Neutral Citation Number: [2017] EWHC 466 (Admin)

Case No: CO/3263/2016

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/03/2017

Before :

MR JUSTICE DOVE

- -

Between :

David Wylde and Others	**Claimants**
- and -	
Waverley Borough Council	**Defendant**

- -
- -

David Smith & Matthew Dale-Harris (instructed by **Burkill Govier**) for the **Claimant**
Jason Coppel QC & Patrick Halliday (instructed by **Sharpe Pritchard LLP**) for the **Defendant**
Charles Banner (instructed by **CMS Cameron McKenna LLP**) for the **Interested Party**

Hearing date: 31st January 2017

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE DOVE

Mr Justice Dove :

Introduction

1. This judicial review challenges the decision of the defendant made on 24th May 2016 to amend an agreement with the interested party which had been entered into for the purpose of achievement of a redevelopment known as the "Brightwells" or "East Street" Scheme ("The Scheme") in Farnham. The challenge is brought on the basis of an alleged failure to comply with the legal requirements required by public procurement law.

2. Permission to apply for judicial review was granted by Andrews J on 12th August 2016. On 9th September 2016 Mr Robin Purchas QC sitting as a Deputy Judge of the High Court ordered that there be a trial of the preliminary issue in relation to the claimants' standing to bring this claim. It is in relation to that discrete issue that this judgment relates. The structure of this judgment is firstly, to set out, so far as necessary, the facts pertinent to the case; secondly, set out the nature of the interest of the claimants in this case; thirdly, to examine the content and structure of the law relating to procurement engaged in this case; fourthly, to consider the law relating to standing and in particular that which pertains to procurement cases; and then finally the judgment considers whether or not the claimants are able to demonstrate standing measured against the legal principles identified.

3. The defendant and the interested party sought to contend that the claimants were unable to demonstrate standing under the established case law but also, in the alternative, contended that judicial review is not an available remedy to a person who cannot bring themselves within the scope of the remedies provided by the Public Contracts Regulations 2006. Clearly that alternative argument does not arise if I am not satisfied that the claimants can bring themselves within the scope of standing as understood from the present case law. I therefore set out my conclusions in relation to whether or not the claimants are able to bring themselves within the existing case law in terms of standing prior to any consideration of this broader, alternative, submission.

The Facts

4. The review of the facts of this case is limited to those that are strictly relevant to the determination of the question of standing. They are as follows.

5. The East Street area of Farnham town centre is an area which the defendant has long wished to see redeveloped and regenerated. In 2002 the defendant undertook a competitive tendering process in relation to the potential redevelopment opportunity at East Street and in October 2002 selected the interested party as their preferred development partner. On 24th April 2003 they entered into a development agreement ("The Agreement"). Amongst the clauses in the Agreement was a "viability condition", which calls for a financial appraisal of the development so as to arrive at a land value for the site. This viability condition is one of the conditions precedent which have to be satisfied before the Agreement becomes unconditional. There are two key elements to the viability condition. Firstly, there needs to be the achievement of a minimum level of profit for the interested party and, secondly, there is a requirement that as a consequence of the financial appraisal the land value generated to be received by the Council exceeds a minimum value of £8.76m. For various

reasons the Agreement has over the course of time previously been varied. Variations have occurred, for instance, in 2006, 2008 and 2009.

6. A preferred proposal for the Scheme was worked up in 2007 and planning permission was granted for the Scheme on 6th August 2009. It appears that that planning permission was replaced and renewed on 6th June 2012, and thereafter implemented in August 2015. Other permissions exist which are relevant to enabling the Scheme to be developed. The defendant promoted a compulsory purchase order for land assembly purposes (on the basis that they did not have all of the necessary land interests to deliver the Scheme) in the form of the Waverly Borough Council (East Street, Farnham) Compulsory Purchase Order 2012. Following a public inquiry into the Order it was confirmed by the Secretary of State in August 2013. At the hearing I was informed that the Order has now been executed and put into effect. There was also a further public inquiry in July 2013 in relation to proposals for the extinguishment of rights of way to enable the Scheme to proceed.

7. On 24th May 2016 the defendant's Executive received a report in relation to the need to vary the Agreement. In particular, based on the advice received from its property consultants GVA, it appeared that unless the viability condition was varied such that the minimum land value was reduced to a figure of £3.19m, and further varied in terms of the interested party's profit element, the requirements of the Agreement which had to be satisfied in order for the development to proceed would not be met. In other words, without variations to the minimum land value and the interested party's profit element, the financial appraisal of the development would not generate an outcome which enabled the agreement to become unconditional. GVA advised that the variations which were proposed to the Agreement would still achieve compliance with the requirement to obtain best consideration set by section 123 of the Local Government Act 1972. In the event the Executive adopted the recommendation of the officers to endorse the variations to the Agreement.

8. On 18th November 2016 (obviously after these proceedings had been commenced) the defendant published a Voluntary Ex Ante Transparency Notice (the "VEAT Notice"). The purpose of such a Notice is to advertise an intention to enter into a contract without holding a procurement competition. The VEAT Notice advertises the intention to enter the contract to other economic operators thereby giving them the chance to challenge the process. Provided the public authority waits for a period of 10 days after the VEAT Notice has been published prior to entering into the contract, the contract cannot thereafter be declared "ineffective" under the remedies provided by the 2006 Regulations. Having published the VEAT Notice the defendant did not receive any response from any economic operator in relation to it.

