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Edition 30

The Building Safety Bill: A Sufficient response to Grenfell and the Cladding Crisis?

PLUS

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WHAT A BIND: SECTION 106 PLANNING OBLIGATIONS WHERE THERE ARE MULTIPLE LAND INTERESTS

Associate Solicitor, Rachel Lee and Trainee Solicitor, Christos Paphiti, who specialise in Planning & Parliamentary issues, examine whether the recent Woking judgment has wider ramifications for Section 106 obligations.

Section 106 planning agreements are a unique form of contract in that the general contract principle of privity of contract (where only the people who signed the agreement are bound by it) does not apply.

Section 106 obligations "run with the land": successors in title to the original parties are bound to performance of the deed's terms. The starting point is to ensure that the freeholder of all parts of the application site is a party to the agreement to ensure that the obligations run with the land.

In the case of R (on the application of McLaren) v Woking Borough Council [2021] EWHC 698 (Admin) (Feb 2021) the s.106 agreement only bound the landowner of one parcel/part of the development site.

From 2017, when the local planning authority ('LPA') first resolved to grant the permission, McLaren (an owner of part of the development site) refused to enter into the s.106 agreement. Eventually, the agreement was entered into by New Central, the other landowner, binding only their respective part of the development site. The planning obligations required payments relating to mitigation for the Thames Basin Health Special Protection Area and an affordable housing overage.

One ground for challenge brought by the claimant was that the agreement was legally deficient in that it did not bind the entire development site.

The Court dismissed this ground. It said that the agreement met all of the legal formalities and requirements set out in section 106 of the 1990 Act and that there is nothing in s.106 requiring such a deed to bind all material interests in the development site.

The court said that McLaren could maintain their objection to the redevelopment of their part of the development site or to sell their interest and that the discussions between the landowners about whether the McLaren land could actually be used and therefore whether the development could ever be built was not a matter material to the LPA's decision to grant the permission.

No prejudice had been caused to McLaren by the completion of the s.106 agreement and issuing of the planning permission.

Of key importance for an LPA is the enforceability of planning obligations, and ensuring the appropriate parties are "on the hook" to perform the obligations.

When considering which parties with land interests need to sign up to a s.106 agreement (and which parties will be bound under express terms of the agreement to perform specific planning obligations) an LPA needs to ensure that there is no "get out" of performance by a relevant party.

The substance of the obligations must be fully considered in the context of which parties have the ability to implement the permission, and which parties (and their successors in title) should be responsible for performance of specific obligations.

There may be a need to consider if obligations require one off performance or are for the lifetime of a development.

Liability of certain interests/parties to perform specific obligations under a s.106 agreement can be excluded by including express terms in the agreement.

For example, individual purchasers/occupiers of market-price housing are usually excluded from obligations relating to delivery of affordable housing, because they are clearly beyond such purchasers'/occupiers' control.

Nonetheless, care should be taken to ensure that a relevant party is not excluded from performing obligations which are relevant.

For example, if car-free provisions (restricting entitlement to on-street parking permits) would be applicable to all individual purchasers/occupiers of both market-price and affordable housing, they should be expressed to bind all successors in title for the lifetime of the development.

We always advise our clients to consider very carefully the land interests in a particular site, and the hierarchy of these interests. There is usually no point binding a leaseholder if the superior freehold interest is not bound. This is because on reversion or expiry of the lease, the freeholder would not be bound to performance under the s.106 agreement.

The parties to the agreement should always consider the substance and nature of the individual obligations and how performance will be achieved and by whom.

It may also be necessary to consider the financial standing of the parties and their ability to pay contributions at the appropriate trigger points as set out in the agreement. In the case referred to above, it is likely that Woking were satisfied that it could adequately enforce performance of the two contribution payments against New Central.

Where the LPA agrees not to bind a particular landowner (whether freeholder or leaseholder) careful consideration should be given to any mitigation (for example indemnities, restrictions on implementation etc.) needed as a result and how this may be secured through the s.106 agreement.

Nothing in the Woking judgment impacts on the LPA's ability to properly consider the land interests and parties as regards performance of specific obligations. An LPA must adequately ensure that there is sufficient land bound into the s.106 agreement to mitigate the impacts of any specific development.

For example, where a new school is required in conjunction with residential development, those with an interest in the land where the school will be developed will need to be a party to the s.106 agreement.

On the other hand, a landowner of another part of the development site that did not include the land allocated for the new school could not give a binding obligation to the LPA to deliver it.

In our view, the Woking case does not have wide implications for current working practices. The LPA will always need to be satisfied that there is sufficient land bound into the s.106 agreement to mitigate the impacts of any specific development in accordance with the statutory tests in CIL Regulation 122.

In many cases, the mitigation may not be achievable unless all the relevant land interests for the whole development site are parties to the s.106 agreement.

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RECOVERING RENT ARREARS: HIGH COURT FINDS IN LANDLORD'S FAVOUR REGARDING LOCKDOWN RENT

Partner, Gemma Duncan, and Trainee Solicitor, Natasha Barlow, review the recent case of ***Commerz Real Investmentgesellschaft mbH v TFS Stores Limited*** and discuss what the judgment means for landlords and tenants who are concerned about payment of rent arrears during the COVID-19 pandemic.

The recent case of **Commerz Real Investmentgesellschaft mbH v TFS Stores Limited [2021] EWHC 863 (Ch)** provides a precedent for landlords to reclaim rent on commercial premises that have fallen into arrears during the COVID-19 pandemic.

Facts of the case

Since the COVID-19 pandemic hit the UK in spring 2020, businesses including retailers, restaurants and offices have been subject to long periods in various states of closure.

The Government has introduced a number of measures to help such businesses, including a moratorium on forfeiture of commercial leases for non-payment of rent under the **Coronavirus Act 2020** and a provision that no order for possession would be allowed in any existing proceedings started before 26 March 2020.

The Corporate Governance and Insolvency Act 2020 also imposed a temporary cessation on winding up petitions and statutory demands where a company is in debt due to COVID-19.

In the case of *Commerz v TFS* the Tenant (trading as The Fragrance Shop at Westfield shopping centre, London) had been in rent arrears since April 2020 and had outstanding service charge payments. In December 2020, the Landlord successfully applied for summary judgment for the unpaid rent and service charge plus contractual interest.

The Tenant's case relied on three key arguments:

1. That the Landlord's claim for payment was issued prematurely and breached the **Code of Practice for Commercial Property Relationships** (the "Code"), which aims to assist discussions between landlords and tenants in relation to rent during the COVID-19 pandemic.

2. That the Landlord was taking advantage of a loophole in the Government's measures to assist commercial tenants by restricting powers of recovery against a tenant.

3. That the Landlord should have insured against a loss of rent in the event of forced closure, notifiable disease or Government action. As such, the Landlord should have claimed against their insurance policy before starting proceedings against the Tenant. The Tenant further claimed that the lease should have terms implied to this effect as well as an implied term that the rent cesser provisions apply to COVID-19.

Judgment

The High Court disposed of the case at summary judgment on the grounds that the Tenant had no real prospect of defending the claim at trial and that there was no compelling reason why the case should go to trial.

The Code of Practice

Master Marsh pointed to the fact that the Code is neither law nor mandatory for landlords to sign up to, thus cannot be a legal basis for defending a non-payment of rent claim. Further, the Code clearly states that it does not change the legal relationship between the parties and that it does not override the Tenant's obligation to pay rent under the terms of its lease.

The Tenant's submission that the Landlord failed to engage in discussions with the Tenant about the rent arrears was similarly dismissed by the court. The Master commented that if anything the Tenant had failed to engage.

The loophole in the Government's measures

Master Marsh did not agree with the Tenant's argument that there was a loophole in the Landlord's ability to pursue a claim for unpaid rent or service charge. While the Government has restricted some of the remedies available to landlords, landlords can still pursue other courses of action. This includes bringing a claim against a tenant for rent arrears liability.

Lease terms

Under the terms of the lease, the Landlord was not obliged to insure against the risk of a notifiable disease or Government action. The Master noted that it is not for the Landlord to insure the Tenant's business losses and that even if the Landlord had such a policy, it could still make a claim against the Tenant rather than the insurance policy.

The lease also contained no provision as to rent cessation or suspension in the event of the premises closing due to legal requirement. On this basis, the Landlord contended that it had suffered no actual loss to its own business and therefore would not be able to claim under its insurance policy. The fact that the Tenant had suffered loss to its business is not a sufficient claim.

The court considered the Tenant's defence that certain terms should be implied into the lease. In order to imply terms into a contract, the **BP Refinery** case summarised that such term must be reasonable and equitable, necessary to give business efficacy to the lease and/or so obvious that 'it goes without saying'. The Master did not deem this test to be satisfied here and therefore declined to imply any terms into the lease to override the Tenant's obligation to pay rent. The judgment also serves as a reminder that landlords and tenants alike should carefully read the terms of their leases.

This case marks a welcome development to landlords concerned about payment of rent arrears during the COVID-19 pandemic. Whether or not they have signed up to the Code, landlords would however be wise to enter discussions with tenants over payment of rent during COVID-19 prior to issuing proceedings.

Recent announcements

The Government announced on 16 June 2021 that it will introduce legislation to ringfence rent arrears accrued due to COVID-19 for business tenancies. It will be for landlords and tenants to come to an arrangement to deal with any such debts, but if this is not possible the Government is proposing that a binding arbitration process will apply to ensure a reasonable position is reached.

The moratorium on forfeiture for non-payment of rent in commercial leases was due to end on 30 June 2021, but the Government has recently announced an extension until 25 March 2022, which will be two years since the measure was first put in place. The restrictions on winding up petitions and service of statutory demands will also remain for a further two months to 30 September 2021. Now that many businesses are re-opening, there may be some landlords who will be disappointed by the further extension. However, tenants are likely to welcome the move, particularly in light of the fact that despite the delay to the easing of lockdown measures there appears to be no extension planned to the current furlough and business rate relief schemes.

