

Remedies in public procurement law

by Simon Taylor, Keating Chambers and Practical Law Public Sector

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A practice note on public procurement remedies in the UK providing guidance on, among others, standing to bring a claim, the standstill period, automatic suspension and ineffectiveness. This note has been updated to February 2023.

Overview

The adoption in December 2007 of a Directive (2007/66/EC) on improving the effectiveness of review procedures concerning the award of public contracts amending Directives 89/665/EC and 92/13/EEC (the Remedies Directive), substantially strengthened remedies for breach of the public procurement rules.

The rules on remedies were consolidated in the Public Contracts Regulations 2015 (SI 2015/102) (PCR 2015), implementing Directive 2014/24/EU. For more information on the public procurement rules, see [Practice note, Public procurement in the UK](#).

This note summarises the rules on remedies and related case law developments. Although this note refers to the TCC Procurement Guidance Note (see [Technology and Construction Court Guide](#)), procedural matters, such as disclosure and confidentiality rings, are not within the scope of this note. Further, this note does not deal specifically with the concessions or utilities rules. For more information about utilities contracts see [Practice note, Utilities procurement: an introduction to the Utilities Contracts Regulations 2016](#). For more information about concession contracts see [Practice note, Concession Contracts Regulations 2016: procuring concession contracts](#).

Withdrawal from the EU: legislation and agreements

European Union (Withdrawal) Act 2018

The European Union (Withdrawal) Act 2018 (EUWA), as amended by the European Union (Withdrawal Agreement) Act 2020 (WAA), gives effect to the UK-EU withdrawal agreement (withdrawal agreement) and adopts measures to adapt the UK legislative framework to withdrawal from the EU.

These measures include:

- **Repeal of the European Communities Act 1972** and exit from the European Union on 31 January 2020 (exit day).
- **A transition period up to 31 December 2020** (IP completion day) during which EU law including the procurement regulations would remain in effect.
- **Conversion of EU law into UK law.** At the end of the transition period, the majority of EU law was converted into UK law, and preserved EU-derived domestic legislation (such as the procurement regulations) which would otherwise have lapsed. This created a new body of retained EU law. For more information, see [Practice note, UK law after end of post-Brexit transition period: overview: Creation of retained EU law: legislating for continuity](#).
- **Secondary implementing legislation.** The powers to make secondary legislation, including, under section 8, regulations that deal with deficiencies (such as provisions in the procurement regulations which refer to the European Commission) in retained EU law.

UK-EU withdrawal agreement

The withdrawal agreement came into force when the UK left the EU on exit day, but many of the withdrawal agreement provisions deal with the period after IP completion day. These include the separation provisions in part three on procurement procedures pending at the end of transition.

Brexit statutory instruments

Much of the retained EU law created under the EUWA required immediate amendment to work in a UK context post-transition. Many of these amendments were achieved by a series of statutory instruments made under EUWA and WAA powers.

The main Brexit SIs relevant to public procurement (excluding defence procurement) are the Public Procurement (Amendment etc.) (EU Exit) Regulations 2020 (SI 2020/1319) (PPAR 2020). The PPAR 2020 amended the PCR 2015, CCR 2016, UCR 2016 and other retained EU law and existing UK primary legislation. For a detailed summary of the changes made by the PPAR 2020 in relation to the PCR 2015 and the CCR 2016, see [Legal updates, Public Contracts Regulations 2015 amended by Public Procurement \(Amendment etc.\) \(EU Exit\) Regulations 2020 \(SI 2020/1319\): Brexit SI and Concession Contracts Regulations 2016 amended by the Public Procurement \(Amendment etc.\) \(EU Exit\) Regulations 2020 \(SI 2020/1319\): Brexit SI](#).

UK procurement law after the transition period

The Public Procurement (Amendment etc.) (EU Exit) Regulations 2020 (SI 2020/1319) (PPAR 2020) were made on 19 November 2020. Except as provided within the PPAR 2020, the regulations came into force at 11.00 pm on 31 December 2020 (IP completion day).

The Schedule to the PPAR 2020 makes provision in relation to procurements that are ongoing on IP completion day. For more information regarding the UK regime as it stands after the end of the transition period, see [Practice note, Public procurement in the UK](#), [Practice note, Brexit: implications for public procurement law](#) and [Legal update, Public Contracts Regulations 2015 amended by Public Procurement \(Amendment etc.\) \(EU Exit\) Regulations 2020 \(SI 2020/1319\): Brexit SI](#).

See also [Legal update, Brexit: Procurement Policy Note PPN 10/20 on procurement after the transition period](#).

For information on the government's proposals to change the public procurement regime see [Legal update, Government publishes response to consultation on proposals for transforming public procurement](#). The Procurement Bill, which gives effect to the majority of these proposals, was introduced to Parliament on 11 May 2022. For a summary of the Bill's core provisions as introduced to Parliament, see [Legal update, Procurement Bill 2022-23 introduced to Parliament](#) and [Legal update, New content: practice note on Procurement Bill 2022-23](#). To track the legislative progress of the Bill, see [Procurement Bill: tracker](#).