The Claimants

9. There are five claimants in this case. Two of the claimants are members of both the defendant and also Farnham Town Council. Other claimants are members of local civic societies. Those societies are the Farnham Society, the Farnham Building Preservation Trust and the East Street Action Association. All of the claimants are council tax payers and all are opposed to the Scheme which is the subject of the Agreement. The Farnham Society and the Farnham Building Preservation Trust are members of another local organisation, the Farnham Interest Group. One of the claimants is a committee member of the Farnham Interest Group. The Farnham

Interest Group appeared at the public inquiries in relation to the orders proposed to facilitate the scheme.

10. The objectives of the claimants in these proceedings have been distilled in a witness statement lodged on their behalf in the following terms:

> "8. The objective of the Claimants is, as stated, to have the decision on 24th May 2016 by WBC quashed, in so far as it authorises the variation of the Development Agreement, on the grounds that WBC has not thereby acted in accordance with European directives, regulations and case law, as set out in the Statement of Facts and Grounds. This would enable Farnham ratepayers to have an opportunity to recover the loss which WBC acknowledges will inevitably arise from the decision to reduce the condition as to Minimum Land Value to £3.19 million. It would also potentially realise an opportunity for a re-consideration of the current development plan more in keeping with Farnham, restoration of amenity areas given to WBC's predecessor: the Farnham Urban Council, for the benefit and amenity of Farnham townsfolk. It would also give potential more likely to create a thriving residential and commercial centre, (sic) thereby meeting the objectives of the Society, the Trust and the Group, which opportunity cannot be expected if there is no re-tendering, enabling other potential developers to take over the project. In this respect the Claimants are concerned that over the years the project has not even got to an unconditional contract, despite being originally proposed by a brief as long ago as 2002. What has happened is that there have been progressive encroachments into the list of "Required Elements" which the Scheme (as defined in clause 1, Bp A239) was required to deliver; all of which reflect the way in which the Scheme has moved from being "planning-led" to "commercial-led". These include encroachments into the grounds of Brightwells House (listed), removal of the bowling green, and demolition of the bowling clubhouse, as well as several others. Due to the refusal of the WBC to provide the 'exempt' parts of the Report it is not currently known whether or not any of these changes have been incorporated into the Development Agreement."

11. It is clear that from the point when the interested party's proposals were adopted they have been opposed vigorously and consistently at various times and in various forums by the Farnham Society, the Farnham Building Preservation Trust and the Farnham Interest Group, as well as by those claimants who are councillors in their representative capacity. The scheme is opposed for a wide variety of reasons including, in particular, what is contended to be its inappropriate scale and its harmful and unnecessary impact upon the historic environment.

The procurement law regime

12. For present purposes the centrepiece of the procurement law regime, as was taken by the parties to be operational in the case, is the Public Contract Regulations 2006. Regulation 2 of the 2006 Regulations defines "contractor", "public works concession contract" and "work" in the following ways:

> " "contractor" means a person who offers on the market work or works and—
>
> (a) who sought, who seeks, or would have wished, to be the person to whom a public works contract is awarded; and
>
> (b) who is a national of and established in a relevant State…
>
> "public works concession contract" means a public works contract under which the consideration given by the contracting authority consists of or includes the grant of a right to exploit the work or works to be carried out under the contract…
>
> "work" means the outcome of any works which is sufficient of itself to fulfil an economic and technical function."

13. It is common ground in these proceedings that the Agreement is a public works concession contract for the purposes of the Regulations. Regulation 4 defines "economic operator" in the following terms:

> "Economic operators
>
> 4.—(1) In these Regulations, an "economic operator" means a contractor, a supplier or a services provider."

14. Thus it is accepted that the defendant's contract with the interested party is within the scope of the 2006 Regulations. The question of when a variation to an existing contract within the scope of the 2006 Regulations amounts in effect or in substance to a new contract requiring a new procurement procedure to be gone through is not directly addressed by the Regulations. However, there is jurisprudence from the European Court of Justice establishing that in principle it is possible for a variation of a contract to require a competitive tendering process and the requirements of procurement law to be followed. The leading case in this respect is Pressetext Nachrichtenagentur GmbH v Republik Osterreich [2008] ECHR I-4401. It is this case law which is engaged in the claimant's contention that there has been a breach of procurement law requirements in this case, as a result of the variation in the Agreement described above. It is unnecessary to dwell at length on this issue. Suffice to say that both the defendant and the interested party accept that it is at least arguable that the principles in relation to variations of contracts covered by the Regulations apply in the present case, and that acceptance formed the basis of Andrews J's conclusion that the case was arguable on its merits.

15. The remedies for a breach of the Regulations are established from Regulation 47A onwards. Regulations 47A, 47C and 47D provide as follows:

"47A. – Duty owed to economic operators

(1) This regulation applies to the obligation on -

(a) a contracting authority to comply with –

(i) the provisions of these Regulations, other than regulations 14(2), 30(9), 32(14),(40) and 41(1); and

(ii) any enforceable [EU] obligation in respect of a contract or design contest (other than one excluded from the application of these Regulations by regulation 6, 8 or 33); and

(b) a concessionaire to comply with the provisions of regulation 37(3).

(2) That obligation is owed to an economic operator…

47C. – Enforcement of duties through the Court

(1) A breach of the duty owed in accordance with regulation 47A and 47B is actionable by any economic operator which, in consequence, suffers, or risks suffering loss or damage.

