

# **Development agreements: are they caught by the PCRs?**

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# Introduction



- Key issue in the design of development agreements
- Developing area of the law: *Faraday v West Berks*
- Talk will address the key cases on DAs and procurement (European and domestic), and identify areas of continuing legal uncertainty

# PCR 2015 – key provisions



Reg 2(1):

- public contracts are "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 products or the provision of services" ...

# PCR 2015 – key provisions



Reg 2(1):

- Public works contracts are public contracts which have as their object any of the following:-
  - (a) the execution, or both the design and execution, of works related to one of the activities listed in Schedule 2;
  - (b) the execution, or both the design and execution, of a work;
  - (c) the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority exercising a decisive influence on the type or design of the work.

## PCR 2015 – key provisions



“work” means: "the outcome of building or civil engineering works taken as a whole which is sufficient in itself to fulfil an economic or technical function."

Reg 2(2) – read in light of the 2014 Directive ... “works” thus includes site preparation and construction of new buildings

## Gestion Hotelera (1994)



- Invitations to tender regarding a hotel owned by the Municipality of Las Palmas which was intended for a casino
- Conditions to be fulfilled by the tenderers included:
  - Their *“sole and exclusive object shall consist in the operation of gaming establishments”* at the hotel
  - The successful tenderer *“was to carry out the necessary works for the renovation, conversion and restoration of the installations so that the hotel and its surroundings could retain their five-star status and could offer the obligatory additional services”*

## Gestion Hotelera (1994)



- ECJ: it was not a public works contract.

“The main object of the award of the contracts was, first, the installation and opening of a casino and, secondly, the operation of a hotel business. It is common ground that those contracts, considered as such, do not fall within the scope of Directive 71/305.”

“For a contract to be a public works contract, its object must be the achievement of a work and... insofar as those works are incidental rather than the object of that contract, they do not justify treating the contract as a public works contract.”

## Ordine degli Architetti (2001)



- Concerned the restoration of La Scala Opera House in Milan
- Italian public law regulation :
  - any activity involving development on municipal land made the owner liable to contribute to the related infrastructure costs
  - the infrastructure contribution was paid to the municipality when planning permission was granted
  - but the recipient of p.p. could undertake to execute the infrastructure works directly and the cost set-off against the financial contribution



## Ordine degli Architetti (2001)



- Development agreement provided that the developers:
  - would fund and construct the related infrastructure works directly (as per the aforementioned Italian law); and
  - would transfer the Teatro alla Bicocca to the Council free of charge

# Ordine degli Architetti (2001)



- ECJ: it was public works contract subject to procurement
  - The definition of “public works contract” should be interpreted purposively, and should not be interpreted in a way that would deprive the Directive of practical effect
  - The fact that direct execution of infrastructure works was provided for by Italian planning legislation was not sufficient to exclude the agreement from the scope of the Directive when the elements needed to bring it within the Directive were present (contract for pecuniary interest between contracting authority and contractor for works)
  - Unaffected by the domestic law rule preventing the authority from choosing the party providing the works – the contract could have required the owner to comply with the requirements of the Directive in selecting who should carry out the work on its behalf

# Auroux v. Roanne



- Agreement between Roanne Council and (part-public, part-private) developer for construction of a leisure centre in successive phases consisting of:
  - cinema, hotel & commercial premises: to be transferred to 3Ps
  - car park, access roads and public spaces: to be transferred to the Council.
- The agreement provided:
  - The Council's aim was to regenerate a run-down urban area
  - Council would contribute towards the financing
  - Any unsold land & buildings would be transferred to the Council, which would guarantee the performance of any ongoing contracts

# Auroux v. Roanne



- ECJ: this was a public works contract
  - Rejected the argument that, because a large part of the works was intended for 3Ps, it could not be required as corresponding to the municipality's requirements
  - Whether or not the developer would execute the works itself or arrange for their execution by subcontractors was irrelevant
  - “Public works contract” is an EU law concept and so the agreement's legal classification in French law was irrelevant

## Auroux v. Roanne

- The existence of a “work” *“must be determined in relation to the economic or technical function of the result of the works undertaken”*. Here, the commercial and leisure elements of the development meant that it should be regarded as fulfilling an economic function
- The construction of the development was to be regarded as *“corresponding to the requirements specified by the municipality”* because, taken as a whole, the project was intended by the Council to reposition and regenerate the local area
- SEDL was a “contractor” notwithstanding its semi-public status

## Helmut Muller (2010)

- Arose out of the sale by the Bundesanstalt (federal agency responsible for managing public property) of a disused barracks
- Contract for sale of property agreed after the local council had approved the project in principle (on a w/p basis)
- Next step was for local council, under the domestic Building Code, to draw up a building plan for the works intended for the site and award the developer a contract for the execution of the works
- No obligation to carry out the works
- Viewed overall, did this amount to a public works contract?

