public matters newsletter

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public sector lawyers

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talk to us...

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The fact that there is continuing conflict between providing for housing and economic growth and retaining existing green belts is not surprising. If we are to achieve growth it seems obvious that a logical approach in planning for sustainable development is to let the belt out a little. We are a nation of increasing population, since 2001 the UK population has increased by around 5 million. To put this into perspective the population of London last year was estimated at 8.2 million. It is clear then that development growth is needed to accommodate more housing, more employment and all other spatial needs such as education and recreation. It is also quite likely that the need for growth will only continue, unless our population and household projection patterns change in the future.

Where to locate the growth?

The problem comes when trying to plan where to locate new development for the necessary growth. No one wants it in their green yard it seems and the Government refuses to direct on green belt designation or allow its local plan inspectors to direct. In March this year Nick Boles, Minister for Planning, wrote to the Chief Executive of Planning Inspectorate (PINS) with a reprimand relating to an Inspector's report on the Reigate and Banstead's Core Strategy. The point was strongly made by Boles that in plan making it was not for any inspector to decide whether there should be development in the green belt, but that it must, *"always be transparently clear that it is the local authority itself which has chosen that path."*

Exceptional circumstances or very special circumstances

The Department for Communities and Local Government (DCLG) has re-stated its key protections for the countryside and, in particular, the green belt. The existing established green belts should only be altered in exceptional circumstances (National Planning Policy Framework (NPPF) para 83). This is music to the ears of a nation of homeowners who realise the benefit of their position either in the green belt or near to it. Those campaigning to protect the existing green belt have referred to the St Albans v Hunston Properties and Secretary of State for Communities and Local Government case (2013 ECWA Civ 1610) as an example of housing need not necessarily justifying development in the green belt. However, whilst the council's decision to refuse the development was upheld by an inspector on appeal, the inspector's decision was subsequently quashed in both the High Court and Court of Appeal. The final judgment refers to the principle of weighing the shortage of housing land compared to the needs of an area as capable of amounting to very special circumstances, which could outweigh the harm which would be caused to the green belt. A public inquiry into a redetermination of the appeal is due to be held.

It remains to be seen whether on further assessment by a planning inspector the case for the Hunston housing development meets the *"very special circumstances"* that continue to be the clear approach in applying Green Belt Policy (NPPF para 87). There have been two recent examples of decisions where the

Secretary of State has made the planning judgment and decided in one case to dismiss a significant new housing led mixed-use development and yet in another to allow development of 45 hectares of green belt for employment purposes. The 750 dwelling housing development with associated school and neighbourhood centre in Bowers Glifford, Essex was dismissed following Eric Pickles' decision that the significant weight of harm to the green belt was greater than the housing need presented by a lack of five-year housing supply. A similar decision was issued on another Essex site at the beginning of the year. However, the Secretary of State did determine that the expansion of Pinewood Studios, to more than twice its existing size on a site in the Buckinghamshire green belt did present very special circumstances due to its contribution to the local and national economy.

Green belt reviews

Challenges to planning application decisions are likely to continue until green belt boundaries have been reviewed and local plans adopted. The NPPF is clear that it is for local planning authorities to establish green belt boundaries in their local plans and once boundaries are set that they should be, *"capable of enduring beyond the plan period"*. In by-gone days this would have been the life of a structured plan at 20-25 years. However, the NPPF is lacking in any clear guidance on this and only requires that there is *"permanence in the long term"* of defined green belts and that planning authorities should be satisfied that boundaries will not need to be altered at the end of the 15 year plan period.

So how are planning authorities dealing with Green Belt Reviews? Reigate and Banstead's adopted core strategy has identified that the council will review green belt boundaries through the Development Management Plan process and the Core Strategy does no more than suggest amounts of housing for areas within which there will then be a search for sustainable urban extensions. Other authorities have brought forward green belt reviews alongside producing their core strategies, sometimes in more than one stage, undertaking a strategic review in order to inform strategic site designation and leaving detailed review to the Development Management Plan/proposals map stage. Planning inspectors have requested reviews take place, before they are willing to consider core strategies further, on the basis that plans are likely to be found unsound if strategies for locating new development involves green belt land and there has been no assessment informing which areas of the green belt are most appropriate for release. The Leeds City Council's Core Strategy proposed 70,000 homes by 2028 and a selective review of the green belt. However, the Planning Inspector has recommended a full review of the green belt as necessary to accommodate the scale of development proposed.