(2) Proceedings for that purpose must be started in the High Court, and regulations 47D to 47P apply to such proceedings.

47D. – General time limits for starting proceedings

(1) This regulation limits the time within which proceedings may be started where the proceedings do not seek a declaration of ineffectiveness.

(2) Subject to paragraphs (3) to (5), such proceedings 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."

16. Further regulations provide a detailed and bespoke regime for remedies and enforcement including, for instance, the creation of an automatic injunction precluding a contractual authority from entering into a contract if it has not done so under Regulation 47G, and specific remedies depending upon whether the contract has been entered into or not under Regulations 47I and 47J. These bespoke remedies include a "declaration of ineffectiveness" if the contract has been entered into, and the grounds for a grant of that type of relief specified in Regulation 47K have been made out.

17. The specific code in relation to remedies for breach of the Regulations established by Regulations 47A to 47P was inserted through changes to the 2006 Regulations made in 2009. These changes were undertaken so as to give effect to amendments to Council Directive 89/665/DC ("The Remedies Directive") which were brought about by Council Directive 2007/66/EC. In terms of the availability of remedies for breach

of European Law requirements for procurement processes in relation to public contracts the Remedies Directive provides as follows:

> "3. Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement."

18. The defendant relies upon the Explanatory Memorandum which accompanied these 2009 amendments in relation to Regulations 47A and onwards. In broad terms that Explanatory Memorandum, and the material which accompanied it in form of a transposition note and impact statement, explained that, save in one respect, the amendments to the 2006 Regulations did no more or less than simply implement the requirements of the Directive without going beyond it.

Standing

19. Section 31(3) of the Senior Courts Act 1981 provides as follows:

> "31(3) No application for judicial review shall be made unless the leave of the High Court has been obtained in accordance with rules of court; and the court shall not grant leave to make such an application unless it considers that the applicant has a sufficient interest in the matter to which the application relates."

20. It is important to note that mere interest alone in the matter in issue or the decision in question is not enough. The interest which must be established must be "sufficient" so as to entitle a claimant to invoke the court's jurisdiction. Not every member of the public will have a right to bring a claim in relation to a breach of a statutory duty or an exceedance of a statutory power or other public law error (see for example R v Secretary of State for the Environment Ex Parte Rose Theatre Company [1990] 1 QB 504 at page 520B-E and 522 C-E; R v Tower Hamlets LBC ex parte Thrasyvalou (1990) 23 HLR 38 at page 47.) In Walton v The Scottish Ministers [2012] UKSC 44 Lord Reed expressed himself in the following terms:

> "94. In many contexts it will be necessary for a person to demonstrate some particular interest in order to demonstrate that he is not a mere busybody. Not every member of the public can complain of every potential breach of duty by a public body. But there may also be cases in which any individual, simply as a citizen, will have sufficient interest to bring a public authority's violation of the law to the attention of the court, without having to demonstrate any greater impact upon himself than upon other members of the public. The rule of law would not be maintained if, because everyone was equally affected by an unlawful act, no-one was able to bring proceedings to challenge it."

21. This is an unusual case in the sense that standing is being considered, at the behest of the parties, after permission has been granted. In R v IRC ex parte Federation of the Self Employed [1982] AC 617 the House of Lords concluded that the question of whether or not there was a sufficient interest so as to establish standing had to be considered together with and alongside the legal context of the application. Lord Wilberforce observed as follows:

> "There may be simple cases in which it can be seen at the earliest stage that the person applying for judicial review has no interest at all, or no sufficient interest to support the application: then it would be quite correct at the threshold to refuse him leave to apply. The right to do so is an important safeguard against the courts being flooded and public bodies harassed by irresponsible applications. But in other cases this will not be so. In these it will be necessary to consider the powers or the duties in law of those against whom the relief is asked, the position of the applicant in relation to those powers or duties, and to the breach of those said to have been committed. In other words, the question of sufficient interest can not, in such cases, be considered in the abstract, or as an isolated point: it must be taken together with the legal and factual context. The rule requires sufficient interest *in the matter to which the application relates.* This, in the present case, necessarily involves the whole question of the duties of the Inland Revenue and the breaches or failure of those duties of which the respondents complain."

22. In assessing the question of standing therefore a key issue will be the legislative framework within which the decision arises. It will be necessary to examine that framework to consider, for instance, whether it provides any express or implied right to complain of the alleged illegality. Further, it will need to be examined to see whether or not it sheds any light on when an interest may be sufficient so as to justify the grant of standing to bring a claim. Part of that examination will be an understanding of the purpose of the legislation as was observed by Lord Hope in Walton in the following terms:

> "152. I think, with respect, that the Extra Division take too narrow a view of the situations in which it is permissible for an individual to challenge a scheme or order on grounds relating to the protection of the environment. An individual may be personally affected in his private interests by the environmental issues to which an application for planning permission may give rise. Noise and disturbance to the visual amenity of his property are some obvious examples. But some environmental issues that can properly be raised by an individual are not of that character. Take, for example, the risk that a route used by an osprey as it moves to and from a favourite fishing loch will be impeded by the proposed erection across it of a cluster of wind turbines. Does the fact that this proposal cannot reasonably be said to affect any individual's property rights or

