Neutral Citation Number: [2018] EWHC 2508 (TCC)

Case No: HT-2017-000233
CO/3864/2017

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/09/2018

Before :

MRS JUSTICE O'FARRELL

- -

Between :

OCEAN OUTDOOR UK LIMITED	**Claimant**
- and -	
THE LONDON BOROUGH OF HAMMERSMITH AND FULHAM	**Defendant**
- and –	
OUTDOOR PLUS LIMITED (in CO/3864/2017 only)	**Interested Party**

- -
- -

Philip Moser QC and Ewan West (instructed by **DLA Piper UK LLP**) for the **Claimant**
James Goudie QC and Joanne Clement (instructed by **Sharpe Pritchard LLP**) for the **Defendant**

Hearing dates: 9th May 2018, 10th May 2018, 14th May 2018, 16th May 2018

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Approved Judgment

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MRS JUSTICE O'FARRELL

Mrs Justice O'Farrell :

1. This is the combined trial of a Part 7 claim by the claimant ("Ocean") and its application for judicial review, challenging the decision by the defendant ("the Council"), to enter into arrangements with Outdoor Plus Limited ("Outdoor Plus") for the leasing of two plots of land and operation of two metal towers, with media screens and supportive software, one on each plot, in West London ("the Two Towers") following a tender exercise.

2. In 2010 the Council granted to Ocean a lease in respect of each plot of land for the purpose of advertising from the Two Towers ("the Original Leases"). In April 2017 the Council invited bids for a new leasing arrangement. Outdoor Plus submitted the highest bid and was the successful tenderer. In June 2017 the Council granted new leases in respect of the land to Outdoor Plus ("the New Leases").

3. Ocean's primary case is that the New Leases transaction is properly to be classified as a services concession to which the provisions of the Concession Contracts Regulations 2016 ("the CCR 2016") apply. Further, there was sufficient potential cross-border interest in the procurement for general EU principles to apply, such as transparency, non-discrimination, equality, fairness and proportionality. The Council failed to comply with the CCR 2016 and was in breach of general EU principles arising from the Treaty on the Functioning of the European Union ("TFEU") in its conduct of the tender exercise for the New Leases.

4. Ocean's alternative case is that the award of the New Leases is susceptible to judicial review in relation to the Council's decisions: (i) to enter into arrangements with Outdoor Plus for the leasing and operation of the Two Towers; and (ii) to execute the New Leases with Outdoor Plus; on the grounds of procedural unfairness and manifest error.

5. The Council's case is that the CCR 2016 do not apply to the tender exercise for the New Leases. The New Leases are not service concession contracts as defined in the CCR 2016; they are land transactions. The Council was obliged to obtain the best consideration reasonably obtainable in respect of any land disposal pursuant to section 123 of the Local Government Act 1972 but was not obliged to comply with the CCR 2016 because such land transactions are excluded from the regulations. Further, they are not governed by the general principles of EU law because they concern internal matters and there is no cross-border interest.

6. The Council's position is that Ocean should not be granted permission for judicial review because the challenge has been made too late, there are no reasonably arguable grounds and any alleged unlawful conduct is unlikely to have made any material difference to the outcome. The Council engaged independent consultants to carry out the tender exercise. The procedure was fair. The Council acted properly in accepting the highest bid.

7. During closing submissions, Ocean indicated that it wished to amend the statement of facts and grounds in its judicial review claim to allege actual bias on the part of the Council. The draft statement was produced on 18 May 2018. The application to amend is opposed by the Council, as set out in its further written submissions on 21 May 2018.

Factual background

8. Ocean is a company specialising in the provision of outdoor advertising and has pioneered the use of electronic media for this purpose.

9. The Council is the freehold owner of two plots of land to the north and south of the Hammersmith Flyover, at a major entry point to central London on the A4.

10. In about 2009 Ocean constructed the Two Towers to support digital advertising screens and their operating software, one on each plot of land.

11. On 11 February 2010 the Council granted to Ocean a lease in respect of each plot of land ("the Original Leases"). The permitted use under the Original Leases was the installation, maintenance and operation of the Two Towers for the display of electronic advertisements. Under each lease Ocean covenanted to pay a turnover fee, calculated as 85% of the gross profit derived from the sale of advertising. Gross profit was calculated as the aggregate of all advertising revenues subject to deductions for fees, commissions, costs and expenses.

12. The Original Leases each contained a good faith provision at clause 10.8:

> "The Parties shall act in good faith in relation to each other in order to maximise Gross Turnover. The Tenant shall use all reasonable endeavours to market and promote the Tower so as to maximise the Gross Turnover. Save where such marketing or promotion reflects usual advertising or marketing practice the Tower shall not be marketed, promoted or let at a discount in order to market, promote or otherwise sell space at other advertising sites operated by the Tenant."

13. The Original Leases were for a term of 6 years from 21 December 2009. On 20 December 2012 the parties executed supplemental leases under which the Council granted a further term, expiring on 20 June 2017, on the same terms as set out in the Original Leases.

14. By letter dated 23 October 2013, Ocean wrote to the Council in the following terms:

> "Please take this as formal notice that we only approve disclosure of contract details (currently 3 locations known as West Cross Route, P10 and Two Towers West) to contract managers at LBH&F that are known to us.
>
> The details are commercially sensitive and require a high level of control with regards as to who has access to them.
>
> For the avoidance of doubt we do not authorise disclosure of the agreements without our prior written approval."

15. On 14 March 2014, following an EU procurement exercise, the Council entered into a framework agreement with Wildstone Property Limited, now Wildstone Consulting Media Limited ("Wildstone") for the provision of professional property services in

respect of Lot 7, advertising hoardings, on a call-off basis. The objectives were stated as follows:

> "The Council's advertising hoarding sites sit in their own property portfolio – the Advertising Hoardings Portfolio. The Council wishes to expand this portfolio by securing new sites in the borough. To help it achieve this, the Council wishes to appoint a contractor specialising in – and with expertise in – advertising and media transactions to fully explore the opportunity to identify additional sites, negotiating with the Council's Planning Department to obtain planning permission for such sites and when obtained, to market the site. In addition, the Contractor will carry out re-lettings and rent review and lease renewals of existing hoarding sites in the portfolio."

16. Clause 19 of the framework agreement contained a confidentiality agreement, including an obligation on each party not to disclose the other party's confidential information without the owner's prior written consent.

17. The fee structure under the agreement provided for Wildstone to receive incentive-based remuneration, including:

    i) a percentage of the increase in rent achieved in respect of rent reviews up to 9.8% for increases over £50,001;

    ii) a percentage of the initial annual rent in respect of lease renewals of 9.8% for rental income over £250,001;

    iii) a fee based on the first year's rental due in respect of new lettings of existing sites that became vacant of 9.8% for rental income over £250,001;

    iv) a scale fee based on the first year's rental due in respect of the marketing of new sites up to 14.8% for rental income over £250,001.

    The fee that Wildstone would earn for a lease renewal would be the same as the fee earned for a new letting of an existing site.

18. In 2015 Izharul Haq, a valuer employed by the Council, expressed concerns that the income from the Two Towers had dropped significantly. Between 2011 and 2014 the rental income was more than £1.3 million per annum but in 2015 it dropped to £844,030. Ocean explained that continued road closures and obstruction of the screens by trees had adversely affected advertising revenues.

19. In January 2016 Wildstone produced a paper, identifying advertising opportunities for the Council. Included was a potential redevelopment of the Two Towers sites. Wildstone stated that the estimated rental value of the sites in 2016-2017 was between £1 million and £1.4 million and asked for the Council to provide details of the existing agreement and any termination provisions.

20. On 6 February 2016 Stephen Joseph, Chief Operating Officer of Ocean, sent to the Council a proposal for discussion in respect of renewal of the leases. The proposal

included a minimum guaranteed rental income of £620,000 in 2016, rising to £750,000 in 2020, for static visual displays. Higher guaranteed rental income figures were shown for moving displays, which were subject to Ocean obtaining planning permission.

21. That offer was considered to be too low by the Council and it was rejected. The Council decided to instruct Wildstone to act as its agent in respect of the negotiations.

22. On 4 March 2016 Mr Haq invited Ocean to put forward a revised offer and stated:

> "If you do put forward a new figure then I would like to run the numbers past our Councillors and external consultants before we speak".

23. On 6 March 2016 Michael Hainge, the Commercial Director of the Council, circulated an email to Nigel Brown, Head of Asset Strategy and Portfolio Management at the Council, and Maureen McDonald-Khan, Director of Building and Property Management at the Council, stating:

> "I am leading on all advertising for H&F in terms of strategy and commercials including sign off or approach to members on any deals.
>
> Nigel you will work with me in order to achieve a significant and rapid increase in our advertising revenue but you continue to report to Maureen for line management and other purposes.
>
> We will use Wildstone as our agents to advise and negotiate within the scope of the existing contract. The only exception is where Wildstone have a clear conflict of interest (eg with TfL). In these circumstances we will only use them if the conflict can be managed to our satisfaction.
>
> We will discuss Wildstone's advice and performance and, where decisions are required, I will take your advice before I make a decision or recommendations are made to members.
>
> Neither Izhar or anyone else is to negotiate with any party regardless of the reasons unless I agree particular[ly] in respect of Ocean or JCD..."

24. On 8 March 2016 Mr Joseph sent an email to Mr Haq, stating:

> "We'd suggest that you meet internally within H&F and agree a position which you, or whoever has the authority to do so, can negotiate an agreement with us in a face-to-face meeting...
>
> The current deal gives 85% of all profits to H&F and of course the risk profile therefore reflects that great years are awarded above original expectations and normal years that follow will reflect a reduction. Moving towards fixed rent is removing all H&F exposure to risk and therefore will naturally require a shift in expectations. We are therefore at a loss to understand what

> you believe is fair and equitable for us in accepting all future risk on these assets. You will be well aware of the changing landscape with competitive locations developed around the Towers over the last 3 years. This only serves to increase the risk that we would be adopting.
>
> Finally, I note you mention external consultants.
>
> We deal with external consultants across all areas of the business, which includes operating the two largest borough councils outside of London, namely Birmingham and Manchester city councils. In all cases we have some base criteria under which we operate and that is for any external consultant to be privy to commercially sensitive information they need to be, in our opinion, neutral. Being involved in the industry as a Media Owner, overtly aligned to any one Media Owner or within its operations display the activities of a Media Owner by selling outdoor advertising would mean the consultant was not neutral. In most scenarios this is almost never the case however H&F need to be conscious of this.
>
> It is ironic that a consultant closely associated with creating competition for the Towers could be deemed worthy as an adviser. We are surprised no one has made an official complaint regarding the independence of certain consultants. As per our letter dated 23 October 2013 we do not authorise disclosure of any of our contractual related negotiations to any third party."

25. On 29 March 2016 James Nelson-Sullivan of Wildstone advised Nigel Brown of the Council that in his view the forecast income under the Original Leases of £850,000 for 2016 was below the market value and should be above £1.25 million.

26. By email dated 6 April 2016 Tim Bleakley, CEO of Ocean, invited Mr Hainge to an introductory meeting to discuss the Two Towers. On the same date, Mr Hainge responded:

> "We will be approaching the wider market place with opportunities that will include the re-development of the Two Towers West, with the potential for full motion, over the coming months. It is likely that we will be using our agents, Wildstone, to do this with our close involvement.
>
> I very much hope that you will be one of the parties who is interested in this and other opportunities.
>
> Thanks for the offer of a meeting. However, at this point, while we are still working on a review of our existing estate and new development sites, I think it would be a little premature. When we are in a position to engage with the market then Wildstone and I will be in touch."