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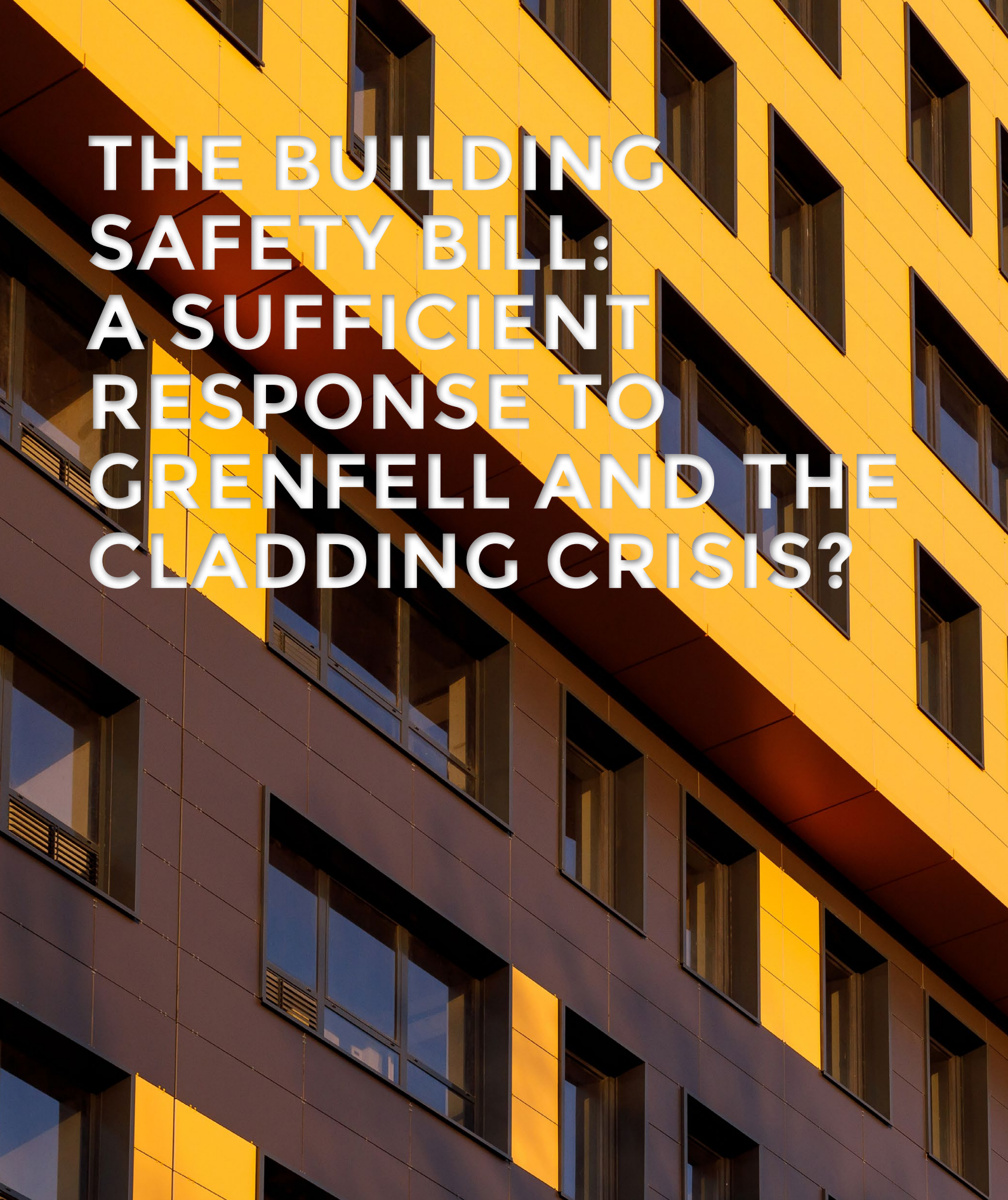


THE BUILDING SAFETY BILL: A SUFFICIENT RESPONSE TO GRENFELL AND THE CLADDING CRISIS?

Legal Director, Deborah Down and Solicitor, Melanie Blake, who specialise in Projects & Outsourcing and Construction and Commercial Contracts, examine the draft Building Safety Bill reviewed by a Parliamentary committee last year, and look at whether the new detail in the Queen's Speech addresses any of the concerns raised by that review and by leaseholders.

Introduction

The Grenfell Tower fire in 2017 cast a dark shadow over compliance with fire safety legislation, adequacy of the building regulations regime and quality standards in construction. The disaster also exposed combustible materials and other fire safety defects in residential buildings, accommodating many thousands of tenants and leaseholders. While for our public sector clients, most have not passed remediation costs onto leaseholders, the situation is not the same for private sector leaseholders, many of whom have found their flats unsellable and bearing additional costs for essential safety works. If leaseholders are not able to retain their homes due to financial pressures, then this could put additional demand on other public services, such as for homelessness.

The Hackitt "Review of Building Regulations and Fire Safety" in 2018 concluded that major reforms were needed to prioritise residents' safety throughout the construction and lifecycle of a building. The evidence from the subsequent Grenfell Tower enquiry has further highlighted those shortcomings. In response, the government published a draft Building Safety Bill in July 2020 for consultation, setting out the framework that the Government intended to adopt for a new building safety regime. It was subject to a report from one of the House of Commons Committees (the "HCLG Report"). Then an updated Bill was laid before Parliament in July 2021 and is currently at committee stage.

The July 2021 Bill has five main features:

1. A new role of building safety regulator for England with prosecutorial, enforcement and approval powers – all "higher risk" buildings will need to be registered with it. The existing Health & Safety Executive will be that regulator.

2. Amending the Building Act 1984 to:

   - make the building safety regulator the building control authority in place of the local authority for "higher risk" buildings;
   - allow more safety-related detail to be included in future Building Regulations;
   - provide for a building control approval gateway **before** construction commences;
   - allow for regulation of those working in building control, including minimum requirements as to competence.

3. Creating new mandatory roles of 'Accountable Person' and 'Building Safety Manager' to provide accountability and oversight in occupied residential "higher risk" buildings, plus granting other rights for residents.

4. Creating a new homes ombudsman.

5. Setting up a framework to ban harmful construction products.

A "higher risk building" is one over 18m or with at least 7 storeys – some of the Act's provisions relate to all types of such buildings, so will include e.g. offices, hotels and university buildings, in addition to residential.

The remainder of this article focuses on the key themes picked out by the Hackitt Review and by the HCLG Report in November 2020 on the earlier version of the Bill, and whether these have been addressed in the updated draft now before Parliament.

Protecting Existing Residential Leaseholders

In November 2020, one of HCLG Report's strongest criticisms of the 2020 draft Bill was its inadequate provisions for funding remedial work on buildings with inadequate fire protection. In general, all leaseholders have obligations in their leases to pay for repairs carried out by the freeholder, which would generally include cladding removal and rectification of other defects such as poorly fitting fire doors. Contrary to repeated assurances from the Government, the draft Bill as first published additionally permits landlords to charge leaseholders for the cost of carrying out other building safety measures under the new legislation (these may not be covered by existing lease covenants). The HCLG Report declared that any legislation which forced leaseholders to pay for building safety defects would be unacceptable and an "abdication of responsibility".

In the months since the HCLG Report, news reports have shone a light on the difficulties faced by (mainly private sector) leaseholders for defects "not of their making". The following support was announced in the Queen's Speech early in 2021 before the new Bill was published:

- Confirmation of the previously announced support of £5bn, for the removal of unsafe cladding on buildings of 18-metres and above;
- a loan scheme for the removal of unsafe cladding from buildings between 11 and 18 metres;
- a new tax on the residential property development sector to raise £2 billion to help cover the costs of the remediation programme;
- £30 million to pay for the cost of common alarm systems, to help end costly waking watch measures in buildings waiting for remediation (many blocks do not have a building-wide alarm system to secure evacuation of the entire building, even if alarms do exist in individual flats).

Whist this additional support package is welcome, the HCLG Report estimated that addressing all the safety defects in high-rise buildings could cost up to £15 billion in total. Furthermore, not all of these points are included in the draft Bill, while leaseholders will have to meet some of the costs of the new regulatory system.

The only additional items in the draft Bill that could provide some comfort to existing leaseholders are:

1. A duty on the landlord to ascertain whether funding for certain types of safety works can be obtained from grants or third parties (e.g. insurance, a product guarantee or by taking legal action) before passing costs on to leaseholders (however, leaseholders are likely to have to meet costs of pursuing these avenues).

2. An extended limitation period to bring claims against developers etc – 15 years from when the right of action started instead of 6. However, these actions are difficult to prove and costly to bring.

3. A commitment to set up a whistle-blowing scheme called a "voluntary occurrence reporting system".

Third-Party Accreditation

The Hackitt review found that a lack of any mechanism for assuring the competence of individuals engaged in the design and construction of higher-risk buildings was a serious flaw in the existing regulatory regime. As a result, one strong recommendation of the HCLG Report was that the Bill include provisions for establishing a national system of third-party accreditation and registration for all professionals working on the design and construction of higher-risk buildings.

The current Bill does not have such a wide-ranging scheme. There is only a general duty in the Bill for the new regulator to "provide such assistance and encouragement...to persons in the built environment industry...with a view to facilitating their improving the competence of persons in that industry...".

Having said that, the new regulator will oversee an overhaul of what is called the building control profession, and there are limited powers to impose new requirements for training on architects as part of their professional registration process.

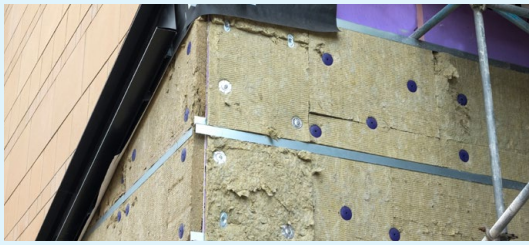
Accountability Issues

After Grenfell, establishing better frameworks for accountability in the event of fire safety defects in residential "higher risk" buildings has understandably been a pressing concern. In response, the draft Bill provides that owners of residential higher-risk buildings will be appointed as 'accountable persons' and they must:

- register the building
- assess building safety risks and commission a safety case report
- appoint 'Building Safety Managers' to oversee the day-to-day management of safety risks on higher risk buildings
- engage with residents as prescribed, including a complaints system overseen by the regulator.