> interests mean that it is not open to an individual to challenge the proposed development on this ground? That would seem to be contrary to the purpose of environmental law, which proceeds on the basis that the quality of the natural environment is of legitimate concern to everyone. The osprey has no means of taking that step on its own behalf, any more than any other wild creature. If its interests are to be protected someone has to be allowed to speak up on its behalf.
>
> 153. Of course, this must not be seen as an invitation to the busybody to question the validity of a scheme or order under the statute just because he objects to the scheme of the development. Individuals who wish to do this on environmental grounds will have to demonstrate that they have a genuine interest in the aspects of the environment that they seek to protect, and that they have sufficient knowledge of the subject to qualify them to act in the public interest in what is, in essence, a representative capacity. There is, after all, no shortage of well-informed bodies that are equipped to raise issues of this kind, such as the Scottish Wildlife Trust and Scottish Natural Heritage in their capacity as the Scottish Ministers' statutory advisers on nature conservation. It would normally be to bodies of that kind that one would look if there were good grounds for objection. But it is well-known they do not have the resources to object to every development that might have adverse consequences for the environment. So there has to be some room for individuals who are sufficiently concerned, and sufficiently well-informed, to do this too. It will be for the court to judge in each case whether these requirements are satisfied."

23. In short Lord Hope concluded that a particular approach to standing was justified in environmental law cases because the purpose of environmental law "proceeds on the basis that the quality of the natural environment is of legitimate concern to everyone".

24. Another ingredient to be considered in determining whether standing has been established will be the strength of the claimant's case, albeit that will not be determinative or a conclusive factor.

25. If a person's rights or financial interests are directly affected by the decision under challenge that will obviously support the finding that standing has been made out. However, the absence of such factors will not necessarily be conclusive that standing has not been established. As Lord Reed observed in Walton there may be cases where a person can establish standing without demonstrating any greater impact on him or herself than any other member of the public. Such cases will, however, require particular public interest features and particular qualifications of a claimant so as to support the existence of a sufficient interest in the case. For example, in R v Foreign Secretary ex parte World Development Movement Limited [1995] 1 WLR 386 Rose LJ provided the following in concluding that the claimants in that case had standing:

> "Leaving merits aside for a moment, there seem to me to be a number of factors of significance in the present case: the importance of vindicating the rule of law, as Lord Diplock emphasised at 644E; the importance of the issue raised, as in ex parte Child Poverty Action Group and Others; the likely absence of any other responsible challenger, as in ex parte Child Poverty Action Group and Others and ex parte Greenpeace Ltd; the nature of the breach of duty against which relief is sought (see per Lord Wilberforce at 630D in ex parte National Federation of the Self Employed and Small Businesses Ltd); and the prominent role of these Applicants in giving advice, guidance and assistance with regard to aid (see ex parte Child Poverty Action Group and Others at 1048J). All, in my judgment, point, in the present case, to the conclusion that the Applicants here do have a sufficient interest in the matter to which the application relates within section 31(3) of the Supreme Court Act and Ord. 53 r.3(7).
>
> It seems pertinent to add this, that if the Divisional Court in ex parte Rees Mogg, eight years after ex parte Argyll Group, was able to accept that the Applicant in that case had standing in the light of his "sincere concerns for constitutional issues", *a fortiori*, it seems to me that the present Applicants, with the national and international expertise and interest in promoting and protecting aid to under-developed nations, should have standing in the present application."

26. Thus there may be features, such as those which persuaded the Divisional Court in the World Development Movement Limited case, that are capable of supporting the standing of pressure or campaign groups to bring cases in which their aims and objectives, and the need to uphold the rule of law in respect of them, are particularly engaged.

27. The particular interests of particular groups of individuals, or individuals as a class of person, may give rise to sufficient interest in certain cases. Of relevance to the arguments raised in the present case, in R v Waltham Forest BC ex parte Baxter [1988] QB 419 rate payers were held to have sufficient interest to bring a judicial review of the manner in which the rates had been set by the Council to whom they paid their rates. In R v Hereford Corp ex parte Harrower [1970] 1 WLR 1424 a group of electrical contractors on an approved contractor list claimed that a Council proposed to place a contract in breach of its standing orders in relation to such matters. It was a case which was heard before the law relating to standing had been rationalised and prior to standing being put on the same footing for all of the forms of relief that might be granted through an action for judicial review. That is the context of the observations of Lord Parker CJ who observed as follows in that case:

> "Lastly, and as I see it this is the real point in the case, Mr. Sears raises the point whether these applicants had a sufficient interest to enable them to come to this court and apply for an order of mandamus. It has always been recognised that there is quite a different criterion of interest which would justify an

> application for certiorari and one which would justify an application for mandamus. It is said that a far more stringent test applies in the case of mandamus and that an applicant must have, as it is put, a specific legal right. The mere fact that these applicants were electrical contractors does not, in my judgment, of itself give them a sufficient right, but if, as I understand, they or some of them are ratepayers as well, then, as it seems to me, there would be a sufficient right to enable them to apply for mandamus."

28. As will be noted Lord Parker CJ concluded that the mere fact that the applicants were electrical contractors would not have sufficed to establish their standing but their status as a rate payer would have done.

