BUDDLEFINDLAY

Legal alert - Balance restored to public sector procurement - the Problem Gambling case

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In two cases over the last few years, the High Court has departed from longstanding principles that meant that courts were reluctant to intervene in the conduct of public sector procurement decisions. Now the Court of Appeal has restored those principles in finding for the Ministry of Health (the Ministry) in *Attorney-General v Problem Gambling Foundation of New Zealand* [2016] NZCA 609.

The Court of Appeal has gone back to the previously leading cases, *Mercury Energy Ltd v Electricity Corp of New Zealand Ltd* and *Lab Tests Auckland v Auckland District Health Board,* to reinstate the general principle that judicial review of commercial contracting decisions by public sector agencies will not be available unless:

- The relevant procurement has some extra public law feature (eg closing a hospital or preventing settlement of a Treaty of Waitangi claim)
- The agency has failed to follow statutory requirements
- In cases of fraud, corruption, or bad faith.

The Court of Appeal has also helpfully stated that it does not agree with the view of the High Court in *Telco Technology Services Ltd v Ministry of Education* [2014] NZHC 213 that, in a commercial context, "the vacuum created by an absence of specific legislative provisions may be filled by public law principles such as natural justice and procedural fairness".

The Court of Appeal commented that, even though the Ministry's development of a problem gambling strategy was a public act with public consequences, the Foundation's judicial review claim did not relate to the public nature of the decision; but rather its own disappointed commercial interests. Accordingly, judicial review of the Ministry's procurement decision was not possible in this case. Further, the Court of Appeal vindicated the Ministry's procurement process after the High Court had granted judicial review on three grounds.

The Court of Appeal found that the Mandatory Rules of Procurement by Departments (and now the Government Rules of Sourcing) are not in themselves able to be enforced by disaffected tenderers through judicial review. The High Court had indicated that a breach of the Mandatory Rules, unless immaterial, would vitiate the relevant procurement decision on the grounds of error of law. The Court of Appeal disagreed, stating that, although the Mandatory Rules bind the Ministry, since the Rules are administrative rules rather than legislation, the consequences of a breach of the Rules in the judicial review context will depend on the nature and consequences of the Rule breached.

The Court of Appeal also stated that the High Court's finding that there was a lack of probative evidence for the Ministry's decision was a review of the merits of the decision rather than of the process. Although the Ministry had, at one stage of the process, used a numbered ranking system to assess tenders, the High Court was wrong to characterise the decision-making process as one involving statistical analysis with only one possible result.

Further, the Court of Appeal was highly critical of the High Court's approach to bias. The High Court had applied the *Saxmere* standard for judicial bias to the members of the panel considering the tenders: whether a fair-minded and reasonable lay observer would reasonably apprehend that the decision-maker might not bring an impartial mind to the issue. The Court of Appeal interpreted this as effectively requiring the panel to be made up of individuals with no previous involvement in the problem gambling sector. Although the Mandatory Rules refer to the elimination of conflicts of interest in procurement decision-making, the Court of Appeal found that it would be unworkable, and not in the public interest, to subject procurement decision-makers to the *Saxmere* standard. Instead, what is required of procurement decision-makers is fairness, good faith, honesty, and a willingness to consider information which might change the decision-maker's view.

The Court of Appeal decision should be welcomed by all public sector agencies conducting procurements. It restores the flexibility required for agencies to conduct effective procurements, while ensuring that serious deficiencies in procurement processes can, in extreme cases, be rectified by way of judicial review. Public sector agencies are now again able to conduct procurement processes with less risk that a disaffected tenderer will be able to successfully challenge decisions for solely commercial reasons.

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