

Effective OJEU contract notice defeats claim for declaration of ineffectiveness

High Court dismissed a claim for a declaration of ineffectiveness for a contract entered into by Basingstoke and Deane Borough Council (the Council) and Newriver Leisure Limited (NLL) for a major regeneration scheme on Basingstoke Leisure Park.

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In *AEW Europe LLP v Basingstoke and Deane BC* [2019] EWHC 2050 (TCC) (26 July 2019) the High Court dismissed a claim for a declaration of ineffectiveness for a contract entered into by Basingstoke and Deane Borough Council (**the Council**) and Newriver Leisure Limited (**NLL**) for a major regeneration scheme on Basingstoke Leisure Park. The claimants (AEW Europe LLP and others) argued that the OJEU Notice published did not make provision for the nature and extent of the retail facility contemplated in the eventual development agreement.

The High Court dismissed the claim on two key bases:

1. Even assuming there had been a breach of procurement law, the claimants would not have the remedy of declaration of ineffectiveness available to them.
2. The Council had published a wholly valid notice and there was a sufficient and close connection between that notice and the development agreement.

Effect of the decision

The consequence of this decision appears to be that where an effective notice has been published which has initiated competition, and where that notice related to the procedure adopted and the contractual outcome, the remedy of ineffectiveness will not be available. Leaving aside 'no notice' situations (such as in *Faraday*) this decision offers a welcome improvement to legal certainty for both contracting authorities and successful bidders.

Background

In June 2013, the Council published an OJEU notice for the procurement of a development partner via a negotiated procedure. 2 bids were submitted in accordance with the published evaluation. Out of the two bids, both of which made it to the second stage, only NLL made a final bid after which negotiations with them continued. In April 2015 NLL proposed a bolder scheme which was subsequently presented to the Council's Cabinet in April 2016. The Council resolved to enter into a development agreement with NLL; the contract was entered into on 19 March 2018.

At the time of publication to procurement was subject to the Public Contracts Regulations 2006; however it was the Public Contracts Regulations 2015 (which replaced the former) that were referred to for the judgement as they were deemed to be, in substance, comparable.

Proceedings

In 2016, AEW, the first claimant, acquired multiple retail investment properties in Basingstoke. It subsequently became aware of the regeneration/development proposal and raised its concerns about the conduct of the procurement with the Council. AEW's incentive for doing so being that it had an interest in how the shopping centre that housed its properties may be affected by the new leisure park.

In September 2018, AEW and other claimants (who owned Festival Place retail facility) issued proceedings against the Council seeking a 'declaration of ineffectiveness in respect of the March 2018 contract'. The claimants argued that the OJEU Notice published in 2013 had only permitted retail development which was minor and ancillary to the operation of the park but the 300,000 square feet of retail space provided for in the March 2018 contract would be a substantial change.

The claimants argued that the development agreement diverged from the contract sought by the tender process to such an extent that it was materially varied and therefore would've required a fresh procurement process under regulation 72 (states that a contract may be modified without a new procurement procedure if any of the cases permitted under that regulation apply, and that a new procurement procedure is required where modification is in a manner not provided for in that regulation). The claimants based their argument on the following:

- They states that the OJEU notice **only** permitted minor development which was ancillary to the construction and operation of a leisure facility.
- The notice **did not** commence procurement for the construction and operation of the facility.
- The provision of 300,000 sq ft (as under the contract with NLL) was a **substantial change** from the procurement process initiated by the June 2013 notice.

The Council countered that the contract was advertised, a tender process was followed and the OJEU notice was broad enough to accommodate for development, and therefore the declaration of ineffectiveness was misconceived.

Procurement documentation

The OJEU notice stated as follows:

- The Council was seeking a development partner to implement a long-term strategy for the development on the leisure park. They were looking to establish a partnership which would explore the means by which the development would best be pursued.
- The partnership would last up to 15 years and long leaseholds would be granted to the developer as phases were delivered.
- The contract value would be between £50-£150m plus VAT.

The chosen partner would be required to:

- Lead the reposition of the leisure park's profile;
- Undertake pre-development work; and
- Bring forward proposals deliverable on a phased basis.

The Invitation to Submit Outline Proposals provided that;

The developer was expected to:

- Secure a development partner to bring forward the development of the whole park (and offer that partner a long-term partnership); and
- Seek innovative proposals to create a regional leisure destination.

The Council recognised that in order to be financially viable as a development scheme proposal schemes may include ancillary supporting and complementary uses.

The development agreement states that the objectives of the development were to create a high quality leisure destination and ensure a high standard of design/architecture. The agreement provided that the ratio of floor space of leisure use to designer outlet centre must not be less than 2:1.

Judgment

Sir Robert Akenhead stated that in this case, as in the *Alstom Transport v Eurostar International Limited* [2011] case, the OJEU notice was valid as he found "*a sufficient and indeed close connection between the OJEU Notice issued in this case and the Development Agreement*". Therefore, the High Court held that the declaration of ineffectiveness was not available to the claimants and the preliminary issue was decided in favour of the Council and NLL.

In deciding the matter the Court noted the following points:

- The procurement regulations do not specifically provide for the event that the OJEU Notice is valid but the contract goes beyond what has been set out in the notice.

- There was no objection to the original OJEU notice (and that this was not a case in which the Council had neglected to publish a notice).
- That in order to require the Court to make a declaration of ineffectiveness there needed to be more than a mere divergence from the contract notice. The most relevant authority on this was the Alstom case. Sir Robert Akenhead commented that *“the primary reason for this approach [to the remedy] is pragmatism, which takes into account the fact that the declaration of ineffectiveness remedy is a Draconian one which brings to an end an otherwise lawful contractual relationship.”*

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