

Public Procurement: Court of Appeal Clarifies Rules on Concessions, Exempt Land Transactions and the Availability of Damages (Part One of Two)

This two-part update examines the recent Court of Appeal judgment in *Ocean Outdoor UK Ltd v London Borough of Hammersmith & Fulham* [2019] EWCA Civ 1642. The decision addressed several important issues of public procurement law as it applies to concession contracts and land transactions.

Part 1 of this update examines the court's findings on the scope of the Concessions Contracts Regulations 2016 and the "pecuniary interest" requirement.

Part 2 will consider its findings on exempt land transactions and the availability of damages to unsuccessful bidders.

Speed-read

In a recent, rare Court of Appeal decision on the Concessions Contracts Regulations 2016 (Regulations), Lord Justice Coulson comprehensively rejected the claims of the challenger and appellant, Ocean Outdoor UK Ltd (Ocean). In doing so, Coulson LJ provided useful guidance on four important questions:

- What constitutes a "services concession contract" for the purpose of the Regulations
- Concept of a contract for pecuniary interest under the Regulations
- Application of the "land transaction exemption"
- Availability of damages to unsuccessful bidders

The court's judgment on all four issues is likely to be welcomed by contracting authorities and favoured suppliers. It, arguably, narrows the scope of the Regulations, broadens the application of the exemption for land transactions and reaffirms the restrictions on the award of damages for alleged procedural breaches in procurement cases.

The Facts

Mrs Justice O'Farrell DBE gave the first instance judgment in September 2018 in the High Court, following a claim by Ocean against London Borough of Hammersmith & Fulham (the Authority). In the initial claim, Ocean challenged the Authority's decision to enter into two leases with a rival company, Outdoor Plus Limited, following a bidding process that did not follow either the Regulations or the Public Contracts Regulations 2015.

The leases in question concerned two plots of land located on either side of the Hammersmith flyover in West London, which housed metal structures supporting large digital advertising screens. These were referred to by the court as the "Two Towers".

Ocean had leased the land and the Two Towers from the Authority between 2010 and 2017. In the final year of the lease, the Authority invited bids for new leases over the land. Ocean made an offer of £600,000 per annum for a period of 10 years. A rival bidder, Outdoor Plus, offered £1.7 million per annum over the same term, with an annual increase plus market review in the fifth year. The Authority entered into two new leases with Outdoor Plus in June 2017 following a recommendation from its consultants (New Leases).

The terms of the New Leases defined a "Tower" as "the structure on which advertisements are displayed", and defined the "Permitted Use" as "the operation of the Tower on the Property for the display of static electronic advertisement". Outdoor Plus did not give a positive covenant to let the Two Towers for advertising, but was subject to a "good faith" clause that required it to "use all reasonable endeavours to market and promote the Tower[s] so as to maximise the income received".

The Claim in the High Court

Ocean argued at first instance that the award of the New Leases to Outdoor Plus was unlawful because the Authority had failed to comply with the Regulations, which implement the Concessions Directive (2014/23/EU) (Directive). Ocean argued that the grant of the New Leases amounted to a concession contract that fell within the scope of the Regulations and was not an exempt land transaction. As such, the Authority should have followed the tendering procedures provided for in the Regulations. Ocean asked the court to declare the New Leases ineffective and award it damages.

O'Farrell J dismissed Ocean's claim on all grounds and held that:

- An essential element of a services concession is that it involves services provided for the benefit of the contracting authority or its residents, which was not the case here
- The leases did not constitute contracts for pecuniary interest for the purposes of the Regulations, because Outdoor Plus was not under a binding obligation to provide advertising services to the Authority
- "Land transaction exemption" applied, meaning that the procurement of the New Leases was, in any event, excluded from the application of the Regulations

Judgment in the Court of Appeal

Ocean was granted permission to appeal the decision on eight grounds. The judge in the Court of Appeal, Coulson LJ, arranged the arguments into four principal issues. This update will consider the first two.

1. Were the New Leases Service Concession Contracts?

The first question was whether the leases for the Two Towers satisfied the definition of a "service concession contract" for the purposes of the Regulations.

Ocean argued that requiring a services concession to be for the benefit of the contracting authority, or the population it serves, was too restrictive. It claimed that this amounted to an "unwarranted qualification" of the types of contracts that are subject to the Regulations.

Coulson LJ, however, agreed with the High Court and found that only services that relate to the Authority's public obligations are subject to the Regulations. He reasoned that, because the Regulations only apply to public bodies and are intended only to cover contracts for services provided on *behalf* of a contracting authority, it must follow that they only apply to services that the contracting authority is obliged to provide in order to pursue its strategic objectives or satisfy its statutory obligations.

Coulson LJ went on to find that the New Leases were not service concession contracts, for the following reasons:

- The Authority had no statutory obligation to provide advertising services and the services were not provided on the Authority's behalf
- Advertising on the Two Towers was not required by the Authority
- The New Leases did not provide a service for the benefit of the Authority
- There was no direct benefit to the Authority or residents from the advertising on the Two Towers

In ruling that the Regulations only apply where a concession is granted for services that relate to a contracting authority's public obligations, the court appears to have taken a significant step in a new direction. This condition is not stated expressly in either the Regulations or the Directive, and no previous judgment has arrived at the same conclusion. This arguably reduces the scope of the Regulations significantly, meaning that they will not apply to several forms of service concessions awarded by contracting authorities.

This appears inconsistent with the primary purpose of the Directive (and, therefore, the Regulations), namely, removing barriers to trade and ensuring an open market. The reason the Regulations only apply to public bodies is arguably not, as Coulson LJ said, to address the "mischief" of "potential misuse of public money". It is, rather, because public bodies do not ordinarily operate in a competitive market and, it is thought, are prone to political and other influences on their procurement decisions. On this basis, there is no logical reason why concessions should only be subject to the Regulations when they procure services that relate to their statutory obligations. It also ignores the fact that contracting authorities routinely provide services that do not fall within this narrow remit, including commercial services.

To the extent that the judgment potentially excludes a wide range of contracts from the scope of the Regulations, however, it may be welcomed by contracting authorities.

2. Were the New Leases Contracts for Pecuniary Interest?

The second question was whether the New Leases were contracts for pecuniary interest within the meaning of Regulation 3(3), being contracts by means of which the contracting authority entrusts the provision and management of services to an economic operator.

Ocean argued that the definition of a concession was "a transfer, by the contracting authority to the economic operator, of the right to exploit a business opportunity by providing a service to third parties, in return for a payment to the owner of that opportunity." Ocean claimed that the New Leases satisfied this definition as they involved the transfer to Outdoor Plus of the opportunity to exploit the Two Towers, and that Outdoor Plus provided services to third party advertisers in return for payment, a portion of which Outdoor Plus passed on to the Authority.

Coulson LJ held that an essential element of the requirement for pecuniary interest is that there must be a binding obligation on the concessionaire to perform the services. Whilst he acknowledged that the court should look at the *substance* rather than the *form* of the contract, in the present case his view was that the New Leases did not impose a legally enforceable obligation on Outdoor Plus to provide advertising services.

As noted above, the New Leases did not include any positive covenants referring to advertising. The court accepted that the good faith clause was enforceable, but held that it did not reach the level of a direct obligation on Outdoor Plus to provide advertising services. The court also held that Outdoor Plus' payments to the Authority were exclusively consideration for its land rights (i.e., rent) and not a transfer of third parties' payments for advertising services.

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