MONCKTON CHAMBERS

Ocean Outdoor v London Borough of Hammersmith & Fulham [2019] EWCA Civ 1642

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Philip Moser QC and Ewan West appeared on behalf of the Appellant.

A. Introduction

In a major judgment handed down by the Court of Appeal last week, Coulson LJ has given important guidance on the scope of the Concessions Contract Regulations 2016 [1] ("the CCRs"), the extent of the land transaction exemption, and the requirements for claimants to show 'sufficiently serious breach' in procurement claims more generally. This was the first case to consider the CCRs in such a level of detail, and – in a ruling likely to be welcomed by public authorities – the meaning of 'concession contract' for the purposes of the Regulations is construed relatively narrowly, with the land transaction exemption given a conversely generous interpretation. The judge's comments on the hurdles which a claimant must surmount to be awarded Francovich damages for breaches of procurement law also have a notably pro-defendant slant.

B. The Facts of Case

The context for the dispute was a pair of leases for two structures (known as "the Two Towers") situated either side of Hammersmith Flyover in West London and used to support large digital advertising screens. The Two Towers had previously been leased by the defendant London borough ("the Council") to the appellant ("Ocean"). When the leases came up for renewal, Ocean were outbid by another media company, Outdoor Plus. New leases were executed accordingly, with Outdoor Plus agreeing to pay annual rent of £1.7m (compared to £600,000 as offered by Ocean).

Amongst the terms of the leases, 'Tower' was defined as 'the structure on which advertisements are displayed' and the 'Permitted Use' was 'the operation of the Tower on the Property for the display of static electronic advertisement'. While there was no positive covenant on the lessee referring to advertising, there was

[1] Implementing the Concessions Directive (Directive 2014/23/EU)

a miscellaneous 'good faith' clause requiring the tenant to 'use all reasonable endeavours to market and promote the Tower so as to maximise the income received'.

Following execution of the new leases, Ocean claimed that the procurement process was unlawful because the Council had failed to comply with the Concessions Directive and/or the CCR, and proceedings were issued in the TCC in August 2017.

C. Judgment at First Instance

The case came before O'Farrell J, with judgment handed down on 28 September 2018. There was no dispute that if the CCRs did apply the Council had not complied with them. Rather, the issue was whether the leases fell within the scope of the CCRs in the first place. The judge held that they did not for a number of reasons (three of which were relevant on appeal) and she dismissed the claim accordingly.

In summary, O'Farrell J held: (i) it was an essential element of a services concession that the relevant services were 'public services' in some way, which advertising was not; (ii) the leases were not 'contracts for pecuniary interest' within the meaning of Regulation 3, as there was no enforceable obligation on the lessee to provide advertising services; (iii) the land transaction exemption under Regulation 10(11) would apply in any event; (iv) damages would not have been awarded either, as the breach was not sufficiently serious and Ocean had been so comprehensively outbid it could never have won the contract.

D. The Appeal

Ocean challenged this decision on eight grounds, which Coulson LJ's judgment reformulates into four 'Principal Issues'.

Principal Issue 1: Whether the new leases were service concession contracts within the meaning of the Regulation.

On appeal, Ocean challenged the view that services concessions had to involve services which were for the benefit of the contracting authority. It argued that the judge's conclusion was too restrictive; 'services' were not defined anywhere in the CCRs and the judge's gloss amounted to an unwarranted qualification on the types of concession contracts caught by the Regulations.

Coulson LJ, however, disagreed. As the CCRs were concerned solely with public bodies, it naturally followed that the services in question must be services to or for the public, which the authority would otherwise have to provide itself. Moreover, the 'mischief' at which the CCRs are aimed is the potential misuse of

public money, supporting the view that only services connected to the authority's 'public obligations' are within scope. This view was also supported by the use of the word 'entrust' in Regulation 3(3) and by Recital 11 of the Concessions Directive, that contracting authorities must 'always obtain the benefits of the works or services in question'. Though there were no judgments directly, the views of the Advocates General in *Gemeente Arnhem v BFI Holding BV* [1998] 1-ECR 6821, *Helmut Muller* [2010] 3 CMLR 18 and *Promoimpresa Srl* [2017] 1 CMLR all offered supporting authority too.