27. By letter dated 7 April 2016 Mr Bleakley replied, raising a number of commercial issues and repeating his request for a meeting. He also stated:

> "... As regards any tender process you decide to implement I can reassure you that Ocean would fully participate in any OJ EU/Public Procurement law compliant tender process. As part of this process we'd expect, as indeed would any tender respondent, that any advisers you worked with would be independent and without a conflict of interest. We look forward to any tender in due course..."

28. Mr Hainge circulated that letter within the Council and stated:

> "... the letter from them from October 2013, I assume they cannot require us to restrict who we share the contract details with unless it is set out in the original contract?"

29. On 22 April 2016 Jonathan Chandler, CEO of Wildstone, sent the following internal message to Damian Cox and Patrick Fisher:

> "Had a mtg with commercial director at H&F this morning.
>
> He has a mtg with Tim Bleakley in next few wks.
>
> I gave suitable perspective to this and offered to provide him with a crib sheet.
>
> Let's chat through.
>
> Good thing is that H&F have no intention of doing an off market deal with Ocean."

30. Mr Chandler duly prepared a crib sheet for Mr Hainge for use in the forthcoming meeting with Mr Bleakley:

> "
>
> - The site is one of the best in the UK...
> - Current income is profit share only which is not the industry norm.
> - Ocean sell a large number of sites often as a pack and sales revenue will be shared equally between a number of sites rather than allocated proportionately based on the strength of each location. This means the Towers will be directly subsidising lower quality locations elsewhere at the cost of revenue share payable to the Council.
> - It is understood income has dropped off on the site and forecast for this year is c£800k. Ocean's accounts show year-on-year growth and this is still one of their best sites

> so this income fall off could be challenged. It would be interesting to see the annual sum payable to the Council over term relative to the performance of other comparable locations.
>
> - It is a key site for Ocean but would also be a key site for many other media owners.
>
> - The Council have exposure to full market volatility by having a rev share only deal. A min. guarantee with profit share top-up allows greater budgeting certainty and less exposure to volatility for the Council.
>
> - A full redesign and relaunch of the site would rejuvenate its position in the market and deliver maximum income potential...
>
> - This would not preclude Ocean from keeping the site and they will be in the strongest position as they know the sales performance better than any other.
>
> In summary in every scenario it is imperative that the Council test the market on this site rather than agreeing an off market deal. Ocean can still regain the site but it will ensure the Council can have confidence that income is being maximised..."

31. Mr Hainge thanked Mr Chandler for the crib sheet, stating:

> "The need to drive a really fantastic deal on this site is a key H&F imperative and I am sure we will be able to [do] that together, following the approach you have set out."

32. Following a meeting between Ocean and the Council, on 27 May 2016 Mr Bleakly sent an email to Mr Hainge, setting out an offer of terms for the continued operation of the Two Towers. The offer was expressed as being: "Strictly Private and Confidential – For Your Eyes Only". The terms of the offer included:

> "1. Immediate payment of £1.8m, comprising an early payment of £600,000 for the second half of 2016 and £1,200,000 advance payment for 2017 profit share if full motion is permitted.
>
> 2. Immediate payment of £1.5m, comprising an early payment of £500,000 for the second half of 2016 and £1,000,000 advance payment for 2017 profit share. No change to current planning status.
>
> 3. Introduction of a quarterly minimum guarantee providing a floor to your income thereafter and improved cash flow timings.
>
> 4. The economics remain as 85% share in your favour so there is no cap on income. The depreciation deduction on the profit share has ceased so there is a further uplift provided attached.

> 5. £500,000 of media value per year to use across Ocean locations in London or nationwide...
>
> The offers above, subject to board approval, are for an extension of 4.5 years on the Towers with a performance break in your favour after 2.5 years..."

The attached schedule showed the profit share based on projected revenues for static and full motion displays. The projected profits, assuming a static display, were forecast to produce an income for the Council of £1.4 million in 2016, rising to £1.8 million in 2021. The minimum guaranteed income for the Council, assuming a static display, was £500,000 in 2016, £1 million in 2017 and £850,000 for each of years 2018 to 2021.

33. The Council arranged a meeting with Wildstone on 7 June 2016 to discuss the marketing of the Two Towers. The day before the meeting Mr Hainge sent the following email to Mr Haq and Mr Brown:

> "We've had an interesting proposal from Ocean which I will be considering with Cllr Coleman tomorrow prior to the meeting. Notwithstanding the sensitivities of Ocean / Wildstone I'd like to bring copies to the meeting for us all to discuss. I will raise it as part of your item 3. But no need to identify on the agenda."

34. On 7 June 2016 the following exchange of emails occurred between Mr Hainge and Mr Chandler:

> Mr Hainge:
>
> "Are you coming over this afternoon by any chance? I have received a proposal and it would be good to discuss it. If not today then soon?"
>
> Mr Chandler:
>
> "Yes I am over this afternoon. 4 til 5 I think.
>
> Can catch up after if that suits?"
>
> Mr Hainge:
>
> "I've got a conference call and then a quick conversation at 5pm but if you can hang around until 5.30pm we can chat then? I will give you a copy of the proposal for you to peruse at the earlier meeting."
>
> Mr Chandler:
>
> "Great. 5.30pm suits.

> Let me know where you want to meet. Our earlier meeting is at Meeting Room 1, 6th Floor, LBHF but I can meet off site if preferred."
>
> Mr Hainge:
>
> "Thanks – will do.
>
> See you at 4pm."

35. At the meeting on 7 June 2016 the Council instructed Wildstone to start work on the tender process for the Two Towers site and they were asked to provide an appraisal of the likely rental value of the sites.

36. Later that day, Mr Hainge met with Mr Chandler and Damian Cox of Wildstone in the Hampshire Hog public house to discuss Ocean's proposal.

37. No concluded agreement was reached between Ocean and the Council.

38. On 18 July 2016 Mr Chandler sent Wildstone's appraisal report to the Council. The report stated as follows:

> "2.4 The existing agreement with Ocean Outdoor is due to expire in June 2017. The contract provides a revenue share based payment structure to the Council and it has been shown that the performance of the site, based on the amount paid to the Council, has been dropping off on an annual basis over recent years.
>
> ...
>
> 5.2 It is assumed that the Council's objectives are as follows:
>
> // Maximise rent
>
> // Prioritise guaranteed rent over profit share
>
> // Promote the longevity of income
>
> // Safeguard the Council's operational obligations.
>
> 5.4 The options to the Council are as follows:
>
> // Renew with Ocean based on existing design
>
> // Retender with existing design
>
> // Renew with Ocean based on new design
>
> // Retender based on new design.
>
> ..."

39. The report identified a number of comparable sites and summarised what were considered to be the relevant factors:

    i) Chiswick Towers – rent of £1.3m pa plus profit share, 10 year term;

    ii) Piccadilly Underpass – rent of £2.67m per annum (guaranteed plus index linked reviews), 10 year term;

    iii) The One, Piccadilly Circus – rent of £2.65m per annum plus net revenue share, 3 year term.

40. The report considered the Ocean proposal and made recommendations:

> "7.1 Ocean have sought to agree an off-market renewal of their agreement and have proposed an increase in the minimum guarantee and forecast an improvement in gross sales income to facilitate an increase in profit share payable.
>
> 7.2 The total forecast rent payable under the proposed renewal terms from Ocean is £1.6m pa rising to £2.06m pa with 50% payable as a minimum guarantee and the remainder payable in the form of a 85:15 profit share split in the Council's favour. This assumes full motion consent. The forecasts with static images (as existing) is approximately 10% below this. The figures above are inclusive of the profit share.
>
> 7.3 This reflects a substantial improvement on revenue share forecast for this year which is understood to be c £800k. It has not been made clear from the information provided how Ocean proposed to increase sales on the site such that the profit share can increase by this amount.
>
> ...
>
> 8.5 On the basis of the above comparables, and making concessions in consideration of the nuances of each, it is estimated that the Two Towers, if tendered in today's market with full motion consent, would attract a rent in the region £2-2.65m per annum on a fixed rent plus profit share basis.
>
> ...
>
> 9.1 It should be noted that Ocean were invited to bid through a competitive process for all of the above-mentioned comparables and were unable to make offers at the same level as the successful bidders. This perhaps reflects the fact that each of the sites provided a unique factor that delivered a strategic advantage to the successful party and

> they were therefore able to pay a greater sum than their rivals. This is likely to also be the case for the Two Towers and a number of media owners are expected to show a very strong appetite for the advertising rights.
>
> 9.2 Without tendering the site the council cannot be certain what another party may be able to pay, however, based on other more recent tenders there are media owners that are currently able to pay bigger rents than Ocean elsewhere. On this basis it is recommended that the site is tendered and if Ocean are successful then the Council can be reassured that they have undergone an appropriate procurement process to reveal the current best value. However if an off-market renewal is done then the true market value will be unknown and the Council may be left vulnerable to challenge.
>
> ...
>
> 9.5 The tender should be structured such that parties are required to bid with an emphasis on fixed rents not profit shares in order to provide the council with greater certainty of future income and less exposure to market fluctuations. Retaining a small profit share element would allow the council to benefit from any super-profit achieved."

41. On 1 August 2016 Wildstone advised that the rental value of the sites with the existing static displays would be £1.6 million to £2.15 million.

42. The Council met with Ocean on 2 August 2016 and stated that it wanted to move to a risk free fixed guarantee model, with a term of 3, 5 or 10 years. Mr Hainge told Ocean that it was expecting to receive in excess of £2 million per annum in rental for the sites.

43. On 3 August 2016 Ocean made an improved offer for renewal of the leases and sought to dissuade the Council from embarking on a tender process. It also suggested that the Council might consider a sale of the sites to Ocean. On 30 September 2016 the Council confirmed that it did not accept Ocean's proposals and would be going out to tender.

44. On 24 April 2017, the Council sent to Ocean and other interested bidders the tender documentation, comprising:

    i) a document entitled: "The Towers, London – Invitation to Tender: Outdoor Advertising Rights" ("the ITT");

    ii) the Tender Bid Form;

    iii) the Heads of Terms;

    iv) a planning application letter, stating that an application would be made for planning consent to display full motion images on the Two Towers; and

v) a marketing brochure.

The ITT stated that Wildstone had been appointed by the Council to market the Two Towers.

45. The ITT indicated that bidders should bid on three alternative scenarios: a three-year term, five-year term and ten-year term. There would be a separate lease for each tower. Refurbishment of the site would be funded by the successful tenderer. Offers should take the form of guaranteed fixed annual payments, paid quarterly in advance. Tenderers were also required to provide an estimated amount of capital expenditure and method of amortisation.

46. The ITT stated:

> "Our client will award the advertising rights subject to completion of appropriate Leases for a term[s] of 3/5/10 years for each tower. The successful bidder will be required to complete the Leases within a time period to be specified following the tender award. The Leases shall be in our client's standard form including rent reviews. The Heads of Terms are attached to this tender."

47. The Heads of Terms provided that the use of the Two Towers was:

> "for the display of advertising content in accordance with the planning consent and the Landlord's advertising content policy which may [change] from time to time."

48. The Tender Bid Form stated:

> "The London Borough of Hammersmith and Fulham will award the exclusive rights at the Towers, London, subject to completion of a Lease for a term of 3/5/10 years (subject to the rent being index-linked annually to the Retail Price Index (RPI) plus 1% from the base date being the Lease Commencement Date. The Rent to be the higher of the passing Rent or the index-linked event...
>
> Premium offered for the award of the advertising leases [figure]. The premium rent (optional) is payable on completion of the leases."

