Neutral Citation Number: [2018] EWCA Civ 2532

Case No: C1/2016/3613

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE ADMINISTRATIVE COURT**
**PLANNING COURT**
**MR JUSTICE HOLGATE**
**[2016] EWHC 2166 (Admin)**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 November 2018

**Before:**

**Lord Justice Lewison**
**Lord Justice Lindblom**
**and**
**Lord Justice Flaux**

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**Between:**

| | |
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| **Faraday Development Ltd.** | **Appellant** |
| **- and -** | |
| **West Berkshire Council** | **Respondent** |
| **- and -** | |
| **St Modwen Developments Ltd.** | **Interested Party** |

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**Mr Nigel Giffin Q.C. and Mr Charles Banner** (instructed by **DAC Beachcroft LLP**)
for the **Appellant**
**Mr David Elvin Q.C. and Mr Joseph Barrett** (instructed by **Womble Bond Dickinson (UK) LLP**)
for the **Respondent**
**The Interested Party did not appear and was not represented.**

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Hearing date: 12 June 2018

# Judgment Approved by the court for handing down (subject to editorial corrections)

**Lord Justice Lindblom:**

*Introduction*

1. This appeal concerns the application of the law of public procurement to contracts by which local authorities seek to bring about the development of land in their ownership. It raises this question. Did a local authority act in breach of the requirements of Directive 2004/18/EC "on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts" ("the 2004 Directive") and the Public Contracts Regulations 2006 ("the 2006 regulations"), when, without having followed a procurement process under the 2006 regulations, it entered into a development agreement containing contingent obligations on the part of the developer to carry out development on its own industrial land?

2. The appellant, Faraday Development Ltd., appeals against the order of Holgate J., dated 26 August 2016, dismissing its claim for judicial review of the decision of the respondent, West Berkshire Council, to enter into a development agreement, on 4 September 2015, for the disposal of land on the London Road Industrial Estate, in Newbury, to the interested party, St Modwen Developments Ltd. The judge also dismissed Faraday's claim under Part 6 of the Public Contracts Regulations 2015 ("the 2015 regulations"). He held that the development agreement did not constitute either a "public works contract" or a "public services contract" under the 2004 Directive and the 2006 regulations. He also concluded that the council had not failed to comply with the requirement in section 123(2) of the Local Government Act 1972 to obtain "best consideration". Permission to appeal was granted by Sales L.J. on 6 October 2017. In granting permission, he observed that there was "a strong public interest" in this court examining the proper application of the legislative regime for public procurement in "a case where a development agreement is structured around an option for the developer to acquire the land in question (but with other contractual obligations, the fulfilment of which may well create a financial incentive for the developer to exercise that option)".

*The issues in the appeal*

3. There are four grounds of appeal. All four relate to ground 2 of Faraday's challenge at first instance, in which it was asserted that the council acted inconsistently with its obligations under the public procurement legislation because the development agreement constitutes a "public works contract" or a "public service contract" within the meaning of Directive 2014/24/EU "on public procurement and repealing [the 2004 Directive]" ("the 2014 Directive"), which is transposed into domestic law by the 2015 regulations, and therefore the council's acknowledged failure to undertake a process of public procurement under the 2014 Directive and the 2015 regulations was unlawful. In a respondent's notice the council invite us to uphold the judge's decision on additional or alternative grounds. Six main issues emerge:

    (1) Is the development agreement a "public works contract", as defined in the 2004 Directive (the first ground of appeal, and the second and third grounds in the respondent's notice)?

(2) Was it unlawful for the council to enter into the development agreement, because by doing so it committed itself to entering into a "public works contract" without following the procedure for public procurement (the second ground of appeal)?
(3) If the development agreement was not a "public works contract", was this because the public procurement regime was deliberately and unlawfully avoided (the third ground of appeal)?
(4) If the development agreement was not a "public works contract", was it, however, a "public services contract" (the fourth ground of appeal)?
(5) Is the claim for a declaration of ineffectiveness precluded by the council's "voluntary transparency notice" (the first ground in the respondent's notice, in part)?
(6) Is any claim seeking relief other than a "declaration of ineffectiveness" time-barred (the first ground in the respondent's notice, in part)?

The first and second issues are closely linked, and can be dealt with together.

*"Public works contracts" under the 2004 Directive*

4. The current regime for public procurement is in the 2014 Directive and the 2015 regulations. But the relevant provisions in the legislation in force at the time when the development agreement was entered into were in the 2006 regulations, which transposed the 2004 Directive into domestic law – because the "contract award procedure" began before 26 February 2015 (see paragraph 166 of Holgate J.'s judgment).

5. As Lord Hope said in *Risk Management Partners Ltd. v Brent London Borough Council* [2011] 2 A.C. 34, [2011] UKSC 7 (in paragraph 10 of his judgment), "[the] broad object of [the 2004 Directive], and of the Regulations that give effect to it, is to ensure that public bodies award certain contracts above a minimum value only after fair competition, and that the award is made to the person offering the lowest price or making the most economically advantageous offer" (see also, to similar effect, the judgment of Lord Hodge in *Edenred (UK Group) Ltd. v H.M. Treasury* [2015] P.T.S.R. 1088, [2015] UKSC 45, at paragraph 28).

6. Recital 2 of the 2004 Directive stated:

> "(2) The award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities, is subject to the respect of the principles of the Treaty … and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency. However, for public contracts above a certain value, it is advisable to draw up provisions of Community coordination of national procedures for the award of such contracts which are based on these principles so as to ensure the effects of them and to guarantee the opening-up of public procurement to competition. These coordinating provisions should therefore be interpreted in accordance with both the aforementioned rules and principles and other rules of the Treaty."

7. Article 1(2) of the 2004 Directive contained these definitions:

> "(a) '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 within the meaning of this Directive.
>
> (b) 'Public works contracts' are public contracts having as their object either the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex I or a work, or the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority. A 'work' means the outcome of building or civil engineering works taken as a whole which is sufficient of itself to fulfil an economic or technical function.
>
> …
>
> (d) 'Public service contracts' are public contracts other than public works or supply contracts having as their object the provision of services referred to in Annex II.
>
> A public contract having as its object both products and services within the meaning of Annex II shall be considered to be a 'public service contract' if the value of the services in question exceeds that of the products covered by the contract.
>
> A public contract having as its object services within the meaning of Annex II and including activities within the meaning of Annex I that are only incidental to the principal object of the contract shall be considered to be a public service contract."

8. Article 28 provided:

> "28. In awarding their public contracts, contracting authorities shall apply the national procedures adjusted for the purposes of this Directive.
>
> They shall award these public contracts by applying the open or restricted procedure. In the specific circumstances expressly provided for in Article 29, contracting authorities may award their public contracts by means of the competitive dialogue. In the specific cases and circumstances referred to expressly in Articles 30 and 31, they may apply a negotiated procedure, with or without publication of the contract notice."

9. Under the 2006 regulations, in awarding a "public works contract" or a "public services contract", the contracting authority was bound to treat economic operators "equally and in a non-discriminatory way" (regulation 4(3)(a)). It was also required to act "in a transparent way" (regulation 4(3)(b)). It was obliged, before the submission of tenders, to publish award criteria that bidders could be expected to understand in the same way (regulations 15 to 18), and, once tenders were received, to apply those criteria (regulation 30). The "contract award notice" itself had to be advertised in the Official Journal of the European Union (regulation 31).

*Remedies under the 2006 regulations*

10. In Part 9 of the 2006 regulations, "Applications to the court", regulation 47A provided the duty owed by a contracting authority to economic operators. Regulation 47C provided for the enforcement of duties through the court. A breach of duty was "actionable by any economic operator which, in consequence, suffers, or risks suffering, loss or damage" (regulation 47C(1)). Proceedings for that purpose "must be started in the High Court", and regulations 47D to 47P applied to them (regulation 47C(2)).

11. Regulations 47D and 47E governed the time limits for claims under the 2006 regulations – regulation 47D, the "General time limits for starting proceedings", and regulation 47E, the "Special time limits for seeking a declaration of ineffectiveness". Regulation 47D stated that, subject to certain specified variations, any proceedings which "do not seek a declaration of ineffectiveness" must be started within 30 days "beginning with the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen" (regulation 47D(1) and (2)), that the court "may extend the time limit imposed by paragraph (2) (but not any of the limits imposed by regulation 47E) where [it] considers that there is a good reason for doing so" (regulation 47D(4)), but that the court "must not exercise its power under paragraph (4) so as to permit proceedings to be started more than [three] months after the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen" (regulation 47D(5)). Regulation 47E stated that, except in the cases identified in regulation 47E(3) and regulation 47E(5), where a shorter time limit may apply, proceedings "seeking a declaration of ineffectiveness" must be started within six months "beginning with the day after the date on which the contract was entered into" (regulation 47E(2)(b)).

12. Regulations 47I and 47J provided for remedies where the court "is satisfied that a decision or action taken by a contracting authority was in breach of the duty owed in accordance with regulation 47A …" – respectively, where the contract has not been entered into and where it has. Regulation 47J(2)(a) stated that the court "must, if it is satisfied that any of the grounds for ineffectiveness applies, make a declaration of ineffectiveness …", unless the "general interest" exception in regulation 47L applies. Regulation 47J(2)(c) stated that the court "may award damages to an economic operator which has suffered loss or damage as a consequence of the breach …". Under regulation 47M(1) an offending contract is to be treated as ineffective from the time when the declaration of ineffectiveness is made. Regulation 47K set out the "three grounds for ineffectiveness". Regulation 47K(2) stated:

> "(2) Subject to paragraph (3), the first ground applies where the contract has been awarded without prior publication of a contract notice in any case in which these Regulations required the prior publication of the contract notice."

A contracting authority may seek to disapply the first ground for ineffectiveness by relying upon a "voluntary transparency notice". This concept was introduced by articles 2d(4) and 3a of Directive 89/665/EEC, as amended by Directive 2007/66/EC ("the Remedies Directive"), which governs the remedies for breaches of EU public procurement law. Those provisions were

transposed into domestic law by regulation 47K(3) and (4) of the 2006 regulations. Regulation 47K(3) provided:

> "(3) The first ground does not apply if all the following apply –
>
> (a) the contracting authority considered the award of the contract without prior publication of a contract notice to be permitted by these Regulations;
> (b) the contracting authority has had published in the Official Journal a voluntary transparency notice expressing its intention to enter into the contract; and
> (c) the contract has not been entered into before the end of a period of at least 10 days beginning with the day after the date on which the voluntary transparency notice was published in the Official Journal."

Regulation 47K(4) stated:

> "(4) In paragraph (3), "*voluntary transparency notice*" means a notice –
>
> (a) which contains the following information –
> (i) the name and contact details of the contracting authority;
> (ii) a description of the object of the contract;
> (iii) a justification of the decision of the contracting authority to award the contract without prior publication of a contract notice;
> (iv) the name and contact details of the economic operator to be awarded the contract; and
> (v) where appropriate, any other information which the contracting authority considers it useful to include; …
> … ."

*The development*

13. Holgate J. set out the relevant facts very fully and clearly (in paragraphs 12 to 128 of his judgment). I gratefully adopt his narrative, and need not repeat all of it here.

14. The London Road Industrial Estate extends to about 10 hectares, on a site to the east of Newbury town centre. Most of the freehold – about 26 plots – belongs to the council. Between May 2011 and November 2014 the council went about selecting a developer to undertake redevelopment. Faraday, a special purpose vehicle, held long leases of three of the plots, and an option to acquire a long lease of a fourth. Planning permission was granted for a mixed-use development on that land, the "Faraday Plaza Scheme" – most recently on appeal in February 2016. In October 2011 Faraday entered into a joint venture agreement with Wilson Bowden Developments Ltd., with a view to developing Faraday's land. In 2013 Wilson Bowden and David Wilson Homes made a bid in the council's tender process for the regeneration of the industrial estate. The bid included Faraday's land at a substantially reduced value in return for a share of the profits. It was envisaged that Faraday would undertake a development of flats on its

land, as well as a proportion of the other housing proposed by the bid. On 27 March 2014 the council chose St Modwen's bid in preference to Wilson Bowden's. As the judge explained (in paragraph 109 of his judgment), there had been no substantial investment in the London Road Industrial Estate for about 40 years. The council's "twin objectives of encouraging regeneration/employment and enhancing its income were advanced in the context of [its] obligation to "maximise" its financial receipts, or achieve "best value"". The redevelopment "would be a long term project, involving a risky and complex land assembly exercise and relocation of existing businesses". The council was advised by Strutt & Parker that St Modwen "had significantly more expertise and experience to offer for this type of project" than Wilson Bowden and Faraday. The "redevelopment risks", including the costs of land assembly and relocation, and changes in market conditions, were to be borne by the development partner, not the council. The risks "could potentially affect the viability of the scheme as it unfolds".

