THE HARINGEY DEVELOPMENT VEHICLE:

LOCAL AUTHORITY DECISION-MAKING WHEN WORKING WITH PRIVATE DEVELOPERS

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Councils who decide to enter into joint ventures with private developers will often face fierce political opposition. Those who want to challenge such ventures will often use a challenge to the legality of the authority's decision-making process as one of their weapons. These challenges are usually launched by those who want to scupper the projects rather than because they want to raise important points of local government law. However the recent judgment of Ouseley J in *Peters v Haringey LBC* [2018] EWHC 192 has made the decision-making path for local authorities clearer than it was before.

Duncan Ouseley is a former planning barrister and his judgment shows a clear understanding of local government law and the reality of the decision-making process. Haringey's scheme has proved controversial on the national stage and, because of changes in political control at the Council, may not now go ahead. The judgment though confirms that the decision itself and the way in which it was made were lawful.

The claim arises from the decision of Haringey LBC to enter into a joint venture arrangement with the private sector called the Haringey Development Vehicle (the HDV). The idea was to bring on board a private sector partner to assist the Council in achieving its strategic aims in relation to housing, affordable housing and employment. The decision was challenged by Gordon Peters, a Haringey resident and a member of a community group opposed to the scheme.

His challenge was on four grounds:

(a) The Council were not entitled to use a limited liability partnership as the joint venture vehicle. Since the objective was "a commercial purpose" they should have used one of the forms of company permitted under s4 the Localism Act.
(b) They had failed in their duty to consult under the Local Government Act 1999.
(c) They had breached the public sector equality duty under the Equality Act 2010.
(d) The decision should have been taken by the full Council rather than the Cabinet.

The Council obviously resisted all these grounds of challenge and in addition said that Mr Peters was out of time as his claim was issued more than three months after the relevant decisions.

A commercial purpose

The Council were relying under the wide power in s1 of the Localism Act 2011 to enter into the joint venture arrangement. This allows a local authority to do anything that an individual can do, subject inevitably to various restrictions and qualifications. One of those restrictions is that if a local authority wishes to do things "for a commercial purpose" it must do so through a company. The reasoning behind this is to ensure that authorities who enter the world of commerce do so on the basis that this is on what is always called a "level playing field", so they do not gain an advantage over their competitors in the world of business. The company, unlike local authorities, will have no tax benefits and will have to pay corporation tax. Section 4 of the Localism Act sets out the type of companies which an authority can use for this purpose, essentially limited companies.

The HDV however was a limited liability partnership under the Limited Liability Partnerships Act 2000. This is more favourable from a tax and financial perspective than a limited company and it was also thought to provide more flexible governance arrangements. The Claimant argued that this was unlawful as the Council were acting for a commercial purpose. The argument was that the Act forbade authorities doing anything for "a commercial purpose" other than through one of the permitted forms of company. So if it received any financial gain then it could not use an LLP. The Council's argument, supported by its joint venture partner Lendlease was that in order to fall within the "commercial purpose" exception, the commercial purpose needed to be the dominant or primary purpose. If there was some financial return along the way this did not matter unless the main motivation is making money.

The judge rejected the argument that because there was "a" commercial purpose, even if incidental, this meant that the Council were doing things for a commercial purpose. He analysed the Council's thinking and decision-making and concluded that the purpose was to develop and manage the Council's land so as to achieve its aims for housing. He concluded that the fact that returns were hoped for which could be reinvested for the same policy objectives does not create a commercial purpose. There is a distinction between acting commercially and acting for a commercial purpose.

Consultation

There is an interesting question as to the extent of an authority's duty to consult over large-scale contracts. In the case of *R (Nash) v Barnet LBC* [2013] EWHC 1067 (Admin) Underhill J at first instance found that the Council's decision to enter into a very large outsourcing deal with Capita was subject to the consultation duty under s3 of the Local Government Act 1999 as it was making "arrangements to secure continuous improvement in the way its functions are exercised". However, in that case the challenge was way out of time.

The judge concluded that Haringey was carrying out its functions (a broad concept) throughout the process, that setting up the HDV was an "arrangement" and that the Council was seeking to "secure continuous improvement". In his view therefore the consultation duty arose, and it had not been fulfilled.

However, as with Barnet, the challenge was out of time. The consultation should have been undertaken before the decisions on the HDV were made in February 2015 or at the latest November 2015 when the Council approved the business case for establishment of the HDV and for a procurement process to begin to choose the joint venture partner. After that time both the Council and Lendlease spent large amounts of money. The judge concluded that to allow this ground of challenge to proceed out of time would cause significant prejudice.

