

PROCUREMENT LAW

SUCCESS ON STRIKE-OUT APPLICATION GIVES “PHOTO-ME” PASSPORT TO TRIAL

PHOTO-ME INTERNATIONAL PLC v NETWORK RAIL INFRASTRUCTURE [2011] EWHC 3168 (QB)

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Of the many grey areas in public procurement law, one of the most vexed is the extent to which procurements which fall outside the scope of the applicable EU Directives are still subject to some form of legal control. The recent judgment of Judge Havelock-Allan QC in Photo Me International v Network Rail Infrastructure Limited [2011] EWHC 3168, considered these questions in the context of an (ultimately unsuccessful) strike out application by Network Rail. Because the judgment only concerns a strike out application, it does not resolve all the issues arising once and for all, and hence those seeking greater clarity in this important area are likely to be tantalised and frustrated in equal measure. However, the judgment does make an interesting contribution to the continuing debate in this highly controversial sphere.

BACKGROUND

The claim arose from a competition for the supply of photo booths at Network Rail's eighteen railway stations across the country. Photo-Me was the incumbent supplier, but lost out to a rival CMS in a competition for a new five year contract. Given the way in which photo booths operate, the contract would constitute a service concession which was not subject to either the Public Sector or Utilities Directives. Photo-Me nevertheless challenged the outcome of the competition, relying on EU Treaty principles, an implied tender contract claim and (unusually) a claim in negligence. Network Rail applied to strike out the claim, arguing that none of those causes of action were engaged.

THE ISSUES

The Court approached the EU law claim on the basis that EU Treaty principles would provide a basis for the claim as long as the contract was one which would have been subject to one or other Directive had it not been a concession. Network Rail argued that neither Directive would have applied. As far as the Utilities Directive was concerned, Network Rail was plainly a “utility” for the purposes of certain of its activities. However, it denied that the photo booth contract related to activities which were subject to the Utilities Directive. As far as the Public Sector Directive was concerned, Network Rail conceded for the purposes of the application only that it was a “contracting authority”. However, it denied that the contract in question was a public service contract which was subject to the Directive.

THE EU LAW CLAIM

Because the issues arising on the EU law claim were pure points of law, the Judge decided them on a “preliminary issue” basis. The relevant activity carried out by Network Rail for the purposes of the Utilities Directive was “*the provision and operation of networks providing a service to the public in the field of transport by railway.*” Photo-Me argued that the provision of photo booths was a necessary and valuable part of the activity of providing a railway station. However, the Judge held that the contract in question had to be one which was necessary to provide or operate the railway network itself. In that regard, the Judge referred to Case C-247/90 *Commission v Portugal*, in which the Court of Justice asked whether the contract related to the “*requisite infrastructure*”. The operation of photo booths did not meet this test, nor would (the judge observed) the operation of a cafeteria at a railway station.

Nevertheless, in light of the concession made by Network Rail that, for the purposes of the application only, the Court could treat it as being a contracting authority within the meaning of the Public Sector Directive would have applied to the contract had it not been a concession. In doing so, he rejected an argument by Network Rail that, where a body was subject to the Utilities Directive, the Public Sector Directive would only apply to the same activities as were subject to the Utilities Directive - the Judge held that the Public Sector Directive was not “*activity specific*”. The Judge also rejected the argument that the contract was not for any of the categories of service set out in Annex IIB to the Directive, noting that the “*Other services*” category in Annex IIB, number 27, is “*entirely general in character*”.

Finally, the Judge rejected an argument that the contract was not of cross border interest. In that regard, the Judge attached weight to the particularly attractive opportunity presented by

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railway station photo booths, and Network Rail's exclusive control over the network to which the contract related.

THE TENDER CONTRACT AND NEGLIGENCE CLAIMS

The Judge also rejected Network Rail's attempt to strike out the tender contract claim, which he approached on the assumption that (contrary to his view) Treaty principles did not apply. On that assumption, he considered it more than merely arguable that Network Rail had undertaken as a matter of contract to evaluate tenders on the basis of the terms set out in the tender documents.

The Judge found the question of whether there was an implied contractual obligation to act "fairly" less straightforward (by which language, he referred to the application of all Treaty principles). He was seemingly not persuaded that the case law provides a clear basis for such a duty in the context of any and all tender processes, referring to the line of case law running from *Blackpool and Fylde Aero Club*, through *Harmon*, through to *Varney*. However, nor was he persuaded by any of Network Rail's arguments as to why the claim was unarguable. In particular, the Judge did not consider the application of Treaty principles to the procurement to be *inconsistent* with the policy of the Directive – it was simply that the harmonised standards created by the Directives did not go so far as to apply to service concessions. The Judge also did not accept that provisions in the tender documents, which stated that the Utilities Regulations did not apply and that Network Rail could reject tenders without reasons, excluded an arguable contractual duty to act fairly.

That left the claim in negligence. Having concluded that the tender contract claim was arguable, the Judge was not inclined to strike out the negligence claim, the arguability of which turned on similar points. The Judge did however recognise that the negligence claim was not viable if the contract claim were to be rejected by a higher court.

COMMENT

As far as the EU law claim is concerned, the judgment in *Photo Me* is clear authority for the proposition that the Public Sector Directive is not activity based, even when applied to bodies that are also utilities. The judgment is also useful authority on the status of the slightly mysterious category of "other" services referred to in Annex IIB.

As for the tender contract claim, any issue decided on a strike out basis tells us what may be, rather than what is, and has little value as a direct precedent before other courts. The Judge's analysis of the tender contract claim is nonetheless interesting. The Judge was clearly impressed by the argument that Network Rail should be held to the terms of its own tender documents. That point alone may provide a fertile basis for claims, such as the claim made by Photo-Me that Network Rail had failed to apply the scoring methodology set out in its tender documents.

On the second question, of a duty to act fairly, the Judge's reasoning is less forthright, but he still considered the point arguable. It may be said that the argument for implying such a duty is stronger where (as the Judge assumed for the purposes of this argument) the contract is not already subject to controls by virtue of EU law. In that way, the *Firebuy* and *Varney* judgments can be distinguished.

Overall, the judgment will inevitably provide encouragement for claimants considering whether to seeking to run tender contract claims. Conversely, defendants facing such claims, and who are contemplating an early strike out or summary judgment application, are likely to think twice in light of the latest contribution to this ongoing saga.

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