Neutral Citation Number: [2015] EWHC 231 (Admin)

Case No: CO/4150/2014

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/02/2015

Before:

THE HONOURABLE MRS JUSTICE LANG DBE

- -

Between:

THE QUEEN
on the application of

KIM ALEXANDER GOTTLIEB — **Claimant**

- and -

WINCHESTER CITY COUNCIL — **Defendant**

SILVERHILL WINCHESTER NO 1 LIMITED — **Interested Party**

- -
- -

Robert Palmer (instructed by **Dentons UKMEA LLP**) for the **Claimant**
David Elvin QC and Richard Moules (instructed by **Berwin Leighton Paisner LLP**) for the **Defendant**
The **Interested Party** did not appear and was not represented

Hearing dates: 28 & 29 January 2015

- -

Approved Judgment

Mrs Justice Lang:

1. The Claimant applies for judicial review of the decision of Winchester City Council ("the Council"), dated 6 August 2014, to authorise variations to a contract with a developer ("the Development Agreement") to build a new mixed retail, residential and transport centre in the heart of Winchester city centre. The area is known as "Silver Hill".

2. The Claimant is a resident of Winchester. By profession, he is a chartered surveyor and a director of a small private property investment and development company. He has been an elected Winchester City Councillor for the Itchen Valley ward since May 2011, and was a member of the Council's Silver Hill Reference Group.

3. The Claimant is a leading member of the Winchester Deserves Better Campaign which opposes this scheme and seeks alternative development proposals. He believes it to be poorly designed (in terms of architecture and layout) and the buildings to be over-sized in their setting within the City. He is concerned that, under the terms of the variation, affordable housing and civic amenities have now been removed from the scheme.

4. In contrast, the Council considers the development will achieve the longstanding objective of regenerating an economically weak area of an otherwise thriving city centre. It favours a comprehensive rather than piecemeal development, to provide all the facilities needed to attract retail operators and customers.

5. Permission to apply for judicial review was initially refused by Dove J. but subsequently granted by Lindblom J. at an oral renewal hearing. The grant of permission was limited to ground 1, namely whether the decision was unlawful because, having varied the terms of the Development Agreement, the Council was required to carry out a procurement exercise under Directive 2004/18/EEC of 31 March 2004 ("the 2004 Directive") and the Public Contracts Regulations 2006 ("the 2006 Regulations").

6. The Claimant contends that the variations to the Development Agreement are such as to require a procurement exercise to be undertaken on the ground that they are materially different in character from the original contract and, therefore, are such as to demonstrate the intention of the parties to renegotiate the essential terms of the contract. The variations changed the economic balance of the contract in favour of the developer in a manner which was not provided for in the terms of the initial contract.

7. The Council's response is that the variations are not materially different in character. They were made in accordance with variation clauses in the Development Agreement, and they do not change the overall nature of it. They still fall within the scope of the original brief. Some of the changes were prompted by external causes; others by changes in circumstances since 2004. The Council has taken independent professional advice which states that the changes do not alter the economic balance in favour of the developer. Indeed, the Development Agreement, as varied, is a more favourable arrangement than the Council would be likely to obtain in the market.

Facts

(1) The Development Agreement

8. The Council, as owner of various freehold and leasehold sites in the city centre, entered into a "Development Agreement relating to a site at Broadway/Friarsgate Winchester" with Thornfield Properties (Winchester) Limited (the Developer) on 22 December 2004.

9. The site consists of approximately 2.89 hectares of land within the city centre's conservation area.

10. The Council did not carry out a procurement exercise when it entered into the Agreement. The development opportunity was not advertised in the Official Journal of the European Union and no competition between developers was held.

11. The Development Agreement provided for the comprehensive redevelopment of the Silver Hill area ("the Site") by way of a mixed-use development comprising residential, retail, car parking, a replacement bus station, a civic square, a CCTV office, shop mobility and Dial-a-Ride service, and a market store.

12. The Development Agreement provided that the Council would assemble the land necessary for the scheme and then grant the Developer a long-term lease, while retaining the freehold interest.

13. Clause 3.2 of the Development Agreement provided that the Developer and the Council agree to observe and perform their respective obligations under Schedule 2. Schedule 2 set out a series of "Conditions", as defined in paragraph 2. They included (among others):

    i) at paragraph 2.1, the Planning Condition (requiring the grant of Planning Permission);

    ii) at paragraph 2.8, the Social Housing Condition (requiring the Developer to enter into a legally binding agreement with a registered social landlord for the sale of affordable housing and to let and manage social rented housing);

    iii) at paragraph 2.9, the Financial Viability Condition (requiring the Developer to demonstrate to the reasonable satisfaction of the Council immediately before the date when the last of the other outstanding Conditions is satisfied or (where provided under Schedule 2) waived that the Development is financially viable meaning that the anticipated profit is not less than 10% of anticipated Development Costs).

14. Clause 4.1 of the Development Agreement provided that "the Initial Scheme Drawings represent the base design for the Development as at the date hereof and that these drawings have been prepared in accordance with the Planning Brief". The Initial Scheme Drawings appear at Appendix 4 to the Development Agreement. The Planning Brief had been adopted by the Council (as local planning authority) in July 2003, and was attached to the Development Agreement at Appendix 16.

15. Clause 4.2 provided that the Developer would work up this design to a full design in approved drawings which would constitute the application for planning permission.

16. The Development Agreement specified a number of minimum requirements that must be provided ("the Required Elements"). These are set out at clause 5.3:

> "5.3.1 The Development shall include each of the following and the Council shall not be required to approve the Initial Scheme Design the Application or the Drawings (and any variation thereof) unless they provide for:-
>
> 5.3.1.1 a minimum of 90,000 square feet of Gross Internal Area of Retail Units;
>
> 5.3.1.2 a minimum of 364 residential units 35% of which are Affordable Housing and 15% of the Affordable Housing or if greater 20 such units to be Social Rented Housing;
>
> 5.3.1.3 a minimum of 279 public car parking spaces (unless such number is reduced due to a change in the car parking policy of the Council acting as the local authority);
>
> 5.3.1.4 a civic square in the form of the square approved by the Council in accordance with clause 4.3 of this Agreement and the intended location of which is illustrated on plan A1 and shown with red hatching and shading and labelled as Silver Hill Square;
>
> 5.3.1.5 a bus station incorporating no fewer than 12 bus bays three layover bays public toilets and other facilities as more particularly described in the Stagecoach Agreement and as shown on Plan C2;
>
> 5.3.1.6 premises for and the reprovision of the Council's closed circuit television equipment (including any necessary additional equipment) and parking offices as provided for in the Planning Brief and as shown on the specification attached at Appendix 15;
>
> 5.3.1.7 premises for a new shop mobility and Dial-a-Ride service as provided for in the Planning Brief and as shown on the specification attached at Appendix 15;
>
> 5.3.1.8 an area for the relocation of the daily Middle Brook Street market and the Farmers' Market including re-provision of the market store and waste compactor;
>
> 5.3.1.9 provision of public art in a form agreed with the Council but costing not more than £336,000."

17. Clause 5.1 recognised that, following the approval of the application for planning permission and thereafter throughout the course of the development, variations to the

approved Drawings might be made. Clause 5.1.3 required that certain variations required Council approval. Those variations were:

> "5.1.3.1 any variation to the Required Elements in which case the Council shall have absolute discretion as to whether to it shall approve such variation;
>
> 5.1.3.2 any material variation to any of the following matters (in which case the Council shall have absolute discretion as to whether it shall approve such variation unless such variations arise due to the requirements of the local planning authority in which case the Council shall not unreasonably withhold its approval …):
>
> (a) the cost and standard of construction unless (in the case of cost) the proposed variation is less than 10% of the estimated cost …
>
> (b) changes to the external elevations or massing of the Development Scheme;
>
> (c) the position or extent or layout of the public areas and streets forming part of the Development Scheme;
>
> (d) the servicing and delivery arrangements;
>
> (e) the position number or capacity of vehicular accesses to and from the public highway;"
>
> (f) the number of the shop units as shown on the Approved Plans and provided that none of the units are more than 30,000 square feet …;
>
> (g) the number of public car parking spaces so that there are fewer than 279 in total;
>
> (h) the number and designation of residential units such that less than 35% are Affordable Housing and less than 15% of the Affordable Housing (or if greater 20 such units) is Social Rented Housing;
>
> (i) the total Gross Internal Area of the Retail Units unless the variation is less than 10% of the total;
>
> 5.1.3.3 any other material variation to the Drawings in which case the approval of the Council shall not be unreasonably withheld…."

18. Clause 6.1.2 of the Development Agreement provided that the Developer should invite competitive tenders from at least three of various building contractors listed in Schedule 5 in respect of the Development Works.

19. Clause 21.5 provided that the Developer could, in consultation with the Council on an open book basis and subject to obtaining the previous consent of the Council, such consent not to be unreasonably withheld, enter into a joint venture or appoint a sub-developer in relation to the residential elements of the Development Scheme.