Finally, as a more general point, the judge observed that all Ocean's arguments tended towards the proposition that any contract entered into by the Council or another contracting authority must in some way be caught by the public procurement rules, through the CCRs or otherwise; yet this was to look at the question the wrong way around. Local authorities entered into thousands of different contracts every year, and it was for the claimant to prove that the leases fell within the scope of CCRs, not for the Council to disprove some kind of presumption to the contrary.

As such, the new leases were not within scope. Nor could it be said that the rent paid by the lessee provided at least an indirect benefit to the Council; this submission was predicated on the basis that the rent was paid in consideration for services to which the CCRs applied, and the Court had already held that it was not [2].

Principal Issue 2: Whether the new leases were contracts for pecuniary interest

Regulation 3(3) defines services contracts as contracts 'for pecuniary interest… by means of which [the] contracting authority entrusts the provision and management of services …to the economic operator'.

Although Coulson LJ endorsed the generic definition of a concession provided by Ocean's counsel, he disagreed that the present case fell within this. Under the so-called 'synallagmatic model' [3] the contracting authority transfers to an

[2] Coulson LJ's one point of divergence from the decision below was as to whether advertising could fall within the categories of services envisaged by the Concessions Directive. Although it might not usually be covered, there could still be cases where advertising was in scope, such as where a publicity campaign was part of the government's statutory obligations (as in Group M UK Limited v Cabinet Office [2014] EWHC 3659 (TCC)), and therefore he accepted that advertising could not be excluded automatically (Recital 1 of the Directive, on which the judge had relied, being only illustrative).

[3] From the Greek synallagma, meaning 'covenant'. Coulson LJ cites R (Faraday Development Limited) v West Berkshire Council [2018] EWCA Civ 2532 as the source of the expression, but in fact Faraday derives the term from a previous CJEU decision, Remondis GmbH and Co KG Region Nord v Hannover (C-51/15) EU:C:2016:985 (paragraph 43).

economic operator the right to exploit a business opportunity by providing a service to third parties, and secures payment in return. An obvious example was a car park, where members of the public paid the concessionaire for the right to park rather than paying money for the service to the authority itself. In this case, though, the third parties were advertisers who had no connection to the Council or its residents, and the money paid by the advertisers to the lessee and the rent paid by the lessee to the Council were entirely separate. Nor was the amount of rent paid in any way dependent on the nature, quality or quantity of advertising sold.

A further essential element that was missing here was any legally enforceable obligation to provide advertising services. Though it was true that in construing a contract such as this it was important to look at the agreement as a whole and have regard to substance rather than form, Coulson LJ's view was that the new leases were not contracts for the provision of advertising services, but just relatively standard land leases. The lack of a profit-sharing mechanism or similar further supported this.

Principal Issue 3: whether the Land Transaction Exemption applied

The 'land transaction exemption' under Regulation 10(11) excludes from the scope of the CCRs concession contracts for 'the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property or which concern interests in or rights over any of them'. Noting the absence of any fuller explanation of this exemption in either the domestic or European authorities, the judge endorsed what he acknowledged to be a wide definition on the basis of Recital 15 of the Directive, so that the exemption encompasses agreements that 'generally contain terms concerning entry into possession by the tenant, the use to which the property is to be put, the obligations of the landlord and tenant regarding the maintenance of the property, the durations of the lease and the giving up of possession to the landlord, the rent and the incidental charges to be paid by the tenant'.

As such, the new leases fell squarely within the exemption. They were genuine leases enabling Outdoor Plus to obtain exclusive possession of the Two Towers; the judge rejected Ocean's submission that their principal object was to ensure the use of the Towers for advertising in order to exploit their advertising potential.

Principal Issue 4: Damages

Coulson LJ acknowledged that in view of his decisions on the first three issues there was no need for him to rule on this issue, but nevertheless chose to set out his conclusions because of the general importance of the point.

Ocean had argued that any failure to comply with the requirements of the Regulations was a 'manifest and grave error' and thereby a sufficiently serious breach; but this view was emphatically rejected. It was not the case that every breach of the 'procedural requirements' under procurement law would trigger an automatic entitlement to damages; rather it would be a fact-sensitive matter in every case.

As to the requirement for a causal link between breach and loss, Ocean had relied on a 'loss of chance' argument: the company had lost the chance to bid in a lawful competition and their loss was therefore capable of being assessed by the Court.