*The voluntary transparency notice*

15. The council did not undertake a public procurement process before entering into the development agreement. On 14 August 2015 it issued a voluntary transparency notice. Under the heading "Short description of the contract or purchase(s)", the notice stated:

> "The agreement relates to the development of the London Road Industrial Estate in Newbury for the purposes of regeneration and maximizing income to the Council. The freehold of the land is owned by the Council.
>
> This notice has been issued voluntarily. The Council believes that the agreement falls outside the scope of Directives 2004/18/EC and 2014/24/EU because (these grounds are provided in the alternative):
>
> – The agreement is an exempt land transaction and not a 'public works contract' because:
>
> (a) the agreement places no binding obligation on St Modwen to undertake any works,
>
> (b) the Council has not specified the requirements for any works, and
>
> (c) the Council does not exercise a decisive influence (nor indeed any influence) on the type or design of any works;
>
> – The contract is not a 'public services contract',
>
> – Any services to be provided by St Modwen are merely incidental to the main object of the agreement, namely an exempt land transaction, and
>
> – In the event that any services had not been merely incidental to the main object of the agreement, the services would nevertheless have classified for the purposes of public procurement law, as a service concession in that St Modwen would bear the risk of providing any such services and any consideration payable to it for the provision of the same would depend upon St Modwen's exploitation of the subject-matter of the project."

*The development agreement*

16. In the court below the parties described the main provisions of the development agreement in an agreed document, which Holgate J. summarized (in paragraphs 110 to 128 of his judgment). The agreed document is annexed to this judgment. A shorter summary will suffice here.

17. The recitals to the development agreement explain its purpose:

> "(A) The Council is the freeholder of the Property and proposes the comprehensive development of the Property for the purposes of regeneration and maximising income.
>
> (B) The Council wishes to appoint the Developer to act as a master and plot developer and estate management adviser in relation to various aspects of the Project in accordance with this agreement."

18. Clause 1.1 defines the "Development" as "the development of the Development Sites and the Infrastructure Works in accordance with the Project Plans, the terms of the relevant Development Strategy and the terms of this agreement generally and which is consented by the Outline Planning Permission"; the "Development Sites" as "each of the Commercial Plots and the Residential Plots which are approved from time to time for Development in the Business Plan …"; and the "Works" as "the Infrastructure Works [as defined] and the Development". Clause 2.1 provides, in effect, that the "Works" will be for the economic benefit of the council and St Modwen, as developer. It states that "[the] objectives of the Council and the Developer in entering into this agreement are to facilitate the comprehensive regeneration of the Property by its redevelopment for mixed uses in such a way as to maximise, preserve and improve (having regard to market conditions at the relevant time and taking account of any changes in market conditions from time to time) the performance and total returns from the Property and the development potential of the Development Sites as far as reasonably possible and to increase the level of income shown in the Council's Current Rental Income Schedule …". It identifies the main components of the development – including employment and residential uses and infrastructure – as shown in the Indicative Master Plan, which illustrates the general disposition of uses in the scheme. Clause 2.3 states that "[the] parties will co-operate fully with each other in relation to the achievement of the Objectives and will do all reasonable acts and things in order to achieve the Objectives". Clauses 3, 4, 6 and 7 provide for the planning and design stage. Clause 3.1 requires that a "Steering Group" be established "for the purpose of reviewing strategic objectives and monitoring the progress of the Project …". St Modwen is obliged to prepare Project Plans, comprising a Master Plan and a Business Plan, for the approval of the Steering Group (clause 6.2). The Project Plans must be in accordance with the Indicative Business Plan and Indicative Master Plan, which are appended to the development agreement (clause 6.3). Once the Project Plans are approved, St Modwen is obliged to prepare a budget for the Infrastructure Costs, for approval by the Steering Group, and an application for outline planning permission in accordance with the Project Plans (clause 6.4). If satisfactory planning permission is obtained, St Modwen is obliged to prepare for the Steering Group's approval an Estate Management Strategy, under clause 5, and a Development Strategy and Plot Appraisal for each of the Development Plots (clauses 6.12 and 13.1), and then to use reasonable

endeavours to obtain detailed planning approval for the work covered by each Development Strategy (clause 7.2).

19. St Modwen is then entitled to serve an Acquisition Notice, for a commercial plot, or a Residential Plot Notice, for a residential plot, together with an Implementation Programme for the development of the plot in accordance with the approved Development Strategy (clauses 14.1 and 14.2). At that point St Modwen will have transferred to it either a Ground Lease, for a commercial plot, or the freehold, for a residential plot (clause 14.4). If St Modwen elects not to take a particular plot, the council retains the benefit of the services provided by St Modwen for that plot (clause 26). St Modwen's decision to draw down land binds the council, without more. Clause 14.4 states that the service of a valid notice "shall constitute a binding contract between the Council and the Developer for the grant of the Ground Lease [as defined] or the transfer of the freehold". When a Ground Lease is granted or the freehold of a plot is transferred, St Modwen as developer is, under clause 13.7(b) and clause 14.5, obliged to carry out, or have carried out, the development of the plot in question. This obligation is repeated in the template Ground Lease appended to the development agreement, with which, under clause 1.1, any Ground Lease must accord.

20. The provisions of the development agreement relating to the "pecuniary interest" have been redacted in these proceedings. But it is common ground in this appeal, and we accept, that the council committed itself to several obligations whose effect is the payment of a relevant "pecuniary interest" to St Modwen.

*Holgate J.'s conclusions*

21. Before Holgate J. it was accepted on behalf of Faraday that one of the three circumstances in which a contract would fall outside the public procurement legislation would be "[where] the contractor is able to walk away from a relationship with a public authority at its unfettered discretion" (paragraph 189 of Holgate J.'s judgment).

22. Holgate J. saw five relevant points. First, when the development agreement was entered into, St Modwen "did not come under any obligation to take a transfer or ground lease of any part of the site". Whether any such disposal took place in the future was entirely a matter for St Modwen to decide. Secondly, when the development agreement was entered into, St Modwen "did not become subject to an obligation enforceable by [the council] to carry out "works"". Any such obligation was entirely confined to any ground lease or freehold that St Modwen might opt to take. Thirdly, the redevelopment of the site depended instead upon the commercial experience, aptitude and commitment of St Modwen to deliver such a scheme. Fourthly, redevelopment of the site was going to be a long and complex process, which would depend upon achieving the relocation of existing occupiers, market and best value testing and obtaining planning approvals. And fifthly, whether, and to what extent, St Modwen exercised its future right to draw down land for redevelopment would depend upon future market conditions and circumstances. In summary, therefore, St Modwen was "free under [the development agreement] to "walk away", in the sense that it can choose not to come under an obligation to acquire and carry out works on any of the redevelopment land in [the London Road Industrial

Estate]" (paragraph 195). It was also plain, in the judge's view, that the development agreement did not contain "a *deferred* obligation on the part of [St Modwen] to carry out redevelopment works because that obligation may never come into existence". Rather, it was an arrangement "plainly analogous to option arrangements which [Faraday accepts] fall outside the scope of the public procurement regime" (paragraph 197). It did not contain "any artificial measures or devices … to avoid the procurement regime" (paragraph 198). The long timescales involved made it understandable that St Modwen "should have the option of not going ahead with the purchase/lease and redevelopment of a particular plot at the particular time envisaged by clause 14.1 ... , or in some circumstances not at all" (paragraph 199).

23. Faraday's "primary case" was that "the main object of [the development agreement] is the "design and execution" of works …" (paragraph 202). The council had submitted in its skeleton argument that "the main object of [the development agreement] is the execution of works", but that the development agreement "falls outside public procurement legislation because [St Modwen] is under no legally enforceable obligation to carry out works". In oral argument it had referred to the "main object … as being to "facilitate the regeneration" of the [London Road Industrial Estate] by redevelopment …" (paragraph 203). The suggestion that the "single main object" of the development agreement was the "provision of services" was, said Holgate J., "wholly untenable" (paragraph 205). Nor was its main purpose "the execution of works". It was "perfectly plain" from the decision of the Court of Justice of the European Union in Case C-451/08 *Helmut Müller GmbH v Bundesanstalt für Immobilienaufgaben* [2011] P.T.S.R. 200 and from the judgment of Hickinbottom J., as he then was, in *R. (on the application of Midlands Co-operative Society Ltd.) v Birmingham City Council* [2012] L.G.R. 39, [2012] EWHC 620 (Admin), "that a contract cannot fall within the public procurement regime unless its *main purpose* corresponds to one of the definitions of a "public contract" *and* the contractor is under an *enforceable obligation to carry out* that *main purpose* …" (paragraph 206). The judge rejected the alternative submission that St Modwen's obligation to carry out "works", though confined to any ground lease or freehold transfer that it elected to take, should be treated as an "indirect obligation" sufficient to engage the public procurement regime (paragraph 207), and the argument that the "main object" of the development agreement was "both the design and execution of works" (paragraphs 208 to 216). He concluded (in paragraph 223):

> "223. … In my judgment [the development agreement] is a contract to facilitate regeneration by the carrying out of works of redevelopment and to maximise [the council's] financial receipts, particularly rent, from [the London Road Industrial Estate]. The provision of services under clauses 4 to 7 and land assembly do not represent a main purpose in themselves, but simply facilitate [the council's] regeneration and financial objectives, the "twin objectives" with which [the council's] process began ... . [The council] lawfully decided that [the development agreement] itself should not impose upon the developer an enforceable obligation to carry out the redevelopment. It is therefore not a "public works contract"."

*Is the development agreement a "public works contract" or did the council unlawfully commit itself to entering into a "public works contract" without a public procurement procedure?*

24. Both sides maintained that their arguments on these two, closely connected issues were supported by relevant case law, European and domestic – in particular, the principles said to emerge from the court's decision in *Helmut Müller*.

25. In Case C-220/05 *Auroux v Commune de Roanne* [2007] E.C.R. I-385 the Court of Justice of the European Union held that an agreement under which a contracting authority entrusted the execution of works to a contractor was a "public works contract", even though that contractor was not going to carry out the works itself but would use sub-contractors, the authority was not itself going to become the owner of the work, and the agreement went beyond obligations for the execution of the works (paragraphs 37 to 57 of the court's judgment). The basic intent of the public procurement legislation was described in the opinion of Advocate General Kokott (at paragraph 43), without any apparent disagreement by the court:

> "43. … Article 1(a) of Directive 93/37 is to be interpreted in the light of the objectives of that legislation, according to which restrictions on the freedom of establishment and the freedom to provide services are to be abolished in respect of public works contracts and the markets concerned are to be opened up to genuine competition. Those objectives may equally be undermined where the contracting authority awards a contract for a work all or part of which – as a measure of regional or urban development … , for example – is to benefit either the general public or private third parties. The risk of a distortion of competition brought about by the preferential treatment of some operators in relation to others is always present where a contracting authority decides to entrust a work to an undertaking, irrespective of the reasons and context for construction of the work or the purpose to which it is to be put."

26. In *Helmut Müller* the Bunsdesanstalt für Immobilienaufgaben published notices announcing its intention to sell land occupied by decommissioned barracks in the municipality of Wildeshausen. The notices stated that the proposed use of the land must be agreed in advance with the municipality of Wildeshausen. The Bundesanstalt asked parties to make offers for the land without any definite proposal for its development. Helmut Müller and another company, GSSI, both made offers, GSSI's being the higher. The town council subsequently asked Helmut Müller and GSSI to submit proposals for development. When that had been done, it expressed its preference for GSSI's proposed development, and duly embarked on the formal procedure for drawing up a scheme on the basis of that. It stated in its decision that its preference was not to be regarded as binding its exercise of planning powers, which it reserved the right to exercise at its discretion. The Bundesanstalt then sold the land to GSSI. GSSI assumed no obligations to carry out development. The contract of sale made no mention of the future use of the land. Helmut Müller brought proceedings before the national courts, contesting the sale of the land, and contending that the sale should have been conducted in accordance with the rules on public procurement. The national court referred a number of questions for a preliminary ruling. Two of those questions – the third and fourth – were, as the court described them (in paragraph 59 of its

judgment), "whether the concept of "public works contracts", within the meaning of article 1(2)(b) of the Directive, requires that the contractor be under a direct or indirect obligation to carry out the works which are the subject of the contract and that that obligation be legally enforceable".