49. The Council did not publish any contract notice in the Official Journal of the European Union ("OJEU"). Emails and brochures were sent to companies thought to be interested in the advertising opportunity. An advertisement was placed in the trade journal, "Marketing Week".

50. On 24 May 2017 Ocean submitted its offer for the new leases. Ocean's tender was:

i) £500,000 per annum over a 3-year lease;

ii) an escalating rent, starting at £725,000 per annum and rising to £825,000 per annum over a 5-year lease;

iii) £600,000 per annum over a 10-year lease.

Further, Ocean offered to pay a premium for the award of the advertising leases, namely, upfront payment of the first 18 months' rent.

51. Three other bids were submitted. Outdoor Plus submitted an offer of £1.7m per annum for a five or ten-year lease.

52. On 1 June 2017 Wildstone produced a tender report for the Council, recommending that it should accept the tender from Outdoor Plus, as the highest bidder.

53. By letter dated 7 June 2017, the Council notified Ocean that it required vacant possession of the Two Towers on expiry of the term of the Original Leases on 20 June 2017 and stated:

> "As you are aware the Council, via its consultants Wildstone, has remarketed the site. A decision on the preferred bidder has yet to be made."

54. On 7 June 2017 the Council's officers produced a briefing note on the tender outcome:

> "The Council wanted to maximise its income but look at its risk profile as income flows have significantly dropped away. Soft market testing was undertaken by our consultant to test if a letting based on a rent basis (rather than pure profit rent) was favourable in the market. This provided a positive response...
>
> The highest bid received was from Outdoor Plus.
>
> Outdoor Plus have an excellent track record in the digital advertising sector...
>
> The Council will receive a minimum of £1.7 million per annum from 1st July 2017 (assuming lease completes) with staged annual increase plus a market review in year 5.
>
> The increase in annual rental income compared to the outturn for 2016/2017 is over £1.0 million uplift...
>
> It is proposed that the council proceeds with granting Outdoor Plus a 10-year lease and to ensure the Director of Property and Building Management, as proper officer within the Scheme of Delegation, approves the final property documentation before legal completion..."

55. On 13 June 2017, Wildstone informed Ocean that their bid had not been successful.

56. On 14 June 2017 the Council's solicitors sent a letter to Ocean requiring it to deliver up vacant possession of the land and the Two Towers.

57. On 16 June 2017 Ocean's solicitors wrote to the Council's solicitors, alleging deficiencies in the procurement process, seeking further information and requesting that the Council should not enter into the New Leases pending the provision of a substantive response.

58. In response to that challenge, by letter dated 22 June 2017, the Council's solicitors stated:

> "Our client is prepared to say that the successful bidder's proposal for the annual rent for both leases was the highest bid and was substantially in excess of the bid put forward by your client. The council has achieved best value by selecting the highest bidder for the sites and has carried out full due diligence on this bidder."

59. On 30 June 2017 the New Leases were executed. The New Leases were in identical terms for the North Tower and South Tower. Each lease granted to Outdoor Plus, as the successful tenderer, a lease for a period of 10 years from 30 June 2017 at an annual rent of £850,000 payable quarterly in advance, a total annual rent of £1.7 million.

60. On 21 July 2017 Ocean was informed that the Council had concluded the New Leases.

61. On 28 July 2017 Ocean's solicitors sent a letter before action and request for pre-action disclosure to the Council.

62. On 3 August 2017 the Council responded, enclosing a copy of the new lease for the South Tower. On 15 August 2017 the Council sent Ocean a copy of the new lease for the North Tower.

Proceedings

63. On 18 August 2017 Ocean issued the claim form in the Part 7 proceedings, claiming a declaration of ineffectiveness, penalty and damages by reason of the Council's failure to comply with the CCR 2016 and/or the Concessions Directive and/or general principles of EU law.

64. On 22 August 2017 Ocean commenced judicial review proceedings in the Administrative Court, seeking permission to challenge the procurement exercise for the New Leases. On 28 September 2017 that claim was transferred to the Technology and Construction Court.

65. On 22 December 2017 Mr Justice Fraser ordered that a rolled-up hearing for permission, and if permission were granted, judicial review, should be heard at the same time as the Part 7 trial, limited to issues of liability (including any issues of sufficiently serious breach) only, and such consequential orders as the Court might make based on its findings as to liability.

The Concessions Directive and the CCR 2016

66. The CCR 2016 implements Directive 2014/23/EU ("the Concessions Directive"). It is common ground that there are no material differences or any conflict between the Concessions Directive and the CCR 2016 for the purpose of these proceedings.

67. Recital 1 of the Concessions Directive sets out the purpose of the rules:

> "The absence of clear rules at Union level governing the award of concession contracts gives rise to legal uncertainty and to obstacles to the free provision of services and causes distortions in the functioning of the internal market. As a result, economic operators, in particular small and medium-sized enterprises (SMEs), are being deprived of their rights within the internal market and miss out on important business opportunities, while public authorities may not find the best use of public money so that Union citizens benefit from quality services at best prices. An adequate, balanced and flexible legal framework for the award of concessions would ensure effective and non-discriminatory access to the market to all Union economic operators and legal certainty, favouring public investments in infrastructure and strategic services to the citizen. Such a legal framework would also afford greater legal certainty to economic operators and could be a basis for and means of further opening up international public procurement markets and boosting world trade. Particular importance should be given to improving the access opportunities of SMEs throughout the Union concession markets."

68. Recital 8 of the Concessions Directive summarises the intent behind the rules:

> "For concessions equal to or above a certain value, it is appropriate to provide for a minimum coordination of national procedures for the award of such contracts based on the principles of the TFEU so as to guarantee the opening-up of concessions to competition and adequate legal certainty. Those coordinating provisions should not go beyond what is necessary in order to achieve the aforementioned objectives and to ensure a certain degree of flexibility. Member States should be allowed to complete and develop further those provisions if they find it appropriate, in particular to better ensure compliance with the principles set out above."

69. Recital 11 of the Concessions Directive explains the nature of concession contracts:

> "Concessions are contracts for pecuniary interest by means of which one or more contracting authorities or contracting entities entrusts the execution of works, or the provision and the management of services, to one or more economic operators. The object of such contracts is the procurement of works or services by means of a concession, the consideration of which consists in the right to exploit the works or services or in that right together with payment. Such contracts may, but do not necessarily involve a transfer of ownership to contracting authorities or contracting entities, but contracting authorities or contracting entities always obtain the benefits of the works or services in question."

70. Recital 14 of the Directive explains the requirement that service concessions impose legally enforceable obligations in respect of the services to be provided:

> "In addition, certain Member State acts such as authorisations or licences, whereby the Member State or a public authority thereof establishes the conditions for the exercise of an economic activity, including a condition to carry out a given operation, granted, normally, on request of the economic operator and not the initiative of the contracting authority or the contracting entity and where the economic operator remains free to withdraw from the provision of works or services should not qualify as concessions. ... In contrast to those Member State acts, concession contracts provide for mutually binding obligations where the execution of the works or services are subject to specific requirements defined by the contracting authority or the contracting entity, which are legally enforceable."

71. Recital 15 of the Directive provides explanation for the land transaction exemption:

> "In addition, certain agreements having as their object the right of an economic operator to exploit certain public domains or resources under private or public law, such as land or any public property, in particular in the maritime, inland ports or airports sector, whereby the State or contracting authority or contracting entity establishes only general conditions for their use without procuring specific works or services, should not qualify as concessions within the meaning of this Directive. This is normally the case with public domain or land lease contracts which generally contain terms concerning entry into possession by the tenant, the use to which the property is to be put, the obligations of the landlord and tenant regarding the maintenances of the property, the durations of the lease and the giving up of possession to the landlord, the rent and the incidental charges to be paid by the tenant."

72. Regulation 3 of the CCR 2016 defines a concession contract as follows:

> "(1) In these Regulations, "concession contract" means a works concession contract or a services concession contract within the meaning of this regulation.
>
> ...
>
> (3) A "service concession contract" means a contract –
>
> (a) 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; and

(b) that meets the requirements of paragraph (4).

(4) The requirements are –

(a) 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; and

(b) the part of the risk transferred to the concessionaire shall involve real exposure to the vagaries of the market, such that any potential estimated loss incurred by the concessionaire shall not be merely nominal or negligible.

(5) For the purposes of paragraph (4)(a), the concessionaire shall be deemed to assume operating risk where, under normal operating conditions, it is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services which are the subject-matter of the concession contract."

73. Regulation 7 of the CCR 2016 states:

"(1) These Regulations establish rules on the procedures for procurement by contracting authorities and utilities by means of a concession contract –

(a) the value of which is estimated to be not less than the threshold mentioned in regulation 9; and

(b) which is not excluded from the scope of these Regulations by any other provision of this Part.

(2) These Regulations apply to the award of works concession contracts or services concession contracts to economic operators by –

(a) contracting authorities ..."

It is not in dispute that the value of the leases exceeds the threshold value referred to in regulation 9.

74. Regulation 8 contains requirements that:

"(1) Contracting authorities ... shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

> (2) The design of the concession contract award procedure, including the estimate of the value, shall not be made with the intention of excluding it from the scope of these Regulations or of unduly favouring or disadvantaging certain economic operators or certain works, supplies or services.
>
> (3) During the concession contract award procedure, contracting authorities ... shall not provide information in a discriminatory manner which may give some candidates or tenderers an advantage over others.
>
> (4) Contracting authorities ... shall aim to ensure the transparency of the concession contract award procedure and of the performance of the contract, while complying with regulation 28."

75. Regulation 10 sets out exclusions from the provisions of the CCR 2016, including the land transaction exemption:

> "(11) These Regulations do not apply to services concession contracts for –
>
> (a) 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 ..."

76. Regulation 28(1) states:

> "A contracting authority shall not disclose information which has been forwarded to it by an economic operator and designated by that economic operator as confidential, including, but not limited to, technical or trade secrets and the confidential aspects of tenders."

77. Regulations 31, 32 and 33 set out the requirements to publish a concession notice and, following the award of the contract, a concession award notice.

78. Regulation 35 contains provisions regarding conflicts of interest:

> "(1) Contracting authorities ... shall take appropriate measures ... to effectively prevent, identify and remedy conflicts of interest arising in the conduct of concession contract award procedures, so as to avoid any distortion of competition and to ensure the transparency of the award procedure and the equal treatment of all candidates and tenderers.
>
> (2) The measures adopted in relation to conflicts of interest shall not go beyond what is strictly necessary to prevent

> a potential conflict of interest or eliminate a conflict of interest that has been identified.
>
> (3) For the purpose of this regulation, the concept of conflicts of interest shall at least cover any situation where relevant staff members have directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the concession award procedure.
>
> (4) In paragraph (3), "relevant staff members" means staff members of the contracting authority ... who are involved in the conduct of the concession contract award procedure or may influence the outcome of that procedure."

79. Regulations 37 and 38 contain procedural requirements in relation to the selection of and qualitative assessment of candidates, award criteria and notices of decisions.

80. Regulation 40 requires the contracting authorities to inform each candidate as soon as possible of decisions reached concerning the award of a concession contract, including the name of the successful tenderer and the grounds for any decision to reject a tender. On request from the party concerned, the contracting authority must within 15 days of receipt of a request, inform any tenderers of the characteristics and relative advantages of the successful tender.

