public matters newsletter

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part B exemption wins Italian ambulance case

The legal background

Directive 2004/18/EC (‘the 2004 Directive‘) defines public contracts as *“contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of goods or the provision of services within the meaning of this Directive”*.

The full rigour of the 2004 Directive applies only to contracts for Part A services which exceed the threshold of EUR 193,000. Such contracts must be awarded in accordance with the provisions of the 2004 Directive.

A judgement by the European Court of Justice (‘ECJ’) on an Italian case in December 2014 (San Lorenzo and Croce Verde Cogema [2014] EUECJ C-113/13) came as something of a surprise with its view that contracts for ambulance services provided by voluntary organisations did not have to be procured through a procedure compatible with the 2004 Directive. While this will be viewed with interest by contracting authorities who are under pressure to support voluntary and community groups and often feel that they cannot award contracts without competitive processes that are seen to favour the bigger, more commercial organisations. There are a number of factors particular to this case that will need to be thought about by a contracting authority wishing to use a similar argument.

The judgement also sets out a very useful summary of the factors to be taken into consideration when looking at Part B contracts, cross-border interest and the application of the 2004 Directive. Where services are mixed between Part A and Part B, the services will be treated as falling within the category to which the greatest value of services to be provided under the contract can be attributed. Ambulance services fall partly within the Part A (transport) and Part B (medical) type services for the purposes of the 2004 Directive.

Facts

In Italy, the principle of voluntary action by citizens is incorporated into national legislation. In the healthcare sector, the relevant national law provides that contracts for ambulance services may be awarded to particular voluntary organisations in preference to other organisations and with no requirement to advertise or run a procurement process, provided that the voluntary organisations to which the ambulance service contracts are awarded are reimbursed only the expenses they have actually incurred.

An Italian regional authority (‘the Authority’) entered into a framework agreement with a number of voluntary sector organisations and concluded a number of call off contracts under the framework for the provision of ambulance services (‘the Disputed Agreements’).

Two other voluntary sector organisations, ('the Claimant Suppliers') brought an action in the Italian courts, claiming that the conclusion of the disputed agreements was incompatible with European Union ('EU') law as they discriminated against organisations in the ambulance services sector which were not carrying out voluntary work. They also argued that the payments made to the suppliers under the disputed agreements exceeded the costs incurred by those suppliers in providing the services, in breach of national and EU law.

At first instance, the claim of the Claimant Suppliers was upheld on the basis that the framework agreement provided for reimbursement of management and indirect costs as well as the costs incurred in carrying out the service. This meant that the contracts had to be procured in accordance with the 2004 Directive.

However, on appeal, the Italian state court referred the following questions to the ECJ:

1) Do the EU procurement rules preclude national legislation from allowing local authorities to entrust the provision of ambulance services on a preferential basis and by direct award without any form of advertising to voluntary associations covered, albeit that the voluntary associations are only reimbursed for the costs actually incurred and a fraction of their fixed and ongoing costs?

2) Do the EU procurement rules preclude national legislation which permits the direct award of public contracts for ambulance services on the grounds that a framework agreement which provides for the reimbursement of fixed and ongoing costs must be classified as having a pecuniary interest (and therefore must be a contract to which the 2004 Directive applies)?

Judgment

The ECJ held that the fact that a framework agreement is concluded on behalf of non-profit making bodies does not preclude it from being a public contract under the 2004 Directive. The fact that the framework provided only for reimbursement for costs to the voluntary sector and not payments for the benefit of the voluntary organisations was not a decisive factor in coming to this conclusion (the court referred to the judgment in Ordine degli Ingegneri della Provincia di Lecce and Others C-159/11, which looked at the use of the Hamburg Waste exemption for a contract for seismology services by a university). It is therefore immaterial that the payment under the framework provided for reimbursement of costs only. Such a framework and the relevant agreements flowing from it may fall within the scope of the 2004 Directive.

However, because of the mixture of Part A (transport) and Part B (medical) services in the nature of ambulance services, the decision as to whether the full regime under the 2004 Directive applies in fact comes down to whether the value of the Part B services is greater than the value of the Part A services to be provided under the framework agreement. If the value of the regional framework exceeds the threshold, and the value of Part A services to be procured is higher than the value of the Part B services, the 2004 Directive will apply and the full rigour of the procurement regulations will apply. If the value of the services does not exceed the threshold, or the value of the medical services outweighs the value of the transport services and the contract may attract cross border interest, then the principles of transparency and equal treatment will apply and the contract must be awarded in accordance with Article 23 and Article 35 (4) of Directive 2004.

