

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

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

In this Part 2, we consider its findings on exempt land transactions and the availability of damages to unsuccessful bidders.

## The Facts

The facts of the case were outlined in Part 1 of this update. In summary, Ocean Outdoor UK Ltd (Ocean) challenged the London Borough of Hammersmith & Fulham's (the Authority) decision to enter into two leases with a rival company, Outdoor Plus Limited. Having lost before the High Court, Ocean sought to overturn the judgment before the Court of Appeal.

Ocean had leased two plots of land and two metal structures supporting large digital advertising screens (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. Following a bidding process, which did not apply the Concessions Regulations (Regulations) or the Public Contracts Regulations, the Authority granted the New Leases to Outdoor Plus.

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. It sought a declaration of ineffectiveness and damages. O'Farrell J dismissed Ocean's claim on all grounds, and an appeal followed.

## Judgment in the Court of Appeal

In Part 1 of the update, we explained the Court of Appeal's findings on the first two issues: (1) the scope of the Regulations and (2) the pecuniary interest requirement. Below, we consider the remaining two issues: (3) the land transaction exemption and (4) the availability of damages.

### 3. Did the New Leases Benefit From the Land Transaction Exemption?

Under Regulation 10(11), land transactions – meaning 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" – are exempt from the Regulations. When a contract benefits from this exemption, the contracting authority is not required to follow the procedures in the Regulations.

Ocean claimed that the New Leases were not exempt land transactions. It argued that the Authority only granted an interest in land for the Two Towers in order to facilitate an advertising concession. Although Outdoor Plus was not subject to a binding obligation to let the Two Towers to advertisers, this was the only permitted use for the land and it was under a good faith duty to maximise advertising income.

The court disagreed with Ocean and held that the wording of the exemption was an "almost perfect description" of the New Leases. Coulson LJ explained that the essential features of the New Leases were that Outdoor Plus obtained exclusive possession of the land and paid a fixed rent. Neither were conditional upon Outdoor Plus selling advertising space. It was deemed irrelevant that Outdoor Plus had permission to use the Two Towers to display advertising and sell the space to third parties, or that this was the land's sole permitted use. Notwithstanding, the New Leases remained agreements for the lease of property, which were exempt from the Regulations.

The judgment may be relied upon as authority in support of a broad approach to the land transaction exemption under the Concessions Regulations and Public Contracts Regulations.

### 4. Was Any Breach Sufficiently Serious to Give Rise to an Award of Damages?

Although Ocean was unsuccessful in its appeal on the first three issues, the court in any event chose to address the question of damages. This is a subject rarely, and sometimes incoherently, considered in the case law.

The court referred to the Francovich conditions for an award of damages, as applied in *Energy Solutions EU Limited v Nuclear Decommissioning Authority*. The conditions are:

- A rule of law must be infringed that was intended to confer rights on individuals
- The breach must be "sufficiently serious"
- There must be a direct causal link between the breach and the damage sustained

Focussing on the second condition, the court rejected Ocean's submission that a failure to comply with the Regulations automatically leads to a "sufficiently serious breach". If that were the case, all procedural breaches would give rise to damages claims, irrespective of other factors. To the contrary, the court must take into account the individual facts of each case and not merely find the existence of a procedural error.

**This is a significant ruling, as it indicates that the sufficiently serious breach test places real limits on the availability of damages in public procurement cases.** This is particularly striking, as the sufficiently serious breach test is itself controversial given its apparent inconsistency with the EFTA Court decision in *Fosen-Linjen AS and AtB AS* (Case E-16/16) 31 October 2017.

Regarding the third condition, Ocean argued that it was entitled to make a bid in a lawful competition and that, because it was deprived of that right, it had a claim for damages based on “loss of chance”. This is the principle that a claimant need not show that it would have won a bidding process in order to obtain damages, but, rather, that it was denied the chance of winning.

The court held that there are instances in which this principle might allow for the award of damages in a public procurement case – notably, where there is a close competition between the successful and unsuccessful bids, and where it can be demonstrated that the flaw in the tender process may have contributed to the outcome. However, the principle will not apply when it is clear that the claimant’s bid would still have lost even if all procedural rules had been followed.

In this case, Outdoor Plus’ bid for the New Leases was so much higher than Ocean’s bid that there would have been no uncertainty as to the outcome even if the Authority had applied the Regulations. In these circumstances, Ocean could not claim for loss of chance.

If the right to damages is substantially restricted, and the right to have the decision set aside is also severely restricted (as it clearly is), the principle of effectiveness is infringed.

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