Michaelmas Term
[2015] UKPC 39
Privy Council Appeal No 0082 of 2014

JUDGMENT

The Central Tenders Board and another (Appellants) *v* White (trading as White Construction Services) (Respondent) (Montserrat)

From the Court of Appeal of the Eastern Caribbean Supreme Court (Montserrat)

before

Lord Kerr
Lord Hughes
Lord Toulson

JUDGMENT GIVEN ON

6 October 2015

Heard on 10 June 2015

Appellants	*Respondent (Acting Pro Bono)*
Karen Reid	David di Mambro
Sheree Jemmotte-Rodney	Wendy Mathers
(Instructed by Alan Taylor & Co)	(Instructed by Bankside Commercial Ltd)

LORD TOULSON:

1. The Central Tenders Board ("the CTB") is part of the Ministry of Finance, Economic Development and Trade of Montserrat. The other appellant, the Attorney General, was not a necessary party to the proceedings and appears to have been included as a matter of formality.

2. The CTB appeals against a decision made by the High Court, and upheld by the East Caribbean Court of Appeal, that it was in breach of a building contract made with the respondent, Mr Vernon White (trading as White Construction Services). The trial judge, Benjamin J (Ag), ordered that Mr White should recover compensation to be assessed in default of agreement.

3. The CTB's defence to Mr White's claim was that it acted ultra vires in failing to comply with proper procedures for the procurement of goods or services by tender, and therefore that the contract was void.

4. On behalf of the CTB, Ms Karen Reid informed the Board that the government was pursuing the appeal in order to obtain guidance about how it should proceed when confronted with issues about non-compliance with public law requirements in the area of awarding contracts, in particular, the requirement of equal treatment of tenderers. She referred in this context to the judgment of Lord Reed in *Healthcare at Home Ltd v The Common Services Agency* [2014] UKSC 49, [2014] 4 All ER 210, para 14. That case concerned European law requirements regarding procedures for awarding public works contracts, but there is no dispute as a general principle of public law that tenderers for public contracts should be afforded fair and equal treatment.

5. The present contract was for the erection of a school hall. Tenderers were supplied with a tender form, drawings, specifications, conditions of contract (based on a standard form), and bills of quantities. The instructions to tenderers required the completed form of tender to be submitted with the tenderer's schedule of labour rates, schedule of material prices, schedule of construction equipment, list of proposed sub-contractors, construction programme and priced bills of quantities. It was stated that failure to comply strictly with such instructions "is liable to cause your tender to be rejected".

6. The instructions to tenderers also included the following statements:

i) “The time for completion for the complete contract is to be determined by the tenderer in the Form of Tender.”

ii) “The Employer, Government of Montserrat, does not bind itself to accept the lowest or any tender.”

iii) “Errors discovered in the Contractor’s Tender will be dealt with as follows:

> The Contractor will be given details of such errors and afforded an opportunity of confirming or withdrawing his offer. If the Contractor withdraws, the tender of the second most advantageous tenderer will be examined, and if necessary this Contractor will be given a similar opportunity.”

iv) “The Tenderer to whom the award is made will be required to enter into an agreement with the Employer. This agreement will be of the form that is in the Tender Documents.”

v) “The party to whom the Contract is awarded will be required to execute the Contract and (if required) furnish the Performance Bond duly executed within seven days, not including Sunday or Legal Holiday. Failure so to execute the Contract shall be sufficient reason for the Architect to cancel the award without obligation or claim upon the Employer.”

7. Tender documents were issued to six contractors and were to be returned by 28 October 2011. Mr White submitted his tender on that date. It began:

> “I/We, the undersigned, having examined the bills of quantities and tender drawings referred to therein do hereby offer to execute and complete in accordance with the conditions of contract the Works – Construction of Lookout School Expansion, Building 6 – New Multi Purpose Hall; the works described for the sum of [offer price in words] (EC$2,227,537.77) and completed in … working weeks from the date of the notice to commence.”

The number of working weeks was left blank.

8. Tenders were received from four other contractors. The five tenders were opened publically and sent to a technical team for evaluation. Mr White was the lowest tenderer.