The HCLG Report made three observations to bolster these proposals:

(i) That the role of 'accountable persons' established in the draft Bill of 2020 was like that of the responsible person established under the Regulatory Reform (Fire Safety) Order 2005, and this similarity could result in confusion. To avoid this, the HCLG Report recommended that the Government should move toward consolidating the two regimes in the long term and provide statutory guidance to ensure clarity until then. However, this has not been reflected in the 2021 draft Bill, though the responsible person under the 2005 Order will now have additional fire safety duties, especially around the provision of information to residents, handover to a successor responsible person and co-operating with the accountable person.



(ii) That the legislation could result in multiple 'accountable persons' and confusion over accountability where ownership structures are not straightforward. In response, the Committee recommended that overlapping responsibility could be avoided by providing for a general duty to co-operate with other accountable persons. The 2021 draft Bill has addressed this by designating which of these accountable persons would be the "principal accountable person" – it is then that person who has the duties under the current Bill.

(iii) That 'Building Safety Managers' be subject to a robust system of accreditation and registration in order to build and demonstrate competence. This has not been addressed in the 2021 draft Bill, the principal accountable person simply has to be satisfied that its Building Safety Manager has necessary "skills, knowledge, experience and behaviours".

It must be said that since the HCLG Report, the 2021 draft Bill has a lot of useful detail and additional provisions that will ensure the embedding of fire safety issues into day to day management of higher risk buildings, though it must also be said that much of the implementation will be left to future regulations. Items (i) and (iii) above indicate potential shortcomings.

Safety of Construction Materials

This was not included in the pre-legislative draft of the Bill in 2020, however in January 2021 the government announced the establishment of a new regulator on the safety of construction products. This is now included in the 2021 Bill, though again with details to be implemented through regulations. It is understood that this will be achieved through expanding the existing Office for Product Safety and Standards.

Conclusion: Will the Building Safety Bill provide sufficient response to Grenfell and the Cladding Crisis?

The Queen's Speech states that more than 13,000 existing buildings will fall into the higher risk regime established by the Bill, with an estimated 400 additional buildings coming into scope each year.

The Building Safety Bill will bring wide-ranging changes for developers, the construction industry and existing freeholders. It is primarily forward-facing with its focus on new construction and regulating building control professionals. However, in relation to existing buildings, there is some assistance for existing leaseholders, while for all existing higher-risk residential buildings there will be new duties on accountable persons who must interact with residents on safety and appoint building safety managers.

Please note that one feature of the Hackitt review will be introduced earlier through existing statutory powers. This is that during the planning process for a higher-risk building, there must be consultation with the Health & Safety Executive and submission of a fire statement to the planning authority to show how fire risk has been taken into account – the target date for implementation being 31st August 2021.

A copy of the Queen's Speech and background notes can be found **here**.

The final report of the Hackitt review can be found **here**.

The published Building Safety Bill 2021 can be found **here**.

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PROCUREMENT IN THE PANDEMIC AND THE RISE OF CHALLENGES BY JUDICIAL REVIEW

Here, Partner, Colin Ricciardiello, Legal Director, Juli Lau, Trainee Solicitor, Sophie Drysdale and Paralegal, James Goldthorpe, examine the future of public procurement in light of Good Law Project's recent victories in the High Court.

Questions regarding the conduct of Government ministers carrying out pandemic-related procurements have captured the public's attention. Reports suggested that emergency procurements at the height of the COVID-19 crisis, which resulted in the award of six-figure contracts, were conducted without compliance with proper procedure.

Enter Good Law Project (GLP), a not-for-profit organisation that has now succeeded on two separate occasions in persuading the High Court that Government ministers acted unlawfully in pandemic-related procurements. Underlying GLP's challenges, and of relevance, is the critical preliminary question of whether non-economic operators have the standing to bring judicial review claims for infractions of procurement law[1]. Considering each GLP case in turn, this article explores the court's latest words on non-economic operators challenging procurement decisions through judicial review and the implications for contracting authorities.

Good Law Project v Secretary of State for Health and Social Care

In February 2021 the High Court held that, when awarding contracts during the COVID-19 pandemic, the Secretary of State for Health and Social Care failed to comply with obligations under both Regulation 50 of the Public Contracts Regulations 2015 (PCR) and the Government's Transparency Policy.

A preliminary issue for the court was whether the claimants had standing to bring the claim. The court applied the (obiter) principles set out by the Court of Appeal in Chandler[2] to determine that GLP did have standing to bring the challenge.

Having the requisite standing ordinarily arises in cases where the applicant is affected in some identifiable way by the challenged decision.

However, in some instances the "gravity of departure from public law obligations"[3] will justify a finding that an applicant has sufficient interest in the matter to which the claim relates. Put simply, where there is no economic operator who would be well placed to bring the claim, the question of standing becomes: is the alleged departure from public law obligations so serious that it is in the public interest to determine that a challenger has standing?

In the absence of an economic operator who could realistically bring the challenge – and given both the value of the contracts and GLP's expertise in this area – the court held there was a powerful public interest in granting GLP standing to bring the challenge.

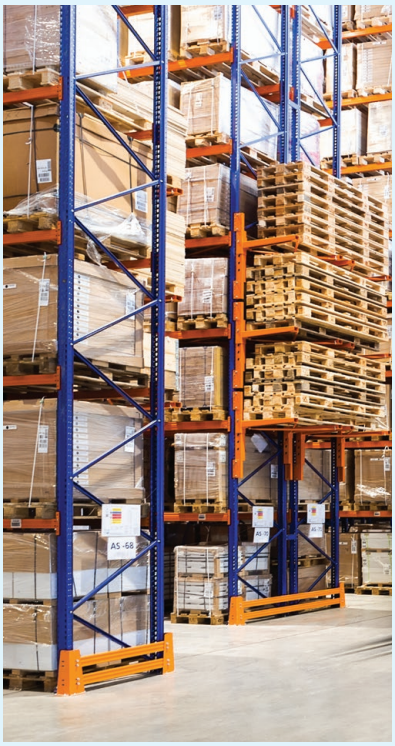
Good Law Project v Minister for the Cabinet Office

In June, the High Court declared that the decision of the Minister for the Cabinet Office to award a £560,000 contract for the provision of communications services during the pandemic gave rise to apparent bias and was unlawful.

The main issues for the court to decide were whether:

- GLP had standing to bring the claim by way of judicial review;
- The requirements for making a direct award under Regulation 32(2)(c) PCR had been satisfied; and
- The decision to award the contract to Public First gave rise to apparent bias (actual bias was not alleged).

The court held that GLP did have sufficient standing to bring the challenge. Adopting the reasoning of the judge in the first claim, the court held that the claim was not one that an economic operator could realistically be relied on to bring: the contract was awarded without competition so there was no disgruntled bidder that might challenge the procurement process and any other economic operator would struggle to establish financial loss (without which no claim would be actionable).



The court also considered that GLP had a sincere interest in promoting good public administration, and that the gravity of the issues justified the scrutiny of the court.

In relation to the substantive issues, the court held that:

- The conditions for making a direct award under Regulation 32(2)(c) were satisfied; but
- The decision to award the contract to Public First gave rise to apparent bias and was, therefore, unlawful.

The court found that the "fair minded and informed observer" could conclude that there was a real possibility that the decision-maker was biased.

This was because the decision-maker's personal connection to Public First might be seen to compromise their impartiality and give rise to concerns of favourable treatment. In such circumstances, there needed to be a clear record that the decision was made using objective criteria.

Additionally, while the departure from usual procedure was not a circumstance giving rise to apparent bias, it nonetheless meant that there needed to be evidence that the decision was reached fairly.

On the PCR issue, the court held that the defendant could rely on Regulation 32(2)(c) due to the urgent and extreme circumstances of the pandemic. The court accepted that services had to be procured quickly and a conventional procurement would have taken too long.

However, the court's decision on the issue of apparent bias demonstrates that even if an emergency justifies the abandonment of a competitive process, there is no justification for conduct which may be perceived as compromising a contracting authority's impartiality.

Implications for contracting authorities

Following GLP's success, questions regarding the availability of judicial review as a means of challenging procurement decisions by non-economic operators have become less clear cut than the position post Waverley[4].

However, the latest interpretation of Chandler expressed in the first case, having been reaffirmed in the second case, should hopefully clarify the correct position on the standing of non-economic operators; namely, that these claimants will have standing to challenge procurements when:

- They have a sufficient interest in compliance with the public procurement regime, in that they are affected in some identifiable way by the challenged decision; and/or
- The gravity of a departure from public law obligations justifies a public law remedy, even if they are not personally affected

As Government ministers have recently discovered, the availability of judicial review to claimants like GLP in the second of these circumstances highlights the fundamental importance of the obligations contracting authorities owe under public law, in addition to the duties they owe to economic operators under the PCR.

With another judgment imminent and further judicial reviews in the pipeline, these developments should serve to remind all contracting authorities of the fundamental importance of adhering to basic principles of public law.

Contracting authorities should now, therefore, be more mindful of the public law factors applicable to procurement decisions. A failure to do so may, in some cases, lead to judicial review challenges on the grounds of unlawfulness, irrationality, procedural unfairness, or legitimate expectation.

Unlawfulness. When the decision-maker misdirects itself in law, exercises a power wrongly, and/or acts outside of its powers (ultra vires). This would include a failure to comply with the PCR (if required) or local government legislation concerning procurement decisions (where applicable).

Irrationality. A decision may be challenged if it is so unreasonable that no reasonable authority could ever have come to it (Wednesbury[5] unreasonableness).

Irrationality may exist where a contract is awarded to the 'wrong' tenderer based on published evaluation criteria. The procurement law basis of challenge of manifest error has been held to be similar to or the same as Wednesbury irrationality[6].

Procedural unfairness. If the decision-maker has not properly observed the relevant statutory procedures and/or there has been a failure to observe the principles of natural justice in the decision-making process (such as if the decision-maker has shown bias or has failed to hear an affected party). These requirements overlap with express obligations under the PCR.

Legitimate expectation. A public authority may, by its own statements and/or conduct, be required to act in a certain way, where persons have an expectation as to the way in which it will act. This ground requires a clear and unambiguous representation on the decision-maker's part as to the way in which it will conduct itself.

