

JUDICIAL REVIEW AND PUBLIC PROCUREMENT

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This note analyses the circumstances when a challenge to a recent or imminent procurement decision can be made by way of a claim for judicial review, either instead of or in addition to a claim under the Public Contracts Regulations 2015 (*SI 2015/102*), and the practical issues caused by this.

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SCOPE

This note analyses the circumstances in which an aggrieved tenderer (or third party) may judicially review a public procurement decision. This may be as well as, or instead of, pursuing a breach of the procurement regime through the statutory cause of action established by the *Public Contracts Regulations 2015 (SI 2015/102)* (PCR 2015). This note focuses on potential challenges to procurement decisions made under the PCR 2015. It focuses less on procurement decisions made under other procurement legislation (such as the *Utilities Contracts Regulations 2016 (SI 2016/274)* (UCR 2016)) or outside any procurement legislation.

This note refers on occasion to cases that engaged the Public Contracts Regulations 2006 (SI 2006/5) (PCR 2006), which the PCR 2015 revoked and replaced. Given that the PCR 2015 made no substantial changes to the remedies available under the PCR 2006 or otherwise to the potential availability of judicial review in a procurement context, these older cases will still be of interpretative value to courts and practitioners.

OVERVIEW: JUDICIAL REVIEW OF PROCUREMENT DECISIONS

Whether judicial review is an appropriate or available route for a party that wishes to challenge a procurement decision will depend on various circumstances, including whether the:

- Procurement was conducted under the PCR 2015.
- Party was classed as an economic operator in that procurement.

In broad terms, an economic operator that has a potential remedy open to it under the PCR 2015 will need to consider carefully whether judicial review is open to it at all. A non-economic operator, however, will have no remedy or standing under the PCR 2015 and it may be that judicial review is their only means of challenging a procurement decision. This does not mean, however, that a non-economic operator will necessarily be able to bring a judicial review claim. A non-economic operator may face difficulties establishing standing, particularly where there is a gulf between the reasons for the claimant's interest in the procurement decision (for example, where their purpose is essentially political) and the aims of the public procurement statutory regime.

CHALLENGES TO PROCUREMENT DECISIONS UNDER THE PCR 2015

The PCR 2015, which implement in the UK the *Public Contracts Directive (2014/24/EU)*, impose obligations on contracting authorities tendering for certain contracts for the supply of works, goods or services that exceed specified financial thresholds. They enshrine in UK law the aims of EU public procurement law, which include the elimination of trade and labour barriers, the promotion of fair and transparent competition between firms and the avoidance of market distortions. Where a contract is covered by the PCR 2015, the contracting authority must comply with its requirements for advertising, procedure, selection criteria and bid evaluation, among other issues. This is a statutory duty owed to economic operators, namely a person or public entity that offers the execution of works, supply of produces or provision of services (regulation 2). For detailed analysis of these provisions, see *Practice note, Public procurement in the UK*.

Economic operators

Regulation 91 of the PCR 2015 provides that a breach of the statutory duty owed to economic operators is "actionable by any economic operator which, in consequence, suffers, or risks suffering, loss or damage". A disappointed or potential tenderer that has been affected by an alleged breach of the PCR 2015 is, therefore, broadly able to bring an action under the PCR 2015 in the Technology and Construction Court. Other interested parties that are not economic operators, such as trade unions or local taxpayers, will not have standing under the PCR 2015, however.

A definitively excluded tenderer, that is one which has been definitively excluded at a preliminary stage of the tendering process, also appears to be precluded from bringing an action under the PCR 2015 at least to the extent that they seek a remedy in relation to the conduct of the tender process after the point at which they were definitively excluded (see *Legal update, ECJ rules that a bidder which has been definitively excluded cannot challenge an award decision*).

Remedies under the PCR 2015

The PCR 2015 prescribe the remedies that are available to successful claimants, which include:

- **Pre-contract remedies.** Before the contracting authority enters into a contract with the successful tenderer, claimants may seek an order from the court to set aside a decision or require the contract authority to amend a document (such as a tender document for reissue).
- **Post contract remedies.** After the disputed contract has been entered into, a claimant may pursue a claim of ineffectiveness, which if successful would nullify any obligations under the contract.

The court may also order the award of damages to the claimant.

For detailed information, see [Practice note, Remedies in public procurement law](#).

JUDICIAL REVIEW

In certain circumstances, judicial review may be available to a claimant to challenge a decision made under the PCR 2015.

Judicial review is the process by which the Administrative Court reviews the lawfulness of a decision or action taken by a public body. Most contracting authorities under the PCR 2015 are likely to be public bodies for the purposes of judicial review. For further information, see [Practice note, Judicial review: an introduction](#).

Decisions that are amenable to judicial review

Not all decisions of public bodies are amenable to judicial review. Only the decisions they make in pursuit of their public functions and that are subject to public law obligations are caught in this respect. This is more likely where a decision is made on a statutory basis. Actions against decisions that are of a commercial nature, such as where a public body defaults in a contractual capacity, for example, or in its obligations to employees, will likely be by way of a private law action, and not judicial review (see, for example, [R \(Hibbit & Saunders\) v Lord Chancellor \[1993\] COD 326](#)). Establishing whether a decision has a sufficient public law element to be amenable to judicial review is not always straightforward. For further information, see [Practice note, Judicial review: an introduction: Which decisions can be judicially reviewed?](#).

