

Case Name: *Faraday Development Ltd v West Berkshire Council & Anor* [2018] EWCA Civ 2532 (14 November 2018)

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Commentary: This was an appeal brought by Faraday Development Limited (the “Claimant”), a special purpose vehicle which owned the leasehold of a number of sites at the London Road Industrial Estate in Newbury, the freehold of which was owned by West Berkshire Council (the “Council”). In September 2015 the Council entered into a development agreement with St Modwen Developments Ltd (the “IP”) for the disposal of land at the London Road Industrial Estate for the purpose of redevelopment. The Claimant, along with a development partner, had made a bid for the regeneration of the estate, and argued at first instance before Holgate J. that the award of the development agreement to the IP was in breach of Directive 2004/18/EC “on coordination of procedures for the award of public works contracts, public supply and public service contracts” and the Public Contract Regulations. The Judge at first instance dismissed the claim. The Court of Appeal overturned Holgate J’s judgment.

The Court considered whether the development agreement would qualify as a “public works contract” as defined in the 2004 Directive and in accordance with the principles set out in a number of European cases. Although the development agreement lacked a number of the requirements of such a contract, namely as the IP was not under an immediately enforceable obligation to carry out the development, the Court found that the Council had bound itself through the development agreement once the IP exercised its option. Therefore although the development agreement itself wasn’t a “public works contract”, the manner in which it was drafted would result in a “public works contract” coming into being at a later stage without a lawful procurement process having been undertaken. By entering into the development agreement the Council had therefore committed itself to act unlawfully in the future.

The Court of Appeal held on the remaining grounds of appeal that:

- a) the lawful procurement process had not been deliberately and unlawfully avoided;
- b) the development agreement was not a “public services contract”;
- c) the claim for a declaration of ineffectiveness was not precluded by the Council’s voluntary transparency notice; and
- d) a claim seeking relief was not time-barred and even if it had been the Court would have exercised its discretion.