The technical team reported on his tender that no errors were found in the measured works or in the preliminaries and that the form of tender including its appendix was properly prepared and priced. In a comparative summary of the tenders, the duration of Mr White's construction programme was shown as 55 weeks. The team recommended that his tender should be accepted.

9. The tenders were considered at a meeting of the CTB on 16 November 2011. Concern was raised that Mr White had not shown the time for completion in his letter of tender. The chairman said that he had asked the Permanent Secretary to obtain legal advice from the Attorney General, but the government architect told the meeting that the duration was shown in a different document which formed part of the tender. (In fact, Mr White's construction programme contained a slight ambiguity, because on different lines it showed the overall duration as "275 days?" and "273 days?". On the basis of a five day working week, 275 days equated to 55 weeks.) The CTB then accepted the technical team's recommendation.

10. On 24 November 2011 the chairman of the CTB wrote to Mr White stating:

> "This is to advise you that your tender submission in the amount of [offer price in words] (EC$2,227,537.77) has been successful."

11. On 25 November 2011 the managing director of the next lowest tenderer wrote a letter of complaint to the CTB that Mr White's tender had been accepted although it failed to state the time for completion. The writer argued that there had been four tenders which complied with the tender request, and that the contract should have been awarded to his company. The chairman of the CTB sought legal advice.

12. In the meantime there was correspondence between the government architect and Mr White about arranging a meeting for the execution of contract documents, but it was postponed by the CTB from time to time. There was also inconclusive discussion between the parties about Mr White's liability for customs duty on materials used in the construction of the building. Mr White was unhappy with certain parts of the standard form of contract wording, which he saw as being inconsistent with the government's usual practice in relation to customs duties and government contracts.

13. In a letter dated 22 March 2012 the chairman of the CTB wrote to Mr White:

> "Please be advised that the award of the above tender was challenged and the Central Tenders Board is advised that the tender was non-compliant. The Central Tenders Board on reviewing the tender confirmed that the tender failed to comply

> with instructions to tender and is accordingly non-compliant. In this regard the tender failed to comply strictly with [the requirement that the time for completion was to be determined by the tenderer in the form of tender].
>
> This is to inform you therefore that the award of the contract to your company has been withdrawn."

14. Mr White promptly issued legal proceedings in the form of a judicial review application against the CTB and the Attorney General. Since the foundation of the claim was that the CTB had acted in breach of contract, it would have been simpler and more appropriate to bring an ordinary claim for breach of contract. But that is of no consequence, apart from perhaps causing a degree of unnecessary complication, because Mr David di Mambro (to whom with his junior, Ms Mathers, the Board is indebted for representing Mr White pro bono) pointed out that under the Eastern Caribbean Supreme Court Civil Procedure Rules 2000, Part 56.1, the court may grant damages on an application for judicial review, in addition to or instead of an administrative order, without requiring the issue of any further proceedings. In this case the claim form included a claim for damages.

15. On the face of the documents, on 28 October 2011 Mr White made an unconditional written offer; that offer was accepted by the CTB by its letter dated 24 November 2011; a contract thereby came into existence; but the CTB wrongfully repudiated the contract by its letter dated 22 March 2012.

16. The source of the CTB's power to enter into a public works contract by public tender is to be found in section 57 of the Finance (Administration) Act and the Procurement and Stores Regulations made under that section. Section 57 empowers the Governor in Council to make regulations providing, among other things, for the issue of public tenders, the powers and duties of the CTB and the award of contracts. Regulation 12 provides that the Governor in Council shall appoint a Tenders Board for the purpose of evaluating tenders for the procurement of goods and services and for the sale of public goods. Regulation 13 provides that the Tenders Board shall have power to accept or reject any tender or part of a tender (provided that any tender for goods and services, including construction works, valued at a sum in excess of $150,000 shall be approved by the Minister).

17. It is argued by the CTB that although it possesses statutory power to award contracts for the procurement of goods and services, in this instance it had no power to accept Mr White's tender, by reason of his failure to state the completion date in the stipulated place; that the CTB thereby failed to comply with the procedural requirements which it had laid down, and that the resulting contract was void.