The case law looking at contracts awarded under the EU treaty principles (Part B services with cross-border interest) requires that such opportunities are advertised in a way that allows providers in other member states to bid for such contracts. The ECJ said that it did not have sufficient facts to decide whether there was cross-border interest in this case.

In this case, the question of Part B services and cross-border-interest was looked at alongside the ability of member states to organise their own social security systems. member states are entitled to take the view that giving preference to voluntary organisations is consistent with the social purpose of ambulance services and may assist in providing such services at an appropriate cost. Articles 49 (freedom of establishment) and 56 (freedom to provide services) of the treaty on the functioning of the EU must therefore be interpreted in a way which does not prevent member states from awarding contracts for ambulance services directly and without advertising to voluntary services. However, the court noted that the preferential treatment of voluntary service providers must actually contribute to the relevant social purpose and to community and budgetary efficiency. It is therefore essential that the voluntary organisations to which contracts are awarded must act only for the good of the community and towards budgetary efficiency, and must not be profit making (although variable, fixed and on-going expenditure incurred in providing the services is recoverable). Such organisations must also adhere strictly to national law.

Conclusions

This case is an interesting one and is helpful in reminding us of the test for Part B services and when a competitive tender must be run for such contracts. However, in terms of how easy it will be to apply the judgement set out to other contracts, I would advise caution. The reasoning was based on there being national legislation that allowed such contract awards to take place and also the importance of there being affordable ambulance services available to the population. Analysis will need to be undertaken on a case by case basis as to whether a similar argument can be made.

talk to us...

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Background

As anyone involved in local government will I am sure agree, the subject of devolution seems to have taken on a bit of a life of its own in recent months.

Indeed, following swiftly on the heels of last year's Scottish referendum we saw the formation of an All-Party Parliamentary Group on reform, decentralisation and devolution in the United Kingdom, the purpose of which is to facilitate discussion on reform, decentralisation and devolution in the United Kingdom by senior politicians and figures from across the UK, and a new Cabinet Committee for devolved powers, chaired by the leader of the House of Commons, William Hague, which had its first meeting on 25 September 2014.

Committee comments

Speaking on the topic of fiscal devolution at a meeting of the All-Party Parliamentary Group last week, William Hague caused quite a stir when he expressed the need for caution when it comes to handing over control of 'revenue-raising powers' to councils. Indeed Mr Hague indicated that the Conservative party is wary of decentralising tax-raising powers because of the 'fraught history' of local government finance and 'a lack of control' displayed by councils in the past.

In support of what he described as a more 'pragmatic' approach to decentralisation by the Conservative party, Mr Hague pointed to the *"very, very fraught history"* of local government finance in the UK, particularly in the raising of revenue, which he said has led to the centralisation of such powers by governments over the past 20-30 years. He went on to stress the view that *"localism is not a way of imposing new taxes"* but rather a way of giving councils more control over the revenue devolved to them.

Local government response

Perhaps inevitably, Mr Hague's 'lack of control' comments have caused a bit of an outcry in local government circles as many local authority chief executives have come out in defence of their position.

Paul Martin, Solace's spokesman for local government finance and chief executive of Wandsworth London Borough Council, has reportedly challenged the present-day relevance of Mr Hague's comments, stating that Mr Hague *"is indeed right to describe these problems as historical"* as it is now generally accepted that councils are the most reliable parts of the public sector in reducing expenditure. Indeed, Mr Martin went on to suggest that, as a notable historian, Mr Hague might agree that *"we should be informed by history, but not imprisoned by it"*.

Clare Marchant, chief executive of Worcestershire County Council ('WCC'), has also come out in defence of the council's position in light of Mr Hague's comments, saying that local authorities had become much better at explaining their budget decisions as a result of the financial pressures that they face. Indeed, Ms Marchant highlighted the recent council roadshows undertaken by WCC to ascertain public opinion to a proposed increase in council tax to deal specifically with the increased number of children being taken into care in the region. *"That process is not willy-nilly"*, said Ms Marchant; *"If we have to have a council tax increase it's because of X, Y or Z and in our case its more children coming into care"*.

