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# Lancashire: Everything in Moderation

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**14 March 2019**

# Overview

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**1. Background facts**

**2. Relevant law**

**3. Judgment – issues decided**

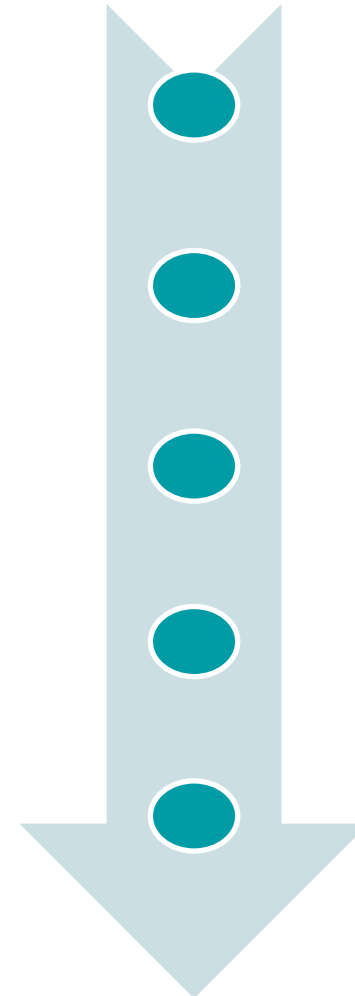
**4. Practical considerations**

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# Background facts

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- **Lancashire County Council responsible for providing 0-19 Public health Nursing Services**
- **Existing services provided by: (i) Lancashire Care Foundation Trust and (ii) Blackpool Teaching Hospitals NHS Foundation Trust**
- **Proposed new contract (Light Touch Regime):**
  - **5 years from 1<sup>st</sup> April 2018**
  - **£104 million**
  - **Vast majority of such services in Lancashire**
- **Only other bidder - Virgin Care – won by 4.07% (78.5% vs 74.43%) – only equated to 2 marks**



**Procurement starts: 29<sup>th</sup> September 2017**

**Decision announced: 27<sup>th</sup> November 2017**

**Proceedings issued: 14<sup>th</sup> December 2017**

**Automatic suspension hearing: 25<sup>th</sup> January 2018**

**Trial: 23<sup>rd</sup> April to 1<sup>st</sup> May 2018**

# Background facts: two judgments

## Automatic suspension

- 31<sup>st</sup> January 2018 - [2018] EWHC 200
- Application to lift automatic suspension
- Refused since:
  - Damages would not adequately compensate the trusts (NB sufficiently serious)
  - Negative impact on healthcare services
  - Possible to offer expedited trial
  - Services uninterrupted until trial

## Trial

- 22<sup>nd</sup> June 2018 - [2018] EWHC 1589
- Dealt with liability and causation
- Detailed consideration of evaluation process, including:
  - ITT documentation and award criteria;
  - LCC witness evidence from:
    - Evaluators
    - Procurement managers

**Relevant law**

## Relevant law

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- **Light touch regime (regs 74 to 76, PCR 2015):**
    - Flexibility as to choice of procedures;
    - But must be *“at least sufficient to ensure compliance with principles of transparency and equal treatment of economic operators”*
  - Emphasis on:
    - Disclosure of criteria
    - RWIND interpretation
    - Manifest error (less so)
    - Transparency in terms of reasoning and ability of court to exercise its power of review
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## Relevant law

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### **Evropaiki Dynamiki:**

*“The statement of the reasons on which a decision adversely affecting a person is based must allow the Community Court to exercise its power of review as to its legality and must provide the person concerned with the information necessary to enable him to decide whether or not the decision is well founded”*