20. Paragraph 15.2 of Schedule 2 to the Development Agreement provided for a right of termination in the event that any of the Schedule 2 conditions had not been discharged (or waived) by a long stop date defined as being 5 years from the date of the Development Agreement (i.e. 22 December 2009).

21. The Development Agreement further provided that:

    i) after taking account of all agreed development costs, the Developer would receive the first 10% profit and the Council would then receive half of the first £2 million profit after the Developer's 10%: paragraph 1.7.1 of Schedule 3;

    ii) beyond the first £1 million share of profit, the Council would then receive a half share of any profit above 15%: paragraph 1.7.2 of Schedule 3;

    iii) in calculating the Developer's return, a deduction would be made for all development costs properly incurred back to (and pre-dating) the entering into the development agreement in 2004, including interest on those costs: paragraphs 1.1, 1.1.1.12 and 4.4 of Schedule 3;

    iv) the Council was guaranteed a minimum rent in relation to the properties that it was then making available for the development by a lease: Clause 11.2 and Appendix 5.

22. Originally, the arrangement provided for:

    i) Payment of a fixed sum of £240,000 per annum payable by the Developer to the Council during the construction period;

    ii) A ground rent payable by the Developer to the Council for the duration of the lease. This ground rent was to be assessed by reference a geared payment based on a percentage (7.56%) of the overall rent of the completed scheme, but subject to a minimum sum of £250,000 per annum. This minimum rent was then subject to periodic review every 20 years.

(2) Grant of planning permission

23. On 9 February 2009, the Council granted planning permission for the redevelopment scheme. The proposals included approximately 95,000 sq ft of retail space (of which 25,000 sq ft was a food store), 287 residential units with 122 car spaces, 20 live work units with car parking, 330 public car parking spaces, a new bus station, a small quantity of office space and extensive proposals for public realm improvements. An accompanying section 106 agreement dated 28 January 2008 secured affordable housing of 35% - 40% of housing units (or an equivalent financial contribution) to be provided.

(3) Acquisition of the site by Henderson

24. In early 2010 Thornfield Properties went into administration and later that year Henderson Global Investors ("Henderson") acquired the developer (Thornfield Properties (Winchester) Limited) from the administrator. Thornfield Properties (Winchester) Limited has been renamed as Silver Hill Winchester No. 1 Limited ("Silver Hill").

(4) The Compulsory Purchase Order

25. In 2011 the Council made the Winchester City Council (Silver Hill) Compulsory Purchase Order 2011 ("CPO") to enable it to acquire all of the outstanding interests in the site. A public inquiry was held.

26. Mr Tilbury, Corporate Director of the Council, gave written evidence to the Inquiry on behalf of the Council explaining that the Development Agreement includes "*a number of Required Elements that must be components of the development*" including the affordable housing and bus station elements detailed above (paragraph 3.2.7, statement dated 30 May 2012). He said that Drivers Jonas Deloitte ("Deloitte") had been appointed to advise on matters relating to the Council's interest in the scheme, including the ability of Henderson to deliver the scheme. Based on the advice received, Mr Tilbury stated that the Council knew of no other reason why the scheme should not proceed in a timely manner (paragraphs 5.3.3-5.3.4).

27. The Inspector recommended that the Secretary of State confirm the CPO, on 17 December 2012. The CPO was confirmed on 20 March 2013.

28. In her report, the Inspector recorded as an important part of the Council's case at the CPO inquiry that the proposal was compliant with planning policy which (with the Planning Brief itself) had been "*the subject of extensive public and stakeholder input*": see paragraphs 4.9-4.12. The Inspector relied upon that evidence in her conclusions at paragraphs 7.3-7.4.

29. The Inspector also recorded the submissions as to the scheme's viability and the Council's conclusion that the Henderson Property Fund had demonstrated to it that "*the Scheme as consented would currently be capable of satisfying the required viability measure as a condition of the development agreement of 10% profit on cost*": see paragraph 4.40. The Inspector relied on that evidence too, at paragraph 7.23.

30. The Council's case (as recorded by the Inspector) concluded:

> "the CPO will enable the site to be developed comprehensively. This approach is a fundamental requirement to ensure that the bus station, car park and public realm are delivered, as these are funded by the more profitable parts of the Scheme, and to ensure a high quality layout which fits in with the historic street pattern. A piecemeal approach over a period of time is highly unlikely to facilitate the multiple benefits that the Scheme will deliver and failure to achieve these would prevent WCC from

meeting various planning and policy requirements" (paragraph 4.48).

(5) Variation of the Development Agreement

31. The Development Agreement has been varied on a number of previous occasions, namely on 22 October 2009, on 10 December 2010 and on 30 January 2014. The variations to the development agreement, inter alia, allowed the Council to request that the affordable housing be provided off-site or by way of a commuted sum. The parties to the Development Agreement had also agreed in an exchange of letters that the Council would not take advantage of its ability to terminate the Agreement.

32. In a letter dated 12 June 2014, Silver Hill sought the Council's consent to vary the form of development approved under the Development Agreement, and to vary the Development Agreement itself. The proposed variations were:

i) A reduction in the number of residential units to 184 residential units only (or such lower number as the local planning authority may require);

ii) The removal from the scheme of a bus station and the provision instead of an on-street bus interchange and facilities (public toilets and a ticket office) on Friarsgate as detailed in the Application;

iii) The deletion of a requirement for a Shop Mobility Centre and Dial A Ride premises in the development;

iv) The deletion of a provision for a market store within the development;

v) The changes to external elevations, massing and servicing arrangements as set out in the Application;

vi) Provision of one shop unit of up to 60,000 sq ft as detailed in the Application;

vii) A reduction in the number of public car parking spaces from 330 to 279;

viii) The amendment of the provision in respect of affordable housing by the substitution of a financial contribution to be assessed on the basis of the future viability of the scheme up to the equivalent of 40% affordable housing provision;

ix) An increase in retail provision from 95,000 sq ft to approximately 148,000 sq ft;

x) The inclusion in the scheme of the Oxfam shop at 153 High Street (subject to appropriate terms being agreed);

xi) Amendments which allowed Silver Hill to be authorised to procure the construction of the whole scheme (retail as well as residential) by a construction company with a house building subsidiary.

33. A report was taken to the Council's Cabinet on 10 July 2014 recommending that the Council as landowner agree to the proposed variations to the Development Agreement. The Cabinet resolved to give approval to those variations, subject to consultation of both the Overview and Scrutiny Committee and the full Council for their views. In particular, the Cabinet agreed to "*the amendment of the provision in respect of affordable housing by the substitution of a financial contribution to be assessed on the basis of the future viability of the scheme up to the equivalent of 40% affordable housing provision*". Cabinet also authorised the removal of the requirement to procure the construction works by a competitive tender from at least three named contractors, and authorised the Developer *"to procure the construction of the whole Scheme (residential and retail) by a construction company with a house building subsidiary, rather than as set out in the Development Agreement*."

34. At its meeting on 16 July 2014, the full Council resolved that Cabinet be asked to reconsider its decision in respect of the affordable housing and seek a more beneficial arrangement for Winchester residents.

35. On 5 August 2014, a further letter was received from Silver Hill, following further work on the scheme by the architects. As a consequence, the letter sought approval to further design changes, the major implications of which were a reduction in the total number of residential units from 184 to 177, and a reduction in residential car parking spaces from 181 to 180.

36. A report was taken to Cabinet on 6 August 2014, which set out the position in relation to affordable housing and the opportunity to secure an offsite financial contribution. The request for the further changes set out in the letter of 5 August 2014 was explained to Members. Cabinet decided to reaffirm its resolution of 10 July 2014 permitting the variations to the Development Agreement (taking account of the further changes sought), subject to "*the amendment of the requirement in respect of affordable housing so that the affordable housing provision be that which shall be determined by the Planning Committee based on the current and future viability of the scheme.*"

37. As part of its planning submission, the Developer has since offered, by way of a section 106 agreement, to pay the sum of £1 million towards affordable housing, and a potential addition payment of up to £1 million if the scheme viability produces a return in excess of 15% profit on cost. The local planning authority resolved to grant planning permission for the revised scheme on 11 December 2014.

38. There were also upward adjustments to the rent payable by the Developer, to reflect increased retail space. In August 2014 the Council and the Developer agreed to increase the existing basis of the rents payable to:

    i) Payment of fixed sum of £295,000 per annum payable by the Developer to the Council during the construction period; and

    ii) A ground rent payable by the Developer to the Council for the duration of the lease. This ground rent was to be assessed by reference to a geared payment based on a percentage (8.25%) of the overall rent of the completed scheme, but subject to a minimum rent per annum of either: (i) £305,000; or (ii) £400,000

if 8.25% of the rent at first letting is not less than £400,000. This minimum rent was then subject to periodic review every 20 years.

