

What is a concession contract?⁴

The High Court has given guidance on what constitutes a concession contract in its first ruling under the Concession Contracts Regulations 2016 (CCR).

The question before the court was whether a lease entered into over a property which permitted advertising next to a highway was a concession contract.

In deciding that this would not amount to a concession contract, the court considered the following factors as relevant to its decision:

- A contract will only be a concession contract where the services or works in question are for the benefit of the contracting authority or utility, in furtherance of its strategic objectives or to satisfy a statutory obligation. As there was no statutory obligation to provide advertising or evidence of any benefit to the authority or its constituents, the lease could not be a concession contract.
- In order to fall within the CCR, the contract must contain a positive, legally enforceable obligation to provide works or services. In this case, the requirement to use “reasonable endeavours” to procure advertising business for the site would not constitute a legally enforceable obligation.
- Even if the arrangement had been concession contract, no procurement would have been required in any event as the lease was a genuine lease and therefore exempt from the scope of the CCR.

The claimant sought to bring an alternative argument on the basis that the contracting authority was bound to comply with the general EU principles, however this argument was rejected on two grounds. Firstly, the leases were not services contracts and secondly, even if they were, there was no evidence of cross-border interest, which is required to engage the general EU principles in any event.

Comment

This case is note-worthy as it is the first in which the court has considered and provided additional guidance on the definition of a concession contract under the (relatively) new CCR. Whilst the court’s ruling and consideration of the issues is not particularly surprising, it is always interesting to see how a court will interpret and apply new legislation for the first time. The court’s ruling in relation to the general EU principles is also comforting, confirming again that cross-border interest is essential in order to engage the principles.

⁴ *Ocean Outdoor UK Limited v London Borough of Hammersmith and Fulham* [2018] EWHC 2508 (TCC)