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Local authorities contracting out enforcement of debts - A review of the High Court's judgment in Bailiffs Limited v Breckland Council [2023] EWHC 1569

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The question for the Technology and Construction Court and Administrative Court in Dukes Bailiffs Limited v Breckland Council [2023] EWHC 1569 was whether a local authority (LA) contracting out enforcement of its debts is governed by the Public Contract Regulations 2015 (PCR) or the Concession Contracts Regulations 2016 (CCR), or alternatively, whether the LA decisions in this regard are open to judicial review.

The Claimant, Dukes Bailiffs Limited, had been on a Dynamic Purchasing System (known as DPS 953) for enforcement agent services and had provided services to Anglia Revenues Partnership (ARP) (a consortium of East Anglian local authorities) since 2019.

In 2022 Breckland Council (member of ARP, and the 'Defendant') invited suppliers under DPS 953 to tender for the replacement of debt enforcement services under DPS 953. The Defendant issued the tender under DPS 953 but made reference to its own "terms and conditions" and the PCR– in short it wasn't entirely clear whether the tender was being run as a mini-competition under DPS 953, or as a free-standing procurement governed by the PCR. The Claimant submitted a bid. The Claimant's bid was unsuccessful – losing out by 2.5% on scoring to a rival bidder, 'Bristow & Sutor'(Bristow). The Claimant had scored the same in every category as the successful bidder, save for "communication with debtors and the council" where the Claimant had scored 10/12.5 "Good" and Bristow scored 12.5/12.5 "Excellent". The Defendant had justified the scoring on the basis that the successful bidder had gone beyond the standards expected in the specification to the contract.

The Claimant initially raised an information request on 31st January 2023, requesting reasons for the Defendant's decision not to award the Contract pursuant to Regulation 86 PCR. The Defendant responded to this request on 7th February and confirmed the only difference in scoring was in relation to communication (see paragraph 3 above).

The Claimant was unsatisfied with the Defendant's response and criticised the legitimacy of the reasons for the scoring via a letter dated 10th February 2023. On 16th February 2023 the evaluation sheets were provided to the Claimant. The Claimant challenged the outcome of the re-tender and criticised the Defendant's scoring, the reasons for its decision, and alleged there had been apparent bias by one of the evaluators towards Bristow as one of the evaluators had connections with Bristow's Manager.

The Claimant issued two claims:

1. firstly, the Claimant issued a claim in the Technology and Construction Court (TCC) on 24th February 2023, on the grounds that the Defendant had acted in breach of the PCR due to apparent bias by one of the evaluators (Regulation 24 PCR), for providing inadequate reasons for the decision to award decision to Bristow and for the Claimant's score (Regulation 86 PCR), for a failure to apply the award criteria as set out in the procurement documents correctly (Regulation 34 PCR), and/or for applying 'manifestly erroneous' scoring to the Claimant's bid (Regulation 67 PCR) and as a result, the contract should be awarded to the Claimant; and
2. secondly, the Claimant issued a claim to the Administrative Court on 10th March 2023, for judicial review for apparent bias and a failure to give reasons.

At the time the Claimant issued proceedings, the Defendant was still within the voluntary standstill period before it could award the contract to Bristow. Despite the issued TCC and Judicial Review (JR) proceedings, the Defendant entered the contract with Bristow on 22nd March with effect from 31st March 2023. The Claimant was informed of this on 4th April. In light of this, the TCC decided for the Claimant's claim for JR to be heard at the same time as the TCC claim, as opposed to being dealt with on the papers. A combined hearing was listed on 6th June 2023. The Claimant filed amended particulars of claim, and the Defendant filed an amended defence. The crux of the issue of this case being that the Defendant contended that the PCR did not apply to the contract awarded, as it was a concession contract. The Defendant pushed back on the claim pursuant to the CCR on the basis that this was not actionable due to the contract value being below the minimum threshold for a concession contract.