Conclusions

(1) Required procurement procedures when awarding contracts

39. EU law on public procurement is intended to eliminate barriers to the movement of business, labour, and capital within the EU, in the belief that a common market will improve overall economic welfare and growth. Restrictive procurement practices by public bodies (in particular, entering into contracts only with preferred domestic contractors) does not allow for fair competition between firms from other member states and may result in market distortions.

40. The Development Agreement was initially entered into by the Council on 22 December 2004. At that time, the relevant legislation was Council Directive 93/37/EEC ("the 1993 Directive") and the Public Works Contracts Regulations 1991 ("the 1991 Regulations") which applied to development agreements of this kind (Case C-220-05 *Aroux & Ors v Roanne* [2007] ECR I-00385).

41. "Public works contracts" were defined by Article 1(a) of the 1993 Directive to mean "contracts for pecuniary interest concluded in writing between a contractor and a contracting authority … which have as their object either the execution, or both the execution and design, of works related to one of the activities referred to in Annex II or a work defined in (c) below, or the execution, by whatever means, of a work corresponding to the requirements specified by the contracting authority." (Annex II listed various activities related to building and civil engineering work including demolition, construction of both residential and non-residential buildings, installation of fixtures and fittings, and building completion work).

42. A "public works concession contract" was defined by Article 1(d) of the 1993 Directive as being a contract of the same type as a public works contract "except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the construction or in this right together with payment."

43. Similarly, a "public works concession contract" was defined under the 1991 Regulations as "a public works contract under which the consideration given by the contracting authority consists of or includes the grant of a right to exploit the work or works to be carried out under the contract".

44. The Development Agreement could be categorised as a concession contract because it provided for the developer to be paid a majority share of the profits of the development, and to be granted a lease of the site under which tenants occupying the site would then pay rent to the developer.

45. The applicable requirements under the 1993 Directive in relation to a public works concession contract were contained in Articles 3(1), 11(3), 11(6)-(7), 11(9)-(13) and 15. The corresponding requirements under the 1991 Regulations were contained in Regulations 5, 25 and 30.

46. In summary, their effect was that:

    i) The Council was required to publish a notice in the Official Journal of the EU, in accordance with the model in Annex V of the Directive, specifying the following information (among other matters): Article 11(3) and (6) and Annex V of the Directive, and Regulation 25(2):

        a) the contact details of the Council including the address from which further information and documentation concerning the proposed public works concession contract could be obtained, and the address to which candidatures must be sent;

        b) a description of the concession contract to be awarded;

        c) the scope of the contract;

        d) the conditions for participation in the competition to be awarded the contract (including information relating to the bidder's legal position, and as to its economic, financial and technical capacity); and

        e) the award criteria for the contact.

47. The notice could not be published in the contracting authority's home press until it had been dispatched to the Official Journal. Any notice in the home press could not contain information other than that published in the Official Journal: Article 11(11) of the Directive and Regulation 30(4).

48. Contracting authorities had to fix a time limit for receipt of applications for the concession, not less than 52 days from the date of dispatch to the Official Journal: Article 15 of the Directive and Regulation 25(3).

49. Upon receipt of applications, the contracting authority was required to complete a tendering process in accordance with the published information. The detailed procedures under the Directive applicable to ordinary public works contracts did not apply, but the tendering process had to be compatible with Treaty principles of freedom of establishment and freedom to provide services, as well as those of equal treatment, non-discrimination and transparency.

50. The Council ought to have complied with the procurement requirements set out above, but did not do so, in reliance on mistaken legal advice. Instead it entered into an agreement with Thornfield Properties because it had a pre-existing commercial relationship with Stagecoach to redevelop its bus station on the site. No other contractors were considered. It is now too late to challenge the lawfulness of the Development Agreement on this basis.

51. The 1993 Directive was replaced by Directive 2004/18/EC and the 1991 Regulations were replaced by the Public Contracts Regulations 2006. In respect of public works concession contracts, the provisions were not materially different.

52. Under the 2004 Directive:

i) Article 2 requires that contracting authorities must treat economic operators equally and non-discriminatorily and must act in a transparent way.

ii) Article 58 (which also incorporates the requirements of Article 36(2)-(8)) provides for the form and manner of publication of notices in accordance with the requirements of Annex VII.

iii) Article 59 provides for the minimum 52 day time limit for the presentation of applications.

53. These requirements were transposed into domestic law by Regulations 36 and 42 of the 2006 Regulations.

(2) Variation of contracts – principles

54. Neither the 2004 Directive nor the 2006 Regulations made provision for variations to public works contracts. The 2004 Directive has now been replaced by Directive 2014/24/EU (26 February 2014). Article 72, headed "Modification of contracts during their term", sets out in paragraphs (1) and (2) the circumstances in which a new procurement procedure is not required for modifications of the provisions of a public contract, and provides that all other modifications do require a new procurement procedure (paragraph (5)).

55. However, as the 2014 Directive has not yet been implemented in the UK, it is agreed that the question whether or not the variations to the Development Agreement were so substantial as to require a new procurement procedure is to be determined by reference to the case law.

56. The leading textbook, *Arrowsmith: The Law of Public and Utilities Procurement* (3rd ed.), sets out the principles at paragraph 6.267 (footnotes omitted):

> "Another issue to consider is when a proposed extension, renewal or modification to an existing arrangement amounts to a new "contract" under the 2004 Public Sector Directive and Public Contract Regulations 2006. When this is the case a contracting authority may not simply place the work with the existing contracting party, but must award it using a new procedure under the directive/regulations. This issue is not currently dealt with by explicit provisions in the directive/regulations. However, the principle that amendments to an existing contract may be regarded as a new contract needing a new procedure has been established and elaborated in the case law of the CJ, most notably in the case of *Pressetext.*
>
> A key reason for this principle relates to the purpose of the legislation of ensuring that work is awarded in accordance with transparent procedures to prevent discrimination. If the contract awarded is later changed, there is a risk that such changes are made for discriminatory motives (for example, to award the firm more work or allow it to operate under easier terms) and

> that national firms, in collusion with the contracting authority or otherwise, may be able to obtain an advantage in the award procedure by tendering favourable terms in the expectation that they will be changed after conclusion of the contract. Changes to concluded contracts can also potentially undermine any policy that contracts should be undertaken by the best tenderer in order to develop the single market. If this is considered as an objective of the directive, rules to limit changes to concluded contracts are also appropriate from this perspective, on the basis that the existing contracting partner may not be the best firm to perform the revised contract. Changing a contract also potentially violates the equal treatment principle that can support such objectives. From a national perspective, changing a contract without a competition for the revised contract raises value-for-money issues as the change is made without considering whether other economic operators can offer value for money and without the terms being fixed under the pressure of competition."

57. The leading case is Case C-454/06 *Pressetext Nachrichtenagentur GmbH v. Republik Österreich* [2008] ECR I-4401. The CJEU held, at [31] to [38]:

> "31. It is clear from the case-law that the principal objective of the Community rules in the field of public procurement is to ensure the free movement of services and the opening–up to undistorted competition in all the Member States (see Case 26/03 *Stadt Halle and RPL Lochau* [2005] ECR-1, paragraph 44). That two-fold objective is expressly set out in the second, sixth and twentieth recitals in the preamble to Directive 92/50.
>
> 32. In order to pursue that two-fold objective, Community law applies inter alia the principle of non-discrimination on grounds of nationality, the principle of equal treatment of tenderers and the obligation of transparency resulting therefrom (see, to that effect, Case C-275/98 *Unitron Scandinavia and 3-S* [1999] ECR 1-8291, paragraph 31; Case C-324/98 *Telaustria and Telefonadress* [2000] ECR 1-10745, paragraphs 60 and 61; and Case C-496/99 *P Commission v CAS Succhi di Frutta* ECR 1-3801, paragraphs 109 and 109).
>
> 33. Directive 92/50 implements those principles and that obligation of transparency in respect of contracts coming within its ambit ….
>
> 34. In order to ensure transparency of procedures and equal treatment of tenderers, amendments to the provisions of a public contract during the currency of the contract constitute a new award of a contract within the meaning of Directive 92/50 when they are materially different in character from the original

> contract and, therefore, such as to demonstrate the intention of the parties to renegotiate the essential terms of that contract (see, to that effect, Case C-337/98 *Commission* v *France* [2000] ECR I-8377, paragraphs 44 and 46).
>
> 35. An amendment to a public contract during its currency may be regarded as being material when it 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.
>
> 36. Likewise, an amendment to the initial contract may be regarded as being material when it extends the scope of the contract considerably to encompass services not initially covered. This latter interpretation is confirmed in Article 11(3)(e) and (f) of Directive 92/50, which imposes, in respect of contracts concerning, either solely or for the most part, services listed in Annex I A thereto, restrictions on the extent to which contracting authorities may use the negotiated procedure for awarding services in addition to those covered by an initial contract.
>
> 37. An amendment may also be regarded as being material when it changes the economic balance of the contract in favour of the contractor in a manner which was not provided for in the terms of the initial contract.
>
> 38. It is in the light of the aforegoing considerations that the questions referred to the Court are to be answered."