See also, [Legal update, Welsh Government introduces Social Partnership and Public Procurement \(Wales\) Bill \(full update\)](#).

Starting proceedings

In relation to proceedings generally, see [Technology and Construction Court Guide](#).

Standing

Regulation 91(1) PCR 2015 and regulation 52(1) CCR 2016 provide that:

"A breach ... is actionable by any economic operator which, in consequence, suffers, or risks suffering, loss or damage."

The underlined words relate to standing (see discussion below on Causation).

An economic operator means:

"any person or public entity or group of such persons and entities, including any temporary association of undertakings, which offers the execution of works or a work, the supply of products or the provision of services on the market."

(Regulation 2, PCR 2015.)

This means that disappointed tenderers who have been affected by the alleged breach are able to bring an action under the public procurement rules. Other economic operators, such as key sub-contractors (see for example *Camelot UK Lotteries v The Gambling Commission* [2022] EWHC 1664 (TCC)) or bid consortia partners may also have standing to bring an action. An economic operator does not need to be a for-profit body (see *Bristol Missing Link Ltd v Bristol City Council* [2015] EWHC 876 (TCC)).

For a case where a "definitively excluded" tenderer, that is, a tenderer which has been excluded and the exclusion has either been held to be lawful or the limitation period has expired on any challenge to the exclusion, did not have standing, see [Legal update, ECJ rules that a bidder which has been definitively excluded cannot challenge an award decision](#).

In circumstances where an economic operator declines to bid, it may be able to challenge the tender rules but is unlikely to be able to leave any challenge to the end of the award procedure for limitation reasons (see [Legal update: Judgment on preliminary reference from Italian court regarding standing where economic operator voluntarily refrained from bidding in a procurement procedure \(ECJ\)](#)).

In *Royal Cornwall Hospitals NHS Trust v Cornwall Council* [2019] EWHC 2211 (TCC), the court struck out certain particulars of claim (alleging a breach of transparency

on the basis of the defendant's refusal to provide the claimant with the information necessary for it to work out whether the published process had been followed) on standing grounds, in a challenge brought under the PCR 2015 arising from a procurement in which the claimant did not submit a bid. Regulation 86 requires a standstill letter to be sent to a "candidate" (that is, an economic operator who has sought an invitation to bid and who has not been informed of its rejection and not given reasons for that rejection). Stuart-Smith J (as he then was) ruled that the principle of transparency arose in favour only of those economic operators who wished to participate in the tender and, in any event, the claimant could not show that it had suffered loss or risked suffering loss as the effective cause of any loss was its decision not to participate.

See also [Legal update, Consortium without legal personality is not an economic operator under the PCR 2015 \(TCC\)](#). In *Community R4C Ltd v Gloucestershire County Council [2020] EWHC 1803 (TCC)*, CR4C argued that the contracting authority should have conducted a tender for the provision and management of an energy from waste plant when amended contractual arrangements were put in place in 2016. CR4C sought damages. In a preliminary issue judgment, it was held that CR4C was not an economic operator at the relevant time (when a tender allegedly ought to have taken place) because it had not by then been legally constituted and was not offering works or services in the market.

See also *Consultant Connect Limited v NHS Bath and North East Somerset, Swindon and Wiltshire Integrated Care Board [2022] EWHC 2037* as an example of a case where a claimant which was not on the framework used by the authority to procure a contract was held to have standing and to have suffered loss as a result of the breaches established. See [Legal update, Challenge to joint procurement for contract to supply the NHS largely succeeds and breaches sufficient to justify an award of damages and payment of civil penalties \(High Court\): Standing to bring a claim under the PCR 2015 \(issue two\)](#).

The rights of non-UK economic operators under the PCR 2015 as amended are explained in [Practice note, Public procurement in the UK: Rights of non-UK bidders](#). In broad summary, economic operators from the EU and GPA countries continue to have standing under the PCR 2015 for procurements covered by the relevant trade agreement.

Judicial review

There is a considerable amount of case law in the Administrative Court on whether an entity which is not an economic operator may bring judicial review proceedings in relation to a procurement. Much of

this is based on observations by the Court of Appeal in *Chandler [2009] EWCA Civ 1011* to the effect that an individual could have standing if they can show that compliance with the procurement rules "might have led to a different outcome that would have had a direct impact on him".

In *R (Unison) v NHS Wiltshire Primary Care Trust [2012] EWHC 624*, a trade union did not demonstrate that it had "sufficient interest" in the defendant's decision to outsource certain services without going through a tender procedure (see paragraphs 9 to 13 of the judgment of Eady J).