Planned changes in the green belt

Core strategies, which plan for development within the green belt are coming forward. The Bath and North East Somerset Core Strategy, adopted on 10 July 2014, allocates a number of sites for strategic development and removes them from the Green Belt. Reigate and Banstead Council have backed their core strategy which agrees the principle of development

in the green belt. It would appear that, for the moment, planning for sustainable development does involve re-shaping the green belt in places.

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With austerity unlikely to ease significantly, local authority shared service arrangements are likely to increase in number and value.

What is a shared service? There is no off-the-shelf model for local authority shared service arrangements. They can range from relatively simple sharing of officers, to more expansive arrangements involving long-term and high-value services. One size does not fit all.

Prospective partners should ask:

- are there strong synergies and economies of scale, which will make the financial and operational case for the shared services?
- is there political buy-in? However compelling the case for a shared service, it is unlikely to get off the ground unless there is strong political will. Unwilling participants can only be counter-productive and waste costs and time
- is there is a sufficient level of fit between the partners' overall aims, and the cultures of the functions subject to the shared service arrangement? What level of control (if any) needs to be surrendered in order to make the arrangement work? Is this acceptable?
- who is the driving force behind the shared service? Key to success will be officers in each partner authority being committed and able to deliver it
- what is key to success? Cost reduction, service improvements, resilience and staff retention might all be important, but where do the priorities lie?

Although there is no single model, there are some legal structures that can be used to deliver a shared service:

Joint committees (JCs)

Under a JC arrangement, powers of partner local authorities will be delegated to the JC to discharge these functions, or advise on the discharge of the functions. Although there will be an agreement setting out the terms on which the JC will operate, this is purely an administrative arrangement with no procurement of services. Importantly, the JC will not be a legal entity and cannot enter into contracts with a third party, employ staff or hold assets. A lead authority must be designated in order to do so on behalf of the JC.

Delegation

Under a delegation, one authority delegates functions to another. As with a JC, there is no procurement and this is a purely administrative arrangement. As a result, the authority delegating the function can have no direct control over, or supervisory role in respect of, the way in which the delegated functions are carried

out. Although delegations can be withdrawn at any time, they are often a difficult sell politically due to the loss of control that results.

Commercial arrangements

One authority can enter into a contractual obligation to provide services to its partners. Under this type of arrangement the authority receiving the services may have to subject them to the procurement regime, as there is no automatic exception merely because the service is being provided by another public body. There should also be a contract between the partners setting out key matters such as the services to be provided, payment terms and so on.

Joint procurements and joint ventures

A shared service arrangement might also involve procurement a private sector partner to provide services to the authorities, and perhaps participate in a joint venture arrangement with them. Unless the joint procurement is being undertaken through a legal entity (for example, a company set up by the partners) the partners must decide whether to procure jointly, or through a lead authority model where one body takes control of the procurement on behalf of its partner. Establishing these inter-authority arrangements will be crucial both in the procurement, to give confidence to the market, and also during the period of the contract to ensure that it can be managed effectively.

Consider these factors – even if to discount – before embarking on any arrangements:

- will the services involve charging or trading? Anything done for a commercial purpose must be effected through of a company

- is there a procurement? Although administrative arrangements need not be procured, contracts which contain service provisions may be subject to the procurement regime. If so, is there any exception? Will implementation of the new procurement directive change this?

- might there be a TUPE transfer of staff who currently deliver the services? Who will take responsibility for employing staff, and how will differential terms and conditions be dealt with?

- what about pensions? The Local Government Pensions Scheme, and liabilities for increasing contributions, is a key matter where a private sector partner might be involved in the shared service. In any event, an actuarial report should be commissioned at the earliest opportunity

- what will be the tax status of the new structure, particularly if a new entity is to be established?

- will any aid be provided (by either of the partner authorities) to the shared service? For example; staff, premises or guarantees in relation to pensions liabilities. If so, the potential for unlawful state aid should be considered.

The contract

When public bodies work together, entering into contractual terms does not always come naturally. This is particularly so with indemnity and liquidated damages that may seem inappropriate between public sector partners sharing the same aims of delivering services to stakeholders.

Consider these points when drawing up a contract:

- if there is a service contract, how are the services defined? Subject matter experts understand the services they run, but may never have had to write it down in contractual terms. This can be one of the most challenging aspects of documenting a shared service, and partners should allow plenty of time to deal with it

- service contracts will also require payment provisions. How will any payments be calculated and how (if at all) will deductions be made from payment if the services are not performed correctly? Even if there is no service contract, the partners may need to agree on payment terms to compensate the body which is hosting a shared service by, for example, allocating staff, premises or other resources

- how will the shared service be funded? If a joint venture is being created as part of the arrangement, how will profits be allocated?