58. Thus, the test to be applied is whether the variations to the contract "*are materially different in character from the original contract and, therefore, such as to demonstrate the intention of the parties to renegotiate the essential terms of that contract*" (paragraph 34). Any material difference has to be assessed by comparing the contract as originally entered into and the contract after variation.

59. The test in paragraph 34 may be satisfied in the circumstances set out in paragraphs 35 to 37. Paragraphs 35 to 37 provide illustrations of the application of the test set out in paragraph 34, and are not an exhaustive list. As Andrews J. said in *Edenred (UK Group) Ltd v HM Treasury & Ors* [2015] EWHC 90 (QB), at [119], these are "three examples of material variation". Both counsel submitted that they should be broadly interpreted, and not construed as if they were statutory provisions.

60. Both counsel agreed that the likelihood of other economic operators bidding for the contract, had it been advertised as amended, ought to be considered as part of the test in paragraph 34 of *Pressetext*, reflecting its underlying purpose of ensuring equal opportunity for economic operators. Both counsel agreed that the reference in paragraph 35 to "allowing" other tenderers to be admitted or tenders accepted should be broadly construed. It could include a range of possibilities, for example, where operators had been deterred from applying by the less favourable terms but were

interested in applying under the improved terms, or where threshold conditions had been relaxed, enabling more operators to qualify.

61. Contrary to Mr Elvin's submission, I consider that an increase in potential profitability for the economic operator can be a material variation for the purpose of the *Pressetext* test. Although paragraph 37 can be read as limited to the economic balance as between the contracting parties, where (as here) the court is considering a development contract or a concession contract, the commercial value will be judged by the potential profits to be obtained from third parties, not the awarding authority. The financial terms between the parties remain relevant but they are not the only consideration.

62. Mr Elvin submitted that, in order to succeed, the Claimant had to identify other economic operators who would have wished to bid for the contract, and would have had a realistic prospect of success. He pointed to the use of the "would" in paragraph 35 of *Pressetext* rather than "might". He also relied upon the judgment of Andrews J. in *Edenred*, at [128]:

> "There is much to be said for the approach taken by Coulson J. [*in AG Quidnet Hounslow LLP v Hounslow LBC [2012] EWHC 2639 (TCC)*] of requiring evidence that someone beside the original bidders would have bid for the contract, because the EU procurement rules are designed to protect against real, not hypothetical distortion of competition. However, I do not need to decide the point, because even if one approaches the question on the basis that a hypothetical bidder has been shut out of the bidding process by the absence of reference to the subject-matter of the proposed amendment, it seems to me that in principle that must necessarily be a realistic hypothetical bidder – i.e. the evidence must demonstrate that there would be someone else who would have been ready, willing and able to bid and who would have wished to have done so if the opportunity had been made clear, but who did not do so because it was not."

63. Andrews J found, at [17], that there had been "a fair and transparent public procurement process" about which no complaint had been made. She was able to analyse the bids and conclude, on the evidence, that none of the unsuccessful bidders would have been successful if the additional services had been advertised and no other entity would have been attracted to make a bid.

64. Mr Palmer did not object to the requirement of a "realistic hypothetical bidder" but he submitted that *Pressetext* and other CJEU cases on the procurement Directives did not require firm evidence of an alternative potential bidder in order to satisfy the test in paragraph 34 of *Pressetext*. In my view, Mr Palmer's analysis is correct.

65. I also accept Mr Palmer's submission that *Quidnet*, Case C-108/98 *RISAN Srl v Commune di Ishia* [1999] ECR 1-5219 and Case C-245-09 *Omalet* [2010] ECR 1-13771 were addressing a different issue, namely, whether EU law was engaged because of cross-border interest. In the absence of cross-border interest, EU law would not be applicable. In *Omalet*, the CJEU confirmed, at [12]:

> "It is settled case-law that the Treaty provisions relating to the freedom to provide services do not apply to situations where all the relevant facts are confined within a single Member State (see, inter alia, Case C-108/98 RISAN [1999] ECR I-5219, paragraph 23, and Case C-97/98 Jagerskiold [1999] ECR 1-7319, paragraph 42).

66. In those cases, the Court was addressing a jurisdictional question, on which it may well have been appropriate to require proof of actual cross-border interest. In contrast, in this case, no jurisdictional issue arises. EU public procurement law is applicable and the Defendant is under a duty to conduct a fair, open and transparent procurement process if the varied terms are materially different.

67. I agree with Mr Palmer's submission that Andrews J.'s approach to the evidence reflected the particular facts in *Edenred*, where there had recently been a full tendering process and so the unsuccessful bidders and those who had expressed an initial interest could all be identified. The Claimant in this case is in a more difficult position, as no tendering process has ever been carried out, and so he cannot identify any actual or potential bidders who were deterred or disadvantaged. The requirement suggested by Mr Elvin would have the undesirable consequence of placing a Defendant who fails to comply with any procurement requirements in a better position than one who does.

68. In *R (Law Society) v Legal Services Commission* [2007] EWCA Civ 1264, the Court of Appeal was concerned with legal aid contracts which had been awarded by the Legal Services Commission to solicitors without a competitive bidding process. The Court concluded that the contract did not meet the requirements of transparency under the 2004 Directive and the 2006 Regulations. Lord Phillips LC said, at [80]:

> "We consider that the principle of transparency will not be satisfied in the present context if uncertainty as to the nature and effect of the amendments that may be made deters, or is liable to deter, some potential service providers from entering into the contract."

Thus, the court made its assessment, at least in part, on the basis that the amendments deterred or were <u>liable</u> to deter potential service providers.

69. In my judgment, the task of the court is to apply the test in *Pressetext* on the evidence before it. Evidence of actual or potential bidders may assist but it is not a pre-requisite. Here the Claimant relies on evidence of the commercial appeal of this development contract to potential developers, and the significantly more favourable terms offered in 2014, compared with 2004. In my judgment, 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.

(3) The variations to this contract

70. The evidence demonstrates that the variations to the Development Agreement contract were made because the Council accepted the Developer's representations that the project was not viable on the original contractual terms, and therefore it would not proceed. It is evident that, in order to save the project, the parties did re-negotiate the terms of the contract. Although I recognise that the subject-matter of the contract remains the same, in my view, the varied contract is materially different in character to the original contract. The most significant difference is that, overall, the varied contract is considered by the contracting parties to be viable for the Developer, whereas they consider the original contract to be unviable.

71. Mr Owen, partner at Deloitte LLP, said in his 1st witness statement at paragraph 17:

> "In common with some other schemes that were being progressed at the time, Thornfield had not reached the point of being able to implement the [Development Agreement] as the global financial crisis emerged in 2007-08. As a consequence of this crisis and the recession that followed in the UK, the market for retail-led developments such as Silver Hill weakened significantly, making it difficult for developers to attract tenants or funding for their schemes. Despite efforts by the Council and Thornfield to progress the scheme, it became clear that Silver Hill was unlikely to be delivered in the prevailing market."

72. Thornfield then went into administration in 2010 and Henderson purchased Thornfield from the administrator.

73. In 2014, Deloitte was instructed by the Council (in its role as party to the Development Agreement and landowner) to consider Henderson's proposals to vary the terms of the Development Agreement. Mr Owen said:

> "24. In order to fully understand these changes we had discussions with Henderson and its team of advisors. As part of these discussions we explored the changes to the scheme and the reasons for them, as well as the proposed changes to the financial terms and the implications of these changes.
>
> 25. From these discussions and our own understanding of the market, we were satisfied that the changes that were proposed in terms of the elements of the development were, in commercial development terms, an appropriate up-dating of what was by that time a scheme that had its design origins some 10 years earlier…..We agreed with the view of the developer that the scheme would not be likely to be viable (i.e. achieve more than the 10% threshold return) without the changes that were proposed and would therefore not proceed."

74. The variation proposals were formally set out in a letter from Henderson dated 12 June 2014 which referred to the negotiations which had already been taking place for

months with Council officers. They were agreed by the Council in a series of decisions which I have set out in the 'Facts' above.

75. The terms in Schedule 3, which provided for a division of profits between the Council and the Developer, were unchanged and the minimum rent payable by the Developer was increased to reflect enlargement of the Site. However, the unprofitable elements of the contract were largely removed, and the Developer gained a much improved opportunity to increase its return, and thus its profit. A key point was made by Mr Gillington, a chartered surveyor and valuer instructed by the Claimant, when he said, at paragraph 22 of his witness statement:

> "even if the [percentage] return intended to be achieved by the Developer does not change …, the *actual* profit that would be achieved would be significantly higher in absolute terms as a consequence of the changes."