In [R \(Chandler\) v Secretary of State for Children, Schools and Families \[2009\] EWCA Civ 1011](#), the Court of Appeal (CoA) held that a contracting authority's failure to comply with the PCR 2006 was an unlawful public law act. This made it theoretically amenable to a judicial review claim which could be brought by anyone with standing, not limited to economic operators (*at paragraph 77*) (see [Standing](#)). The CoA did not accept the finding by the High Court in the first instance which held that the PCR 2006 did not confer any public law rights, but only private law rights on economic operators (see [Legal update, Court of Appeal dismisses appeal against ruling that public procurement rules do not apply to establishment of school](#)). Similarly, in [R \(Gottlieb\) v Winchester City Council \[2015\] EWHC 231 \(Admin\)](#), a public authority's failure to open a competitive tender process under the PCR 2006 (in breach of the PCR 2006), could be challenged by judicial review.

A procurement decision may also involve a public law element as a result of statutory obligations in addition to and outside those established by the PCR 2015. This may also be the case in respect of decisions to award contracts that are not subject to the PCR 2015. For example, a public authority may be under a statutory obligation to conduct contractual negotiations in a particular way. In [Mass Energy Ltd v Birmingham City Council \[1994\] Env LR 298](#), Glidwell LJ stated that the case was really a commercial dispute between a successful and an unsuccessful tenderer, but that the dispute had a public law element because of the statutory requirements on the city council to enter into a contract for its waste disposal operations and for the construction of an incinerator to be the subject of a contract entered into by tender (*at paragraph 36*). Without that public law element, Glidwell LJ indicated that the claimant could only have brought an action against the council on a contractual basis, such as by persuading a court that there was an implied term which entitled them to recover the wasted costs of tendering.

In [R \(Donn & Co\) v Legal Aid Board \[1996\] 3 All ER 1](#), the court, citing [Hibbit](#), stated that the mere fact that an authority was exercising a power to contract conferred by statute did not confer a sufficient public law element to make a claim amenable to judicial review. The statutory obligations in issue must impose particular duties "owed as a matter of public law" and it is those that must have been breached in order for a claimant to bring a judicial review claim (*at paragraphs 40-41*). The public authority committee's rejection of certain information provided to it in the course of its consideration did not breach any obligation, including a public law obligation that might have been set out in statute, as it had a discretion as to how to evaluate tenders.

R (Menai Collect Ltd) v Department for Constitutional Affairs [2006] EWHC 727 (Admin) involved an application for judicial review of a tender process under the *Courts Act 2003* and not under the procurement legislation. No alternative remedy point could be taken. McCombe J held that the claimant could not seek judicial review, because its complaint that particular information had not been considered did not disclose a breach of a public law obligation.

R (Gamesa Energy) v National Assembly for Wales [2006] EWHC 2167 (Admin) also involved a challenge to a tender process by an unsuccessful bidder alleging that the public procurement procedure was irrational and unfair (it was not disputed by the parties that the tender process was not subject to the statutory scheme). The main issue for the High Court was whether the claimant's challenge to the procurement process had a sufficient public law element to make it amenable to judicial review on the grounds of irrationality. Gibbs J rejected the availability of judicial review because the context of the procurement process did not involve a complaint of a breach of a statutory obligation in a public law context:

"It should be remembered that the background to these criticisms is that the pre-qualification process was one which the defendants were not obliged to by statute or otherwise to carry out at all. The way in which the tendering process and specifically any pre-qualification process were carried out, provided it was in good faith and untainted by corruption et cetera, were entirely a matter for them" (at paragraph 74).

For more information, see [Legal update, High Court rules that a challenge to a procurement procedure is not amenable to judicial review](#).

In both *Menai* and *Gamesa*, the court held that there was not a statutory obligation as to how the procurement process should be carried out. In contrast, where the PCR 2015 apply to the process, detailed public law obligations are set out in the legislation that define how the process must be conducted. Consequently, judicial review should not be denied on the basis that a complaint of breach of the PCR 2015 (as opposed to a breach of some other obligation) does not involve a sufficient public law element.

It is sometimes unclear whether a claimant's best prospect of success lies in a pure public law challenge or in a claim for a breach of a private law right (such as an implied contractual obligation) which imposes on the public authority similar requirements in respect of its decision-making as are recognised in judicial review proceedings. It may therefore be desirable to bring these closely allied claims in the alternative. The technical question of whether proceedings should be issued by way of a regular Part 7 claim or by way of an application for judicial review is no longer as important as it once was.

The courts have taken a pragmatic line in respect of proceedings issued in the wrong way (see *Trustees of the Dennis Rye Pension Fund v Sheffield City Council [1998] 1 WLR 840* and *Clark v University of Lincolnshire [2000] 1 WLR 1988*). If in doubt, the courts have suggested that an application for permission to apply for judicial review should be issued since the matter can always be subsequently transferred. *CPR 30.5* and *54.20* apply to such transfers.

For more information on the decisions that can be judicially reviewed and the evolving boundary between public bodies and bodies that exercise functions of a public law nature, see [Practice note, An introduction to judicial review: Which decisions can be judicially reviewed?](#).

