



Neutral Citation Number: [2019] EWCA Civ 1642

Case No: A1/2018/2681

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM**  
**THE HIGH COURT OF JUSTICE**  
**TECHNOLOGY AND CONSTRUCTION COURT**  
**THE HONOURABLE MRS JUSTICE O'FARRELL DBE**  
**[2018] EWHC 2508 (TCC)**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 08/10/2019

**Before:**

**LORD JUSTICE LONGMORE**  
**LORD JUSTICE COULSON**  
and  
**MR JUSTICE SNOWDEN**

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**Between:**

<b>OCEAN OUTDOOR UK LIMITED</b>	<b><u>Appellant</u></b>
<b>- and -</b>	
<b>THE LONDON BOROUGH OF HAMMERSMITH &amp; FULHAM</b>	<b><u>Respondent</u></b>

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

Hearing date: 9th July 2019  
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**Approved Judgment**

## **Lord Justice Coulson :**

### **1. Introduction**

1. The rules relating to public procurement grow ever more complex. Following on from the original EU Directives relating to public procurement generally (most notably, Council Directive 89/665/EEC of 21 December 1989), and the various iterations of the Public Contract Regulations in the UK of 2006, 2009 and 2015, the rules have now been extended to what are known as concession contracts. This appeal raises novel questions as to the scope of the Concessions Directive (Directive 2014/23/EU) (“the Concessions Directive”), and the Concessions Contract Regulations 2016 (“the Regulations”) which implement that Directive.
2. The contracts in issue are two leases (referred to by the parties as “the New Leases”) for land either side of the Hammersmith Flyover in West London, on which are situated substantial structures (known as “the Two Towers”) which support large digital advertising screens. The respondent (whom I shall call “the Council”) owns the land and the Two Towers. They originally leased the land to the appellants (whom I shall call “Ocean”). When the leases came up for renewal, Ocean were comprehensively outbid by Outdoor Plus Limited (whom I shall call “Outdoor Plus”), and on 30 June 2017 the Council entered into the New Leases with Outdoor Plus.
3. After failing to secure the New Leases, Ocean complained that the procurement exercise (in which they had freely participated) was unlawful, because it was one to which the Concessions Directive and the Regulations applied. The Council denies that the Regulations applied. If the Concessions Directive and the Regulations did apply, it is common ground that the procedural formalities they require for any procurement exercise did not occur. Ocean claim damages as a result. The Council maintains that, even if the Regulations were applicable, the breach was procedural only and not ‘sufficiently serious’ to justify a claim for damages. Moreover, the Council submits that the scale by which Ocean were outbid by Outdoor Plus means that there could have been no causal link between the Council’s breach and any loss suffered by Ocean.

### **2. The Factual Background**

4. The Council leased the land to Ocean in 2010, and those leases were extended to 20 June 2017.
5. In April 2017, the council engaged the services of Wildstone Media Consulting Limited (“Wildstone”) to oversee a competition for the New Leases. Bids were invited on the basis of a 3-year term, a 5-year term, and a 10-year term. Offers had to be made in the form of a guaranteed fixed annual payment to the Council, paid quarterly in advance.
6. Various bids were submitted. For a 10-year lease, Ocean offered £600,000 per annum with an upfront payment of the first 18 months’ rent. By contrast, Outdoor Plus offered £1.7 million per annum over the same 10-year term, with a staged annual increase and a market review in year 5. A similar scale of difference was apparent in the respective bids for a 5-year term.

7. On 1 June 2017, Wildstone produced a tender report for the Council, recommending that it should accept the bid from Outdoor Plus. On 13 June, Wildstone informed Ocean that their bid had been unsuccessful. The following day the Council’s solicitors wrote to Ocean requiring it to deliver up vacant possession of the land and the Two Towers.
8. On 30 June 2017, the New Leases were executed by the Council and Outdoor Plus. The New Leases were in identical terms for each plot of land. They were for a 10-year term, and reflected Outdoor Plus’ successful bid in a total annual rent of £1.7 million.
9. The relevant terms of the New Leases are set out below.
  - (a) The “Property” was defined as:

“Property and the Tower erected thereon as described in Schedule 1 together with any alterations or additions thereto”.
  - (b) The “Tower” was defined as:

“the structure on which advertisements are displayed including all supports and the electrical cables and apparatus used for the lighting of the structure as further described in Schedule 1 hereto”.
  - (c) The ‘Permitted Use’ was defined as:

“... the operation of the Tower on the Property for the display of static electronic advertisements”.
  - (d) Clause 4 was headed “Demise”. Pursuant to that clause the Council exclusively let to Outdoor Plus the Property for the term of 10 years.
  - (e) The tenant’s covenants included, at clause 5.1, the obligation to pay the annual rent in quarterly payments. There was no positive covenant referring to advertising although, amongst the lengthy list of other obligations on the part of Outdoor Plus, there were two negative covenants relating to unlawful and motion advertising (at clauses 5.12.2 and 5.12.4 respectively). By contrast, the Council’s covenants were limited to the covenant of quiet enjoyment at clause 8.
  - (f) Clause 10 was headed “Miscellaneous”. Clause 10.8 was headed “Good Faith” and was in these terms:

“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”.
10. Schedule 1 of each New Lease defined the Property by reference to a plan. The relevant Tower was defined by reference to the applicable grant of planning permission. Schedule 2 dealt with the revision of the annual rent.