### **Strabag Benelux:**

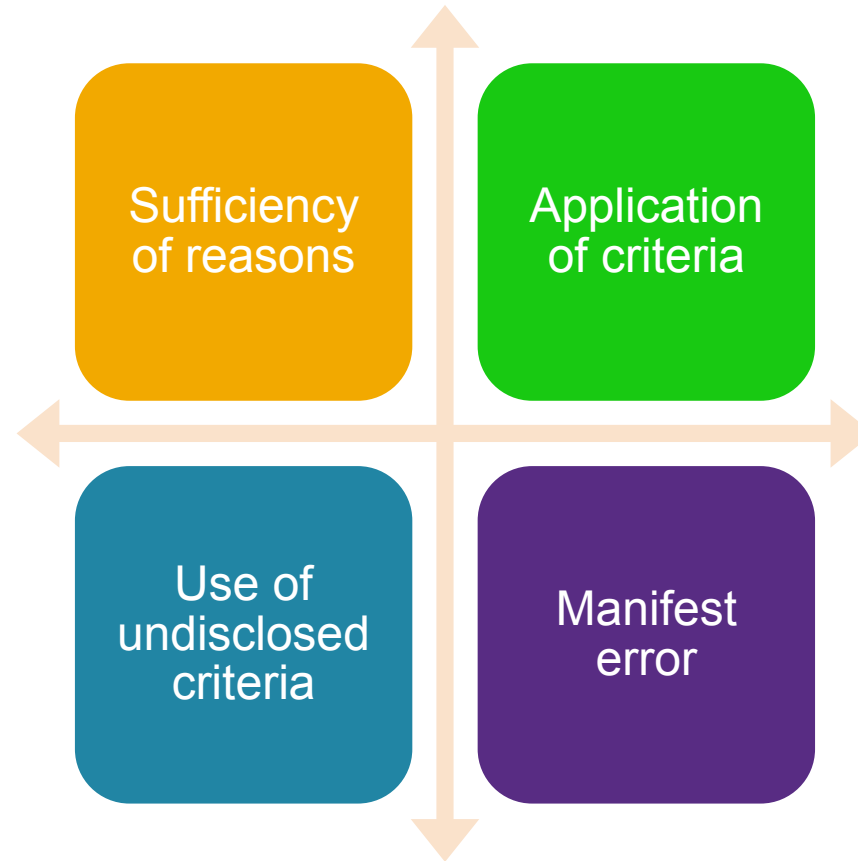
*“The reasoning followed by the authority which adopted the measure must be disclosed in a clear and unequivocal fashion so as, on the one hand, to make the persons concerned aware of the reasons for the measure and thereby enable them to defend their rights and, on the other, to enable the court to exercise its supervisory jurisdiction..”*



**Judgment - issues  
decided**

# Issues challenged

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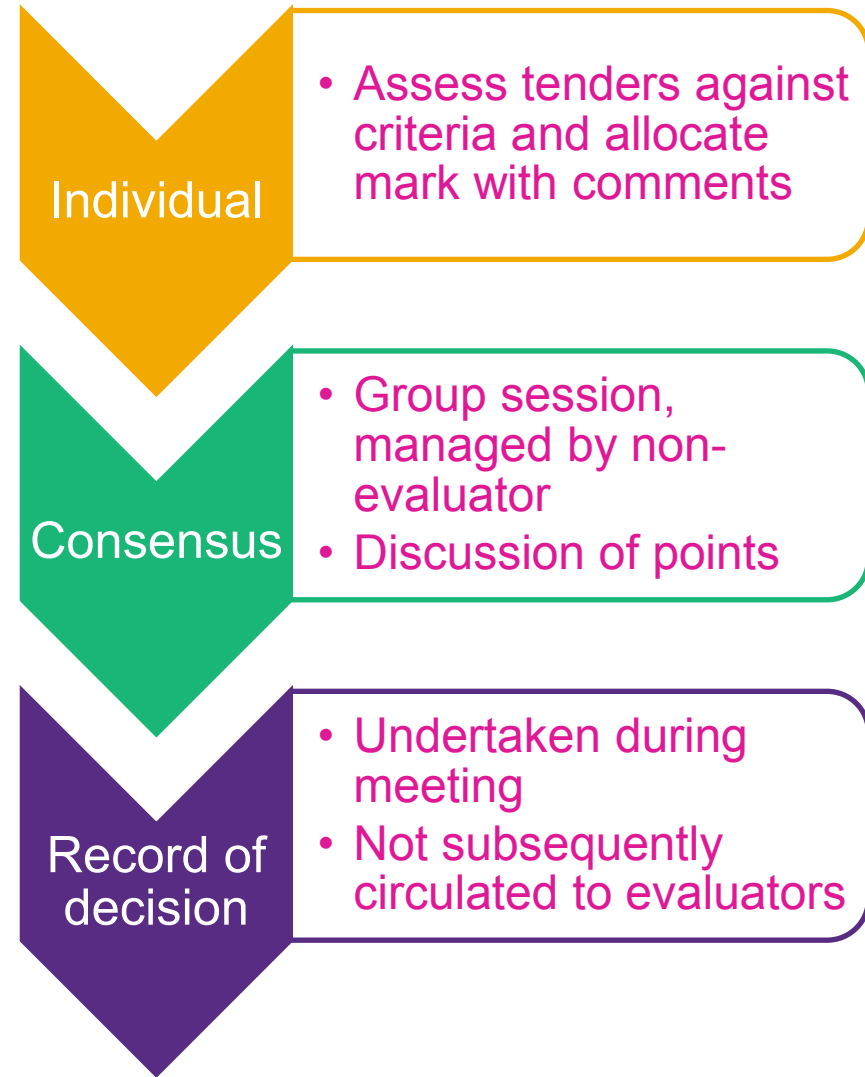
# Moderation key to the issues