27. In his opinion, with which the court did not disagree, Advocate General Mengozzi cautioned against a purely "functional" interpretation of the 2004 Directive (paragraphs 35 and 36). On the question of whether the concept of a "public works contract" necessarily implies that the contractor is obliged to carry out the work or works, he said that in his view "… the obligation to carry out the work and/or works constitutes an essential element in order for there to be a public works contract or a public works concession" (paragraph 76). This followed, he said, from the provisions of the 2004 Directive, which defined "public works contracts" as contracts for pecuniary interest (paragraph 77). He continued (ibid.):

> "77. … The concept is therefore based on the idea of an exchange of services between the contracting authority, which pays a price (or, alternatively, grants a right of use), and the contractor, who is required to execute a work or works. Thus, public contracts are clearly mutually binding. It would obviously be inconsistent with that characteristic to accept that, after being awarded a contract, a contractor could, without any repercussions, simply decide unilaterally not to carry out the specified work. Otherwise, it would mean that contractors were entitled to exercise discretion with regard to the requirements and needs of the contracting authority."

28. A separate question was "whether or not, in order for there to be a public works contract, any obligation assumed by the contractor vis-à-vis the public authority must be legally enforceable" (paragraph 78). The Advocate General's view was that "… a public works contract is to all intents and purposes a contract, that is to say, a legal document which, in all the variety of national legal systems, is by nature binding at all times and in all circumstances", and that "… for there to be a public works contract, the contractor must be under a contractual obligation to provide the specified service" (paragraph 80). It followed that "the concepts of a public works contract and a public works concession within the meaning of [the 2004 Directive] presuppose that the contractor is under a contractual obligation to the public authority to provide the agreed service" (paragraph 81).

29. The court agreed that "only a contract concluded for pecuniary interest may constitute a public contract coming within the scope of [the 2004 Directive]" (paragraph 47 of the judgment). This concept was, it said, "based on the premise that the contractor undertakes to carry out the service which is the subject of the contract in return for consideration", and that "[by] concluding a public works contract, the contractor therefore undertakes to carry out, or to have carried out, the works which form the subject of that contract" (paragraph 60). This would embrace an obligation to secure the performance of works through a sub-contract. The court went on to say that "[since] the obligations under the contract are legally binding, their execution must be legally enforceable. …" (paragraph 62), and (in paragraph 63):

> "63. Consequently, the answer to the third and fourth questions is that the concept of "public works contracts" [under article 1(2)(b) of the 2004 Directive], requires that

the contractor assume a direct or indirect obligation to carry out the works which are the subject of the contract and that that obligation be legally enforceable in accordance with the procedural rules laid down by national law."

30. In grappling with two further questions – the eighth and ninth – the court considered the status of contractual arrangements leading in more than a single stage to a contract for works. The eighth question was "whether the provisions of [the 2004 Directive] apply to a situation in which one public authority sells land to an undertaking, even though another public authority intends to award a works contract in respect of that land without yet having formally decided to award that contract". The ninth concerned "the possibility of regarding as a unity, from a legal point of view, the sale of the land and the subsequent award of a works contract in respect of that land" (paragraph 81). The court made this general observation (in paragraph 82):

> "82. In that regard, it is prudent not to exclude from the outset the application of [the 2004 Directive] to a two-phase award procedure in the form of the sale of land which will subsequently form the subject of a works contract, by considering those transactions as a unity."

But there was, it said, "nothing in the circumstances of the case in the main proceedings to confirm that the prerequisites for such an application of [the 2004 Directive] exist" (paragraph 83). The parties "did not assume any legally binding contractual obligations" (paragraph 84). And "[the] intentions revealed by the documents in the case file do not constitute binding obligations and cannot in any way satisfy the requirement of a written contract which is inherent in the very concept of a public contract set out in article 1(2)(a) …" (paragraph 88). Therefore, the court said (in paragraph 89):

> "89. … [In] circumstances such as those of the case in the main proceedings, the provisions of [the 2004 Directive] do not apply to a situation in which one public authority sells land to an undertaking, even though another public authority intends to award a works contract in respect of that land but has not yet formally decided to award that contract."

31. Similar observations were made by Advocate General Jääskinen in his opinion in C-306/08 *European Commission v Spain (re award of urban development contracts in Valencia region)* [2011] 3 C.M.L.R. 43. The Advocate General said that the court's case law had given rise to "a debate as to whether land-use agreements are or should be classified … as public works contracts as they often involve, directly or indirectly, the execution of public works by the developer or the landowners" (paragraph 73). In his view it was "not the purpose of the mere exercise of urban planning powers, intended to give effect to the public interest, to obtain a contractual service or immediate economic benefit for the contracting authority as required by [the 2004 Directive]" (paragraph 74). In the infringement action before the court in that case "a classification of the IAP as a public works contract would have the practical consequence of discouraging private initiatives in the field of planning and land development …", and that "[the] only option left in planning law would then be the classical model where the public authorities draw up and adopt all documents relating to planning and land-use, finance and organise their execution and implementation directly and from the public purse" (paragraph

76). The court, he said, should "be careful not to over-stretch the meaning of certain criteria within the public procurement directives for the sake of fitting the present arrangement within the scope of the public procurement rules", for "[to] do so would amount to a Procrustean solution" (paragraph 77).

32. The reference in Case C-51/15 *Remondis GmbH v Region Hannover* ECLI:EU:C:2016:985 concerned the lawfulness of the transfer by the Region of Hannover of waste treatment tasks to a public body, the Zweckverband Abfallwirtschaft Region Hannover. In his opinion Advocate General Mengozzi said (in paragraph 35):

> "35. … [Where] a public contract was awarded within the framework of a legal arrangement comprising a number of operations, in order to safeguard the effectiveness of the EU rules on public procurement, the award of the contract must be examined taking into account all those stages as well as their purpose. Accordingly, an operation such as that in the main proceedings which is conducted in several stages and involves, among other things, the creation of a legal entity, must be assessed globally in order to determine whether or not it gives rise to the award of a public contract which falls under EU rules."

Echoing what he had said in his opinion in *Helmut Müller*, he said (in paragraph 36):

> "36. …[It] is clear from the very wording of the … definition of public contract in [the 2004 Directive], which refers to 'a contract for pecuniary interest', that an essential element of that concept is the creation of legally binding reciprocal obligations. A public contract is characterised by an exchange of services between the contracting authority, which pays a price, and the contractor, who, in exchange for that price, undertakes to execute a work or works or to provide services. The concept of public contract therefore presupposes and applies to operations involving the acquisition by the contracting authority of works, supplies or services for consideration."

33. In its judgment the court said (in paragraph 37):

> "37. For possible categorisation of a multi-stage operation as a public contract under that definition, the operation must be examined as a whole, taking account of its purpose (see, to that effect, judgment of 10 November 2005, *Commission v Austria*, C-29/04, EU:C:2005:670, paragraph 41)."

It was therefore "necessary to take into account, as a whole, the various stages of the operation at issue in the main proceedings. …" (paragraph 38). As to the essential nature of the contractual relationship itself, the court said this (in paragraph 43):

> "43. Only a contract concluded for pecuniary interest may constitute a public contract coming within the scope of [the 2004 Directive], the pecuniary nature of the contract meaning that the contracting authority which has concluded a public contract receives a service which must be of direct economic benefit to that contracting authority (see, to that effect, … *Helmut Müller* ... , paragraphs 47 to 49). The synallagmatic nature

of the contract is thus an essential element of a public contract, as observed by the Advocate General in point 36 of his Opinion."

34. The domestic courts have sought to adhere to the principles applied in the European case law (see, for example, the recent judgment of O'Farrell J. in *Ocean Outdoor UK Ltd. v London Borough of Hammersmith and Fulham Council* [2018] EWHC 2508 (TCC)). In *Midlands Co-operative Society* both Tesco and a consortium led by the Co-op obtained planning permission for retail-led development on the site of a community centre owned by the city council, subject to a section 106 agreement providing for the community centre to be replaced at another site. In the third tender process, Tesco were the only bidder. The Co-op contended that the process was "fundamentally flawed", and the invitation to tender process a "sham". The regime for public procurement had not been complied with. The arrangement between the city council and Tesco amounted to a "public works contract", to which the provisions of the 2006 regulations applied.

35. Hickinbottom J. rejected that argument. He held that a clause in a section 106 agreement by which Tesco undertook to provide "replacement community facilities" did not satisfy the requirement for there to be a "legally enforceable obligation" to carry out the works. The relevant obligation became enforceable only if Tesco chose to implement the planning permission. The court's reference in *Helmut Müller* to a "direct or indirect obligation …" simply reflected, said Hickinbottom J., "the flexibility with which the obligation may be met, ([e.g.] through sub-contractors)" (paragraph 100). He acknowledged that "the "replacement community facilities" formed part of Tesco's planning permission and [clause] 4.3.1. of the [section] 106 agreement obliged Tesco to be responsible for all works of fitting out and re-location costs of "the Replacement Community Facilities"". And he saw force in the submission that if the section 106 agreement was triggered, there would then be an obligation on Tesco to carry out works, legally enforceable by the city council, and that "[the] matter would legally, then, be out of Tesco's hands". But this, in his view, was not enough to engage the public procurement regime. Tesco were "not … committed to any of the obligations in the [section] 106 agreement". Those obligations did not arise unless the planning permission was implemented, and Tesco were "not legally committed to start the development at all". They had "no development obligations". They were "entitled to walk away" from the site. Whether they decided to go ahead and impose on themselves an obligation to carry out works, was "entirely in their own hands". Given their commitment to the site in terms of money and effort, it might be very likely that they would in fact proceed, but they had "no legally enforceable obligation to do so" (paragraph 110). The council could not be criticized for formulating a strategy for the development of the site that avoided the "onerous obligations" of the public procurement legislation. This was "particularly so as the council's primary objective was of a planning nature – to develop the site – rather than having performed the works involved in replacing the community facility" (paragraph 116). Tesco were not "now under any legally enforceable obligation to perform any relevant works that mean that the arrangements between it and the council or any of them (including the contract for the sale of the community facility) fall within the scope of 'public works contract' for the purposes of the 2006 regulations; and, hence, the procurement provisions of those regulations do not apply" (paragraph 117).

36. Similar reasoning is to be seen in the judgment of Coulson J., as he then was, in *AG Quidnet Hounslow LLP v London Borough of Hounslow Council* [2013] P.T.S.R. 828, [2012] EWHC

2639 (TCC). In that case the proposed agreement had been deliberately drafted not to impose an enforceable legal obligation to carry out any works. For the purposes of the hearing before Coulson J., it was assumed that the effect of the court's decision in *Helmut Müller* was that the 2004 Directive did not apply, but the claimant contended that the principles underpinning the Treaty on the Functioning of the European Union – in particular, article 56 – called for a transparent award procedure. Coulson J. rejected that argument. The purpose of the agreement, in his view, was simply to agree the terms of a long lease of the site. There was "no express obligation on the part of [Legal & General] to develop the site or to provide any services whatsoever". This might be "the deliberate result of careful drafting", to avoid the effect of the 2006 regulations, but "the fact remains that the heads of terms require no services to be provided by [Legal & General]" (paragraph 42 of the judgment). As a matter of construction, the proposed agreement was not a contract for the provision of services as defined in the Treaty, and it fell outside article 56 (paragraph 44).

37. For Faraday, Mr Nigel Giffin Q.C. submitted that the effect of Holgate J.'s analysis was that a local authority can sidestep the regime for public procurement simply by including in a contract an option, enabling the developer to decide whether to proceed with the works or not, even though the authority has no control over whether the option is exercised. He argued that a "contingent obligation" such as that found in the development agreement is still an obligation within the principles recognized in *Helmut Müller*. It was enough to engage the 2004 Directive. If, for example, an authority contracted with a developer for the carrying out of building works, and the contract was to remain conditional until planning permission for the works had been granted, or there was a clause allowing notice to be served within a specified period, it could still be a "public works contract" within the scope of the 2004 Directive. There is nothing in *Helmut Müller* to indicate that contracts containing such contingencies are excluded from the legislation. That case did not involve such an arrangement. Nor did the court consider what approach should be taken to contingent obligations. There was, in fact, no obligation on the contractor to carry out any works at all. The essence of what the court said was that the contractor must assume an obligation that is legally enforceable, but not necessarily an obligation that is immediately enforceable or unconditional. Contingent obligations are still obligations, and legally enforceable – though only, of course, once the contingency is satisfied. Even though St Modwen has a choice about whether to draw down land, once it does so it will be bound to develop in accordance with the development agreement.