76. I turn now to compare the original contract terms with the varied terms.

The bus station and additional retail space

77. A significant change in circumstances, leading to re-negotiation of the contract terms, was that Stagecoach, the bus company, decided that it was no longer a justifiable business expense to operate a bus station in the town centre "in the commercial and operating environment which now prevails" (witness statement of Mr Tilbury, paragraph 39).

78. Under the original contract, the existing bus station was to be demolished and replaced with a new bus station (re-labelled as a "bus passenger interchange") in a different location within the Site. Construction of a new bus station by the Developer was a "Required Element" under clause 5.3. A minimum of 12 x 12 metre bus bays and 3 layover bays were required. It had to incorporate high quality passenger facilities, including toilets, waiting space, information and ticketing, public refreshment, weather protection for passengers, disabled access, facilities for drivers and operational staff, clear separation of vehicle and pedestrian areas and set down and pick up facilities for taxis. It also had to provide for scheduled coach services such as National Express.

79. On completion the Developer was required to hand the bus station back to the Council, by transferring the freehold or granting a long lease at peppercorn rent. The Council would manage the facility with the bus company, and receive income from user charges.

80. Under the varied terms, the Developer will still have to demolish the existing bus station but it will no longer have to pay for the construction of a new bus station. Instead it will bear the reduced cost of providing bus stops and bays in the streets, with ticket and mess facilities alongside.

81. The bus station would have been non-profit making for the Developer. Now, that site has become available for profit-making retail use instead. The proposal is for a department store, occupying some 59,741 square feet. The limit in clause 5.1.3.2(f),

limiting the size of any one shop unit to 30,000 square feet, has been amended to allow for one shop of up to 60,000 square feet. This new retail space will result in a total provision of 147,514 square feet – more than 50 percent over what was previously proposed and envisaged to be capable of accommodation on the site. Mr Gillington notes that the rent per square foot for a large store will be less than for a smaller unit, but considers that the net economic benefit for the Developer, after deduction of costs and rental, will be about £7 million. He explains that the inclusion of an 'anchor' store is likely to have a positive economic benefit by increasing the attractiveness of the other retail units to retailers leading to higher retail rents and faster letting. In his second witness statement, Mr Owen disputes Mr Gillington's estimate of the value to the Developer, and concludes that the construction costs and tenant incentives will result in a negative outcome for the Developer. Mr Owen does not provide any alternative figures.

82. In my judgment, a significant increase in the volume of potential retail space is very likely to add value to the contract for the Developer over time. Even if Mr Gillington's figures are too high, I cannot accept that there will be no benefit for the Developer. The Developer has made a commercial decision to develop a large 'anchor' store. If that is not a viable commercial option, then the Developer can, and no doubt will, consider other retail uses which would provide a better return. There is no evidence to suggest that this prime site will not be capable of being let.

83. Overall, I consider that, had this variation been in place in 2004, the contract would have been of significantly greater commercial value to potential bidders. A potential bidder could not have anticipated this change; nor was it anticipated or provided for in the contract. In my view, this is a major change to the contract.

Affordable Housing

84. The Development Brief stated that "a significant residential component is expected to be included in any development". Mr Gillington's evidence is that the overall area of the residential units is 166,866 square feet. In the original contract, it was a "Required Element" that 35% affordable housing should be provided, and not less than 15% of the Affordable Housing (or if greater 20 such units) should be Social Rented Housing. Mr Gillington assesses the 35% affordable housing to equate to 58,403 square feet.

85. The sale or rental price of affordable housing is capped at a percentage of market rate, and so provides a significantly lower return to the developer than housing which can be let or sold at market prices. A potential bidder deciding whether or not to tender for the contract would have factored the lower return in to its calculations assessing its costs, and the likely viability and risks of the scheme.

86. I do not consider that a potential bidder would have assumed that this requirement could be varied at a future date to improve his return. There was no provision in the Development Agreement to that effect; nor was the obligation to provide affordable housing expressed to be subject to any change in planning policy.

87. By its decision of 6 August 2014, the Council decided not to require any affordable housing at all in its capacity as landowner. It amended the requirement in respect of affordable housing "so that the affordable housing provision be that which shall be

determined by the Planning Committee based on the current and future viability of the scheme".

88. Subsequently, the Planning Committee resolved, on 11 December 2014, to grant planning permission, following the offer of the developer (to be contained in a section 106 agreement) to provide:

    i) a "voluntary" offer of the sum of £1 million towards affordable housing off site; and

    ii) the possibility (under a "claw-back review mechanism") of up to a further £1 million of surplus profit generated if the scheme produces a return in excess of 15% profit on cost, i.e. the first £1 million profit after the 15% threshold is passed (if it is).

89. The Council agreed to this substantial variation of the original terms because it accepted the developer's claim that the scheme would not be viable if the obligation to provide affordable housing was maintained. Mr Owen said (1st witness statement, paragraph 29) that the inclusion of the affordable housing requirement "*would reduce the viability of the scheme such that it was unlikely to achieve the 10% threshold return, and would therefore [be] unlikely to be delivered.*"

90. The "voluntary" sum of £1 million offered by the developer was not taken into account by the Planning Committee in its deliberation as to whether to grant planning permission, as it accepted that it was not necessary to provide any affordable housing at the site or require the provision of any affordable housing contribution (see the officer report to committee at paragraphs 20.20, 20.25-26 and 20.36). Instead, only the claw-back review mechanism was taken into account.

91. Deloitte had provided a viability assessment on 3 December 2014 which made clear that the possibility of receipt of the further maximum contribution of £1 million was contingent upon future growth in residential values, above and beyond future growth in costs. There was no guarantee of any further sum being paid.

92. Even taken at its highest (i.e. assuming an ultimate contribution of £2 million), this offer fell substantially below the commuted sum of £6,442,800 which would be payable in respect of a 35% affordable housing requirement (based on Deloitte's calculation that £7,363,200 would be payable were the developer to provide a financial contribution in lieu of 40% affordable housing). However profitable the scheme proves to be, there is now no prospect of the Developer being obliged to provide the equivalent of a 35% affordable housing contribution, even by way of commuted sum.

93. Without the new clawback mechanism, the Council would have received 50% of the first £1 million profit above the 15% threshold in any event. So the Council is, in effect, funding half of the cost of the payment clawback review mechanism in any event, as it has acknowledged.

94. Mr Gillington assesses this variation to represent a net economic benefit of £11 million to the Developer. Mr Owen disputes Mr Gillington's figures, without providing any alternative estimate. I am not able to resolve that difference of view,

but overall, I consider that, had this variation been in place in 2004, the contract would have been of significantly greater commercial value to potential bidders. In my view this is a major change to the contract. The variation is a material one.

95. Mr Elvin submitted that the variation of the affordable housing terms was a result of "requirements" imposed by the planning authority, within the meaning of variation clause 5.1.3.2. I do not accept this submission. It is correct that provision of residential accommodation, including affordable housing, is part of planning policy, at national and local level, and this was reflected in the Council's original requirements for this scheme. However, planning permission was granted for the scheme in 2009, on the basis of the housing provision in the original contract. There was no requirement from the planning authority to vary it in 2014. The reason for varying (i.e. reducing) the level of affordable housing was the wish to make the project more profitable for the Developer. The Council's Cabinet approved this variation but the full Council asked it to re-consider. Cabinet then resolved that the terms relating to affordable housing should be decided by the Planning Committee, having regard to the viability of the scheme. On receiving representations from the Developer, the Planning Committee duly reduced the affordable housing requirement. It was able to do so because, inter alia, the National Planning Policy Framework provides, at paragraph 173, that overly onerous obligations which threaten viability should not be imposed on developers. However, the initiative to vary the housing terms in the contract was not as a result of any "requirements" imposed by the planning authority, as provided for in clause 5.1.3.2. These terms were not varied at the behest of the planning authority. In reality, the position was that the Developer negotiated a reduction in the affordable housing requirements with the Council, both in its capacity as contracting party and as planning authority.

Reduction in provision for civic uses

96. Clause 5.3.1 of the Development Agreement provided that the following civic amenities were "required elements" in the contract. They included:

i) a civic square;

ii) premises for and the re-provision of the Council's CCTV equipment;

iii) premises for shop mobility and Dial-a-Ride service;

iv) an area for the relocation of the daily Middle Brook Street market and the Farmers' Market including re-provision of the market store and waste compactor.

97. A potential bidder deciding whether or not to tender for the contract would have factored in these costs to its bid. As civil amenities, they would not generate any profit for the developer. As they were "required elements", I do not consider that a potential bidder would have assumed that these requirements could or would be varied.

98. However, in 2014, at the request of the Developer, the requirements to provide premises for shop mobility, Dial-a-Ride and CCTV were deleted from the Development Agreement.

99. As to the market, in an earlier variation to the Development Agreement, in 2009, it was agreed that the market would be relocated off site, on the street Broadway. The revised 2009 plans showed just a small number of stalls still potentially located on site in Silver Hill Square.

100. In 2014, the Developer requested and was granted a further variation to remove the requirement to provide a market store on site. Presumably it would no longer be required as the market had been relocated.