81. Regulation 41 stipulates that concession contracts must be awarded on the basis of objective criteria which comply with the principles set out in regulation 8, and which ensure that tenders are assessed in conditions of effective competition wo as to identify an overall economic advantage for the contract authority.

82. Regulation 47 requires the contracting authority to notify the tenderers of its decision to award a concession contract.

> "... a contracting authority or utility shall send to each ... tenderer a notice communicating its decision to award the concession contract.
>
> *Content of notices*
>
> (2) Where it is to be sent to a tenderer, the notice referred to in paragraph (1) shall include—
>
> (a) the criteria for the award of the concession contract;
>
> (b) the reasons for the decision, including the characteristics and relative advantages of the successful tender, the score (if any) obtained by—
>
> (i) the tenderer which is to receive the notice, and

(ii) the tenderer to be awarded the concession contract ...;

(c) the name of the tenderer to be awarded the concession contract; and

(d) a precise statement of either—

(i) when, in accordance with regulation 48, the standstill period is expected to end and, if relevant, how the timing of its ending might be affected by any and, if so what, contingencies, or

(ii) the date before which the contracting authority ... will not, in conformity with regulation 48, enter into the concession contract..."

83. Regulation 48(1) provides that the contracting authority must not enter into the concession contract before the end of the relevant standstill period. The standstill period is at the end of the 10th day after such notice is given, if notice is given by electronic means, or, if sent by other means, the earlier of the end of the 15th day after such notice or the end of the 10th day after the date on which the last of the economic operators receives the notice.

84. Regulation 50(1) requires the Council to comply with the CCR 2016 and any enforceable EU obligation in the field of procurement in respect of a concession contract falling within the scope of the CCR 2016.

The issues

85. The parties have agreed a list of issues, which is attached to this judgment with summary answers to each question. The issues can be summarised as follows:

i) Do the CCR 2016 apply to the tender procedure for the New Leases?

ii) Was the award of the New Leases governed by the general principles of EU Law?

iii) Was the Council in breach of the CCR 2016 or any general EU obligations in respect of the tender procedure adopted for the New Leases?

iv) If the Council was in breach of its obligations, to what remedies, if any, is Ocean entitled?

v) Should Ocean be given permission to seek judicial review of the decisions to enter into the leasing arrangements with Outdoor Plus and/or to execute the New Leases?

vi) If permission is granted, were the decisions (a) to enter into the New Leases and/or (b) to execute the New Leases unlawful?

vii) If either or both of the decisions were unlawful, what, if any remedy should be granted?

Does the CCR 2016 apply to the tender procedure for the New Leases?

86. Ocean's case is that the transaction for the New Leases was a concession contract within the meaning of the CCR 2016. Mr Moser QC, on behalf of Ocean, submits that the New Leases satisfy the requirements for a services concession contract as defined in the CCR 2016. Under the New Leases, the Council has entrusted the provision and management of advertising services to Outdoor Plus. The New Leases are contracts for pecuniary interest. Outdoor Plus is obliged to use reasonable endeavours to generate revenue from the advertising concession. The Council is not required to make any payment to the economic operator for the services. The consideration that the Council provides under the New Leases consists of the right to exploit the provision of advertising services to third parties, for which services it charges. The commercial risk of providing the advertising services is transferred to the economic operator. The fixed rent is payable to the Council regardless of the income derived from advertising or the costs of maintaining the site and providing the services. There is a real exposure to the vagaries of the market. The risk is more than nominal or negligible.

87. Mr Moser submits that the New Leases do not fall within the land transaction exemption. The essence of the New Leases is that the lessee is required to earn advertising revenue from which rent is payable to the Council. That renders the transaction one for advertising services, as opposed to a transaction for land. The Two Towers have no value save for their potential to generate advertising revenue. Properly construed, the New Leases entrust to the lessee the provision and management of advertising services, the consideration for which comprises the lessee's right to exploit those services.

88. The Council's position is that the CCR 2016 do not apply to the tender exercise for the New Leases. Mr Goudie QC submits that the arrangements entered into between the Council and Outdoor Plus were by way of leases and were land transactions. Under the New Leases there is no provision of services for the benefit of the Council. Therefore, they do not fall within the definition of a services concession for the purpose of the CCR 2016. The New Leases are not contracts for pecuniary interest because there is no legally enforceable obligation to carry out the services which are the subject of the contract. The fundamental bargain is the exclusive letting of land in exchange for the payment of annual rent. The permitted use of each plot of land is the operation of the tower for the display of static electronic advertisements but there is no obligation on the lessee to use the property for such purpose. The Council's interest is to generate a guaranteed income from the land which could be used in the provision of its statutory services to residents. Even if the New Leases could be categorised as contracts for pecuniary interest, they would fall within the land transaction exemption in Regulation 10(11) of the CCR 2016.

89. The provisions of the CCR 2016 must be considered together with the recitals in the Concessions Directive and the relevant authorities. Regulations 3 and 10 of the CCR 2016 provide that an agreement between a contracting authority and an economic operator amounts to a services concession contract falling within the ambit of the CCR 2016 if the following requirements are satisfied:

i) the contracting authority entrusts the provision and management of services to the economic operator;

ii) there is a mutually binding obligation for the provision of the services;

iii) the consideration for the concession is the right to exploit the services (with or without additional payment);

iv) the contracting authority transfers to the economic operator an operating risk in exploiting the services;

v) the contract does not fall within one of the excluded contracts in regulation 10.

I address each of these requirements below.

(i) Services concession

90. The definition of a service concession contract in regulation 3(3) includes the requirement that the contract is:

> "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 ..."

91. An essential element of such a services concession is that the contracting authority entrusts the provision and management of services to the economic operator.

92. Recital 11 of the Concession Directive provides that the services must be for the benefit of the contracting authority in respect of its public obligations:

> "... contracting authorities or contracting entities always obtain the benefits of the works or services in question."

93. In C-67/15 *Promoimpresa srl v Consorzio dei Comuni della Sponda Bresciana del Lago di Garda e del Lago di Idro, Regione Lombardia* (and another joined reference) [2017] 1 CMLR 22 the opinion of the Advocate General included the following at paragraph [62]:

> "A services concession is characterised in particular by the fact that the public authority entrusts the exercise of a service activity, a service the provision of which would as a rule fall to that public authority, to the concessionaire, thus requiring that concessionaire to provide a specific service."

94. The need for a public benefit was considered in C-360/96 *Gemeente Arnhem and Gemeente Rheden v BFI Holding BV* [1998] I-ECR 6821. The opinion of the Advocate General stated at paragraph [26]:

> "Under Community law, the service that is the subject of a service concession must also be in the general interest, so that a public authority is institutionally responsible for providing it.

> The fact that a third party provides the service means that the concessionaire replaces the authority granting the concession in respect of its obligations to ensure that the service is provided for the community."

95. In *C-451/08 Helmut Muller* [2010] 3 CMLR 18 the concept of benefit was considered by the CJEU in the context of public works contracts. The opinion of the Advocate General stated at [52] and [53]:

> [52] In my view, it is possible from a full examination of the measure, bearing in mind the meaning that the Court has so far attributed to it, to deduce the fundamental principle that for a given activity to fall within the ambit of the law on public works contracts there must be a strong and *direct link* between the public authority and the work or works to be executed. That link normally follows from the fact that the work or works are executed on the public authority's initiative.
>
> "[53] Contrary to the view taken by the referring court, non-material and indirect benefit alone is not sufficient. Nor is the mere fact that the activity to be assessed is, generally, in the public interest sufficient. It should be noted that, in cases where a permit for the activity has to be issued by a public authority (which is normally the case with all building activities), the activity must obviously be in the public interest in order to obtain a permit, since the public interest is the reference parameter on which the public authorities grant permission. Unless the scope of the Directive is extended indefinitely, the general existence of a public interest which justifies permission to pursue the activity cannot therefore constitute the decisive criterion for determining which cases are to fall within it. In particular, it must be borne in mind that a building permit, that is to say, the typical expression of the authorities' powers in the *objective* area of town planning, is usually confined to removing restrictions on a private initiative, not a public initiative."

In paragraph [58] of the judgment, the CJEU confirmed that the concept of public works required that the purpose of the works should be an immediate economic benefit to the contracting authority.

96. It follows from the above that the Concessions Directive and the CCR 2016 are concerned with contracts for services or works where such services or works are for the benefit of the contracting authority or its residents, in furtherance of the strategic objectives of the contracting authority, or to satisfy the contracting authority's statutory obligations.

97. I have concluded that the New Leases do not entrust to Outdoor Plus the provision of services for the benefit of the Council and therefore do not engage the CCR 2016 for the following reasons.

98. Firstly, the Council has no statutory obligation to provide advertising services for its residents. The advertising services are not provided on the Council's behalf.

99. Secondly, the advertising from the Two Towers is not required by, or provided for, the Council. The grant of planning permission for advertising and permitted use under the New Leases do not constitute a request for advertising by the Council. The Council derives income from the rent paid under the New Leases but such income is consideration for possession and use of the land. The Council does not dictate the content of the advertising and the advertising is not designed to support the objectives of the Council or in discharge of its statutory obligations.

100. Thirdly, the New Leases do not provide a service for the benefit of the Council or its residents. Advertising is a commercial venture. There is no public benefit to the community from commercial advertising. The Council does not derive any benefit from the advertising at the Two Towers.

101. Fourthly, general advertising does not fall within the categories of services envisaged by the Concessions Directive, such as infrastructure and strategic services as referred to in Recital (1). The cases where a services concession has been found are those where there is an obvious benefit to the contracting authority or the community, such as parking facilities, leisure services or public toilets.

102. Mr Moser submits that the Council derives a benefit from free advertisements. Mr Bleakley confirmed in his evidence that Ocean provided community and local government messaging free of charge to the Council. However, Ocean could not be compelled to provide such advertising and there is no obligation under the New Leases for Outdoor Plus to provide any free advertising for the Council.

103. Mr Moser also submits that the Council derives a benefit from the rental income, which is ploughed back into the Council's coffers and used by the Council to provide services for its residents. However, the income received is the rent due under the New Leases, regardless of any advertising provided or advertising revenues received. The rental income is not a service; it is a payment. Its character is not changed by its application.

104. In conclusion, the New Leases are not service concession contracts within the meaning of the CCR 2016.

(ii) Legally enforceable obligation

105. The definition of a service concession contract in regulation 3(3)(a) stipulates that the contract should be *"for pecuniary interest"*.

106. The concept of a contract for pecuniary interest was considered by the CJEU in *C-451/08 Helmut Muller* [2010] 3 CMLR 18 (in respect of public works contracts). The opinion of the Advocate General stated at [76]-[77]:

> "In my view, however, it is clear that... the obligation to carry out the work and/or works constitutes an essential element in order for there to be a public works contract or a public works concession.

> This follows, first and foremost, from the provisions of [the Public Contracts Directive] itself which... define public works contracts as contracts for pecuniary interest. The concept is therefore based on the idea of an exchange of services between the contracting authority which pays a price (or, alternatively, grants a right of use) and the contractor, who is required to execute a work or works. Thus, public contracts are clearly mutually binding. It would obviously be inconsistent with the characteristic to accept that, after being awarded a contract, a contractor could, without any repercussions, simply decide unilaterally not to carry out the specified work. Otherwise, it would mean that contactors were entitled to exercise discretion with regard to the requirements and needs of the contracting authority."

