INTO THE WOODS

A consideration of the two judgments in Woods Building Services v Milton Keynes Council

Introduction

In July 2015, Coulson J handed down two judgments in the case of *Woods Building Services v Milton Keynes Council*. The first[1] determined that the Defendant Council had failed in its obligations under the Public Contracts Regulations 2006 in its evaluation of the Claimant's tender for the provision of asbestos removal services. The second[2] made an order for damages, but declined to order the Council to award the contract to the Claimant. This essay will consider the propriety of the court's interventionist approach, and the question of whether a mandatory injunction would have been an appropriate remedy.

Woods' complaints

The Council undertook a tender process for the award of an £8 million 4 year framework agreement for asbestos removal services. The tender proposal of the incumbent provider, Woods, was the cheapest. However, the contract was awarded to European Asbestos Services ("EAS") as a result of the Council's evaluation of the quality criteria in the tenders. The scoring was weighted 60/40 in favour of price over quality. Therefore, on the Council's evaluation, EAS significantly out-scored Woods on the quality aspects of their respective tenders.

Woods' complaints centered on the following issues:

1. The tender evaluation was allegedly unfair because the Council did not treat the proposals equally and the evaluation process lacked transparency;

2. The Council had made manifest errors in the evaluation process; and

3. The evaluation was tainted by the fact that some parts of the EAS tender were plagiarised from Woods' archive of tender proposals.

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[1] [2015] EWHC 2011 (TCC)
[2] [2015] EWHC 2172 (TCC)

Transparency and equality of treatment

Coulson J highlighted the fact that the Council was afforded no margin of appreciation in the fulfilment of its duties of transparency and equality (based on the decision in *Lion Apparel Systems v Firebuy Ltd*[3]). Indeed, he recognised that Woods had sought to focus on allegations of breaches of these duties due to this lack of a margin of appreciation.

The application of the duties of transparency and equality could give the court an excuse for being heavy-handed in its review of the evaluation process. However, Coulson J sought to narrow the issues by focusing on the substantive complaints made by Woods, and stated that he would *"only address the alleged breaches of the duties of transparency and equality on those (fewer) occasions when it seems to me that it is they which give rise to the substantive issue"*. He also referenced the objective approach to the assessment of the duty of transparency (as applied by the Supreme Court in *Healthcare at Home Ltd v Common Services Agency for the Scottish Health Service*[4]).

Allegations of a lack of transparency and equality of treatment were made in relation to a number of the scoring criteria. The Judge considered both of these allegations in relation to the "Roles and Responsibilities" section, which at Question 2.3 of the tender document stated the following:

> *"Specify the members of delivery/project team, including their roles and responsibilities (including CVs)."*

EAS scored 8 points for their answer to this question, whilst Woods scored only 6 points. The justification given by the Council for this disparity was that EAS had identified a Contract Manager whom the Council believed would work solely on this contract, whereas Woods sought to appoint a Project Director who, the Council thought, would work on other duties/projects concurrently. The Council desired a dedicated Contract Manager and therefore believed EAS's answer deserved a higher score.

However, as was confirmed by a Council witness during cross-examination, it would have been impossible for the tenderers to know from the award criteria that a dedicated Contract Manager would attract greater marks. Coulson J considered that, if this matter was significant enough to justify a difference in

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[3] [2007] EWHC 2179 (Ch)
[4] [2014] UKSC 49

scoring, it was significant enough to constitute a breach of the Council's duty of transparency. Further, on the basis that EAS's response did not explicitly state that the Contract Manager would work solely on that contract, and Woods' response did not explicitly state that the Project Manager would be working on other projects, the Judge also considered that the Council had failed to treat the tenderers equally in reaching its conclusions.

This is a clear example of the correct application of the duties of transparency and equality. It was evident, and admitted by the Council's witnesses, that the evaluation process had gone awry. Given the lack of a margin of appreciation, such a finding was sufficient to justify the court's intervention.

However, in some places, the Judge's assessment of the Council's duties seems heavy-handed. Taking the Health and Safety question as an example, EAS scored 10 and Woods scored 6 points. The Judge, who identified this as the most borderline of the equality/transparency allegations, concluded that there had been a breach of the duty of equality. This conclusion was based on the language and detail of Woods' tender, which he stated was *"set out in a much crisper fashion"* than that of EAS. The Judge was also quick to discredit the Council's justification for EAS's greater score, which was a bonus scheme to reward their employees for complying with Health and Safety legislation, on the basis that the employees were obliged to comply with the legislation in any event.

It is arguable that the Judge's conclusion that this scoring amounted to a breach was overly-interventionist. Indeed, it seems that EAS's bonus scheme was dismissed without a real consideration of whether it would have any practical effect; it may be true that the employees are obliged to comply with the legislation, but that does not mean that they will not be encouraged to do so by the lure of bonuses. Further, the Judge's conclusion is largely based on a preference for the language of the Woods' answer over the *"aspirational management-speak"* preferred by EAS. Analysis based on a preference for the language or detail of Woods' proposal arguably strays into the subjective.