11. By a claim form issued in the TCC on 18 August 2017, Ocean claimed that the procurement process was unlawful because the Council had failed to comply with the Directive and/or the Regulations. The remedy sought was damages. The trial of the action took place in May 2018. In a reserved judgment dated 28 September 2018 ([2018] EWHC 2508 (TCC)), O'Farrell J dismissed Ocean's claims. Permission to appeal was granted on 17 December 2018.

### **3. The Legal Framework**

12. The Concessions Directive begins with a startling 88 separate Recitals. It is happily only necessary to set out five of them for present purposes, as follows:

- (a) Recital 1 sets out the purpose of the Directive:

"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."

- (b) Recital 8 summarises the intent behind the new 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."

- (c) Recital 11 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."

- (d) Recital 14 explains 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."

- (e) Recital 15 provides an explanation for what is known as 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."

13. It was common ground, both before O'Farrell J and this court, that there were no material differences or conflict between the Concessions Directive and the Regulations. The following Regulations are relevant to this appeal:

- (a) Regulation 3, which defines concession and service concession contracts in the following terms:

"(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."

(b) Regulation 8, which contains the basic requirements of a fair and transparent process:

"(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."

- (c) Regulation 10 which includes the land transaction exemption, expressed as follows:

"10 (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 ..."

14. The procedural requirements in respect of the publication of a concession notice and a concession award notice are set out in Regulations 31-33. It is unnecessary to set those out in detail. Similarly, Regulations 37, 38, 40 and 41 also contain other procedural requirements. Regulation 47 requires the contracting authority to notify the tenderers of its decision to award a concession contract. And finally Regulation 50 (1) requires the contracting authority to comply with the Regulations and any enforceable EU obligation in the field of procurement in respect of a concession contract falling within the scope of the Regulations.

#### **4. The Judgment of O'Farrell J**

15. The main issue for the judge was whether the Regulations applied to the tender procedure for the New Leases. She dealt first at [86]-[104] with whether the New Leases were service concession contracts within the meaning of the Regulations. She concluded that they were not. There were two elements to that decision.

16. First, she said at [91] that it was an essential element of a services concession that the contracting authority entrusted the provision and management of services to the economic operator and, at [96] that such services or works had to be 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.

17. Secondly, the judge went on to explain why the New Leases did not entrust to Outdoor Plus the provision of services for the benefit of the Council, and therefore did not engage the Regulations. She said:

"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.”

18. The judge then considered whether the New Leases were ‘contracts for pecuniary interest’ for the purpose of regulation 3. This part of her analysis was at [105] - [114]. At [110] she concluded on the basis of the authorities that it was an essential requirement of a contract for pecuniary interest that the contractor assumed a direct or indirect obligation to carry out the services which were the subject of the contract and that such obligation was legally enforceable. She concluded that the New Leases imposed no legal obligation on Outdoor Plus to provide any service. In so doing, she rejected Mr Moser’s argument that clause 10.8 of the New Leases (paragraph 9(f) above) gave rise to an enforceable obligation to provide advertising services. She said at [112]:

“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.”

19. Her wider conclusions, rejecting Ocean’s case that the New Leases were contracts for pecuniary interest in accordance with regulation 3, were set out at [113] - [114]:

“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 [Regulations].”

20. The next section of the judgment which is relevant for the purposes of this appeal addressed the land transaction exemption at [121] - [127]. The judge’s conclusion at [125] was that, even if the New Leases could be construed as service concession contracts, they were excluded by the land transaction exemption:

“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.”

21. For reasons which will become apparent below, it is unnecessary to set out any more of the judge’s judgment in relation to matters of liability. It should be emphasised that she was dealing with a number of other disputes which do not arise on this appeal.
22. It is however necessary to deal with the judge’s conclusion as to Ocean’s inability to claim damages if (contrary to her conclusions) the Regulations applied to the New Leases. Having set out some of the Regulations, at [153] - [157], the judge went on to conclude that this was not a case where the breach was sufficiently serious to give rise to an award of damages, and that there was no causal link between the breach and the loss in any event. Her reasoning was at [158] - [160]:

“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.”

## **5. The Grounds of Appeal**

23. The grounds of appeal number eight in total. They are as follows:

1. “The learned Judge found that the Concessions Directive and the CCR 2016<sup>1</sup> are concerned with contracts for services or works where such services or works are for the benefit of the contract authority or its residents, in furtherance of the strategic objectives of the contracting authority, or to satisfy the contracting authority’s statutory obligations (Judgment [96]). In so holding, the learned Judge was wrong as a matter of law and/or fact. She should have found that the Concessions Directive and the CCR 2016 were not concerned only with contracts for services or works where the services or works were for the benefit of the contracting authority or in furtherance of the strategic objectives of the contracting authority, or to satisfy the contracting authority’s statutory obligations. She should have found that there was no requirement that the contracting authority or its residents had to benefit from the right to exploit the provision of services granted under the relevant contract.
2. The learned Judge held that the New Leases do not entrust to Outdoor Plus the provision of services for the benefit of the Respondent and therefore do not engage the CCR (Judgment [97] - [103]). In so holding, the learned Judge was wrong as a matter of law and/or fact. She should have found that to the extent it was necessary that the New Leases entrust the provision of services for the benefit of the Respondent, that requirement was met, in particular as a consequence of the substantial financial benefit that would accrue to the Respondent and which it accepted was to be used to support frontline services.
3. The learned judge held that general advertising does not fall within the categories of services envisaged by the Concessions Directive (Judgement [101]). In so holding, the learned Judge was wrong as a matter of law and/or fact. She should have held that

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<sup>1</sup> What I have called the Regulations

general advertising was with the scope of the services by the envisaged by the Concessions Directive.

