SHARPE PRITCHARD

SHARPE FOCUS

Edition 26

Should local authorities be borrowing money to invest in land?

Planning Decisions – Challenging the Housing Delivery Test results

PLUS

Money alone doesn't make the world go round – Nike and New Balance clash over kit deal

European Court considers the territorial application for global search engines in 'the right to be forgotten'

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- 'Absolute leaders in the field' – our firm remains a 'Top Ranked' firm in Chambers and Partners 2020
- Sharpe Pritchard acts for BT Plc in 2019's largest UK legal outsourcing project
- What is best value?
- The Show Must Go On! Managing Main Contractor Insolvency Issues
- Public Procurement and the availability of the ineffectiveness remedy – first ground
- Sharpe Pritchard advises Brentwood Borough Council on landmark joint venture with Morgan Sindall Investments
- Concession contracts regulations – Court of appeal dismisses procurement challenge
- Stakes and Ladders – Government Proposals for Improved Shared Ownership Scheme

‘ABSOLUTE LEADERS IN THE FIELD’ – OUR FIRM REMAINS A ‘TOP RANKED’ FIRM IN CHAMBERS AND PARTNERS 2020

We are delighted to have once again been named as a ‘Top Ranked’ firm in the Chambers and Partners 2020 guide, with one client describing the firm’s lawyers as ‘absolute leaders in the field’.

The prestigious rankings are based upon detailed written submissions, setting out the highlights of the firm’s work in each practice area, as well as feedback from client referees on the work carried out for them.

A selection of client comments which helped earn us this prestigious ranking include:

“I would class them as absolute leaders in the field. They are extremely knowledgeable.”
(Parliamentary)

“They are very professional but, more than that, they clearly demonstrate a desire to deliver the best possible outcome for their clients.”
(Local Government)

“Sharpe Pritchard employees have a manner that puts you at ease. Their experience in this sector provides them with a calm assurance and a thorough understanding of the political environment.”
(Public Procurement)

Alastair Lewis, Senior Partner, said:
“We are very pleased to have once again received such a strong set of rankings, particular as they reflect the feedback the researchers have received from our clients.

“It is very rewarding to be described in such glowing terms by people with first-hand knowledge of the service we provide.”

Our firm’s departments and partners are ranked as follows:

Ranked Departments	Ranked Lawyers
London	
Construction: Purchaser	Justin Mendelle
Planning	Denise Stephenson Brian Hurwitz
Real Estate	Jo Pickering
UK wide	
Parliamentary & Public Affairs: Electoral Law	Emyr Thomas
Parliamentary & Public Affairs: Parliamentary Agency	Alastair Lewis (Band 1) Emyr Thomas
Projects: PFI/PPP	Nicola Sumner Roseanne Serrelli
Public Procurement	

SHARPE PRITCHARD ACTS FOR BT PLC IN 2019'S LARGEST UK LEGAL OUTSOURCING PROJECT

Sharpe Pritchard has been instructed by BT Plc in the outsourcing of its legal services for claims and real estate work - the largest legal outsourcing project in the UK market in 2019.

We were instructed earlier this year to advise the telecommunications giant on a competitive tendering process to secure a provider of managed legal services.

Senior associates, Raechel Slattery and Rachel Murray-Smith led the negotiations for the firm, resulting in the award of a five-year contract to DWF LLP.

Partner, Justin Mendelle, who headed the team, said: “We are delighted to have advised BT on this major and ground-breaking project, which follows on from Thames Water’s outsourcing of its legal services.

“There has been a real shift in the way that major corporates approach their buying of legal services; they have seen the benefits of moving towards large-scale outsourcings and we believe that this trend will continue.”

Sharpe Pritchard has a strong track record of advising on major legal outsourcings, having acted for Thames Water on the successful delivery of a managed legal service and parallel panel arrangement in 2018, which was the largest ever outsourcing of legal services in the UK.

WHAT IS BEST VALUE?

Senior Associate Deborah Down and Trainee Solicitor Christos Paphiti examine two recent cases which serve as a reminder that the Best Value duty is still very much alive.

The core duty to obtain Best Value is established by Section 3(1) of the Local Government Act 1999 ('LGA 1999'):

"A best value authority must make arrangements to secure continuous improvement in the way in which its functions are exercised, having regard to a combination of economy, efficiency and effectiveness."

"Economy, efficiency and effectiveness" are known as "the three Es". It can be seen that this duty is not solely concerned with a one-off duty to achieve "best value" in service delivery, but requires a process of continuous improvement.

Elsewhere in Section 3 there are two further concepts:

- A best value authority must 'consult' with various representatives, including taxpayers.
- A duty to have regard to guidance issued by the Secretary of State.

The duty is part of a wider statutory regime in which the performance of best value authorities is monitored by central Government. Underperforming authorities can see intervention from the Secretary of State including, in the most extreme cases, the exercise of specified functions of the authority itself.

This was used recently in Northamptonshire, where commissioners are currently running the county council.

Failure to comply with the duty has led to a number of legal challenges, particularly around whether sufficient consultation has occurred. These assist in clarifying the extent of the duty. After explaining these, the remainder of this article looks at two recent cases.

Nash v London Borough of Barnet was a 2013 Court of Appeal case concerning mass outsourcing of most Council services. The court commented that the Section 3 duty "connotes high-level choices about how, as a matter of principle and approach, an authority goes about performing its functions", and that the duty to consult is concerned with "questions of policy and approach", not "specific operational matters".

The High Court in Northern Ireland in Bryson Recycling held that, following the Nash case, the decision that was the subject of the case did engage the best value duty set out in equivalent NI legislation, but was not sufficiently high level to engage the duty to consult.

The case concerned the best value authority's decision to tender its waste collection, including key changes to how this was delivered. The court decided that the decision would have to be 'plainly highly strategic' before the need to consult arose, and so the challenge on that ground failed.

It is worth noting that the court in last year's challenge to Haringey's redevelopment company confirmed that the best value consultation duty imposed a need for consultation on high-level policies; although the challenge failed on another ground, the court did decide that the Council had failed in its consultation duty.

R (on the application of Williams) v Caerphilly CBC

The Claimant sought to challenge two decisions made by Caerphilly County Borough Council regarding adoption of leisure and sports strategy documents. It was argued by the Claimant that the authority failed to comply with its obligations under the equivalent Welsh legislation, whereby the authority "must make arrangements to secure continuous improvement in the exercise of its functions".

The court compared this with the English law best value duty. The court held that Nash cannot mean that every "high-level" decision falls within the scope of the Section 3 duty.

Rather, the issue at hand is whether the nature of the decision taken was to secure an improvement in the exercise of the authority's functions. The court decided that these strategy decisions of Caerphilly CBC was not in the nature of an arrangement to secure continuous improvement in exercising their functions,

The Claimant's challenge therefore failed. This may be seen as a surprising decision, because adoption of a strategy for delivery of leisure and sport services over 10 years might be considered to be a key way of demonstrating the required continuous improvement. It is almost as if the more unambitious the strategy, the less likely it is engage the duty.