John Jory, chief executive of Reigate and Banstead Borough Council, may arguably have captured the strength of local opinion when he said that *"central government needs to trust local government to give leadership to resolving local issues and if local communities are willing to pay more for public services then that's fine"*. Mr Jory went on, perhaps somewhat more controversially, to draw a link between the lack of participation in local elections in part with a lack of local control over local issues, suggesting that giving councils more revenue-raising powers would be *"…an opportunity to reignite local democracy"*.

So where are we now? Well, nowhere certain at the moment, for sure, and so for now the debate looks set to continue.

What's next?

The Cabinet Committee for devolved powers is expected to publish a report soon, so watch this space for further updates!

In February Browne Jacobson will also be hosting a roundtable discussion with leading individuals involved in devolution. The results of our devolution roundtable will be launched in April 2015.

talk to us…

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Overtime and 'normal remuneration'

In the joined cases of Bear Scotland Ltd and others v Fulton and others UKEATS/0047/13 ('Bear Scotland'); Hertel (UK) Ltd v Woods and others UKEAT/0160/14 ('Hertel'); and AMEC Group Ltd v Law and others UKEAT/0161/14 ('AMEC Group'), the Employment Appeal Tribunal ('EAT') confirmed that all elements of a worker's normal remuneration, including payments in respect of non-guaranteed overtime, must be taken into account when calculating holiday pay under the EU Working Time Directive ('Directive'). This therefore relates to the four weeks' holiday granted by the Directive and not to the extra 1.6 weeks' statutory holiday granted by the Working Time Regulations 1998.

Previously under UK law, where a worker had 'normal working hours' holiday pay was generally calculated by reference to that worker's basic salary only. Where guaranteed compulsory overtime was included in the contract (that is an obligation on the employer to offer overtime and an obligation on the worker to work it), this was covered within 'normal working hours'. However, when considering the joined cases above, the EAT determined that holiday pay should be based on a worker's 'normal remuneration', which would include 'non-guaranteed' overtime (where the employer is not obliged to offer overtime but if it does, the employee is obliged to work it).

The question as to whether the same position applies to voluntary overtime has yet to be determined (voluntary overtime being overtime that an employee can choose whether or not to work). The EAT has focussed on pay that is normally received and which is intrinsically linked to the performance of tasks under the contract. In the tribunal case of Neal v Freightliner (ET/1315342/2012) ('Neal'), the conclusion of the Employment Judge was that the voluntary nature of the overtime did not mean it was no longer 'intrinsically linked'; although Neal was originally joined with the other cases in Bear Scotland, it was settled prior to the hearing and so the EAT did not comment specifically on this. Although tribunal decisions are not binding, other tribunals may interpret voluntary overtime in a similar way as forming part of normal remuneration, particularly if a pattern of working has developed.

What if the amount of overtime varies?

The case of Lock v British Gas Trading Ltd (Case C-539/12), in which the European Court of Justice (ECJ) ruled that commission must be included within the calculation for holiday pay, is due to return to the Leicester Employment Tribunal in February 2015 to consider the level of holiday pay to which Mr Lock was entitled. The ECJ ruled that it was for the national court to calculate 'normal remuneration' by taking an average over a reference period that is 'considered to be representative'. This case will therefore be watched to see what approach will be taken to the determination of the reference period. However, in the absence of further guidance from the ECJ, tribunals will need to approach this issue on a case by case basis and may choose different reference periods depending on the circumstances.

How far back can workers claim?

Prior to the decision in Bear Scotland, the case of HMRC v Stringer and others [2009] IRLR 677, allowed holiday pay claims to be brought as unlawful deductions from wages claims. This meant that workers did not need to bring claims within three months of the date when the specific payment fell due (as under the WTR 1998) but could bring claims within three months of the last of a series of deductions. In theory, workers could therefore have claimed that their holiday pay had not been paid correctly since 1998 when the WTR 1998 came into force (assuming that they had worked for the same employer since then).

However, the EAT has significantly limited the impact of its decision in Bear Scotland by confirming that if there is gap of more than three months between any periods of underpayment, any such claim would be out of time (subject to the stringent rules on extending time). Unite, which represented the claimants in Hertel and AMEC Group, has announced the EAT's decision will not be appealed. (Permission to appeal was not granted in Bear Scotland.)

The government has also introduced the Deduction from Wages (Limitation) Regulations 2014 (SI 2014/3322) which include a two-year limitation period on unlawful deductions from wages claims. This new period will apply to claims presented on or after 1 July 2015 and is not limited only to holiday pay claims but extends to 'wages', as defined in section 27(1)(a) of the Employment Rights Act 1996.