38. Mr Giffin submitted that the requirement for there to be enforceable obligations is inherent in the need for the contract to be for pecuniary interest if it is to come within the scope of the legislation. But this is not the same thing as saying there must be a present, immediately enforceable obligation. The court should always look at the real substance of the transaction, not merely its form (see paragraphs 81 and 82 of the judgment in *Helmut Müller*). The crucial question is whether there remains any decision for the contracting authority to make before entering into an agreement for the carrying out of "works". In this case the development agreement is not simply a land sale with the aspiration that works will be carried out – as in *Helmut Müller* and IP/08/867 *City of Flensburg* (5 June 2008). It is a contract for pecuniary interest whose object, explicitly, is the execution of works, and which makes detailed provision for the carrying out of a development involving the execution of works by St Modwen in accordance with the council's requirements. The court's judgment in *Helmut Müller* should not

be applied formulaically, but with a view to determining whether the transaction in question is, in substance, a "public works contract". The carrying out of works is no less the object of a contract merely because it depends on the developer taking a particular step in the future. Although in *Helmut Müller* the Advocate General referred (in paragraph 77 of his opinion) to its being inconsistent with a public contract that the contractor could "simply decide unilaterally not to carry out the specified work", he did so specifically in the context of the need for the contract to be for pecuniary interest, and on the assumption that in such a case there would be no mutually binding contract at all. What he meant was that there could not be a "public works contract" when the choice of what works were going to be done was left to the contractor rather than the authority.

39. Mr Giffin contended for a "purposive" interpretation of the legislation, and for it to be applied realistically to the circumstances of the case. Had the judge taken a realistic approach to the concept of a contract for "pecuniary interest", whose "object" was the execution of works, he should have held that the development agreement was the kind of transaction that fell within the legislative purpose, even though the contractor had to take certain steps before its obligations to undertake works were triggered. Any other approach would create a wide scope for abuse. The court should not focus narrowly on the single question of whether there was an immediate enforceable obligation to carry out the works at the date of execution of the development agreement. The circumstances here were more akin to *Auroux* – where the municipality was acquiring a regenerative development and entrusting the works of construction to a developer – than they were to *Helmut Müller*. This case was also quite unlike *Midlands Co-operative Society*. The development agreement was a very different sort of arrangement from the sale and purchase agreement between developer and local authority in that case, and the section 106 planning obligation. The court must ask itself whether this was a transaction in which the council entrusted the execution of public works to a developer. It was. The whole purpose of the development agreement was that St Modwen would carry out the works. Once it drew down the land, it would be, under the development agreement, not merely entitled but obliged to undertake the development. This is the kind of agreement to which the public procurement legislation was intended to apply.

40. For the council, Mr David Elvin Q.C. submitted that in *Helmut Müller* the court held, in effect, that an essential requirement for a "public works contract" is that the agreement in question must, at the date it is entered into, impose a legally enforceable obligation on an "economic operator" to undertake works. Otherwise, the agreement is not subject to the requirements of the regulatory regime for public procurement. The principles acknowledged by the court in *Helmut Müller* should not be circumvented. An agreement will not be subject to the 2004 Directive and the 2006 regulations simply because its "main object" is concerned with realizing public works, regardless of whether it includes an enforceable obligation to carry out those works. The 2004 Directive does not itself provide an "autonomous definition" of a "public works contract". In his opinion in *Helmut Müller*, however, the Advocate General emphasized (in paragraphs 77 to 80) that "public contracts" must be mutually binding and enforceable – regardless of whether they are "one stage" or "multi-stage". If the developer is able unilaterally to withdraw there cannot be said to exist a contract for the execution of works, with relevant mutually enforceable obligations. The Court of Justice of the European Union has never held otherwise.

41. In this case, Mr Elvin submitted, the essential point is that the development agreement does not contain bilateral, or mutually enforceable, commitments to the works. It does not impose an enforceable legal obligation on St Modwen to undertake them. It can "walk away" if it wants to. As the authorities show, an agreement that gives the contractor an option, or right of election, to carry out works is not a "public works contract". The commercial realities underlying the development agreement were clear. As the judge recognized, it leaves open the question of performance. The council is committed, but St Modwen, as "the Developer", is not. This was a flexible, long-term arrangement, in which St Modwen was going to shoulder most of the risk. The decision to incorporate an option mechanism was commercially important. It enabled the developer to choose whether and when to go ahead with the development. The difference between this and a "public works contract" is one of substance, not form. If it was to be a "public works contract", the development agreement would have had to give the council "decisive influence" or "positive control" over the actions of St Modwen, as developer, which it does not. Clause 3.6 does not give the council control or a right of veto over the design of the development, and there is a mechanism for independent dispute resolution where the parties cannot agree (clause 28). Clause 6.3(c) permits St Modwen, when submitting a draft Project Plan, to react to "the market conditions prevailing at the time". Clause 14 entitles them to serve the specified notices, triggering the obligation to perform the works, but, crucially, it does not compel them to do so. Without such a notice, there is no obligation to develop the site at all.

42. Mr Elvin submitted that a local authority must be allowed the freedom to enter into agreements not covered by the 2004 Directive. One consequence of allowing this appeal would be to compromise the operation of section 106 obligations, many of which are agreements for the execution of works, conditional on the implementation of a planning permission – an arrangement analogous to that under the development agreement here. The approach adopted by Hickinbottom J. in *Midlands Co-operative Society* was correct. He focused on the choice taken by the authority. If it chose to have control over the works going ahead, it must procure; otherwise, it need not.

43. Mr Giffin's submissions here have much to commend them. They strike at the perceived mischief of an authority being able to avoid the legislative regime for public procurement by including in a contract with a developer an option for the developer to decide whether or not he will go ahead with the relevant public works, despite the fact that the authority has no control over the exercise of that option, but nevertheless intends and expects that it will be exercised. Against this, however, there is obvious force too in Mr Elvin's argument, which, he submitted, founds itself on the proposition that, to be a "public works contract", the agreement in question must impose enforceable obligations on the developer, and that an agreement that does not have this effect ought not to be subjected to the procedure for public procurement. This, Mr Elvin submitted, is the general tenor of the relevant authorities, both European and domestic.

44. The existing case law does not, in my opinion, yield a definitive answer to the contest between those two arguments, at least in the particular circumstances of this case. But it does provide ample guidance on the approach the domestic court should take in determining whether a particular agreement is or is not a "public works contract". In resolving this issue, we must keep in mind the underlying principles in the public procurement legislation, as they have been applied in the cases, and apply them with realism and common sense to the circumstances here.

45. The starting point should be the relevant definitions in the 2004 Directive itself. Those definitions are in broad terms. They do not refer explicitly to obligations, let alone to immediately enforceable obligations, or contingent obligations. The definition of a "public contract" in article 1(2) identifies four main constituents of such a contract: first, that it is "for pecuniary interest"; second, that it is "in writing"; third, that it is entered into by an "economic operator" and a "contracting authority"; and fourth, that it should have as its "object" the "execution of works" or the "supply of products" or the "provision of services". The definition of a "public works contract" is also essentially concerned with the "object" of the contract, which must be either the "execution" or the "design and execution" of relevant "works", as defined, or the "realisation" of a "work corresponding to the requirements specified by the contracting authority". There is no definition of a "contract" as such. The concept of "works" is specifically limited to the "outcome of building or civil engineering works … sufficient … to fulfil an economic or technical function". As Mr Giffin submitted, the development agreement does not fail any of those basic requirements. It is a contract for pecuniary interest, in writing, entered into between an economic operator and a contracting authority, and its object is the execution of works. All of this is apparent on the face of the development agreement itself.

46. The case law, however, has developed the concept of relevant "obligations" in this context. It is clear from the jurisprudence that a transaction will not fall within the definition of a "public works contract" unless it involves the contractor assuming an obligation. But a question left unresolved by specific authority is the defining quality of a relevant obligation, and, in particular, whether or not it must be an obligation that is immediately enforceable.

47. In resolving that question, as Mr Giffin submitted, the court must look at the substance of the transaction, not merely its form. It must establish the true nature of the development agreement. The substance of the development agreement demonstrates its object, which is the execution of works of development on the land to which it relates, in accordance with the council's aspirations. A transaction of this nature is clearly to be contrasted with the kind of agreement with which the Court of Justice of the European Union was concerned in *Helmut Müller* and *Flensburg*. In those cases the substance of the agreement was the sale of land, without any attendant obligations, immediate or contingent, for the carrying out of works – only the expectation of such a contract sometime in the future. In this case, by contrast, the development agreement is a contract in which a mechanism has been put in place for the implementation of works of development by St Modwen, to give effect to the council's intended regeneration of the industrial estate. It provides for the precise extent and effect of those obligations, and for the precise circumstances in which they are to become effective. And in my view, the council has reserved ample control over the content and execution of the works, even though the precise parameters remain to be set. Thus far, I can agree with Mr Giffin's submissions.

48. The development agreement leaves the fulfilment of the contingency in the control of St Modwen, as developer. The contingency is fulfilled only if St Modwen proceeds to draw down the land. But once that is done, mutually binding obligations on the council and St Modwen will take effect under the development agreement. The council has made its decision, which is a legally enforceable decision, to commit itself to that arrangement, and in committing to it has bound itself as contracting authority to St Modwen as economic operator. St Modwen, for its

part, has committed itself to the obligations that are immediately enforceable and, contingently, to those that are not. But it remains for the time being, until the contingency is fulfilled, uncommitted to some of its contractual tasks as developer, including the execution of the development works. To that extent, it is, as the judge said, "free … to "walk away"".

49. Looking at the development agreement in this way, I think it is possible to conclude, consistently with the case law, that it is not, at this stage, to be regarded as a "public works contract". This, I acknowledge, involves reading into the authorities the notion that a contingent obligation, or an obligation that is not immediately enforceable at law, is generally not a relevant obligation for the purposes of the definition of a "public works contract", at least where the contingency or the enforceability of the contract rests in the control of the developer. The Court of Justice of the European Union did not decide as much in *Helmut Müller*. It did not examine the concept of a legally enforceable obligation, or distinguish between legally enforceable obligations of one kind and legally enforceable obligations of another. It left to the national court the question of whether a particular obligation was "legally enforceable in accordance with the procedural rules laid down by national law" (paragraph 63 of the judgment). It did not say that an obligation would serve to create a "public works contract" even if it was not immediately enforceable or was contingent on future events within the contractor's control.

50. The context for those conclusions in *Helmut Müller* was – as the court made clear in paragraph 60 of its judgment – the requirement that the contract be for pecuniary interest, and – as the Advocate General made clear in paragraph 77 of his opinion – the principle that a contract cannot be a "public works contract" if it leaves the contractor, after being awarded the contract, free to choose what works, if any, he will carry out. That is not the context here. In this case St Modwen, once it has drawn down the land, will be bound to develop it in accordance with the development agreement. This is not a case in which the court is being asked to extend the scope of the public procurement regime to transactions that confer some benefit on a contractor without a reciprocal commitment to carry out works of development.

51. Nonetheless, I think the right conclusion on this issue is that because St Modwen's obligations to carry out works under the development agreement, though plainly directed to the object of that contract, are – for the moment – contingent obligations, the development agreement is not yet a "public works contract". This conclusion, in my view, is not inconsistent with the authorities, European or domestic.

52. I should add that even if I had not reached that conclusion, I would have seen nothing inconsistent with the outcome in *Midlands Co-operative Society*. The sale and purchase agreement in that case was a very different transaction from the development agreement here. It contained no obligation, contingent or otherwise, for the carrying out of development.