29. At this point in the assessment of the authorities it is necessary to turn to a number of cases which have considered these principles in the context of the particular position of standing in relation to challenges related to public procurement exercises. This case law commences with the decision of Richards J (as he then was) in R (Kathro) v Rhondda Cynon Taff [2001] 4 PLR 83. That case concerned a challenge to the development of an education facility. There were a number of grounds of challenge to this development but one of them related to public procurement on the basis that the project was to be funded through a PFI initiative. At paragraph 77 of the judgment, having dismissed all of the grounds upon which the claim proceeded including that based on procurement, Richards J observed as follows:

> "77. In any event I have strong doubts about the claimants' standing to raise this issue, though I need express those doubts only briefly. The correct procedure is a matter of obvious concern to tenderers or would-be tenderers, but those persons have their own remedies under the regulations themselves. The claimants have not been shown to be affected in any way by the choice of tendering procedure. They have seized on the point simply as a fall-back way of trying to stop the project. I see no wider public interest to be served by allowing a challenge, and in all the circumstances the claimants should not in my view be regarded as having a sufficient interest for the purposes of the PFI challenge."

30. In R (on the application of The Law Society) v Legal Services Commission and others [2007] EWHC 1848 (Admin) Beatson J (as he then was) had to consider a challenge which was brought on the basis of alleged procurement law failings in respect of what was known as the Unified Contract for legal services, a part of a programme of reform for the funding of legal aid which the Legal Services Commission was promoting. The question of the Law Society's standing to bring the claim was raised. That submission was made in the context of broader submissions that the 2006 Regulations (as they were at the time of Beatson J's decision) provided a regime of exclusive remedies which excluded the possibility of judicial review being pursued. Beatson J's assessment of those submissions and his consideration of whether or not the Law Society had standing to bring the case was set out in the following terms:

"111 The Law Society is, moreover, the professional body that represents all solicitors. It represents both those who have signed and those who have declined to sign the Unified Contract. It also has statutory functions relating to the profession. It states (in paragraph 70(1) of its skeleton argument) that it has brought this claim in order to protect the interests of the firms it represents. It states that solicitors who are economically dependant on legal aid work were not in a position to seek relief whereby the LSC's decision to offer the Unified Contract would be suspended or set aside.

112 In these circumstances I reject the submission that the Law Society does not have "sufficient interest" to bring judicial review proceedings. It is well established that to oust the court's jurisdiction by way of judicial review requires clear and explicit language in the relevant statute or regulations: see *R (Sivasuvramaniam) v Wandsworth County Court [2003] 1WLR 475* at [44], citing Denning LJ's classic statement in *R v Medical Appeal Tribunal, ex p. Gilmore [1957] 1 QB 574* , 583, and *R (G) v Immigration Appeal Tribunal [2005] 1 WLR 1445* at [21]. There is no such language in the 2006 Regulations.

113 Should the court decline to grant a remedy in the exercise of its discretion because the effect would be to provide a remedy not available under the regulations? In *R (Kathro) v Rhondda Cynon Taff County BC [2001] EWHC Admin. 527* it was *inter alia* claimed by a community group and concerned citizens that the choice of award procedure violated the relevant procurement regulations. Richards J (as he then was) strongly doubted (at [77]) whether the claimants had standing to bring a claim in respect of the award procedure. He contrasted their position with that of tenderers or would-be tenderers, but stated that those persons have their own remedies under the regulations themselves. It is, however, important to bear in mind that Richards J stated (at [72]) that the claimants were not affected in any way by the choice of procedure that it was alleged had violated the procurement regulations and there was nothing to show that the choice of procedure would result in practice in the award of the contract to a different contractor or at a different price.

114 The position of the Law Society in the present case is fundamentally different. For the reasons I have given the Law Society has been and will probably continue to be a participant in the LSC's consideration of the reform of legal aid. It is thus directly affected. It is, moreover, the professional body that represents all solicitors and has statutory functions relating to the profession."

31. The next case to be considered is the only one of this sequence of cases to have been heard by the Court of Appeal. It is the case of R (on the application of Chandler) v Secretary of State [2009] EWCA Civ 1011. In that case the claimant challenged a decision by the Secretary of State to approve UCL as the sponsor of an academy school which they proposed to establish in the London Borough of Camden. The challenge proceeded on the basis that the decision to approve UCL was not one which was compliant with public procurement law requirements. In the event, the Court of Appeal concluded that the decision did not engage the requirements of procurement law but as they had heard substantial submissions on the question of standing, and that issue had arisen before the Judge at first instance, the Court of Appeal went on to offer observations, albeit obiter, on the question of whether or not the claimant had standing. Those observations were as follows:

> "77 The judge accepted the submission that a failure to comply with any of the regulations gives rise only to a private law claim (judgment, [138] to [140]). Such a conclusion has potentially far-reaching implications. It means that a person who is not an economic operator entitled to a specific remedy under reg 47 can never bring judicial review proceedings in respect of that failure unless he can bring himself within the exceptional type of claimant in R (Law Society) v Legal Services Commission . We consider that the judge's proposition goes too far. The failure to comply with the regulations is an unlawful act, whether or not there is no economic operator who wishes to bring proceedings under reg 47 , and thus a paradigm situation in which a public body should be subject to review by the court. We incline to the view that an individual who has a sufficient interest in compliance with the public procurement regime in the sense that he is affected in some identifiable way, but is not himself an economic operator who could pursue remedies under reg 47 , can bring judicial review proceedings to prevent non-compliance with the regulations or the obligations derived from the Treaty, especially before any infringement takes place (see generally Mass Energy v Birmingham CC [1994] Env LR 298 , 306 cf Kathro , where Richards J held that the claimants were not affected in any way by the choice of tendering procedure). He may have such an interest if he can show that performance of the competitive tendering procedure in the Directive or of the obligation under the Treaty might have led to a different outcome that would have had a direct impact on him. 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. However, while the court is in general bound to ask itself why a public law remedy is necessary when private law remedies are available, once permission to bring judicial review proceedings has been given, then, 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.
>
> 78 However, in this case the observations of Richards J in Kathro are particularly apposite. Ms Chandler states in her witness statement that she is sceptical about Academy schools. She fears that they select the most gifted children as pupils. She is concerned that Academy schools are run more like businesses than schools. Her first choice would be for her children's school to be run by the local education authority. What Ms Chandler wants to happen is that there should be a competition to determine who should run the new school in Camden and she suggests that she should have the right to be consulted if the public procurement regime applied. In fact there would be no consultation of the kind she seeks. Ms Chandler is not challenging the Secretary of State's decision because of any interest that she has in the observance of the public procurement regime but because she is opposed to the institution of Academy schools. She is thus attempting, or seeking, to use the public procurement regime for a purpose for which it was not created. In all the circumstances, it would, in our judgment, be outside the proper function of public law remedies to give Ms Chandler standing to pursue her claim."

32. Following on from this, in R (on the application of Unison) v NHS Wiltshire PCT and others [2012] EWHC 624, Eady J had to deal with a challenge by Unison, a trade union, to the outsourcing of some NHS medical services by the defendant to other providers outside the NHS. Unison were not an economic operator. The question arose as to whether or not they could seek judicial review. Eady J accepted that in principle a breach of the Regulations could give rise to public law remedies. He accepted the approach taken by the Court of Appeal in Chandler and sought to apply it to the case before him. The conclusions which he reached were as follows:

> "9 Given the statutory structure of the Regulations, and the underlying policy as embodied in the corresponding European Directive, it is likely that breaches of the Regulations are more often going to give rise to private rather than public law remedies, which are going to be relatively rare. It is thus important to focus carefully upon the suggested criteria in the Chandler case and not to interpret them too freely. Mr Béar submits that it plainly cannot extend to permitting any trade union, or any individual worker, to have a potential public law remedy every time it is proposed that a particular service in the NHS, or in any other public sector, should be outsourced. There is a general disinclination to permit challenges to commercial decisions by public bodies: see e.g. the discussion in R (Menai Collect Ltd) v Dept of Constitutional Affairs [2006] EWHC 727 (Admin). Moreover, in the particular context of procurement, there has apparently been a decision by the legislature to confine the specified remedies to commercial

competitors. That too needs to be borne in mind when attempting to give effect to the *obiter dicta* in Chandler.

10 Mr Bowsher QC gave examples of entities which might bring themselves within the words of Arden LJ. He suggested regular suppliers of an economic operator, who might themselves be significantly affected by the grant or withholding of a particular public contract. He also posited the possibility of a trade association which might need to take steps in a case in which (say) there had been discrimination against a class of economic operators.

11 There seems to be no previous example of a trade union seeking a public law remedy in the context of these Regulations or their predecessors, but that is no reason to suppose that it is not legally possible. One can envisage circumstances in which a breach of the Regulations *could* so affect the members of a union that the law should afford a remedy in public law. I am not concerned at this stage, however, to speculate about possible scenarios, but rather to investigate whether the Court of Appeal criteria have been shown to apply on the present facts. I remind myself, in doing so, that I am not construing a statute but trying to give effect to the spirit and general tenor of the words I have quoted. Can Unison show that performance of the competitive tendering procedure might have led to a different outcome that would have a direct impact on it or its members? Not surprisingly, Mr Giffin emphasises the word "might", selected by Arden LJ rather than "would". That is a fair point to make but, even so, I apprehend that in order to *show* even what might have happened the burden would rest upon an applicant to support the proposition by some evidence, presumably related to the particular facts of the case before the court, rather than to generalities or mere speculative possibilities.

12 Here, it is not known what might have happened if the procedures contemplated under the Regulations had been meticulously carried out. There are no known candidates who could have expected to present themselves as bidders; nor can one speculate as to the terms which possibly have been offered to provide the relevant services. It is thus extremely difficult to see how the Claimant could discharge the burden contemplated in the passage of Arden LJ's judgment from which I have quoted. Contemplation of any such hypothetical scenario is bound to be speculative.

13 I cannot conclude on the limited evidence before me that Unison is capable of discharging that burden. It has not demonstrated that its members "are affected in some identifiable way" by the decision to outsource with SBS as

> opposed to going down the route prescribed by the 2006 Regulations. It has not established a "sufficient interest"."

