time-barred by reason of the provisions of Regulation 53(2) CCR 2016. I would have dismissed the claim for that reason alone.

CONCLUSION ON THE MODIFICATIONS CLAIM

1120. For all the reasons set forth in this judgment, I dismiss the Modifications Claim.

OVERALL CONCLUSION ON THE PROCESS CLAIM AND THE MODIFICATIONS CLAIM

1121. In summary:

i) The Claimants have failed to make out any case of manifest error on the part of the Commission in their Process Claim. They have also failed to establish that either Camelot or Allwyn should have been disqualified from the Competition, whether by reason of incumbency advantage (Camelot) or conflict of interest (Allwyn). The Competition that was conducted for the award of the Fourth Licence reached a lawful outcome. The Process Claim is dismissed.

ii) The Claimants have also failed to establish that the Commission acted in breach of Regulation 43 CCR 2016 in making the Challenged Modifications without resorting to a new concession contract award procedure. Although the Challenged Modifications were foreseeable, they were not substantial in that they did not change the economic balance in favour of Allwyn in a manner that was not provided for in the Competition version of the Enabling Agreement and Fourth Licence. Even if that is wrong, the Claimants have not established that any breach has caused them to suffer a loss. There is no real prospect on the available evidence that TNLC would have won a 5NLC. Finally, the Modifications Claim is time-barred, such that it would have failed in any event. The Modifications Claim is also dismissed.