By contrast, in *R (Kim Alexander Gottlieb) v Winchester City Council [2015] EWHC 231 (Admin)*, a resident of Winchester who was also a city councillor was given permission to bring a judicial review challenging changes made to a development agreement under the PCR 2006. It was held that the claimant had sufficient interest to bring the claim and obtain a remedy as he had a legitimate interest to ensure that the elected authority complied with the law, spent public funds wisely and secured through open competition the most appropriate development scheme for the city. (See [Legal update, High Court rules that variation of development agreement without new procurement procedure was unlawful](#).)

In *Wylde and others v Waverley Borough Council [2017] EWHC 466 (Admin)*, the High Court declined to follow *Gottlieb*. The five claimants (two of whom were local councillors) were opposed to Waverley Borough Council's (council) plans to regenerate and redevelop the East Street area of Farnham town centre and sought to challenge a decision by the council to authorise a variation of the viability condition in the development agreement without a fresh competitive tendering exercise. The court, applying the test on standing established in *Chandler v Secretary of State [2009] EWCA Civ 1011*, held that the claimants lacked the necessary standing to bring the claim. They had difficulty in showing that any competitive tendering exercise would produce a different outcome, they were unable to demonstrate any direct impact upon them that would arise from the conduct of a competitive tendering exercise and their interest as either council tax or rate payers or as members of local authorities, were not sufficient to establish that the claimants were within the ambit of the *Chandler* test. As Dove J stated at paragraph 44:

"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."

In R (Good Law Project Ltd) and Others v Secretary of State for Health and Social Care [2021] EWHC 346 (Admin), the Good Law Project Ltd (GLP) and others applied for judicial review of the Secretary of State for Health and Social Care's (SoS) failure, when awarding contracts for goods and services during the COVID-19 pandemic, to comply with the obligation (as to publication of contract award notices) imposed by regulation 50 of the PCR 2015. The first claimant (GLP) was a not-for-profit organisation which campaigned in relation to governance and transparency. The second, third and fourth claimants were Members of Parliament (MPs). The SoS argued that the claimants did not have standing to bring the claim.

Chamberlain J held that the first claimant had standing to bring the claim but that the second to fourth claimants did not. The challenge was not one that an economic operator could realistically be expected to bring. The first claimant had a sincere interest, and some expertise, in scrutinising government conduct in that area. The alleged breaches related to contracts worth several billion pounds and there was a powerful public interest in resolving those issues. An MP could have standing. However, the availability of a better-placed challenger was an important factor in considering whether it was necessary to accord standing to a person who was not directly affected.

In R (Good Law Project Ltd) v Minister for the Cabinet Office [2021] EWHC 1569 (TCC), GLP challenged the grant of a contract to Public First Limited (Public First) for focus group services at the start of the COVID-19 pandemic in March 2020 (formally awarded by decision of 5 June 2020) without an advertised tender process on the basis of regulation 32(2)(c) of the PCR 2015 and the common law doctrine of apparent bias. Adopting with approval the analysis of Chamberlain J in *R (Good Law Project Ltd and others) v Secretary of State for Health and Social Care [2021] EWHC 346 (Admin)*, O'Farrell J held that GLP had standing to bring the claim. First, the claimant had a sincere interest in promoting good public administration. Second, the current claim was not one that an economic operator could be relied on to bring given the absence of a procurement and the difficulty in showing financial loss. Third, the gravity of the issues raised justify the scrutiny of the court and where appropriate the grant of a public law remedy. While the court's finding of apparent bias was successfully appealed (in *R (Good Law Project Ltd) v Minister for the Cabinet Office [2022] EWCA Civ 21*), the ruling on standing was not appealed. Nevertheless, the Court of Appeal in that case made the following comment on standing at [54]:

"The question of standing for complete strangers to the procurement process with no commercial

interest both under the Regulations and on public law grounds is a question ripe for review when it next arises."

R (Good Law Project Ltd) v The Secretary of State for Health and Social Care [2022] EWHC 2468 (TCC) concerned a claim for judicial review brought by GLP against the Secretary of State for Health and Social Care (DHSC) in relation to the award by the DHSC of three contracts to Abingdon Health plc in respect of the development of COVID-19 antibody lateral flow tests. Waksman J held that standing had not been established on the facts of this case. It could not be said that GLP was affected in any tangible way by the award of the contracts. There was a clear "scheme" (under the PCR 2015) designed, essentially, to protect economic operators. While the failure of economic operators to litigate was of some relevance, it was not of substantial weight. As for gravity, this was not a case of contracts involving billions of pounds deliberately not publicised nor one dealing with the basic obligation to notify the public of the existence of the contracts. It concerned a single operator in contracts worth around £15 million. GLP argued that, even if not affected by DHSC's alleged unlawful conduct, it had "reasonable concerns" as to governance and upholding democracy and a sincere interest in securing the accountability of government, which should give it standing. However, this was not considered sufficient to confer standing.