The judgment of the CJEU confirmed this requirement at [59]-[63]:

> "... the concept of "public works contracts", within the meaning of [the Public Works Directive] requires that the contractor assume a direct or indirect obligation to carry out the works which are the subject of the contract and that that obligation be legally enforceable in accordance with the procedural rules laid down by national law."

107. In *R (Midlands Co-operative Society Ltd) v Birmingham City Council* [2012] EWHC 620 the *Muller* test was applied (again in respect of a public works contract) per Hickinbottom J (as he then was) at paragraphs [100]-[101]:

> "[100] The principles underlying the propositions helpfully set out in the OCG Guidance were emphasised the recent judgment of the Court of Justice of the European Union (Third Chamber) in Helmut Müller GmbH v Bundesanstalt für Immobilienaufgaben [2010] 3 CMLR 18. At paragraph 63 ...
>
> The reference there to "direct *or indirect* obligation to carry out the works" does not detract from the firm requirement that there must be a legally enforceable obligation on the contractor, the reference to "indirect obligation" simply reflecting the flexibility with which the obligation may be met, (e.g. through sub-contractors.
>
> [101] The rationale for the proposition that a legal obligation to carry out works specified by the contracting authority is a required element for there to be a public works contract is admirably set out in the Opinion of Advocate General Mengozzi in Helmut Müller, as follows (at paragraphs AG76-77) ...
>
> Hence, to fulfil the purpose of the Directive, a required element is a commitment by the contractor, legally enforceable by the contracting authority, to perform relevant works. It is insufficient

> if, legally, the contractor has a choice and is entitled not to perform the works."

108. In *R (Faraday Development Limited) v West Berkshire Council* [2016] EWHC 2166 Holgate J considered and approved the test set out in the *Muller* and *Midlands* cases at paragraphs [174] & [188].

109. The need for a legally enforceable obligation was identified in respect of services concessions by the Advocate General in C-67/15 *Promoimpresa* (above) at AG [63]-[64]:

> "[63] For an instrument to be regarded as a services concession, it must therefore be established that the provision of services is subject to specified requirements laid down by the public authority concerned and that the economic operator is not at liberty to withdraw from the provision of such services.
>
> [64] These considerations are borne out by recital 14 of Directive 2014/24, according to which certain member States act such as authorisations or licences, in particular where the economic operator remains free to withdraw from the provision of such services, should not qualify as concessions. Unlike those acts, concession contracts provide for mutually binding obligations whereby the execution of the works or services is subject to specific requirements defined by the contracting authority."

110. From the above authorities, I consider that an essential requirement of a contract for pecuniary interest is that the contractor assumes a direct or indirect obligation to carry out the services the subject of the contract and that such obligation is legally enforceable.

111. Mr Moser relies on clause 10.8 of the New Leases as giving rise to an enforceable obligation to provide advertising services.

112. Clause 10.8 states:

> "The Tenant shall use all reasonable endeavours to market and promote the Tower so as to maximise the income received. Save where such marketing or promotion reflects usual advertising or marketing practice the Tower shall not be marketed, promoted or let at a discount in order to market, promote or otherwise sell space at other advertising sites operated by the Tenant."

That clause imposes on Outdoor Plus a legally enforceable obligation to use all reasonable endeavours to market and promote the site but only for the purpose of producing revenue. It does not require Outdoor Plus to procure or carry out any particular scope, volume or value of advertising. There are no specific requirements defined by the Council that must be satisfied by Outdoor Plus. Outdoor Plus does not have to deliver any advertising.

113. In my judgment the New Leases do not impose a legal obligation on Outdoor Plus to provide any service. There is a legally enforceable covenant on the part of the tenant to pay rent but there is no tenant's covenant to provide advertising in the New Leases. There is permission to use the land for the purpose of advertising but no enforceable obligation to provide any defined advertising service.

114. Therefore, the New Leases are not contracts for pecuniary interest for the purpose of regulation 3 of the CCR 2016.

(iii) Right to exploit the services

115. Regulation 3(3) defines a service concession contract as a contract:

> "... 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 ..."

116. A service concession can be distinguished from a service contract by the existence of a business opportunity that can be exploited by the provision of services to third parties for a charge. It is not disputed that the planning permission and permitted use under the New Leases entitles Outdoor Plus to exploit the Two Towers by providing advertising services to third parties for financial gain. Therefore, if this were a legally enforceable contract for public services, this definition requirement would be satisfied.

(iv) Operating risk

117. Regulation 3(4) provides that a service concession contract must satisfy the following requirements:

> "(a) 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; and
>
> (b) the part of the risk transferred to the concessionaire shall involve real exposure to the vagaries of the market, such that any potential estimated loss incurred by the concessionaire shall not be merely nominal or negligible."

118. A required element of a concession contract is that the recipient of the service is not the contracting authority, but a third party, and the economic operator's remuneration is derived wholly or in part from the provision of the service, transferring economic risk to the operator: *Case C-360/96 Gemeente Arnhem v BFI Holding BV* [1998] I-E.C.R. 6821 at [26]; *Case C-458/03 Parking Brixen BmbH v Gemeinde Brixen* [2005] ECR I-8612 [38]-[43].

119. Even a small amount of operating risk transferred is sufficient to constitute a concession: *Case C-206/08 Wasser und Abwasserzweckverband Gotha und Landkreisgemeinden (WAZV Gotha) v Eurawasser Aufbereitungs und Entsorgungsgesellschaft mbH* [2009] ECR I-8377 at [46]-[80]; *Case C-274/09 Privater*

Rettungsdienst und Krankentransport Stadler v Zweckverband fur Rettungsdienst und Feuerwehralarmierung Passau [2011] ECR I-01335 at [33].

120. Under the New Leases, Outdoor Plus is responsible for the refurbishment and maintenance of the Two Towers, and for all advertising costs. The full rent is payable, regardless of the revenues generated from advertising. The operating risk has been transferred from the Council to Outdoor Plus. Therefore, if this were a legally enforceable contract for public services, this definition requirement would be satisfied.

(v) Land transaction exemption

121. Regulation 10(11) of the CCR 2016 excludes from its ambit *"services concession contracts for the acquisition or rental ... of land ..."*

122. Mr Moser submits that the transaction as a whole is an advertising concession; the grant of the interest in the land is merely to facilitate the advertising concession and therefore is wholly incidental to the land transaction.

123. Mr Goudie submits that the relevant transaction documents are the New Leases. They contain standard landlord and tenant obligations. The essential elements are the provision for exclusive possession of the land, and the tenant's covenant to pay the rent. Even if the New Leases could be construed as procuring advertising services for the Council, by reference to clause 10.8, such obligation would be subsidiary to the essential landlord and tenant obligations.

124. The Court must determine the classification of the transaction by reference to the essential obligations which characterise the transaction. It is common ground that the relevant test is to ascertain the main object or purpose of the transaction: C-331/92 *Gestion Hotelera Internacional* [1994] ECR I-1329; C-145/08 & C-149/08 *Club Hotel Loutraki AE v Ethniko Simvoulio Radiotileorasis* [2010] 3 CMLR 33; C-412/04 *Commission v Italy* [2007] ECR I-619 at paragraph [47]-[49]; C-306/08 *Commission v Spain* [2011] 3 CMLR 43 [90]-[91]; E-4/17 *EFTA Surveillance Authority v Norway* [64] & [83]-[85]; C-536/07 *Commission v Germany* [53]-[61]; C-213/13 *Impresa Pizzarotti v Comune di Bari* [41].

125. The New Leases are contracts for the rental of land within the meaning of regulation 10(11) of the CCR 2016. The New Leases are genuine leases. Although the objective of Outdoor Plus in entering into the lease arrangement is to exploit the advertising rights, the primary objective of the Council in granting the New Leases is to obtain a guaranteed income stream from the rental payments. The advertising concession authorises Outdoor Plus to exercise an economic activity on state-owned land but does not require Outdoor Plus to provide a service for the benefit of the Council. The essential features of the New Leases are that Outdoor Plus gains exclusive possession of the land and the structures on it. It has permission to use those structures for the display of static advertising and to sell the advertising space to third parties but that does not change the nature of the transaction as one for the rental of land.

126. Accordingly, even if the New Leases could be construed as service concession contracts, they would be excluded from the operation of CCR 2016.

127. For the above reasons, I conclude that the CCR 2016 do not apply to the tender exercise for the New Leases.

General principles of EU Law

128. Ocean's alternative case in the Part 7 claim is that, if the New Leases were not concession contracts, they were nevertheless awarded in breach of the general principles of EU law. Mr Moser submits that there is sufficient potential cross-border interest in the contracts to engage general EU principles. The test is whether it is seriously likely that there would have been more overseas interest if there had been wider advertising. Reliance is placed on the emails sent by Wildstone to advertisers in other parts of Europe and further afield, notifying them of the tender exercise, as evidence of international interest in the Two Towers.

129. The Council's case is that EU treaty principles are not applicable if the New Leases were not service concession contracts. In any event they do not apply to purely internal situations. In this case, all relevant activities are confined to the UK. The Council is an English local authority. Ocean is a UK company. Outdoor Plus is a UK company. The land in question is in the UK. Further, there is no sufficient cross-border interest. Ocean has not been able to point to others who would have been ready, willing and able to bid and who would have wished to have done so if the opportunity had been sufficiently advertised.

130. The relevant part of the Treaty on the Functioning of the European Union ("TFEU") relied on by Ocean is that dealing with freedom of movement of services.

131. Article 49 of the TFEU provides for freedom of establishment. Article 56 provides as follows:

> "Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended ..."

132. Services are defined in Article 57 and include activities of a commercial character.

133. The award by a Member State public body of a services contract or concession with a cross-border interest is subject to the TFEU principles, in particular the principles of freedom of establishment and freedom to provide services, as well as the principles deriving therefrom such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency, as explained by the Advocate General in: C-91/08 *Wall AG v Stadt Frankfurt am Main* [2010] ECR I-02815 at AG [6]-[8] and by the court in C-318/15 *Tecnoedi Costruioni Sri v Commune di Foassano* at paragraph [19].

134. The scope and ambit of the TFEU in such cases was considered by Coulson J (as he then was) in *AG Quidnet Hounslow LLP v London Borough of Hounslow* [2012] EWHC 2639. That case concerned an agreement by the local authority to grant a long lease of a site to a developer with a view to its development for retail, leisure and parking facilities. The proposed agreement contained no express obligation on the developer to carry out any part of the development works. A procurement challenge was made on

grounds that included the application of Article 56. Coulson J held that Article 56 did not apply because the agreement was a land transaction and not a contract for the provision of services, it was an internal matter and there was no cross border interest:

> "[41] In reality, this is not a case in which [the developers] are providing services of the type envisaged by article 56FEU. This is no more than an agreement to agree the terms of a long lease of the site...
>
> [44] In those circumstances, as a matter of construction, I conclude that the proposed agreement was not a contract for the provision of services as defined in the TFEU, and it fell outside article 56FEU...
>
> [47] ... [any services] would be for [the developers'] own benefit, in order that they maximise their interest in the land. Again, they would not be caught by article 56FEU.
>
> [48] ... Pursuant to the proposed agreement, [the developers] are not being granted a concession. They are not being put in the shoes of the council, obliged to provide services to the public but entitled to charge for such services... [They] are not being granted a concession to provide public services at all...
>
> [56] ... what matters for the purposes of article 56FEU is not the particular nature of the development opportunity, but whether there is a restriction placed by the public authority on the services to be provided to that authority.
>
> [57] The proposed agreement does not contain any restriction being place by the council on the provision of services...
>
> [74] [The developers] are a UK company. The council is a UK authority. Quidnet are a UK company. The land in question is in the UK. There is no evidence that any undertaking in any other member state is interested in the development of the site, in Hounslow town centre. In those circumstances, I conclude that this is an internal matter ..."