Coulson LJ did not dispute that 'loss of chance' methodology could be appropriate for an assessment of damages in some cases. However, he strongly rejected the suggestion that the loss of chance principle relieves the claimant of any obligation to establish even a potential causal connection between breach and loss. The principle might apply where there was a close comparison between unsuccessful and successful bids, and where it could be shown that the illegality in the tender process might have contributed to the rejection of the losing bid. However, it could not apply where it was plain that the claimant's bid would have been rejected in any event. Given the divergence in the value of the two bids here, there was no uncertainty as to the hypothetical outcome had the competition been held lawfully. Ocean would inevitably have lost.

E. Comment

This is a notably pro-authority decision that generally limits the scope of procurement law to impinge upon public bodies' commercial activities. The general tenor of the judgment suggests an underlying concern that the procurement regime risks placing undue fetters on the public sector: Coulson LJ opens with the observation that, "*The rules relating to public procurement grow ever more complex*"; the Concessions Directive "*begins with a startling 88 separate Recitals*". In the light of these misgivings, it is perhaps less surprising that the judge went on to endorse a relatively narrow view of the Regulations' scope.

Indeed, in holding that the CCRs only apply where the services in question are within the scope of the authority's public obligations, the Court has placed a very material gloss on the Regulations and the Directive. While it is true that there is support for this view in the opinions of the Advocates General cited, it is perhaps surprising that such a significant qualification is not found on the face of the legislation or in any judgment previously. While Recital 11 of the Directive does require that the authority obtain the benefit of the services provided, it would not seem to follow automatically that the benefit must be in the form of securing some kind of public service provision rather than (as

here) payment of rent into the public coffers. Similarly, to the extent that the Regulations are aimed at preventing the misuse of public money, it is not clear how this supports the conclusion that only services serving a public function are caught; if a contracting authority sells the right to exploit a business opportunity without a fair competition and thereby does not secure the full sum which it might otherwise have obtained, there is still an equivalent loss to the public purse, notwithstanding that the business in question does not involve providing a public service.

The 'synallagmatic' definition of a concession provided by Ocean's counsel and endorsed by the Court is also likely to be a key point of reference in future CCR disputes. However, in finding that the new leases fell outside this, Coulson LJ appears to rely in part on the fact that there was no contractual connection between the amount of advertising sold and the rent paid to the Council (such as a profit-sharing mechanism). This point is repeated several times in the course of the judgment, but one might query why the fact that Outdoor Plus was simply paying a fixed sum for the opportunity was so significant. Indeed, the absence of a profit-share might even be said to point the other way: Regulation 3(4) requires concessionaires to assume at least part of the operating risk of the business opportunity, which will of course be achieved most easily if the sum payable to the authority is fixed for the duration of the agreement and unaffected by the actual revenue received.

The wide definition of the land transaction exemption endorsed here may also be a touchstone in future disputes. Notwithstanding the breadth of the definition, one might still wonder why a lease for a demise explicitly defined as 'the structure on which advertisements are displayed' and whose permitted use was 'the display of static electronic advertisements' was so obviously within the exemption and fell to be treated as a standard land agreement rather than the sale of an advertising opportunity. In his reasoning on this point, the judge quotes part of Recital 15 of the Directive to the effect that agreements generally containing standard land lease terms are covered; however, he omits the first part of the relevant sentence, which says only that such contracts will 'normally' fall within the exemption. It is submitted that this may be an important qualification, and serves to prevent the exemption being used to circumvent the procurement regime where the substance of the transaction is not a land agreement at all. As such, there is perhaps a risk that the present decision may encourage public authorities to attempt to structure their commercial activities as land transactions in order to gain the protection of the exemption and avoid the full rigour of the statutory procurement process.

Finally, on the availability of Francovich damages, the judge's suggestion that if a breach is merely 'procedural' it will not necessarily be sufficiently serious to sound in damages is noteworthy; given that the procurement regime to a large extent involves requiring public authorities to follow due process,

‘procedural’ breaches will be precisely what is at issue in many cases. In view of the judge’s comments on the causal link requirement, it appears that the previous Francovich condition may to some extent now be subsumed within this; in other words, a breach will be sufficiently serious if (and perhaps only if) it would have affected the outcome of the competition (such that the claimant would have had a real prospect of winning). As to ‘loss of chance’ claims, while not ruling these out, Coulson LJ certainly does little to encourage them, and in such circumstances it may now be hard for unsuccessful bidders who were anything other than a close second in the original competition to bring successful damages actions.

The comments made in this case note are wholly personal and do not reflect the views of any other members of Monckton Chambers, its tenants or clients.

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