- how will liabilities be dealt with? For example, if the partners have jointly procured a service and one of them fails to comply with its obligations, will the partner at fault compensate the other for contractual losses? These issues should be set out in an appropriate inter-authority agreement.

- who will own existing assets, how will new assets be purchased and are there any contracts to be transferred from the partners to the shared service? How will costs and liabilities in relation to staff be allocated?

- how will change be managed? This is particularly important in long-term arrangements given the potential for public bodies to change their policy and strategic directions over time, or for new bodies who may wish to join the shared service

- partnerships cannot be created by a contract, but the documents can reflect a partnering ethos. Provisions should be included to bolster communication, openness and a non-adversarial approach to contract management.

The exit

Even the strongest and most well planned arrangements can go wrong. Considering exit, just as the parties are starting out together, may seem pessimistic but the shared service should include provisions for these circumstances. One way to address this is for the partners to create a contractually binding and detailed exit plan either before the shared service begins, or during its initial period. The timescales factored into the plan should take into account the need to re-procure the relevant services.

The exit plan should include:

- how assets will be dealt with – which partner will want or need them going forward? Do they need to be valued and, if so, on what basis?
- will any contracts be transferred?
- how will liabilities for employees be transferred or apportioned?
- where is the shared service currently provided from? Will that need to change and, if so, are there suitable exit provisions in any lease?
- should any insurances be maintained for a specific time following the end of the shared service?

Any but the most straightforward shared service arrangement will raise some or all of these issues. By considering them at the outset, public service partners can increase the chance that a shared service arrangement will prosper in the long-term.

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Servicio de Utilizacao Comum dos Hospitais (SUCH) is a creature of statute, established by Portuguese law with a public service mission to contribute to the implementation of health policy and to the efficiency and financial sustainability of the National Health Service. Membership of SUCH is limited to public or social sector entities that provide health care or who are engaged in activities related to the promotion and protection of health. The majority of voting rights at general meeting had to belong to persons under the control of the member of the government responsible for health. Certain other decisions also required to be ratified by the Government Minister for Health.

SUCH was awarded a contract for the supply of meals to patients and staff by a hospital who was a member of SUCH. The contract was for five years with the option to extend and was worth €6,476,455 over the initial five years. The contract was awarded without a procurement exercise on basis it was within the framework of existing internal relations between members and SUCH. This was challenged by another provider of the same services that had previously had a contract with the hospital in question

The Portuguese court annulled the agreement but, on appeal to a higher court, six questions were referred to the European Court of Justice (ECJ) for a preliminary ruling:

1. Is it compatible with EU doctrine on in-house procurements that a public hospital, having dispensed with the procedure provided for by law for concluding the relevant contract, should award to a non-profit organisation, which it is in partnership with, and whose aim is to carry out a public service mission in the area of health with a view to enhancing the effectiveness and efficiency of its partners, a contract for the provision of hospital catering services within its area of competence, thereby transferring to that organisation responsibility for its functions in that area, if, under the provisions of its statutes, partners of that organisation may be, not only entities from the public sector, but also those from the social sector, given that on the date of the award, out of a total of 88 partners, there were 23 non-governmental organisations (IPSS) from the social sector, all of which were non-profit making and included charitable associations?

2. Can it be considered that the contractor is subordinate to the decisions of its public partners, in that the latter, on their own or as a whole, exercise a control which is similar to that which they exercise over their own departments, if, under the provisions of its statutes, the contractor must ensure that the majority of the voting rights are held by member partners and are subject to the management, supervision and guidance powers of the member of the Government responsible for health, given that the majority of the Management Board is also made up public partners?

3. In the light of EU doctrine on in-house procurements, can it be considered that the requirement of 'control which is similar' has been fulfilled, if, under the provisions of its statutes, the contractor is subject to the guidance powers of the member of the Government responsible for health who is in charge of appointing the President and Vice-President of the Management Board, approving the resolutions of the General Meeting on taking out loans involving a net debt equal to or greater than 75 % of the equity recorded in the previous financial year, approving resolutions on amendments to the statutes, approving resolutions of the General Meeting on the dissolution of the contractor and determining how the assets are to be distributed in the event of a dissolution?

4. Does the fact that the contractor is a large and complex organisation, which operates throughout Portuguese territory, is in partnership with most departments and institutions of the SNS, including the majority of the country's hospitals, has an estimated turnover in the order of EUR90 million, has a business that includes varied and complex areas of activity, with very impressive activity indicators, and more than 3,300 workers, and participates in two additional enterprise groupings and in two commercial companies, mean that its relations with its public partners may be described as merely internal or in-house?