Given the publicity that this case has received (and the new limitation period introduced by the government), employers can expect an influx of claims on the back of this decision. Employers who regularly pay non-guaranteed overtime to staff could be at risk of claims for unlawful deduction of wages if this overtime was not taken into account when calculating holiday pay. For voluntary overtime, employers may find that employees are seeking to recover this too.

It is important to note that this decision applies to all workers, not just employees. Therefore payments may be due to agency workers, apprentices, casual workers, consultants, fixed term workers and apprentices.

talk to us...

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Local authorities and land collaboration/joint venture agreements #2

In our December edition we included the first of three articles dealing with this subject, and hopefully provided food for thought to enable the parties to a proposed land collaboration/joint venture deal to consider what they wanted to get out of the arrangements, and what they were prepared to put in.

We also set out a number of questions that the local authority might ask of itself in order to produce a useful set of heads of terms.

By way of reminder we proposed the following simple scenario:

Brownshire Metropolitan Borough Council (the Council) owns 40 acres of greenbelt land on the outskirts of Brownville (a sizeable town in Brownshire).

Jacobsons Strategic Land (Brownville) Limited (the Developer) are housebuilders owning 60 acres of land adjoining the Council's land as part of their strategic land bank. The Developer approaches the Council with a view to collaborating in the promotion and development of the Council's land and the Developer's land for residential development.

Of course the Developer might not own the land but have options over it - this can be significant, and we touch on in this article.

The Developer believes that the combined land (the Site) will support a new urban extension – 'Brownville Village' - of approximately 1,500 dwellings.

Significant infrastructure works would need to be carried out in order to fully unlock the Site involving the construction of a new distributor road and service media, some off-site works (including the building of a bridge over a railway) and substantial S.106 commitments (affordable housing, transport and education contributions) would be required according to current planning policy.

The Company's suggestion is that 'a joint venture agreement' is entered into and that the contract documents will contain 'equalisation' provisions. The Council and the Developer start initial discussions.

Having considered answers to the following questions:

1. Objectives: what do the Parties want to achieve?
2. Status quo: what's the current position?
3. Investment: what else will the Parties do to further their objectives?
4. What else should we think about?

You may want to dig out December's article here and have another read of that... We now want to look at some typical joint venture and disposal structures.

In this second article we'll look at the joint venture structures, and in our next article we'll deal with disposal structures.

As we said last time, the more the Parties can identify where they are at the moment, what their objectives are and what they will and won't be able to agree the better they will be prepared to proceed via heads of terms to a workable contractual framework to deliver their aspirations.

Joint venture structures

Once the Parties have settled the basic terms of their collaboration what are the Parties options in terms of joint venture structure?

We make no apologies for the fact that there are other possible permutations, but we set out below our summary of what we believe to be the most common types of collaboration structure – the contractual joint venture, land pooling (by trust) and the use of special purpose vehicle companies (SPVs).

The distinctions can become blurred - for example joint venture agreements might contain or provide for land pooling arrangements, and may involve SPVs, and it is always more important (especially from a tax perspective) to look at the substance of the proposed arrangements rather than what they are called or what the Parties call them.

It's beyond the reasonable scope of this article to try to consider all variations on these themes but we'll try and provide simple guidance on the main features and implications of these three joint venture structures.

There is of course a fourth obvious alternative: the Parties could simply continue to do what they may have done to date – discuss and negotiate, carry out certain activities to promote the Site through planning, talk to potentially interested purchasers, developers and promoters, and share certain costs on an 'as and when' basis.

However, at some point, leaving matters on this basis will mean one Party feels rather more exposed than the others and will require something a little more formal and contractually binding.

Contractual joint venture - general

Many joint venture agreements rest on contract only. In a simple and 'pure' contractual joint venture, each Party retains its existing land ownership and the terms of the joint venture (or collaboration, or consortium, or equalisation) agreement regulate how the Parties will collaborate and share receipts and costs.

We not suggest for a minute that such arrangements are always simple or pure. The fact is that contractual arrangements for large and complicated land collaboration matters tend to be, well, large and complicated.

In particular, defining the Parties' objectives and the scope of the collaboration is vital.

At one end of the spectrum, do the Parties simply intend to collaborate to produce a master plan/promote the allocation of the Site through the planning process and decide what to do (or not to do) at a later stage?

In our scenario the Council and the Developer might agree only to deal with master planning and promotion of their combined 100 acres of greenbelt land through the planning process and decide what to do once they have secured an outline planning permission. This would be an unusually limited contractual joint venture.