18. There is a narrower and a broader answer to this argument. The narrower answer is that the instructions to tenderers did not state that any failure to comply strictly with the instructions would automatically result in a tender being disregarded. Rather, they stated that such failure was "liable to cause [the] tender to be rejected". There is a difference. By way of illustration, the instructions also contained a paragraph about bribery. That paragraph stated that the offer of a bribe to any person with the object of influencing the placing of the contract "will result in instant rejection of the tender concerned". When the CTB wished to indicate that something would result in instant rejection of the tender, it said so. The words "liable to be rejected" are more equivocal. A reasonable tenderer would understand them to mean "may be". It is unsurprising that the CTB did not pre-commit itself to a particular response in the event of a lack of strict compliance with the instructions to tender, because this might vary in significance from one case to another. In the present case the architect considered it to be of no significance to the question whose bid should be accepted, because the necessary information for evaluating Mr White's tender was to be found in his construction programme.

19. The broader answer is that if one assumes (without deciding, because the Board has not heard full argument on the point) that the statutory power of the CTB to make a contract for the procurement of goods and services is confined to a power to accept an offer obtained through a public tendering process, Mr White's tender was indeed such a tender (whether or not it was in strict conformity with the terms of the instructions to tender). At worst, the CTB exercised its statutory power to accept the tender, in disregard of a failure to comply with procedural pre-conditions set by itself as to the form of tender submitted, and thereby itself failed to observe the procedural requirements for the exercise of its statutory jurisdiction. For the "narrow" reasons given above, the Board does not accept this premise. But what if it is right? The effect of a procedural irregularity in the exercise of a legal authority is the subject of a considerable amount of case law and academic writing. There is difference between a case of a procedural irregularity in the formation of a contract of a kind which a public body has power to enter, and a case of a public body purporting to conclude a contract of a kind which it has no power to make (such as *Hazell v Hammersmith and Fulham London Borough Council* [1992] 2 AC 1).

20. The Board has not heard detailed argument on this topic in this case, but the CTB has brought the appeal in the hope of obtaining guidance in a case where issues of non-compliance arise, and it may be helpful at least to identify certain leading authorities which indicate the present direction of travel.

21. Some statutory powers are accompanied by statutory procedural requirements. The courts used to categorise procedural requirements in the exercise of a statutory jurisdiction as either mandatory or directory. A breach of the former would make the act invalid, but a breach of the latter would not. But over time the distinction was found in practice to be unsatisfactory. In *London and Clydeside Estates Ltd v Aberdeen*

District Council [1980] 1 WLR 182, 189-192, Lord Hailsham of St Marylebone LC said, at p 190, that in many cases:

> "though language like 'mandatory', 'directory', 'void', 'voidable', 'nullity' and so forth may be helpful in argument, it may be misleading in effect if relied on to show that the courts, in deciding the consequences of a defect in the exercise of power, are necessarily bound to fit the facts of a particular case and a developing chain of events into rigid legal categories or to stretch or cramp them on a bed of Procrustes invented by lawyers for the purposes of convenient exposition."

22. Over the ensuing 35 years the courts have adopted a more flexible approach, which involves evaluating the seriousness of the breach and the degree of any injustice and public inconvenience which may be caused by invalidating the act. It is also potentially relevant to consider any alternative remedies available to a person legitimately aggrieved by the conduct of the public body.

23. In *R v Soneji* [2006] 1 AC 340 Lord Steyn examined the development of this branch of the law, not only in the United Kingdom but in other common law countries including Australia, Canada and New Zealand. He cited with approval, at para 22, the statement of Evans JA in *Society Promoting Environmental Conservation v Canada (Attorney-General)* (2003) 228 DLR (4th) 693, 710 that:

> "the more serious the public inconvenience and injustice likely to be caused by invalidating the resulting administrative action, including the frustration of the purposes of the legislation, public expense and hardship to third parties, the less likely it is that a court will conclude that legislative intent is best implemented by a declaration of invalidity."

24. Other authorities confirm this approach: see, for example, the decision of the Board in *Director of Public Prosecutions of the Virgin Islands v Penn* [2008] UKPC 29 and the decision of the Court of Appeal in *Regina (M) v Hackney London Borough Council* [2011] EWCA Civ 4, [2011] 1 WLR 2873, paras 84-94.