The Shropshire Fire Authority case

The Claimants, consisting of several fire authorities, applied for judicial review of the defendant Secretary of State's decision to transfer their governance to Police and Crime Commissioners under Section 4A of the Fire and Rescue Services Act 2004.

The Secretary of State could only do so if it appeared 'in the interests of economy, efficiency and effectiveness for the order to be made'. Therefore, the case concerned the interpretation of the wording of the three Es also contained in Section 3(1) LGA 1999.

The Claimants argued that the three Es should have been considered separately, instead of collectively. The Secretary of State's decision to approve the proposals referred to the three Es as a collective test.

The Court held that the starting point of statutory interpretation is the natural and ordinary meaning of the words used. Therefore, it was not appropriate to adopt a purposive construction if it would be inconsistent with the words' plain meaning.

The Court held that the use of the connector "and" was significant and the addition of "economy" was intended to add a separate consideration to the other Es. Thus, any proposal should individually consider the three Es.

The Court referred to a National Audit Office document ('Assessing Value for Money') that the three Es meant as follows:

- **Economy:** minimising the cost of resources used or required (inputs) – spending less;

- **Efficiency:** the relationship between the output from goods or services and the resources to produce them – spending well; and

- **Effectiveness:** the relationship between the intended and actual results of public spending (outcomes) – spending wisely.

However, "economy" did not require an overall fall in expenditure; it meant that costs should be kept as low as was consistent with achieving the desired outcome. The application therefore failed.

Implications

These two recent cases highlight that a best value authority:

1. Must bear in mind the Section 3 duty is a constant duty and must be complied with.
2. The duty will rarely be engaged – it is only concerned with "high-level" decisions. Even where it is engaged, the duty to consult may not arise.
3. The three Es must be considered separately and not collectively.

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THE SHOW MUST GO ON!
MANAGING MAIN CONTRACTOR INSOLVENCY ISSUES

Partner, David Owens and Senior Associate, Rachel Murray-Smith, examine the warning signs of financial instability and the proactive steps that can be taken to safeguard against contractor insolvency.

“Strong growth in total revenue and increased operating profit”: the Carillion forecast sent to the City in May 2017, just eight months before the firm’s collapse, highlighting that employers can ill afford to become complacent in respect of contractors’ financial standing.

Thankfully, there are proactive measures employers can take to guard against the effects of main contractor insolvency and, if the worst does happen, reactive steps that can be taken to ensure completion of the project and recovery of costs.

Contractual Safeguards

Proactive measures to guard against the impact of main contractor insolvency can be implemented by public sector employers at two key stages of the construction process: the procurement stage and the drafting stage.

Regulation 58(7) of the Public Contracts Regulations 2015 (PCR 2015) allows Contracting Authorities to impose financial requirements on bidders, for instance specifying a minimum yearly turnover. In so doing, Contracting Authorities can seek to preclude financially unstable bidders from the procurement process. As we saw in the case of Carillion, however, substantial turnover does not necessarily provide a cast iron guarantee against insolvency. It is important to ensure that the financial assessment of bidders, and their supply chain, is proportionate, flexible, and contract-specific.

A ‘one size fits all’ approach is unlikely to provide Contracting Authorities with the information they require to properly assess bidders. The Central Government’s Outsourcing Playbook (July 2019) provides helpful and informative guidance on assessing and monitoring the economic and financial standing of bidders.

The aforementioned highlights particular factors/warning signs for Contracting Authorities to look out for:

- Profitability, cash flow, liquidity and solvency of the bidder;
- Existence of any charges/debts;
- Profit warnings;
- Change of control;
- Payment of large dividends; and
- The existence of mitigating factors/security.

It is, however, important to remain mindful of context to ensure that any assessment of the above factors is done in compliance with the PCR 2015.

In addition to appropriate due diligence at the procurement stage employers should consider the best procurement/contractual structure for their project. Employers can utilise “twin-tracking” arrangements (where a reserve contractor is procured at the same time as the main contractor), framework agreements and lotting in order to divide and manage risk.

There are a number of forms of security employers may choose to request from their contractors. Performance bonds provide a route for the employer to recover the losses it has incurred (up to a maximum sum) as a result of breach of contract or early termination from a third party surety.

Whilst performance bonds provide a useful form of security, contractors are rarely enthusiastic about their use, so watch out for (sometimes hidden) ‘premiums’ attached to the same.

An alternative or additional form of security for contractors with parents is a Parent Company Guarantee (PCG). PCGs serve to reimburse the employer for loss suffered due to contractor insolvency. It should be remembered, however, that PCGs are only as good as the covenant strength of the parent company.

Employers should be sure not to enter into a PCG with a 'shell' company lacking the funds to honour the agreement.

An employer should also seek subcontractor warranties (from key or significant subcontractors) so that it has direct contractual recourse to the subcontractors.

Consideration should also be given to the inclusion of step-in rights to enable the employer to step into the shoes of the main contractor and directly engage the subcontractor. Such rights can prove highly useful when attempting to complete works in a post-insolvency event.

Insolvency Scenario

If an employer has concerns in respect of a contractor's solvency – perhaps through media reports regarding the contractor's instability, suggestions that subcontractors are not being paid, or simply as a result of numbers of people on site reducing and progress coming to a halt – it is crucial to gain an understanding of the contractual position.

Seeking legal advice at the earliest possible stage is the most effective method of preparing for potential contractor insolvency, but there are steps employers can take independently.

The employer should check the contract for insolvency and default provisions, review any ancillary security documents (for instance PCGs and the like discussed above), get to grips with any subcontracts or subcontractor warranties and familiarise itself with termination and notice procedures.

With regard to this last point, employers should be sure to double-check the address for service of notice; failure to do so could provide a contractor with all too easy a way out.

Completing the Project

In the event of main contractor insolvency, solutions need to be found to two key issues:

1. Who can finish the works?
2. How best to recover associated costs?

There are a number of avenues employers may wish to pursue in terms of finding an alternative contractor.

Some employers will be fortunate enough to have a reserve contractor already appointed, in which case it is simply a question of checking the contractual provisions and how to engage them. Otherwise, an employer could seek to complete the project itself by directly appointing subcontractors or stepping into subcontracts.

If, however, self-assignment feels like a stretch too far, employers may seek to procure an alternative contractor through an existing framework or by running a new procurement process. Seeking legal advice in respect of any of these options represents sound practice.

The main contractor's insolvency is bound to have numerous legal implications, for instance the potential for claims from third parties to arise against the employer, and it is essential that such risks are fully understood.

The employer's chances of successful cost recovery will depend to a considerable extent on the security provisions put in place when the contract was entered into, as well as the type of insolvency the contractor has used.

Employers should also be wary of actions by the insolvent contractor, their liquidator or someone acting on their behalf, seeking to make claims against the employer.

