

PROCUREMENT LAW

JBW LTD v MINISTRY OF JUSTICE [2012] EWCA CIV 8

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In JBW Ltd v Ministry of Justice [2012] EWCA Civ 8 (16 January 2011) the Court of Appeal held that the procurement of bailiff services by the Ministry of Justice was a service concession and therefore fell outside the scope of the Public Contracts Regulations 2006 (“the Regulations”).

This was an appeal against a summary judgment ordered by Master McCloud dismissing JBW's claims based on various breaches of the Public Contracts Regulations 2006 and on breach of terms of an implied contract that the Ministry of Justice (“Moj”) would consider tenders fairly, transparently and in accordance with the terms set out in the invitation to tender. The Master held that the Regulations were not applicable to the contracts in questions because they were service concessions which are expressly excluded from the scope of the Regulations and held further that a contract could not be implied as alleged by the Claimant. The Court of Appeal dismissed the appeal.

The judgment of the Court of Appeal was delivered by Elias LJ although the Master of the Rolls added his further judgment confined to consideration of reference to the Court of Justice. Elias LJ began by recalling the distinction between the definitions of public service contract and service concession and the specific exclusion of the latter from the scope of the Directive 2004/18/EEC and the Regulations. Whereas a public service contract is a public contract other than a public works or supply contract which has as its object the provision of services referred to in Annex II of the Directive (which includes the services here relevant), Article 1(4) defines a service concession as:

“..a contract of the same type as a public service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in this right together with payment.”

Before turning to the relevant case law, he examined the contractual terms and specifications contained in the invitation to tender. The vast majority (more than 90%) of the work under the contracts consisted of the enforcement of warrants of distress issued by magistrates for the non-payment of fines. Although the contractor was to specify the maximum fee he proposed to charge for execution of the warrants, the costs of recovery were in fact to be borne by the defaulters. The services to be performed were those detailed in the specification to the service levels specified. An operational protocol allowed the MoJ to impose certain restrictions on the manner in which the contractor performed its functions such as specifying the days and times when certain orders could be enforced. Payment terms were such that monies raised through execution of the distress warrants were to be paid into a client account and the contractor was required to remit periodically the amounts referable to warrants to the MoJ but, after having satisfied that requirement, it could retain its contractually agreed fees.

Recognising that the concepts of “public service contract” and “service concession” had an autonomous meaning in EU law, Elias LJ then surveyed the relevant case law of the Court of Justice beginning with *European Commission v Italian Republic* [1994] ECR-I-1409 and concluding with the recent cases of Case C-458/03 *Parking Brixen* [2005] ECR I-08585; Case C-300/07 *Oymanns* [2009] ECR I-4779, Case C-206/08 *Wasser* [2009] ECR I-08377 and Case C-274/09 *Stadler* (judgment dated).

From those authorities, Elias LJ elicited that the paradigm case of a service contract is

“where the applicant performs a service for the authority and is paid an agreed fee for that service. It is important to emphasise that such a contract is not necessarily risk free. Like any contracting party, the contractor may find that he has struck a bad bargain; the cost of providing the service to the authority may prove to be greater than the remuneration received”

He continued:

“the paradigm case of a concession is where the applicant is put in possession of a business opportunity which he can exploit by providing services to third parties and charging them directly for those services. The contractor then bears the risks of running the business which are typically greater than those involved in performing a contract for a fixed fee. The *Parking Brixen* and *Wasser* cases are classic examples of such contracts, albeit that the risk in the latter case was limited. The fact that there may be some regulation of the price which the

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contractor can charge the third party for the service does not of itself prevent the arrangement constituting a concession”.