Public Sector Equality Duty

The Council has a duty under s149 of the Equality Act 2010 in the exercise of its functions to have regard to the need to eliminate discrimination, advance equality of opportunity and promote good relations between groups with different protected characteristics.

This is a frequently used basis for challenging local authority decisions and a wise authority will take care to ensure that it has prepared and taken into account equality impact assessments (EqIAs) to demonstrate that it has complied with this duty.

The Claimant's argument was that the EqIAs undertaken in September 2015 could not have complied with the duty as too little was known at this stage about the proposed arrangements. The more substantial EqIAs produced in July 2017 could not fulfil the duty as they assumed the existence of the HDV and could not examine the equality implications of the decision to set it up. The Claimant gave four examples of this:

(a) Those with protected characteristics could lose political influence as decisions had been transferred to the HDV;
(b) The HDV was not itself subject to the Equality Act obligations as a public authority would be;
(c) A financial failure would be likely have a disproportionate impact on those with protected characteristics;
(d) The commercial imperative would affect the HDV's approach to existing residents who had protected characteristics, such as those with a disability who could be affected by the difference between a commercial and public authority approach.

This ground of challenge was rejected in robust terms. The court commented: "What is actually most striking about the sequence of decision-making is the regularity with which the PSED has been considered." The EqIAs were described as "considerable documents" containing an analysis of the data on protected characteristics, the consultation which had taken place and the proposals for regeneration.

The notion that there was a stage in the decision-making process, which dealt with the choice of the HDV in principle, which required PSED compliance, was dismissed. The way in which the Council structured its decision-making, first by deciding on the option to pursue the strategic regeneration aims and then, having pursued it to the stage of detailed agreements, deciding whether to enter into those agreements, was perfectly legitimate. The four points opposite were described as "remote from reality".

Decision-making forum

Under s9D of the Local Government Act 2000 a Council's decision-making powers are vested in the executive or Cabinet unless a specific provision makes them decisions of the full Council. Under regulation 4(1)(b) of the Local Authorities (Functions and Responsibilities) Order 2000 one of the functions which is not to be the sole responsibility of an authority's executive is the function "of formulating a plan or strategy for the control of the authority's borrowing, investments or capital expenditure or for determining the authority's minimum revenue provision". It was argued on behalf of the claimant that the decision to set up the HDV fell within this wording.

The suggestion was rejected by the court. It was accepted that a decision did not need to form part of the conventional budget-setting process to fall within this description. In addition the decision to enter into the HDV arrangements could properly be described as a "plan or strategy". However, it could not be described as controlling borrowing, investments or expenditure.

CONCLUSIONS

The most important principle established by the case is the meaning of "commercial purpose" under the Localism Act. The decision that this means the overall purpose of the transaction is to be welcomed. The alternative interpretation would have required all manner of local authority activities to be undertaken through limited companies for no benefit whatsoever. The fact that money can be made from a scheme and then reinvested does not automatically mean the arrangement is for a commercial purpose.

The distinction is easy enough to make. If the purpose of the transaction is to make a profit which goes back into the Council's general fund, then it must be undertaken through a limited company. If the project is such that any surplus funds are reinvested then it is a matter for the authority what vehicle (if any) they use. This includes a limited liability partnership which will come as a relief to many local authorities since many projects have used this as a model.

The decision also encourages a prudent approach to such transactions. Provided the overall object is not commercial, a local authority is entitled to structure a transaction in such a way that it can project a potential surplus which will be used for reinvestment.

Haringey ensured that the reports and minutes reflected the essentially non-commercial nature of the transactions. This is important. If there is an indication that making a profit is a potential motive then the prospects of a successful transaction will be greatly increased.

The issue of consultation is a massive potential trap. As with Barnet, if the objectors had managed to start proceedings at the right time, they would have succeeded on this ground. It is still not clear though what scale of transaction triggers the duty to carry out consultation under the 1999 Act. The message to authorities is to play it safe. An authority planning large-scale transfer of land or a big outsourcing project, should ensure that the consultation is carried out.

The judge's response to the PSED challenge is a further indication that the courts are likely to be unsympathetic to arguments that try to pinpoint some failure along the way and ask the court to quash the whole decision as a result. This does not obviate the need to take equalities duties seriously. Haringey had clearly thought about their duties and what they needed to do to fulfil them. The fact that they had done so and that the impact assessments were thorough pieces of work clearly impressed the court. An authority which fails to carry out or skimps on its impact assessments is far more likely to be vulnerable to challenge on PSED grounds.

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