Coulson J also concluded that there had also been a manifest error in the evaluation of this answer. Manifest error will be considered further below, but given that the justification for such a finding was that *"[a] higher score for EAS was irrational and incapable of being justified"*, it is not clear that the analysis goes any further than a preference for Woods' answer, something which it could be said ought to be left to the Council's discretion.

It is important to remember that the duties of transparency and equality of treatment will be crucial in the context of the "Light Touch" regime, under which certain service contracts may be tendered without compliance with the full suite of procurement rules. Indeed, despite the flexibility given to authorities under the Light Touch regime, the procurement process is still to be governed by the duties transparency and equality. These obligations may, therefore, be vital in ensuring that the procurement process is conducted in a proper manner in relation to such contracts.

However, in the present context, it is less convincing that the court should intervene except in clear-cut cases. Whilst Coulson J was certainly correct to find breaches on the Council's part in relation to the Roles and Responsibilities section of the tender where there was an obvious contravention, it could be said that his approach did not consistently conform to his own assertion that he would only consider these duties where they were substantively relevant.

Manifest error

Coulson J equated "manifest error" with Wednesbury unreasonableness. He stated that this test is essentially about the nature and centrality of the error in question, but the mere fact that the error might not be immediately apparent to the layman is not necessarily a reason to conclude that it is not manifest. Woods' counsel argued that the Wednesbury test of unreasonableness is too high a threshold. However, on the basis that it was noted by the Judge that the Wednesbury test is not to be exaggerated, this approach fits sensibly with the margin of appreciation given to the Council in questioning whether a manifest error has been made.

One of the allegations of manifest error made by Woods was in relation to the scoring of Question 2.1 of the tender document, which requested the tenderers to do the following:

> *"Provide a method statement (of two A4 pages maximum) setting out your proposals to meet the requirements of the service information."*

The answer to this question was clearly important; it carried a weighting of 50% for that section of the tender and would be incorporated as a contract document.

EAS received a score of 10 for their answer. Coulson J concluded that there had been a manifest error in granting this score on the basis that EAS had wholly failed to deal with the reinstatement works in their method statement. It was an undisputed fact that the reinstatement works were to be worth approximately 40% of the total contract value. The Council also admitted that EAS's method statement failed to deal with other important matters, such as IT, quality assurance or progress reports.

As the scoring criteria specifically stated that a tenderer was to be awarded zero points in relation to an answer if there was *"[I]nsufficient information to demonstrate Tenderer's ability to deliver the services"*, it was manifestly incorrect to award EAS 10 points when there were such significant omissions. EAS's score was therefore reduced to zero.

Woods' score, on the other hand, was unaltered by the Judge. Whilst Woods submitted that it ought to have been awarded 10 points rather than 8, Coulson J considered that this score fell into the margin of appreciation which allowed the Council some discretion in applying the subjective award criteria, such as meeting the contractual requirements *"to a very high standard"* and providing *"clear and credible"* added value and/or innovation. Such an approach was undoubtedly correct; an alteration of this score would have undermined the discretion of the Council and, on a more general level, would encourage discontented tenderers to issue proceedings in any case where they believed they could argue for a few more points. This was the correct place to draw the line.

The only question in which the Judge concluded he was permitted to increase Woods' score due to a manifest error was that dealing with Health and Safety. As discussed above, this score was also found to have been awarded in breach of the duty of equality. The Judge increased Woods' score to 10. It could be said that providing a new score is overly interventionist, particularly where the new score was not evident from the scoring criteria. Indeed, it would have been possible for the Judge to conclude there was an error or breach and then leave the scores to be determined in the rerun of the tender process. However, on balance, it is preferable for new scores to be suggested. This is firstly because it gives context to the decision; if the Judge merely concluded that there had been breaches on the part of the Council but did not determine the proper scores, it would be unclear which tenderer ultimately ought to have been awarded the contract and would make the assessment of an aggrieved tenderer's damages claim difficult. Secondly, the Judge increased Woods' score to match EAS's score in circumstances where

he believed a disparity could not be justified. This does not, therefore, usurp the Council's discretion but instead ensures that, when both tenders are evaluated correctly, the scores are in line with what the Council considered appropriate.

Plagiarism

The final thrust of Woods' argument was that the EAS tender contained sections of tender submissions previously submitted by Woods. These had allegedly been accessed by a current employee of EAS who had previously worked for Woods. Although the Judge was disparaging about the employee in question, he concluded that the Council would not have known of such plagiarism during the evaluation process and it would therefore not have had any impact on the scoring outcome. The Judge did, however, warn the Council that, if a re-run of the competition was necessary, it must bear in mind the possibility of such plagiarism in the future. This approach is clearly sensible; any complaint about plagiarism ought to be directed at EAS rather than the evaluation process itself.

