John G Walton
Commercial Barrister and Mediator

Problem Gambling in the Court of Appeal
Sense prevails!

> *"In their Lordships' opinion, the duty of good faith and fair dealing as applied to* [tender evaluation] *required that the evaluation ought to express the views honestly held by the members of the* [tender evaluation team (*TET*)]. *The duty to act fairly meant that all the tenderers had to be treated equally. One tenderer could not be given a higher mark than another if their attributes were the same. But Transit was not obliged to give tenderers the same mark if it honestly thought that their attributes were different. Nor did the duty of fairness mean that Transit were obliged to appoint people who came to the task without any views about the tenderers, whether favourable or adverse. It would have been impossible to have a TET competent to perform its function unless it consisted of people with enough experience to have already formed opinions about the merits and demerits of roading contractors. The obligation of good faith and fair dealing also did not mean that the TET had to act judicially."*[1]

Introduction

In the quote above, Lord Hoffman was dealing with the last of the *Pratt Contractors* appeals, and the allegation that a member of Transit's tender evaluation team was biased due to previous experience dealing with Pratt; needless to say, that previous experience counted against Pratt in the evaluation.

A number of things were striking in that case. First Justice Goddard felt that the preliminary contract required Transit not only to comply with the method of selection in the tender documents but also with its own internal procedural rules, which it had failed to do.

Second, she held that the process contract included implied terms as to fair dealing and good faith, finding that the tender round was so tainted by the real risk of bias that it was irrelevant that Transit had the right to reject all tenders.

The Privy Council, as evidenced by the quote above, took a different view. Since 2003, that very clear and black letter law approach has progressively been under some attack, in the apparent belief that even when acting commercially, public bodies must perform to a higher standard.

Public Law impositions post-*Pratt*

The issue of compliance by public bodies with Government procurement guidelines has been considered by the Court of Appeal in 2008 in *Lab Tests Auckland Limited v Auckland District Health Board and others;*[2] by the High Court in 2015 in *Problem Gambling Foundation of New*

1 *Pratt Contractors v Transit* [2003] UKPC 83
2 [2008] NZCA 385

BANKSIDE CHAMBERS
Level 22, 88 Shortland Street, Auckland 1010, New Zealand
phone +64 9 308 0514 | fax +64 21 696 161 | mobile +64 21 473 656 | email john@johnwalton.co.nz | www.johnwalton.co.nz

Zealand v Attorney-General;[3] by the Supreme Court in 2016 in *Ririnui v Landcorp Farming & A-G.*[4]

Lab Tests Auckland Limited v Auckland District Health Board and others

In 2006 the Auckland, Waitemata and Counties Manukau District Health Boards (the DHBs) tendered for the provision of laboratory services across the region. The incumbent, Diagnostic Medlab, was generally acknowledged to be a high quality service provider; however, following a tender round, LabTests prevailed and a handover date for the entire service provision was set. From that date, LabTests would start from scratch, and Diagnostic Medlab would effectively have a large part of its business come to an end.

Not surprisingly, Diagnostic Medlab applied for judicial review of the tender process; its grounds were that a Dr Bierre, an owner of LabTests, was a pathologist and elected member of the Auckland District Health Board and had been involved in the preparation of the request for proposals. The judicial review succeeded in the High Court,[5] and the DHBs appealed to the Court of Appeal.

In the Court of Appeal, Arnold J reviewed the authorities, and made a number of observations:[6]

(1) public bodies involved in a commercial process must exercise its procuring power in accordance with its empowering statute;

(2) procedural obligations of public bodies will vary with context, for example the principles of natural justice may be applicable to some functions, but not to others;

(3) the *context* will depend on the nature of the decision, the nature of the body making the decision and the statutory setting of that decision; and

(4) citing the Privy Council decisions in *Mercury Energy*[7] and *Pratt Contractors*, judicial review of contracting decisions by public bodies is available in only limited circumstances.

In relation to *Pratt Contractors*, His Honour observed (emphasis added):

> *The Privy Council's unwillingness to import public law notions into the contractual framework suggests that their Lordships saw the contractual framework as sufficient in itself. As we have already said, it is significant that the contracting decision in that case was made in the context of a more detailed and specific statutory setting than is found in relation to SOEs.* ***But the statutory requirement for a competitive commercial approach towards tendering led to the conclusion that the implied duties were limited and***

[3] [2015] NZHC 1701
[4] [2016] NZSC 62
[5] HC AK CIV 2006-404-4724, 20 March 2007, Asher J, reported in part [2007] 2 NZLR 832
[6] Ibid at paras [55] to [60]
[7] *Mercury Energy v Electricity Corporation* [1994] 2 NZLR 385 (PC)

> ***would not be supplemented by means of a public law analysis***. *Furthermore, their Lordships were unwilling to impose process requirements on Transit (in relation to bias) which were inconsistent with the use of an appropriate evaluation methodology (i.e., an evaluation team involving persons knowledgeable in the industry, who, because of their knowledge and experience, were likely to have views about tenderers).*

The Court of Appeal found that the High Court did not give proper weight to the commercial context in which the DHBs were operating, and that judicial review was not appropriate in that case.