4. The learned Judge held that the New Leases are not service concession contracts within the meaning of CCR 2016 (Judgment [104]). In so holding, the learned Judge was wrong as a matter of law and/or fact. She should have held that the New Leases were service concession contracts within the meaning of the CCR 2016 on the basis that even if it were necessary to show a benefit to the public that requirement was fulfilled and that advertising services are within the scope of services envisaged by the Concessions Directive given the learned Judge correctly held there was a right to exploit the provisions of services and that Outdoor Plus held.
  5. The learned Judge held that the New Leases are not contracts for pecuniary interest for the purpose of Regulation 3 CCR 2016 (Judgment [114]). In so holding, the leaned erred as a matter of law and/or fact. She should have held that clause 10.8 of the New Leases gave rise to a legally enforceable obligation for Outdoor Plus to carry out advertising services and that the New Leases were therefore contracts for pecuniary interest.
  6. The learned Judge held that the land transaction exemption applied (Judgment [126]). In so holding, the leaned Judge was wrong as a matter of law and/or fact. She should have held that the land transaction exemption did not apply to the New Leases because the grant of the interest in land was merely to facilitate the advertising concession.
  7. The learned Judge held that the CCR 2016 did not apply to the tender exercise for the New Leases (Judgment [127]). In so holding, the leaned Judge was wrong as a matter of law and/or fact. She should have held that the tender exercise for the New Leases did fall within the ambit of the CCR 2016 and that the Respondent was required to comply with the relevant obligations of that legislation.
  8. The learned Judge held that any breaches of the CCR 2016 and/or general EU principles would not be sufficiently serious to give rise to an award of damages (Judgment [160]). In so holding, the leaned Judge was wrong as a matter of law and/or fact. She should have held that any breach of the CCR 2016 and/or general EU principles would have been sufficiently serious to give rise to an award of damages given that the Appellant would have lost the chance to participate in a lawful procurement exercise and that the bids submitted as part of the tender exercise conducted by the Respondent could not be assumed to be the same as those which would have been submitted in such a lawful procurement.”
24. I consider that these grounds of appeal can sensibly be resequenced so as to focus on the principal issues which arose between the parties at the hearing. There are three such principal issues of liability, with which I deal in detail below:
- a) *Principal Issue 1:* Whether the New Leases were service concession contracts within the meaning of the Regulations (ground 1 above);
  - b) *Principal Issue 2:* Whether the New Leases were contracts for pecuniary interest for the purposes of regulation 3 (ground 5 above);

c) *Principal Issue 3*: Even if they were contracts for the provision or management of services, whether the land exemption applied to the New Leases (ground 6 above).

25. Thereafter I deal much more briefly with the remaining issues as to liability (namely grounds 2, 3, 4 and 7). I address principal issue 4, which is concerned with damages (ground 8 above) in more detail, because I consider it to be a question of wider significance.

26. I approach the principal issues in this way because, unless Ocean is successful on each of principal issues 1, 2 and 3, then their claim cannot succeed. Moreover, even if they are successful on all three of those principal issues, unless they are also successful on principal issue 4, their entitlement to relief would (as the judge noted) be limited to a declaration of ineffectiveness in any event, and would not encompass a claim for damages.

## **6. Principal Issue 1: The Nature of a Services Concession Contract**

27. There are two elements to principal issue 1. The first is general, and concerns whether or not there is a connection between the contracting authority (in this case the Council) and the kind of services which are intended to be covered by the Regulations. The second is specific, and concerns whether services covered by the Regulations were being provided here. These two elements reflect the judge's approach summarised at paragraphs 16 and 17 above.

28. As to the general point, the definition of a services concession contract is set out at regulation 3(3) (paragraph 13 (a) above). The judge found at [92] that, in order to come within that definition, the services in question must be for the benefit of the contracting authority "in respect of its public obligations". Having gone on to set out some of the authorities, the judge concluded at [96] that the Concessions Directive and the Regulations related to services which were 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."

29. It does not appear that this topic was the subject of any sustained debate before the judge. However, on appeal, it was Mr Moser's first criticism of the judge. He argued that her conclusion adopted too restrictive an approach to 'services'. He pointed out that 'services' were not defined anywhere in the Regulations and that the judge's conclusion amounted to an unwarranted qualification on the types of concession contracts that would be caught by the Regulations.

30. In my view, notwithstanding Mr Moser's clear submissions to the contrary, the judge's conclusion was correct. There are a number of reasons for that.

31. First, it must be remembered that the Concessions Directive and the Regulations are concerned solely with public bodies. The definition of "contracting authorities" in regulation 4 makes that plain<sup>2</sup>. The Regulations apply to those contracts into which such contracting authorities may enter, pursuant to which they grant a concession to an economic operator, in order that the economic operator might provide the services

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<sup>2</sup> Regulation 4 defines 'contracting authorities' as including 'State, regional or local authorities' and 'bodies governed by public law'.

in question on behalf of the contracting authority. Accordingly, it seems to me to follow that those services must be services to or for the public, which the contracting authority would otherwise have to provide itself.