There are some similarities between public law duties and duties owed in procurement law to economic operators.

For instance, the avoidance of apparent bias, the ground successfully argued by GLP in the Public First case, has parallels with the duty on contracting authorities under PCR Regulation 24 to properly manage conflicts of interest.

Nevertheless, these overlaps do not assist in answering the practical question of whether the duties owed to an economic operator under procurement law can be enforced by a non-economic operator whose interest in the decision is derived from some wider public law imperative of securing observance of procurement law.

With further decisions pending, a position may emerge whereby factors such as the general importance of a procurement and its wider public interest (alongside the gravity of the alleged non-compliance) will prove sufficient to have standing. These factors ought to restrict challenges being brought by non-economic operator claimants simply as a fall-back way of trying to stop a project[7].

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[1] Under S. 31 (3)of the Senior Courts Act 1981 no application for judicial review can be made unless the applicant has sufficient interest in the matter to which the application relates

[2] R (on the application of Chandler) v Secretary of State for Children, Schools and Families [2009] EWCA Civ 1011, [2010] P.T.S.R. 749, [2009] 10 WLUK 252.

[3] R (on the application of Chandler) v Secretary of State for Children, Schools and Families [2009] EWCA Civ 1011, [2010] P.T.S.R. 749, [2009] 10 WLUK 252.

[4] R. (on the application of Wylde) v Waverley BC [2017] EWHC 466 (Admin).

[5] Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1947] EWCA Civ 1.

[6] See, for example, BY Development v Covent Garden Market Authority [2012] EWHC 2546 at paragraph [11].

[7] As was the case in Chandler and in R (Kathro) v Rhondda Cynon [2001] 4PLR 83 – a challenge on a number of grounds including PFI funding and the choice of procurement procedure – "The claimants have not been shown to be affected in any way by the choice of tendering procedure. They have seized on the point simply as a fall-back way of trying to stop the project" at paragraph [77].

RECONCILABLE DIFFERENCES: INSOLVENCY AND ADJUDICATION POST-BRESCO

Associate Solicitor, Helen Batter, and Trainee Solicitor, Anna Sidebottom, from our Construction and Commercial Contracts team, take a look at the recent Bresco judgment and explain how this will affect future insolvency cases.

The landmark Bresco[1] case, which was heard by the Supreme Court in 2020, provided definitively that companies in liquidation can bring an adjudication.

This was an issue that the courts had been grappling with for quite some time. On the one hand, where there are claims and cross-claims between two parties and one of them is insolvent, the Insolvency Rules impose an accounting process to set-off the mutual dealings against one another to produce a single net balance.

On the other, the Construction Act only allows referral of a dispute "arising under the contract" to adjudication. How (or if) these two regimes can work together has, quite understandably, caused the courts some difficulty.

As the construction industry navigates the post-COVID landscape and the regrettable anticipated increase in contractor and sub-contractor insolvencies, we are likely to see the development of case law in this area as similar cases come through the courts.

The Bresco case

Bresco was an electrical sub-contractor for Lonsdale. A dispute arose between the parties, with each party alleging wrongful termination of the contract against the other.

Bresco subsequently entered into liquidation and, several years later, initiated (via the liquidator) an adjudication claiming that sums were due to it from Lonsdale. Lonsdale sought an injunction to prevent Bresco from referring the dispute to adjudication.

The judge in the TCC granted Lonsdale an interim injunction, which prevented Bresco from bringing the adjudication. The judge's reasoning was that any adjudicator would not have jurisdiction owing to the operation of the Insolvency Rules, which meant that the only claim in existence was one for the net balance between the parties and there was no longer a dispute "arising under the contract" capable of being referred to adjudication under the Construction Act.

The case was then heard by the Court of Appeal. While it held that there was no reason in principle why liquidation would extinguish a contractual right to refer a claim to adjudication, it nonetheless upheld the injunction.

The reason given was that the insolvency and adjudication regimes are incompatible and a decision in Bresco's favour would be very rarely enforced owing to the existence of Lonsdale's cross-claim. An adjudication in such circumstances would, therefore, be an exercise in futility, which was a good reason to prevent it from proceeding.

The case was then heard by the Supreme Court. The Lords agreed with the Court of Appeal that the adjudicator would have jurisdiction to hear the claim but disagreed that there was any incompatibility between the Insolvency Rules and the Construction Act: unenforceability of an adjudicator's decision did not necessarily render the process futile.

It therefore held that liquidators could pursue claims through adjudication (subject to certain qualifications) but also preserved the TCC's discretion regarding enforcement of an adjudicator's decision.

This approach seems to align with recent cases in the TCC[2] which held that, subject to provision of adequate security for both the decision amount and possible adverse costs orders, an adjudication brought by an insolvent company could potentially proceed.

Post Bresco

After Bresco, it wasn't long before the TCC was able to put these principles into practice.

The case of John Doyle Construction Limited (in liquidation) v Erith Contractors Limited[3], which had been adjourned pending the decision in Bresco, concerned a claim for summary enforcement of an adjudicator's decision by a company in liquidation.

The judge set out the following considerations in such circumstances:

- Whether the dispute concerns the whole of the parties' financial dealings (e.g., valuation of the final account). Highly technical disputes (i.e., "smash and grab adjudications") are unlikely to meet the bar for enforcement.
- Whether there are mutual dealings between the parties outside the relevant construction contract.
- Whether different defences are available to the defendant that were not used in adjudication.
- Whether the liquidator is prepared to offer appropriate/adequate undertakings (e.g., ring-fencing the enforcement proceeds, other undertakings, guarantee bonds or insurance).
- Whether there is a real risk that enforcement will deprive the paying party of security for its cross-claim (i.e., the amount paid to satisfy the adjudicator's decision and recovery costs).

In John Doyle, the security being offered was found wanting in terms of both substance and amount and so summary enforcement was refused. This case was significant in two respects: first, in affirming the approach in Bresco; and secondly, in its guidance for insolvent companies seeking to enforce an adjudication decision.

Subsequently, the case of Styles & Wood (in administration) v GE CIF Trustees[4] was one of the first successful attempts by an insolvent party to enforce an adjudicator's award in the courts post-Bresco. It also gave greater clarity to the conditions of enforceability laid out in the previous case law.

To meet the relevant conditions, Styles & Wood offered to ring-fence the awarded sums and to take out an after-the-event insurance policy to meet adverse costs in subsequent proceedings. These were considered sufficient in the circumstances and enforcement was granted.

Conclusion and Considerations

The decision in Bresco was lauded by insolvency practitioners for providing the opportunity to use adjudication in their accounting process, definitively dismissing any previous barriers based on jurisdiction and arguments of futility.

Subsequent case law demonstrates that although the courts are willing to enforce judgments in favour of an insolvent company, there will still be significant hurdles to overcome, with each case turning on its own particular facts.

Take-aways on this case law for employer clients are:

- Do not dismiss the possibility of an insolvent contractor bringing an adjudication – continue to make relevant preparations so that you are not caught unawares.
- On the contrary, the developments in case law mean that there is likely to be an increase in the number of adjudications brought by insolvent contractors – potentially with the backing of litigation funders who may see this as a possible revenue stream.
- The key battle will be in the enforcement of an adjudicator's decision.
- If seeking to make a viable challenge to the amount being offered by an insolvent party by way of security in enforcement proceedings, be prepared to give a detailed breakdown of costings.
- As with any disputes, seek advice early in order to consider your position and best possible options – this will stand you in good stead to deal with matters, however they progress.

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[1] *Bresco Electrical Services Limited (in liquidation) v Michael J Lonsdale (Electrical) Limited* [2020] UKSC 25
[2] *Meadowside Building Developments Ltd v 12-18 Hill Street Management Co Ltd [2019]* EWHC 2651 *(TCC) and Balfour Beatty Civil Engineering Ltd v Astec Projects Ltd [2020]* EWHC 796 *(TCC)*
[3] [2020] EWHC 2451 (TCC)
[4] [2020] EWHC 2694 (TCC)

WHEN IS A LEASE NOT A PUBLIC WORKS CONTRACT?

THE CJEU DIVERGES FROM THE AG'S OPINION IN COMMISSION V AUSTRIA (C-537/19)

Gemma Duncan is a Partner in Sharpe Pritchard's Real Estate Department specialising in complex development and regeneration projects. Here, she examines a case concerning a claim by the European Commission against the Republic of Austria which highlights the need for local authorities to ensure any similar land transactions and development agreements follow EU case law.

Brief overview

Stadt Wien-Wiener Wohen (WW) (a contracting authority which manages public housing in Vienna) had directly awarded a public works contract to Vectigal Immobiien GmbH & Co KG (VI) in respect of the construction and lease of office premises ('Gate 2') on VI's land without competitive tendering or publication of a contract notice.

The Commission claimed that although the parties concluded the contract as a lease, it was in fact an above threshold public works contract as they argued WW had a decisive influence over the design of the office building and execution of the Gate 2 project.

Contrary to the Opinion of the Advocate General, the CJEU dismissed the Commission's action and held that the contract was not a public works contract and fell outside of the public procurement rules.

The CJEU's decision should be noted by contracting authorities in the UK when considering whether a lease falls within the scope of the Public Contracts Regulations 2015 (as amended), which continue to apply post-Brexit.

Facts of the Case (Commission v Austria (Case C-537/19))

WW concluded a lease with VI for the Gate 2 office building, including an underground carpark, on a plot of land in Vienna. At the time the lease was entered into, planning permission for the office building had been granted, but the construction of the building had not taken place. The lease related to the ground to fifth floors of Wing A and Wing B of the building and provided the option for bridges to be built between the two wings. An addendum to the lease provided WW with an option (which they exercised) to additionally lease floors six to eight in Wing B.

The lease term was for an indefinite period but could be terminated by WW (i) after 25 years and every 10 years thereafter upon giving 12 months' notice; (ii) in the event of serious or persistent infringement of the lease terms by VI; (iii) if the office building could not be used for the agreed use for more than six months.