Conclusion

Employers should proactively, and in accordance with the PCR 2015, assess the economic and financial standing of bidders prior to awarding and entering into a construction contract, and keep a careful eye out for warning signs of financial instability.

Consideration should be given to the optimal contractual structure for a project and the appropriate forms of security to require from the contractor and its supply chain.

Employers should take action quickly and seek legal advice if concerns arise around possible contractor insolvency, and consider carefully their options in respect of completing the project and recovering costs.

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PLANNING DECISIONS
CHALLENGING THE HOUSING DELIVERY TEST RESULTS

Senior associate Rachel Lee and Trainee solicitor, Sarah Rhodes, focus on planning decisions for housing development in the context of relevant planning law and policy.

We are all familiar with the headline that we need to build more homes in the UK. Demand outstrips supply.

The planning system plays a fundamental role in supporting sustainable development and growth with an undeniable emphasis on the provision of new housing.

The need for Local Planning Authorities (LPAs) to demonstrate adequate housing supply is key. Planning legislation deals with how the planning policies for a LPA's area are formally adopted and then how these are applied when making individual planning decisions. It is often referred to as a plan-led system.

An area's policies (contained in strategic plans, local plans and neighbourhood plans, referenced for this article as the Plans) will contain site allocations for new housing along with policies indicating where new housing should be built.

The legislation highlights the importance of the development plan in the determination of planning applications by the planning authority. Section 70(2) of the Town and Country Planning Act 1990 states that in dealing with an application for planning permission, the authority shall have regard to 'the provisions of the development plan, so far as material to the application'.

Section 38(6) of the Planning and Compulsory Planning Act 2004 specifies that, if regard is to be had to the development plan under the planning legislation, the determination of a planning decision must be made in accordance with the development plan unless material considerations indicate otherwise.

National planning policy is contained in the National Planning and Policy Framework (NPPF). Through both plan-making and decision taking the presumption in favour of sustainable development (PiFSD) at Paragraph 11 of the NPPF is key. The wording of Paragraph 11 (c) and (d) is as follows:

For decision-taking this means:

c) Approving development proposals that accord with an up-to-date development plan without delay; or

d) Where there are no relevant development plan policies, or the policies which are most important for determining the application are out-of-date, granting permission unless:

  i. The application of policies in this Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed; or

  ii. Any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole.

Where a LPA fails to demonstrate a five year supply of deliverable housing sites or where the area's Housing Delivery Test (HDT) indicates that delivery is substantially below[1] the housing requirement over the previous three years, the policies contained in a development plan are considered to be out of date. Where polices are out of date, the PiFSD contained in Paragraph 11 d) of the NPPF will apply.

The issue for LPAs with the application of the PiFSD at Paragraph 11 d) is unless there are clear reasons for refusal as per i) or ii), this could result in housing developments being brought forward in areas which are not allocated for housing in their plans.

Some LPAs are under increasing pressure from housing developers submitting planning applications seeking reliance on Paragraph 11 d). Applying NPPF Paragraph 11 d) can ultimately result in some lack of control over future planning decisions for LPAs where developers challenge decisions via appeals and beyond through the courts.

There is a duty placed upon LPAs to maintain and monitor supply of deliverable housing sites with appropriate buffers built in to accommodate changes in circumstance. Identifying and maintaining a five year housing supply of well-located and designed sites, supported by necessary infrastructure and facilities is not always an easy task for LPAs.

Every area will be different in topography and land restraints. Where land supply is limited, housing site allocations may be competing with other land allocations (e.g. land required for logistic parks and/or designated land areas e.g. Areas of Outstanding Natural Beauty).

There will be a need to gain support for allocations by local communities and where necessary work with other authorities in formulation of policies to demonstrate adequate housing supply.

In the case of *SPRE Surrey v Waverley BC POW Campaign Ltd v Waverley BC*[2], the court dismissed an appeal against the Inspector's recommendation to modify a local plan the effect of which was to increase the annual housing requirement in the local planning authority of Waverley in order to address 50% of the unmet housing need in a neighbouring area.

The HDT measurement (introduced in February 2019) is a figure published annually by the Ministry of Housing, Communities & Local Government and should be read in conjunction with the Housing Delivery Test rulebook (which sets out the method for calculating the measurement).

The Housing Delivery Test is a percentage measurement of the number of new homes delivered against the number of homes required as set out in strategic planning polices for the areas covered by the HDT over a rolling three year period. This gives a clear indication as to whether the local area is meeting its housing targets. In any given year a 20% buffer will be applied to LPAs which deliver below 85% of the housing requirement.

The measurement can be recalculated and any policy consequences re-analysed if a new housing requirement is adopted in the interim period (e.g. a new Local Plan is adopted bringing forward entirely new housing site allocations).

Lewes District Council v Secretary of State for Housing, Communities and Local Government[3]

This recent case was about the HDT percentage calculation. It followed on from the 2017 judgment in *Wealden DC v Secretary of State for Communities and Local Government*[4] where the court ruled in favour of the claimant (Wealden DC) and quashed part of a local plan, the joint core strategy, approved by the Secretary of State's Inspector. However, the joint core strategy was only quashed in so far as it formed part of the development plan for South Downs National Park Authority.

This case left an administrative problem in relation to the HDT for Lewes District Council (Council). In February 2019, this was calculated at 50% for the area covered by the Council. Consequently, the Council was required to add a 20% buffer to their housing requirement.

> *"The Council was therefore failing to demonstrate adequate housing delivery. The Council was of the opinion that the Secretary of State had erred in law by failing to separate its housing requirement from the housing requirement for the South Downs National Park Authority."*

Following the grant of permission to bring the judicial review claim, the Secretary of State reviewed the HDT result and published a new percentage for the Council of 83%. At 83% the Council were still just below the 85% and a 20% buffer was still to be applied.

The Council responded by amending the grounds of claim to challenge the new % the Secretary of State had published. The core argument was that the 83% figure was calculated on a flawed basis. In the Council's view, the Secretary of State had now recognised the need to disaggregate the housing requirement figure given for Lewes but had not conducted the calculation in a rational way.

The Council's argument was ultimately accepted by the Secretary of State who agreed via consent order. On 22 October 2019, a new HDT result was published for the Council putting the percentage at 86%. This meant the 20% buffer no longer applied.

Putting this in context, the PiFSD in the NPPF at Paragraph 11 d) no longer applies. This percentage change (from 83% to 86%) means that the Council's policies are not out of date. The changed HDT percentage figure should help the Council resist future applications for housing on unallocated sites.

This result is an encouraging outcome for LPAs. Where there is a good argument to challenge the results calculated by the HDT there is scope to do so. This may be helpful to a LPA where the HDT percentage calculation, as per the Council's case, makes a difference under NPPF Paragraph 11 for how housing planning decisions are made. The case clearly demonstrates that LPAs can hold the Secretary of State to account for decisions founded upon the HDT measurement information.