The judgment is key in that it sets out a test for considering whether the PCR or CCR applies to an LA's outsourcing of enforcement of its debts. The significance of determining whether the PCR or CCR applies is that in the event Regulation 2 PCR applies, the contract will be above the threshold for public service contracts under Regulation 5 PCR. If the PCR applies, this will place obligations and remedies on the Defendant. The effect of the PCR applying and the Claimant successfully claiming under any of the grounds listed in paragraph 6 above is that the contract awarded to Bristow would be in violation of the standstill period (Regulation 95 PCR) as the contract was entered into after the TCC claim was issued.

On the other hand, if the contract is a concession contract and Regulation 3 CCR applies, the PCR would not apply as it would not be a 'public contract'. In the event that the Contract is a concession contact, as the contract value is below the £5.3m threshold for of the provisions of Regulation 9 CCR 16 to apply, the obligations and remedies set out in the CCR would not apply.

HHJ Tindal held "there is a real 'cliff-edge' between the PCR 15 and CCR 16 for contracts less than £5.3m in value. If the PCR 15 apply, there are strong statutory remedies. If not, as the CCR 16 do not, there are no statutory remedies." (Dukes Bailiffs Limited v Breckland Council [2023]EWHC 1569 (TCC) p.26, para 36.3.). HHJ Tindal sets out the following five-stage test for considering whether the contract was a service concession contract or if Regulation 2 PCR applies:

(1) What is the relevant contract?

The Claimant's case is that the relevant contract is a contract between Yorkshire Purchasing Organisation (the national LA procurement company) and the Claimant admitting it as a supplier onto the DPS 953 (DPS Contract). The Claimant claimed this on the grounds that they had tendered several times on the basis that the PCR applied – including tenders submitted through DPS 953. The Court however held that this does not mean the PCR does apply, especially considering the Claimant only made an assumption the PCR applied.

In contrast, the Defendants case is that the relevant contract was the final agreed contract granted to Bristow. This was a contract concluded in writing pursuant to Regulation 3 CCR. The contract described itself as being a "services concessions" contract which was not included within the Schedule 9 draft contact wording. The Court held that the Defendant amended Schedule 9 to "'label' the contract as a 'services concession' and this was the first time in the procurement process that had been explicitly said" and this 'label' was an "afterthought, if not a deliberate tactic" made by the Defendant given the proceedings (page 52, paragraph 72 of the judgment).

The Court determined that the relevant contract was the contract awarded to Bristow, which save for three changes (including the changes to schedule 9) was the same as the proposed draft contract (Proposed Contract) put forward with the original procurement documents. The changes made to the contract to finalise this after the issue of the TCC claim (Adjusted Contract) were ignored by the Court as they did not change the substance of the contract.

(2) Was the relevant contract 'for a pecuniary interest?

The Court held that the DPS was a contract to join a DPS pursuant to Regulation 34 PCR and not a public services contract. Whilst the DPS enables a supplier to bid for procurements, it does not oblige a supplier to perform any services. When looking at the Proposed Contract and Adjusted Contract, the court held that both were contracts for a pecuniary interest concluded in writing in the sense that both contracts imposed obligations to perform services.

HHJ Tindal held that "the question is whether the Defendant can show both the 'Adjusted Contract' and 'Proposed Contract' actually fell within the 'concessions exception' in Regulation 2 which is defined by reference to Reg.3 CCR 16" (page 55, para 79 of the judgment).

(3) Does the contract fall within Regulation 3(3)(a) CCR?

Here the Court considered Regulation 3(3)(a) CCR which provides that a services concession contract means a contact “for pecuniary interest concluded in writing by means of which one or more contracting authorities or utilities entrust the provision and the management of services (other than the execution of works) to one or more economic operators, the consideration of which consists either solely in the right to exploit the services that are the subject of the contract or in that right together with payment”. For both the Proposed Contract and the Adjusted Contract, the Court held that Regulation 3(3)(a) CCR applies as subject to the evaluation methodology, tenderers would lose marks on ‘Price’ if they quoted for such payment in their submission, and minor payments did not change the main subject-matter of the contract.

(4) Does the contract fall within Regulation 3(4)(a) read with Regulation 3(5) CCR?