The MoJ, relying principally on Wasser and Stadler contended that it was sufficient to satisfy the definition of services concession that payment to the contractor came from third parties rather than the contracting authority, and that some risk was transferred from the contracting authority to the contractor, even if that risk was small having regard to the nature of the services to be provided. The Claimant contended however that, inconsistently with a service concession, the MoJ retained a significant influence over the operation of the contract. The true beneficiary of the service was the MoJ and not the defaulters, who had no contractual relationship with the Claimant. It could not be said that there was a business to exploit in the traditional sense since contractors could not for example increase the client base or change the terms. Although there was a risk involved for the contractor in unsuccessful execution of warrants, the transfer of some risk alone was not sufficient to lead to the arrangement being a concession.

In his judgment, Elias LJ acknowledged that the case before the Court did not fit neatly into either category of public service contract or concession. It lacked several principal features of a concession since:

- (i) it did not enable the contractor to exploit, develop or expand the service or business but rather was confined to dealing with defaulters identified by the MoJ and subject to a fee negotiated with the MoJ;
- (ii) there was no direct contractual relationship with the third party clients of the service (here the defaulters);
- (iii) the MoJ retained considerable control over the manner in which the contract is performed not least through the constraints imposed by the operational protocols
- (iv) this was unlike a classic concession in that the contracting authority directly benefitted from its performance: the service was not performed for the benefit of third parties.

On the other hand the arrangement lacked important features of a public service contract in that:

- (i) although the contractor had no direct relationship with the defaulters, the latter do, albeit unwillingly, pay for the service and there is no payment from the MoJ directly;

- (ii) the contractor bore the risk of running the service in that the remuneration is unknown and unpredictable, there is a risk that the contractor will be unable to recover the fines and/or the costs of execution: even if those risks are small they are coterminous with the risks to which the MoJ would be subject if it were to perform the services itself.

Elias LJ considered that although a literal reading of the authorities could produce the result that the transfer of risk coupled with the fact that the third party "beneficiaries" are paying for the service was sufficient to render the arrangement a concession, such an approach was oversimplistic and the Court of Justice had not yet considered a case before it in which the risk of running the business is carried by a contractor who has no real opportunity to exploit the service in any meaningful way. He concluded however that the relevant contract was indeed a service concession owing to the following:

- (i) all the risks involved in running and managing the service are transferred from the MoJ which is released even from the costs of failing to execute a warrant;
- (ii) there is no payment directly from the MoJ;
- (iii) although the MoJ benefits from the performance of the service in a manner not normally present in concession, the service is also provided to third parties;
- (iv) even though the beneficiaries are not willing recipients of the service, that is equally the case in other cases where the Court of Justice has found a concession to exist eg Stadler
- (v) the fact that the MoJ retained a substantial degree of control over the contractor's execution of the service was not enough to outweigh the contrary considerations.

As for the implied contract relied upon by the Claimant to impose duties of fairness transparency, and compliance with the terms of the invitation to tender, even though the contract fell outside the scope of the Regulations, Elias LJ saw no basis upon which those contractual duties need be implied to give efficacy to the contract. Moreover there could be no common intention that they should be implied in view of the fact that the MoJ had always denied that the Regulations apply. Furthermore, there is no basis for assuming that EU principles can alter the way in which terms are implied at common law. The appeal was therefore dismissed.

The Master of the Rolls declined to make a reference to the Court of Justice stating that the difficulty in the case arose not from determining the legal principles applicable, which were clear, but from the application of those principles which did not present the appropriate circumstances for a reference.

CONCLUSION

This is the first time the Court of Appeal has examined the distinction between service concessions and service contracts and it is perhaps fortunate that their Lordships were presented with what was admittedly for them a difficult case because it has led to a careful and comprehensive analysis of the relevant Court of Justice jurisprudence and an extremely useful insight into the sorts of considerations engaged in cases which do not fall neatly into one or other paradigm of contract. Furthermore, the judgment confirms that in cases where a tender falls outside the scope of the Regulations, there will generally be no implied contract which imports any or all of the basic duties applicable under the Regulations unless, perhaps, if the contracting authority seeks to mirror the content of the Regulations and it can be inferred that it was the common intention of the parties that those duties were to apply.

Christopher Vajda QC acted for the Ministry of Justice