5. Does the fact that the contractor, under the provisions of its statutes, is able to provide services on a competitive basis to non-partner public entities or private entities, be they national or foreign (i) provided that there is no resulting loss or harm caused to the partners, and that it is beneficial to them and to the contractor, whether economically or in terms of enhancement or technical performance, and (ii) provided that the provision of those services does not represent a volume of invoicing that is greater than 20% of its overall annual turnover recorded in the previous financial period, mean that the requirement for in-house procurements, in particular the requirement for the 'essential purpose of the activity', has been fulfilled?

6. If the response to any of the above questions is not in itself sufficient to conclude whether or not the requirements for in-house procurement have been fulfilled, does an overall assessment of the responses to the above questions imply the existence of that type of procurement?

The Teckal line of case law has long established the requirement that a Teckal-compliant company must:

1. be controlled by the one or more contracting authorities that are owners or members of the company as if the company was an internal department of the contracting authority (with slight nuances where more than one contracting authority is involved);

2. provide the essential part of its activities back to the controlling contracting authority; and

3. not have any private sector capital investment (this was included from a later case Stadthalle and RPL Lochau).

Interestingly, the Portuguese transposition of EU Directive 2004/18, has already codified the first two limbs of the test above.

The Attorney General (AG) reviewed the first five questions in an opinion on 27 February 2014. The AG concluded that the arrangement did not fall within the Teckal exemption, mainly because the participation of bodies in the membership of SUCH, that were not public bodies, meant that the requisite degree of control over the activities of SUCH by the contracting authority could not be exercised. The AG also referred to an earlier case (Tragsa) where it was held that 10% of the services being provided to bodies other than the member contracting authorities was within the limits of the Teckal exemption. The AG said that 20% seemed too much.

The ECJ noted, initially, that the services in question were probably part B services, meaning that the EU procurement regime may not apply. However, it was left the Portuguese referring court to decide that.

The ECJ's main findings were that:

1. SUCH was not a company in which it was possible to hold share capital, being a creature of statute, and, that the social sector partners are not undertakings as considered in the Stadthalle judgement. It was necessary to look at the purpose behind the EU procurement regime and at the reasons why the lack of involvement of partners other than public sector bodies was an important defining characteristic of a Teckal compliant company. One reason being that the Teckal exemption is to allow public resources to be used to provide public services rather than relying on private sector resources as well;

2. the involvement of a private sector entity, even one which is non-profit making, means that aims other than that of the public sector will play a part in the decisions that are made. This removes the ability to meet the limb of the test that requires the contracting authority to exercise a degree of control similar to an internal department over the company;

3. even if SUCH was not established in a way that allowed the members to hold capital, the private sector members of SUCH did still provide other services on the commercial market and the award of a contract to SUCH, without competition, may give them an advantage over their competitors; and

4. even a minority private sector interest was sufficient to taint the Teckal exemption.

Frustratingly, because of its judgement in relation to the first question, the ECJ did not address questions two to six. However, both the AG's comments and the ECJ's rulings are worth considering, particularly in light of the codification of the Teckal exemption in Article 12, subparagraphs 1 to 3 of the new EU Directive 2014/24 on public procurement (the New Directive).

Article 12 of the New Directive, states:

"1. A public contract awarded by a contracting authority to a legal person governed by private or public law shall fall outside the scope of this Directive where all of the following conditions are fulfilled:

(a) the contracting authority exercises over the legal person concerned a control which is similar to that which it exercises over its own departments;

(b) more than 80 % of the activities of the controlled legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authority or by other legal persons controlled by that contracting authority; and

(c) there is no direct private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.

A contracting authority shall be deemed to exercise over a legal person a control similar to that which it exercises over its own departments within the meaning of point (a) of the first subparagraph where it exercises a decisive influence over both strategic objectives and significant decisions of the controlled legal person. Such control may also be exercised by another legal person, which is itself controlled in the same way by the contracting authority.

2. Paragraph 1 also applies where a controlled legal person which is a contracting authority awards a contract to its controlling contracting authority, or to another legal person controlled by the same contracting authority, provided that there is no direct private capital participation in the legal person being awarded the public contract with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.

3. A contracting authority, which does not exercise over a legal person governed by private or public law control within the meaning of paragraph 1, may nevertheless award a public contract to that legal person without applying this Directive where all of the following conditions are fulfilled.

(a) the contracting authority exercises jointly with other contracting authorities a control over that legal person which is similar to that which they exercise over their own departments;

(b) more than 80 % of the activities of that legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authorities or by other legal persons controlled by the same contracting authorities; and

(c) there is no direct private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.