101. The variations of the contract to remove the requirements to fund unprofitable civic amenities, if in place in 2004, would have provided an economic benefit to potential bidders beyond the original contract. In my view, they are material variations to the original terms which could not have been anticipated by potential bidders.

Additional site

102. The site identified in the 2004 contract has been enlarged by the addition of a Council property at 153 High Street. Deloitte (report of 4 July 2014) calculated that the addition of the property to the scheme would justify an increase in the minimum rent payable to the Council from 7.56% to 8.62%. In the event 8.25% was agreed. Mr Gillington observes that the Council was willing to agree to a rental at below the market rate, to benefit the Developer. I do not agree with the Council's submission that, in view of the increased rent, this additional site was of no economic benefit to the Developer. I note that it was Henderson who initiated the negotiations to gain this site, presumably believing it to be advantageous to do so. In my view, the enlargement of the site, providing the commercial opportunity of additional retail space, is a material variation to the original contract which, if in place in 2004, would have provided an economic benefit to potential bidders, beyond the original contract. It could not have been anticipated by potential bidders.

Revised contracting arrangements for construction works

103. Clause 6.1.2 of the Development Agreement provided that the Developer should invite competitive tenders from at least three of various building contractors listed in Schedule 5 in respect of the Development Works.

104. While clause 21.5 also provided that the Developer may (in consultation with the Council on an open book basis and subject to obtaining the previous consent of the Council such consent not to be unreasonably withheld) enter into a joint venture or appoint a sub-developer in relation to the residential elements of the Development Scheme, that freedom did not extend to the remaining elements of the scheme (including retail in particular), which would have to be procured by competitive tender.

105. The varied terms allow the Developer to be authorised to procure the construction of the whole scheme (retail as well as residential) by a construction company with a house building subsidiary, without competitive tender. Mr Gillington explains in his evidence that these more flexible terms would allow the Developer to offset risk by bringing in a joint venture partner to deliver the residential development and take on the construction and sales risk of the scheme.

106. I accept that this is a material variation to the original contract which, if in place in 2004, would have provided an economic benefit to potential bidders, although I consider it is too speculative to quantify.

Extension to long-stop date

107. Paragraph 15.2 of Schedule 2 to the Development Agreement provided for a right of termination in the event that any of the Schedule 2 conditions had not been discharged (or waived) by a long stop date defined as being 5 years from the date of the Development Agreement (i.e. 22 December 2009).

108. A bidder in 2004 would have been aware that the Development Agreement required the development to become "unconditional" within 5 years, failing which the Council would be able to terminate the agreement at its option. That would have been assessed by any bidder as a risk. Substantial costs would be incurred in preparation of such a development, but which would be lost in the event of termination.

109. In 2010, the Council entered into an agreement with the Developer not to exercise the right to terminate prior to August 2014. In January 2014, it entered into a further agreement with the Developer not to exercise the right to terminate prior to June 2015.

110. I accept that these extensions have benefited the Developer, giving it additional time to progress the development, whilst retaining the opportunity to recover the historic costs incurred prior to 2010, which are in excess of £5.4 million. However, these were not variations of the termination clause in the contract, which has not been amended. The Council had an option to terminate under the contract and it was entitled not to exercise that option, on such terms as it saw fit. Although such an option could be abused and used as a device to sidestep a procurement process, there is insufficient evidence on which to conclude that was the Council's motive for the extensions in this case.

(4)Variation clause in the original contract

111. Mr Elvin submitted that the fact that the variations were made in accordance with a variation clause in the Development Agreement was a strong indication that no further procurement process was required.

112. The effect of variation clauses in the contract has been considered by the CJEU.

113. In Case C-91/08 *Wall AG v Stadt Frankfurt am Main* [2010] ECR 1-2815, the City of Frankfurt ("Frankfurt") held a procurement process for a 16 year concession for the construction, operation and maintenance of public lavatories. The contract was

awarded to FES, a company 51 percent owned by Frankfurt. It provided that the lavatories would be provided by an experienced sub-contractor, Wall, and that Wall would market advertising space. After the contract was awarded, Frankfurt consented to FES changing its sub-contractor, under a clause allowing a change of sub-contractor, and Wall was entirely excluded.

114. The CJEU held that the variations were materially different in character and demonstrated the intention of the parties to renegotiate the essential terms. It said:

> "39. A change of sub-contractor, even if the possibility of change is provided for in the contract, may in exceptional cases constitute such an amendment to one of the essential provisions of a concession contract where the use of one subcontractor rather than another was, in view of the particular characteristics of the services concerned, a decisive factor in concluding the contract, which is in any event for the referring court to ascertain.
>
> 40. The referring court observes that in the concept annexed to the offer submitted to the City of Frankfurt by FES, FES stated that it would use City-WCs from Wall. According to the referring court, it is likely that in that case the concession was awarded to FES because of the identity of the subcontractor it had introduced."

115. *Wall* demonstrates that, even where a variation is expressly provided for in the original contract, nonetheless a fresh procurement process will be required if the variation goes to a 'decisive factor' in the award of the contract. The Court acknowledged that it was "exceptional" for the identity of the subcontractor to be a decisive factor. The decision in *Wall* also illustrates the more general point made by Arrowsmith at 6-280:

> "a change cannot be permitted merely because it is contemplated in the contract in advance – that would provide *carte blanche* to avoid the constraints of the Directive by amending or extending any contract as soon as it is concluded by including a general clause that provides for adjustment of obligations by mutual agreement."

116. In Case 496/00 *Commission v CAS Succhi di Frutta* [2004] ECR 1-3801, a procurement process, held by the European Commission for the supply of fruit products as food aid, provided for payment in the form of apples and oranges. After the contract was awarded the terms were varied to provide for payment in peaches. The CJEU said:

> "110 Under the principle of equal treatment as between tenderers, the aim of which is to promote the development of healthy and effective competition between undertakings taking part in a public procurement procedure, all tenderers

must be afforded equality of opportunity when formulating their tenders, which therefore implies that the tenders of all competitors must be subject to the same conditions.

111 The principle of transparency which is its corollary is essentially intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority. It implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the notice or contract documents so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and, secondly, the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the relevant contract.

…

116 Although, therefore, any tender which does not comply with the specified conditions must, obviously, be rejected, the contracting authority nevertheless may not alter the general scheme of the invitation to tender by subsequently proceeding unilaterally to amend one of the essential conditions for the award, in particular if it is a condition which, had it been included in the notice of invitation to tender, would have made it possible for tenderers to submit a substantially different tender.

117 Consequently, in a situation such as that arising here, the contracting authority could not, once the contract had been awarded and, moreover, by a decision which derogates in its substance from the provisions of the earlier regulations, amend a significant condition of the invitation to tender such as the condition relating to the arrangements governing payment for the products to be supplied.

118 Should the contracting authority wish, for specific reasons, to be able to amend some conditions of the invitation to tender, after the successful tenderer has been selected, it is required expressly to provide for that possibility, as well as for the relevant detailed rules, in the notice of invitation to tender which has been drawn up by the authority itself and defines the framework within which the procedure must be carried out, so that all the undertakings interested in taking part in the procurement procedure are aware of that possibility from the outset and are therefore on an equal footing when formulation their respective tenders.

119 Furthermore, if such a possibility is not expressly provided for, but the contracting authority intend, after the contract

> has been awarded, to derogate from one of the essential conditions specified, it cannot legitimately continue with the procedure by applying conditions other than those originally specified.
>
> 120 If, when the contract was being performed, the contracting authority was authorised to amend at will the very conditions of the invitation to tender, where there was no express authorisation to that effect in the relevant provisions, the terms governing the award of the contract, as originally laid down, would be distorted.
>
> 121 Furthermore, a practice of that kind would inevitably lead to infringement of the principles of transparency and equal treatment as between tenderers since the uniform application of the conditions of the invitation to tender and the objectivity of the procedure would no loner be guaranteed.
>
> 122 In this case, it is established that, once the contract had been awarded, the Commission replaced the fruit specified in the notice of invitation to tender with other fruit as the means of payment for the fruit to be supplied by the successful tenderer, although no such substitution was provided for either in that notice or in the relevant legislation on which that notice was based.
>
> …
>
> 126 Moreover, as the Court of First Instance expressly held at paragraph 81 of the contested judgment, the Commission could, if necessary, have made provision, in the notice of invitation to tender, for the possibility of amending the conditions for payment of the successful tenderers in certain circumstances by laying down in particular the precise arrangements for any substitution of other fruit for that expressly prescribed as payment for the supplies at issue. In that way, the principles of equal treatment and transparency would have been fully observed."

117. *Pressetext* provides example of variations which were provided for in the original contract. The adjustment to a rebate rate was within the ambit of the original contractual terms (at [81] – [84]) and an updating price index had been specifically provided for in the original contract (at [68]).

