

The logo for Hogan Lovells, consisting of the name "Hogan Lovells" in a black serif font, centered within a solid lime green square.

Hogan  
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# White Paper Conference

Ciara Kennedy-Loest

17 November 2017

A large, abstract graphic on the right side of the slide. It features a large, downward-pointing arrow shape composed of several overlapping, semi-transparent white and light grey geometric planes. The background behind these planes is a solid lime green color, matching the logo's color.

# Today's question

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- When is the court willing to examine more subjective or evaluative tender criteria (because of lack of transparency around how such criteria are scored), and substitute its own view for that of the authority?

# Will the Courts review a CA's scoring decisions?

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- Cases:

- *Energy Solutions EU Limited v Nuclear Decommissioning Authority* [2016] EWHC 1988 (TCC)
- *Woods Building Services v Milton Keynes Council* [2015] EWHC 2011 (TCC)
- *Willmott Dixon Partnership Limited v London Borough of Hammersmith and Fulham* [2014] EWHC 3191 (TCC)
- *Letting International Ltd v London Borough of Newham* [2008] EWHC 1583 (QB)
- *Lion Apparel Systems Limited v Firebuy Limited* [2007] EWHC 2179 (Ch)

# When will the Courts be prepared to rescore?

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- "The court should only disturb the Authority's decision where it has committed a "manifest error"."
  - (*Lion Apparel*)
- "Absent a manifest error, the Court will not interfere"
  - (*Energy Solutions*)

# What is a manifest error?

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- "When referring to a "manifest" error, the word "manifest" does not require any exaggerated description of obviousness. A case of "manifest error" is a case where an error has clearly been made."
  - *Lion Apparel*
- The meaning of manifest was further examined:
  - "The phrase is defined in dictionaries as something which is: readily perceived, clear, evident, clearly apparent, obvious or plain"
    - *Gibraltar Gaming and Betting Association Ltd*
- However, this is not enough. In the case of manifest error:
  - "...it is not enough for errors in marking to be present; they must have made a difference"
    - *Energy Solutions*

# What is a manifest error?

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- Debate as to whether the manifest error test which applies in procurement cases is the same as "*Wednesbury*" unreasonableness:
  - "... the test of "manifest error" .....is very similar to, if not the same as, the *Wednesbury* test of irrationality in domestic judicial review proceedings..."
    - *BY Development Ltd*
  - "*In my view there is a broad equivalence between the two concepts.*"
    - *Woods*
  - "*The debate may in any event prove to be simply one of semantics ..... an academic debate which it is not necessary to consider in any detail.*"
    - *Energy Solutions*

# Margin of appreciation

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- When dealing with questions of a CA's judgment – the CA has a "margin of appreciation"
  - " In relation to matters of judgment or assessment the Authority does have a margin of appreciation ..."
  - *Lion Apparel*
- No margin of appreciation when the evaluation results in a breach of the transparency obligation
  - *Lion Apparel*
- No margin of appreciation when the evaluation results in a breach of the duty of equality
  - *Woods*

# A prohibition on the Court's review?

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- *Energy Solutions* case:
  - Assertion was that an evaluative judgment is not capable of constituting a manifest error
  - Court disagreed:
    - *"There is no prohibition, but there is a margin of appreciation. Differences of opinion are not sufficient to have the score changed. Absent a manifest error the court will not interfere."*

# Predisposition to find manifest error?

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- Another assertion in the Energy Solutions case was that the Courts are more likely to find a manifest error has been committed if the evaluation exercise as a whole has been casual and ill-organised
- *Woods*: there were a number of factors present that ought not to be present in an well-organised procurement:
  - One of the evaluators was a previous employee of Woods, didn't tell them about his involvement and even went to so far as to mislead Woods as to his involvement
  - Brief notes, not constituting proper reasons etc
- Court seemed to accept that this might be the case:
  - "... the court may find more manifest errors, or might find manifest errors more readily, in a poorly organised competition...."
  - but did not accept that there should be a default position or presumption in favour of a well-organised competition