53. The section 106 planning obligation was also a very different kind of agreement. It had a distinct status and role in the statutory planning scheme. Its purpose was to regulate the development of land for which the local planning authority was granting planning permission. By its terms the developer, and its successors in title, would not be able lawfully to proceed with the development for which planning permission was granted, and in particular would not

be able to demolish the existing community facilities on the development site, until it had constructed replacement facilities. The section 106 agreement did not oblige the developer to proceed with the development. But in any case it was not the kind of transaction that is governed by the public procurement regime. By its very nature, it was not a "public works contract". Its essential object – and its necessary justification in the interests of the proper planning of the local planning authority's area – was to ensure that the community facilities would be replaced if the planning permission were implemented. Otherwise, the proposed development itself would not have been acceptable, and planning permission should not have been granted for it. As Hickinbottom J. said (in paragraph 116 of his judgment), "the council's primary objective was of a planning nature – to develop the Site – rather than having performed the works involved in replacing the community facility". In this case, by contrast, when it entered into the development agreement, the council was not exercising any of the functions of a local planning authority under the statutory planning scheme. It was entering into a contract whose essential object was the execution of the works for which it provided. It therefore fell within the scope of the public procurement regime.

54. I turn then to the second issue, which is whether it was nevertheless unlawful for the council to enter into the development agreement, because by doing so it committed itself to entering into a "public works contract" without following the procedure for public procurement. I should say straight away that this argument appears not to have been advanced before the judge, or at least not in the same way as it was put to us.

55. Mr Giffin submitted – in the alternative to his submissions on the previous issue – that as soon as St Modwen exercises its right to draw down land under the development agreement, a "public works contract" will come into being; that, he said, is indisputable. In entering into the development agreement, the council has committed itself, unlawfully, to entering into a "public works contract" without complying with the public procurement legislation, and in breach of it. And this is also – in public law terms – illegality. The council has put the matter out of its own hands. Once the option is exercised, the council will be obliged to grant a long lease, and St Modwen will be obliged, both under the ground lease and under the development agreement, to carry out the "works". Although the carrying out of the works is conditional on the exercise of the option, it is clear that the main purpose of the development agreement is that the works will be carried out. The suggestion made on behalf of the council – that the only relevant point in time was the date on which the development agreement was entered into – is wrong because it ignores the jurisprudence on "multi-stage" processes, and the need for the court to look at agreements as a whole (see the court's judgment in *Remondis*, at paragraph 37). In *Helmut Müller* there was nothing binding either party to the carrying out of works. In this case the council, as "contracting authority", has made its commitment. After it had entered into the development agreement, there was no further decision for it to make. There is support for this argument, Mr Giffin submitted, in the fact that the 2006 regulations envisage proceedings for anticipated as well as actual breach. Does the law of public procurement allow an authority to enter into an agreement, without undertaking a procurement process, giving a developer the option to require it to enter into a contract it could not lawfully have entered into at the outset? As Mr Giffin put it, even more simply than that, the proposition that an authority can lawfully grant a developer the option to require it to act unlawfully in the future is a startling one, and incorrect.

56. Mr Elvin submitted that this argument is wrong in principle, and unsupported by authority. Under the 2004 Directive the decisive moment for ascertaining the status of an agreement is at the date on which it is entered into, not the date on which an option is exercised or a contingency determined – for example, by drawing down land. It is at that moment that the local authority must consider whether it is required to conduct a regulated procurement. If, under the agreement, an option may later be exercised, no public procurement takes place. All that occurs is simply the working out of an arrangement already in place, which itself was not, and is not, subject to the legislative regime.

57. In my view Mr Giffin's argument here, if his argument on the previous issue does not prevail, is a compelling alternative to it. The basic analysis is as he contended. It incorporates and extends the reasoning on the previous issue, and its conclusions are the corollary. If the development agreement was not a "public works contract" on the day it was entered into, because St Modwen was not then under an immediately enforceable obligation to carry out development, it will nevertheless become a "public works contract" once the option is exercised, the land is drawn down, and binding obligations, for consideration, are triggered.

58. The legislative regime is directed to the actions and defaults of "contracting authorities". It is their behaviour in procuring works and services that is regulated. The language in recital 2 to the 2004 Directive, in article 7 (which provides the "[threshold] amounts for public contracts"), and also in articles 28 and 31 speaks of public contracts being "awarded" by authorities. The court's duty is to review what the authority did, or failed to do, in awarding a contract and the contractual arrangements that it concluded with the economic operator when it did so.

59. Contracts for public works will, of course, vary widely. The Court of Justice of the European Union has not dealt with an exact analogue to the transaction here. In a case such as *Helmut Müller* there is no commitment to the carrying out of any works. There will be others where the agreement that has been entered into contains binding and immediately enforceable obligations to carry out works. There will be others again, such as this case, in which some or all of the obligations are contingent. The court's decisions in *Helmut Müller* and *Remondis* encourage the reviewing court, when ascertaining whether legally binding reciprocal obligations constitute a public contract, to look at the relevant contractual arrangements as a whole – as, for example, in a case where chronologically distinct decisions to sell land and award a contract for its development may properly be seen as a unity (see paragraphs 88 and 89 of the court's judgment in *Helmut Müller*). The court must consider the relevant transaction in its totality to establish whether the contracting authority has, by its "decision or action", procured, or contractually committed itself to procuring, works or services from a particular economic operator.

60. This is not to ignore the principle that one must look at the commercial substance of an agreement, and its essential characteristics, at the date when it is entered into, or to focus impermissibly on the position that would obtain if and when an option is later exercised. On the contrary, it is to recognize, and indeed emphasize, that the court must comprehend the whole content of the agreement at the date of its being entered into, and establish whether, at that date, it embodied defined obligations that will, once they take effect, compose a "public works contract". As Mr Elvin said, it was only at that stage, at the time when the development

agreement was being entered into, that the council had to consider whether it was under a duty to conduct a regulated procurement – because otherwise a timely procurement procedure, or any procurement procedure, was going to be impossible. The touchstone, then, is whether, in substance, the agreement in question, at the date it is concluded, provides for a relevant procurement.

61. In this case, judged by that test, the development agreement clearly did provide, at the date it was entered into, for a procurement by the council of the development it was intended to deliver. At that date, no further act of procurement by the council remained to be done, for which a lawful public procurement procedure could later be conducted. The time for that had passed. When it entered into the development agreement, the council had nothing more to do to ensure that a "public works contract" would come into being. It had, in fact, done all that it needed to do to procure. It had committed itself contractually, without any further steps being required of it, to a transaction that will fully satisfy the requirements of a "public works contract". It had committed itself to procuring the development from St Modwen. The development agreement constitutes a procurement in its result, and a procurement without a lawful procurement procedure under the 2004 Directive and the 2006 regulations. The procurement crystallizes when St Modwen draws down the land. The ground lease entered into by St Modwen will contain an unqualified obligation to carry out works, and a corresponding obligation will also be brought into effect in the development agreement itself. The development agreement made that commitment on the part of the council final and provided also for a reciprocal commitment on the part of St Modwen. It did so without a public procurement process, and without affording any opportunity for such a process to be gone through before the "public works contract" materializes. At that stage it would be too late. Thus a "public works contract" will have come into being without a lawful procurement process. The regulation of the council's actions in procuring the development will have been frustrated.

62. By entering into the development agreement, therefore, the council effectively agreed to act unlawfully in the future. In effect, it committed itself to acting in breach of the legislative regime for procurement. As Mr Giffin submitted, that is in itself unlawful, whether as an actual or anticipatory breach of the requirements for lawful procurement under the 2004 Directive and the 2006 regulations, or simply as public law illegality, or both. The only other possibility would be that a contracting authority is at liberty to construct a sequence of arrangements in a transaction such as this, whose combined effect is to constitute a "public works contract", without ever having to follow a public procurement procedure. That would defeat the operation of the legislative regime.

63. Those conclusions do not, in my view, offend any principle in the authorities. They sit well with the approach evident in the relevant decisions of the Court of Justice of the European Union, which requires the national court to look at the real substance of the transaction, and to view the several stages of a "multi-stage" process as a whole. In this case that entails not only a first stage, comprised in the development agreement itself, but also a second stage provided for in it, which is initiated when the option is exercised and land is drawn down by the developer. In that second stage the developer's obligation to execute the works is effective, and the public works performed. Inherent in this two-stage process is a public procurement. The breach of the 2004 Directive and the 2006 regulations occurs when the land is drawn down by St Modwen.

At that point the council retains its contractual control over the content of the works, but has no further control over the award of the contract for their execution. Once the option is exercised, the council is obliged to enter into a long lease, and St Modwen is obliged, under both the lease and the development agreement, to bring the works to fruition.

64. Doubtless there were good commercial reasons for the parties constructing the development agreement as they did, not least the flexibility it provided against the risk borne by St Modwen. But this cannot undo the conclusion that there was here a procurement of development that did not undergo the requisite procurement procedure.

65. In my view, therefore, the appeal should succeed on this, the second ground of appeal. What remedy the court should grant would best be considered in the light of further submissions.

*Was the public procurement regime deliberately and unlawfully avoided?*

66. In the alternative to his arguments on both of the previous issues, Mr Giffin submitted that, by constructing the development agreement in the way that it did, the council had attempted deliberately to avoid the public procurement regime. Deliberate avoidance of the regime was unlawful. The legislative purpose in the 2004 Directive was to bring agreements such as this within its scope. In concluding the development agreement, it was clearly the council's aim that St Modwen would carry out the development of the land. It was not right to say, as the judge did (in paragraph 184 of his judgment), that "neither the 2014 Directive nor the 2015 Regulations contain any general anti-avoidance principle". Article 18(1) of the 2014 Directive provides that "[the] design of the procurement shall not be made with the intention of excluding it from the scope of this Directive", and this, by implication, was also the position under the 2004 Directive, as it was under the general principles of EU law. Under EU law it is an "abuse of rights" to seek to gain advantage by entering into artificial contractual arrangements that do not correspond "with the economic and commercial reality of the transactions" – a principle recognized, for example, in a number of tax cases (see the decision of the Supreme Court in *HMRC v Secret Hotels2 Ltd.* [2014] 2 All E.R. 685, [2014] UKSC 16).

67. Countering this argument, Mr Elvin submitted that the court should consider the purpose of the alleged abuse. The purpose of the option arrangement in the development agreement was a lawful commercial purpose, not the unlawful avoidance of the public procurement regime. For its own legitimate reasons, the council had chosen to enter into a transaction that was neither in form nor in substance a "public works contract" under the 2004 Directive. This was quite unlike, for example, the circumstances in Case C-29/04 *Mödling* [2005] ECR I-9705, where the court held that a scheme under which a local authority created a company of which it held all the shares, awarded that company a "public service contract" for waste disposal, and then sold 49% of the shares to a third party, was a "sham", whose sole purpose was to evade Directive 92/50/EEC "relating to the coordination of procedures for the award of public service contracts". Reliance on the tax avoidance cases was misplaced. There was no abuse here of the legislative scheme for public procurement.

68. I do not accept Mr Giffin's argument here. It cannot be said that the underlying purpose of the option provisions in the development agreement, or of the development agreement as a whole, was an unlawful purpose, even if the development agreement itself ought to have been the subject of a procurement process in accordance with the legislative regime. It is perfectly possible in principle for the purpose of the development agreement, namely the development of the land by St Modwen in accordance with the objectives declared in its recitals, to be lawful, but the development agreement itself to be unlawful for the council's failure to undertake a lawful procurement process. There is no logical difficulty in this. It also follows that Faraday does not have to succeed on this ground as well as on the argument as to the true effect and status of the development agreement if its appeal is to be upheld.

69. It was not unlawful for the council to put in place a contractual relationship with a developer, or with St Modwen in particular, to secure the regeneration of the industrial estate. Nor was it inherently unlawful for the council to seek to achieve, if it could, a lawful contractual relationship with St Modwen, or any other developer, that fell outside the reach of the public procurement regime. It was lawfully entitled to attempt to find such an arrangement, without at any stage intending the arrangement to be unlawful. This was not, without more, an "abuse of rights". It is not the same thing as an authority, or an authority and a developer, attempting to gain advantage for itself, or themselves, by deliberately entering into an artificial arrangement in an effort to disguise the "economic and commercial reality" of the transaction. That would likely be an "abuse of rights".