There is also conflicting caselaw on whether an economic operator is able to bring a judicial review in the Administrative Court based on alleged breaches of the procurement regulations either in parallel with or in substitution for a Part 7 claim in the TCC. The better view is that, as judicial review is a remedy of last resort, the court should exercise its discretion to refuse permission for economic operators to bring a judicial review of procurements (see *R (Glencore Energy UK Ltd) v Revenue and Customs Commissioners [2017] EWCA Civ 1716 at [55]*). To the extent that judicial review provides for arguments or remedies which are not available in a Part 7 claim under the regulations, the rule in *Monro v HMRC [2008] EWCA Civ 306 at [22]* per Arden LJ is that the common law is displaced:

"In my judgment, the authorities give clear guidance that if Parliament creates a right which is inconsistent with a right given by the common law, the latter is displaced. By "inconsistent", I mean that the statutory remedy has some restriction in it which reflects some policy rule of the statute which is a cardinal feature of the statute. In those circumstances, the likely implication of the statute, in the absence of contrary provision, is that the statutory remedy is an exclusive one."

Limitation periods

The limitation period is as follows:

- 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.
- The court may extend the time limit where it considers that there is a good reason for doing so.
- The court must not exercise its power to extend the 30 day time limit so as to permit proceedings to be started more than three months after the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen.

Proceedings are to be regarded as started when the claim form is issued.

(Regulation 92, PCR 2015 and Regulation 53, CCR 2016.)

In *Sita UK Limited v Greater Manchester Waste Disposal Authority* [2010] EWHC 680 (Ch) (see [Legal update, High Court rules that procurement challenge was brought out of time](#)) the test applied by Mann J and approved by Elias LJ on appeal (see [Legal update, Court of Appeal confirms that procurement challenge was brought out of time](#)) was that:

“The standard ought to be a knowledge of the facts which apparently clearly indicate, though they need not absolutely prove, an infringement.”

As is clear from regulation 92, constructive knowledge may be sufficient to trigger the limitation period even where actual knowledge (of the basic facts which indicate the breach) is lacking.

In *Traffic Signs & Equipment Limited v Department for Regional Development & Department of Finance and Personnel* [2010] NIQB 138, it was held that the limitation period began on the date when the defendant downloaded the key document (rather than two days later when it was actually read).

The test in *Sita* was cited with approval by Akenhead J in *Mermec UK Limited v Network Rail Infrastructure Limited* [2011] EWHC 1847 (TCC).

In *Turning Point Limited v Norfolk County Council* [2012] EWHC 2121, the court struck out a claim relating to a tender for drug and alcohol treatment services. It was held that the claimant “must have had knowledge of the basic facts which clearly indicated an infringement” (regarding the inadequacy of the TUPE information) when it submitted its tender, some six weeks before the claim was issued and outside the 30-day limitation period. This meant that Turning Point would have had to bring proceedings before it was informed that it had been unsuccessful.

It had been confirmed by the Court of Appeal in *Jobsin v Dept of Health* [2001] EWCA Civ 1241, at paragraphs 26 to 28, that a tenderer cannot wait to bring proceedings until after the tender award if the alleged breach arises from the ITT.

In *Turning Point*, Akenhead J refused to grant an extension and applied a strict test of “good reason”. Rejecting the argument that an extension should be given because the delay was only 14 days, the judge noted that “A good reason will usually be something which was beyond the control of the given Claimant: it could include significant illness or detention of relevant members of the tendering team.”

It has sometimes been argued by claimants facing limitation difficulties that the breach is “continuing” and therefore they are able to count the limitation period from the last iteration of the breach. This argument has however been rejected by the Court of Appeal, at least where the recurring breaches are of the same duty (see *SITA UK Limited v Greater Manchester Waste Disposal Authority* [2011] EWCA Civ 156 (paragraph 89), and *R (Nash) v Barnet London Borough Council* [2013] EWCA Civ 1004). Time runs from when the grounds first arose and not from knowledge of a fresh breach of the same duty.

In *Idrodinamica Spurgo Velox Srl v Acquedotto Pugliese SpA* (Case C-161/13), the ECJ held that the time allowed for bringing an action for the annulment of the decision awarding a contract starts to run again where the contracting authority adopts a new decision, which may affect the lawfulness of that award decision. That period starts to run from the communication of the new decision to the tenderers or, in the absence of such communication, from when they became aware of that decision. In this case, the new decision was to allow the bidder which had been awarded the contract to change its consortia and it was this second decision which was the subject of the claim and therefore triggered the limitation period (see [Legal update, ECJ ruling on time limit for bringing procurement action](#)).

While the court has made it clear that the limitation period starts to run before the claimant knows that they have a real likelihood of success (Court of Appeal in *Sita* at paragraph 30), it is not triggered by a mere suspicion of a breach (*Nationwide Gritting Services v Scottish Ministers* [2013] CSOH 119 at paragraphs 28-30, where the claimant had, at the relevant date, only “hearsay evidence” of a contract being placed without a tender procedure).

A more receptive approach to extensions was seen in *Perinatal Institute v Healthcare Quality Improvement Partnership* [2017] EWHC 1867 (TCC) (21 July 2017) (at paragraphs 38 to 45) and *Amey Highways Ltd v West Sussex CC* [2018] EWHC 1976 (TCC) (30 July 2018).