32. As noted at the outset of this judgment, the Concessions Directive and the Regulations came into effect long after both the EU and the UK had enacted detailed rules governing public procurement generally. Originally, concession contracts were the subject of a different ‘light touch’ regime, but it was felt that, in consequence, concession contracts were being used (and possibly misused) so as to avoid the full rigour of the public procurement rules. That explains why the Concessions Directive and the Regulations were subsequently thought to be necessary. This history emphasises that the mischief at which these Regulations are aimed is the potential misuse of public money, which in turn supports the judge’s conclusion that it was only services in respect of the contracting authority’s public obligations which were caught by the Regulations.
33. Secondly, I consider that defining the services in this way is entirely consistent with the word ‘entrust’ in regulation 3(3). That is an unusual word in secondary legislation of this sort, and it carries with it the concept of a service to the public, which the contracting authority would otherwise be obliged to provide directly, instead of being ‘entrusted’ to the economic operator, through the concession contract. It is not just contracted out to a third party. This again strongly suggests that the services in question are public services which the contracting authority would otherwise be obliged to provide itself.
34. Thirdly, Recital 11 of the Concessions Directive (set out in full at paragraph 12 c) above) stipulates that contracting authorities must “always obtain the benefits of the works or services in question”. As the judge correctly noted at [92], that again suggests that the services in question are those which the contracting authority is required to provide by way of its own legal obligations.
35. Fourthly, I consider that there is ample CJEU authority in support of the judge’s conclusion. I take those authorities in chronological order.
36. In *Gemeente Arnhem v BFI Holding BV* [1998] 1-ECR 6821, the opinion of the Advocate General (with which the court indicated no dissent) stated at paragraph 26 that:

“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.”

That is a plain statement that the service must be one which the contracting authority is responsible for providing. Although Mr Moser properly drew our attention to the fact that this was an old case concerned with different provisions, that does not seem to me to lessen the relevance of the passage I have cited. Equally, that passage is not undermined by the fact that, at the time, a service concession might have been thought of in slightly different terms to those which have subsequently been agreed: the AG’s

view was expressly offered “in the absence of a specific Community definition embodied in legislation.”

37. Next is the well-known case of *Helmut Muller* [2010] 3 CMLR 18. Paragraphs 52 and 53 of the AG’s opinion (with which the court again did not indicate any disagreement) stated as follows:

“AG52 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.

AG53 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.”

Those paragraphs again seem to me to confirm that there must be a direct link between the contracting authority’s obligations and the services being provided: the services must “obviously be in the public interest”.

38. Finally, there is the more recent case of *Promoimpresa Srl* [2017] 1 CMLR which is of direct relevance because it relates to the Concessions Directive. In that case, not only was the AG’s opinion not dissented from (and expressly endorsed in numerous passages in the judgment itself) but I consider that it deals directly with this issue. Thus:

“AG62 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.

AG63 For an instrument to be regarded as a services concession, it must therefore be established that the provision of services is subject to specific 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.

AG64 Those considerations are borne out by recital 14 of Directive 2014/23, according to which certain Member State acts such as authorisations or licences, in particular where the economic operator remains free to withdraw from the provision of works or 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.

AG65 In this case it is not apparent from the facts described in the respective orders for reference whether the applicants in the main proceedings were required, under acts classified under national law as “concessions of State-owned assets”, to provide services that had been specifically entrusted to them by a public authority and were subject to specific requirements defined by that authority.”

39. These passages make plain that the services are those which “as a rule” would otherwise fall to be provided by the public authority. Mr Moser relied on the qualification, which certainly indicates that this principle may be subject to exceptions. But the effect of *Promoimpresa*, and the other authorities to which I have referred, makes it clear that, at least as a matter of general principle, the services which are the subject of the Concessions Directive (and therefore the Regulations) are services which would otherwise be provided by the contracting authority as part of its statutory obligations or in furtherance of its strategic objectives.
40. Finally, standing back from the detail, I would add this general point. All of Mr Moser’s arguments on principal issue 1 edged towards the proposition that, because the Council is a public authority, any contract into which it enters must, in some way or another, be caught by either the general public procurement rules, or these Regulations.
41. In my view, that is not looking at the question the right way round. A local authority like the Council will enter into a myriad of different contracts every year. Some may be caught by the Regulations; most will not. It is for Ocean to prove that the New Leases fall within the ambit of the Regulations, not for the Council to displace some sort of presumption that, because it is a public authority, all of its contracts are caught in one way or another by the public procurement rules.
42. The judge’s general conclusion, that the services had to be services which the Council was otherwise obliged to perform (or were for the benefit of the Council or its residents) then fed into her subsequent findings at [98] – [103] (set out at paragraph 17 above) about the terms of the New Leases in this case. Having concluded generally that the services had to be services which the Council would otherwise be obliged to provide, the judge had no doubt that the New Leases were not service concessions contracts. This was because, as she held:

- i) the Council had no statutory obligation to provide advertising services for its residents and the advertising services were not provided on the Council's behalf [98];
  - ii) the advertising from the Two Towers was not required by, or provided for, the Council [99];
  - iii) the New Leases did not provide a service for the benefit of the Council or its residents [100]; and
  - iv) advertising did not fall within the categories of services envisaged by the Concessions Directive [101].
43. In my view, the judge's conclusions summarised at i) - iii) above were plainly right. The Council had no statutory or other obligation to provide advertising services for its residents (or anyone else) and Ocean do not suggest otherwise. Accordingly, any advertising services being provided pursuant to the New Leases were not and could not be provided on the Council's behalf. There was no express request for advertising by the Council within the New Leases, and its income was derived from Ocean Plus' possession and use of the land, not the nature or quantity of advertising they might sell. That advertising was in any event unrelated to the objectives of the Council or any of its public obligations.
44. In addition, I consider that there was no direct benefit to the Council or its residents as a result of the nature and quantity of the advertising featured on the Two Towers. Although the Council imposed negative covenants as to particular types of advertising (unlawful and moving advertisements were prohibited), it was irrelevant to the Council whether or not those who saw the advertisements (whether they were local residents or otherwise) benefited in some way from the advertisements that they saw.
45. Mr Moser suggested that the Council could be said to have derived at least an indirect benefit from the rent payable under the New Leases (which gave rise to ground 2 of the appeal). But that misses the point. That submission assumed that the rent was paid in consideration for services to which the Regulations applied. But it was not, for the reasons already given.
46. For completeness, I should say that I do not agree with the judge's fourth and final reason at [101], summarised at point iv) at paragraph 42 above. Whilst I accept that advertising does not fall within the categories of services envisaged by Recital 1 of the Concessions Directive, that of itself does not seem to me to be determinative: see the fuller exposition of my reasoning on this issue at paragraphs 73-76 below. However, since I expressly agree with each of the first three reasons for the judge's finding that the New Leases were not service concessions contracts, this difference of opinion is irrelevant to the disposal of this appeal.
47. In those circumstances, I consider that the twin strands of the judge's conclusions on principal issue 1 were essentially correct. In consequence, the Regulations did not apply to the tender process for the New Leases.

**7. Principal Issue 2: Were the New Leases Caught by the Definition in Regulation 3(3)?**



48. Principal issue 2 is concerned with whether the New Leases were contracts “for pecuniary interest... by means of which [the] contracting authority entrust the provision and the management of services... to the economic operator” (regulation 3(3)). The judge concluded that they were not. Her reasoning is at [105] – [112] and her conclusion is at [113] – [114] (paragraph 18 - 19 above).
49. The starting point for any consideration of this issue is to attempt to define what is meant by a concession. Mr Moser described it as a transfer, by the contracting authority to the economic operator, of the right to exploit a business opportunity by providing a service to third parties, in return for a payment to the owner of that opportunity. In this way, he said that the New Leases involved a grant by the Council to Outdoor Plus to exploit the opportunity to advertise; that Outdoor Plus provided advertising services to third party advertisers, in exchange for which the advertisers provided money to Outdoor Plus; and that Outdoor Plus then passed at least some of that money back to the Council.
50. Whilst I do not demur from Mr Moser’s generic definition of a concession, it will be seen straight away that the facts of this case do not easily fit within his proposed synallagmatic<sup>3</sup> model. In a paradigm concession contract, the third parties will be those members of the public for whom the contracting authority is obliged to provide the services in question (like residents who need car parking, or who require leisure facilities). Here the third parties are advertisers who have no connection whatsoever with the Council or its residents. Moreover, the money paid by the advertisers to Outdoor Plus has nothing to do with the Council, which has a separate entitlement to a fixed sum by way of rent, regardless of the nature, quality or quantity of the advertising sold or the monies received by Outdoor Plus from those advertisers.
51. The decision in *Promoimpresa* is also of assistance on the general definition of a concession:

“47. However, in the cases in the main proceedings, as the Commission notes, the concessions do not concern the provision of a particular service by the contracting entity, but an authorisation to exercise an economic activity on State-owned land. It follows that the concessions at issue in the main proceedings do not fall within the category of service concessions (see, by analogy, *Belgacom NV v Interkommunale voor Teledistributie van het Gewest Antwerpen (Integan)* (C-221/12) EU:C:2013:736; [2014] 2 C.M.L.R. 23 at [26]–[28]).

48. Such an interpretation is, furthermore, supported by recital 15 of [Directive 2014/23](#). That recital states that 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, whereby the State establishes only general conditions for their use without procuring specific works or services, should not qualify as “service concessions” within the meaning of that directive.”

Again, that passage would suggest that the New Leases were not concession contracts as defined, but were instead (to adopt the court’s language) an authorisation to exercise

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<sup>3</sup> The expression used in *Faraday* (see paragraph 53 below).

an economic activity (namely the selling of advertising on the Two Towers) on land owned by the Council.

52. Finally on the question of general definition, Mr Moser relied on the decision of this court in *JBW Group Limited v Ministry of Justice* [2012] EWCA Civ 8; [2012] 2 CMLR 10. That case involved the tender process for contracts for bailiff services to be provided to magistrates' courts. The case pre-dated the Concessions Directive and the Regulations and was in fact concerned with whether or not the dispute fell under the Public Contract Regulations 2006<sup>4</sup>. It is therefore of tangential relevance to the present case and offers no assistance on, for example, the meaning of a contract for pecuniary interest pursuant to regulation 3.