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[1] NPPF, Annex 1, Paragraph 215 sets out transitional arrangements for HDT between November 2018 and November 2020. Substantially below for November 2018 is delivery less than 25%, for November 2019 less than 45% for November 2020 less than 75%
[2] [2019] EWCA Civ 1826
[3] [20173 (CO/1359/2019)
[4] EWHC 351 (Admin)

Solicitor, Allan Owen, takes a look at the recent dispute involving Liverpool FC's kit deal and, in particular, how wider factors often play a part in the calculation of an offer's overall worth

MONEY ALONE DOESN'T MAKE THE WORLD GO ROUND – NIKE AND NEW BALANCE CLASH OVER KIT DEAL

New Balance Athletics Inc v Liverpool Football Club and Athletic Grounds Ltd [2019] EWHC 2837 (Comm)

In the modern era, Premier League kit deals are big business. Manchester City's 10-year deal with Puma is worth £60 million a year and even this is overshadowed by Manchester United's deal with Adidas, which is worth an eye-watering £75m per year.

Sportswear manufacturers are all too aware of the considerable value in providing kits to the country's biggest clubs. The combination of kit sales (including training wear and even certain 'fashion collections') and global advertising via the Premier League's worldwide audience, make such deals highly profitable.

It is unsurprising, therefore, that the upcoming expiry of Liverpool FC's kit deal with New Balance has created quite the stir in the sportswear market.

On the pitch, Liverpool FC have begun to relive the glory days of old, having won the Champions League in 2019 and currently sitting at the top of the Premier League.

As one might expect, the right to provide their kits for the foreseeable future is a highly attractive proposition.

Off the pitch, this proposition was so attractive that it has led to a High Court battle being fought between New Balance and Liverpool FC.

Liverpool FC had accepted a £150 million five year offer from global heavyweight brand, Nike, to provide their kits. For a top-tier kit deal, this is a relatively modest sum but Liverpool FC are thought to have been attracted by Nike's unparalleled marketing and distribution services.

Eager not to lose out, New Balance commenced court proceedings to enforce a "matching clause" in its current deal with Liverpool FC, which entitled New Balance to renew the agreement, provided that it matched any competitor's offer.

New Balance's case was dismissed by Mr Justice Teare in the High Court recently. He stated that New Balance's offer did not adequately match that of Nike, mainly due to the superior marketing and distribution reach of Nike.

Though financially similar, when taken as a whole, Nike's offering far outweighed that of New Balance. This was a product of Nike's ability to call upon superstars such as Serena Williams and LeBron James to promote Liverpool kits, combined with their commitment to sell licensed products in not less than 6,000 stores worldwide.

New Balance's inferior store network and its inability to call upon a range of international superstars meant that it could not truly match Nike's offer.

This case is interesting in that demonstrates the significant role which kit deals and sponsorship arrangements play in sport today.

Moreover, from a legal perspective, it is a useful reminder that the value of a particular offer is not always simply the basal monetary amount; wider factors often play a part in the calculation of an offer's overall worth.

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SHOULD LOCAL AUTHORITIES BE BORROWING MONEY TO INVEST IN LAND?

Councils across England are borrowing huge sums to finance the purchase of real estate. In a number of cases the sums being borrowed eclipse their annual budgets.

With such investment in property becoming a modern staple for the financing of these authorities in order to counter budgetary pressures, Partner, Peter Collins and Solicitor, Ryan Copeland, looks at the rewards and the pitfalls.

The background and incentive to a local authority borrowing to invest in real estate is clear. Local authorities are increasingly looking at alternative forms of funding to plug gaps in their budgets and are turning to more traditional private-sector financing arrangements. The advantages are clear; a local authority can borrow at a very attractive rate with low interest and then invest in real estate to harvest a very healthy return.

Strong yields increase the financial standing of the local authority, resulting in more money being allocated towards the provision of public services and investment in the area to benefit local residents (thereby performing their primary function).

Commercial property investments are volatile, and the fact that councils are often financing them through borrowing increases their risk profile significantly. As outlined below, local authorities have a clear power of investment. However it is the extent and nature of some of these investments which has attracted public interest (and concern) over the last few years.

Local authorities have the power to do anything which is calculated to facilitate, or is conducive or incidental to, the discharge of their functions (Local Government Act 1972, Section 111(1)).

Local authorities also have the "general power of competence" (Localism Act 2011, Section 1) which means they can do anything that individuals generally may do. All borrowed money must be spent in pursuance of the public duty of the local authority.

More than just plugging the gaps

According to Savills, local authorities' share in total investment in the commercial property market has risen from 0.2% to 3.4% between 2015 and 2018. Local authorities need to find new ways of financing their functions after coming under increasing budgetary strain (the National Audit Office calculates central government funding for councils has fallen by 50% in real terms since 2010).

Local authorities are restricted in how much they can raise council tax by and how much they can generate from business rates; but there are no such restraints when it comes to purchasing real estate (although a local authority must determine and keep under review its borrowing limit and how much money it can afford to borrow (Local Government Act 2003, Section 3)). In being able to borrow at attractive rates and invest in property the local authority can yield substantial returns from rent and dividend payments. Financial pressures are thereby reduced resulting in public investment and additional initiatives to benefit their communities which would not otherwise be viable.

But this is about more than just "plugging the gaps". Such investment results in an enhanced public stake in a particular area. The private sector is consequently provided with a level of assurance and comfort that the area is likely to benefit in the future and so the private sector considers the area for investment also.

The local authority investment can act as a catalyst for other investment, including land regeneration and infrastructure improvements. These in turn encourage private development in the form of further property and leisure development, resulting in increases in local employment also.

The pitfalls

A local authority's primary function is not speculative investment in property: it is predominately tasked in the provision of local services to local people. Such investment in property and land is by and large ancillary and outside the scope of their public duties for which they are chiefly tasked and due to this staff employed by a local authority are understandably unlikely to possess substantial knowledge and

experience in investing in property. Commonly, an investment company will be formed in order to separate these investment activities from such primary functions. Although this does compartmentalise risk to some degree and ensures a long term investment strategy can be pursued, a company is a very different institution from a local authority and this can result in difficulties.

It would not be unusual for directors of the company to find themselves in conflicts of interest. Officers and elected members are often chosen to be on the management boards of such investment companies. It is foreseeable therefore that conflicts between their duties as directors for the investment company and as officers/elected members of the local authority are likely to arise.

Such delegation of these functions into a private company can also cause accountability issues. Members of the public may, understandably, be interested in the local authority's decision to embark in property investment.

However, requests for information can be met by a refusal to disclose it due to its confidential nature or commercial sensitivity. Such refusals can result in some bad publicity for a local authority if it is not addressed carefully.

The concern surrounding public investment in property is the crucial notion that a local authority should not gamble with public money.

