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Sarah Hannaford QC

Keating Chambers

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Land and development agreements after *Roanne*

**Sarah Hannaford Q.C.
Keating Chambers**

The problem

- To what extent are regeneration projects, development agreements and even section 106 agreements affected by the procurement regime?
- The effects of *Roanne*

When do the Directive and Regulations apply?

- Public works contracts
- Public services contracts

Public Contracts Regulations 2006

Regulation 2:

- *“a contract, in writing, for consideration (whatever the nature of the consideration)-
(a) for the carrying out of a work or works for a contracting authority; or
(b) under which a contracting authority engages a person to procure by any means the carrying out for the contracting authority of a work corresponding to specified requirements.”*
- Works are any of the activities specified in Schedule 2 to the Regulations.
- A “work” means: *“the outcome of any works which is sufficient of itself to fulfil an economic and technical function”*.

The case law – starting point

- *R v Brent London Borough Council, ex parte O'Malley* (31.7.97) (CA)
- Case C-399/98 *La Scala* (2001)
- Case C-220/05 *Jean Auroux v Roanne* (2007)

La Scala

The facts:

- Construction of the shell of a theatre by a developer on its land – which was to be transferred to the Council
- The Council did not pay for the work, but it was set-off against an infrastructure contribution

The judgment:

- This was a public works contract
- The execution of the infrastructure works amounted to “works”
- There was a contract – although the Council could not choose the contractor
- The set off was enough for pecuniary interest
- The developer was a “contractor”

Roanne

The facts:

- Regeneration project - development of leisure centre
- On land to be acquired by SEDL
- Land was mainly to be transferred to 3rd parties
- SEDL to advertise sub-contracts
- Payment from Council and 3rd parties
- On expiry, land unsold to be transferred to Council and Council to pay excess on balance sheet

The judgment:

- Main purpose of agreement was the performance of works, leading to a “work”
- The agreement fulfilled an economic function
- It corresponded with the Council’s requirements
- It was for pecuniary interest

It did not matter that:

- The agreement went beyond the execution of works – classification depended on its main purpose
- The development was on the developer's own land
- Much of the development was to be transferred to 3rd parties
- The developer was not carrying out the works itself

Is there any way out?

A number of possibilities:

- Not for pecuniary interest
- No specified requirements
- The land exemption
- The sale of land
- Mixed purpose transaction
- Exclusive rights
- Paragraph 100 of *La Scala*
- Concessions

No easy answer

- Limited case law since *Roanne*
- Long awaited OGC guidance – Information Note 11/09, 16.10.09
- But - not intended to be definitive or comprehensive and does not include section 106 agreements....

(1) No pecuniary interest

- Broad construction of pecuniary interest:
see *La Scala* and *Roanne*
- Set-off is enough
- Payment by combination of Council and third parties counts

(2) No specified requirements

- How specific is specified?
- Case C-536/07 *Commission v Germany (Cologne)*, AG Opinion, 4.6.09
- OGC Guidance – broad parameters different from type of specification necessary

(3) The land exemption

- Regulation 6(2)(e): the acquisition of land, including existing buildings and other structures
- Contrast purchase of existing buildings with work corresponding to specified requirements

(4) The sale/transfer of land

Flensburg infringement proceedings (IP/08/867)

- Sale of land to developer for construction of a building to correspond to urban development needs. Council had right to re-purchase land if building not constructed
- Infringement proceedings started and dropped (June 2008)
- Not a public works contract – no legally binding obligation to execute specified works

(5) Mixed contract - main purpose test

- What is the main purpose of the contract?
- *Gestion Hotelera Internacional* [1994] ECR I-1329

- *Quedlinburg* infringement proceedings (IP/09/437) 19.3.09
- Case C-536/07 *Commission v Germany (Cologne)*, 4.6.09 (AG Opinion)

(6) Exclusive rights

- Regulation 14(1)(iii): use of the negotiated procedure without prior notice is permitted when *“for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the public contract may be awarded only to a particular economic operator”*
- But: is ownership of land an exclusive right?
- *Quedlinburg* infringement proceedings
- The use of exemptions must be strictly justified

(7) La Scala

- Paragraph 100 of judgment
- Compliance at the lower level
- But is this paragraph correct in the light of *Roanne*?

(8) Concessions

- Public service concessions excluded from Regulations
- Public works concessions not excluded

- Key factors – right to exploit and risk
- Commission's *Interpretative communication on concessions under Community law*
- Case C-458/03 *Parking Brixen*
- Case C-382/05 *Commission v Italy*

- *Osboldwick* infringement (IP/09/1000)
25.6.09
- *Doornakkers Centre, Eindhoven*
(IP/09/1478), 8.10.09

OGC's conclusions

- Development agreement may be less likely to comprise public works contract/works concession if:
 - To be undertaken at initiative and autonomous intention of the developer
 - Ancillary/incidental to property transfer
 - Based on developer's proposals not authority's requirements
 - No pecuniary interest
 - No specific contractually enforceable obligations to do works

Conclusions

- Safe solution in many cases is advertisement
- Possible ways round: arguable, but not risk free
- Response awaited on infringement cases (see above) and references (e.g. Case C-451/08 *Mueller v Bundesanstalt für Immobilienaufgaben*)

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