53. The concept of a contract for pecuniary interest (as set out in regulation 3(3)) was considered in *Helmut Muller* and by Hickinbottom J (as he then was) in *R (Midlands Co-operative Society Limited) v Birmingham City Council* [2012] EWHC 620; [2012] BLGR 393. Having referred to the decision in *Helmut Muller*, Hickinbottom J said that:

“... to fulfil the purpose of the Directive, a required element is a commitment by the contractor, legally enforceable by the contracting authority, to perform the relevant work. It is insufficient if, legally, the contractor has a choice if he's entitled not to perform the work.”

That analysis was expressly endorsed by this court in *R (Faraday Development Limited) v West Berkshire Council* [2018] EWCA Civ 2532; [2019] PTSR 1346. The requirement for such a legally enforceable obligation is also apparent from *Promoimpresa* and the paragraphs of that judgment referred to at paragraph 38 above.

54. In the present case, the judge concluded 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 that form the subject of the contract; and that such obligation is legally enforceable.” She held that, on analysis, the New Leases did not impose any such obligation on Outdoor Plus to provide advertising services.

55. Mr Moser submitted that this was an unrealistic reading of the New Leases and that, in reality, they were all about the provision of advertising services. He relied in particular on clause 10.8 of the New Leases (set out at paragraph 9 (f) above). In response, Mr Goudie QC, on behalf of the Council, said that the New Leases were just that: leases for the land and the structures upon them. They were not contracts in respect of advertising services at all and clause 10.8 could not make them so.

56. I accept that, as was made clear by this court in *Faraday*, it is important to look at the New Leases as a whole, and to have regard to their substance rather than their form. But I consider that such an exercise only supports the judge's conclusions. In my view, the New Leases were not contracts which “entrust the provision and the management of [advertising] services” to Outdoor Plus. Again, there are a number of reasons for that conclusion.

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<sup>4</sup> It was therefore the sort of dispute under the general public procurement rules which gave rise to the Concessions Directive itself.

57. First, I think Mr Goudie is right to say that the New Leases were in relatively standard terms: on the front page, each was expressly called a “standard poster lease”. Their terms, in respect of the tenant’s covenants on the one hand, and the landlord’s covenant on the other, were in conventional form. That is perhaps unsurprising, since they follow the Land Registry model form of lease. Although there is a good deal of detail about the Two Towers, that too is unexceptional, given that the Two Towers were an integral part of the commercial arrangement between the parties. The judge found that the New Leases were genuine leases of land, and in my view, she was right to do so.
58. Secondly, there was no direct obligation within the New Leases on the part of Outdoor Plus to provide any advertising services at all. The rent is the result of the land rights which have been granted by the Council, not the provision of any advertising services by Outdoor Plus.
59. As I have said, the best that Mr Moser could do to counter these propositions was his reliance on clause 10.8. This clause came under the general heading of “Miscellaneous” and under the sub-heading of “Good Faith”. It made no express reference to advertising at all. It is not therefore an obvious vehicle for a submission that the New Leases were really contracts for the provision of advertising.
60. I do accept that (contrary to Mr Goudie’s arguments) clause 10.8 was an enforceable obligation, by which Outdoor Plus had to provide at least some use for the Two Towers. But I do not consider that it amounted to a direct and immediately enforceable obligation on their part to provide advertising services. It sets out no positive obligation to provide advertising, let alone advertising of a particular nature, quality or minimum quantity. It simply provides a relatively vague mechanism to encourage Outdoor Plus not to let the screens sit there blank. Moreover, clause 10.8 does not affect the fact that the consideration payable by Outdoor Plus was not for the provision of advertising services, but a fixed rental for their right to hold the land and the Two Towers as a tenant. There was (for example) no profit-sharing agreement, which might have linked the Council’s ability to recover monies to the nature and amount of advertising on the Two Towers
61. For these reasons, therefore, I consider that the New Leases were not contracts for pecuniary interest by means of which the Council entrusted to Outdoor Plus the provision or the management of advertising services. Accordingly, even if I was wrong about principal issue 1, Ocean has not shown that the New Leases came within the definition in regulation 3(3), so their separate failure on principal issue 2 would be fatal to the appeal.

## **8. Principal Issue 3: Did the Land Exemption Apply?**

62. Recital 15 of the Concessions Directive is set out at paragraph 12 e) above. In addition, Article 10 of the Directive, at paragraph 8, makes plain that it does 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 concerning rights thereon...”

In the Regulations, the exclusion at 10(11) is couched in slightly different form. It excludes 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 ...”