70. There is no evidence in this case, and indeed no suggestion, of the council having acted at any stage in bad faith, or with any motive to create a mistaken understanding of its objectives in entering into the development agreement or of the "economic and commercial reality" of the transaction. That "economic and commercial reality" is fully apparent in the terms of the development agreement. It is not disguised. This was not, it seems to me, an arrangement of the kind that the court had to deal with in *Mödling*, which it could truly describe as a "sham" – because the transaction, in substance, was an arrangement within the ambit of the relevant legislative regime, and had been split into two parts with the simple aim of avoiding that regime. Evasion was the real and sole purpose of that structure. A similar analysis is to be seen in the Advocate General's opinion in *Helmut Müller* (at paragraphs 103 to 107). That was not so here. The development agreement may have been entered into in breach of the requirements of the public procurement legislation. But it was not a "sham" in the true sense of that concept.

71. I should add that, in my view, as Mr Elvin submitted, the case law in the realm of tax avoidance does not assist us. It does not suggest any different conclusion on the question of abuse in the field of public procurement – at least in circumstances such as these.

*Is the development agreement a "public services contract"?*

72. Again in the alternative to his argument on the preceding grounds, Mr Giffin submitted that the development agreement was clearly a "public contract" of one kind or another. If it was not a "public works contract", it must be a "public services contract" – because St Modwen undertook immediately enforceable obligations to provide the council with services for

planning and design. Putting to one side the contingent obligations for the carrying out of works, these were the obligations that gave the development agreement its character. The judge was wrong to conclude that it was not a "public services contract" on the basis that its "main object" was not the provision of services, but the provision of works. There is no principle in the law of public procurement that the legislation only catches the provision of services when such provision is an end in itself.

73. In response, Mr Elvin submitted that although the clauses in the development agreement requiring the performance of preliminary services were obligatory, those services were not its "main object". They were wholly ancillary, and inseparable from the development they were intended to facilitate. A parallel may be seen in Case C-145/08 and Case C-149/08 *Hotel Loutraki* [2010] 3 C.M.L.R. 33, where it was held that a contract fell outside Directive 92/50/EEC because it was an indivisible whole, its main object being a sale of shares, to which the provisions for works and services were ancillary. Two questions arose with "mixed contracts" of this kind: first, whether the contract constitutes an indivisible whole, and second, if so, whether its "main object" falls outside the relevant Directive. There was no suggestion before Holgate J. that the development agreement was anything other than an indivisible whole.

74. The agreement considered by the court in *Hotel Loutraki* involved a share sale and the performance of certain works and services. The transaction was described by the court as a "mixed contract" (paragraph 46 of the judgment), comprising an agreement for the sale of 49% of the shares in EKP, an agreement under which AEAS – a company set up by the successful tenderer – would take over management of a casino business, in return for payment, and an agreement under which AEAS would also undertake the refurbishment of the casino and two adjoining hotels and development of surrounding land (paragraph 47). The court said that "in the case of a mixed contract, the different aspects of which are … inseparably linked and thus form an indivisible whole, the transaction at issue must be examined as a whole for the purposes of its legal classification and must be assessed on the basis of the rules which govern the aspect which constitutes the main object or predominant feature of the contract …" (paragraph 48). This conclusion was, said the court, "valid irrespective of whether or not the aspect constituting the main object of a mixed contract falls within the scope of the directives on public contracts" (paragraph 49). The court found that "a mixed contract of which the main object is the acquisition by an undertaking of 49 per cent of the capital of a public undertaking and the ancillary object, indivisibly linked with that main object, is the supply of services and the performance of works does not, as a whole, fall within the scope of the directives on public contracts" (paragraph 62). The court's approach in *Commission v Spain* (in paragraphs 89 and 90 of the judgment) was similar.

75. Viewed in the light of the court's approach in *Hotel Loutraki* and *Commission v Spain*, Mr Elvin's submissions to the effect that the development agreement is not a "public services contract" are sound. There is no reason to resort here to an unconventional approach to analysing a "mixed contract", departing from that indicated in those cases. The conventional approach requires the court to consider whether the contract in question is or is not an "indivisible whole", and, if so, what is its "main object". Applying that conventional approach, as Holgate J. did, leads to the conclusion that the development agreement is not a "public service contract" under the 2004 Directive.

76. The development agreement does contain enforceable legal obligations on the part of St Modwen to provide certain services, and indeed those obligations are not contingent but immediately enforceable in the sense emphasized by Mr Elvin in his argument on the first two issues. But there is no justification for segregating those obligations from the obligations for the transfer of land and the carrying out of the defined works. They are preliminary to the performance of those obligations, and may properly be described as ancillary to them. The obligations to provide design and planning services essential to the project itself cannot sensibly be divorced from the obligations directed to the undertaking of physical works of development. They have no independent purpose. Together with the other obligations, including the obligations for the carrying out of the works, they make a comprehensive and complete set of obligations for the realization of the project. The principal purpose of the development agreement, essential to all the obligations in it, is plainly to bring about the execution of the works, and thus to implement the development that will result from them. The obligations are all directed to that ultimate objective.

77. It is not appropriate, or possible, to disaggregate that indivisible whole by selecting one part of it and detaching it from another, let alone to separate the subordinate obligations from the dominant, before considering whether its "main object" falls outside the scope of the 2004 Directive. The question of what its "main object" is, and whether it is, for the purposes of the public procurement regime, a "public contract" – be it a "public works contract" or a "public service contract" – must be addressed by considering it as a whole, not in two or more constituent parts. On any view, its "main object" cannot be regarded as the provision of services, so as to bring it within the definition of a "public service contract" in article 1(2)(d). Its "main object", in my opinion, brings it squarely within the definition of a "public works contract" in article 1(2)(b), as a public contract "having as [its] object either the execution, or both the design and execution, of works …". It is not a "public service contract".

*Is the claim for a declaration of ineffectiveness precluded by the council's voluntary transparency notice?*

78. In the court below, as Holgate J. noted (in paragraph 201 of his judgment), the council did not seek to rely on its voluntary transparency notice. Mr Elvin told us that this was because it took the view that it did not need to do so.

79. In Case C-19/13 *Ministero dell'Interno v Fastweb SpA* [2015] P.T.S.R. 111 the court considered the limits of the procedure provided for in article 2d(4) of the Remedies Directive, by which, as Advocate General Bot said in his opinion, "the review body is required to maintain the effects of the contract concluded in infringement of the rules on advertising and competitive procedure if the contracting authority published a notice for voluntary *ex ante* transparency and observed the minimum standstill period of 10 days between that publication and conclusion of the contract" (paragraph 79). It was "essential that, in the course of its verification of the conditions laid down in [article 2d(4) of the Remedies Directive], the review body assess the conduct of the contracting authority", and "should, in particular, determine whether the contracting authority acted in good faith and with due diligence when concluding the contract

and whether the reasons it has given for awarding the contract by a negotiated procedure without publishing a contract notice in the Official Journal are or were legitimate" (paragraph 80). The national court must "examine the reasons which could, reasonably and honestly, have led the contracting authority to believe that it was entitled to award a contract by negotiated procedure, without publication of a contract notice; and to distinguish between a mistake committed in good faith and an intentional infringement of the procurement rules" (paragraph 85).

80. In its judgment the court emphasized that the exception under the notice procedure was to be "interpreted strictly" (paragraph 40). It said that "the unlawful direct award of contracts is the most serious breach of EU law in the field of public procurement" (paragraph 43). To achieve the objectives referred to in article 1(1) of the Remedies Directive, "including the availability of effective remedies against decisions taken by contracting authorities in breach of public procurement law", it was "important that the body responsible for the review procedure should, when verifying whether the conditions laid down in article 2d(4) of [the Remedies Directive] have been fulfilled, carry out an effective review" (paragraph 46). Under the condition relating to the need for the contracting authority to publish in the Official Journal a notice, as described in article 3a, announcing its intention of concluding the contract, "the notice must state the justification for the contracting authority's decision to award the contract without prior publication of a contract notice" (paragraph 47). The court went on to say (in paragraph 48):

> "48. On that last point, the "justification" must disclose clearly and unequivocally the reasons that moved the contracting authority to consider it legitimate to award the contract without prior publication of a contract notice, so that interested persons are able to decide with full knowledge of the relevant facts whether they consider it appropriate to bring an action before the review body and so that the review body is able to undertake an effective review."

81. In that case the contracting authority, acting on the basis of article 31(1)(b) of the 2004 Directive, had used the negotiated procedure without having published a contract notice (paragraph 49). The court made clear that in such circumstances "[in] its review, the review body is under a duty to determine whether, when the contracting authority took the decision to award a contract by means of a negotiated procedure without prior publication of a contract notice, it acted diligently and whether it could legitimately hold that the conditions laid down in article 31(1)(b) of the 2004 Directive were in fact satisfied" (paragraph 50). Among the factors to be taken into consideration were "the circumstances and the reasons" mentioned in the notice under article 2d(4) of the Remedies Directive that had led the contracting authority to use the negotiated procedure (paragraph 51). If the review body found the conditions laid down in article 2d(4) of the Remedies Directive not satisfied, "it must then declare that the contract is ineffective, in accordance with the rule laid down in article 2d(1)(a)" (paragraph 52). Otherwise, it "must maintain the effects of the contract, pursuant to article 2d(4)" (paragraph 53).

82. Mr Elvin submitted that in this case the claim for a "declaration of ineffectiveness" is precluded by the voluntary transparency notice issued by the council on 14 August 2015. Under regulation 47J, the only remedy Faraday could claim – because its claim was issued after the development

agreement was entered into – was either for damages or for a "declaration of ineffectiveness". There is no claim for damages. And, Mr Elvin submitted, no "declaration of ineffectiveness" can be made in this case because the requirements of regulation 47K(3) and (4) were complied with. The relevant tests, as set out in *Fastweb* were clearly met. The council had "acted diligently and … could legitimately hold that the conditions laid down in article 31(1)(b) of [the 2004 Directive] were in fact satisfied". Holgate J. concluded, following full argument, that the development agreement is not a "public contract" under the 2004 Directive. There can therefore be no sensible dispute that the council had "acted diligently" and was entitled "legitimately [to] hold", at least, that it was not a "public contract". The language used in the voluntary transparency notice, which referred to the development agreement as an "exempt land transaction", was appropriate, when read in its context. It meant a contract that was not subject to the 2004 Directive. The notice provided a clear statement of the reasons on which the council relied in concluding that the development agreement was not subject to the 2004 Directive or the 2006 regulations. It enabled Faraday to allege illegality on 20 November 2015, before it had seen the development agreement. Mr Elvin said the council had not abandoned reliance on the voluntary transparency notice in the court below. The point had been properly pleaded, and stood as a question of law for the court to decide. This court was as well placed to do that as was Holgate J.

83. Mr Giffin submitted that the council's voluntary transparency notice was invalid. Regulation 47K(4) of the 2006 regulations requires a "description of the object of the contract", and a "justification" of the authority's decision to award it without prior advertisement. In this case, said Mr Giffin, the council's consideration of whether it was legitimate to award the contract without publication of a contract notice was well below the standard of diligence required (see paragraph 50 of the court's judgment in *Fastweb*). The voluntary transparency notice fell short of the requisite clear and unequivocal disclosure. The only evidence the council had produced of its pre-notice consideration of the issue was a brief reference to it in the officers' reports to its Executive – which did not identify the source of the legal advice on which it was based. The voluntary transparency notice asserted that the development agreement placed no binding obligation on the developer to execute any works. But there were such obligations, albeit contingent on the option being exercised. Even if it was correct on that point, the voluntary transparency notice did not present a full picture of the relevant facts. It also claimed that the development agreement was a "land transaction". This too was inaccurate – as was effectively conceded before Holgate J.

84. Mr Giffin also submitted that even if Mr Elvin's argument here would prevent a "declaration of ineffectiveness", it could not defeat the claim for judicial review – which seeks an order quashing the council's decision to enter into the development agreement and a declaration that the development agreement is invalid – nor the claim in the proceedings under the 2006 regulations for a declaration that the grant of a lease or transfer of land under it would itself be unlawful. The voluntary transparency notice, even if valid, would only go to the availability of the remedies under the 2006 regulations. Faraday's claim for judicial review asserts a breach of the 2006 regulations, and this was, in principle, a legitimate public law challenge (see the judgment of the court in *R. (on the application of Chandler) v Secretary of State for Children, Schools and Families* [2010] P.T.S.R. 749, at paragraph 77). Its standing to bring that claim had never been questioned.