Relief in judicial review

On an application for judicial review, the court has broad powers to grant relief. The forms of relief which are likely to be most relevant in a procurement context include orders quashing the decision taken by the public authority, prohibiting the authority from acting unlawfully or mandating the authority to act in accordance with its duties. Interim injunctive relief is also available where necessary to "hold the ring" pending a final determination of the lawfulness of the action under review.

The differences between the relief available in judicial review and that available under the PCR 2015 are important because:

- Judicial review may be an attractive route for a claimant if it offers a form of relief which is necessary to achieve justice for the claimant and which is unavailable in a claim under the PCR 2015.
- If the claimant is in a position to claim under the PCR 2015 and could thereby obtain comparable relief to that sought in the judicial review, the availability of an alternative remedy in the form of a claim under the PCR 2015 may preclude proceeding by way of judicial review.

For more information, see [Alternative remedies](#).

There is presently some doubt as to whether the availability of a claim under the PCR 2015 will always amount to an alternative remedy and therefore preclude a claimant from proceeding by way of judicial review or whether judicial review is only precluded if a claimant could obtain the relief sought (or substantially similar relief) under the PCR 2015.

As the remedy of a declaration of ineffectiveness is available in proceedings under the PCR 2015, it is likely that the circumstances in which a claimant can only obtain adequate relief in proceedings by way of judicial review will be limited. Nevertheless, there may be cases in which justice to the claimant requires relief beyond that available under the PCR 2015. For example, a claimant might wish to obtain final relief in the post-contract period other than damages or a declaration of ineffectiveness (such as an order mandating that the contract be given to the rightful winner of the tender).

For further information, see [Practice note, Judicial review: an introduction](#).

PROCUREMENT SCENARIOS WHERE A CLAIMANT MAY SEEK JUDICIAL REVIEW

There are two primary scenarios where judicial review of a procurement decision may be available and desirable to a claimant, and these scenarios have been the focus of most of the case law concerning judicial review of procurement decisions to date. These are where:

- An economic operator, which has a statutory cause of action under the PCR 2015, seeks judicial review in respect of a breach of one or more of the obligations set out in the PCR 2015. The economic operator's primary issue will be in convincing the court that it does not have an adequate alternative remedy under the PCR 2015, and that judicial review should be open to it (see [Alternative remedies](#)).
- A third party, non-economic operator, which does not have standing or, therefore, a statutory cause of action under the PCR 2015, seeks judicial review in respect of a breach of one of the obligations set out in the PCR 2015. The non-economic operator's main issue in bringing judicial review proceedings will likely be that it has standing to do so (see [Standing](#)).

It may also be the case that a claimant brings a judicial review claim where a contract award does not engage the PCR 2015 or, potentially, any other statutory regime and there is either no other statutory route of challenge open to them. Again, the claimant would need to argue that the decision has a sufficient public law element, and that it has sufficient standing.

Breaches of public law obligations

The recognised grounds for judicial review are well-established and include:

- Illegality, which includes, most obviously, a failure to conduct a procurement under the PCR 2015 when the PCR 2015 would require this and a breach of a contracting authority's obligations under the PCR 2015. This may also apply where another statutory obligation, outside the PCR 2015, has been breached by a public authority in awarding a contract.
- Irrationality, which may be evident for example where a contract is awarded to the "wrong" tenderer based on disclosed evaluation criteria or other policy reasons.

- Procedural unfairness, which may include a failure to treat tenderers equally, apparent bias in decision-making or an alleged conflict of interest.

For further information, see *Practice note, Judicial review: an introduction: Grounds for judicial review*.

The PCR 2015 prohibit most if not all of the potential behaviours by a contracting authority that would constitute a breach of public law principles in this respect. Certain public authorities are, however, bound by additional statutory obligations in respect of their decision-making powers and limits to these (see *R (Cookson & Clegg Ltd) v Ministry of Defence [2005] EWCA Civ 811, at paragraph 18*). For further information, see *Practice note, Decision-making by public bodies: avoiding legal challenge*. Local authorities are, for example, under a duty to enter contracts according to particular rules and principles outside the PCR 2015 (see *Practice notes, Capacity of local authorities to contract and the formalities for entering into contracts: Exercising contractual powers and Local government: statutory powers and duties and their proper exercise*). Certain public authorities are also under the public sector equality duty (PSED), established by the Equality Act 2010 (see *Practice note, PSED: general public sector equality duty under section 149 of the Equality Act 2010*).

ALTERNATIVE REMEDIES

Judicial review is a “remedy of last resort”. This means that the court may refuse permission to bring a claim if the claimant has an alternative remedy available which has not been exhausted. This would typically include a right of appeal or alternative review of the decision in issue, or other statutory challenge.

In the context of procurement, the proposition that a disappointed or potential tenderer should not be able to make a claim for judicial review has been justified primarily on two bases:

- A procurement decision is not necessarily amenable to judicial review. Procuring goods and services is an exercise principally engaging private law rights as between the procuring party and the supplier, even where the procuring party is a public authority (see *Decisions that are amenable to judicial review*). Where a procurement does not engage a statutory scheme, where there is no breach of private law right and where there is an insufficient public law element otherwise to subject the decision to judicial review, it follows that no remedy will (or should) be available to a disappointed tenderer.
- The statutory cause of action in the PCR 2015 provides a suitable alternative remedy to judicial review (see *Practice note, Judicial review procedure: a practical guide: Alternative remedies*). The PCR 2015 is focused on the rights and interests of economic operators, who are directly engaged with or otherwise interested in the procurement process, and makes remedies available to them. The PCR 2015 serve a public interest in aiming to ensure that contracting authorities achieve value for money and adopt objective evaluation criteria, for example.