# What are the limits of the Court's review?

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- The Courts are not undertaking a comprehensive review of the tender evaluation process
- It is not substituting its own views on the merits for those reached by a CA just because they might be different
  - *"... If I had been evaluating the Woods tender I may well have given it an 8 or even a 10. But that is not the test. Although tempted so to do, I consider that I ought not to conclude the Council's score was a manifest error"*
- *"... it is not my task merely to embark on a remarking exercise and to substitute my own view but to ascertain if there is manifest error, which is not established merely because on mature reflection a different mark might been awarded"*
  - *Letting International Ltd*

# What sort of things constitute a manifest error?

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- *Woods*: framework agreement for asbestos removal and reinstatement services
- Scoring mechanism gave zero for a response that does not meet requirements
  - Winner scored 10/10 for a Method Statement that failed to deal with the reinstatement works and in which there were no specific proposals as to how the asbestos removal works themselves were going to be performed
    - Court found manifest error – "incapable of rational explanation"
    - Council's own scoring criteria dictated 0/10
  - On mobilisation – winner failed to answer half the question – how time scales would be met – which the Council had said were of critical importance
    - Court found manifest error – "wholly failed" to address a very important element
    - Council's own scoring criteria dictated 0/10

# What sort of things constitute a manifest error?

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- On mobilisation – Woods scored 6. Court would have given an 8 or 10 BUT:
  - That is not the test – margin of appreciation meant that it was not a manifest error – it was not irrational
- On Contract Manager – Woods scored 2 marks less because Council wanted a dedicated manager
  - Not disclosed in the scoring criteria – breach of transparency – no margin of appreciation
  - Woods mark was increased to the same as the winner
- On training and competencies: Woods said winner should have scored less and it more
  - Omissions by winner re customer care training were not "of any great significance"
  - Added value asserted by Woods was for the Council and their "subjective judgment"

# What sort of things constitute a manifest error?

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- "... *incapable of rational explanation.*"
- "... *no sensible alternative ...*"
- "... *it is impossible to say that the result...was or could be justified.*"
- "... *complete failure to justify any differential ...*"
- "... *plainly did not comply....*"
- "... *nothing which justified ..... (even arguably) ...*"
- "... *no cogent material ...*"

# What sort of things constitute a manifest error?

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- *Willmott Dixon*: identifies some limits on where manifest error might be found:
  - "unclear" why one bidder scored lower – not a basis for concluding manifest error
  - "greater detail" in a lower scoring bid – not a basis for concluding manifest error
  - offering a bespoke v generic system – of itself does not establish manifest error
  - recognition of "pickiness" – doesn't necessarily lead to a finding of manifest error
  - a number of instances where manifest errors didn't affect the scoring

# Practical implications?

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- Overall organisation
- Emphasis again on proper record keeping
  - May weaken your case (due to a lack of certainty)
  - Don't paraphrase scoring guidance in reasoning
  - Reasons and commentary need to justify the scores
- Choose your evaluation criteria/scoring mechanism carefully – you will be held to doing what they say:
  - Unnecessary rigidity?
  - Courts have so far found the rescoring exercise relatively easy – the scoring system clearly required a zero/there was no "value add" to get an extra mark
- Avoid management/aspirational speak – focus on specifics/assess specifics
  - Are things being mentioned or offered? Are you assessing specifically or overall?

# Practical implications?

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- Still a pretty high bar for manifest error - more often than not, the "I got a 3 instead of a 4" claim will fail – margin of appreciation
- But can be a very powerful, game-changing, claim when valid –
  - *Woods* – reduced the original winning score by 40 and increased the losing score by 6 – changing the outcome of the competition
  - *Energy Solutions* – original winner went from 86.48 to 85.56 and original loser went from 85.42 to 91.48 – would have changed the outcome of the competition

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