In *Perinatal*, Jefford J held that in circumstances where the draft (second) claim had been provided to the defendant within the 30 day period and an application had been made to the court but not yet heard, there was a good reason to extend.

In *Amey*, Stuart-Smith J (as he then was) granted an extension partly because of an absence of prejudice to the defendant, noting that it would be “potentially sterile and unjust not to extend time” where a short delay would make no difference because of the existence of other claims relating to the same procurement that were not time barred. He stated that possible grounds for extending a limitation period in a procurement claim include (non-exhaustively): “(a) the importance of the issues in question (b) the strength of the claim (c) whether a challenge at an earlier stage would have been premature, the extent to which the infringement is unclear and the claimant’s knowledge of the infringement, and (d) the existence of prejudice to the defendant, third parties and good administration.” He also noted (see paragraph 41) that where the defendant had agreed not to take any points on limitation during pre-action correspondence, this was a good reason to extend for the period of that “suspension” on limitation.

See also *SRCL Ltd v National Health Service Commissioning Board* [2018] EWHC 1985 (27 July 2018) (TCC), in which Fraser J found that SRCL had failed to issue proceedings within the required time-limit and SRCL’s claims were out of time with no good reason to extend time (see [Legal update: Procurement challenge to NHS England’s decision to award clinical waste contract to “abnormally low” price bid fails \(High Court\): Limitation and regulatory time limit for starting proceedings](#)).

In *Faraday Development Ltd v West Berkshire Council* [2018] EWCA Civ 2532 (14 November 2018), the Court of Appeal allowed an appeal against the dismissal of an application for judicial review of a local authority’s decision to enter into a development agreement for the disposal of land to the developer (SMDL) without a procurement process.

The court held that the longer limitation period which applies to a declaration of ineffectiveness of 6 months after the date on which the contract is entered into (unless the economic operator has been informed of the conclusion of the contract and provided with relevant reasons, in which case it is 30 days) did not apply to other remedies sought under the procurement regulations (for which a 30 day period applied). Lindblom LJ found that the limitation period had not expired but stated that the court would exercise its discretion to extend time in any event. See [Legal update, Development agreement containing contingent obligations on developer was “public works contract”](#)

[under PCR 2006 \(Court of Appeal\): Further issues \(Grounds 3-4 and respondent’s grounds\)](#).

In *Royal Cornwall Hospitals NHS Trust v Cornwall Council* [2019] EWHC 2211 (TCC) the court struck out certain particulars of claim (relating to the service specification) on limitation grounds in a challenge brought under the PCR 2015 arising from a procurement in which the claimant decided not to submit a bid. The court did not accept that the time that the claimant spent investigating its ability to comply with the specification was a good reason for an extension and in any event it had apparently concluded this analysis within the 30-day time limit for bringing a claim. See [Legal update: Procurement challenge struck out on basis of time-bar and impermissibly wide reading of disclosure obligations on contracting authorities \(TCC\)](#).

In *Riverside Truck Rental Ltd v Lancashire County Council* [2020] EWHC 1018 (TCC) the council told Riverside on 29 November 2019 that its tender was non-compliant with a mandatory (pass or fail) requirement and had been disqualified. On 24 January 2020, Riverside issued procurement and judicial review claims with applications for extensions of time in both. It was held that both claims were out of time and an extension of time was not appropriate in either. Riverside’s argument that time only began to run, in relation to both claims on 10 January 2020 when it learnt the price of the successful tender, was rejected and there was no good reason to extend time. See [Legal update, Procurement and judicial review challenges to contract award ruled out of time \(TCC\)](#).

See also *Community R4C Ltd v Gloucestershire County Council* [2020] EWHC 1803 (TCC), in which the Sita test was applied and the court concluded that it would not have expected CR4C to have had the requisite knowledge to make its claim in relation to the amended contract until details of the updated capital expenditure were revealed pursuant to FOIA proceedings.

Mr Justice Eyre set out a helpful summary of the legal principles applicable to limitation defences, based on *SITA*, in *Bromcom Computers Plc v United Learning Trust* [2022] EWHC 18 (TCC), in finding on a strike out application that the claim was not time barred. On actual knowledge, the court (citing *SITA* at [33]) noted at [55] that it will be difficult for a claimant who has issued a statutory or pre action letter intending it to be a genuine statement of his belief that there has been a breach of the regulations and that he is proposing to commence proceedings, to deny that he has sufficient knowledge to start time running, at least as regards the breach or breaches identified in the letter. On constructive knowledge, the court at [64] – [65] cited *Matrix-SCM v London Borough of Newham* [2011] EWHC 2414 (Ch), finding that a claimant will have constructive

knowledge if, upon reasonable enquiries, it should have discovered the alleged infringement. The court added that in considering the enquiries which reasonably should have been made and the inferences which should reasonably have been drawn regard should be had to the approach of the reasonably well informed and normally diligent (RWIND) tenderer.