In the context of the PCR 2015, this second issue will typically only affect an economic operator, which may have a right to challenge the decision under the PCR 2015. Plainly a third party who is not an economic operator, and so does not enjoy a statutory cause of action under the PCR 2015, cannot be denied judicial review in respect of a breach of the PCR 2015 on the basis that there is an alternative remedy. The right of an interested party that is not an economic operator as defined in the PCR 2015 to bring a claim for judicial review was established in *R (Law Society) v Legal Services Commission [2007] EWHC 1848 (Admin)* (although see also the issues presented by *Standing*).

Cookson & Clegg Ltd

In *R (Cookson & Clegg Ltd) v Ministry of Defence [2005] EWCA Civ 811*, the claimant issued claims both under the statutory cause of action (under the pre-PCR 2006 legislation, the now revoked Public Supply Regulations 1995 (PSR 1995)) and for judicial review. The claimant relied on substantially the same grounds and sought the same relief. The claimant justified doing this on the basis that if it relied on the statutory cause of action alone, it:

- Might not be able to obtain an order setting aside the contract.
- Would not be able to run its wider public law complaint of irrationality as well as its complaint of breach of the PSR 1995.

However, the Court of Appeal refused the claimant permission to seek judicial review, because it had the alternative remedy of the statutory cause of action. Buxton LJ held that the claimant could not justify proceeding by way of judicial review for breach of the PSR 1995 on the basis that an order setting aside the contract might not be available under the statutory cause of action.

One issue between the parties in *Cookson* was whether the ECJ's decision in (*Alcatel v Bundesministerium für Wissenschaft und Verkehr (Case C-81/98) ECR I-07671*) required the PSR 1995 to be interpreted purposively so as to allow for a final remedy of setting aside despite the fact that no such remedy was expressly made available in the regulations.

In the event, it was unnecessary for the court to determine the *Alcatel* point because it held that whether or not an order setting aside was available under the PSR 1995, the claimant could not use judicial review to evade the operation and limitation of the statutory scheme.

In dismissing the appeal, Buxton LJ emphasised that where a statutory scheme of relief is provided, judicial review should be withheld, not least to protect the integrity of the statutory process. That principle should not be departed from unless there were significant grounds for thinking that the statutory scheme was inadequate to assert complaints that the subject legitimately wished to make (*at paragraph 20*). In this case all of the faults that were asserted in the judicial review claim could also have been and were asserted in the PSR 1995 claim; this demonstrated that there was "no room for a separate claim under judicial review, and judicial review [was] not required to fill any gap in the protection afforded to the claimants" (*at paragraph 19*). The court identified that the faults the claimant identified in the PSR 1995 were "presented...in English public law terms" in the judicial review proceedings (*at paragraph 7*).

Buxton LJ also pointed out that the purely commercial award of a contract was not a public law matter. However, he stated that (in the light of the decision in *Mass Energy*) it was possible for public law vices to arise out of procurement decisions, and it was possible that these vices did not involve breaches of statutory duties as well. However, that was not the case with a challenge based on the irrationality of the selection. Buxton LJ gave as examples where this might be the case: "bribery, corruption and the implementation of a policy that was unlawful in itself, either because it was ultra vires or for other reasons" (*at paragraph 18*).

Buxton LJ's judgment has been cited with approval by subsequent cases that have considered alleged breaches of the PCR 2006 and PCR 2015. That the case arose from a decision under the PSR 1995 does not diminish the authority of the principles it established.

David Connolly's Application

In *Traffic Signs and Equipment Ltd and David Connolly's Application (Leave Stage) [2012] NICA 18*, the Court of Appeal in Northern Ireland (NICA) (upholding the decision of the High Court of Justice in Northern Ireland (NIHC)), provided another illustration of the proper application of judicial review in a procurement context. In this case, the second claimant (DC), a non-economic operator, was the shareholder and director of the first claimant company (TS). TS was an economic operator that had bid in a PCR 2006 procurement. The NIHC held that the award of three contracts in that process had breached the PCR 2006 and ordered that they be set aside. The contracting authority proceeded to enter into other contracts that TS had challenged in the proceedings, but which the NIHC had not found fault with. TS did not appeal under the PCR 2006 and the statutory stay expired. Instead, TS and DC applied for judicial review of the contracting authority's decision to enter into the other contracts. The NIHC refused permission on the basis that there had already been a review by the court as to whether the procurement had been conducted lawfully (under the PCR 2006), distinguishing the case from *Chandler*, where the claimant had not brought proceedings under the PCR 2006 (and had not, in fact, been able to as a non-economic operator). The NIHC considered that judicial review was not intended to displace a statutory scheme, and the judicial review claim was "in effect making a collateral challenge" to the civil PCR 2006 proceedings.