118. Similarly, in Case C-337/98 *Commission v France* [2000] ECR I-8377, the CJEU found that the increase in price was a result of the application of the formula for the revision of prices contained in the original contract, indicating a continuation of the contract rather than a re-negotiation of its terms (at [53]).

119. In contrast, the general power of amendment in the legal aid contract considered by the Court of Appeal in *R (Law Society) v Legal Services Commission* [2007] EWCA Civ 1264 did not satisfy the requirement of transparency. Lord Phillips CJ said:

> "29. The Law Society and Dexter Montague accept that the principle of transparency does not prevent a contracting authority from reserving a right to amend the terms of the contract. But if the contracting authority wishes to reserve such a right, not only must all those who may be interested in the contract be informed of that possibility, but they must also be informed of "the detailed rules" governing its exercise (Case 496/00 *Commission v CAS Succhi di Frutta* [2004] ECR 1-3801, at [111], [118]) so that "the subject-matter of [the] contract [is] clearly defined" (Case C-340/02 Commission v France [2004] ECR 1-9845, at [34]).
>
> 30. The obligation of transparency is not satisfied here. The contract contains general and unlimited powers of amendment. It is not sufficient for the LSC to satisfy the obligation of transparency simply by virtue of the fact that the power of amendment is limited by public law limitations …
>
> 31. Nor is it sufficient for the LSC to satisfy the obligation of transparency by reference to the knowledge of solicitors as to the general parameters of reform which may be likely in the future… "

120. The material parts of the variation clause in this case are set out at paragraph 15 above. Variations required the approval of the Council, and applications for variation had to be accompanied by a statement of the effect of the variation on the projected rental income (Clause 5.1.2), indicating that was a relevant factor for the Council to take into account in deciding whether or not to grant approval.

121. In relation to the "Required Elements" of the contract, Clause 5.1.3.1 gave the Council an absolute discretion whether or not to grant approval. There was no indication of what changes might or might not be accepted or on what basis.

122. In relation to the important matters listed in Clause 5.1.3.2, the Council also had an absolute discretion whether or not to grant approval, without any indication of what changes might or might not be accepted, or on what basis. Save that, where the variations arose due to the requirements of the local planning authority, the Council was not to unreasonably withhold its approval, and a dispute could be referred to independent determination.

123. In relation to any other matters, the approval of the Council was not to be unreasonably withheld or delayed (Clause 5.1.3.3).

124. In my judgment, the variation clause was so broad and unspecific that it did not meet the requirement of transparency, as set out in *CAS Succhi di Frutta* at [111]. It did not provide the information which an economic operator would need in order to assess the potential scope for variations when tendering, contrary to paragraph [118] of *CAS*

Succhi di Frutta. At best, a potential bidder would only know that applications could be made to the Council for variations and that the effect of any variation on rental income would be a relevant factor.

125. The provision for variation, pursuant to the requirements of the planning authority, which are unknown at the time of bidding, cannot be used as "*carte blanche* to avoid the constraints of the Directive", adopting Arrowsmith's phrase. In theory, on an application for planning permission, highly significant changes to the contract might be required. For example, a change to the size and location of the development site, the permissible number of buildings, or further obligations to fund infrastructure and local public services. The *Pressetext* principle would have to be applied in such cases.

126. The opportunity, under Clause 5.1.3.4, to refer any dispute to independent determination, in accordance with Clause 23, does not assist the Defendant. Under Clause 23.2.1, the determination of a dispute as the rights and liabilities of the parties and the terms and conditions of the contract by leading counsel specialising in property law would have little bearing on a clause giving the Council absolute discretion to withhold approval.

(5) The likelihood of realistic bids from other economic operators

127. In my judgment there is evidence upon which the Court can properly conclude that other potential bidders, with a realistic prospect of success, would have bid for this contract, if the opportunity had arisen.

128. The issue is not, as the Defendant suggests in its evidence and its submissions, whether or not any other bidder would offer more favourable terms to the Council. The purpose of the procurement regime is to ensure open competition, not to secure the most favourable terms for the public authority.

129. The commercial appeal of the project was explored in detail at the CPO Inquiry, where a key issue was its viability. In his written evidence to the Inquiry, Mr Tilbury said that Winchester was "*a prosperous and successful small city*" with excellent communication links for commuters. He added that the city was "*an attractive location for investment*" and has focussed on a strong town centre retail and commercial environment, resisting significant out of town retail provision.

130. Mr Perry, Director of Retail Development for Henderson, made a witness statement on 6 June 2012 in which he described Henderson's expertise and experience in a range of large and small retail development projects across the UK. He went on to say:

> "7.1. Henderson are investment managers and act on behalf of their clients as research led property investors in seeking opportunities to achieve returns in excess of the market benchmark. The property investment staff are supported by a dedicated research team which monitor retail and business locations throughout the UK and internationally to advise the investment staff and investors … as to appropriate location and

timing for investment in retail, food retail and business space …

7.2. Henderson were attracted to the retail investment opportunity in Winchester by the strong demographic catchment and the quality and resilience of the city centre offer throughout its recent history. Good access for pedestrians, car and public transport, availability of car parking, strong retailer demand and prominence are all factors that are sought out to ensure a highly desirable investment opportunity. The additional benefit of substantial tourist spend is also a significant factor in the investment selection.

7.3. The opportunity to secure a significant investment opportunity within the centre of an historic cathedral city is rare and often needs to be accessed via a comprehensive property development route….

….

8.3. Henderson produces retail property market forecasts for some 120 sample locations across the UK (including Winchester) with the outlook ranging quite widely to reflect those markets that Henderson believe will prove most robust or fragile…

….

9.1. As a retail destination Winchester benefits from strong local catchment demographics, plus a significant tourist boost to shopping spend. The City dominates its local catchment with very little supply outside of the city centre. Vacancy rates in Winchester are low compared to the national average and reported retailer requirements are high. In terms of requirements as a proportion of existing space, Winchester is one of the most sought after destinations in the UK.

9.2. Henderson's internal research team forecast prime rental growth in Winchester to average 2.9% per annum over the next five years. This compares favourably to the average prime town forecasts of about 0% per annum…. Henderson forecast total returns for prime Winchester shops to average 9% per annum over the next five years, well ahead of the UK retail average.

9.3. Recent independent research by Javelin, released in April 2012 takes a geographical approach to assessing the risk profile of the UK retail market…..Under Javelin's regional town classification, Winchester is reported to be the fourth most robust (after Richmond, St Albans and Putney) supporting the Henderson favourable rental growth outlook for the city.

9.4. Similar research by Colliers in 2011 classified town using a series of risk indicators. Again, Winchester falls into their "Thriving" category, meaning it is likely to be among the best performing retail locations in the UK over the medium term.

….

9.7. Whilst research is always the backbone of investment decision made on behalf of clients of Henderson, it should be supported by evidence of known requirements and transactions for retail space. Henderson … contacted the acquisition teams for national retailers who were absent or under represented within the city, providing them with an understanding of the consented scheme's design and space configuration. The response was overwhelming with significant interest amounting to a requirement for three times the amount of space that could be provided which is quite remarkable considering the challenging retail market in the UK at the current time.

9.8. Recent transactional evidence of a prime shop unit on the High Street which has come to the market as a result of company liquidation attracted rental offers of around 10% above its current rental level.

9.9. Retail demand for space in the city remains consistently strong with many known retailers actively seeking space but with no suitable units available within the core. Most of the retail space within the core is in historic buildings which generally fail to meet modern retailers trading requirements. This has limited the normal retailers in the city … with many known high street brands being completely absent. When these retailers have been approached they state their absence is because the space and configuration is simply not available, leaving them with no choice other than to locate in competing out of town or neighbouring town and city centres. This is clearly detrimental to the trading performance of Winchester as a whole.

….

10.1. Henderson has appointed Savills to advise on the residential market demand for the residential content of the development.

10.2 …Savills Summer 2011 regional update .. shows that the south of England is expected to see the strongest levels of house price growth over the next five years ….

10.3. The Winchester market has proved the most robust in the wider area over the downturn with high demand from the local market and interest from London commuters ..

> 10.4. … The proposed development provides conventional flats, duplex and triplex properties to meet the known market demand for town centre residential.
>
> 10.5. Value growth in Winchester has consistently bettered the national average …"

131. Mr Perry's evidence was accepted by the Defendant and by the Inspector. Once the compulsory purchase order was made, Henderson informed the Defendant that they needed to secure more favourable contractual terms in order to make the project viable for them. The reasons for this change of stance are not clear. I note the Claimant's observation (3rd witness statement paragraph 26) that the Defendant did not want to change any aspect of the scheme prior to the CPO Inquiry, since it was concerned about a potential legal challenge on its failure to comply with the procurement regime by a rival developer, London & Henley, an owner of substantial parts of the site which were the subject of the CPO. A settlement was apparently reached with London & Henley. As I have not heard or seen all the evidence relating to this issue, I am not able to make any firm findings. However, there is no evidence to suggest that Henderson's assessment of Winchester's thriving retail and housing market, as set out in Mr Perry's statement, is either unreliable or has materially changed.