33. The final authority in this sequence of cases is R (on the application of Gottlieb) v Winchester City Council [2015] EWHC 231. That case involved a challenge to the decision to vary a development agreement which was in existence between Winchester City Council and their preferred developer in respect of a proposed city centre redevelopment project. The claimant, who was a local councillor, contended that there had been a breach of procurement law requirements and that the varied contract could only properly be the subject of a procurement procedure. Lang J had to consider the question of standing. She expressed her conclusions on this issue in the following terms:

> "151 The Claimant, in his capacity as a resident, council tax payer, and City Councillor, has a legitimate interest in seeking to ensure that the elected authority of which he is a member complies with the law, spends public funds wisely, and secures through open competition the most appropriate development scheme for the City of Winchester. He has been closely involved in the consideration of this scheme at different stages, both as a Councillor and as a long-standing proponent of the widely-held view that alternative development schemes should be considered on this site. It is noteworthy that his standing to bring this claim was not disputed at permission stage.
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> 152 It is well-established that a direct financial or legal interest is not required to establish standing to bring a claim for judicial review: R v Inland Revenue Commissioners ex parte National Federation of Self-Employed and Small Businesses Ltd [1982] AC 617 , at 694B-C; R v Secretary of State for the Environment ex parte Rose Theatre Trust Co. [1990] 1 QB 504 , at 520D. Although there is a specific remedy for economic operators under the 2006 Regulations, this does not preclude claims for judicial review by those who are not economic operators (e.g. R (Law Society) v Legal Services Commission [2007] EWCA Civ 1264).
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> 153 This claim is distinguishable on the facts from R (Chandler) v Secretary of State for Children, Schools and Families [2010] LGR 1, where the court held that the claimant lacked standing to bring a judicial review claim because she did not have any interest in the observance of the public procurement regime, being motivated by her political opposition to academy schools. In contrast, the Claimant in this case does not pursue any ulterior motive. He seeks what the procurement process is intended to provide, namely, an open competition to allow Winchester to select the development which best fulfils its needs."

Do the claimants have standing?

34. Mr David Smith who appears on behalf of the claimants places considerable reliance on the case of Gottlieb and also Harrower to contend that as council tax payers, members of relevant local authorities and as people concerned in relation to the impact of the proposed development, the claimants have sufficient interest in the case to justify a finding that they have standing to bring it. In particular, he draws the obvious factual parallels between the present case and that of Gottlieb. He submits that both cases involved a variation of a development agreement and, perhaps more pertinently, that the claimants are in a similar position in relation to the matter as the claimant in Gottlieb.

35. The claimants distinguish themselves from the cases of Kathro and Chandler on the basis that, unlike in those cases, the claimants in the present case have a genuine and legitimate concern in respect of the procurement process and the need for alternative proposals to be allowed to come forward through the medium of a further competitive tendering exercise. Furthermore, and as a basis for establishing that distinction, the claimants submit that the policy of the decision in Chandler was in substance to exclude those with an ulterior motive from having standing. It is submitted on behalf of the claimants that Arden LJ did not lay down a strict requirement or limitation that only those who could show "direct impact" have standing to bring a claim. Thus it is submitted that based upon Gottlieb the claimants have a sufficient interest to bring the present case.

36. The defendant and the interested party contend that the claimants cannot bring themselves within the scope for the test of standing established by Chandler. They submit that the claimants are unable to demonstrate that a competitive tendering procedure would have led to a different outcome having a direct effect upon the claimants. If a competitive tendering procedure occurred, it would in any event be for the varied contract, and thus have the effect of facilitating the development of the Scheme which the claimants oppose. It is submitted therefore that this further demonstrates the distance between the claimants' interests and ambitions, and the substance of the alleged procurement law breach. The defendant and interested party contend that simply being a council tax payer or member of the local authority will not suffice in circumstances where a challenge is being brought on the basis of failures in respect of the public procurement law regime. In their submission Gottlieb should not be followed in respect of Lang J's conclusions on standing. It is submitted that in that case the test for standing in a procurement claim was in reality reduced to the tests of standing which would apply in a normal judicial review case. Further it was submitted in particular by the defendant that the real motive of these claimants has in truth nothing to do with the free movement of goods and services and the public procurement process, but was rather concerned with prosecuting their amenity objections to the scheme via other means.

37. To start with that final point, based upon an examination of the "real motives" of the claimants, it seemed to me that there was in the submissions on all sides a considerable and unnecessary emphasis on the motives of the claimants. That is not to say that the motives of a claimant may be wholly irrelevant. Rather, motive may be relevant if it is being contended that the claim is being pursued out if ill-will or for some other improper purpose. Such conduct would amount in effect to an abuse. This case is not an extreme case of that kind. This approach was affirmed by Dyson LJ (as

he then was) in R (on the application of Feakins) v DEFRA [2003] EWCA Civ 1546, at paragraph 23:

> "In my judgment, if a claimant has no sufficient private interest to support a claim to standing, then he should not be accorded standing *merely* because he raises an issue in which there is, objectively speaking, a public interest. As Sedley J said in Rv Somerset County Council and ARC Southern Ltd ex p Dixon [1997] Env LR 111, when considering the issue of standing, the court had to ensure that the claimant was not prompted by an ill-motive, and was not a mere busybody or a trouble-maker. Thus, 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 for some other improper purpose. It is an abuse of process to permit a claimant to bring a claim in such circumstances. If the real reason why a claimant wishes to challenge a decision in which, objectively, there is a public interest is not that he has a genuine concern about the decision, but some other reason, then that is material to the question whether he should be accorded standing."

38. It appears to me that the observations in Kathro and Chandler at paragraph 78 are not directed to the question of whether or not there is an ulterior motive for bringing the claim, but are rather observations directly concerned with the gulf which existed in those cases between the interests of the claimants and the policy and purpose of the public procurement legislation that they were seeking to invoke in their challenges. In both of those cases the claimants would not have been affected by the undertaking of a procurement process or its mode, nor were their interests engaged by the purpose of the legislative regime. The observations made by the courts in those cases threw into sharp focus the distance between their interest in the decision and the objective of the legislation they sought to rely upon. Thus it is the purpose of the legislation, its aims and objectives, that are the important question, rather than the ultimate motivation of the claimant (unless motivated by ill-will or other improper purpose), and it is the purpose of the legislation which was at the heart of those decisions.