The Commission contended that the lease of Gate 2 was in fact a public works contract that should have been competitively tendered and advertised in accordance with the EU Public Procurement Directive. It claimed that WW had a decisive influence over the design of the building and over the execution of the Gate 2 building project, as specifications attached to the lease went further than what would usually be stipulated by a tenant in a lease agreement.

The Republic of Austria responded that apart from certain demands relating to surface area and number of parking spaces, lease negotiations related primarily to the amount of rent and operating costs.

Further, the specifications attached to the lease only contained standard tenant requirements; the only aspects of the works which WW was able to influence was how the office building would be subdivided and what the basic amenities of the leased space would be and did not extend to other parts of the building to be leased by others or communal areas.

Public Works Re-cap

The award of public works contracts in EU member states with a value in excess of set financial thresholds must be subject to national procurement rules which take into account the rules laid down in Directive 2004/18 (which has now been superseded by Directive 2014/24 but the same principles apply) relating to advertising and competitive tendering.

Article 1 of the Directive defines 'public works contracts' as those relating to the design and/or execution of building/civil engineering works specified by a contracting authority.

Article 16 of the Directive specifically excludes from the ambit of the Directive any public service contracts for *"the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property or rights thereon".*

Several previous CJEU judgments have given some assistance in deciding whether an agreement is a public works contract or a 'pure' land transaction and these were referred to by the Court.

In the case of *Auroux*[1] the CJEU made it clear that land agreements could fall within the public procurement regime if:

- A contracting authority requires a developer to enter into legally binding requirements or abide by detailed specifications in relation to the development;
- The agreement is concluded for pecuniary interest (this could include, for example, the grant of rights and not just the payment of a price).

In the case of *Helmut Muller*[2], the CJEU went on to say that for a scheme to fall within the public procurement rules:

- the contracting authority must have taken steps to define the type of work or at the very least had a decisive influence on the design of the works and must have imposed directly or indirectly enforceable obligations on a developer;
- the scheme must in some way present a direct economic benefit to the contracting authority.

In the case of Impresa Pizzarotti[3], the CJEU re-stated the position set out in earlier case law that *"where the main object of a contract is the execution of a work corresponding to the requirements expressed by the contracting authority, that contract constitutes a public works contract"* and therefore is not covered by the exclusion relating to land transactions *"even if it contains an undertaking to let the work in question".*

Advocate General's Opinion

AG Campos Sánchez-Bordona delivered his **AG Opinion** on 22 October 2020, concluding that the main object of the contract was for public works.

The Opinion concluded that WW did exert a decisive influence over the eventual configuration of the design and on the construction of the building as it was able to insist on significant modifications to the initial plans as a condition of signing the contract and/or were captured in the later construction of the building.

Such influence was *"not consistent with the position of a mere tenant but, rather, with that of an actual project owner who imposes his own solutions on the plans for the building and their execution"* and which *"go beyond the customary scope of the landlord-tenant relationship"*.

CJEU Judgment

The CJEU dismissed the Commission's action, contrary to the AG Opinion. In its judgment the Court found that:

- The design of the building was completed prior to conclusion of lease negotiations, and the design of the sixth to eighth floors in Wing B (subject to the option) and the bridges linking Wings A and B were not planned to meet a need specified by WW. *"The mere fact that WW made use of the options offered… cannot suffice to show that entity exercised a decisive influence on the design of the work in question"*.
- A decisive influence on the design of a building can exist in relation to the architectural structure of that building, but specifications concerning interior fittings could only be regarded as decisive influence if they are distinguished due to their specificity or scale.
- The fact that a lease is concluded for a long period, irrespective of the circumstances of the case, is not in itself unusual.
- Engaging a specialist third party to monitor deadlines for handover, delays, does not mean a decisive influence is exerted over design. It is not unusual for a tenant to take measures to ensure that a move into premises could take place on the planned date, especially where large-scale relocation is involved.
- The building was designed as a traditional office building without reference to specific tenants/ needs. In such circumstances it is normal for a tenant to specify its requirements whether in respect of a building which is yet to be built or a change of tenant where upgrade work is carried out.
- The adjustments requested by WW, although detailed, did not exceed what a tenant may normally require and were to ensure compliance with statutory technical standards.

Comment

This decision of the CJEU continues to be relevant to the interpretation of the Public Contracts Regulations 2015 (as amended) (PCR) as the PCR still remains in force post-Brexit, even though the Directive no longer has effect.

The opposing views of the Advocate General and the Court demonstrate that the line between pure land transactions (which fall outside the PCR) and public works contracts (which must be procured pursuant to the PCR) is finely balanced. The case does provide a degree of comfort to local authorities but highlights the need to ensure that any similar planned transaction follows the tests laid down in the line of EU case law dealing with land transactions and development agreements, as helpfully summarised in the Court's judgement.

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[1] *Jean Auroux v Commune de Roanne (Case C-220/05)*

[2] *Helmut Müller GmbH v. Bundesanstalt für Immobilienaufgaben (Case C-451/08)*

[3] *Impresa Pizzarotti & C. SpA v Commune di Bari and Others (Case C-213/13)*

PROCUREMENT LAW SINCE BREXIT – WHERE ARE WE NOW?

Legal Director, Juli Lau, and Paralegal, Beth Edwards, from our Infrastructure team discuss how procurement law has changed since the UK left the EU and examine the details set out in the Green Paper in advance of the new Procurement Bill.

At 11:00pm on 31st December 2020, the Brexit implementation period ended and the UK entered a new era outside the EU. In the months since, the principles and substance of the procurement regime remain unchanged, but procedures to be followed and some terminology used within legislation have been amended to reflect the UK's new status outside the EU.

In light of Brexit, this article aims to summarise the key developments in procurement rules since the end of the implementation period whilst also looking ahead at proposed reforms to the UK procurement regime.

Find a Tender Service

Changes to UK public procurement legislation, including the Public Contracts Regulations 2015 ("PCR"), came into force on 1st January 2021 by way of the Public Procurement (Amendment etc.) (EU Exit) Regulations 2020.

A notable change is the requirement for all new procurements to be published on the new UK procurement portal, **Find a Tender Service ("FTS")**. Prior to this, contracting authorities published contract notices in the Official Journal of the European Union ("OJEU")[1]

The Government has published two procurement policy notes (**PPN 08/20** and **PPN 10/20**) to assist contracting authorities in using FTS.

Procurement Policy Notes

A number of procurement policy notes have come into effect since 1st January 2021:

PPN 06/20 "Taking Account of Social Value in the Award of Central Government Contracts"

- PPN 06/20 outlines the requirement for In-Scope Organisations (including Central Government Departments, their Executive Agencies, and Non-Departmental Public Bodies) to explicitly evaluate social value in procurements where the requirements are related and proportionate to the subject-matter of the contract.
- The model must be applied to all relevant new procurements after 1st January 2021.
- The social value model introduces a number of policies that In-Scope Organisations should take into account during procurements. These policies come under the themes of tackling economic inequality, fighting climate change, equal opportunity, wellbeing, and COVID-19 recovery.

PPN 11/20 "Reserving Below Threshold Procurements"

- PPN 11/20 outlines the options that contracting authorities have when procuring contracts below the relevant procurement thresholds for supplies, services, or works.
- In-Scope Organisations, including Central Government Departments, their executive agencies, and Non-Departmental Public Bodies, must follow the options outlined in this PPN.
- Other organisations (including local authorities) are "encouraged" to apply the principles in the PPN. It is worth noting that if local authorities decide to use PPN 11/20, they must consider how to do so while also complying with local government legislation on taking non-commercial considerations into account, which are not covered in the PPN.
- The PPN states that contracting authorities should consider reserving below-threshold procurements to operators on the basis of supplier location, either in a singular county or the entirety of the UK; or to small and medium size enterprises ("SME") and voluntary, community, and social enterprises ("VCSE").
- However, in line with Article 13 of the EU-UK Trade and Cooperation Agreement ("TCA"), contracting authorities must also ensure that the use of PPN 11/20 does not result in any less favourable treatment for EU-based suppliers who are also established in the UK.

PPN 02/21 "The WTO GPA and the UK-EU TCA"

- PPN 02/21 advises UK contracting authorities to familiarise themselves with the requirements under the World Trade Organisation's Agreement on Government Procurement ("GPA") and the TCA.
- The UK is now an independent signatory to the GPA. As current UK law is already compliant with the GPA, contracting authorities' compliance with the GPA is satisfied by following the relevant national procurement rules.
- The TCA goes beyond the requirements of the GPA. While contracting authorities will generally comply with the TCA by following the UK's procurement law regime, there are some areas of divergence outlined by PPN 02/21 where the TCA must be read into UK law, although none of these principles will be unfamiliar to procurement practitioners. These include a principle of non-discrimination that extends to procurements falling outside of the scope of the Regulations, and an express permission for contracting authorities to ask if a seemingly abnormally low tender accounts for subsidies.

Changes to the PCR and other public procurement legislation resulting from the UK's independent accession to the GPA are made by the Public Procurement (Agreement on Government Procurement) (Amendment) Regulations 2021. In addition to the PPNs outlined above, **PPN 03/21** requires all In-Scope Organisations to apply the third annual update of the **Sourcing Playbook** (previously known as the Outsourcing Playbook) to new procurements.

Further, **PPN 04/21** replaces the guidance on applying exclusions in public procurement, managing conflicts of interests and whistleblowing that was initially published under **PPN 01/19.** The updated guidance clarifies changes to the procurement regulations following the UK's exit from the EU.

Reform: "Transforming Public Procurement" and the Provisional Common Framework

In anticipation of the UK's exit from the EU, the Government published its Green Paper *Transforming Public Procurement* in December 2020.

The proposals aim to cut red tape in the current process-driven approach and create a streamlined and flexible regime which can be tailored by contracting authorities to their own needs. This increased freedom will also be accompanied by increased transparency built in throughout the lifecycle of a procurement.