On the issue of conflict of interest, the Court of Appeal found that Dr Bierre had an initial conflict of interest, however he did not have a conflict of interest at the time that he was involved in the request for proposals. Similarly, the Court found that Dr Bierre did not have the benefit of, nor improperly use, any insider information.

In conclusion, His Honour observed (again, emphasis added):[8]

> *DML's claim was very broad. It was based on a notion that it is the role of the courts to ensure what Mr Hodder described as* ***good hygiene in public decision-making****. In our view, that overstates the courts' role in this context. The processes at issue in the present case were lengthy, involved numerous people, evolved over time, raised difficult medical, business, financial and other considerations and ultimately involved a competition for the community laboratory services market for the contractual period. Courts are not well equipped in judicial review proceedings to deal with the range of issues that such processes raise.*

Problem Gambling Foundation of New Zealand v Attorney-General

Unlike the *Pratt* case, the *Problem Gambling* case did not turn on any argument of breach of a process contract.

The Ministry of Health issued a request for proposals for an integrated problem gambling strategy in 13 regions of New Zealand and nationally for a 30 month period. The incumbent, the Problem Gambling Foundation, was unsuccessful in the tender round and applied for judicial review on two grounds; mistake of fact resulting in a decision not supported by probative evidence; and breach of natural justice.

Justice Woodhouse considered four issues:

(1) on what grounds is judicial review available;

(2) did the Ministry fail to follow the request for proposal procedures;

[8] At para [343]

(3) were there material errors in conclusions reached during evaluation to such an extent that the Ministry's final decision was not the result of logical and reliable decision making; and

(4) should the decision be set aside because of apparent bias or conflict of interest.

Finding that the decision was appropriate for judicial review, his Honour held that the decision by the Ministry should be set aside on the basis that the Ministry failed to follow its mandatory procurement rules. He granted the application for judicial review on three specific grounds:

(a) breach of legitimate expectation and mandatory procurement rules;

(b) mistake of fact/lack of probative evidence; and

(c) inadequately managed conflicts of interest.

Woodhouse J's analysis was in equal measure important and worrying in that:

- it showed a willingness to intervene by judicial review where others, notably the Court of Appeal in *LabTests*, feared to tread;
- public law concepts were applied to public body procurement, where previously commercial activities of such bodies were immune from such scrutiny except in the case of fraud and the like;
- the Government Rules of Sourcing were given a high degree of legal force; and
- evaluation teams were vulnerable to suggestions of perceived bias and conflict of interest.

Ririnui v Landcorp Farming & A-G[9]

The challenge in this case was by a local iwi group to Landcorp's decision to sell the Whārere farm, relying on advice (since found to be erroneous) from the Office of Treaty Settlements (*OTS*) that the land was not subject to Treaty claim.

The land was subject to memorials under section 27B of the State Owned Enterprises Act 1986, which protect the rights of Treaty claimants. Landcorp and OTS had entered into a protocol whereby, before selling any land, Landcorp would consult with OTS, who would in turn advise whether or not the land was subject to any claim. While this was an internal arrangement between Landcorp and OTS, Landcorp had provided that it would *assist the Crown to meet its Treaty obligations* in its statement of corporate intent.

In this case, OTS incorrectly advised that all claims raised by the local iwi, Ngāti Whakahemo, had been settled. On advice from the shareholding Ministers, Landcorp cancelled a public tender and engaged with another iwi, Ngāti Mākino, for the sale of the land. Relying on the advice from OTS, all attempts by Ngāti Whakahemo to have the same opportunity as Ngāti Mākino to purchase the land fell on deaf ears. When Ngāti Mākino was unable to proceed,

[9] [2016] NZSC 62

the land was sold to the highest bidder under the cancelled tender process. Ngāti Whakahemo applied for judicial review.

A number of issues were raised before the Supreme Court; of particular concern, whether or not the decision by the board of Landcorp to treat with Ngāti Mākino, but not with Ngāti Whakahemo (based on erroneous advice) was reviewable. The majority of the Supreme Court (Elias, Arnold, Glazebrook and O'Regan JJ, with Young J dissenting) held to the view that the decision by Landcorp was reviewable, notwithstanding its commercial nature.