The NICA upheld the NIHC's decision. It appeared to the NICA that the judicial review claim was an attempt to obtain different relief from that ordered by the NIHC under the PCR 2006, which DC appeared to consider was too narrow. This was "an impermissible attempt to make a collateral attack on a binding and final decision not challenged on appeal" (at paragraph 26). DC did not have a legitimate interest in the issue (although TS did), and could not, therefore, demonstrate that he would be entitled to a remedy through judicial review. For further information, see [Legal update, Director and shareholder did not have standing to bring judicial review proceedings for breach of the procurement regime](#).

Faraday

In [Faraday Development Ltd v West Berkshire Council and another \[2018\] EWCA Civ 2532](#), counsel for the respondent local authority argued, citing [Cookson & Clegg Ltd](#), that the claimant's only cause of action was a claim under the PCR 2006 and that it could not make a claim for judicial review to pursue the same complaint, because it had a suitable alternative remedy. The court accepted this submission to the extent that where a claim under the PCR 2006 was duplicated in a claim for judicial review, the claimant could not bring a claim for judicial review because the PCR 2006 provided an alternative remedy. It does not appear, however, that the court in [Faraday](#) heard argument as to whether the claim under the PCR 2006 provided adequate relief and the reference to a claim under the PCR 2006 being "duplicated" in judicial review leaves open the question of whether differences in relief claimed or available would be sufficient to evade the alternative remedy principle (see [Legal update, Development agreement containing contingent obligations on developer was "public works contract" under PCR 2006 \(Court of Appeal\)](#)).

Further case law

Before the PCR 2015 came into force, a series of cases brought against the former Legal Services Commission (LSC) by disappointed tenderers for publicly funded legal work raised some doubt as to the proposition that judicial review based on breach of the PCR 2006 was not available to an economic operator (or at least revealed a pragmatic approach by the court to proceedings that have been commenced in the wrong court). These included:

- [R \(Harrow Solicitors and Advocates\) v Law Services Commission \[2011\] EWHC 1087 \(Admin\)](#), in which the claimant (having participated unsuccessfully in a procurement exercise governed by the PCR 2006) issued a claim for permission to apply for judicial review on the basis that it was a breach of the principle of equality. A subsidiary issue in the case was the claimant's assertion that the relief available under the PCR 2006 (damages) was inadequate because it sought an order requiring the LSC to reconsider its decision, which could only be provided by judicial review. The claim was rejected on substantive grounds but the court added that an adequate alternative remedy under the PCR 2006 had to offer no difference in relief. The court was entitled to look at the specifics of what was available under the purported alternative remedy to ascertain this (see [Legal update, High Court rules that contracting authority was entitled to refuse to allow tenderer to correct genuine mistake](#)).
- In [Yvonne Hossack v The Legal Services Commission \[2011\] EWCA Civ 788](#), the Court of Appeal accepted that it was arguable (for the purposes of the permission stage of judicial review proceedings) that the claimant might not secure the same remedy for a breach of the principle of equality under the PCR 2006 as under judicial review and consequently that it was not certain that there was indeed an alternative remedy (at paragraphs 38-42). The claimant was granted permission to seek judicial review, therefore, which was later rejected by the High Court (and upheld by the Court of Appeal) (see [Legal update, Court of Appeal refuses permission to appeal High Court order refusing judicial review of Legal Services Commission rejection of tender](#)).

These cases must be interpreted with some caution because:

- Legal services were "Part B" services under the PCR 2006, to which a less intensive statutory regime applied and, therefore, a less effective statutory remedy was available.
- The comments in [Harrow Solicitors and Advocates](#) were strictly obiter, the case having been disposed of on substantive grounds.

- The court in *Hossack* only found that the point was arguable.

What the cases do show is that notwithstanding *Cookson & Clegg* and *Faraday*, there may be limits to the proposition that the judicial review of a procurement decision is precluded merely because there is some statutory remedy available, albeit one that does not, in the circumstances, provide effective relief.

STANDING

In order to apply for judicial review of a public law decision, a party must have a “sufficient interest in the matter to which the application relates” (*section 31(3), Senior Courts Act 1981*). The general test for whether a person has standing “is a mixed question of fact and law; a question of fact and degree”, in which the court has regard to the relationship between the claimant, the matter to which the claim relates and all the other circumstances of the case (see *R (National Federation of Self Employed and Small Businesses) v Inland Revenue Commission [1982] AC 617*).

The concept of standing in judicial review claims has generally been interpreted widely by the courts. A financial or legal interest in the decision in issue is not strictly necessary on the claimant’s part.

For further information, see *Practice note, Judicial review: an introduction: Locus standi and public interest*.