For the purposes of point (a) of the first subparagraph, contracting authorities exercise joint control over a legal person where all of the following conditions are fulfilled:

(i) the decision-making bodies of the controlled legal person are composed of representatives of all participating contracting authorities. Individual representatives may represent several or all of the participating contracting authorities;

(ii) those contracting authorities are able to jointly exert decisive influence over the strategic objectives and significant decisions of the controlled legal person; and

(iii) the controlled legal person does not pursue any interests which are contrary to those of the controlling contracting authorities."

So it would seem that on one hand, the Portuguese government was ahead of its' time by allowing SUCH to undertake 20% of its activities on the general market since this the test under Article 12 states that more than 80% of the activities must be for the controlling contracting authorities. On the other hand, the continuing requirement under Article 12 for no direct private sector capital involvement would not help a similar case in the future.

The ECJ stated that the holding of capital was not the defining feature of the involvement of the private sector bodies, but rather the introduction of competing interests in the control of the company. The wording of Article 12(1)(c) and 12(3)(c) suggests that a minority interest in a company similar to SUCH which has certain legislative requirements relating to the involvement of private sector undertakings may now be possible. Given the comments by the court and the AG that any exemption to the EU procurement regime must be applied restrictively, I remain unconvinced that many opportunities will exist where they don't at the moment.

This case is a good reminder of the complexities and specific facts that are considered when looking at the Teckal exemption. Public sector bodies are increasingly looking to diversify the manner in which they provide services, including the establishment of separate corporate vehicles. Inevitably, they will want to be able to award contracts to these entities without the uncertainty and additional costs associated with a competitive tender. England and Wales will shortly have procurement regulations that set out an exemption to the general requirement for competitive tendering for most services over the EU threshold. In light of the changing face of public service delivery, it is likely that the boundaries of, and meaning behind, the wording of Article 12, and the English equivalent, will be considered and tested on a number of occasions.

talk to us...

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Refreshed guidance from the Charity Commission

The Charity Commission has recently published revised public guidance on conflicts of interest for charity trustees. The updated guidance has been amended in light recent cases brought to the Commission's attention; almost all of the Commission's completed investigations in 2012/13 featured some form of conflict of interest for trustees.

In order to try to stem the tide of cases, as well as reiterating their general guidance on dealing with existing conflicts, the Commission have provided new guidance for preventing conflicts from arising in the first place.

With the growth of The Big Society and the blurring of lines between the public and third sectors, public sector employees may find a real or potential conflict between their personal and professional roles. In addition many public sector bodies may act as trustees of charities or ask key individuals with the organisation to take on that role. Both the employee and their employer should be aware of how to deal with any issues which arise as the risk of failing to identify conflicts can be legally significant and harmful to the reputation of both the public sector body and the charity.

What is a conflict of interest?

A conflict of interest is a situation where the personal interests or loyalties are, or could be seen to be, stopping a trustee from being able to make an unbiased decision.

The personal interest or loyalty could extend beyond the trustee himself to friends or relatives and can include loyalties to organisations such as employers, community groups, charities etc.

For example, key employees from a local authority are appointed as trustees of a playing fields charity. The charity's primary source of income for maintaining the playing fields is the local authority. The trustees would then have a potential conflict of interest between their loyalty to their employer (the local authority) and their duty as trustees of the charity.

Identifying the risk of conflict

It is best practice to ask trustees to declare any other interests they have, irrespective of whether this currently constitutes a conflict. Records kept should be clear, up to date and easily accessible but trustees should be aware of their obligations under data protection legislation about the retention of such information.

The duty to declare interests is an ongoing one so that, as new interests arise, they should be declared and the necessary records updated. Being able to identify significant conflicts before an individual is appointed as a trustee will assist public bodies in managing conflicts and avoiding any potential perception of conflict or bias when potentially contentious decisions relating to the charity are made.

A robust policy which clearly sets out what a conflict of interest is, how to identify a conflict and how to manage it will assist trustees in managing situations where a conflict may arise. Trustees should be aware of the policy, its contents and when it should be used.

Managing conflicts of interest

Trustees of a charity must base their decision solely on what is in the best interests of the charity and any conflict of interest which could potentially affect their decision must be eliminated. This may require the trustees to not pursue a particular course of action entirely, not appoint a particular individual as trustee or take an alternative action which does not involve a conflict.

For example, a town council acts as the trustee of a theatre charity. The charity is considering free tickets just to employees and councillors of the town council. There is an obvious conflict of interest between the council acting as trustee and as a town council and therefore no free tickets should be offered.