The same principles were followed by Eyre J in *Siemens Mobility Limited v High Speed Two (HS2) Limited* [2022] EWHC 2451 (TCC) at [55] to [66]. Without making a definitive finding on limitation, the court declined to strike out a claim based on an alleged conflict of interest relating to the procurement of rolling stock by HS2.

In *Bromcom Computers Plc v United Learning Trust* [2022] EWHC 3262 (TCC), Waksman J confirmed in his trial judgment that the claim was not time barred.

The relevant principles on limitation may therefore be summarised as follows:

- What is needed is knowledge of material which does more than give rise to a suspicion of breach. But there can be the requisite knowledge even if the potential claimant is far from certain of success.
- The focus is to be on what the potential claimant knew at the relevant time and not on what it did not know.
- There is a difference between the grounds of the complaint and the particulars of breach which are relied on to make good those grounds. The former is sufficient to start time running.
- Put in a different way, the essential facts sufficient to constitute a cause of action starts time running. The claimant cannot wait until it knows the detailed facts which might be deployed in support of the claim.
- If the allegations are different breaches of the same duty then a potential claimant has the requisite knowledge when it first knows or ought to have known of facts clearly indicating a breach of that duty. The time period is not extended simply by the potential claimant learning at a later stage of further separate breaches of the same duty.
- A claimant will have constructive knowledge if, upon reasonable enquiries (applying the RWIND tenderer test), it should have discovered the alleged infringement.
- An extension on the 30 day limitation period may be granted (up to 3 months) where there is good reason.

Amendments

There are a number of cases where the court has considered limitation issues in the context of applications to amend the claim form or pleadings. Claimants often seek to make new allegations in the course of

proceedings as documents are disclosed. If these new allegations constitute a separate cause of action, rather than further particulars of already pleaded claims, the limitation rules may apply. In practice, this means that claimants must be diligent to ensure that consent is sought from the defendant for amendments to the particulars of claim and/or claim form as soon as it has possession of any new facts which could give rise to a new cause of action. If no such consent is forthcoming, the claimant may either make an application to the court for permission to amend or issue a new claim within the 30 day limitation period. (See *D&G Cars Ltd v Essex Police Authority* [2013] EWCA Civ 514, *Corelogic Limited v Bristol City Council* [2013] EWHC 2088 (TCC), *Travis Perkins Trading Company Limited v Caerphilly County Borough Council* [2014] EWHC 1498 (TCC), *DWF LLP v The Secretary of State for Business Innovation and Skills* [2014] EWCA Civ 900). See the comments of Fraser J on the practice of issuing new claims relating to a single procurement as new information comes to light in *SRCL Ltd v National Health Service Commissioning Board* [2018] EWHC 1985 (TCC) at [158].

Under CPR 17.4, the court may only allow an amendment, whose effect will be to add a new cause of action after the end of a relevant limitation period, where “the new claim arises out of the same facts or substantially the same facts” as the pleaded claim. However, Jefford J in *Perinatal Institute v HQIP* [2017] EWHC 1867 (TCC) took the view, and Ter Haar J in *Accessible Orthodontics Ltd v NHS Commissioning Board* [2020] EWHC 785 (TCC) agreed, that CPR 17.4 is not applicable to procurement claims. In *Accessible Orthodontics*, the court found that amendments (based on debrief reports provided some 18 months previously) which challenged the scoring of the winning tenderer’s bid for the first time (the previous claim having related to the scoring of the claimant’s tender) did not amount to a new claim.

Finally, an amendment to the relief sought will not in itself trigger a new limitation period. In *Braceurself v NHS England* [2019] EWHC 3873 (TCC) at paragraphs 58-61, the claimant was permitted (in a procurement claim) to amend the relief claimed to add a claim for damages on the basis that this did not amount to a new cause of action. The court refused, however, to allow another amendment (alleging that the successful bidder was allowed to change its bid after contract award) on the basis that this would constitute a new cause of action, had little prospect of success and had been known about for some time.

Service

Once proceedings have been started, the economic operator must serve the claim form on the contracting

authority within seven days of the date of issue and to serve means to serve in accordance with the rules of court (regulations 94(1) and (5) of PCR 2015 and 55 of CCR 2016).

The rules of court generally deem that the claim form is served on the second business day after completion of the relevant step required for service, such as sending by email or posting under CPR 6.14 and 7.5(1).

If applied to the procurement rules, this would mean that the claimant has only five days from issue in which to complete the relevant step. This can cause particular problems over the holiday period (for those, for example, who have experienced issuing on Christmas Eve).

The court held in *Heron Bros Ltd v Central Bedfordshire Council* [2015] EWHC 604 (TCC), adopting a purposive approach and having regard to the principle of effectiveness, that the requirement is met provided the relevant step mentioned in CPR 7.5(1) is completed within the seven day period. In that case, the sealed claim form had been served after the seven day period and the court found that it had no power under the rules of court to grant consent for an extension to that period as the period was based on statute. The court concluded that, on the facts, service of an albeit defective claim form (a draft claim form had been sent to the defendant prior to issue) had taken place by the seven day deadline and it was appropriate to cure the defect.