135. I respectfully agree with and adopt that analysis in this case. The general EU principles do not apply for the following reasons.

136. Firstly, as explained above in the context of the CCR 2016, the agreement for the New Leases was a land transaction; it was not a services concession contract. Therefore, it is not a transaction to which TFEU principles apply.

137. Ocean relies on a number of cases where it has been held that EU principles apply in the absence of the relevant directive. In *Telaustria Verlags GmbH v Telekom Austria AG* [2000] ECR I-10745, the court stated at paragraph [62]:

> "That obligation of transparency which is imposed on the contracting authority consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed."

138. In the judgment of the CJEU in C-458/03 *Parking Brixen GmbH v Gemeinde Brixen* [2005] ECR I-8585 it was stated:

> "[54] ... Stadtwerke Brixen AG argues that Articles 43 EC to 55 EC do not apply to a situation such as that in the main proceedings, because it is a situation purely internal to a single Member State, given the Parking Brixen, Stadtwerke Brixen AG and the Gemeinde Brixen all have their seats in Italy.
>
> That argument cannot be accepted. It is possible that, in the main proceedings, undertakings established in Member States other than the Italian Republic might have been interested in providing the services concerned ... In the absence of advertising and the opening to competition of the award of a public service concession such as that at issue in the main proceedings, there is discrimination, at least potentially, against undertakings of the other Member States which are prevented from making use of the freedom to provide services and of the freedom of establishment provided for by the Treaty ..."

139. Further support is found in *Club Hotel Loutraki* (above) at paragraphs [62]&[63]:

> "[62] Having regard to the foregoing considerations, the conclusion must be that a mixed contract of which the main object is the acquisition by any undertaking of 49% of the capital of a public undertaking and the ancillary object, indivisibly linked with that main object, is the supply of services and the performance of works does not, as a whole, fall within the scope of the directives on public contracts.
>
> [63] That conclusion does not preclude the fact that such a contract must observe the basic rules and general principles of the Treaty, in particular those on the freedom of establishment and the free movement of capital..."

140. However, in those cases where TFEU principles have been applied, the agreements in question have been characterised as agreements concerning the provision of works, services or capital. In this case, there is no obligation on Outdoor Plus to provide any services for the benefit of the Council. Therefore, there can be no question of any restriction of the provision of services that might engage Article 56.

141. Secondly, the agreement for the New Leases is an internal matter in respect of which there is insufficient cross-border interest for TFEU principles to apply.

142. I accept Mr Goudie's submission that it is necessary to consider (i) whether the transaction is internal and (ii) whether there is sufficient cross-border interest. However, I consider that they are different aspects of the same test. Both concern the question whether the nature and circumstances of the transaction are such that it could and should be open to competition throughout the European Union in furtherance of the TFEU freedoms.

143. Although the land, the parties and the bidders were all based in the UK, that in itself is not necessarily determinative of the issue, as demonstrated in *Parking Brixen*. A failure to advertise so as to open up the market to competition could of itself limit the bidders to a particular region or state, thus rendering what should be a cross-border exercise into a domestic exercise. Likewise, the mere fact that an entity in another state demonstrates an interest in bidding for an opportunity, no matter how unrealistic the bid, does not change an internal matter into one to which EU principles apply.

144. There must be evidence of cross-border interest before the general principles of EU law will apply: C-245/09 *Omalet* [2010] ECR 1-13771 at paragraph [12]:

> "It is settled case-law that the Treaty provisions relating to the freedom to provide services do not apply to situations where all the relevant facts are confined within a single Member State ..."

145. There must be evidence to support a claim of cross-border interest: C-318/15 *Tecnoedi* (above) at paragraphs [20] and [22]:

> "[20] As regards the objective criteria which may indicate certain cross-border interest, the Court has previously held that such criteria may be, in particular, the fact that the contract in question is for a significant amount, in conjunction with the place where the work is to be carried out or the technical characteristics of the contract and the specific characteristics of the products concerned. In that context, it is also possible to take account of the existence of complaints brought by operators situated in other Member States, provided that it is determined that those complaints are real and not fictitious...
>
> [22] ... a conclusion that there is certain cross-border interest cannot be inferred hypothetically from certain factors which, considered in the abstract, could constitute evidence to that effect, but must be the positive outcome of a specific assessment of the circumstances of the contract at issue. More particularly, the referring court may not merely submit to the Court of Justice evidence showing that certain cross-border interest cannot be ruled out but must, on the contrary provide information capable of proving that it exists."

146. The test is an objective one, namely, whether the "realistic hypothetical bidder" would have bid for the contract if the opportunity had arisen: *R (Gottlieb) v Winchester CC* [2015] EWHC 231 per Lang J at paragraphs [60]-[67]; *Edenred (UK Group) Ltd v HM Treasury & Others* [2015] EWHC 90 per Andrews J at paragraph [128]:

> "There is much to be said for the approach taken by Coulson J [in *Quidnet*] of requiring evidence that someone beside the original bidders would have bid for the contract, because the EU procurement rules are designed to protect against real, not hypothetical distortion of competition. However, I do not need to decide the point because even if one approaches the question on the basis that a hypothetical bidder has been shut out of the bidding process by the absence of reference to the subject-matter of the proposed amendment, it seems to me that in principle that must necessarily be a realistic hypothetical bidder – i.e. the evidence must demonstrate that there would be someone else who would have been ready, willing and able to bid and who would have wished to have done so if the opportunity had been made clear, but who did not do so because it was not."

147. On the facts of this case, I am satisfied that this transaction was purely an internal UK matter and there was insufficient potential cross-border interest to engage TFEU principles. Advertising is a global industry and the prominent position of the Two Towers on a major route into London was capable of attracting international interest for advertisers. However, the transaction concerned the grant of leases of land located in London. The Council did not control access to opportunities to provide advertising through the New Leases. The advertising opportunity granted by the transaction was limited to permitted use and planning permission in respect of the land. The New Leases did not restrict the ability of any other commercial entity to provide advertising in other locations in Hammersmith and Fulham, or elsewhere in London, by the use of media screens or otherwise. Although messages were sent to potential bidders outside the UK, no interest was expressed from any of them. There is no evidence of a realistically hypothetical bidder who would have bid for the New Leases if the opportunity had arisen.

148. For those reasons, I conclude that the tender exercise for the New Leases was not subject to general EU principles.

Breach

149. It is common ground that if the CCR 2016 applied, the Council would be in breach of the regulations. The Council did not publish a concession notice in the OJEU, failed to give proper notice of a standstill period and awarded the contract without publication of a contract notice.

150. Ocean's case is that the Council failed to conduct a procurement process in accordance with the CCR 2016. It alleges inadequate ITT information, no process of prequalification and inadequate clarity as to the award criteria. Regulation 53 of the CCR 2016 requires proceedings to be started within 30 days beginning with the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen. The breaches alleged in connection with the ITT documents must have been known to Ocean when the ITT was published in April 2017. No satisfactory reasons have been provided that would justify the Court in extending time. Therefore, the commencement of proceedings in August 2017 would be too late in respect of those allegations.

151. If applicable, the general principles under the TFEU did not require any particular formalities as part of the procurement process. There was a requirement for sufficient advertising so as to open up the market to competition: C-324/98 *Telaustria* [2000] ECR I-10745 at [62]. That requirement was satisfied in this case. Wildstone sent brochures and emails to potentially interested parties, including parties in other parts of the EU and beyond. Wildstone also advertised the tender exercise in a specialist trade publication. That was sufficient to make potentially interested bidders aware of the opportunity. No potential bidder from outside the UK showed any interest, either before or after the exercise.

152. Ocean alleges unlawful failure to protect its confidential information and unlawful failure to address a conflict of interest. The CCR 2016 and TFEU require that the tender process must ensure equal treatment, transparency, non-discrimination and proportionality. In his closing submissions, Mr Moser indicated that these issues formed the principal grounds of challenge in the judicial review claim. Therefore, I deal with these additional allegations below.

Remedies if breach

153. Regulation 59 provides for remedies, where a breach is established and the concession contract has been entered into:

> "(1) Paragraph (2) applies if –
>
> (a) the Court is satisfied that a decision or action taken by a contracting authority or utility was in breach of the duty owed in accordance with regulation 50 or 51; and
>
> (b) the concession contract has already been entered into.
>
> (2) In those circumstances, the Court –
>
> (a) must, if it is satisfied that any of the grounds for ineffectiveness applies, make a declaration of ineffectiveness in respect of the concession contract unless regulation 61 requires the court not to do so;
>
> (b) must, where required by regulation 63, impose penalties in accordance with that regulation;
>
> (c) may award damages to an economic operator which has suffered loss or damage as a consequence of the breach, regardless of whether the Court also acts as described in sub-paragraphs (a) and (b);
>
> (d) must not order any other remedies.

> (3) Paragraph (2)(d) does not prejudice any power of the Court under regulation 62(3) or 63(12)."

154. Regulation 60 sets out the grounds for ineffectiveness:

> "(2) ... where the concession contract has been awarded without prior publication of a concession notice in the Official Journal in any case in which these Regulations required the prior publication of a concession notice.
>
> ...
>
> (5) (a) the concession contract has been entered into in breach of any requirement imposed by –
>
> (i) regulation 48, or
>
> (ii) regulation 56, or
>
> (iii) regulation 57(1)(b);
>
> (b) there has also been a breach of the duty owed to the economic operator in accordance with regulation 50 or 51 in respect of obligations other than those imposed by regulation 48 and this Chapter;
>
> (c) the breach mentioned in sub-paragraph (a) has deprived the economic operator of the possibility of starting proceedings in respect of the breach mentioned in sub-paragraph (b), or pursuing them to a proper conclusion, before the concession contract was entered into; and
>
> (d) the breach mentioned in sub-paragraph (b) has affected the chances of the economic operator obtaining the concession contract."

155. Regulation 61 provides that the Court must not make a declaration of ineffectiveness if (a) the contracting authority raises an issue under this regulation and (b) the Court is satisfied that overriding reasons relating to a general interest require that the effects of the concession contract should be maintained.

156. Regulation 62 sets out the consequences of ineffectiveness, including at (1):

> "Where a declaration of ineffectiveness is made, the concession contract is to be considered to be prospectively, but not retrospectively, ineffective as from the time when the declaration is made and, accordingly, those obligations under the concession contract which at that time have yet to be performed are not to be performed."

157. Regulation 63 makes provision for the Court to impose penalties in addition to, or instead of, declarations of ineffectiveness. Any penalties must be effective, proportionate and dissuasive. The Court must take account of all relevant factors, including (a) the seriousness of the relevant breach of the duty owed; (b) the behaviour of the contracting authority; and (c) the extent to which the concession contract remains in force.

158. On the basis of the admitted breaches by the Council, if the CCR 2016 applied, such breaches would be serious and material. Ocean would be entitled to a declaration of ineffectiveness and the Council would be required to pay a civil financial penalty. The purpose of these remedies is to penalise the wrongdoer and act as a deterrent. I reject Mr Goudie's submission that the adverse financial impact of a declaration of ineffectiveness would constitute overriding reasons relating to a general interest, requiring that the effects of the concession contract should be maintained, to engage regulation 61. As the New Leases do not affect the provision of services for the Council's residents, there would be no direct impact on public services. Any losses suffered by Outdoor Plus or third party advertisers would be a matter as between those parties and the Council.

