

Court of Appeal confirms application of the concessions regime

Published 19 November 2019

In our briefing last October we detailed the High Court's judgment in *Ocean Outdoor UK Ltd v London Borough of Hammersmith & Fulham*. The case was significant as it was the first time the Concession Contracts Regulations 2016 ("CCR") were argued in Court and many contracting authorities were relieved by the result. The decision was subsequently challenged and the Court of Appeal has recently upheld the decision in favour of the local authority.

What happened in the case?

Ocean Outdoor UK ("Ocean") leased two plots of land from the London Borough of Hammersmith & Fulham (the "Council"). Ocean constructed two towers on these plots. Those towers showed advertisements and were visible to drivers on the Hammersmith flyover. As part of the arrangement, Ocean paid 85% of its profits from the selling of advertising space on the two screens to the Council. Over the years the revenue declined and the Council's consultants (Wildstone Property) advised the Council that there was an opportunity to increase the revenue obtained. There were various interactions between Ocean and the Council but ultimately the Council decided to retender the opportunity. It did so by contacting providers directly and advertising in a trade journal. The outcome was that Ocean lost the land to Outdoor Plus, who entered into new leases with the Council.

What did the Court consider?

Ocean argued that the arrangement between Outdoor Plus and the Council was a service concession and that the Council was under an obligation to run a regulated procurement process under the CCR. Two of the points that the Council argued were that (1) there was no service being provided to which the CCR applied; and (2) the arrangement was a land transaction in any event.

1. Did the arrangement constitute the provision of services caught by the CCR?

To be a concession contract the contracting authority must entrust the provision of the services to the economic operator. In order for a contracting authority to entrust, the contracting authority must have a requirement to undertake that service or there be a benefit to the contracting authority or its residents, in the furtherance of the strategic objectives of the contracting authority. Although the Council received income from the arrangement, it had no statutory obligation to provide advertising services to residents, the advertising was not required by, or provided for the Council and the Court upheld that there was no public benefit to the community from commercial advertising. Further, there was no legal obligation on Outdoor Plus to provide any service. There was an obligation to pay rent but not to provide advertising services. The arrangement was therefore not a service concession.

2. Was the arrangement an exempt land transaction in any event?

The arrangement between the Council and Outdoor Plus was constituted by way of leases. Leases, as interests in land, are exempt from the CCR and therefore do not require a procurement under the CCR. Not all leases will be genuine land transactions and for this reason a Court will look at the main object or purpose of the transaction. If a lease has been used to 'hide' an otherwise procurable contract there will be a procurement risk. In the Ocean case the Council had used standard template leases. The primary objective was to obtain a guaranteed income stream from rental payments and the essential feature of the leases was exclusive possession of the land and the structures on it. The arrangement therefore would have been exempt from the CCR even if other features making it a contract procurable under the CCR were present.

What can contracting authorities take from the case?

As part of its procurement strategy, a contracting authority should consider in detail the mechanics of any proposed concession transaction in order to determine whether it is actually caught by the CCR. Services contracts must contain a legal obligation on the concessionaire to provide the services and must relate to services that would otherwise be provided by the contracting authority as part of its statutory obligations or in furtherance of its strategic objectives (although it is unclear how far such public obligations will reach). Further, the judgment arguably gives more scope to authorities when granting leases where previously they may have considered them to fall within the scope of the CCR. The main object of any transaction will be key to ensure that the arrangements are in fact genuine leases and not merely concealing a concession

arrangement. Being a land transaction outside a regulated regime will provide contracting authorities with much more flexibility in its negotiations with providers.

Authors



Hannah Chapelhow

Newcastle

hchapelhow@dacbeachcroft.com



Victoria Fletcher

London - Walbrook

vfletcher@dacbeachcroft.com



Mary Mundy

Leeds

mmundy@dacbeachcroft.com