However, in *Citysprint UK Ltd v Barts Health NHS Trust* [2021] EWHC 2618 (TCC), Fraser J confined the reasoning of *Heron* to its own particular facts. Fraser J stated that the reasoning of the court in *Heron* depended upon a submission or concession in that case that there could be a different approach under the procurement regulations (allowing service to be constituted by an unsealed claim form) than under the CPR. Such a concession was not made in *Citysprint* and regulation 94(5) of the PCR 2015 provided that “serve” meant to serve in accordance with rules of court. It was therefore held that: (1) the date of the claim form is the date of the seal and (2) that date starts the 7-day period during which the claim form must be served (under regulation 94(1) of the PCR 2015). The sealed claim form was in fact served two days late though an identical unsealed claim form had been sent within the 7-day period. In addition, the claim form was not served in accordance with the relevant Practice Direction as the defendant had not confirmed that it would accept service by email. Nevertheless, the court exercised its general power under CPR 3.10 to rectify these errors in the exceptional circumstances, which included the fact that the court office had made an administrative error in the marking of the Approved Date on the claim form and the short delay. (See [Legal update, Relief granted under CPR 3.10 for serving unsealed claim form following confusion over dates generated by CE-File \(High Court\)](#)).

Regulations 94(1) (PCR 2015) and 55(1) (CCR 2016), read with CPR 7.4(2) (*Particulars of claim must be served on the defendant no later than the latest time for serving a claim form*) also require that the Particulars of Claim in procurement cases must be served within seven days of the issue of proceedings. However, as this requirement flows from the CPRs (rather than statute), the parties may agree an extension (CPR 2.11) or the court may grant an extension for this deadline under its general powers (CPR 3.1(2)(a)) (See [Legal update: case report, High Court refuses application to extend time to serve particulars of claim until a date after disclosure of documents in procurement dispute](#)).

Expert evidence

In *Atos Services UK Ltd v Secretary of State for Business, Energy and Industrial Strategy* [2022] EWHC 42 (TCC) (*Atos*), the claimant applied for permission to adduce expert evidence in its claim against the defendants. The proceedings arose out of the defendants’ procurement of a new supercomputer. Eyre J held that:

- Expert evidence would not normally be admissible in a procurement challenge. It may exceptionally be admitted where it was required either to explain technical concepts or was necessary (rather than just helpful) to enable the court to reach a proper conclusion on the question of manifest error.
- Expert evidence is only needed where the meaning of technical concepts or the proper approach to a particular exercise is contentious. If the parties can agree on the specific technical issues, expert opinion evidence is not needed as the court can be provided with an agreed position.
- Expert evidence is not admissible if it is an expression of opinion on the very issue which the court had to determine such as the existence or otherwise of a manifest error. The court’s function should not be usurped by expert opinion.
- Where a procurement exercise was challenged for failure to satisfy the requirements of equal treatment and transparency, the court had to consider whether the requirements imposed on the tenderers would be comprehensible to a reasonably well-informed and normally diligent (RWIND) tenderer, and how the requirements would have been understood by such a tenderer. The court might admit expert evidence to explain technical terms in order to put itself in the position of the RWIND tenderer, but beyond that would not admit expert opinion evidence to establish how a RWIND tenderer would have understood the criteria of a particular procurement exercise.

See also *BY Development Ltd v Covent Garden Market Authority* [2012] EWHC 2546 (TCC) at [20] – [22], *Circle Nottingham Ltd v NHS Rushcliffe Clinical Commissioning*

Group and Another [2019] EWHC 2358 (TCC), Circle Nottingham Ltd v NHS Rushcliffe Clinical Commissioning Group [2019] EWHC 3635 (TCC) and Siemens v High Speed Two (HS2) Ltd [2022] EWHC 2190 (TCC).

In *Siemens v HS2*, O'Farrell J explained that the party seeking to adduce expert evidence must (a) identify the pleaded issues in the case on which it considers that technical explanations may be needed, (b) identify the nature and scope of the expert evidence that it seeks to adduce and rely on and (c) explain why it is needed to resolve the dispute.

Pre-contract remedies

Before the contract has been entered into with the successful bidder, the remedies available to claimants include:

- An order setting aside a decision (for example, to award the contract).
- An order requiring the contracting authority to amend a document (for example, requiring a tender document to be reissued).

In both cases, in addition or as an alternative to a claim for damages. (See discussion below on Appropriate remedy)

Once the contract has been entered into the only remedy available is damages unless the conditions for ineffectiveness are met. If they are met, this remedy must be ordered by the court (see Post-contract remedies).