159. An award of damages can only be made, in accordance with the *Francovich* principles, if any breach of the CCR 2016 is sufficiently serious to merit an award and there is a direct causal link between the breach and the damage sustained: *Nuclear Decommissioning Authority v EnergySolutions EU Limited* [2017] 1 WLR 1373.

160. Any breaches of the CCR 2016 and/or general EU principles would not be sufficiently serious to give rise to an award of damages. Any distortion of the internal market through a failure to alert potential bidders from other EU states would not have affected the outcome of the tender exercise for Ocean. The successful bid from Outdoor Plus was more than £1 million per annum higher than the bid from Ocean. Therefore, even if the opportunity to tender had been offered to other bidders, Ocean would not have been successful. For that reason, Ocean would not be able to establish a causal link between any breach and damages.

Judicial Review claim

161. Ocean's alternative case is that the decisions to accept Outdoor Plus's bid and/or to enter into the New Leases are impugned on grounds of: lack of procedural fairness, lack of transparency, irrationality, bias or conflict of interest, breach of confidence and breach of equal treatment. The primary grounds relied on are (i) disclosure of Ocean's confidential offer to other bidders; and (ii) bias or conflict of interest through Wildstone's involvement in the tender exercise.

162. The Council contends that permission should be refused on the grounds that (i) any challenge based on the ITT and associated documents has not been brought promptly and should be refused for delay; (ii) the grounds of claim are unarguable; (iii) the application to amend the grounds should be refused; and (iv) any breaches established by Ocean would be highly likely to make no difference to the outcome.

Delay

163. CPR 54.5(1) provides that a claim for judicial review must be filed (a) promptly and (b) in any event not later than 3 months after the grounds to make the claim first arose.

164. The ITT and associated documents were published by Wildstone on 24 April 2017. The claim for judicial review was issued on 22 August 2017. There is no reasonable explanation for the delay in making a challenge based on any inadequacies in the pre-qualification requirements, lack of clarity as to the selection criteria or other deficiencies in the tender information. Those were matters that must have been obvious from the documents.

165. The challenge to the decisions to enter into the arrangements with Outdoor Plus and to execute the New Leases Ocean based on allegations of breach of confidentiality and conflict of interest/bias was not made late. Ocean's case is that those breaches tainted the decisions. The decisions were made on 7 June 2017 and the claim was issued within 3 months of that date. On 13 June 2017 Ocean was notified that its bid had been unsuccessful but the Council was slow to provide proper details of the identity of the successful bidder and the basis of the decision to award the New Leases to Outdoor Plus. The Council failed to notify Ocean of its decision to enter into the New Leases with Outdoor Plus until after they had been executed. Against the timing of the Council's disclosure, those claims were not made late.

Breach of confidentiality

166. Ocean's case is that the Council failed to keep confidential the terms of Ocean's initial offer, which was used by the Council as a benchmark against which the other offers were assessed. Ocean's offer was made to the Council in circumstances which left no room for doubt that its contents were to be regarded as confidential. The breach of confidence is pleaded in the statement of grounds as follows at paragraph [35]:

> "On 2 June 2017, the Claimant's Chief Executive Officer, Mr Timothy Bleakley, met with Mr Jonathan Lewis, the Chief Executive Officer of Outdoor Plus at a lunch in the context of an industry trade body meeting as they were both members. Mr Lewis informed Mr Bleakley that Outdoor Plus had submitted a tender in the Procurement. He indicated that Outdoor Plus's tender would not be anywhere near the same level as what he referred to as *'Ocean's benchmark offer'* that had been shared with him by the Defendant's new commercial director and Wildstone. The Claimant inferred from that statement that the Defendant had shared with Outdoor Plus and presumably therefore with other tenderers the details of the Claimant's offer."

167. In his witness statement, Mr Bleakley stated:

> "Over the lunch, the subject of the Hammersmith and Fulham tender came up, and Jonathan stated that they were bidding and that they would be doing so *'sensibly, but nowhere near the levels of the Ocean benchmark offer that the Defendant's new commercial director and Wildstone had shared with him'*."

168. The Council's commercial director referred to was Mr Hainge. Jonathan Lewis of Outdoor Plus set out in his witness statement the following concerning his meeting with Mr Hainge on 7 September 2016:

> "[Mr Hainge] informed me that the Council had received a private offer in respect of the Towers to extend the current lease. He did not specifically mention that the offer had been made by Ocean, but I was aware that they were the current lessees. Michael said that he thought that the right thing to do was for the Council to go out to tender in the marketplace again and that was what they were intending to do. He said that if they went out to tender again, they would be looking for a fixed rent and not a profit share. He said that any interested parties would need to bid north of £2m if they were going to be successful. Michael provided me with no detail of the offer that had apparently been made to the Council and he did not show me any documents. He did not explain how he got to the £2m figure and did not say that it was based on the offer he had received, although that suggestion was implicit."

169. In cross examination, Mr Lewis gave the following further evidence:

> "Q. It didn't take much for you to put two and two together and work out that a private offer must have been from Ocean, did it?
>
> A. It seemed most likely.
>
> Q. When he said that any interested parties would need to bid north of £2 million, what you concluded was that an offer that would be or would beat the offer that he had received from Ocean, didn't you?
>
> A. No, I don't think that was my conclusion. I think my conclusion was that was a possibility or he could have just been talking bidders up
>
> ...
>
> It was implied by him, but it wasn't received that way by me. My view was he was implying that but it could just as easily be him talking it up, so I didn't necessarily believe that that bid was the case."

170. Mr Lewis disputed that he referred to "Ocean's benchmark offer" during his meeting with Mr Bleakly on 2 June 2017:

> "Q. You talked about an Ocean offer, didn't you?

> A. No, I didn't talk about an Ocean offer. I said that we had been given an indication of what was necessary to win the site and therefore we didn't expect to win the site.
>
> ...
>
> Q. It's not unlikely that you would have used words to the effect of "your offer" or "an offer", "Ocean's offer"?
>
> A. As I said, I don't believe I did but I certainly would have said that we had been given an indication of what it would take to win the site and we therefore didn't expect to win it. "

171. Mr Hainge stated in his witness statement:

> "I did not share any details of Ocean's offer with any individuals outside the Council nor did I discuss their offer with any third parties, other than with Jonathan Chandler and Damian Cox of Wildstone. I certainly did not reveal any details of Ocean's May 2016 offer to Jonathan Lewis of Outdoor Plus as is being alleged by Ocean ... I did not discuss any details of Ocean's May 2016 offer with any other media operators either."

172. Regarding the meetings with other potential bidders, Mr Hainge stated:

> "I informed the media operators that the Council was not going to just extend Ocean's leases again and stated that we would be going back out to the market. I 'talked up' the site; I explained that the council was looking at getting a rental income of around £2m to £2.5m if full motion consent was granted and said that we were confident of achieving that kind of figure... I do not recall specifically mentioning to any of the individuals I met at these meetings that an offer had been received from Ocean. I certainly did not provide them with any details of Ocean's May 2016 offer and I did not state that there was a 'benchmark figure' that they would need to beat. In particular, I did not discuss Ocean's offer with Jonathan Lewis of Outdoor Plus ..."

173. In cross examination, Mr Hainge accepted that he was aware that Ocean's 2016 offer was made on a confidential basis. He also accepted that he was aware of Ocean's letter of 23 October 2013, prohibiting disclosure of Ocean's contract details with third parties without prior written approval. He gave the following account of the meeting at the Hampshire Hog on 7 June 2016:

> "I had a separate meeting with Jonathan Chandler to discuss the Ocean offer. Damian Cox was also present at this meeting and we met up in the garden of a local pub. I had not met Damian Cox before and he came along at Jonathan Chandler's suggestion. I assume that Jonathan had suggested this as an opportunity for Mr Cox, the principal of the business, to meet me

> and to demonstrate Wildstone's commitment to the Council, particularly as this was going to be the first big piece of work they were going to undertake on our behalf. Although the e-mail from Ocean had been marked private and confidential, I wanted to take Wildstone's expert view on it as the council's appointed consultants. My own view was that it was not a particularly good offer and it was not something that the Council wanted to accept. I was not, however, an expert in this area and I wanted to ensure that there was nothing in the offer that I was missing nor that there were other factors that I should also be taking into account when considering if this was an offer which the council should accept. I therefore wanted to discuss it with our expert advisers."

174. It was very unwise of Mr Hainge to have an informal meeting offsite with Wildstone and not to have any proper record of what was discussed or agreed. It is not good enough for him to say that the Council has limited resources. Keeping a record of all dealings in respect of a public contract worth substantial sums of money is essential to avoid suspicion of the kind that has been raised in this case. However, it made no difference to the course of action adopted by the Council or the outcome of the tender exercise. The Council had already instructed Wildstone to go ahead with the tender exercise. Wildstone confirmed its advice to the Council that there should be a tender exercise, and the basis for that advice, in its appraisal report sent to the Council on 18 July 2016.

175. Mr Chandler confirmed in his witness statement that he did not discuss Ocean's offer with anyone outside the Council other than with Damian Cox at the meeting with Mr Hainge on 7 June 2016. In cross-examination, he confirmed that he asked Mr Hainge to mention the £2 million steer to potential bidders but said that he did not have any dialogue with potential bidders about the level of offers that were expected either before or after the bids were made.

176. In my judgment there was no breach of confidentiality by the Council in respect of Ocean's offer.

177. Firstly, the Council was entitled to share the terms of Ocean's offer with Wildstone, its appointed consultants. On 4 March 2016 Mr Haq told Ocean that he would discuss any offer made with the Council's external consultants. Ocean knew that Wildstone were the Council's external consultants. The Council notified Ocean on 6 April 2016, prior to Ocean's 2016 offer, that it was using Wildstone to negotiate the new arrangement for the Two Towers site. In such circumstances Ocean had no reasonable expectation that the Council would keep its offer from Wildstone.

178. Secondly, Ocean's 2016 offer was not used as a benchmark. On the contrary, it was considered to be too low and was a reason for the Council's decision to test the market by going out to a competitive tender. Ocean's offer was not £2 million. The minimum guaranteed income was no more than £1 million. The projected profits were £1.4 million in 2016, rising to £1.8 million in 2021 but there was no guarantee that the advertising revenues would produce such figures.

179. Thirdly, Mr Hainge informed all bidders that the Council was expecting offers above £2 million. That indication was based on Wildstone's appraisal report and the figures given on 1 August 2016, namely, that the land had a rental value of £1.6 million to

£2.15 million based on static displays. Wildstone's estimate was based on its analysis of the market. Although it must have included Ocean's offer in that consideration, even if it didn't have full details of the offer, the estimate was clearly based on the comparables that were identified.

180. Fourthly, there is no evidence that Wildstone shared any details of Ocean's 2016 offer with other interested parties.

181. In any event, Mr Lewis was clear in cross-examination that even if he had been aware of the amount of Ocean's 2016 offer, it would not have affected the level of the bid by Outdoor Plus:

> "... Whether I believed Michael Hainge or didn't, it didn't inform our bid. We bid below the level at which he thought he told us would win the site and regardless there were going to be other bidders in the process. So even if it had been Ocean and even had I have known, that wouldn't have told me what the likes of JC Decaux were going to bid, so I still had no choice but to put in a bid that I was happy to win the site at."

182. Mr Lewis explained that the bid by Outdoor Plus was made on normal commercial terms, based on an assessment of the income that the sites were likely to generate, the costs that would be incurred and the likely returns based on Outdoor Plus's assumptions and forecasts.