Property values are not a constant and reductions in value or difficulties in returns through vacancies or economic uncertainty means these investments are far from risk-free. It remains to be seen how successful the long term management of these assets by local authorities will be and alongside these considerations it will be interesting to see how the private sector responds to the rapid increase in local authority investment and any market distortion which may result.

Guidance

MHCLG has issued Statutory Guidance which clearly sets out the considerations a local authority needs to consider when contemplating property investments through borrowing.

This guidance includes the long term sustainability risk implicit in becoming too dependent on commercial income and importantly states that authorities must not borrow more than or in advance of their needs purely in order to profit from the investment of the extra sums borrowed.

Alongside this MHCLG Statutory Guidance, CIPFA's Prudential Code reiterates this principle but this is not binding and councillors are only required to "have regard" to these guidelines.

Where a decision has been made by a local authority to borrow, if such guidance has not been followed, its investment strategy should clearly outline the reasons for this, the purpose of the borrowed monies, and what procedures are in place should the expected returns not materialise for whatever reason.

Such investments are quickly becoming an important reality of local authority funding. However it remains important to ensure the local authority is following recommended guidance and acting in a commercially sensible manner. Local authorities have responsibilities to avoid the exposure of public funds to unnecessary and unquantified risk.

MHCLG's Statutory Guidance should be thoroughly reviewed and implemented and any departure needs to be properly considered and challenged. Reasons for any departure should be verified and confirmed with elected members and officers within the local authority.

The UK, and indeed the global economy, is in a period of incredible unpredictability and uncertainty and so local authorities should ensure any borrowing for property investment is justified and risks are assessed, scrutinised and stress-tested.

Ultimately, if commercial investment does remain part of the financing strategies of local authorities, the local authority should ensure it is not too reliant on the expected returns. To do so connects the financial viability of public services intricately to the property market and the ultimate delivery of these services should not depend on the economic success of property investment.

CONCESSION CONTRACTS REGULATIONS

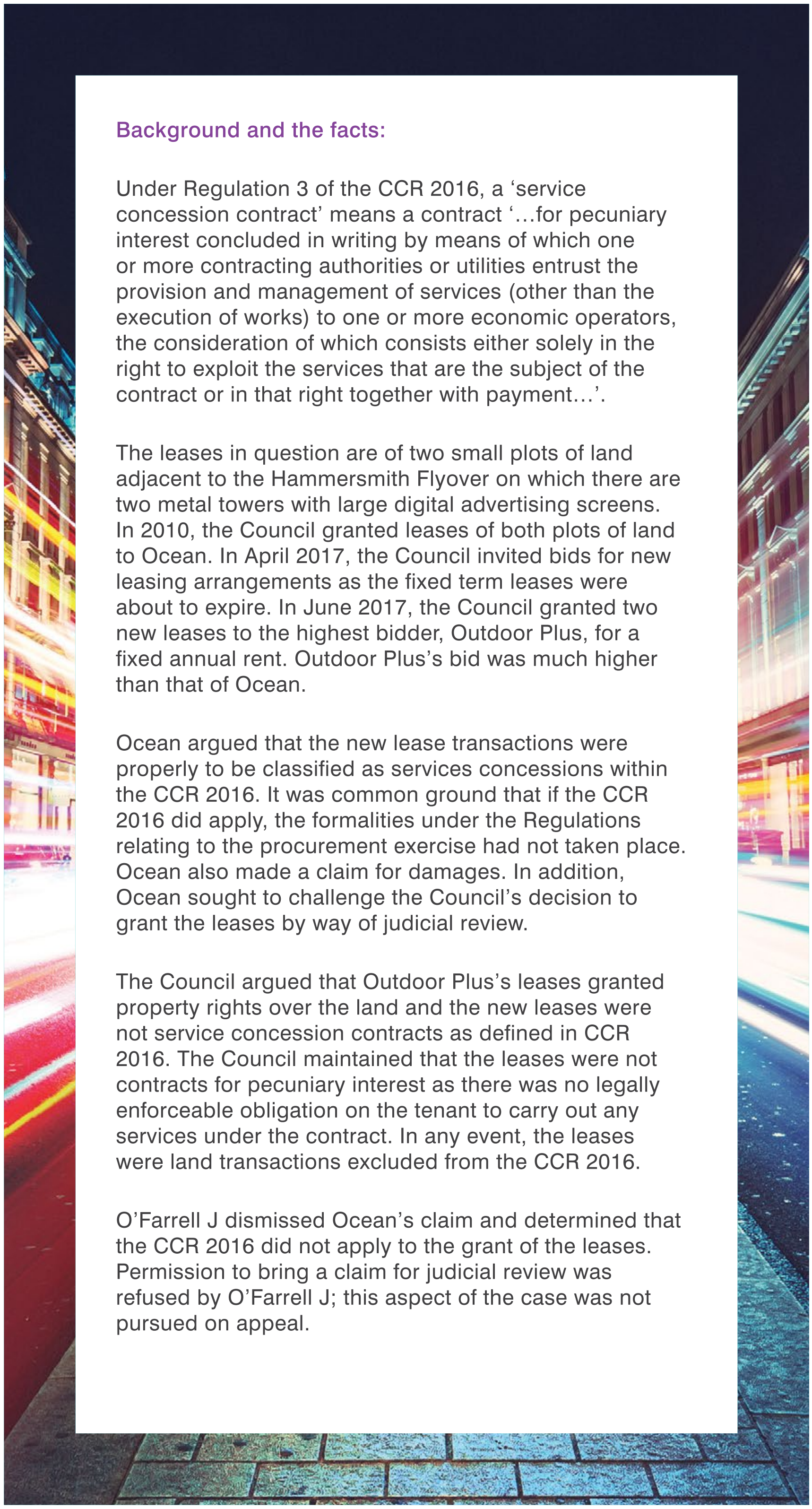
COURT OF APPEAL DISMISSES PROCUREMENT CHALLENGE

Mari Roberts, a Partner and Dispute Resolution specialist at Sharpe Pritchard, recently acted on behalf of the London Borough of Hammersmith and Fulham. Here she explains how the dispute was successfully defended.

Introduction:

Ocean Outdoor UK Limited v London Borough of Hammersmith & Fulham [2019] EWCA Civ 1642

On 8 October 2019, the Court of Appeal handed down judgment in the first appeal to consider the Concession Contracts Regulations (‘the CCR 2016’). The Court unanimously dismissed an appeal from Ocean Outdoor UK Limited (‘Ocean’) against the decision of O’Farrell J, who had dismissed Ocean’s procurement challenge claiming that the CCR 2016 applied to a tender exercise carried out by the London Borough of Hammersmith & Fulham (‘the Council’) relating to two leases of land owned by the Council.



Background and the facts:

Under Regulation 3 of the CCR 2016, a ‘service concession contract’ means a contract ‘…for pecuniary interest concluded in writing by means of which one or more contracting authorities or utilities entrust the provision and management of services (other than the execution of works) to one or more economic operators, the consideration of which consists either solely in the right to exploit the services that are the subject of the contract or in that right together with payment…’.

