

Faraday in the Court of Appeal

Development hits a snag

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Introduction

- Background and key features of the development agreement
- What did the High Court decide?
- What did the Court of Appeal decide?
- What conclusions can we draw from the Court of Appeal's judgment?

The development agreement - background

- Objective: re-development of London Road Industrial Estate, near Newbury Town Centre for regeneration and maximising income
- Land mostly owned by the Council
- Council sought (non-OJEU) bids and chose St Modwen (SM) as development partner
- Faraday was part of a consortium bid, but was unsuccessful.

The development agreement – key features

- Council appointed St Modwen (SM) as developer and estate management adviser for the site
- SM was under an enforceable obligation (from the date the DA was entered into) to provide various services to the Council in respect of the site – including preparing the development strategy and plot appraisals for specific plots within the site
- SM was obliged to submit the development strategy and plot appraisals to a Steering Group (consisting of two SM members and two Council members) for approval
- If SM wished to develop a plot it could serve a notice on the Council
- Upon SM serving notice, a land interest would be transferred to SM and at that stage SM would become subject to an enforceable obligation to carry out the proposed works on that plot.

Key point: SM would not have an obligation to carry out works unless **it chose** to serve a notice

What did the High Court say?

- What is the main object of the contract?

Main object = works (not services)

- Does that object correspond to works, services or supplies definition in PCR?

Yes, corresponded to the works definition

- Is the contractor under an enforceable legal obligation to carry out that main object?

High Court said “no”. SM was not under a legally enforceable obligation to carry out the works. Whether SM came under such obligation was entirely a matter for SM to decide.

“In summary, therefore [SM] is free under the DA to “walk away”, in the sense that it can choose not to come under an obligation to acquire and carry out works on any of the redevelopment land...” (paragraph 195)

Therefore, it is not a public works contract (paragraph 223)

What did the Court of Appeal decide?

- Was the development agreement a public works contract?
 - CA said “not yet”
 - It was not yet a public works contract because “[SM’s] obligations to carry out works are – for the moment – contingent obligations” and not immediately enforceable (paragraph 51)

What did the Court of Appeal decide?

- By entering into the development agreement without advertisement, did the Council unlawfully commit itself to entering into a public works contract?
 - CA said “yes”
 - The DA would become a public works contract once the option is exercised (paragraph 57)
 - The Court must consider the transaction in its totality (paragraph 59)
 - At the date the DA was entered into, the Council had done all that it needed to do to procure. It had committed itself contractually (paragraph 61)
 - By entering into the DA the Council agreed to act unlawfully in the future. That is in itself unlawful (paragraph 62)

What did the Court of Appeal decide?

- Did the Council deliberately and unlawfully avoid the procurement regime?
 - CA said “no”
 - *“It cannot be said that the underlying purpose of the option provisions in the DA ,or of the DA as a whole was an unlawful purpose, even if the DA itself ought to have been the subject of a procurement process..”* (paragraph 68)
 - The *“economic and commercial reality”* is fully apparent from the DA and had not been disguised. It was not a sham (paragraph 70)

Conclusions on Public Works Contracts?

Red	Amber	Green
<p>Agreements that impose obligations for works (whether conditional or unconditional). Has the authority committed itself? Take a broad, purposive approach</p>	<p>Section 106 agreements? <i>(see Midlands Co-operative v Birmingham CC and para 53 Faraday)</i></p>	<p>Terms which restrict the permitted use of the land or which allow the authority to recover possession if the land is not in fact developed within a specified period</p>
<p>Structures where the real and sole purpose is to avoid the procurement regime</p>		<p>True land sale (with no obligations)</p>
		<p>Below threshold contracts</p>
		<p>Regulation 32 (exclusive rights exemption)</p>

The Court of Appeal on VEAT notices

- Was the Council's VEAT notice valid?
 - CA said "no"
 - It was not transparent enough
 - The description of the object as "an exempt land transaction" was "*more than mere over-simplification*" (paragraph 89)
 - The justification for the decision not to follow a public procurement procedure, which referred to no binding obligation "*still leaves too much unclear*" (paragraph 90)
 - The VEAT "*did not alert a third party to the real nature of the transaction*" (paragraph 90)
 - Caution against describing in negative terms.

Case references

- *Helmut Muller*, Case C-451/08
- *R (on the application of Midlands Co-operative Society Ltd) v Birmingham City Council* [2012] EWHC 620 (Admin)
- *Remondis*, Case C-51/15
- IP/08/867 *City of Flensburg* (5 June 2008)
- *Modling*, Case C-29/04
- *Fastweb*, Case C-19/13
- *R (on the application of Faraday Development Limited) v West Berkshire Council* [2016] EWHC 2166 (Admin)
- ***Faraday v West Berkshire Council* [2018] EWCA Civ 2532**

Thank you

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