At the other end of the spectrum, do the Parties intend to promote the Site for planning, and if successful to then acquire land for off-site works, install on-site infrastructure, carry out off-site works, and sell (and in some cases develop) the consented land?

The broader the extent of that scope will give rise to a number of drafting issues in terms of parameters (to set the ground rules for proceeding to the next stage), costs for budgeting, sharing of costs (which costs? historic costs also? in-house costs? budgeted costs only?) and decision making.

Bowing to majority rule on key decisions may in particular give a local authority issues from a governance/public law point of law. For example, a local authority would not wish to be bound by a majority view if the wishes of the majority could require it to do something in breach of its public law obligations. A sale at less than 'best value' would be an obvious example of this.

In addition, the further the Parties intend to go in terms of appointing consultants and contractors to design and implement infrastructure strategies, or to require buyers to carry out predetermined infrastructure or other works on the Site is likely to give rise to a number of procurement issues for the local authority.

The likely outcome of the negotiations on the Brownville scheme is likely to lie somewhere between a limited 'master plan and promote through planning only' joint venture and an unqualified 'we're in it from day one until the end of the project, whatever the cost and other implications' collaboration.

We'll assume (for the sake of simplicity) that subject to detailed provisions regulating decision-making and payment of monies that the Council and the Developer in our scenario want to market the Site for sale once they have obtained a satisfactory planning permission and to equalise defined shared costs and receipts i.e. they will share those defined shared costs on a 40/60 basis wherever the expenditure is incurred, and whoever incurs it, and will take a 40/60 share of land disposal receipts irrespective of whether the land disposed of is Council land or Developer land.

Whatever the scope, such an arrangement will be a contract only - no land will be transferred between the Parties and no security will be taken over the other Party's land.

If one Party decides it isn't going to stick to its obligations under the contract there may be a breach of contract action but is that enough? The land may have been transferred to a purchaser who would not, unless it has entered into contractual obligations with the other Parties to be bound, be bound by the terms of the joint venture.

Of course the Parties might seek to include contractual provisions (secured by a restriction on title) preventing disposal without an incoming purchaser entering into a direct deed of covenant to abide by the terms of the joint venture, although in some cases a restriction would not be possible-for example where the land in question is not registered at the Land Registry.

Particular consideration has to be given to dealings with developers having options over land rather than the landowners themselves - what happens if the developer does not want to exercise its options, or if the option agreements lapse/are determined and are not renewed?

Maybe the landowners should also join into the joint venture or the developers should agree to assign the benefit of the options to the other Parties or be amended such that the landowners are obliged to notify the other joint venture Party of any proposed termination and allow it to step in.

Security for performance of obligations may then raise some eyebrows, and legal concerns, but more fundamentally, as by definition, in a contractual joint venture, the arrangements rest on the contract only, will the Parties 'feel' they are part of a genuine joint venture?

Contractual joint ventures - tax considerations

It is difficult (and dangerous) to generalise with tax but it will be necessary for all Parties to obtain professional advice as to the tax consequences of any joint venture arrangement.

We make the following general points only in relation to tax concerning contractual joint ventures (although stress that the outcomes might be very different depending upon the substantive terms of the joint venture agreement - especially where the arrangements include or anticipate transfers of land interests, trust arrangements or options to purchase):

a) each Party should be taxed in its own right as no separate structure is created-this can be an advantage (see d) below). Care must be taken that it is receipts and costs that are equalised, and not profits (as each Party is likely to account for these in different ways) … and certainly not post-tax profits;
b) Assuming no joint ownership of land and no supplies of land between the Parties, the Council and other Parties would continue to operate in VAT terms through their own separate VAT registrations, would bear their own VAT and consider their own VAT positions in terms of whether or not to 'opt to tax'. Whilst this saves on costs and admin of setting up a new VAT registration for a project vehicle, it may make day to day VAT accounting more difficult for the parties in relation to shared costs and receipts;
c) as long as no land is transferred or leased between the Parties, or declared to be held on trust, and as long as no options to purchase land are granted, there ought to be no Stamp Duty Land Tax payable as a consequence of the Parties entering into the joint venture. On eventual sale the purchaser would of course have to consider if and how much SDLT was due in the usual way;
d) whilst a local authority should be able to rely on statutory exemptions from direct taxes (corporation tax, income tax and CGT) upon disposal of its interests in the Site to a third Party, the position can be more complicated for the other Parties, who may be taxed on actual receipts without being able to deduct payments made to the other Parties under the 'equalisation provisions' – the position will also be different depending upon whether the other parties own land as a capital asset rather than on 'trading account'. This can be an issue for landowner Parties and some developers. Complicated.