If only certain trustees are affected, the remaining trustees may still decide to continue in spite of the conflict if they are confident they can prevent it from affecting their decision. In this instance, the trustees should follow the conflicts provisions set in their governing document and ensure that no conflict trustees part in the decision making process. If no conflicts provision exists in the governing document, the trustees may amend the governing document or ask the Charity Commission to authorise the proposed transaction.

For example, three trustees of a charitable public sector mutual providing care services are appointed by a local authority. When considering whether to enter into a contract with the local authority, these three trustees must not attend meetings (or any part of a meeting) where the proposed contract is discussed, cannot count towards the quorum of those meetings and cannot vote on the proposed contract.

Recording conflicts of interest

Once an actual or potential conflict of interest has been identified, the charity should record details of the conflict and how it was handled in the charity's records. If any decision is called into doubt later on, this information will be vital to assist with demonstrating that the decision was properly taken and was reasonable in the circumstances.

In summary

Charities should:

- keep accurate and up to date records of interests
- have a clear and robust policy for identifying and dealing with conflicts
- ensure trustees are aware of policy and how to deal with conflicts of interest
- check their governing document to ensure that it contains provisions to deal with conflicts of interest and, if not, consider amending the document.

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break point again (!)

Two more cases on break clauses

There seems to be a never ending supply of cases involving break clauses at the moment, particularly involving landlords seeking to challenging tenants who think they have exercised their break rights.

We deal here with two more Court of Appeal decisions reported close enough to Wimbledon fortnight/Roland Garros to pardon (we hope) the pun above.

Siemens Hearing Instruments Ltd v Friends Life Ltd [2014] EWCA 382

Facts

Under a 25 year lease granted in 1999, the tenant had a break option on 23 August 2013. Exercise of the break option required between 6 and 12 months' notice to be given and was subject to certain pre-conditions being satisfied (vacant possession being given; all sums due being paid; and payment of an additional six months' rent). In addition, the lease also provided that the notice *"must be expressed to be given under section 24(2) of the Landlord and Tenant Act 1954"*. The tenant's solicitors served a notice in time exercising the option, but failed to include the wording in italics above.

Issue

Was the break notice invalid because the required wording had been omitted?

Decision

The break notice was invalid. Where a party has a unilateral option (such as an option to terminate a lease) which requires substantive conditions to be complied with before the other party's obligations are triggered, those conditions have to be complied with completely (substantial compliance is not enough) and even trivial non-compliance will preclude the exercise of the option.

Points to note/consider

1. At the time the agreement to grant this lease was entered into, there was a concern amongst landlords that tenants could exercise a break right by serving a section 26 request for a new lease (in order to get the rent reduced). The wording was included here in an attempt to stop the tenant doing just that. The 1996 case of Garston v Scottish Widows Fund has since made it clear that section 26 cannot be used in this way in any event.

2. The judge at first instance had held the break notice valid. He was influenced by the fact that the break clause was part of a well-drafted lease and the lease did not say that a failure to include the required wording invalidated the break notice (so it was up to the court to decide on the

consequences of non-compliance). The Court of Appeal ruled that this approach was incorrect. The consequences of non-compliance were supplied by the common law. If a purported exercise of an option failed to satisfy both the formal and substantive requirements of the relevant clause, it would be ineffective.

3. Whilst the decision may seem harsh on the tenant, it confirms what most people had understood the law to be prior to the first instance decision. It brings to mind Lord Hoffman's famous observation in the 1997 case of Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd that *"if the clause had said that the notice had to be on blue paper, it would be no good serving a notice on pink paper, however clear it might have been that the tenant wanted to terminate the lease"*. The decision also brings certainty back to the situation (the tenant has either complied with all the conditions or it has not) and so makes advising landlords and tenants easier in the future.

4. This strict approach to the construction of break clauses has also been recently confirmed in a Scottish case of Arlington Business Parks GP Ltd v Scottish & Newcastle Ltd [2014] CSOH 77. In that case, the break options in two separate leases were conditional on the tenant not being in breach of any of its obligations *"at the date of service of such [break] notice and/or the termination date"*. As the tenant had not complied with its repairing obligations on the date it served its break notices, the Outer House of the Scottish Court of Session held that the leases had not been validly determined (even though the tenant subsequently spent over £1.3m to ensure that the premises were in proper repair at the termination date specified in the break notices).

Marks and Spencer Plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd and another [2014] EWCA Civ 603

Facts

Marks and Spencer (M&S) had four leases on four separate floors of an office building, each with identical break rights on 24 January 2012. Operation of the break clauses was conditional on there being no arrears of basic rent on the break date and on M&S paying a penalty equivalent to a year's rent.