183. Ocean was not placed at a disadvantage by Mr Hainge's indications to the other bidders. Ocean had been told by Mr Hainge at the meeting in August 2016 that the Council was expecting more than £2 million per annum for the sites. Contrary to the allegation by Ocean, the Council did not negotiate with any of the other tenderers. Clarification was sought and one tenderer was asked whether it would submit a compliant bid but there is no evidence of any negotiations in respect of the bids.

184. In conclusion, Ocean's 2016 offer had no impact on, and was not relevant to, the conduct or outcome of the tender exercise in 2017.

Conflict of interest / apparent bias

185. Ocean's case is that the position of Mr Cox in Wildstone created an obvious conflict of interest.

186. Mr Joseph, Chief Operating Officer of Ocean, was at Ocean when Mr Cox left in 2010. Mr Joseph states in his witness statement that financial irregularities were identified which led to a warranty claim being made against Mr Cox. He also states that Mr Cox's management style was very aggressive and he had a bad reputation with many customers. Mr Cox blamed the new chairman at Ocean for forcing him out of the company. He states that when Wildstone launched its business, it approached Ocean's landlords and told them they could do better deals when Ocean's contracts were coming to an end. Two examples are given, Liverpool and Westfield, but no particulars have been provided.

187. Mr Bleakley's witness statement set out Ocean's concerns about Mr Cox:

> "Mr Cox was my predecessor as the CEO of the claimant. Mr Cox left the Claimant's employment in acrimonious circumstances in January 2010. He left following allegations of financial irregularities which has meant the parties have irreconcilable differences. The Claimant informed the Defendant at a quarterly review meeting in 2015 that there was a conflict in respect of Mr Cox and that he should not be used in relation to the Two Towers contract as he also had knowledge of the Claimant's position on that contract, having been involved in its negotiation. At the time the Defendant seems to accept this but subsequently there was a change in personnel at the Defendant and Mr Cox was involved in the tendering process. Mr Cox also appeared to be targeting opportunities with Authorities where the Claimant had an existing relationship."

188. In cross-examination, he accepted that Ocean did not provide details of the alleged conflict to the Council:

> "Q. ... But the fact is that although there was some communication about unhappiness about Wildstone and Mr Cox, the council were never really told any solid basis for that.
>
> A. I mean, I disagree. We put in writing that we felt there was a conflict of interest. We warned the council we thought there was a conflict of interest. We told the council there was a conflict of interest, and to quote yourself: ducks, quacks, it was a conflict-of-interest...
>
> Q. ... The council is never given any hard information as to why there is anything wrong with Mr Cox.
>
> A. That is not true ... We do not need to go into detail. The fact we have raised it as a problem should be enough."

189. Mr Haq stated in his witness statement:

> "Mr Damian Cox, the then Chief Executive of Ocean was involved in the lease negotiations with the Council and signed the original leases on behalf of Ocean. Mr Cox left Ocean shortly after the leases were completed. I have no knowledge of the circumstances which led to him leaving Ocean. I had understood that Mr Cox had set up Ocean in the first place and was under the impression that he had sold his interest in the company and had left to set up a new venture. Until the commencement of this dispute with Ocean, I had no idea that Mr Cox had apparently left Ocean in acrimonious circumstances."

190. Mr Haq explained in his witness statement that, although Ocean informed him that they were not happy about Wildstone's appointment, they provided no detail of any specific incident or concerns to substantiate their complaint.

191. There is no dispute as to the test to be applied. It is conveniently summarised in *Porter v Magill* [2002] 2 AC 357 per Schiemann LJ, referring to Lord Browne-Wilkinson in *R v Bow Street ex.p.Pinochet Ugarte (No.2)* [2000] 1 AC 119 p.36:

> "... having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him ..."

192. The evidence does not support Ocean's complaint that there was a real danger of bias in this case. Mr Cox was the CEO of Ocean and was aware of the terms of the Original Leases but he left in 2010 and therefore he had no experience of the advertising business model for the site in operation. Any contractual restrictions on working with former clients would have long expired. Given the passage of time, any commercial information he had acquired at Ocean would be of limited value.

193. It is suggested that Mr Cox left in acrimonious circumstances following allegations of financial irregularities but no particulars of any wrongdoing have been put before the Court. Mr Bleakley did not join Ocean until after Mr Cox had left and therefore has no direct knowledge of the dispute that lead to Mr Cox's departure. Mr Joseph identified contracts that had been targeted by Wildstone but gave no details that suggested any improper motive.

194. Ocean raised on a number of occasions with the Council its concern as to the impartiality of Mr Cox and/or Wildstone. However, as Mr Bleakly accepted in cross-examination, there was no written notice of any particular grounds on which such concern was based. In those circumstances, it would have been improper for the Council to act on unsubstantiated rumours.

195. Ocean's complaint about a conflict of interest is inconsistent with its behaviour. Ocean willingly participated in a tender exercise for another site, the Trinity underpass in Wandsworth. Wildstone acted for the landowner. Ocean was the successful bidder.

Actual bias – application to amend

196. The proposed amended grounds allege the following additional matters:

> "(a) The crib sheet provided by Mr Chandler to Mr Hainge by way of email dated 29 April 2016 contained untrue statements in relation to Ocean and its business operations which Mr Chandler knew to be untrue, alternatively for which he had no reasonable basis for any belief in their truth. The claimant relies in that regard in particular on the claim that *"Ocean sell a large number of sites often as a pack... The towers will be directly subsidising lower quality locations elsewhere at the cost of revenue share payable to the Council"*. The unchallenged evidence of Mr Stephen Joseph at trial was that this statement was untrue and did not

reflect the claimant's business model. Mr Chandler not only made that untrue statement but also suggested it should form the basis to challenge the claimant over the forecast income from the Two Towers.

(b) The report *"Two Towers Hammersmith flyover: appraisal of advertising rental value and future strategy"* prepared by Wildstone and provided to the Defendant on 18 July 2016 (the Appraisal Report) contained a false, misleading and detrimental statement concerning the Claimant at section 9.1 (under the heading recommendations), namely that *"It should be noted that the claimant was invited to bid through a competitive process for all of the above-mentioned comparables and were unable to make offers at the same level as the successful bidders."* ...

(c) The fair-minded objective reader could and would only interpret the statement above contained at section 9.1 of Wildstone's report as meaning that the Claimant had participated in the competition for all three sites discussed at section 7 and had not been able to match the amounts offered by the successful bidders and for that reason had not been awarded the relevant contracts. However the unchallenged evidence of Mr Stephen Joseph was that the Claimant had not bid for two of those sites. In one case, the Claimant had not even been aware of the relevant opportunity.

(d) ... on the basis of the evidence provided by Mr Chandler at trial, that statement was included by Wildstone in the Appraisal Report in the knowledge that it was untrue. Alternatively, Wildstone was reckless as to the truth of the statements it made, despite it being obvious that it would have a materially adverse impact on the Claimant and its reputation and would render any subsequent tender process unfair and unequal.

(e) Thereafter, the Defendant acted upon the advice contained in the crib sheet and the Appraisal Report. The Defendant conducted a subsequent tender process for the Two Leases which was infected by a wholly erroneous understanding of the Claimant's business model and position in the market, in particular in respect of its participation in recent competitions, and by a perception that the Claimant would be unlikely to meet the level offered by other tenderers and/or that such alleged inability to meet the level offered by other tenderers reflected adversely the Claimant's financial standing. That erroneous understanding was a direct

> consequence of Wildstone's biased approach in both the crib sheet and the Appraisal Report."

197. The Council objects to the application to amend on the following grounds:

i) The claim is long out of time. Ocean's claim of actual bias is based on (a) the crib sheet provided by Mr Chandler to Mr Hainge on 29 April 2016; and (b) the appraisal report prepared by Wildstone and provided to the Council on 18 July 2016. These documents were produced almost 2 years ago. At the very latest Ocean should have sought permission to amend the claim when these documents were disclosed on 15 February 2018.

ii) Ocean's case on actual bias depends on these two documents from early 2016. The real complaint is that Ocean was not given the direct awards they sought in the early summer of 2016. The outcome of Ocean not being given a direct award is that the Council held a tender process and opened up the grant of the new leases to fair competition. Ocean was able to, and did, participate in that tender process.

iii) Ocean alleges that the evidence relied on demonstrates that the Council (through its agent, Wildstone) was actually biased against Ocean in the procurement. However, the tender process did not begin until 24 April 2017. There is no evidence to suggest that the Council, or its agent, was actually biased against Ocean in the conduct of that tender exercise and/or in taking the decisions subject to challenge in this claim.

198. In my judgment there is no basis for the suggestion that Wildstone was biased against Ocean. Ocean bid for, and won, the competition run by Wildstone in respect of the advertising concession at the Trinity Underpass. Wildstone had no financial or other interest in the outcome of the tender exercise for the New Leases. The basis of its fee would be the same whether the Original Lease were re-negotiated or the New Leases were executed.

199. Mr Moser established through cross-examination of Mr Chandler that there were errors in the information contained in the crib sheet and in the appraisal report prepared by Wildstone. The error in the crib sheet was careless and demonstrated that Wildstone had not carried out sufficient research. There is no evidence that it was deliberate. In any event the crib sheet did not contain advice or Wildstone's opinion of Ocean; the purpose of the crib sheet was to provide arguments for the Council to use in its negotiations with Ocean. No doubt, if the Council raised this in its negotiation, Ocean could readily rebut the point. The error in the appraisal report was misleading. However, the thrust of the advice in that report was that Ocean's offer was too low and that the Council could obtain a better outcome through a tender exercise. Such advice proved to be correct.

200. Wildstone were appointed by the Council in 2014. Ocean was aware that Wildstone were the Council's consultants. Ocean complained to the Council informally that there had been a rift with Mr Cox and that Wildstone was hostile to them but such complaint was not put in writing and no particulars were ever provided.

201. Ocean was keen to extend the Original Leases by entering into a direct agreement with the Council. Mr Hainge wanted to ensure that all negotiations went through him and Wildstone. That was a proper course of action for him to take to ensure a fair process and to ensure that best value was achieved for the Council.

202. Mr Hainge notified Ocean that Wildstone would be appointed to act as the Council's agents in a tender exercise for the New Leases as early as April 2016. Ocean wanted to keep its offer confidential but the Council was entitled to share that information with its consultants and Ocean was told by Mr Haq that its offer would be shared with the Council's consultants. Ocean's offer in 2016 was rejected because it was too low. Wildstone advised the Council to go out to tender based on its assessment that the rental value of the site was significantly higher than Ocean's offer. Wildstone's advice proved to be correct.

203. The New Leases were entered into following a competitive tender process. There were four bidders, including Ocean. Outdoor Plus's bid was much higher than the other bids, including any offer made by Ocean. Outdoor Plus was demonstrably the successful bidder. Pursuant to the Council's "best value" duty under the Local Government Act 1999 and its fiduciary duty to its council taxpayers, the Council was obliged to accept the bid of Outdoor Plus.

204. I conclude that the new allegations of actual bias have no real prospect of success. In any event, they are made too late, after the conclusion of the evidence. The application to amend is refused.

205. For the above reasons, Ocean has failed to establish any unlawful conduct in respect of the tender exercise. The claim does not raise any arguable grounds for judicial review and therefore, permission is refused.

Conclusion

206. For the reasons set out above:

i) the part 7 claim is dismissed;

ii) permission to amend the statement of grounds is refused;

iii) permission to proceed with the judicial review is refused;

iv) the judicial review is dismissed.