- **Criteria:**

- **Quality - 80%**
- **Price - 20%**

- **Qualitative:**

- **Question (identified as weighted criteria)**
- **List of non-exhaustive areas to cover (not individually weighted)**



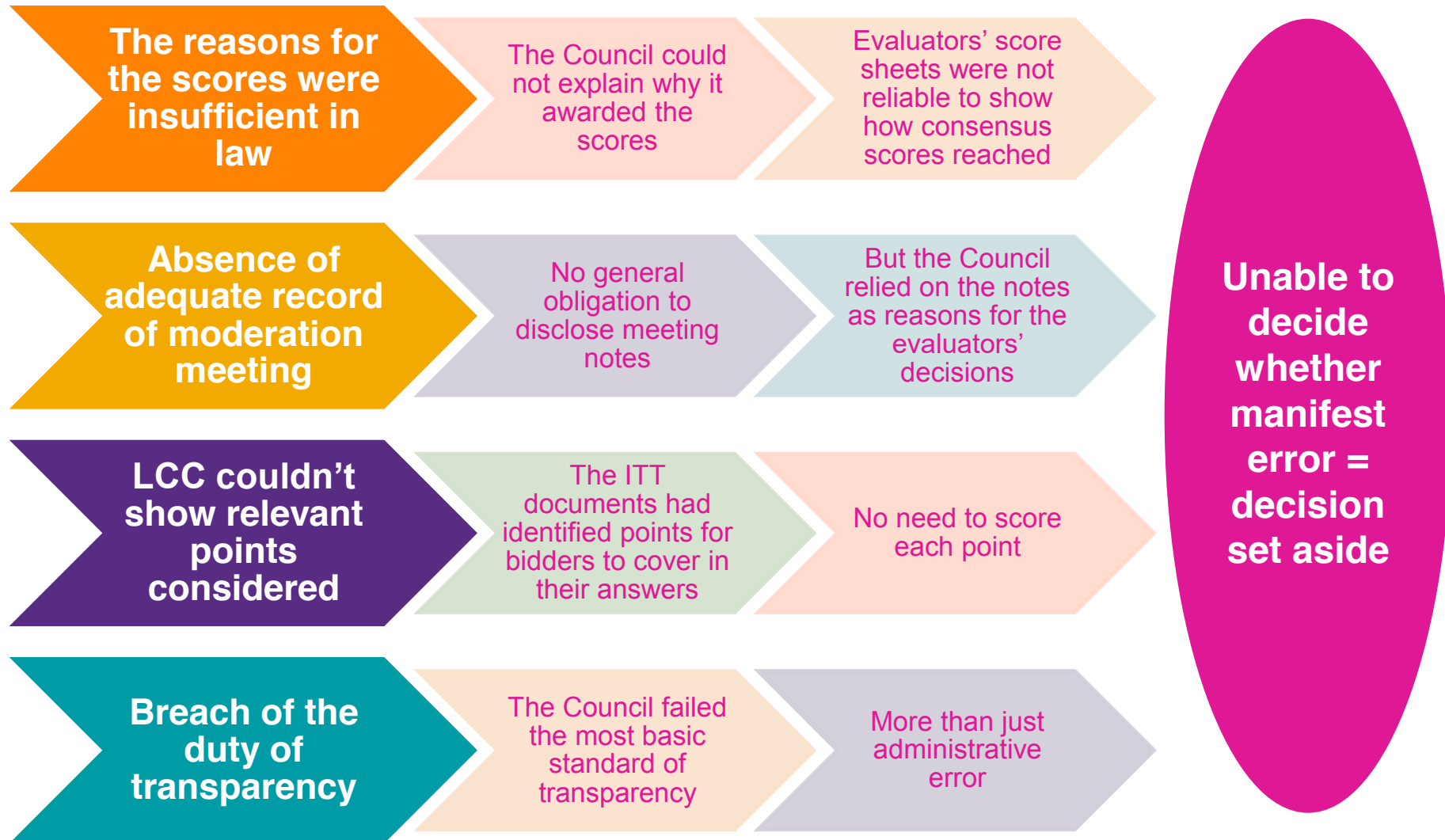
# Moderation key to the issues

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## The moderation meeting notes failed to:

- Be clear that each point was discussed
  - Identify which evaluator had made each point
  - Reconcile points of disagreement
  - Be a complete record of points made
  - Be consistent in identifying key points
  - Provide reasoning for the scores
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# Judgment



# Practical considerations

# Practical considerations

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## Award criteria and structure

- Are they measuring the relevant outputs?
- Are they easy to mark and to justify?

## Evaluators

- Do they have relevant experience of the area evaluated or of procurements?
- Is there sufficient training?

## Audit trail

- Maintaining accurate records of the process is essential – both individually and of any moderation/consensus process

## Market consideration

- Critical to assessment of risk of challenge
  - Relevant to court considerations
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