M&S exercised the break rights successfully but then claimed from the landlord a refund of the rent, service charges, insurance and car park licence fees paid in advance for the period from the break date to the next quarter day (described in the case as the 'broken period'). There was no express provision in the leases requiring the reimbursement of this money.

Issue

Could a term be implied into the leases entitling M&S to a refund?

Decision

The Court of Appeal held that such a term should not be implied as the leases (read as a whole against the relevant background) would not reasonably be understood to include such a term. It would have been obvious to the parties before they signed up to the leases that rent would have to be paid in full on the last quarter day for a period going beyond the break date. They could easily have added clauses requiring the landlord to reimburse advance payments for the broken period had they been so minded to do so. The loss for the broken period should lie where it fell (save as mentioned below).

Points to note/consider

1. Case law [the 2012 cases of PCE Investors Ltd v Cancer Research UK and Canonical UK Ltd v TST Millbank LLC] makes it clear that where a conditional break clause requires a tenant to pay all rent due up to the break date, the tenant must pay the full quarter's rent on the quarter day before the break date (it is not enough to pay an apportioned sum from the quarter day to the break date). Whilst each case will turn on its own facts, this case indicates that once the break clause has been successfully exercised, the tenant will not usually be entitled to a refund of the excess rent from its landlord if the lease is silent on this point.

2. Interestingly, Arden LJ did say (without having to decide the point) that had M&S paid the break penalty by the quarter day prior to the break date, it could then have paid on that quarter day a proportionate part of the rent covering the period to the break date (because the rent was expressed to be payable *"proportionately for any part of a year"* and the break clause would then have become unconditional, so it would have been certain that the lease would end on the break date). However, it would be a brave (or perhaps foolhardy) tenant who relied on this in the current climate.

3. As a result of this decision, M&S are nearly £1m out of pocket. When acting for a tenant (unless the break date is just before a rent payment date), it is imperative to state expressly that, following the exercise of a break clause, the landlord will reimburse the tenant for any excess sums paid in advance covering any period after the break date.

4. The landlord did accept in this case (based on established case law) that M&S were entitled to recoup any service charges they had already paid for services which had not been provided by the break date, as well as any credit for past overpayments of service charge.

Comments

As landlords are ever keen to retain tenants (or at least those rent paying tenants they want to retain!) it is important for a landlord to check with its legal advisers before assuming or accepting that a break clause has been validly served and that any preconditions have been fulfilled.

Careful consideration at heads of terms stage is extremely helpful in seeking to identify any conditions to be specified and minimising legal spend on negotiating lease break clauses.

Tenants have been given enough warnings by case law over the last couple of years to be wary of agreeing break clauses with conditions, or at least without negotiating those conditions out to the fullest extent achievable given other commercial considerations, and must surely now be aware that they are going to have to provide explicitly for any rent paid in respect of a period after a break date to be refunded if that is intended and required.

So, advice at both drafting and pre-exercise stages is vital for the tenant.

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'As of' right or 'by' right – what is the difference?

A recent Supreme Court decision is potentially significant for local authorities wishing to develop land originally made available to the public under a statutory power or sell it for development, as well as to developers looking to buy and build on it.

It will now be easier to defeat applications by local inhabitants to register such land as a town or village green ('TVG') in order to prevent development.

The case will also be relevant for registration authorities.

R (on the application of Barkas) v North Yorkshire County Council [2014] UKSC 31

Facts

Land belonged to a local authority, whose predecessor had acquired it in 1951 under the provisions of the Housing Act 1936.

The local authority had laid it out and maintained it as a recreation ground pursuant to Section 80(1) of that Act, which permitted local authorities to provide and maintain recreation grounds in connection with the provision of housing under that Act.

The appellant applied to register the land as a town or village green (TVG) under section 15 of the Commons Act 2006 (CA 06) on the ground that it had been used as of right by local inhabitants for sports and pastimes for the requisite period of 20 years.

The application was rejected on the basis that the public had a legal right to use the land for recreation and so their use was 'by right', not 'as of right'. The appellants sought judicial review of this decision.

Issue

Was the publics' use of the land 'by right' (in which case the application to register the land as a TVG would fail) or 'as of right' (in which case it would succeed)?

Decision

Where land was provided and maintained by a local authority pursuant to section 12(1) of the Housing Act 1985 (or its statutory predecessors), the use of that land by the public for recreational purposes was not use 'as of right' within the meaning of section 15(2)(a) CA 06. Members of the public had a statutory right to

use the land for recreational purposes and therefore they used the land 'by right' and not as trespassers (so that no question of use 'as of right' could arise).