Examples of specific proposals include:

- Replacing the existing EU-derived principles with new UK procurement principles of value for money, public good, transparency, integrity, fair treatment of suppliers, and non-discrimination;
- Streamlining the 350+ current regulations relating to procurement into one single set of rules;
- Publishing National Procurement Policy Statement ("NPPS") which will set out the Government's strategic policies for public procurement (priorities are expected to include social value and commercial delivery and capability);
- Replacing 'Most Economically Advantageous Tender' as an evaluation criteria with 'Most Advantageous Tender', encouraging contracting authorities to consider factors other than price when deciding on a tender;
- Reducing the six existing procurement procedures to three, including a new 'competitive flexible procedure' which gives contracting authorities increased flexibility to find a process that caters to their needs, and permits negotiation with bidders;
- Introducing new mandatory transparency obligations including requiring authorities to disclose procurement and contract data as soon as practically possible;
- Allowing contracting authorities to take into account the past performance of bidders, which will also be accompanied by a centrally managed debarment list of contractors;
- Developing a new oversight unit with powers to review and intervene in procurements if necessary.

In addition to the Green Paper, the UK Government and devolved administrations have jointly developed a provisional non-legislative Common Framework for procurement.

The framework recognises that a certain level of co-operation is necessary across the UK and devolved administrations when it comes to procurement and, in the absence of governance through EU legislation, aims to establish consistent agreed working practices in relation to domestic and international procurements.

Looking Forward – What comes next?

The consultation period for the procurement reforms outlined in the Green Paper ended on 10th March, and the Queen's Speech in May indicated the Government's commitment to introducing the Procurement Bill and publishing the first NPPS in the near future. The briefing notes which accompanied the speech reflect the Green Paper's key messages, suggesting these will be taken forward into the Bill.

It will be worth paying close attention to further announcements regarding the Procurement Bill, and once the Procurement Bill is published, to follow its passage through Parliament to see what shape the new regime will take and prepare for the changes to come.

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[1] Notices relating to procurements launched before the end of the implementation period may still need to be published in the OJEU.

LAND, LEGAL COSTS AND CHARGING FOR LOCAL AUTHORITIES

Sharpe Pritchard's Head of Local Government, Rob Hann, and Trainee Solicitor, Christian Grierson, consider the key questions for local authorities seeking to recover fees and charging in relation to property transactions including under the Care Act 2014.

Local authorities are having to get creative in finding ways to absorb increased costs with reduced funding. Ensuring they recover the costs for certain land transactions may provide a substantial area of income support.

Local authorities already struggling with reduced funding and increased pressure on resources are experiencing yet further **demands in responding to the COVID-19 pandemic**.

Whilst the Government has provided **a boost to funding for local authorities**, it remains the case that they are having to absorb the financial cost.

Can a local authority recover fees and charging?

Generally, for property related matters there are no specific powers which either permit or prohibit the recovery of costs for general land transactions entered into by local authorities.

Where there are no express powers governing the local authorities' function then the general charging (cost recovery) provisions contained in either **Section 93 Local Government Act 2003** and/or **Section 1 and 3 Localism Act 2011** apply. A local authority can seek to recover costs by agreement.

The specific costs for each specific property transaction should be considered to meet these requirements as that would be a matter for the local authority to explain and set out (in the event of any challenge or query) what costs it is seeking to set off through recovering these charges.

To avoid a dispute about fees how should a local authority seek to recover from third parties?

It is common for local authorities to seek to recover a contribution to its outgoings when entering into commercial arrangements with third parties. This would also be by agreement with the parties – any concerns around charging would usually be addressed at this stage.

By agreeing the anticipated level of fees at this stage there is certainty for both parties and makes the recovery of the fees straightforward.

What types of fees could be recoverable?

When a local authority is involved in a property transaction such as a freehold transfer, a new commercial lease or even the assignment of a beach hut there will be related costs. The surveyors' and legal fees in preparing the relevant documentation, registering the Land Registry Documents or preparing a licence to assign may all be recovered.

It is best practice for local authorities to prepare a schedule outlining the relevant costs for each specific transaction. For example, certain transactions may be subject to a minimum legal fee or capped at a certain level.

As long as the local authority can demonstrate they are genuinely seeking to recover costs (as opposed to seeking to act commercially and make a profit) then the relevant fees could be recovered.

Does this mean a local authority can recover the fees and costs for all land transactions?

No, as local authorities must always be careful to check the relevant function and legislative area the charges relate to, in order to explore whether there are limitations and prohibitions contained in the specific legislative codes.

Can local authorities recover costs from third parties related to the Care Act 2014 for property transactions?

The **Care Act 2014** place complex principles and duties on local authorities and its operation can be highly fact dependant and the specific circumstances in each case should be examined. However, where the local authority enters into a deferred payment agreement ("DPA") with an individual, administration charges (which can include legal fees) can be added to the total amount deferred.

Why should the specific circumstances always be considered?

Charging under the Care Act 2014 is strictly restricted in certain cases. The general framework for charging is set out in Sections 14 and 17 of the Care Act 2014 and the Government has provided guidance on charging and financial assessment in the **Care and Support Statutory Guidance** (the "Guidance").

This prohibits local authorities charging more than the cost that it incurs in meeting the assessed needs of the person and also, they cannot recover any administration fee relating to arranging that care and support (with only limited exceptions such as the person is above the upper capital limit).

What is a deferred payment agreement and what fees can be recovered?

A DPA allows people who require care and support in a care home to defer payment of some or all of their assessed charges for care and support, until a later date. The local authority can then obtain adequate security for the payment of the person's deferred amount (i.e. against their property).

Paragraph 9.69 the Guidance confirms that local authorities can recover the administrative costs associated with DPAs, including legal and ongoing running costs, via administration charges which can be passed on to the individual.

The relevant costs may include registering a legal charge with the Land Registry against the title of the property, the cost of valuation and re-valuation of the property and costs for removal of charges against property.

Summary

Local authorities should seek to utilise their charging powers to recover their fees where appropriate for property transactions. Whilst isolated transactions may not represent a large amount the combined effect can result in substantial savings.

Caution must be exercised to ensure appropriate fees are being charged in each case but having a clear schedule setting out the level of fees relating to the different transactions, alongside appropriate guidance, will enable consistent charging to be facilitated.

*This article was developed after we received a query through our new **Sharpe Edge service** hosted by Local Government Lawyer. The Sharpe Edge service also lets you download our head of Local Government, **Rob Hann's** latest edition of 'A Guide to Local Authority Charging and Trading Powers' (which can be downloaded for free here). This guide contains (amongst other things) a useful compendium of local authority charging powers.*

> Sharpe Pritchard is well placed to advise on all manner of issues related to charging and the proper exercise of local government statutory powers and duties. If you have any queries in relation to this article you can email Rob.

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TIME AFTER TIME: EXTENDING TIME FOR DETERMINATION OF A PRIOR APPROVAL APPLICATION

Rachel Lee, Senior Associate, and Christos Paphiti, Trainee Solicitor, examine the time period for determination of Prior Approval ('PA') applications and explore how a local authority can extend the time period for determination.

The basics of PA applications

Certain types of development are deemed to have planning permission without the need to submit a planning application for planning permission – this is known as 'permitted development'. The relevant legislation is the Town and Country Planning (General Permitted Development) (England) Order 2015 ('GPDO 2015').

For certain types of permitted development, there is a requirement on the developer to submit an application to the local planning authority for its prior approval ('PA') or for a determination as to whether PA is required.

The Government is pressing ahead with their build agenda and the trend to increase, and expand upon, the categories of permitted development rights shows no signs of slowing. For example, the new class E business to residential class permitted development right is being introduced from August 2021.

Time period for determination

The local planning authority must make a decision on a PA application within the relevant time period specified in Schedule 2 to GPDO 2015 and an applicant should not commence the development until the local planning authority has issued its determination.

A local planning authority has to be very aware of the time periods for determining PAs and should ensure that PA applications are dealt with efficiently and promptly and that the 8 week deadline is calculated correctly. A development could be 'deemed approved' if the time period for determination expires and no decision notice has been issued.

If the time period expires without a determination, the local planning authority may lose the opportunity to refuse a proposal that fails to meet the conditions set out under the relevant class of permitted development and/or fails to ensure that the permitted development proceeds with appropriate conditions, for example, ensuring permanent provision of refuse, recycling and cycle facilities.

It is crucial that the local planning authority correctly calculates the deadline for determining an application; a key point is that the 8 weeks **includes the date on which a valid application is received**.

By default, this time period is an 8-week period from when the application is received, but this

can vary depending on the type of proposal. Article 7 of GDPO 2015 says that the time period for determination will be:

- Within the period specified in Schedule 2 (see below);
- Where no period is specified, within a period of 8 weeks beginning with the day immediately following that on which the application is received by the authority; or
- Within such longer period as may be agreed by the applicant and the authority in writing.

Two examples where Schedule 2 to GDPO 2015 sets out a time limit are Class A changes (from restaurants, cafes, takeaways, or pubs changing to retail) and Class T (from business, hotel etc. to state-funded schools or registered nursery). The period is 8 weeks for both.

Extending the time period for determination

The time period for determination can be extended if the parties are in agreement: Article 7(c) of GDPO 2015.

The case of *Gluck v Secretary of State for Housing Communities and Local Government [2020] EWHC 161 Admin* concerned Class O permitted development rights which allow a change of use from offices to residential accommodation. In that case, the judge determined that:

"Article 7 must be read as if limb (c) is an alternative to both limbs (a) and (b). The consequence is that any of the prior approval time periods specified either in Schedule 2 or in Article 7 is capable of being extended by an agreement by the applicant and the LPA in writing." (Para 85).

The judge ruled (at paragraph 102 of his judgment) that *"I do not think that limb (c) necessarily insists upon an agreement being expressed by both parties in writing…it is sufficient that a verbal agreement was made by both parties which was then appropriately evidenced in writing"*.

Therefore, local planning authorities can rely on Article 7(c) of GDPO 2015 when dealing with a PA application if they need more time to deal with the matter. As a matter of good practice, and to avoid disputes, it will be important to have evidence of any time extension properly documented between the applicant and the local planning authority. A local planning authority will need a clear indication of agreement by the applicant to extend the time frame.

It could be argued that processing these PA applications is not necessarily an easy or quick task, nor should it be. The number of PA applications is likely to rise, not necessarily matched by resources (or income from PD application fees).