Remedies

The Judge determined that the Council had failed in its obligations to evaluate Woods' tender in a transparent and equal manner, and that the evaluation process was undermined by manifest errors. The result was that EAS's score was reduced by 40 points, whilst Woods' score was increased by 6 points, leaving Woods with a greater score than EAS.

In his second judgment, Coulson J set aside the tender process, formally recorded his findings as to the proper scores, and declared Woods' tender to be the most economically advantageous. An award of damages (to be assessed at an appropriate time) was made. However, the Judge refused to order a mandatory injunction requiring the Council to enter into the contract with Woods.

The Judge recognised that, although Regulation 47 of the Public Contract Regulations 2006 does not explicitly identify as a remedy the ordering of the authority to enter into a contract with the successful claimant, the Regulation *"does not prejudice any other powers of the Court"*, and therefore it might be open to the court to order such a mandatory injunction.

However, he relied on the decision in *Co-Operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd*[5], in which Lord Hoffmann noted that such injunctions will only rarely be granted to order parties to enter into a contract due to the need for constant supervision, the expense of enforcement, the need for precision and the unjust enrichment of the claimant. He also noted cases which are authority for the proposition that employer-employee relationships will rarely be governed by mandatory injunctions. His conclusion was that, whilst a mandatory injunction could be ordered in procurement cases in exceptional circumstances, such circumstances had not arisen in this case.

It is arguable that the procurement context itself should constitute the exceptional circumstances in which Coulson J felt able to order an injunction. Under the 2006 Regulations, the authority was to award a contract to the most economically advantageous or lowest priced tender[6]. The 2015 Regulations require that contracting authorities award public contracts on the basis of the most economically advantageous tender assessed from the point of view of the contracting authority[7]. Given that neither regime affords the authority any flexibility in awarding a contract once it has been determined which tender is successful, the logical next step would be to order the authority to award the contract. In addition, from a policy perspective, ordering a re-run of the tender process and allowing a damages claim is more costly to the public purse.

Further, in the first and best known case in which a judge worked through a tender evaluation process to see whether or not manifest errors had been made[8], the Judge suggested that it may be appropriate to add the claimant's name to the list of successful tendering parties under a framework agreement (albeit the remedy was left for the parties to agree). It is accepted that the award of a contract is different from the appointment of a successful claimant under a framework agreement. However, in light of the fact that the court is able to determine that the successful claimant ought to have been awarded the contract, and in those circumstances there are no excuses available to the authority for not awarding the contract, it is certainly arguable that there is no good reason for distinguishing between the two.

However, there were fact-specific justifications in *Woods* for refusing to grant the injunction, namely that such a remedy had not been pleaded by the

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[5] [1998] AC 1
[6] Public Contracts Regulations 2006, Regulation 30(1)
[7] Public Contracts Regulations 2015, Regulation 67(1)
[8] *Letting International Ltd v London Borough of Newham* [2008] EWHC 158 (QB)

Claimant, and the Claimant did not contend that damages were an inadequate remedy. Further, Coulson J thought it inappropriate to award a contract out of a fundamentally flawed tender evaluation process. Given that this was the first case in which the court has set aside a publicly procured contract, it was foreseeable that the court would view a mandatory injunction as a step too far.

In light of the fact that the Public Contracts Regulations 2015 also do not expressly refer to the court's power to order a contracting authority to award the contract to a successful claimant, it is unclear whether the courts will be willing to make such an order in the future. Coulson J did not elaborate on what *"exceptional circumstances"* he considered would render such an order appropriate.

Conclusion

It is, at times, arguable that the court's approach became overly-interventionist. However, on the whole, Coulson J recognised the importance of respecting the Council's discretion and applied the margin of appreciation correctly whilst focusing on only the substantively relevant allegations. On the basis of the sheer number of points that were altered by the Judge, it is clear that the tender evaluation process had gone significantly awry. The court was correct to suggest the appropriate scores for the tenderers' answers, and the Judge's approach of adjusting Woods' scores to match those awarded to EAS ensured that the Council's discretion was maintained.

The disjunction in these decisions arises from the unwillingness to order the authority to award the contract to the successful claimant. Whilst the specific circumstances of this case made such an order inappropriate, Coulson J's second judgment indicates a general reluctance to grant such an order. This reluctance is made particularly poignant by his failure to identify what he would consider to be *"exceptional circumstances"*. Whilst it is clear that the court will adopt a robust approach to an assessment of the evaluation process, when it comes to remedies it would seem that contracting authorities are somewhat out of the woods.