The leases in question are of two small plots of land adjacent to the Hammersmith Flyover on which there are two metal towers with large digital advertising screens. In 2010, the Council granted leases of both plots of land to Ocean. In April 2017, the Council invited bids for new leasing arrangements as the fixed term leases were about to expire. In June 2017, the Council granted two new leases to the highest bidder, Outdoor Plus, for a fixed annual rent. Outdoor Plus’s bid was much higher than that of Ocean.

Ocean argued that the new lease transactions were properly to be classified as services concessions within the CCR 2016. It was common ground that if the CCR 2016 did apply, the formalities under the Regulations relating to the procurement exercise had not taken place. Ocean also made a claim for damages. In addition, Ocean sought to challenge the Council’s decision to grant the leases by way of judicial review.

The Council argued that Outdoor Plus’s leases granted property rights over the land and the new leases were not service concession contracts as defined in CCR 2016. The Council maintained that the leases were not contracts for pecuniary interest as there was no legally enforceable obligation on the tenant to carry out any services under the contract. In any event, the leases were land transactions excluded from the CCR 2016.

O’Farrell J dismissed Ocean’s claim and determined that the CCR 2016 did not apply to the grant of the leases. Permission to bring a claim for judicial review was refused by O’Farrell J; this aspect of the case was not pursued on appeal.

The Judgment:

Coulson LJ who gave the main judgment in the Court of Appeal identified three principal issues:

1. Whether the new leases were service concession contracts within the meaning of the CCR 2016;
2. Whether the new leases were contracts for pecuniary interest for the purposes of Regulation 3;
3. Even if they were contract for the provision or management of services, whether the land exemption applied.

On the first issue, the Court of Appeal ruled that the leases were not service concession contracts. The CCR 2016 are concerned with services that are run for the benefit of the contracting authority or its residents, to meet their statutory obligations or further their strategic objectives. Regulation 3 deals with a contracting authority entrusting the provision and management of services to an economic operator.

The Court held that the Council had no statutory or other obligation to provide advertising services for its residents or anyone else. The Council made no express request for advertising within the new leases and the advertising was unrelated to the Council's objectives and its public obligations. Coulson LJ found that there was no direct benefit to the Council or its residents as a result of the advertising. The 'indirect benefit' of rent was not paid in consideration for services.

On the second issue, the Court of Appeal held that the leases were not contracts 'for pecuniary interest'. A pecuniary interest requires the contractor to assume a legally enforceable obligation to carry out the services. The leases had permitted user clauses but there was no direct obligation within the new leases on the part of Outdoor Plus to provide any advertising services at all.

Ocean had sought to rely on a 'good faith' and 'reasonable endeavours' clause in the leases, but that did not amount to a direct and immediately enforceable obligation to provide advertising services. The rent paid by Ocean was not consideration for the provision of advertising services, but was a fixed rental for their right to be in possession of the land.

On the final issue, the Court of Appeal held that the land exemption applied. The new leases were held to be genuine leases and not contracts to provide advertising services. Outdoor Plus obtained exclusive possession of the plots of land and paid fixed rent which was not conditional upon, nor affected by, any particular type or level of advertising sold.

In his judgment, Coulson LJ commented that:

> *"If the New Leases were not caught by the land exemption, it is difficult to see what kind of lease or contract would fall within that exemption."*

(Paragraph 68).

Although the issue of damages did not strictly arise as Ocean had failed on all three principal issues, Coulson LJ did go on to look at the question of damages as he considered that the point was of general interest.

He stated that in public procurement cases, the loss of chance principle was most likely to arise where there was a close comparison between the successful and the unsuccessful bids, and where it could be shown that the illegality in the tender process might have contributed to the rejection of the losing bid.

Here, Ocean had been comprehensively outbid by Outdoor Plus and it was plain to the Court that Ocean's bid would have not been successful in any event.

Coulson LJ stated (Paragraph 93) that:

> *"It should no longer be the practice in public procurement cases for the losing tenderer to claim damages by rote, regardless of the absence of any possible connection between the alleged illegality of the process and any loss it may have suffered, simply by relying on a loss of chance principle. In my view this case is a paradigm example of where damages – even calculated by reference to a loss of a chance principle – would never have been recoverable."*

Mari Roberts, a partner in Sharpe Pritchard's Dispute Resolution Team, acted for the Council in the appeal and in the Court below and instructed James Goudie QC and Joanne Clement of 11 KBW.

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SHARPE PRITCHARD ADVISES BRENTWOOD BOROUGH COUNCIL ON LANDMARK JOINT VENTURE WITH MORGAN SINDALL INVESTMENTS

Sharpe Pritchard recently advised Brentwood Borough Council and its property company, Seven Arches Investments Limited, on a landmark joint venture with Morgan Sindall Investments.

The deal is expected to be worth up to £1 billion over the next 30 years and will contribute to the creation of new homes, mixed-use developments, public spaces, commercial and leisure facilities on land owned by the Council.

The agreement also provides for the Council to act as a central purchaser for other Essex authorities looking to partner with the firm and for the Council to acquire properties for purposes including affordable housing.

Sharpe Pritchard was engaged from the outset of this project and we were delighted to see another innovative and exciting joint venture procurement come to market.

Justin Mendelle, who led the team, said: *"The Council was clear from the outset that it wanted delivery at pace and this was very much achieved. This joint venture can provide a springboard for a host of development opportunities in Brentwood, from residential schemes to a major town centre regeneration."*

This project is the latest in a series of joint ventures that we have advised on.

Peter Collins, the corporate lead, explained: *"The market has matured in the last couple of years and both bidders and public bodies are able to move much more quickly in getting to their desired outcomes, which ultimately involves delivering great schemes for residents."*

EUROPEAN COURT CONSIDERS THE TERRITORIAL APPLICATION FOR GLOBAL SEARCH ENGINES IN 'THE RIGHT TO BE FORGOTTEN'

Partner and technology specialist, Gemma Townley and trainee solicitor, Nadia Ahmed, consider the recent judgment by the CJEU in *Google v CNIL*, which gives a landmark ruling on the territorial application of the right to be forgotten for global search engines.

Google Inc v Commission nationale de l'informatique et des libertés (CNIL) C-507/17

On the 24 September 2019, the Court of Justice of the European Union ('CJEU') held that the right to be forgotten, now codified in Article 17 of the General Data Protection Regulation ("GDPR"), requires a search engine to carry out a request for de-referencing only within the territory of the EU, and not on a global basis, confirming the territorial scope of the right to be forgotten.

In Google Inc. v CNIL, this is the first case that has ruled on the interpretation of the GDPR and will have a substantial impact on the approach search engine companies take to receiving requests to erase personal data.

Background and Facts:

Article 17 GDPR affords data subjects with the right to erase their personal data and places an obligation on the controller to then erase that personal data without delay. This right is widely known as the 'right to be forgotten'.