132. The Claimant, in his 3rd witness statement, provides some updating information:

> "16. … As every industry practitioner would confirm, the property market has recovered from the recession and has performed strongly over the last two years. I quote from the Deloitte Property IQ Q4 2014 report which says, *"2014 was an outstanding year for UK commercial property. The latest monthly IPD figures show annual total returns have climbed to 20%, a level not seen over the last 20 years. To date, around £46 billion has been invested in the market this year, one of the highest totals ever."* The residential market is in robust form too, and the common experience of new residential developments in Winchester is that they are often entirely sold prior to completion."

133. I appreciate that this evidence all post-dates 2004, the date at which the original contract was entered into. According to Mr Owen, the terms of the Development Agreement in 2004 were *"fairly typical of the sort of arrangements that were being agreed in the market as it then existed"* though the 10% minimum return to the developer was at the lower end of the likely range (1st witness statement, paragraph 15). In my view, the key features which make Winchester a thriving City, as identified by Mr Tilbury and Mr Perry, have not changed. The varied terms of the contract are considerably more favourable to the developer than the original terms in 2004. On the basis of the evidence before me, I am satisfied that the contract as varied would have been an attractive commercial opportunity for other potential bidders, in 2004.

134. The Claimant cannot point to any other actual bidders because the contract was not advertised nor open to other offers. Mr Tilbury said in his 1st witness statement,

paragraphs 5 and 6, that only Henderson and one other company expressed interest to the administrator in purchasing Thornfield in 2010. However, at that time there had just been a global financial crisis, followed by a recession in the UK and the market for retail-led developments had weakened significantly. Therefore I do not consider that this is an indicator of the likely level of commercial interest in 2004, which was well before the global financial crisis.

135. In my view it is probable that there are other companies with the capacity, funding and expertise to bid for a major development such as this. In 2014, the Claimant made initial enquiries of a number of major companies, although he has not been in a position to provide them with confidential details. However, the Silver Hill scheme is known in the industry and has been the subject of press articles. Persimmon, Crest Nicholson, Kier Property, Helical Bar, Galliard Group, Bride Hall Group, Berkeley Group, Salmon Harvester and Citygrove Securities plc have all expressed positive interest in working with the Council on this development. It seems likely that companies such as these would also have expressed interest in this contract in 2004.

136. I am unable to accept the assertion by the Council that no other bidder would be likely to express an interest, which I consider is contrary to the balance of the evidence, both in relation to the desirability of Winchester as a commercial opportunity and the existence of other developers able to undertake a major city centre development project.

137. In the light of all the evidence, I am satisfied, on the balance of probabilities, that a realistic hypothetical bidder would have applied for the contract (as varied), had it been advertised.

(6) Application of the *Pressetext* principles to this case

138. For the reasons I have set out above, I consider that the variations to the contract in 2014, taken as a whole, resulted in a contract which was materially different in character, such as to demonstrate the intention of the parties to re-negotiate the essential terms of the contract (applying the test in paragraph 34 of *Pressetext*).

139. There were extensive negotiations between the parties, varying many of the terms. The fundamental change which the parties intended to achieve was to increase the potential profit to the Developer so as to make the scheme viable (i.e. achieve more than the 10% threshold return). Both parties believed that the original contract was no longer viable.

140. The removal of the requirements to provide 35% ‘affordable housing’ and civic amenities reduced the Developer’s costs and increased its potential profit margins. The removal of the requirement to sub-contract to listed building contractors, using competitive tendering, was a commercial benefit. The extension of the Site by the addition of another property, and the 50% plus increase in retail space in place of a bus station, increased the Developer’s potential profits, even taking into account increased rental, construction costs etc. The fact that it was a third party, Stagecoach, which decided that it no longer wanted to incur the running costs of a bus station, has no bearing on the test to be applied under *Pressetext*.

141. Although the subject-matter of the contract has remained the same, the terms have become a significantly more attractive commercial proposition for a potential bidder. As I have already indicated, in a concession contract, economic benefit is not to be assessed just on the basis of the financial terms between the Council and the Developer, but also on potential profits from third party contracts. If there had been a procurement process in 2004, I am satisfied, on the balance of probabilities, that the more favourable terms would have enabled other realistic bidders to bid, because of the reduced costs and increased opportunity for profit.

142. Therefore, I conclude that the Council's decision to authorise variations to the Development Agreement, without carrying out a procurement process as required by Directive 2004/18/EC and the Public Contracts Regulations 2006, was unlawful.

(7) Discretion to refuse relief

143. The Council submits that the court ought to refuse a remedy in the exercise of its discretion because:

i) No useful purpose would be served by quashing the decision given independent expert evidence to the effect that the Development Agreement as varied represents "a good deal" for the Council which would be better than any developer in the market would be likely to offer; and

ii) The Claimant (a non-economic operator) has no interest in the observance of the public procurement regime.

144. Counsel referred me to *Berkeley* [2001] 2 AC 603, *Walton v Scottish Ministers* [2013] PTSR 51, *Edenred* (supra), *R v. Department of Transport, ex p Presvac Engineering Ltd* (1992) 4 Admin L.R. 121 and *R v. Criminal Injuries Compensation Board ex p P* [1995] 1 W.L.R. 845

145. In my judgment, the Council has committed a serious breach of the procurement regime, which is both substantive and procedural in nature. This is the second occasion upon which it has committed such a breach in the lifetime of one contract. It would be an exceptional course to allow its unlawful decision to stand.

146. The Council's failure to follow an open, competitive, transparent and non-discriminatory procurement process for such an important contract, at any stage, casts real doubt on whether the scheme proposed by the Developer is the best scheme on the best terms available.

147. Deloitte negotiated the variations with the Developer and recommended them to the Council in 2014, advising that *"the revised terms represented an attractive financial arrangement for the Council in respect of the delivery of the revised scheme, and not one that was likely to be improved on by marketing the opportunity to be the developer.."* (Mr Owen's 1st witness statement, paragraph 35). Deloitte made this judgment without having the benefit of considering any alternative bids. In their negotiations and advice to the Council, they were subject to the constraints imposed by the Council, namely, that the existing scheme should be preserved, and changes should be limited so far as was possible, in an attempt to avoid triggering a

procurement process. The Council was keen to proceed with the scheme as soon as possible. So Deloitte was not asked to assess the merits of this scheme against the possibility of any alternative scheme with any other developer.

148. Deloitte was, naturally, only considering the financial aspects of the scheme. However, the architecture, design and layout of the scheme are as important as the cost, given its setting in the heart of an historic cathedral city. The Developer had responsibility for presenting the architecture, design and layout of the proposed scheme to the Council. If there was an open competition, other bidders could present alternative, and perhaps improved, proposals. Although the desirability of development on the Site is acknowledged, there has been widespread concern among local people that the appearance, height, bulk and density of the new buildings are out of character with the surrounding buildings and streets.

149. The changes to the plans for the City's central bus terminus and the proposed loss of 35% affordable housing are major ones, which merit a genuine re-consideration of the original scheme, with the benefit of an open competition introducing new bidders with fresh ideas.

150. Whilst delay is always regrettable, there is no pressingly urgent need to develop this Site. The Council does have time to consider the various options available to it.

151. The Claimant, in his capacity as a resident, council tax payer, and City Councillor, has a legitimate interest in seeking to ensure that the elected authority of which he is a member complies with the law, spends public funds wisely, and secures through open competition the most appropriate development scheme for the City of Winchester. He has been closely involved in the consideration of this scheme at different stages, both as a Councillor and as a long-standing proponent of the widely-held view that alternative development schemes should be considered on this site. It is noteworthy that his standing to bring this claim was not disputed at permission stage.

152. It is well-established that a direct financial or legal interest is not required to establish standing to bring a claim for judicial review: *R v Inland Revenue Commissioners ex parte National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, at 694B-C; *R v Secretary of State for the Environment ex parte Rose Theatre Trust Co.* [1990] 1 QB 504, at 520D. Although there is a specific remedy for economic operators under the 2006 Regulations, this does not preclude claims for judicial review by those who are not economic operators (e.g. *R (Law Society) v Legal Services Commission* [2007] EWCA Civ 1264).

153. This claim is distinguishable on the facts from *R (Chandler) v Secretary of State for Children, Schools and Families* [2010] LGR 1, where the court held that the claimant lacked standing to bring a judicial review claim because she did not have any interest in the observance of the public procurement regime, being motivated by her political opposition to academy schools. In contrast, the Claimant in this case does not pursue any ulterior motive. He seeks what the procurement process is intended to provide, namely, an open competition to allow Winchester to select the development which best fulfils its needs.

154. I conclude that the Claimant has sufficient interest to bring this claim and to obtain a remedy. In the exercise of my discretion, I do not consider it appropriate, in the circumstances of this case, to withhold relief.