85. I do not accept that the council may not seek to rely in this court on the voluntary transparency notice, having chosen not to do so in the court below. The point is not an entirely new one raised only at this stage. It was live at the outset, though clearly in the alternative to the council's main defence to the proceedings, then deliberately not pursued before the judge, but equally not abandoned. Even though, as Mr Giffin submitted, the question of whether an authority has acted diligently in the sense referred to by the court in *Fastweb* may engage some consideration of the relevant facts, and that was not done at first instance here, I do not agree that this prevents us from deciding whether the notice is valid and effective in the light of the relevant legal principles.

86. Clearly, the requirements of regulation 47K(3)(a) were complied with. The council also published a notice in the Official Journal "expressing its intention to enter into the contract", and to that extent complied with regulation 47K(3)(b). The requirement as to timing in regulation 47K(3)(c) was also satisfied. The critical question is therefore whether the notice was, as regulation 47K(3)(b) stipulated, a "voluntary transparency notice" within the definition in regulation 47K(4). This question comes down to the five requirements in regulation 47K(4)(a). They must all be complied with. The requirements in paragraph (4)(a)(i) and (iv) clearly were. The requirement in paragraph 4(a)(v) is open-ended. It leaves it to the authority to decide whether it would be "useful" to include in the notice any information further to that specified in the preceding four requirements. That is a broad discretion, and, realistically in my view, it is not suggested that it was unlawfully exercised here. The two requirements on which Mr Giffin's submissions centred were those in paragraphs 4(a)(ii) and (iii) – the requirement that a "description" be given of the "object" of the development agreement (paragraph 4(a)(ii)), and a "justification" of the council's decision to enter into it without publishing a contract notice (paragraph 4(a)(iii)).

87. The nature of the requirement transposed into domestic law in paragraph (4)(a)(iii) was elucidated in the court's decision in *Fastweb*. More than a mere formal justification is required. The justification must be complete. This does not mean that it must be elaborated at great length. But as the court stressed in *Fastweb* (at paragraph 48), what is required is a clear and unequivocal explanation of the reasons that led the contracting authority to the view that the contract could be awarded without following the procedure for public procurement. Essential to this is that interested third parties, which in this case would clearly include Faraday, are able to decide "with full knowledge of the relevant facts whether they consider it appropriate to bring an action". This is the standard of justification required – that it should provide enough by way of relevant objective detail about the contract to enable the third party to decide, in the short period allowed to him, whether to launch proceedings challenging the authority's decision to go ahead with a regulated procurement. Necessarily, such a decision must always be a properly informed decision.

88. As the court also said in *Fastweb*, it is for the national court to determine whether the contracting authority "acted diligently" and whether it "could legitimately hold" that the conditions for not following the public procurement procedure were met (paragraph 50). Mr Giffin sought to persuade us that the evidence the council had produced of its consideration of the need for a procurement process, which included the relevant officers' reports to the

council's Executive on 27 March 2014 and 20 November 2014, and referred to "legal advice" – for which privilege has not been waived – either failed to show that the council had "acted diligently" and "could legitimately hold" there was no need for a public procurement procedure, or that it proved the contrary. In the absence of the relevant "legal advice", I would not be able to conclude in the light of the officers' reports alone that the council did not act "diligently". But even so, the voluntary transparency notice itself did not, in my view, say all that it should. In short, it is not transparent enough. And this is so in spite of the fact, as it seems, that the council, on "legal advice", had satisfied itself the development agreement did not generate a contractual relationship between itself and St Modwen requiring a public procurement procedure.

89. The "[short] description of the contract or purchase(s)" in the notice begins by stating that "[the development agreement] relates to the development of the London Road Industrial Estate … for the purposes of regeneration and maximising income to [the council]". It does not state this to be the "description of the object of the contract" required by regulation 47K(4)(a)(ii). In the fourth of the "grounds" stated in the notice, however, the "main object of the agreement" is expressly identified as being "an exempt land transaction". That "ground" evidently seeks to distinguish "an exempt land transaction" from a "public services contract". And the first "ground" distinguishes it from a "public works contract". It seems clear, therefore, that the council was seeking to stress that concept, "an exempt land transaction", as the "object of the contract". This, it seems to me, was more than mere over-simplification. It was incorrect, or at best misleading. The development agreement extends considerably further than a transaction for the disposal or transfer of land. It contains intricate provisions for the design and execution of a large development, which it was envisaged and intended that St Modwen would carry out, in accordance with the arrangements provided. The requirement in regulation 47K(4)(a)(ii) was not, I think, properly complied with.

90. Nor was the requirement in regulation 47K(4)(a)(iii). In the first place, the description of the development agreement, in the first "ground", as an "exempt land transaction", seems to be presented not only as the "main object of the agreement", but also as the main "justification" for the council's decision not to follow a public procurement procedure. If that is a mistaken understanding of the object of the contract, as it surely is, it undermines the "justification". Secondly, the proposition in reason (a) in the first "ground" that the development agreement placed "no binding obligation" on St Modwen, even if read as meaning "no immediately enforceable binding obligation", still leaves too much unclear. Nothing at all is said about the various obligations borne by St Modwen, including obligations to undertake works, contingent only on their decision to draw down the requisite land. It would be easy to infer from the notice that no such obligations had been included in it. Thirdly, this implication is not removed, but if anything reinforced, by reasons (b) and (c) – that the council has "not specified the requirements for any works" and "does not exercise a decisive influence (nor indeed any influence) on the type or design of any works". It may be that neither of those propositions can be said to be inaccurate, as far as it goes. But they do not alert a third party to the real nature of the transaction. Nothing is said, even in the broadest terms, about the arrangements in the development agreement for master planning, the preparation of "Project Plans", the submission of applications for outline planning permission, the subsequent preparation of "Development Strategies" and "Plot Appraisals", the obtaining of approval for details, and so on. And fourthly,

it is striking that the only part of the justification given in the notice that purports to explain what the development agreement actually is, rather than what it is not, is the statement that it "is an exempt land transaction". The rest is all in negative terms, and leaves no picture of the contract as it truly is.

91. The sum effect is a failure to give an adequate justification for the council's decision to proceed as it did. In my view the voluntary transparency notice fails the requirement in regulation 47K(4)(a)(iii). It is not a valid notice, and is not effective to prevent the court making a "declaration of ineffectiveness" if that remedy is justified.

*Is any claim seeking relief other than a "declaration of ineffectiveness" time-barred?*

92. Mr Elvin submitted that Faraday's only potential cause of action in a challenge to the development agreement was a claim under the 2006 regulations. It could not make a claim for judicial review to pursue the same complaint, because it had a suitable alternative remedy (see *Cookson & Clegg Ltd. v Ministry of Defence* [2006] Eu. L.R. 1092, [2005] EWCA Civ 811). Since the claim form was issued after the development agreement was signed, the only remedies available under the 2006 regulations were either a "declaration of ineffectiveness" or an award of damages. Because regulation 47J(2) prevents the court from ordering any other form of relief, it was not open to the court to award alternative forms of relief in a claim for judicial review.

93. Mr Elvin also argued that any claim seeking relief other than a "declaration of ineffectiveness" was in any event time-barred by CPR rule 54.5(6), which states:

> "(6) Where the application for judicial review relates to a decision governed by [the 2015 regulations], the claim form must be filed within the time within which an economic operator would have been required by regulation 92(2) of those Regulations (and disregarding the rest of that regulation) to start any proceedings under those Regulations in respect of that decision."

For the purposes of any claim for judicial review challenging a decision taken by a contracting authority that is or may be affected by the duties in regulation 47A of the 2006 regulations, a 30-day time limit applies.

94. On a true understanding of regulations 47D and 47E, submitted Mr Elvin, the longer time limit in regulation 47E applies only to a claim for a "declaration of ineffectiveness". Where no such declaration can be made because of a valid voluntary transparency notice, claims for other forms of relief cannot benefit from the longer period for launching proceedings in regulation 47E. The relevant limitation period under regulation 47E for any claim other than a claim for a "declaration of ineffectiveness" is 30 days from the date of actual or constructive knowledge. The voluntary transparency notice was published on 14 August 2015. The development agreement was entered into on 4 September 2015. The claim for judicial review was issued on 20 November 2015. The claim under the 2006 regulations was issued only on 8 January 2016. Faraday had effectively acknowledged in its original statement of facts and grounds that it was

first made aware of the development agreement on 9 September 2015. At the very latest, however, Faraday had had sufficient knowledge to start the statutory limitation period running by 20 November 2015. Mr Elvin acknowledged that this argument on limitation was raised only in his skeleton argument for the hearing in the court below. But, he submitted, it goes to the court's jurisdiction (see the first instance judgment in *R. (on the application of Williams) v Secretary of State for Energy and Climate Change* [2015] EWHC 1202 (Admin), at paragraphs 50 to 68).

95. Mr Giffin submitted that the time limit – or "limitation" – argument was never properly pleaded by the council in the court below. It was not, he argued, a pure point of law. It required the court to consider when Faraday had had the knowledge required to start time running under regulation 47D, and whether it should exercise its discretion to extend time. The claim under the 2006 regulations was clearly within time, because it was a claim seeking a "declaration of ineffectiveness" – as well as other relief – and so the six-month time limit in regulation 47E applied. The 30-day period under regulation 47D did not start to run on 4 September 2015. Time begins to run only when a claimant has the requisite knowledge (regulation 47D(2)). Here, Faraday could not have known whether or not the development agreement was a "public works contract" until it was disclosed. The development agreement was not disclosed until 10 December 2015, and only in a redacted form. The original grounds in the claim for judicial review were then amended to formulate the appropriate challenge, and the claim under the 2006 regulations was issued. Had a point about "limitation" been taken by the council when it ought to have been taken, there would have been compelling grounds for a discretionary extension of time under regulation 47D(4). Faraday could not be in a worse position under CPR rule 54.5 than it was under the 2006 regulations.

96. I agree with Mr Elvin that to the extent that any complaint properly raised in Faraday's claim under the 2006 regulations was duplicated in its claim for judicial review, the latter was precluded on the basis that there was an alternative remedy under the legislative regime for public procurement. Because the claim under the 2006 regulations was issued after the development agreement had been entered into, the only remedies potentially available, under regulation 47J(2), were a declaration of ineffectiveness and an award of damages. Only a declaration of ineffectiveness was, in fact, sought.

97. I also accept Mr Elvin's submission that, under regulation 47E, the 30-day time limit in regulation 47D is not disapplied for remedies other than a declaration of ineffectiveness if the claim is pleaded to seek such a declaration as well as some other remedy. In those circumstances, in my view, the longer period for launching proceedings in regulation 47E applies specifically and only to the claim for a declaration of ineffectiveness, and not to any claim for another form of relief. Such claims do not benefit from the more generous time limit, but are subject to the shorter one in regulation 47D. Under regulation 47D(2) the question is one actual or constructive knowledge "that grounds for starting the proceedings had arisen". Time runs from that moment.

98. In paragraph 1 of the statement of facts and grounds in the claim for judicial review – issued on 20 November 2015 – it was stated that Faraday was "first made aware [of the development agreement] on 9 September 2015", and in paragraph 18(iii) it was asserted that "in order to

avoid the public procurement procedures under the Public Contracts Regulations 2015, [the development agreement] deliberately omitted any obligation … to undertake works and/or failed to specify the works that were to be undertaken". I can therefore see some force in the submission that Faraday had sufficient knowledge to cause the statutory time for making a claim to start to run at least from 20 November 2015. But I am prepared to accept Mr Giffin's submission that, in the circumstances, Faraday can properly say that it could only be sure of the terms of the development agreement when it was disclosed on 10 December 2015, and it was then necessary to re-formulate the grounds in the claim for judicial review. In view of the deficiencies of the voluntary transparency notice, the relatively complex provisions of the development agreement and the need for Faraday to understand its provisions before it could discern what grounds for a claim there were, that is, I think, a reasonable argument. It might not be so in every case. Under regulation 47D(2), therefore, time would not have started to run until 10 December 2015. But if I were wrong about that, I would also accept that the court should exercise its discretion under regulation 47D(4) to grant the necessary extension of time.

*Conclusion*

99. For the reasons I have given, I would allow the appeal. If my Lords agree in that conclusion, the question of the appropriate form of any relief should, I think, be the subject of further submissions by the parties.

**Lord Justice Flaux**

100. I agree.

**Lord Justice Lewison**

101. I agree that the appeal should be allowed for the reasons given by Lindblom LJ. However, I prefer not to express an opinion on the "abuse of rights" argument, which is not essential to our decision.

