ARRESTED DEVELOPMENT COURT OF APPEAL ISSUES FIRST DECLARATION OF INEFFECTIVENESS UNDER THE ENGLISH PROCUREMENT REGIME

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Legal Briefings

For the first time, the Court of Appeal has issued a declaration of ineffectiveness under the English procurement regime in *Faraday Development Ltd v West Berkshire Council* [2018] EWCA Civ 2532, allowing an appeal against the first instance decision. The challenge concerned a development agreement for a parcel of land owned by the respondent Council which had been entered into outside the framework of the Public Contracts Regulations ("PCR 2006"). As the agreement, when taken as a whole, committed the Council to the procurement of works from the developer, it fell within the scope of the procurement regime and as such a declaration of ineffectiveness was warranted.

Key Points

- This the first time that a declaration of ineffectiveness has been made in England under the procurement regime.
- The Court took a holistic approach when considering the overall effect of the agreement in question. It held that even where the developer could walk away from the agreement,

the fact that no further steps would be needed to procure the works, should certain conditions be fulfilled, meant that the agreement ought to have been subject to the procurement regime.

- The case provides an insight into the drafting of Voluntary ex ante Transparency Notices ('VEATs'), explaining the level of detail required for a VEAT to be valid and thus potentially preclude a declaration of ineffectiveness. The respondent Council's notice was here found to be ineffective, failing the *Fastweb* test.

FACTS AND DECISION AT FIRST INSTANCE

Faraday Development Ltd. ("Faraday") challenged the decision of the Council to enter into a development agreement with St Modwen Developments Ltd. ("St Modwen") to "facilitate the comprehensive regeneration" of an area of land in Berkshire. The Council owned most of the freehold of the land, whilst Faraday held long leaseholds on a small number of the plots and hoped to redevelop the area. The agreement, in essence, provided for the re-development of the area, requiring the developer to prepare detailed proposals for submission to a steering group; if certain conditions were satisfied, the developer would then have the option of acquiring long leases on certain plots of the land. Where the developer chose not to rely on those options, it would be under no obligation to carry out any of the planned works. To that extent, it was open to the developer to "walk away" from any obligation to carry out works.

At the centre of the challenge brought by Faraday was the contention that the process of selecting a developer ought to have been subject to the public procurement regime and that in not subjecting the process to that regime the Council had erred in law.

Dismissing the claim on all grounds at first instance, Holgate J held that the agreement was neither a public contract nor a public works contract within the meaning of the procurement regulations and so fell outside of that regime.

COURT OF APPEAL DECISION

In overturning the High Court decision, the Court of Appeal accepted that the agreement could be interpreted in the light of the case law as falling outside the definition of a public works contract; though "plainly directed to the object of that agreement", the obligations under the agreement to carry out works were "for the moment" contingent obligations and as such the agreement was "not yet a public works contract".

However, when the Council entered into the agreement with St Modwen, "no further act of procurement by the council remained to be done". By entering into the agreement, operating outside of the procurement regime, the Council had "effectively agreed to act unlawfully in the future." This was in itself unlawful. Under the procurement regime, the courts are required to "consider the relevant transaction in its totality to establish whether the contracting authority has, by is "decision or action", procured, or contractually committed itself to procuring, works or services from a particular economic operator." For there to have been any other conclusion would have allowed the legislative regime to be defeated through a sequence of arrangements of the kind found in this case.

There was, however, no finding to the effect that the regime had been deliberately avoided: the Council was "lawfully entitled to attempt to find" an arrangement that fell outside of the public procurement regime.

Effect of the Voluntary ex ante Notice

The VEAT made by the Council in 2015 stated that the Council considered the agreement to fall outside of the public procurement regime because, inter alia, the agreement was an "exempt land transaction" and it placed no binding obligation on the developer to undertake any works.

Regulation 47K(4) of the PCR 2006 (its equivalent can now be found at Regulation 99(4) of the PCR 2015) sets out the requirements of a VEAT; the nature of the requirements was elucidated by the CJEU in Case C-19/13 *Ministero dell'Interno v Fastweb SpA ('Fastweb')*. What is required is a "clear and unequivocal explanation" of the reasons that led the contracting authority to act outside of the procurement regime. It is for the national court to decide whether the contracting authority "acted diligently" and whether it could "legitimately hold" that the conditions for not following the public procurement procedure were met. It was said to be "striking that the only part of the justification given in the notice that purports to explain what the development agreement actually is, rather than what it is not, is the statement that it is "an exempt land transaction." The rest is all in negative terms and leaves no picture of the contract as it truly is." To that end this was not a valid VEAT and could not preclude a declaration of ineffectiveness.

The Court granted a declaration of ineffectiveness, and ordered the payment of a nominal civil financial penalty by the Council. Permission to appeal to the Supreme Court was refused.

COMMENT

This is the first time that a declaration of ineffectiveness has been issued under the procurement regime in England. The Court of Appeal's judgment shows that it will take a holistic approach in assessing individual agreements that purport to sit outside the procurement regime. The Court must establish whether, at the point of entering into the agreement, it "embodied defined obligations that will, once they take effect, compose "public works"". The Court looked beyond the immediacy of the obligations: this was in effect an 'inchoate' public works contract. The Council was "entering into a contract whose essential object was the execution of the works for which it provided". This is what brought it within the scope of the procurement regime.

This shows the care required in drafting agreements, where the ability of the economic operator to “walk away” from its obligations is not seen as being decisive. Those involved in negotiating and drafting such agreements must consider the overall practical effect of the contractual relationship in procurement terms, in the immediate as well as long term future. Anything seen to tie the hands of the contracting authority in procuring works may well fall foul of the regulatory framework. For a VEAT to be an effective option for protecting against the sort of outcome seen in this case, it must provide sufficient clarity to adhere to the guidelines as set out by the CJEU in *Fastweb*.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

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