Regulation 3(4)(a) CCR 16 provides that the award of the contract “shall involve the transfer to the concessionaire of an operating risk in exploiting the works or services encompassing demand or supply risk or both” subject to Regulation 3(5) CCR.

The Court defined an operational risk to be deemed as assumed if “there is ‘no guarantee’ of breaking even in ‘normal operating conditions’; but if even if there is, such risk can still be proven.” (p.49, para 64 of the judgment). To assess whether there is an operational risk, HHJ Tindal set out a two-stage test:

1. Is the contractor guaranteed under normal operating conditions to recover the costs of operating services under the contract? If not, the contractor is deemed to assume operating risk by Regulation 3(5) CCR and one can go on to Regulation 3(4)(b) CCR; and
2. Even if stage one is met and there is such a guarantee, it should be considered whether the contract involves a transfer of part of an operational demand or supply risk or both? If not, it is not a concession.

The Court held that the Claimant takes on a substantial operating risk as it does not recover a proportion of its fees for many of the debt enforcement cases sent by ARP. The contract in place with ARP only allowed for the Claimant to recover an appropriate level of fees overall as opposed to full recovery. There is therefore, ‘no guarantee’ of recovering costs The Defendant also cannot guarantee how many debt recovery cases there will be each year and this is known to fluctuate resulting in an operational risk of demand and or supply.

(5) Does the contract fall within Regulation 3(4)(b) CCR?

Regulation 3(4)(b) provides that “the part of the risk that is transferred to the concessionaire shall involve real exposure to the vagaries of the market such that any potential estimated loss incurred by [it] shall not be merely nominal or negligible”..

The Claimant claimed that as the incumbent provider it had run the contract with a healthy profit margin and the risk of any potential loss would be negligible therefore Regulation 3(4) CCR did not apply.

HHJ Tindal rejected this submission on the grounds that:

1. Regulation 3(4)(b) is not concerned with whether the incumbent provider was profitable, it is concerned with the level of exposure to risk of loss. There are a number of factors which are not guaranteed and indicate an exposure to risk of loss such as the number of debt recovery cases, the number of debtors who will refuse payment, and the recoverability of costs. Furthermore, the contracts only allow for a proportion of fees to be recovered which is also a risk to exposure of loss in the market.
2. The contract must transfer all or part of the operating risk which shall involve exposure to loss. The Proposed Contract and Adjusted Contract transfer all of the risk from ARP to the supplier as there is a risk as there is no guarantee of debt enforcement. The contracts require costs to be incurred by the supplier (by visiting homes pursuant to Liability Orders) but does not contain any provision to recover these costs.
3. The Judge referred to the case of JBW Group v MoJ [2012] EWCA Civ 8 and the criteria that was set out to analyse whether there was on balance a concession and found that all four limbs of the test were met.
4. If the Claimant, who established that they were efficient and profitable as the incumbent provider, was only able to recover a proportion of their fees then the average contractor would be even more exposed to a risk of loss under the contract.
5. The Claimant interpreted Regulation 3(4)(b) as referring to the profitability of the contract. Whilst this is incorrect as the question for Regulation 3(4)(b) is the potential loss for the concessionaire (i.e. Bristow), it is likely that Bristow will, in the current economic climate, suffer a loss.

In considering each of the above questions HHJ Tindal decided that the contract was a concession contract, and the PCR did not apply. The Judge held that the Defendant had shown the Claimant had no realistic prospect of success at trial - there were no reasonable

grounds of claim for the PCR claim and summary judgment should be granted. The Claimant's claim was therefore struck out and the Claimant had no right to any remedies under the PCR.

Issues in this case:

Claimant's claim for breach of contract:

The Claimant pleaded breach of contract on the grounds that the DPS stated that the PCR applied, and the call-off competition was run subject to the PCR. The Claimant also pleaded that the Claimant, and the Defendant, assumed the PCR applied and the Defendant deliberately labelled the contract as a concessions contract following the issue of the Claimant's claim to the TCC.

The Claimant's amended particulars of claim pleaded that the DPS contract was breached by a failure to apply the PCR to the tender, and/or that the procurement documents amounted to an express or implied contract between the Defendant and the tenderersto conduct the call-off competition "as if the PCR applied" (page 66, para.102 of the judgment). As a result, the Claimant's claim was that a failure to conduct the call-off competition in line with the PCR was a breach of contract.