So, a few general points on tax, but we reiterate that an understanding of the substance of the joint venture agreement and the tax positions of the Parties is fundamental to a full tax analysis.

Contractual joint ventures - public law issues

The substance of the terms of the joint venture agreement is again key.

We make no apologies for not going into detail here. The interpretation of the public procurement and state aid regimes and the subject of complicated European legislation and guidance in relation to the proposed joint venture terms, will always require detailed specialist advice.

A few things to think about though, and sooner (preferably at heads of terms stage) rather than later – the Parties should not leave it until presenting engrossments of final documents for execution!

Are works, supplies or services being procured by a public authority? This needs to be considered both in the arrangements with the other landowners as well as when appointing professionals and contractors. It should be possible to structure arrangements between landowners so as to not make them subject to the procurement regime however, care and advice will need to be taken.

If the Council is appointing consultants and contractors directly as sole appointor (and probably even as joint appointor) to provide works, supplies or services, then unless the values of the contracts are below permitted thresholds, a procurement exercise will be required.

Even if the Developer is appointing, if the Council is sharing in the cost (fees payable to consultants) or benefitting in other ways from the works or services the consultants or contractors provide, procurement obligations might arise.

So, advice will be required, and in some cases it might make sense to package works and services contracts to maximise the ability to take advantage of the thresholds.

Is the arrangement conferring a financial benefit or other advantage upon the other party which it ought not to receive under European state aid law?

State Aid can be found in a huge variety of different scenarios not just where there is direct financial support such as soft loans, guarantees and transfers of land at an undervalue. Early identification and then consideration of how arrangements are structured is important. Again, a specialist area requiring expert advice.

Is the Council committing to a venture that might involve it selling assets for less that it ought to? This can be difficult as the Structadene case (R v Hackney LBC Ex p Structadene 19 October 2010) established that the time of the disposal for 'best value' purposes is the date of completion of the disposal not the date that an equitable interest is established through contract. The disposals might not take place for years after the joint venture agreement is signed.

Commercially the Council might still want to commit to the agreed commercial terms even if they might involve one or more of the above (to secure regeneration and jobs, to deliver housing targets and Council Tax/New Homes Bonus benefits) but can it do so lawfully?

The proposals could be justifiable on public law grounds, or restructured to comply, but the Council will need a sound audit trail of advice and decision-making. A well advised Developer will also want to be satisfied that the proposed joint venture complies with public law-reputational damage, clawback and penalties should be a concern for all collaborators.

At a more basic level there is also a practical issue with contractual joint venture, particularly where the local authority landowner is also the local planning authority and/or highway authority – concluding S.106 and other statutory agreements can be problematic when the local authority wearing its 'assets' hat owns part of the Site and the local authority as local planning authority needs to bind the whole of the Site for the purposes of securing the affordable housing and transport and education contributions under Section 106.

Land pooling/trust - general

Okay, it's in the heading to these articles but what is 'land pooling'?

The Council and the Developer could agree, either at the outset (unlikely unless the SDLT and VAT savings and other considerations (e.g. easier to enter into Section 106 and other statutory agreements) outweigh the downside of parting with land indecently early), or following satisfaction of certain conditions, for example satisfactory planning permission obtained, to transfer land into a jointly owned corporate vehicle (an SPV or special purpose vehicle).

We'll look at the SPV structure later.

In this section, by 'land pooling' we mean that each of the Parties agree to hold their respective land interests in the Site on trust for all Parties on the terms of the agreed joint venture, or to transfer their interests to themselves, or some of them, as trustees to hold on those trusts for all Parties.

In the latter case, as a matter of law there can only be four legal trustees and so dealing in this manner when there are more than four landowners may mean that some landowners are represented at beneficiary level only.

The Parties' entitlement to sale proceeds and responsibilities for the payment of shared costs and other obligations would be set out in the trust and transfer documentation.

The trust documents would contain the terms of the agreed joint venture/collaboration (in a contractual joint venture these would be set out in the joint venture or collaboration agreement).

The trusts would be protected by restrictions on title to prevent trustees disposing in breach of trust.