As the permitted development regime expands and the list of PA considerations for the various types of permitted development increases (for example, the recent introduction of minimum space standards for new permitted development homes) the ability to extend the determination time frame and the interpretation in Gluck of Article 7 of the GPDO 2015 may prove an essential tool for local authorities.

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THE NATIONAL SECURITY AND INVESTMENT ACT 2021: IMPLICATIONS FOR THE PUBLIC SECTOR

On Thursday 29 April 2021, the National Security and Investment Bill received Royal Assent strengthening HM Government's screening regime when investigating mergers, acquisitions and associated deals which may involve "hostile foreign direct investment"[1].

Here, Partner, Peter Collins, and Trainee Solicitor, James Hughes, review the legislative framework and the impact this has on businesses and, in particular, public authorities.

What is the National Security and Investment Act 2021?

The National Security and Investment Act 2021 (hereafter "NSIA 2021") is a legal framework establishing government intervention and scrutiny of acquisitions and investments with a view to protecting national security[2].

The NSIA regime is applicable to "qualifying entities" and "qualifying assets". These are directed towards the private sector. However, the NSIA regime also affects public authorities – in particular, their compliance with overseas disclosure requirements.

It is important to note that, whilst the NSIA 2021 replaces some national security provisions under the Enterprise Act 2002 ("EA 2002"), it is still separate from the procedures that the Competition and Markets Authority utilises when examining mergers under the EA 2002. Accordingly, the NSIA regime involves interaction between both public bodies when applying their respective processes.

What is the meaning of National Security?

The NSIA 2021 does not define the meaning of "national security" in respect of new transactions or investments for the purposes of notification mechanisms. It is also silent on the inclusion of factors which the Secretary of State should consider when assessing national security risks.

Instead, the NSIA 2021 allows the Secretary of State to publish a "Statement" for the purpose of outlining how the "Secretary of State expects to exercise the power to give a call-in notice" pursuant to s3(2). However, s3(3) prescribes that such a Statement is a discretionary power. In the event the Secretary of State makes a Statement, it may include:

*"(a) Details of **sectors** of the economy in relation to which the Secretary of State considers that **trigger events** are more likely to give rise to a **risk to national security**,*

*(b) Details of the **trigger events, qualifying entities and qualifying assets** in relation to which the Secretary of State expects to exercise the power to give a call-in notice, and*

*(c) Details of **factors** that the Secretary of State expects to take into account when deciding whether or not to exercise the power.[3]"*

The purpose of adopting this approach is to recognise that modern day national security threats are often insidious, multi-faceted and complex. To be prescriptive and to provide a narrower definition could limit the applicability of the NSIA regime. Accordingly, this flexible approach enables the Secretary of State to make Statements that reflect modernised national security threats. However, it is important to note that pursuant to s1(6) of the NSIA 2021, the Secretary of State must publish a Statement prior to exercising their "call-in power".

BEIS has recently issued a draft "Statement of Policy Intent" which identifies concerns as "target risk[s]". These are split into three categories: core areas; core activities; and the wider economy[4].

Core areas covers "headline sectors" where national security risks may arise and includes national infrastructure sectors. Core activities includes specific activities where risks are likely to arise which will require the Secretary of State to utilise their Call-in power. The wider economy concerns those transactions in the remaining areas of the economy where it is envisaged national security risks are likely to be very infrequent and exceptional cases.

What this means for businesses and entities that are caught within the scope of the NSIA regime is, to an extent, partial certainty for two reasons:

1. There has been a publication of what the Statement is likely to look like; and

2. The Statement must obtain the approval of either Houses of Parliament as inscribed in Statute[5].

It therefore follows that, by the Secretary of State laying before the Houses of Parliament their Statement, as required by Statute, the Statement is being debated and scrutinised. It is envisaged that greater detail will be drawn from those debates witnessing the production of clear and accurate guidance.

However, this is qualified by the fact that the NSIA regime is still new and the draft "Statement of Policy Intent" is a draft and, in its current state, lacks detail. This cannot be underestimated and, as such, is still uncertain going forward.

Who is caught under the NSIA regime?

Application of the NSIA regime arises from "trigger events"[6] by the "acquirer". For the purposes of NSIA 2021, s5(1) defines "trigger event" to mean either: (1) a person gaining control of a qualifying entity whose percentage of shares or interest or voting rights increases "from 25% or less to more than 25%" up to 100% or has the ability to "materially" influence the policy of the entity[7]; or (2) a person gaining control of an asset by acquiring a right in the asset to either use the asset, or in a greater capacity than previously able prior to the acquisition, or control how the asset is utilised[8].

A "qualifying entity" for the purpose of this NSIA regime is either a legal person who is not an individual but, to name a few, includes body corporates, partnerships and unincorporated associations[9]. Also, "qualifying asset" includes land, tangible moveable property and "ideas, information or techniques which have industrial, commercial or other economic value"[10].

Accordingly, the broad coverage of a "trigger event" means that the NSIA regime has the potential to cover a large proportion of mergers and acquisitions which may be classed as "notifiable acquisitions" in the event those mergers and acquisitions fall within the Secretary of State's Statement. In such an event, the transaction must be approved by the Secretary of State prior to its completion.

What are the procedures for notifiable acquisitions?

The NSIA 2021 has three key notification mechanisms which have been established as a means of scrutinising those mergers and acquisitions which concern national security considerations. It is important to note that s6(1) of NSIA 2021 provides for the Secretary of State to make regulations in respect of notifiable acquisitions such as those trigger events identified above. Accordingly, it is envisaged that the below scrutiny mechanisms may be subject to further amendments or the introduction of new forms of notification.

Mandatory Notification

Assuming a trigger event arises as a result of a person gaining control of a qualifying entity or a qualifying asset by meeting the necessary threshold tests, a Mandatory Notification may arise pursuant to s14 of NSIA 2021. This requires the acquirer to notify the Secretary of State[11]. Failure to comply with Mandatory Notifications renders the notifiable transaction void.

Voluntary Notification

This is applicable to transactions that do not meet the necessary threshold for Mandatory Notifications as outlined above through either a person exercising control over assets or their increase in shares or voting rights[12]. Body corporates may wish to produce a Voluntary Notification in the event the parties consider it constitutes a trigger event which may have underlying national security concerns. The Explanatory Note to s18 of the NSIA 2021 suggests practical guidance should be sought from the Secretary of State's Statement in the event of confusion or doubt.

Government Call-in Powers

This enables the Secretary of State to "call-in" any transaction in relation to a trigger event that "reasonably suspects" or has given rise to a national security risk[13]. S1(1) of the NSIA 2021 prescribes the test which must be met in order to issue a Call-in notice. The notice may be issued during the progression of the transaction or contemplation thereof or, in the event of the completion of the transaction, within six months of the Secretary of State having acquired knowledge of the completion.

For the latter, the Secretary of State must acquire that knowledge within five years from the date of completion of such transaction or investment. Please note, this Call-in power also acts retrospectively for transactions with potential national security implication completed from 12 November 2020.

What happens if an entity fails to notify the Secretary of State of a notifiable acquisition?

Under the NSIA regime, the Secretary of State has several powers of redress including interim and final orders pursuant to ss25 and 26 of NSIA 2021. The Secretary of State may seek redress in the form of imposing conditions arising from the transaction, prohibiting same or demanding the unwinding of the transaction. The NSIA contains a wide variety of civil and criminal sanctions, including, but not limited to, fines of up to 5% of the qualifying entity's worldwide turnover or £10 million and custodial sentences of up to five years[14].

Next Steps

Whilst the NSIA 2021 is now in force, we eagerly await publication of HM Government's guidance in respect of a finalised Statement of Policy in order to obtain a clearer picture of the parameters of the target and trigger risks. We are also conscious that there are likely to be notifiable acquisition regulations arising from this new legislative regime which will affect how the NSIA 2021 is applied in practice.

In the meantime, UK companies which wish to transact, invest or lend should carefully consider whether those transactions fall within the scope of the NSIA regime and conduct further due diligence checks.

Implications for the public sector

The provisions of NSIA 2021 are likely to affect larger private sector businesses in those sectors highlighted above but the provisions will impact on the public sector, particularly for those transactions centred in the energy, defence and infrastructure sectors. Many large corporates operating in these sectors will have contracts with central and/or local government.

Public bodes should therefore be mindful of the potential for change control provisions to be impacted. Public bodies should also consider the impact before contract signature, such as what happens if the Government calls in a transaction in the middle of the procurement process (and the associated impact on any qualifying criteria). Contractual wording around change control may also be examined to ensure that performance is not impacted by any investigation that takes place under the regime.

About the Team

We have extensive experience advising public bodies on corporate law matters including business acquisitions, share acquisitions and their disposal. If you would like to discuss this in more detail we would be happy to advise.

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[1] BEIS (2021) Press Release: National security bolstered as Bill to protect against malicious investment granted Royal Assent. From: https://www.gov.uk/government/news/national-security-bolstered-as-bill-to-protect-against-malicious-investment-granted-royal-assent.
[2] Paragraph 1 of the Explanatory Note attached the Act of Parliament.
[3] s3(3)(a)-(c) of NSIA 2021.
[4] See Target Risk Statement of policy intent – GOV.UK (www.gov.uk).
[5] Pursuant to ss3 and 4 of the NSIA 2021.
[6] s5 NSIA 2021.
[7] Ss5(1)(a) and s5(1)(b), 8(2), 8(5) and 8(8) of the NSIA 2021.
[8] S9(1) NSIA 2021.
[9] S7(1) NSIA 2021.
[10] S9(1) NSIA 2021.
[11] Ss14(1), 8(5), 8(8),8(2) and 6(2) NSIA 2021.
[12] S18(1)(a) NSIA 2021.
[13] S1 NSIA 2021.
[14] s41(1) NSIA 2021.

WHEN PROCUREMENT LAW AND CONTRACTS FOR INTERESTS IN LAND MEET

Partner, Colin Ricciardiello, highlights the key takeaways from a number of recent prominent procurement cases and examines the overlap between a requirement to procure and a contract for the disposal of an interest in land.