As the Court determined the PCR does not apply to the contract, allowing a claim based on the fact that the procurement was conducted "as if" the PCR applied is difficult. HHJ Tindal held that this type of claim was not addressed within the summary judgment or strike out claim and would be a matter for trial.

Judicial review:

The Claimant had to show that on the merits of the particular grounds of challenge it had a realistic prospect of success to bring a successful JR claim. To establish whether the claim had realistic prospects of success the court analysed the "amenability" of the claim. In other words, the court reviewed whether the claim had a sufficient public law element to be amendable to JR.

The Court analysed the Claimant's JR claim based on the grounds of legitimate expectations, Ermakov, inadequate reasons, and apparent bias.

The Claimant claimed that the Defendant had moved away from the legitimate expectation that the PCR applied by arguing that the contract awarded was a concession contract. The Court held this argument was not amenable to JR as it sought to challenge a commercial contract decision. The challenge of a commercial contract merged public and private law elements of the Claimant's claim to make them indistinguishable from each other and, as a result, the court refused permission for JR on this ground for there not being a sufficient public law element.

The Ermakov principle relates to the Defendant only being able to defend the legality of the decision to award the contract to Bristow on the basis of the reasons which it relied upon in taking the decision. The Claimant claimed that the Defendant cannot reverse-engineer an explanation as to why the contract was awarded to Bristow after the decision was made by labelling it a "concession contract". The court held on this point that the PCR did not apply to the contract, but if it did, it was not breached and therefore permission to bring a claim on this ground was also refused.

The Claimant also claimed that the reasons provided by the Defendant for their scoring were inadequate. The court accepted that when linked to a permissible challenge inadequate reasons can be a ground for a JR claim, however, a claim to solely challenge scoring is unlikely to be amenable as it relates to a commercial decision on scoring as opposed to a public law element. The court also held that this ground was not arguable as the Defendant had cleared up any uncertainties in relation to the scoring through its correspondence with the Claimant. Finally, even if the Defendant had been clearer in its reasoning, this would have made no difference to the outcome of the procurement and therefore, permission was also refused on this ground.

The final ground for the Claimant's JR claim was that the decision to award the contract to Bristow was biased. This is on the basis that Ms H, an employee who worked for the Defendant was close to an employee, Mr J, who works for Bristow. Mr J was also a former employee of the Claimant. Ms H and Mr J had accompanied each other to award ceremonies, lunches and had commuted on the train together. Ms H was on a period of leave before returning to work and evaluating bids on behalf of the Defendant. The Claimant's claim is that the Defendant allowed Ms H to act as an evaluator although it was aware of the apparent bias and Ms H was also the lowest scoring evaluator given her connection to Mr J.

The Court referred to the case of R (Good Law Project) v Cabinet Office [2022] PTSR 933 and determined that there are three issued to be addressed in relation to granting permission to bring a JR claim on the grounds of apparent bias:

1. Firstly, was the contract award decision amenable to JR for apparent bias?
2. Secondly, if the contract is amenable to JR is it arguable on the merits? And
3. Thirdly, in any event, would there be a substantially different outcome to the procurement without Ms H being an evaluator? (page 77, para 82 of the judgment).

The Court held that apparent bias is a ground permissible for JR. However, the Court did not find that this case is arguable on the merits. The Court would have to determine that “the fair minded and informed observer would conclude that there was a real possibility the decision maker was biased” (page 79. Para 126 of the judgment). The Ccourt held that the connections between Ms H and Mr J were that of a professional friendship. Furthermore, Ms H scoring was not too different from the scores provided by other evaluators, in the event Ms H had been biased the disparities between scores would have been much more pronounced from the view of the fair-minded observer. Finally, even if the apparent bias argument was arguable this would not have altered the outcome and HHJ Tindal therefore refused permission on this ground too.

HHJ Tindal concluded that he refused permission for the JR claim as well as striking out the TCC claim and granting summary judgment on that point.

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