The key advantages of the land pooling/trust structure are that each of the Parties obtains a part interest in each part of the Site and therefore the Parties are fully bound-this may then look and feel more like a true joint venture - and also that as title to all of the Site is held by the trustees, the trustees are able to deal with the Site as a separate unit.

The main disadvantage is that each of the Parties ceases to be the sole owner of its existing land, and so this might not be considered to be appropriate in the early stages of a joint venture - the parties might want to have substantially more comfort that they have a live viable scheme before giving up their land to the trust.

So, to transfer land into a trust at an early stage may not be commercially sensible (the trust would need to be unwound and land re-transferred if the preconditions to full project commitment were not satisfied), albeit the parties could contemplate and provide for land pooling by way of trust further down the line, for example when a planning permission is obtained which is satisfactory to both of the Parties.

Land pooling/trust - tax considerations

As it is not clear that the Jenkins v Brown case (see below) is applicable to SDLT the cautious view is that in transferring land into a trust, and acquiring an interest under the trust, SDLT will be payable by the Parties, and assessed on market values of the land interests disposed and acquired.

In basic terms then the more valuable the site when transferred into the trust, the higher the SDLT charge is likely to be. The Parties would need to balance the additional SDLT that may be incurred in pooling land later against the commercial implications of transferring sooner.

A trust would probably have a distinct identity for VAT purposes, subject to how the trust is constituted, and so the transfers of land from the Council and the Developer into a trust would constitute supplies for VAT purposes. The transferring Parties would need to consider their own VAT position and decide whether or not to opt their parts of the Site for VAT purposes.

The Trust might then need to register for VAT itself in order to assist its own VAT recovery position, and consider whether it should itself opt to tax the Site to assist or protect its own VAT recovery position.

The 1989 case of Jenkins v Brown establishes strong arguments based on the facts of the case that no capital gains tax should be triggered by Parties pooling their land into a bare trust (please note that other forms of trust can give materially different tax analyses) or taking land out of the trust.

Whilst not directly relevant to the Council due to statutory exemptions from capital gains tax this may be advantageous other Parties - they would however almost certainly want specific advice on their tax position and the facts of the proposed trust and joint venture terms before accepting that they could successfully rely on Jenkins v Brown.

A bare trust is tax transparent for disposal purposes-on disposal of land by the trust, the beneficiaries, being the Council and the Developer, would be taxed on their share of the receipts and the Council would rely on its direct tax statutory exemptions.

Land pooling/trust - state aid, procurement and public law

The use of a trust is not an automatic solution to the public law concerns set out in relation to the contractual joint venture, and would need to be considered at the point of transfer of land into the trust, particularly in relation to 'best value' and state aid.

The stronger the argument that the value of what the Council is parting with is equivalent to the value of what the Council is acquiring, the better.

Once the Site has been transferred to the trust, the trustees would enter into all arrangements with any consultants or contractors (or promoters) and there is an argument that as transfers of land are outside the scope of the procurement regulations, procurement is not an issue.

This is a bold and we would suggest simplistic interpretation of procurement law - as a beneficiary under the trust the Council would still be the recipient of at least an indirect benefit and potentially a direct benefit from the services, works and supplies provided by any contractor or consultant appointed by the trust, and any ultimate purchaser/developer/promoter, and so the procurement regime cannot be ignored.

It might be an easier structure to work with but a detailed analysis of the joint venture terms would be required.

It might also be easier for the trust to enter into statutory agreements with the relevant authorities where the Council is the relevant authority, simply because there may be up to four trustees that now own the Site (of which the Council is but one; the Council might even be comfortable in electing to be a beneficiary only rather than a trustee as well).

SPVs - general

An SPV is simply a special purpose vehicle established by the Parties for the purposes of a specific project, often used to ring-fence the asset (the Site) and the parties' liabilities in respect of it.

It doesn't have to be a limited company, and could be a general partnership, a limited partnership or a limited liability partnership (although in relation to the latter consideration of the vires position for a local authority to enter into an LLP will need to be carefully analysed).

For the sake of simplicity, in our example we'll assume that the Council and the Developer form a joint venture SPV company - Brownville (SPV) Limited (the Company).

The Council and the Developer would transfer their interests in the Site to the Company each taking shares in the company which might be allotted in proportion to their 40/60% land interests. The terms of the joint venture would be regulated by the memorandum and articles of association of the Company and a shareholders' agreement.

As the Company is a separate legal entity distinct from its shareholders, the Council and the Developer as shareholders will not (save in limited circumstances) be responsible for the debts and liabilities of the Company beyond any unpaid capital contribution and the value of the land they have transferred into the Company.