39. This approach centred upon the policy and purposes of the legislation is consistent with the principles which are set out above in the earlier review of the authorities relating to standing. The approach taken by the Court of Appeal in Chandler is in my view clearly grounded in a conventional approach to an assessment of standing. However, that conventional approach, focused upon the purpose and policy of legislation being invoked, leads to a much more restrictive qualification for standing in procurement cases than would apply in judicial review generally.

40. It is clear from the 2006 Regulations which have been set out above that the purpose of those Regulations and the Directive which lies behind them, is firstly, to provide for an open and transparent system for the competition for public contracts in the interests of securing a fair and efficient market for those contracts and secondly, to provide a bespoke system of remedies for those parties who are directly involved in

competing for such contracts and participating in the market for them. This regime is quite clearly tightly focused on those directly engaged with and actively seeking the benefit of obtaining public contracts that fall within the scope of the 2006 Regulations. The public interest is no doubt served by these aims and objectives of the 2006 Regulations (for instance, by fostering value for money and the objective evaluation of bids for public works), but that is very different from saying that it follows that any member of the public could have an interest in the enforcement of those Regulations which should be recognised by the grant of standing in judicial review. It is in my view entirely consistent with the purpose of the Regulations to confine standing in any judicial review claim brought outside the extensive range of remedies available to economic operators, and by a person who is not an economic operator, to only those who "can show that performance of the competitive tendering procedure… might have led to a different outcome that would have had a direct impact on him". The context of the 2006 Regulations is therefore in clear contrast to the context of environmental law cases (see paragraph 23 above), but the rationale for the approach to considering the grant of standing, based on the purpose of the legislation, is similar.

41. In my view the Law Society would come within the test which was proposed in Chandler. As Beatson J observed, given their particular circumstances they were directly affected by the subject matter of the litigation and in the context of the procurement regime (see paragraph 114 of his judgment) they are in reality akin to the kind of trade association which it appears was contemplated in the course of argument in the Unison case at paragraph 10. In my view it is clear that a council tax payer, or concerned local resident, or member of the local authority cannot without more bring themselves within that test. There is no direct impact upon them as a consequence of the alleged failure in any procurement requirements.

42. It follows that I do not feel able to follow the approach which was taken by Lang J in Gottlieb for the following reasons. Firstly, it is pertinent to note in my opinion that Lang J recognised that for the claimant in that case to be found to have standing to bring the claim it would be necessary to distinguish the case of Chandler. For the reasons I have already given that must be right. I am, however, unable to accept Lang J's reasons for distinguishing Chandler and reaching the conclusions which she did. Her grounds for distinguishing the claimant in Gottlieb from Chandler set out in paragraph 153 related to considerations of ulterior motive, which she considered existed in Chandler but which did not arise in the case before her as the claimant genuinely wanted to have an open competition for the procurement of the development partner for the development. The difficulty with that analysis is that in my view it does not engage with the reason why there is the restricted test for standing set out in Chandler, namely the policy, aims and objectives of the 2006 Regulations and their focus on the interests of economic operators. As I have set out above, in my view what was being examined in paragraph 78 of the Court of Appeal's decision in Chandler was not directly related to ulterior motive but rather a demonstration of the distance between the interests of the claimant and the policy and purpose of the public procurement regime. It appears clear that had the Chandler test been applied in Gottlieb the claimant in that case would not have established that he had standing to bring the claim.

43. Applying the approach from Chandler I am quite satisfied that these claimants are unable to demonstrate that they have standing to bring this claim. Firstly, albeit not in my view the most important point in the case, like the claimants in Unison, they have difficulty in showing that any competitive tendering exercise for the varied contract would produce a different outcome. Aside from the fact that that exercise would be for an economic operator to take up the varied terms in order to deliver the same scheme to which the claimants object, and thus no difference in terms of their concerns, the more significant point is that the VEAT Notice did not demonstrate that there was any competing interest available.

44. Far more centrally in relation to the issues which arise in respect of standing, these claimants are unable to demonstrate any direct impact upon them which would arise from the conduct of a competitive tendering exercise. Not only are they not economic operators, but they are not remotely approximate to any economic operator, nor could they begin to demonstrate any interest in the procurement process which might be akin to or a proxy for status as an economic operator. Whilst, therefore, I have no doubt that the concerns and objectives of the claimants are entirely genuine and expressed by them in the public interest, that observation, and their interest as either council tax or rate payers or as members of local authorities, are not sufficient to establish that they were within the Chandler test and thus they do not have standing to bring this claim.

45. Since on the basis of my analysis of the existing case law I am satisfied that the claimants are unable to succeed in establishing that they have standing to bring this judicial review it is unnecessary for me to examine the broader submission made on behalf of the defendant and the interested party that judicial review is, in effect, excluded in respect of the 2006 Regulations. The point does not arise, and notwithstanding the care of the submissions on all sides in respect of that issue there is no need for me to determine it in order to reach my decision.

Conclusion

46. For the reasons set out above I am satisfied that the claimants do not have standing to bring this claim for judicial review. As a consequence, this claim must be dismissed.