63. Although the wording of the Concessions Directive, on the one hand, and the Regulations, on the other, is slightly different, the difference is minimal. Nothing turns on it. I shall therefore refer to these provisions generically as “the land exemption”.
64. Neither counsel was able to identify any European or domestic authorities which explained the land exemption more fully. The point arose in argument in *Faraday* but was not addressed by this court in its judgment. In addressing principal issue 3, it is therefore necessary to start with the words of the land exemption itself.
65. In my view, the description in the latter part of Recital 15 of “land lease contracts” which are the subject of the land exemption is an almost perfect description of the New Leases in the present case. Thus, in the words of that Recital, the New Leases “generally contained 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”.
66. That analysis is consistent with the width of the land exemption set out in regulation 10(11). That makes clear that the Regulations do not apply to contracts for the rental of existing buildings, or contracts “which concern interests in or rights over” existing buildings. As Mr Moser accepted, that is a very wide definition. It seems to me that it must cover the New Leases, which are almost exclusively concerned with the Two Towers (namely the existing buildings) on these two pieces of land.
67. Mr Moser submitted that, when looked at as a whole, the New Leases were not land transactions, but contracts in relation to advertising services. He went so far as to say that “they make no sense as a lease”. By reference to the judgment in *Faraday*, he suggested that the main object of the New Leases was not to possess two pieces of land and the Two Towers upon them, but to ensure the use of the towers for advertising in order to exploit their advertising potential. Even then, he properly accepted that there was no binding obligation to that effect on the part of Outdoor Plus.
68. I have already explained at paragraphs 55-60 above why I reject that submission, and why I consider the New Leases to be genuine leases, and not contracts to provide advertising services. If the New Leases were not caught by the land exemption, it is difficult to see what sort of lease or contract would fall within that exemption.
69. The essential feature of the New Leases is that pursuant to their terms, Outdoor Plus obtain exclusive possession of these pieces of land and the Two Towers which exist there. They pay a fixed rent which is not conditional upon or affected by any particular type or level of advertising sold. Of course, Outdoor Plus have permission

to use the Two Towers for the display of static advertising and to sell the advertising space to third parties, but that does not – in my view, cannot - change the nature of the underlying transaction: it remains an agreement for the rental of land.

70. For these reasons, therefore, I consider that this was precisely the sort of situation which the land exemption was designed to cover. In those circumstances, that is a third reason why the Regulations do not apply to the New Leases.

## **9. Other Liability Issues**

71. It is unnecessary to deal in any detail with the other grounds of appeal on liability. The appellant had to succeed on each of principal issues 1, 2 and 3 in order to succeed on liability. On my analysis, the appellant has not succeeded on any of them.
72. Ground 2 was material only in that it went to support the submission that the payment of rent was a benefit to the Council. I have dealt with that argument at paragraph 45 above.
73. Ground 3 was a separate argument to the effect that, at [103], the judge was wrong to say that advertising was not the sort of service envisaged by Recital 1 of the Concessions Directive because it was not akin to the provision of infrastructure or strategic services, like parking, leisure facilities, or toilets. I have indicated at paragraph 46 above that I accept Mr Moser's submission on ground 3.
74. Recital 1 is set out at paragraph 12 (a) above. It is useful because it indicates the sorts of contract to which it was envisaged that the Concessions Directive would apply, in particular contracts relating to the provision of infrastructure and strategic services. I agree with the judge that advertising would not usually be considered a strategic service. On the other hand, it seems to me that, depending on the facts, advertising could still fall within the Concessions Directive. Recital 1 is only illustrative.
75. Mr Moser derives support for his argument on ground 3, albeit indirectly, from the decision of Akenhead J in *Group M UK Limited v Cabinet Office* [2014] EWHC 3659 (TCC). That was a case about advertising government information. It was not suggested in that case that advertising fell outside the sorts of public procurement rules with which we are concerned. But in an important sense, I regard *Group M* as contrary to Ocean's overall case on this appeal. In that case, the advertising was in respect of government information, which the government was seeking to contract out. The advertising of the information was plainly part of its statutory and legal obligations. There was therefore a direct link in *Group M* between the advertising and the contracting authority's obligations, which I consider to be necessary (for the reasons set out in paragraphs 27-47 above, dealing with principal issue 1), but which is not present here.
76. However, coming back to the narrow point about Recital 1, I accept that, if and to the extent that the judge ruled that advertising will always, in any circumstance, be outside the Concessions Directive, she was wrong to do so. For the reasons given, that does not affect the outcome of principal issues 1, 2 or 3.
77. Finally, Mr Moser confirmed that grounds 4 and 7 were sweep-up points which added nothing new.

78. On that basis, therefore, I have addressed all of the grounds of appeal in relation to matters of liability, albeit, for the reasons which I have given, in a different sequence to that in which they were originally set out. If my lords agree, for the reasons that I have given, the appeal must be dismissed.

#### **10. Principal Issue 4: Damages**

79. Strictly speaking, this issue no longer arises, because Ocean have not been successful on principal issues 1, 2 or 3. But, since it raises a matter of general importance, and since we heard detailed argument, I would wish to set out in brief terms my conclusions on principal issue 4 in any event.

80. Mr Moser complained that at [160] (set out at paragraph 22 above), the judge failed to deal in detail with the issue of whether any breach on the part of the Council was sufficiently serious to give rise to an award of damages. He submitted that, although the judge made a finding that there was no causal link between the breach and the damage sustained, that was logically the second question, and the first question (namely, whether the breach was sufficiently serious to merit an award of damages) had been ignored. He went on to argue that the judge had also erroneously rejected Ocean's case on causation, based as it was on the loss of a chance principle.

81. The question of damages in public procurement cases was dealt with by the Supreme Court in *Energy Solutions EU Limited v Nuclear Decommissioning Authority* [2017] UKSC 34; [2017] 1 WLR 1373. There the court identified the three *Francovich* conditions for damages, in the following terms:

- (i) The rule of law infringed must be intended to confer rights on individuals;
- (ii) The breach must be sufficiently serious;
- (iii) There must be a direct causal link between the breach of the obligations and the damage sustained by the injured party.