This can make the Company structure attractive when the joint venture is to be responsible for significant site remediation and infrastructure costs, or responsible for performing other works or payment obligations in any deal with an ultimate purchaser, developer or promoter.

Further benefits are that the shares in a Company are usually readily transferable although the Parties would be able to agree suitable restrictions on disposals where required.

The Parties might agree with a buyer for the buyer to acquire shares in the Company rather than the Site itself and so using a corporate structure could provide additional exit flexibility, which could be advantageous to the buyer for SDLT purposes (although realistically this may only be appropriate where the buyer wants to acquire the entire Site).

There are as ever further variations on the theme. Rather than transfer the land at the outset, the Parties could retain their land interests and grant options to the Company to acquire parts of the Site, once planning permission has been obtained, other preconditions satisfied, and buyers found. This would enable the Site or parts of it to be sub-sold and might avoid a double SDLT charge although care needs to be taken in structuring the arrangements.

Again, for the sake of simplicity we'll assume that the Parties are considering transferring their land to the Company.

As with land pooling/trust, the Parties may not want to transfer land into the Company sooner than is commercially sensible, although once again the later the land is transferred the higher the value/purchase price of the land and therefore the higher the charge to the Company for SDLT is likely to be.

SPVs - tax considerations

SDLT will be payable if the chargeable consideration for the transfers by the Council and the Developer to the Company exceeds the current SDLT thresholds.

This chargeable consideration would be assessed on market value rather than actual consideration if the Developer and/or the Council are connected with the Company for tax purposes. A careful analysis would be required here to establish whether any of the Parties were so connected with the Company.

The onward sale of land by the Company to buyers would also give rise to SDLT considerations (unless using the option to acquire/sub-sale structure referred to above), which could be mitigated by a sale of shares rather than land.

The transfers of land to the Company would be supplies for VAT purposes and so the Council and the Developer would need to consider whether to opt to tax their interests in the Site for VAT purposes, as would the Company. This would dictate the VAT treatment of the onward sale of the Site and is relevant to the Company's ability to recover VAT on costs it incurs.

In relation to direct taxes, the Council will as usual rely on its statutory exemptions. Direct taxes will though be more relevant for the Developer (and any other joint venture Parties) and the transfer of land to the Company may trigger a tax charge depending upon whether a profit or gain is made, and the Party's own tax position and tax reliefs available to it.

During the promotion/development phase it may be more advantageous to those Parties for the costs to be incurred at the Company level.

On the disposal of land by the Company, the Company may be liable to tax on its profit or gains. Whilst the Council should again be able to rely upon its statutory exemptions from direct taxes in respect of a dividend distributing cash proceeds out of the Company, subject to the tax status of the Developer and other Parties, they would need advice as to whether they would suffer a charge on dividends payable to them - there is the possibility of double taxation.

SPVs - public law

The procurement and state aid risks are similar here to the land pooling/trust structure.

Even though the Company appoints contractors and consultants and may enter into promotion or development agreements with promoters or buyers, as the Council would receive a dividend resulting from any 'profit' on sale made by the Company, it is receiving at least an indirect economic benefit (and arguably a direct benefit) from the joint venture. The Council may also be receiving a direct or indirect benefit from the services and works supplied to the Company.

It may be possible to structure the joint venture arrangements to seek to distance the Council from the Company and the eventual economic benefit that the Council derived from its work, but this would not be straightforward, and it would be cavalier to ignore procurement.

As with the contractual joint venture and the land pooling/trust structure best value and state aid issues must also be explored.

Ready to take that dip then?

If we haven't stressed enough that the Parties should have a clear idea as to their current position, what they expect out of the collaboration and what they are prepared to put into it, and that substance can be more important than form in analysing general pro's and con's we reiterate that again.

The Parties, especially the Council, will always need to consider public law issues. The decision to proceed by way of contractual joint venture, land pooling/trust or an SPV is also likely to be influenced by the scope of the joint venture, the commercial considerations as to whether and for how long to retain legal ownership of land, and the advice that the Parties receive on their tax positions.

However, before deciding upon the proposed joint venture structure, there's a final element that needs to be borne in mind and may add an additional dimension that steers the parties for or against a particular structure, and that's the proposed disposal structure (or delivery route or exit strategy).

We'll look at some potential disposal structures in the next article. Brownville Village remains at the concept stage for the time being.

talk to us...

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