The Commission nationale de l'informatique et des libertés ('CNIL') is an authority which regulates the compliance of data protection laws in France.

In 2015, CNIL served notice on Google that, when granting a request for links to web pages to be removed from the list of results displayed following a search of that requester's name, it must apply that removal to all its search engine's domain name extensions, not just the EU member states domain.

Google refused to comply with the notice and proposed a 'geo-blocking' feature on the search engine. This feature would prevent EU member state users from accessing the search results in question even if searched from a Google domain outside of the EU.

This meant that the search result in issue was not removed and therefore users outside of the EU could access the search result when searching from a domain outside of the EU.

In response, CNIL imposed a EUR 100,000 fine on Google in respect of the refusal to remove search results worldwide.

Google took the issue before the Conseil d'État (Council of State, France) who referred the issue to the CJEU.

Judgment and comment:

The CJEU held that where a search engine operator grants a request for de-referencing… that operator is not required to carry out that de-referencing on all versions of its search engine, but on the versions of that search engine corresponding to all the Member States.

The decision reveals the CJEU's attempts to perform a balancing act between the right to be forgotten and the right to freedom of information.

The decision to not impose the GDPR on non-EU member states mirrors the borderless nature of the World Wide Web, and reflects the remit of European data regulators.

While this outcome is a welcome relief for companies who rely on personal data on a global scale, this undoubtedly will disappoint champions of data protection laws.

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PUBLIC PROCUREMENT AND THE AVAILABILITY OF THE INEFFECTIVENESS REMEDY – FIRST GROUND

Partner, Colin Ricciardiello, who specialises in procurement challenges, examines the Court's refusal to permit an appeal in *AEW v. Basingstoke & Deane Borough Council.*

Background:

Agreements for the development of land have proven to be a valuable source of judicial guidance on procurement law issues associated with variations to contracts post award[1] and the ineffectiveness remedy[2] – first ground.

The first ground appears in Regulation 99(2) of the Public Contracts Regulations 2015 and "… applies where the contract has been awarded without prior publication of a contract notice".

That body of procurement law guidance was extended on 26 July 2019 when the High Court handed down judgment in *AEW Europe LLP v Basingstoke & Deane Borough Council and New River Leisure Ltd*[3].

Facts:

The Borough Council owned a leisure park which it wished to redevelop and regenerate. The Council accordingly published an OJEU Contract Notice on 21 June 2013 – a notice which the Judge described as being in "relatively broad terms". 52 expressions of interest were received but only the Interested Party, New River Leisure Ltd, ("NRL") and one other bidder submitted initial tenders.

Only NRL went on to submit a final more detailed tender. Negotiations followed which included a bolder regeneration scheme that increased the potential retail element. A development agreement was signed on 19th March 2018.

The Claimant, AEW, was not an economic operator who had in any way participated in the procurement sparked by the OJEU notice (so for the purposes of the Regulations it was neither a "candidate" nor a "tenderer").

It had, however, bought nearby retail investment properties known as Festival Place in December 2015. It therefore had a commercial interest in preventing a rival retail facility development. They accordingly issued proceedings on 17 September 2018 seeking to declare the March 2018 development agreement ineffective, as well as damages.

The claim was issued in time as the "longstop" time limit for the ineffectiveness remedy in Regulation 99(2) (b) is six months after the date on which the contract was entered into.

AEW argued that Alstom should be distinguished because it dealt with a procurement based on a "qualification system" whereby the potential suppliers had to qualify in order to progress in the competition – in that event the issue became whether or not the qualification system was contrary to the original OJEU Notice.

Issues and procedure:

In essence AEW did not argue that the Borough Council's OJEU Notice was invalid but sought the remedy of ineffectiveness on the basis that the development agreement was so different to the contract sought in the OJEU Notice that a new procurement should been commenced, starting with a new OJEU notice.

The parties agreed that the availability of the first ground of ineffectiveness could be dealt with on the basis of assumptions at a trial of a preliminary issue as follows:

"…the Development agreement departs from the contract sought by the tender process to such an extent that it is a materially varied contract which is not actually the subject of the previous tender process and would have required a fresh process in accordance with the applicable regulations".

The fundamental point determining the outcome of the preliminary issue was whether or not the decision of Mr Justice Mann in *Alstom Transport v Eurostar International Ltd* [2011] 1828/Ch EWHC applied to this case.

That brought into play the findings in Alstom that the first ground of ineffectiveness is not about a failure of the process generally but is specifically tied to a failure to give prior notice; the existence or absence of a notice is a mechanistic test – but not to the point that a notice is pure form and of no substance; the notice given is capable of being related to the procedure and the contract awarded; the notice given sparked a competition.

The Decision:

The Judge decided that even allowing for the assumption in the preliminary issue, the declaration of ineffectiveness remedy was not available and that Alstom did apply to this case despite the attempt to distinguish it.

The Court's principal findings are succinctly found at Paragraphs 41 and 42 of the judgment:

(a) There has to be an effective notice "which is capable of being related to the procedure and the contract" awarded.

(b) Regard can be and indeed should be had to the fact that the OJEU notice sparked the competition.

(c) The Regulation (dealing with ineffectiveness) operates by looking to the existence or absence of an OJEU notice which involves the application of a "mechanistic test" the benefit of which is that it will be easier to apply for clarity reasons "if the remedy is to operate sensibly in a commercial context.

At Paragraph 42 the Judge remarked that the above all became clear when one noted that the first ground applied where the contract was awarded without prior publication of a contract notice and here "…as in Alstom a wholly valid OJEU notice was published".

NRL argued that the ineffectiveness remedy is only available where there was a failure to call for competition but again, in tune with Alstom, the Judge decided (at Paragraph 45) that such a proposition went too far. Whilst the mechanistic test involved a broad brush approach, there still had to be a relationship between the published notice and the contract.

The Judge gave an example of the Borough Council publishing its notice for a regenerated leisure park but let a contract for 1,000 dwellings: in such circumstances "…one can readily see that such a contract went so far beyond what was covered by the original Notice that it bore no relation to it at all."

The Court found that there was

"…a sufficient and indeed close connection between the OJEU Notice issued in this case and the Development Agreement."

(Paragraph 47 of judgment).

AEW's application for permission to appeal to the Court of Appeal was refused on 3rd September 2019 by Coulson L.J.

Conclusions and comment:

In confirming the approach in Alstom it would appear that where a competitive procedure has been started by a valid notice (so unlike Gottlieb and Faraday where there were no prior notices) which is sufficiently close to the concluded contract, then the grant of a declaration of ineffectiveness is a very unlikely outcome.

This consistency of approach can only assist in generating certainty and continues to confine ineffectiveness to its intended limited circumstances. As the court noted, the remedy was extreme and that was why the test of mechanistic compliance was appropriate and based on:

"…pragmatism, which takes into account the fact that the declaration of ineffectiveness remedy is a Draconian one which brings to an end an otherwise lawful contractual relationship."(Paragraph 44 of the judgment).