25. Evans JA referred in the passage cited to the position of third parties. For the court to invalidate a contract entered into between a public body and a party acting in good faith, by reason of a procedural defect in the contractual process, and moreover to do so without compensation (for it is not obvious what compensation would be available), would be a serious denial of that person's rights. It would offend against

orthodox principles of private law (contractual rights) and public law (the right not to be deprived of property without compensation).

26. In the present case, neither section 57 nor the regulations made under it imposed any procedural requirements as to how a public tender process was to be conducted. This was left to the CTB. It had express statutory power to decide which, if any, tender to accept. So there can be no question of the CTB acting ultra vires, in the proper sense, when it accepted Mr White's tender. Ultra vires is not, of course, the only ground on which a court may quash an administrative decision, but it would be wrong for a court to do so in such a way as to nullify a contract made between a public body pursuant to a legal power and a person acting in good faith, except possibly on terms which adequately protect that person's interest.

27. What if something goes wrong in the process of awarding a contract by tender, giving rise to a legitimate grievance on the part of an unsuccessful bidder that if he had been fairly and properly treated, he would have secured the contract, or have had a good chance of doing so? If so, there is a possible remedy which does not involve setting aside a contract lawfully made with the successful bidder. The decision of the Court of Appeal in *Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council* [1990] 1 WLR 1195 is instructive. The council invited tenders for a concession to operate pleasure flights from Blackpool airport. Relevant parts of the council's Standing Orders with respect to contracts were attached to the instructions to tenderers. These included the words "No tender which is received after the last date and time specified shall be admitted for consideration". The plaintiff club was the highest tenderer, but a mistake on the part of a council employee resulted in its tender being wrongly marked as received late. So it was not considered by the council's relevant committee, which awarded the concession to the highest under-bidder in the belief that it was the top bidder. When it discovered the error, the council attempted to declare the process invalid and to seek tenders for a second time. But the under-bidder contended that the council was contractually bound by the council's acceptance of its tender and threatened to bring legal proceedings. At that stage the council decided to honour the contract made with the under-bidder, and it was then sued by the club.

28. The Court of Appeal held that there was an implied contract between the council and a person who was invited to tender that if he submitted a conforming tender in time, it would be opened and considered in conjunction with all other conforming tenders. In reaching that conclusion Bingham LJ asked rhetorically what the position would have been if the council had opened the first tender and accepted it, although the deadline had not expired and other invitees had not responded; or if the council had accepted a tender admittedly received well after the deadline. The import of his reasoning was that the council owed a duty to treat all invitees fairly and equally, which was enforceable by way of an implied contract. It was an important part of the context that the council was conducting a tender process governed by its Standing Orders. If a private citizen had invited offers for the sale of some personal possession and set a deadline, it by no

means follows from the Court of Appeal's judgment that such a person would be barred by an implied contract from accepting an earlier offer or a later offer, but it is unnecessary to explore that distinction in the present case.

29. In a case such as the present, there would be no difficulty in finding that the CTB owed an implied contractual duty to the under-bidder and to every other invitee that they would be treated fairly and equally. If a breach of that duty caused a tenderer to suffer a loss of a chance of a contract, the tenderer would be entitled to damages. In fact there has been no such claim by the under-bidder, and that is no cause for surprise. The CTB had a discretion to accept Mr White's tender and the under-bidder would have no legitimate cause for complaint.

30. The CTB advanced a supplementary argument that it was entitled to cancel the contract with Mr White because of his failure to execute a formal contract within seven days from the date of acceptance of his tender. It also relied on an answer given by Mr White in cross-examination that he did not sign the contract because he was not comfortable about the terms relating to customs duties, which he thought should be either removed or clarified, and that he was waiting to hear back from the government on the subject. There is no merit in the supplementary argument. It required two parties to execute the formal contract. As previously related, dates for an execution meeting were postponed on the government side. In those circumstances it would have been necessary to provide Mr White with the document(s) for execution and to set a deadline before the CTB could invoke the contractual provision for its cancellation.

31. The Board will humbly advise Her Majesty that the appeal should be dismissed.