In reaching this conclusion, the majority accepted the views outlined in the *Mercury Energy v Electricity Corporation* and *Lab Tests* that contracting decisions by state-owned enterprises were unlikely to be amenable to judicial review unless the case included fraud, corruption or bad faith or any analogous circumstances.

In summarizing its position, the majority commented as follows (emphasis added):

> *… it is not correct, in our view, to see the decision of Landcorp's board to cancel the tender and offer Ngāti Mākino the opportunity to purchase as simply a commercial one. Rather, it had a substantial public interest component to it, in that it enabled the Crown to act towards Ngāti Mākino in a way that the Ministers, and in particular the Minister for Treaty of Waitangi Negotiations, considered appropriate in the circumstances. Both the Ministers and Landcorp's board thought that Landcorp could, consistently with its obligations under the SOE Act and statement of corporate intent, facilitate the Crown's wish to accommodate Ngāti Mākino's concerns in relation to Whārere, even though Landcorp stood to suffer some damage to its commercial reputation as a consequence of cancelling a commercial sale process after the date for submission of offers.*
>
> *...*
>
> ***To summarise, we consider that Landcorp's decision to cancel the tender process and allow Ngāti Mākino the opportunity to purchase Whārere was a decision which, while largely accommodating Landcorp's commercial interests, was taken for broader public interest reasons**. That has implications for Landcorp's decision to sell to Micro. By acceding to the Minister's request, Landcorp accepted that Ngāti Mākino had an interest in purchasing Whārere which merited special treatment. The uncontested evidence indicates that had Landcorp understood the true position in relation to Ngāti Whakahemo's historical claims, that would have influenced its decision making. In short, then, Landcorp's decision-making in respect of Whārere had a dimension to it that was not simply commercial in nature.*[10]

While the case is strong on public law issues, it does show an increased willingness to impose public law considerations into what would otherwise be commercial activity.

[10] At paras [71] & [74]

The Court of Appeal decision in *Problem Gambling*

On 16 December 2016, the Court of Appeal released its long awaited decision in *A-G v Problem Gambling Foundation of New Zealand.*[11]

The judgment, delivered by Winkelmann J, provided a wide ranging consideration of the grounds for judicial intervention in the commercial activities of public bodies; where in the High Court, Woodhouse J was concerned with Mr Hodder QC's *good hygiene*, the Court of Appeal took the more robust view that judicial review should not be an opportunity for disappointed tenderers to reopen commercial decisions relying purely on public law considerations.

On appeal, the court recognised that no process contract could be created, as the request for proposals specifically provided that it was not an offer capable of acceptance.

It found the following findings of note:

(1) the narrow scope for judicial review outlined in the *Lab Tests* case is to be preferred, and judicial review was not available in the case for the following reasons:

   (a) the decision to be reviewed was commercial – a contract for services following a procurement process; and

   (b) the challenging party was the disappointed party under a procurement process which specifically excluded contractual relations;

(2) the Government's Mandatory Rules for procurement (a predecessor to the Government Rules of Sourcing) may bind Government agencies, they do not impose a procedural obligation "*enforceable by the disappointed potential contractors*";

(3) echoing the Privy Council in *Pratt*, the court approved of a comment by Professor McLean that:

> *Decision-makers are allowed to bring strongly held favourable or adverse views to the process; decision-makers are not required to disqualify themselves or to extend an opportunity to the party to correct any prejudicial views about the tenderers by the decision-makers.*

   In the court's view, "*Even where there is a process contract, fairness and good faith only require honesty and a willingness to consider information which might change their view*";

(4) in order to establish a breach of legitimate expectation it is necessary to (i) establish the nature of the commitment by the public authority, whether by promise or settled practice or policy (a question of fact); (ii) determine whether or not the reliance on the promise or practice was legitimate (which goes to reasonableness); and (iii) decide what remedy is available, if such legitimate expectation is established.

[11] [2016] NZCA 609

Conclusion

After a brief diversion, it would appear that we are back to the principles outlined by Lord Hoffman in *Pratt*, but with a number of words of caution.

As a general principle, the terms of a process contract will be binding.

If a request for proposals excludes any intention to enter into binding contractual or other legal relations during the procurement process, then that will be effective in excluding a process contract.

Tender review panels may bring their knowledge and experience of the bidders with them to the tender evaluation.

Judicial review of Government procurement decisions is available, but on a narrow basis. The starting point will be that if the procuring body is acting in a commercial capacity, judicial review will only be available in cases of fraud, corruption and bad faith, unless there is a public policy circumstance which would justify a wider view.

Government bodies must comply with their empowering statutes, and with the mandatory Government Rules of Sourcing, however non-compliance with the latter is not ground for challenge.

John Walton
Bankside Chambers

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