

# 'Faraday scheme' contract declared ineffective: development agreements, ineffectiveness and VEAT notice analysis (Faraday Development Ltd v West Berkshire Council)

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**Local Government analysis: Contracting authorities have been waiting for some time for the Court of Appeal's judgment in the case of Faraday. This case concerned West Berkshire Council's (the council) entry into a development agreement with St Modwen Developments Limited (SMDL) on 4 September 2015 for the disposal of land on the London Road Industrial Estate, in Newbury. The case succeeded on the second ground of appeal that it was unlawful for the council to enter into the development agreement, because by doing so it committed itself to entering into a public works contract without following the procedure for public procurement. One of the most striking outcomes of the judgment is that the court made a declaration of ineffectiveness in respect of the works contract. This judgment raises significant implications for contracting authorities looking to structure development agreements which fall outside the EU public procurement regime. Written by Catherine Maddox, solicitor and Matthew Mo, partner, at Bevan Brittan LLP.**

*Faraday Development Ltd v West Berkshire Council* [\[2018\] EWCA Civ 2532](#)

## **What are the practical implications of this case?**

Key practical implications for contracting authorities include:

### **Contracting authorities will need to consider whether arrangements could be construed as a whole**

Chronologically distinct decisions may be seen as a whole. The court will consider the relevant transaction in its totality to establish whether the contracting authority has procured or contractually committed itself to procuring works from a particular economic operator. Contracting authorities will need to think carefully about their EU procurement obligations when sequencing land sales and subsequent development arrangements.

### **VEAT notices must disclose the full extent of the proposed arrangements**

This case highlights the importance of transparently drafting a voluntary ex-ante transparency (VEAT) notice in such a way as to disclose the full extent of the proposed arrangements. A VEAT must be clear and unequivocal, provide a full picture of the relevant facts and provide enough by way of relevant objective detail to alert a third party to the real nature of the transaction.

### **Issues in relation to limitation**

This case raises questions in relation to when the procurement breach occurred: was it at the time when the overall development agreement was finalised (at the beginning of the scheme) or at the time when SMDL drew down the land? The court judgment observes: 'The procurement crystallises when St Modwen draws down the land' (para [61]). However, parties interested in bringing a procurement complaint or challenge on a similar scheme may need to consider whether the relevant cause of action arises on entering into the overall development agreement for the scheme, or whether the cause of action arises when the enforceable obligation to carry out works is triggered.

### **What was the background?**

Faraday Development Limited (part of a consortium bid) was unsuccessful in a non-EU regulated tender process. The tender process in question was for an appointment as development partner of West Berkshire Council for the regeneration of the London Road Industrial Estate in Newbury. In brief, the structure of the arrangement was that the developer would have the option to draw down land for development. If the developer drew down the land, it would then have an obligation to perform works in accordance with plans approved by a steering group composed of representatives from the council and the developer. While the appeal judgment does not address this point, our interpretation is that the court assumed that decisive influence by the council was exerted through this steering group.

If the developer did not draw down the land, there would be no obligation to perform works. Once the development agreement was finalised by the council and developer, the decision as to whether to draw down the land rested solely with the developer.

Faraday challenged the decision by the council to award the development agreement to SMDL. The first instance judgment concluded that the development agreement did not create an enforceable obligation on SMDL to carry out the redevelopment and so it was not a public contract for the purposes of the EU procurement rules.

When permission to appeal was granted, it was observed that there was a 'strong public interest' in the court 'examining the proper application of the legislative regime for public procurement in a case where a development agreement is structured around an option for the developer to acquire the land in question (but with other contractual obligations, the fulfilment of which may well create a financial incentive for the developer to exercise that option)' (para [2]).

### **What did the court decide?**

The Court of Appeal observed the following:

#### **An authority cannot commit to acting unlawfully in the future**

An authority cannot lawfully grant a developer an option to require it to act unlawfully in the future. In entering into the development agreement, the council was committing itself, unlawfully, to entering into a public works contract in the future without complying with the public procurement legislation.

#### **Arrangements must be construed as a whole**

There is a need for the court to look at agreements as a whole. Decisions in previous cases such as *Helmut Müller GmbH v Bundesanstalt für Immobilienaufgaben* [C-451/08](#) and *Remondis GmbH & Co KG Region Nord v Region Hannover* [C-51/15](#) illustrate the importance of looking at the relevant contractual arrangements as a whole.

If a contracting authority is at liberty to construct a sequence of arrangements in a transaction which have the combined effect of constituting a public works contract, without ever having to follow a public procurement procedure, this would defeat the operation of the legislative procurement regime.

#### **A high degree of transparency must be observed in VEAT notices**

The VEAT notice published by the council described the 'main object of the agreement' as 'an exempt land transaction.' The VEAT notice is described by the court as 'incorrect, or at best misleading' (para [89]), as the development extended 'considerably further than a transaction for the disposal or transfer of land,' containing 'intricate provisions for the design and execution of a large development.'

We note that in addition to the declaration of ineffectiveness, according to the Counsel instructed on the case, there is also a civil financial penalty to be paid of £1, (although this amount is not specified in the judgment).

Permission to appeal to the Supreme Court was refused.

#### **Case details:**

- Court: Court of Appeal, Civil Division
- Judge: Lewison, Lindblom, Flaux LJ
- Date of judgment: 14 November 2018

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