Standing of economic operators

It is difficult to conceive of circumstances where an economic operator under the PCR 2015 will not be deemed to have a sufficient interest in a procurement decision for the purposes of judicial review (this does not, however, necessarily mean that the decision will be amenable to judicial review, see *Alternative remedies*). The following points, not all of which concern procurement matters, are of wider importance in this respect:

- The court has accepted that there can be sufficient interest in the remedy and not the particular legal ground on which the complaint is made. For example, in *R (Kides) v South Cambridgeshire District Council [2002] EWCA Civ 1370*, the claimant wanted planning permission to be set aside so that no housing could be built, but her ground of challenge was that a council had failed to consider the need for affordable housing. The court considered that it was unjust to debar a litigant from relying on grounds (that may be good grounds) but in which they had no real interest, even though they had a real and genuine interest in obtaining the relief sought. A claimant challenging an administrative decision must be entitled to present his challenge on all available grounds.
- An interest in stopping a competitor from enjoying an advantage has also been held to be sufficient. In *R (Rockware Glass Ltd) v Chester City Council and Quinn Glass Ltd [2006] EWHC 2250*, it was held that a glass manufacturing firm could challenge the more lenient pollution regime that applied to its competitor.
- In *R (Williams) v Surrey County Council [2012] EWHC 867 (QB)*, the claimant (who was part of a loose group of individuals opposed to the council’s decision to introduce community public libraries) was held to have the requisite standing to bring a judicial review challenge, even though she lived and worked outside the local authority’s area. In its judgment, the court cited authorities that demonstrated that interest groups and individuals, with an interest in matters of public concern, have been held to have a sufficient interest in bringing judicial review proceedings where a breach of relevant legislation has impacted on a section of the community which does not necessarily need to include the individual bringing the proceedings. For more information, see *Legal update, Council’s decision to staff libraries with volunteers failed to consider impact on accessibility of library to protected group (High Court)*.

There has nevertheless been an undercurrent of judicial dissatisfaction at the potential for abuse of the ability to seek judicial review on the basis of a desire to stop somebody else doing something of which the claimant disapproves. In *R (Noble Organisation Ltd) v Thanet District Council [2005] EWCA Civ 782*, Auld LJ expressed dissatisfaction at:

“the way the availability of the remedy of judicial review can be exploited – some might say abused – as a commercial weapon by rival potential developers to frustrate and delay their competitors’ approved developments, rather than for any demonstrated concern about potential environmental or planning harm” (at paragraph 68).

However, the challenge to the grant of planning permission to a commercial rival was refused in this case on the merits and not on the basis of standing.

In *R (Feakins) v Secretary of State for the Environment* [2003] EWCA Civ 1546, Dyson LJ stated that:

“if a claimant seeks to challenge a decision in which he has no private law interest, it is difficult to conceive of circumstances in which the court will accord him standing, even where there is a public interest in testing the lawfulness of the decision, if the claimant is acting out of ill will or some other improper purpose. It is an abuse of process to permit a claimant to bring a claim in such circumstances” (at paragraph 23).

In *Feakins*, standing was held to exist for a farmer to challenge the way in which the remains of cattle incinerated on his land were to be disposed of, although it was said that his challenge was designed only to boost the amount of compensation to be paid to him. His motive was relevant but not determinative.

Standing of non-economic operators

A non-economic operator seeking judicial review of a PCR 2015 decision may find that the court’s approach to standing is more restrictive than in non-procurement judicial review cases. Non-economic operators, such as members of the public or other interested parties, will need to demonstrate that a contracting authority’s compliance with the PCR 2015 “might have led to a different outcome that would have had a direct impact on [them]” (*R (Chandler) v Secretary of State for Children, Schools and Families* [2009] EWCA Civ 1011, at paragraph 77). This means that they would need to be affected by the precise way in which the procurement was conducted, and be able to establish that they would have been in a significantly better position had the procurement been properly carried out. This may account for relatively few third parties, but might include, for example, trade associations, other representatives of economic operators, subcontractors, suppliers or employees of a third party that are affected by a decision affecting an economic operator. It is also possible that a local taxpayer may have standing to challenge a selection of a more costly option where this might raise local taxes, or for an environmental activist to challenge the selection of a more environmentally damaging option (though the decision in *Waverley* suggests that taxpayers will not have sufficient interest merely because the procurement decision involves the spending of public money). This would also become potentially more likely where an act is so severe that the court considers that it should intervene in any event. In *Chandler*, the CoA stated that:

“a failure to comply with the regulations is an unlawful act, whether or not there is no economic operator who wishes to bring proceedings under [the PCR 2006], and thus a paradigm situation in which a public body should be subject to review by the court... We can also envisage cases where the gravity of a departure from public law obligations may justify the grant of a public law remedy in any event” (at paragraph 77).

It is worth noting that not all of the authorities on this point are consistent with each other. Some of the principles they establish may also apply to potential claimants who are involved in procurement decisions made outside the PCR 2015.

Chandler

In *Chandler*, the claimant was a non-economic operator, opposed to the institution of Academy schools. Her judicial review claim was brought on the basis that the Secretary of State had not complied with the public procurement regime (then established by the PCR 2006). The CoA held that she did not have standing because she was not interested in ensuring a proper procurement exercise but rather in stopping any procurement of local Academy schools at all. She was attempting to use the public procurement regime for a purpose for which it was not created.

In the circumstances, the CoA considered that it was outside the proper function of public law remedies to give the claimant standing to pursue her claim (see [Legal update, Court of Appeal dismisses appeal against ruling that public procurement rules do not apply to establishment of school](#)).