82. Condition (i) is not in issue here; conditions (ii) and (iii) are. I deal with them in turn.

83. As Lord Mance noted at paragraph 11 of his judgment, there is guidance as to what amounts to "sufficiently serious" (condition (ii)), including the clarity and precision of the rule breached; the measure of discretion left by that rule; whether the infringement and the damage caused was intentional or involuntary; whether any error of law was excusable or inexcusable; and other matters related to Community law. The authorities indicate that persistence in a breach, despite a judgment finding the infringement in question to have been established, will "clearly be sufficiently serious".

84. Mr Moser submitted that, because there had been a failure to comply with the procedural elements of the Regulations (no notice in the OJEU, no standstill agreement etc, all in breach of the regulations summarised at paragraph 14 above), it automatically followed that the breach was sufficiently serious so as to give rise to damages. He called it a "manifest and grave error." He was unable to cite any authority in support of these propositions.

85. In my view, it would be wrong in principle to hold that (subject to the separate point about the causal link) a claimant in the position of Ocean was automatically entitled to claim damages as a result of a contracting authority's failure to follow the Regulations. That would mean that every breach of the procedural requirements would automatically trigger a claim for damages, regardless of any other factor. That is emphatically not the law. In order to attract damages, the breach has to be "sufficiently serious", and that will always depend on the individual facts of the case.
86. Accordingly, I reject Mr Moser's submission that the mere fact of non-compliance with the Regulations, without more, can be regarded as sufficiently serious for the purposes of the second *Francovich* condition.
87. For completeness, I should say that I do not accept Mr Moser's proposition that the judge failed to deal expressly with the question as to whether the breach was sufficiently serious. As I read her judgment, she concluded that it was not sufficiently serious, partly because there was no direct impact on public services ([158]) and partly because any distortion of the internal market did not affect the outcome ([160]). Those were findings which the judge was entitled to reach and there is no reason to interfere with them.
88. Mr Moser submitted that condition (iii) was established in this case, despite the fact that Ocean had lost out to Outdoor Plus so comprehensively. His argument was that Ocean were entitled to the opportunity to make a bid in a lawful competition and, because (on this assumption) they had been deprived of that right, they had a claim for damages based on what he called "the loss of a chance principle", which was capable of being assessed by the Court.
89. I accept that there will be occasions when the loss of a chance principle might provide a realistic tool for the assessment of damages in a public procurement case. Although I think that Mr Moser was rather elevating the significance of the passage in *Exel Europe Limited v University Hospitals Coventry & Warwickshire NHS Trust* [2010] EWHC 3332 (TCC) (because that was merely an explanation by Akenhead J as to why damages – based on the loss of a chance principle - were an adequate remedy in that particular procurement case), there is no doubt that a percentage calculation based on the loss of a chance can be an appropriate methodology for the court to adopt in cases of this kind.
90. In my view, the fundamental flaw in Mr Moser's argument was his assumption that the loss of a chance principle relieves the claimant from any obligation to establish even a potential causal connection between the breach and the loss. The rationale of the loss of a chance principle "is to permit recovery to a claimant who, by reason of uncertainty, would otherwise be unable to prove causation to the standard of a balance of probabilities" (see Gross LJ in *AerCap Partners 1 Ltd v Aviva Asset Management AB* [2010] EWHC 2431 (Comm) at [76]). But a claimant is still required to show a possible causal connection between the breach and the loss before the loss of a chance principle is engaged.
91. So in public procurement cases, the loss of a chance principle is most likely to arise where there is a close comparison between the unsuccessful and the successful bids, and where it can be shown that the illegality in the tender process may have contributed to the rejection of the losing bid. The principle can be applicable because

of the uncertainties caused by the number of hypothetical variables in play. But it will not apply where, even taking into account all those uncertainties, it is plain that the claimant's bid would have been rejected in any event.

92. That is manifestly this case. Here, on the preferred basis of a 10-year lease, Ocean were outbid on a scale of 1 to 3. Even for a 5-year term, they were outbid on a scale of 1 to 2.5. As the judge put it at [160], “even if the opportunity to tender had been offered to other bidders, Ocean would not have been successful” (paragraph 22 above). In other words, Ocean underbid so comprehensively that there can be no uncertainty as to the hypothetical outcome of a lawful competition: Ocean would still have lost. In those circumstances, the loss of a chance mechanism would never have been applicable and *Francovich* condition (iii) was not made out.
93. It should no longer be the practice in public procurement cases for the losing tenderer to claim damages by rote, regardless of the absence of any possible connection between the alleged illegality of the process and any loss it may have suffered, simply by relying on the loss of a chance principle. In my view this case is a paradigm example of where damages – even calculated by reference to the loss of a chance principle – would never have been recoverable.
94. So for the reasons I have given, in addition to my rejection of the appeal on the three principal issues relating to liability, I also reject Ocean's appeal against the judge's finding that they were not entitled to claim damages in any event (principal issue 4, which covers ground of appeal 8).

**Mr Justice Snowden**

95. I agree.

**Lord Justice Longmore**

96. I also agree.