**Agreed Summary of the Development Agreement**

**[SK2/1/1-208]**

1. Definitions are set out in cl. 1.1 [SK2/1/5-26] including:

- "**Business Plan**" (BP) is a plan in the form of the Indicative Business Plan, identifying specified matters including initial Development Site and Retained Site categorisations, initial Infrastructure Works, and Outstanding Interests. To be prepared by the Developer. Can be varied in accordance with cl. 6 (p. 5);
- "**Development**" comprises both the development as consented by the Outline Planning Permission of the Development Sites and the development of the Infrastructure Works in accordance with the Project Plans, the relevant Development Strategy and the terms of the Agreement (p. 9);
- "**Development Sites**" is the composite term for the Commercial Plots (those parts of the LRIE Site to be used for commercial or mixed use development) and the Residential Plots (those parts of the LRIE Site to be used for residential development). In essence, the term "Development Sites" encapsulates all those parts of the LRIE Site which might be subject to development under the DA (p. 10);
- "**Development Strategy**" is the detailed strategy for the Development of a Plot, specifying matters such as the Works relevant to the Plot, the timing of the Works, the method and details of the proposed disposal of the Plot, a Plot Appraisal, and relevant outstanding interests (p. 10);
- "**Ground Lease**" is a lease of a relevant commercial plot in the form annexed at Appendix 7 and which is otherwise agreed or determined pursuant to Clauses 13.7 and 13.8 (p. 12). Clause 3.20 of the draft Ground Lease at Appendix 7 (p. 141) requires the Tenant to comply with the Developer's obligations as set out in Schedule 1 to the Development Agreement during the Development Period (defined at p. 130);
- "**Indicative Business Plan**" is defined (p. 12) as the structure of the indicative Business Plan attached to the DA at Appendix 1 (p. 90);
- "**Indicative Master Plan**" is defined as the indicative Master Plan attached to the DA at Appendix 5 (p. 120);
- "**Infrastructure Land**" means the parts of the Property which are required to undertake Infrastructure Works;

- "**Infrastructure Works**" (IW) are defined by reference to a non-exhaustive list of types of work necessary or desirable for the Project (p. 14);
- "**Master Plan**" (MP) is a plan, in the form of the Indicative Master Plan, which: identifies the Retained Sites; identifies the Development Sites and their proposed uses; provides a Land Appraisal; and provides an indicative implementation programme for the Business Plan. The MP to be prepared by the Developer and approved by the Steering Group. Can be varied in accordance with cl. 6 (p. 16);
- "**Master Planning Services**" are defined to include ten activities all of which are preliminary to securing a Planning Permission and the undertaking of works (pp. 16-17);
- "**Outline Planning Permission**" is defined as Planning Permission for Works comprised in the Approved Form Master Plan (p. 18);
- "**Planning Permission**" is a composite term for any planning permission including an Outline Planning Permission or a Reserved Matters approval for all or any part of the Works (p. 20);
- "**Plot Appraisals**" are the development appraisals prepared for any given Plot, modelled on the form provided in Appendix 3 to the DA [SK2/1/103] and which specify financial estimates and calculations (pp. 20-21);
- "**Project**" is defined as achieving the Objectives in accordance with the Approved Form Project Plans and each Development Strategy (p. 22);
- "**Project Plans**" is the composite term for the MP and BP (p. 22);
- "**The Property**" is the LRIE Site, together with such other adjacent/neighbouring land which is nominated by SMD, approved for acquisition by the Steering Group and in fact acquired (p. 22);
- "**Works**" is the composite term for the IW and the Development (p. 26)

2. The **Objectives** (p. 17) of the DA are set out in cl. 2.1, as being to:

> "facilitate the comprehensive regeneration of the Property by its redevelopment for mixed uses in such a way as to maximise, preserve and improve (having regard to market conditions at the relevant time and taking account of any changes in market conditions from time to time) the performance and total returns from the Property and the development potential of the Development Sites as far as reasonably possible and to increase the level of income shown in the Council's Rental Income Schedule …".

There then follows a non-exclusive list of objectives, comprising increased employment, mixed residential development, improved infrastructure, establishing and implementing a

cohesive estate management structure and strategy for the Property and the sites the Council will retain, and the establishment and implementation of a "Development Strategy for the Development and Disposal of the Development Sites" (pp. 27 – 28).

3. There are general obligations under cl. 2.3 (p. 28) for the parties to "co-operate fully with each other in relation to the achievement of the Objectives" and to "do all reasonable acts and things in order to achieve the Objectives" and under cl. 33 to act in good faith in their dealings with each other (p. 64).

4. The principal decision-making body in respect of the strategic objectives, the development strategy, the estate management strategy, and a number of documents arising under the DA, is the **Steering Group** (cl. 3.1) (SG). The SG has two members representing SMD and two members representing the Council (cl. 3.5), and its decisions are required to be unanimous (cl. 3.6). If the SG is unable to make unanimous decisions, any voting member can refer the decision to the DA's dispute resolution mechanism as set out in cl. 28 (cl. 3.6). There is no express obligation to refer although see cl. 2.3.

5. The DA sets out a series of obligations some of which are unconditional on the terms set out in the DA and some that do not apply unless the Developer elects to exercise the option to drawdown interests in the land, primarily under clauses 9 and 14.

6. Cl. 5 (p. 30) requires the Developer, within 4 months of the expiry of the deadline or dismissal of JR proceedings relating to a Planning Permission, to prepare and submit to the SG for its approval an **Estate Management Strategy** setting out its strategy for the management of the Property and Retained Sites, and during the first three years, to review the strategy every six months, and thereafter as agreed.

7. Cl. 6 obliges the Developer to:

    (a) **Provide or procure Master Planning Services** – includes preparation and review of Project Plans & Land Appraisal (p. 15), identification of Plots, preparation of Development Strategy, identification and assessment of likely Infrastructure Services;

    (b) Cl. 6.2 **Prepare the draft Project Plans** and submit to SG for approval within 4 months of Commencement Date (p. 7);

    (c) Cl. 6.3 each of such PPs "**shall be consistent with**" Indicative Business Plan (p. 12) and Indicative Master Plan (p. 12), the Objectives and terms of DA generally and market conditions prevailing at the time and identify Development Sites or Retained Sites from time to time;

(d) Under cl. 6.4 and 6.5 within 4 months following approval of each PP to **prepare initial budget for anticipated Infrastructure cost** (p. 13) (LIC Budget) and at 6 monthly intervals (or other required by SG) to **review and submit** to SG review of LIC Budget, Business and Master Plans;

(e) Cl. 6.6 requires that reviews of LICB, Master Plan and Business Plan be consistent with an promote the Objectives, take forward or adopt principles, Objectives etc for preceding approved form LICB, Master Plan and Business Plan etc;

(f) Cl 6.6 and 6.7 SG may a**ccept, reject or require reasonable changes to draft PPs and LICB** but only reject or require changes if the documents are inconsistent with each other or the Objectives;

(g) There are provisions for the Developer to change the LICB or PP at 6.10 and 6.11;

(h) Cl. 6.12 Following approval of Master Plan, Business Plan and LICB and receipt of Outline Permission satisfactory to Developer to **prepare and submit** to SG **from time to time** for approval a **Development Strategy** in relation to a Plot consistent with approved MP, BP and LICB, Objectives, prevailing market conditions and terms of DA generally. The Development Strategy must include an indicative implementation programme;

(i) Cl. 6.13 SG **not required to approve Development Strategy** where Commercial Plot Appraisal (p. 6) shows Development Ground Rent payable pursuant to relevant Ground Lease **less** than income in Council's Rental Income Schedule (pp. 7-8) in respect of the relevant Plot. This is the mechanism for ensuring the Council's rental income does not fall below the required level;

(j) Cl. 6.14 Developer has option to make a **material change** to an approved form DS to be submitted to SG in accordance with cl.6.

8. Cl. 7 provides for Planning:

(a) Cl. 7.1 obligation for SMD to prepare and submit as soon as reasonably possible a planning application for **Outline Planning Permission (p. 18) for the Works (p. 26) as a whole** (i.e. for the whole site) together with an Environmental Statement and other supporting documents. That application must be in accordance with the PPs (Master Plan and Business Plan) as approved by SG. The obligation to submit a planning application therefore only arises once the Master Plan and Business Plan have been approved by the SG.

(b) Cl. 7.2 - as soon as reasonably practicable after the approval of a Development Strategy for a Plot, the Developer must submit an application for **detailed permission or reserved matters approval**. Developer to use reasonable endeavours to obtain Satisfactory Planning Permission (p. 23, onerous conditions pp. 17-18). Onerous conditions procedure in cl. 7.5.

9. Under cl. 9 (Infrastructure Works (IW)) -

(a) Cl. 9 applies where the Approved Form BP or Development Strategy provides for construction of IW.

(b) In considering the nature and extent of the IW, the Developer must have regard to the Objectives, the MP and BP, the likely programme for commencement of the IW and the marketing and disposal of the Development Sites (cl. 9.2). IW are to be provided within Infrastructure Land (IL).

(c) Under cl. 9.4 "*the Developer **may** serve a written notice at any time*" for the transfer of the relevant part of the IL (p. 13) which gives rise to a binding contract for the transfer of the relevant part of the IL (cl. 9.5) – with the exception of land which is to be dedicated as highway, of which the Council is to retain the freehold. Developer obliged to procure management of IL in accordance with Estate Management Strategy.

(d) Cl. 9.9 and 9.10 impose obligations, which in the case of Cl. 9.9 expressly follow transfer of the IL, that the Developer is to procure that such IL shall be managed in accordance with the Estate Management Strategy and that it should be developed in accordance with the standards set out in cl. 9.10(a) to (c) (p. 37).

(e) Following service of notice calling for a transfer, the Council has powers to compel performance of the obligations in cl.9 (cl. 9.12).

10. Cl. 13 (Plot Appraisals)

(a) Cl. 13.1 requires the Developer to submit a Plot Appraisal to the SG for approval within 10 business days of receipt of a Satisfactory Planning Permission (p. 23). Any dispute or failure to approve is referred to dispute resolution in accordance with Cl. 28 (clauses. 13.5 and 13.6)

(b) Cl. 13.7 requires that within one month of receipt of a Plot Appraisal by the SG, the Developer and the Council must use reasonable endeavours to agree the form of the Ground Lease or transfer, which must include (among other requirements) "an obligation on the part of the Developer to carry out or procure the carrying out of the Works relating to the relevant Plot" in accordance with the Developer's

Obligations which are defined (p. 9) with reference to the obligations set out in Schedule 1 (see pp. 66 – 67).

(c) Any failure to agree the form of the Ground Lease or Transfer must be referred to dispute resolution in accordance with Cl. 28 (Cl. 13.8)

11. Cl. 14 (Plot development by the Developer):

(a) cl. 14.1 confers an option on the Developer to serve Acquisition or Residential Plot Notices (pp. 4, 23) on the Council for the acquisition of Development Sites, within ten business days following Approved Appraisal for the relevant Plot and satisfaction/waiver of Pre-Commencement Conditions (p. 21) in the approved DS.

(b) The notice should identify the Plot to which it relates and include an Implementation Programme (p. 12) for that Plot.

(c) (provided the Council does not trigger cl. 14.3) the service of the notice gives rise to a binding contract for grant of the Ground Lease (p. 12, Appendix 7, pp. 123-180) or transfer of the freehold of the relevant plot under cl. 14.4 in either case subject to the development obligation in Clause 13.7(b) (see cl. 14.5, p. 44).

(d) On completion of the Ground Lease/transfer of freehold cl. 14.6 imposes an obligation to credit of pay the sums stipulated in (a) and (b).

12. Clause 28 (pp. 61 – 64) provides for the resolution of disputes by an expert (Independent Person) or arbitrator if agreed by the parties.

13. The rents to be paid following drawdown of Ground Leases for each plot is set out in cl. 2.1(c) (p. 133) and Schedule 2 Part 2 (p. 157) of the form of Ground Lease at Appendix 7 i.e. the initial rent until practical completion which is at the passing rent and, following completion, to be reviewed to the level required under the DA following the processes summarised above.

14. Plot transfer proceeds are distributed in accordance with cl. 17 (pp. 48-50) and in accordance with the confidential formula at cl. 17.2 (b).

15. Overage is payable under cl. 18 (pp. 50-52) following a Commercial Sale or completion of the final dwelling on a Residential Plot in accordance with the confidential formula and on the confidential percentages there set out.