# Helmut Muller



- ECJ: this was not a public works contract
- Key point: the Directive requires an enforceable agreement giving rise to an obligation to undertake works
- Economic benefit to public authority can arise either by acquiring ownership of works, or in benefits derived from future use of the works etc ... but exercise of planning powers in the public interest does not, on its own, give the public authority an immediate economic benefit of the relevant kind.

## Helmut Muller

- As to the requirement for an obligation:
  - Requires contractor to undertake to carry out, or to have carried out, the subject works
  - Contractor must assume a direct or indirect obligation to carry out the works
  - Obligation must be legally enforceable
- As to requirement for works to correspond with public authority's specified requirements, authority must either take measures to define the works, or have had a decisive influence on them
  - “Decisive influence” now reflected in PRC 2015



## Implications of the need for an enforceable obligation: *Midlands Co-operative* (2012)



- Local authority executed DA with developer
- Developer paid non-refundable deposit on execution of DA
- Council had specified period in which to serve put option notice, which it could only do on obtaining VP and consents for the development site
- Developer could then choose, at its discretion, whether to exercise option to acquire land. Development obligation arose if, and only if, the purchase was completed.

# Implications of the need for an enforceable obligation: *Midlands Co-operative* (2012)



- Held (Hickinbottom J): not a public contract

“The advantage, from the Council's point of view, was that the onerous provisions of the procurement provisions would not apply to the sale of the land, and may not apply to any part of the arrangement. The disadvantage is that they lost the imposition of an obligation on the successful bidder to commit themselves to the development obligations. However, these are the different sides of the same coin: both derive from the presence or absence of contractual obligations to perform works. ... The Council cannot be criticised for formulating a strategy with regard to the development of this Site that, whilst having other downsides (including an absence of development obligations it could enforce against a successful tenderer) avoided the onerous obligations of the ... 2006 Regulations.”

## Implications of the need for an enforceable obligation: *Midlands Co-operative* (2012)



- As to direct and indirect obligations (*Helmut Muller*):

“The reference there to “direct *or indirect* obligation to carry out the works” does not detract from the firm requirement that there must be a legally enforceable obligation on the contractor, the reference to “indirect obligation” simply reflecting the flexibility with which the obligation may be met, (e.g. through sub-contractors.”

## Faraday v West Berkshire Council (2016)

- Most recent case on DAs in the planning context
- Concerned £125 million redevelopment of an industrial estate in Newbury
- West Berks executed DA with ST Modwen; challenge brought by unsuccessful rival bidder

## Faraday v West Berkshire Council (2016)

- Key points in DA:
  - SM proposed contents of plans and strategy documents
  - SM proposals approved by steering group with equal numbers from SM and WB
  - SM determines content of planning applications
  - SM only under a development obligation for any given plot if it exercises right to acquire that plot. Has a commercial incentive to do so, but no legal obligation.

## Faraday v West Berkshire Council (2016)



- Held (Holgate J):
  - Main object of a contract determined having regard to transaction as a whole, and any essential obligations (para 174)
  - No room for an anti-avoidance principle in deciding the scope of “indirect obligations” as referred to in *Helmut Muller*; , rather, the question whether a contract falls within the PCR is an objective one (para 188)
  - “Indirect obligation” principle limited to sub-contracting or agency-type arrangements (para 207)

## Faraday v West Berkshire Council (2016)

- Held (Holgate J):
  - On the facts, SM under no works obligations, even deferred ones, unless and until it exercises draw down on a plot, and whether it draws down a plot is entirely a matter for SM (para 195)
  - Where contract's main purpose is the design and execution of works, only a public contract if developer under a legally binding and enforceable obligation to deliver both the design and the execution.
  - Further, WB had no “decisive influence” for purposes of “by whatever means” limb. Steering group approval had to be unanimous, so WB could not veto SM proposals unilaterally

## The future ...

- Appeal in *Faraday* pending – likely to involve a wide-ranging analysis of interaction of DAs with the PCR regime, particularly on contingent obligations
- Brexit .....





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