In addition to the ineffectiveness issues, AEW's damages claim was of interest – AEW's claim was put as if they were an economic operator to whom a duty was owed under Regulation 89 and sought to enforce a breach of duties owed under Regulation 91.

The writer understands that the damages claim has been abandoned and indeed the Judge noted that there was a very real issue as to whether there was locus for bringing a breach of duty claim (Paragraph 21).

That same issue recently came before the *Court in Royal Cornwall Hospitals NHS Trust v Cornwall Council [2019] EWHC 2211* and the Court emphatically decided that no duties were owed to an economic operator who did not participate in a procurement and, in consequence, was unable to show that it suffered or risked suffering any actionable loss as required by Regulation 91.

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1. Gottlieb v Winchester City Council [2015] EWHC 231 (Admin) concerning the lawfulness of post award modifications to a development agreement; and Wilde v Waverley Borough Council [2017] EWHC
2. Faraday Development Ltd v West Berkshire Council [2018] EWCA Civ 2532 in which the Court of Appeal made the first declaration of ineffectiveness in an English public procurement case as the development agreement constituted a public works contract which should have been the subject of a competitive procurement but no contract notice had been published.
3. [2019] EWHC 2050 (TCC).

STAKES AND LADDERS

GOVERNMENT PROPOSALS FOR IMPROVED SHARED OWNERSHIP SCHEME

Solicitor, James Nelson, who specialises in Development Agreements, looks at the limitations of the current shared ownership scheme and the challenges the Government faces as it seeks to overhaul the system.

The British dream of home ownership has increasingly become something of a pipe dream for a large number of 'millennials'. Affordability burdens and an imbalance in supply and demand are some of the factors obstructing the ability of younger adults to get a foot on the ladder or make a move towards home ownership.

Amongst a backdrop of measures designed to assist prospective first-time buyers (such as stamp duty land tax relief), the government has released a discussion paper with the intent of overhauling the Shared Ownership scheme – with a view to bringing more people onto the property ladder.

Shared Ownership was introduced in the 1970s as a tool to get homebuyers, hampered by barriers such as deposit amount and income, on to the property ladder.

Under the scheme, homeowners would buy between a 25% and 75% share of their property from a landlord (housing association) and pay a subsidised rent on the remainder.

The main attraction of the scheme was that the homeowner had the right to buy extra shares in the property (a process known as 'staircasing') – which could ultimately lead to owning the property outright.

However, the scheme has its limitations and shortcomings. For example, homeowners are only able to buy a minimum stake of 10% for each time they staircase (which can sometimes be substantial) and have to pay legal and valuation fees incurred during the process.

Furthermore, the current process for selling a shared ownership home is not renowned for its simplicity or efficiency – mainly due to the inclusion of a landlord pre-emption clause which gives the landlord an eight week window to market the property first.

The new scheme proposes to address both of the limitations stated above.

Firstly, the steeper 10% minimum share stake would be cut down to a 1% minimum share stake, enabling homeowners to invest more flexibly in their property.

Secondly, the landlord pre-emption clause would be jettisoned in favour of a 'time limited right of first refusal', which would provide a window for landlords to repurchase the property.

One challenge that the government will undoubtedly need to overcome will be to address the administrative fees associated with each respective staircasing.

For example, a homeowner seeking to buy numerous share increments of say 1% over a short period of time would be liable for the associated administrative fees for each staircasing transaction. This could provide to be costly.

The Government will also need to consider what time period is attached to the landlord's right of first refusal and the conditions for returning the control to the homeowner to resell, to ensure that it does not just become a re-labelled pre-emption clause.

Whilst the scheme proposal is a purely a discussion document at this stage and therefore not set in stone, it is nevertheless a step in the right direction for buyers looking to take their first step on to the housing ladder.

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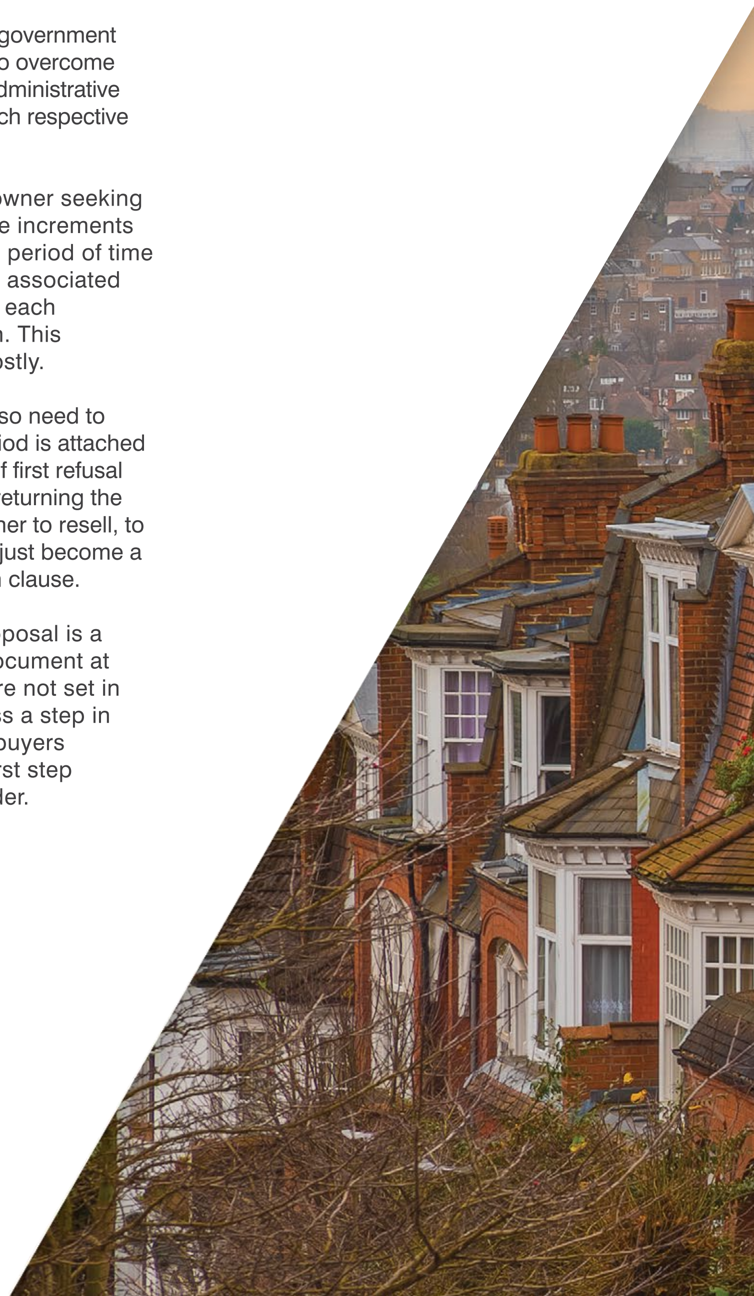

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