There ought to be no procurement issue when these two elements come together in cases where one of the parties is a contracting authority within the meaning of The Public Contracts Regulations 2015 ("PCR") as the PCR does not apply to contracts for interests in land. The PCR applies to "public contracts" which are defined as "… contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their objective the execution of works, the supply of products or the provision of services".

Equally, the position should be straightforward under the Concession Contracts Regulations 2016 ("CCR") as there is a specific exemption in Regulation 10(11) (a) which states that the CCR does not apply to services concession contracts for: "the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property or which concern interests in or rights over any of them".

The issue that has arisen is in cases where the contract for disposal of land is also part of a wider development agreement under which the transferred interest may also be a "public works contract", being contracts which have as their object the execution of works/design and which currently exceed £4.7m. Those activities are set out in Schedule 2 of the PCR and include construction of new buildings, restoration works and common repairs.

Similarly, under the CCR there may be an overlap if the land transaction also amounts to: a "works concession contract" – being one for a pecuniary interest that entrusts the execution of works in consideration of the right to exploit the works or; a "services concession contract" – namely a contract for a pecuniary interest under which the contracting authority entrusts the provision and management of services (other than for works), the consideration for which is the right to exploit the services provided under the contract.

Faraday Developments Ltd v West Berkshire Council[1]

Here, the contract was a development agreement which involved disposal of a development site. The Council went through a S.1232 process (but not a procedure as if it was a public works contract). As a result, a development agreement was made with St Modwen Developments Ltd.

The Council decided that the agreement was not a public works contract but was alive to the issue and so published a precautionary VEAT notice[3]. In that notice the Council described the object of the agreement as "an exempt land transaction".

The agreement gave St Modwen the option to draw down parcels of land by giving notice to take a grant of a long lease or transfer of the freehold. If it chose not to do either, it was under no obligation to execute any works. However, if it did then service of that notice constituted a binding contract for the grant or sale and on completion it was obliged to build and develop.

The Court of Appeal decided that it was necessary to look at the arrangements as a whole and their commercial substance. From that perspective the agreement was not a public works contract when it was entered into because St Modwen was not under an immediate enforceable obligation to undertake works, it would though become obliged once the option to draw down was exercised.

Therefore, on entering into the agreement, the Council "… had committed itself contractually, without any further steps being required of it, to a transaction that will fully satisfy the requirements of a "public works contract". It had committed itself to procuring the development from St Modwen" (paragraph 61).

Entering into the agreement was held to be an actual and anticipatory breach of the PCR and a breach of public law as it meant that the Council had agreed to act unlawfully in the future by not holding a procurement after the option was exercised.

At first it does not appear that Faraday sits too well with the Section 106[4] agreement considered in R (Midlands Co-op) v Birmingham City Council[5].

Both involved contingent developer obligations. However, the Court in Faraday distinguished the cases by holding that the Section 106 agreement in Birmingham was very different to the Faraday private law contractual development obligation.

Section 106 agreements have a distinct status and role in the statutory planning scheme for regulating the development of land for which planning permission is granted. Also, the Council in Birmingham was not trying to commission the works but mitigating the effects of the development if it was undertaken and, in so doing, it was discharging its regulatory (and statutory) planning function, not embarking on contractual arrangements for development of its land.

AEW Europe LLP v Basingstoke & Deane Borough Council & NewRiver Leisure Ltd[6]

In this case the Council did carry out a procurement procedure to redevelop and regenerate a leisure park. Only two economic operators submitted initial tenders. The successful one ultimately offered a more detailed tender and following negotiations (and post the final tender stage) a development agreement was signed which contemplated a bolder regeneration and increased retail element than envisaged at the procurement stage.

The Claimant, AEW, did not participate in the procurement. It had bought nearby retail investment properties and had a commercial interest in preventing the Council's retail development. AEW sought to declare the development agreement ineffective as it so radically departed from the contract sought in the procurement and required a fresh procurement.

As an aside, there was a live but undetermined issue as to whether AEW had standing to bring a claim at all – no duty could be owed to an economic operator who did not participate in the procurement[7].

Comparing the OJEU original notice and the development agreement, the court held that they were sufficiently related so the notice was effective and sparked a competition. On that basis the claim for a declaration of ineffectiveness for failing to advertise the procurement failed.

European Commission v Republic of Austria[8]

The issue here was whether a contracting authority's taking of a long-term lease amounted to a public works contract which should have been the subject of a competitive procedure. That was based on the definition of a works contract which extends to cases where the works correspond to the requirements specified by the contracting authority who exercises decisive influence on the type or design of the work. That element of control also featured in Faraday.

It was held that the lease was not a public works contract because:

- The lease provided for the option of letting additional space, not the construction of that space. That option did not have a decisive influence on the design;
- The design of additional floors and connecting bridges was envisaged in plans which existed before the lease negotiations – and so the Authority could not have exercised a decisive influence on that pre-existing aspect of the design;
- In order to be of decisive influence, it would be necessary to influence the architectural structure e.g. size/external walls, or its specifications for the interior were very specific and detailed requirements. If not, then the influence is unlikely to be decisive;
- The conclusion of a long lease was not unusual, and it was normal for a tenant to make its specification wishes clear in respect of new build or an upgrade in cases where a tenant changes; and
- Overall, the Authority's stipulations did not exceed what a tenant normally requires.

Peters v London Borough of Haringey & Lendlease Europe Holdings Ltd[9]

In this important ruling, it was confirmed that LLP structures (rather than a company) can be used to create joint venture vehicles with private sector entities to undertake regeneration projects.

Whilst not the only regeneration power available to the Council, a point in issue was that the general power of competence under The Localism Act 2011 was subject to Section 4(2) of that Act so that where a local authority does things for a commercial purpose it must do them through a company and so (it was argued) that excluded an LLP structure.

Here it was held that: the commercial purpose of money making was not the Authority's dominant purpose – those purposes included the best/only means to use the Council's land and buildings to achieve regeneration (not commercial property development), job creation and newly built houses. In particular: the relevant purpose was that of the Council not the LLP or its private sector partner.

That was an important finding as the definition of an LLP includes an entity who has the objective of making a profit; mere profit making did not in itself equal a commercial purpose; if there were separate purposes, then the company only requirement under Section 4(2) would apply where the dominant purpose was a commercial one.

Ocean Outdoor v London Borough of Hammersmith[10]

This was the first case on the CCR and concerned the Council's decision to enter a lease for two plots of land it owned and the operation of two advertising screens.

The Council sought competitive bids for new leases of the plots and the winner's bid offered much higher rent than the Claimant's bid. Ocean argued that the grant of the leases were a "Services Concession Contracts" which should been the subject of a procedure under the CCR.

The Court of Appeal held that, in line with established EU case law, "Services" are those which otherwise would have to be provided by the Authority as part of its statutory obligations or furtherance of its strategic objectives.

The Authority had no statutory obligation to provide advertising services and they were not provided on the Authority's behalf; it is for the challenger to prove that the procurement rules apply and not for the Authority to displace an assumption that they do; the paradigm concession contract will involve third party members of the public for whom the Authority is obliged to provide services.

Here, the third parties were the advertisers who had no connection with the Authority and the money they paid to the Authority Tenant had nothing to do with the Council who had a separate entitlement to rent unrelated to the advertising revenue received by the tenant.

Importantly, the Regulation 10(1)(a) land exemption was held to be applicable – the leases were genuine and not contracts to provide advertising services; they granted exclusive possession; a fixed rent was paid and was not conditional on or affected by a type or level of advertising sold by the Tenant.

Conclusions

When it comes to development agreements, since Faraday it seems clear that: deferred or contingent development obligations in themselves will not prevent such an agreement from being a public works contract; whilst the PCR applies, the protection offered by a VEAT notice will not necessarily be secured if the notice lacks the required detail11 as occurred in Faraday. A consequence which led to the first declaration of ineffectiveness ever made in the UK.

The Republic of Austria decision usefully illustrates and alerts to the possibility of over specified, and perhaps out of the ordinary, Buyer/Tenant requirements leading to the unintended creation of a public works contract.

Peters and Haringey serves to illustrate how the more flexible and greater control offered by an LLP structure is permissible in the regeneration area but if that is the vehicle chosen, then it would be prudent to have a detailed internal account of the public body's regeneration purpose in order to show that regeneration was not predominantly for commercial reasons.

It seems clear that even if the rent payable in Ocean was a turnover one, the land exemption would still apply.

Post Brexit, even after the current procurement regime is replaced as anticipated, the requirement to tender for the equivalent of public works contracts will remain. With that in mind, and the emphasis on public authorities to regenerate through development agreements and otherwise (in order to make the most of their land holdings), the principles in these key cases are likely to remain relevant.

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[1] Court of Appeal [2018] EWCA Civ 2532

[2] Section 123 of The Local Government Act 1972 under which there is a duty on the Authority to achieve the best price reasonably obtainable when disposing of an interest in land.

[3] A voluntary ex ante notice under Regulation 99 (3) of the PCR. If the VEAT procedure is complied with then that should disapply the first ground of ineffectiveness, being the most obvious "penalty" for directly awarding a contract in breach of the PCR.

[4] Section 106 of The Town & Country Planning Act 1990.

[5] [2012] EWHC 620 (Admin) where Tesco agreed to replace/rebuild community facilities if its proposed redevelopment caused the existing facilities to be lost. The Court held that this was not an enforceable contractual obligation as it was up to Tesco to decide on whether it should redevelop and if it did not then there was no obligation to replace/rebuild.

[6] [2019] EWHC 2050 (TCC)

[7] In Royal Cornwall Hospitals NHS Trust v. Cornwall Council [2019] EWHC 2211 the court decided no duties were owed to an economic operator who did not participate in a procurement and, in consequence, was unbale to show that it suffered or risked suffering any actionable loss as required by Regulation 91 of the PCR.

[8] (Case C-537 /19). See also a link to a more detailed article on this decision.

[9] [2018] EWHC 192

[10] [2019] EWCA Civ 1642.

[11] The emphasis on the exempt land transaction element in the VEAT notice was held to be "…. more than mere over-simplification. It was incorrect, or at best misleading. The development agreement extends considerably further than a transaction for the disposal or transfer of land. It contains intricate provisions for the design and execution of a large development, which it was envisaged and intended that St Modwen would carry out".

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