Points to note/consider

1. Under section 15(2) (a) CA 06, anyone can apply to register land as a TVG where a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years. A use 'as of right' must be without force, secrecy or (crucially in this case) permission.

2. In this case, the Supreme Court explained that the expression 'as of right' was effectively the antithesis of 'of right' or 'by right'. It referred to a situation where the use did not have the permission of the landowner, but was nonetheless carried on as if it were by right. A person either had a right to be on the land doing what he was doing, or he did not; someone who was using land with the permission of the landowner could not be using it 'as of right' (he was instead using it 'by right').

3. In the 2004 case of R (on the application of Beresford) v Sunderland City Council, the House of Lords had held that land acquired under the New Towns Act 1965 and used for recreation purposes pending development (which the local authority had power to do under that Act) was not used 'by right' (and so could be registered as a TVG).

4. To avoid leaving the law in a state of confusion, the Supreme Court took the unusual step of ruling that this earlier case had been wrongly decided.

Comments

This has to be seen as a common sense decision which will clearly be welcomed by local authorities seeking to realise value from land owned by them with development potential and to promote regeneration, if not by all members of the local electorate.

Disposal of recreation areas and other open spaces, particularly when close by established residential communities, whether or not technically greenfield land, is always going to be politically charged but at least in cases such as this objectors may have to rely on due planning process and other ways of seeking to thwart development proposals.

This case also ought to be borne in mind where a local authority is responsible for maintaining the Register of Common Land and Town and Village Greens is presented with an application in similar circumstances.

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the living wage

The living wage commission has announced its findings from its 12 month inquiry into the future of the living wage. The living wage, unlike the national minimum wage, is not a statutory minimum rate of pay, but a voluntary rate viewed as socially acceptable and intended to bring those on the lowest rates of pay above the poverty line. It is calculated by the Greater London Authority and the Centre for Research in Social Policy and increases each year as living costs rise.

The commission, made up of business leaders and anti-poverty groups and chaired by John Sentamu, Archbishop of York, recommends that the Government adopts the living wage as an 'explicit goal' to help lift 1 million workers out of low paid jobs. However, it refused to go further and support demands for legislation to create a higher minimum wage. Instead, the commission believes that the decision whether to adopt the living wage should be left for employers to decide, rather than being forced to introduce it.

The UK living wage rate currently stands at £7.65 an hour outside London (approximately £14,758 per annum based on a 37 hour working week); and at £8.80 per hour in London. This is higher than the lower pay scales on National Joint Council (NJC) pay scales.

Employers who want to implement the living wage can simply choose to pay their staff the relevant rate of pay, whilst others choose to seek accreditation from the Living Wage Foundation. The breakdown of accredited employers shows that the vast majority and in the private and third sectors, with only 18% of accredited employers in the public sector.

What is the cause of this? Is it the squeeze on the public purse, the obligations that becoming accredited imposes including being committed to a salary rise imposed by a third party, or the impact on less flexible pay structures?

Accreditation allows employers to use the living wage employer mark, amongst other benefits, but correspondingly brings with it certain obligations. These include applying the annual uplift and imposing an obligation on the employer's contractors to apply the living wage for their own staff. This can be imposed on contractors through the procurement process for the relevant service.

However this raises additional problems. Does the contractor apply the living wage for all members of its workforce, or will it only be obliged to do so for employees assigned to the service being provided?

If it creates differential rates of pay across the contractor's workforce there may be equal pay implications needing the contractor to demonstrate a material factor to explain the differences or, if there is a gender

imbalance, objective justification. Objective justification requires a legitimate aim (here likely to be the aim to ensure workers are paid at least enough to meet the cost of living) and to have acted proportionately in the way in which an employer goes about achieving that aim.

The potential issues do not end there. Applying the living wage to the lowest pay grades creates a further imbalance with employees at a higher grade being paid less than those evaluated at a lower level. Employers adopting the living wage for its lower paid workers are unlikely to want to adjust pay at all levels and so will need to assess whether there is a disparate impact on one gender and whether that is a short term transitional issue or a longer term problem that needs to be addressed.

This imbalance may be further accentuated by the higher annual uplift due to cost of living increases in the case of the living wage (the last living wage increase in November 2013 was 2.68%) than the increases that would otherwise be applied to other pay scales.

Whilst there are many advantages therefore flowing from the living wage scheme, employers should be careful not to simply adopt it for its lower paid staff without carefully assessing and considering the potential impact on other levels of staff, the risk of pay inequalities and finding ways to balance the overall effect on its pay and grading system to avoid equal pay liabilities.

If this is something you are considering, do give us a call and speak to us about managing the employment or procurement and commissioning implications.

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