The proposition that the claimant in *Chandler* should not be regarded as having standing can be criticised because the CoA:

- Adopted an approach that was at odds with the generally permissive approach adopted to standing in judicial review. It is open to doubt that the decision on standing would have been as robust if the challenge had not been rejected on its substance.
- Preferred the restrictive approach to standing taken by Richards J in *R (Kathro) v Rhondda Cynon Taff County Borough Council [2001] EWHC 527 (Admin)* (in which the claimants were unable to show that they were affected in any way by the choice of tendering procedure) to the CoA's approach in *Kides* that if a claimant were interested in the outcome, it would be irrelevant that she were not interested in the ground. Although the Court of Appeal referred at paragraph 73 to the claimant relying on *Kides*, nowhere did it say why that approach should be rejected.
- Had previously acknowledged that the claimant was interested in there being a competition to see who should be the sponsor of the Academy and that she had an interest as a local parent in what bodies were so involved (at paragraphs 8-9). This would appear to be a sufficient interest.

Post-Chandler: Gottlieb and Waverley

In *R (Gottlieb) v Winchester City Council [2015] EWHC 231 (Admin)*, the High Court held that a councillor, who was a resident of the area, a council tax payer and who led a campaign group against a proposed development, had standing to bring a judicial review claim against the council (to whom he was elected). The council had not advertised or opened a competitive tender process when varying a development agreement contract pursuant to the PCR 2006, which the court held was unlawful. It stated that the councillor had a legitimate interest in ensuring the council complied with the law, used public funds "wisely" and secured open competition for the most appropriate development scheme. It appeared to be relevant that his roles as councillor and a member of the campaign group afforded him close involvement with the consideration of the scheme. The High Court distinguished the councillor from the claimant in *Chandler*, who it deemed had a "political" ulterior motive to oppose academy schools; the councillor sought an open competition, which the procurement process was intended to provide (see [Legal update, High Court rules that variation of development agreement without new procurement procedure was unlawful](#)).

In *R (Wylde and others) v Waverley Borough Council [2017] EWHC 466 (Admin)*, which was decided after *Gottlieb*, the High Court held that a group of claimants that included members of the defendant council and members of local civic societies, did not have standing to challenge a variation of a contract to redevelop a town centre that was not procured through the PCR 2006. All of the claimants were council tax payers who opposed the scheme. This was not, however, enough to demonstrate a sufficient interest because the claimants could not satisfactorily demonstrate that:

- A differently conducted tendering exercise would have produced a different outcome.
- They were directly affected by any failure to follow procurement requirements, in that they were not economic operators nor could they demonstrate a "proxy" interest that an economic operator might have.

The court stated that it would take more than simply being a council tax payer, concerned local resident or member of a local authority to have a sufficient interest pursuant to the "restricted test" for standing in *Chandler*. It was necessary to show a direct impact from an alleged breach of procurement procedure. For further information, see [Legal update, Claimants in public procurement challenge lacked standing to bring judicial review claim](#).

The claimants in *Waverley* were of a similar status to the claimant in *Gottlieb* and it is difficult to reconcile the two cases. The court in *Waverley* considered that it could not follow *Gottlieb*, on the basis that the latter had wrongly

emphasised the significance to the CoA of the claimant's ulterior motive in *Chandler*, from which it distinguished the claimant in *Gottlieb* (who genuinely wanted there to be an open competition for a procurement). In *Waverley*, the court considered that the CoA's judgment in *Chandler* instead related to the "distance" between the claimant's (political) interests and the policy and purpose of the public procurement regime. The court noted, however, that a claimant's motive for bringing a judicial review claim could be relevant, particularly if it was pursued out of ill-will or another improper purpose, which may constitute an abuse of process (citing *Feakins*, at paragraph 23).

In *David Connolly's Application*, the NICA held that the director and 50% shareholder of a company (TS) that had bid in a procurement bound by the PCR 2006 (and which had made an earlier challenge to the decision under the PCR 2006) did not, as an individual, have standing to bring a judicial review claim. It considered that there was no direct impact on him arising from the contracting authority's decision to award 15 contracts to bidders other than TS (see *David Connolly's Application* and *Legal update, Director and shareholder did not have standing to bring judicial review proceedings for breach of the procurement regime*).

The standing of representative bodies

The judgments in *Chandler*, *Gottlieb* and *Waverley* each cited, without controversy, *R (Law Society) v Legal Services Commission [2007] EWHC 1848 (Admin)* or the CoA's judgment of the appeal (*R (Law Society) v Legal Services Commission [2007] EWCA Civ 1264*), in which the third party Law Society was able to bring judicial review proceedings for breaches of the PCR 2006, in parallel with the proceedings issued by the economic operator firm of solicitors, based on its statutory cause of action. Both the Law Society and the firm of solicitors complained, successfully, that the contracting authority's unilateral power to amend the Unified Contract between it and a firm of solicitors that had succeeded in its bid to undertake publicly funded work, was contrary to the requirement of transparency under the PCR 2006. The High Court considered that the Law Society had standing to bring the claim on the basis that it:

- Was a professional body that represented all solicitors, and both those who had signed and declined to sign the Unified Contract.
- Had statutory functions relating to the profession.
- Brought the judicial review claim to protect the interests of the firms it represented.

(at paragraphs 111-114).

The Law Society was, therefore, directly affected by and had a sufficient interest in the decision.

For more information, see *Legal update, Court of Appeal judgment on application of transparency requirement when amending public contracts*. This case was part of a number of related cases brought against the former Legal Services Commission by disappointed tenderers for publicly funded legal work.

In *R (Unison) v NHS Wiltshire Primary Care Trust [2012] EWHC 624*, a trade union did not satisfactorily demonstrate that it had a "sufficient interest" in the defendant's decision to outsource certain services without going through a tender procedure. In particular, it could not show that a different decision, that had been made in accordance with the PCR 2006, would have had a different effect on its members and, therefore, that they had a sufficient interest in the outcome (paragraphs 9 to 13 of the judgment of Mr Justice Eady) (see *Legal update, High Court rules that trade union does not have standing to seek judicial review of procurement decisions*).

In *R (Law Centres Federation) v Lord Chancellor [2018] EWHC 1588 (Admin)*, the claimant was an organisation whose members were law centres carrying out work under legal aid contracts. Many of the members were affected by changes introduced by the Legal Aid Agency to the way in which contracts under the Housing Possession Court duty solicitors scheme were awarded. No standing point appears to have been pursued by the respondent but the case is notable for its contrast with *Unison*. Here, the case on the decision-making error was strong, the respondent did not contend that correction of the error would have made no difference to the outcome and the claimant's members were closely and directly affected by the changes in the tendering process.

PRACTICAL CONSIDERATIONS IN JUDICIAL REVIEW CLAIMS AGAINST PROCUREMENT DECISIONS

For detailed information on filing and issuing a claim for judicial review, see [Practice note, Judicial review procedure: a practical guide](#).

Limitation periods

Judicial review proceedings must ordinarily be brought promptly and in any event not later than three months after the grounds to make the claim first arose ([CPR 54.5\(1\)](#)). This would apply to a decision that fell outside the PCR 2015 (which was not challenged on the basis that it should have been made under the PCR 2015 but was not).

For decisions subject to the PCR 2015, judicial review proceedings must be issued within the time within which an economic operator would be required by [regulation 92\(2\)](#) of the PCR 2015 to start proceedings in respect of the decision ([CPR 54.5](#)); this period is, by default, 30 days from the date on which the alleged breach was known or ought to have been known by the claimant ([regulation 92\(2\), PCR 2015](#)).

Filing dual procurement and judicial review claims

The PCR 2015 and the pre-action protocol for judicial review prescribe particular and quite nuanced procedures for the preparation and filing of documents.

The Technology and Construction Court (TCC) has issued a [Guidance note on procedures for public procurement cases](#) (see [Legal update, TCC Guidance on public procurement cases published](#)). This provides that dual claims under the PCR 2015 and for judicial review will be heard and case managed together before a TCC judge who is also a designated Administrative Court judge, unless otherwise ordered by the Judge in Charge of either the Administrative Court or the TCC ([at paragraph 13](#)).

The TCC guidance outlines the steps that a claimant's solicitors, where twin proceedings are to be issued against the same defendant "almost simultaneously", in this respect should take, including:

- At the time of issuing the claim form for judicial review in the Administrative Court, writing to the Administrative Court Office to request that the claim be heard alongside the related claim in the TCC (providing a copy to the Judges in Charge of both the Administrative Court and the TCC).
- Marking the letter with the stipulated wording in [paragraph 14\(2\)](#).
- Contacting the Administrative Court Office within three days of issuing proceedings if notification of the transfer has not been received, and keeping the TCC informed of the position ([at paragraph 14](#)).

The TCC guidance also outlines the procedure for consideration by the Judge in Charge of the TCC as to whether it should be case managed and heard together ([at paragraphs 16-19](#)).

The titles of all of the documents filed in the judicial review proceedings should display the Administrative Court title and case number, and that the judicial review claim is being heard and managed together with the TCC claim (including its specific case number) ([at paragraph 20](#)).

Arguments on standing

Permission stage

A defendant that seeks to resist a judicial review claim on the basis of the claimant's (lack of) standing should do so at the permission stage as a procedural issue.

In *Gottlieb*, the High Court noted, apparently in support of its finding that the claimant had a legitimate interest in the claim, that the issue of standing had not been disputed at the permission stage (*at paragraph 151*).

Substantive hearing

At the substantive hearing, the court may decide to determine the issue of standing as:

- A preliminary issue in judicial review proceedings (which it did in *Unison* and *Waverley*) and before it hears the substantive grounds for judicial review. If the court determines that the claimant does not have standing to bring the claim, then it may decline to consider the substantive claim as this will have become academic.
- Part of the substantive case against the defendant (which it did in *Chandler* and *Gottlieb*), particularly where the underlying issues of the claim are entwined with the question of whether the claimant has standing.

It may be advantageous for a defendant to seek to have the issue of standing decided as a preliminary, procedural issue before the court, particularly where the substantive merits of the case mean that a defence based on the claimant's lack of standing is likely to appear unattractive. In *Chandler*, however, the CoA stated that once permission to apply for judicial review has been granted at the permission stage,

“unless it is appropriate to deal with standing as a preliminary issue, there is likely to be little point in spending valuable court time and costs on the issue of standing. In that situation, we would not encourage the court to embark on a complex argument about standing. This will especially be the case where standing is a borderline issue” (*at paragraph 77*).

For further information on the structure of judicial review proceedings and the distinction between the permissions stage and the substantive hearing, see [Practice note, Judicial review procedure: a practical guide: The permission stage](#).