Standstill

In order to enable unsuccessful bidders to consider whether they have a potential claim before the contract is signed, the regime provides for a standstill period after the contracting authority announces its intention to award the contract to the successful bidder. Contracting authorities must not enter into the contract (or conclude the framework agreement) before the end of the standstill period.

Timing of standstill

The standstill period ends at midnight at the end of the tenth day after the date on which the contracting authority sends a compliant award decision notice to all the relevant operators (by fax or e-mail) (*Regulation 87(2), PCR 2015 and Regulation 48(2), CCR 2016*). (See also [CCS Guidance on the standstill period](#)).

Where the standstill letter is sent by means other than fax or e-mail, the period ends at the latest by midnight at the end of the 15th day after the sending date (or earlier, if more than ten days, after the date on which

the last economic operator received the notice, have elapsed) (*Regulation 87(3), PCR 2015 and Regulation 48(3), CCR 2016*).

Where the final day for the purposes of these rules falls on a non-working day the deadline is extended to the end of the next working day (*Regulation 2(4), PCR 2015*).

Application of the standstill rules to Schedule 3 services contracts (PCR 2015 and CCR 2016) and sub-central authorities

While most of the rules on remedies apply to the light touch regime under the PCR 2015 and the CCR 2016, there are notable exceptions (see Light touch regime and sub-central authorities (PCR 2015 and CCR 2016)).

The effect of regulation 86(5)(a) of the PCR 2015 and regulation 47(5)(a) of the CCR 2016 appear to be that the standstill (and award decision notice) provisions do not apply to light touch regime tenders under the UK rules. This is because a contract may be awarded under the light touch regime through prior publication of a prior information notice (PIN) rather than through the prior publication of a contract notice (*regulation 75(1) PCR 2015*) or a concession notice under *regulation 31(3) CCR 2016*, where the PIN appears to be mandatory. The Crown Commercial Service Guidance on the light touch regime under the PCR 2015 (on the question of whether a standstill is required) acknowledges that:

“Although this may not strictly be required (particularly where a PIN has in fact been used to call for competition), the position is not wholly clear.”

The Crown Commercial Service suggests that contracting authorities will usually wish to send award notices and observe the standstill period, in the same way as in procurements governed by the main rules. For more information on the light touch regime, see [Practice note, Light touch public procurement regime \(PCR 2015\)](#).

Furthermore, if it is correct that the standstill provisions do not apply to the light touch regime under the PCR 2015, it should also follow that they do not apply to tenders conducted by sub-central authorities using the restricted or competitive procedure with negotiation under the PCR 2015. This is because regulation 26(9) states that sub-central authorities can make the call for competition by way of a PIN when it uses these procedures. On this, the Crown Commercial Service's Guidance notes:

“CCS recommends that standstill is applied in these circumstances, despite the absence of a certain legal position on the matter. The issues discussed at the start of this guidance in relation to LTR contracts apply equally to contracts

procured by sub-central authorities using a PIN as call for competition.”

The prudent option for local authorities is likely to be to continue to follow the rules on award decision notices and standstill. However, a more flexible approach may well be appropriate under the light touch regime and urgency (for example, for clinical services) may well lead authorities (such as NHS commissioners), in appropriate cases, to the view that it would be reasonable not to hold a standstill period. In such cases, it would generally be prudent to ensure that all tenderers were fully aware of the procedure to be followed so that any objections would have to be made early and within the limitation period.

Tender award notices (Standstill letter)

Under the PCR 2015, and the CCR 2016, contracting authorities must issue an award decision notice (standstill letter) to tenderers and candidates as soon as possible after the decision has been made (*Regulation 86(1) and (2), PCR 2015 and Regulation 47(1) CCR 2016*) (this is subject to the same exceptions as the standstill period considered above). Tenderers are defined as those economic operators which submitted an offer and have not been “definitively excluded”. Tenderers which have been definitively excluded need not, therefore, be sent an award decision notice. An exclusion is definitive if the tenderer has been notified of it and one of the following applies:

- The exclusion has been held in proceedings to be lawful.
- Proceedings to challenge the exclusion would be out of time even assuming the grant of the maximum extension.

(*Regulation 86(7) and (8), PCR 2015 and Regulation 47(7) and (8) CCR 2016*).

The award decision notice must include:

- The award criteria.
- The reasons for the decision, including the characteristics and relative advantages of the successful tender.
- The scores obtained by the recipient and the operator to be awarded the contract.
- The successful operator’s name.
- A precise statement of when the standstill period is expected to end.
- Any reasons for non-compliance with the technical specification.

(*Regulation 86(2), PCR 2015 and Regulation 47(2) CCR 2016*.)

A similar notice must also be sent to candidates (that is, an economic operator who has sought an invitation to bid and who has not been informed of its rejection and not given reasons for that rejection) (*Regulation 86(4), PCR 2015 and Regulation 47(4), CCR 2016*). The notice to candidates will not include the relative advantages of the successful tender, as the candidate will not have submitted an offer.

In *Royal Cornwall Hospitals NHS Trust v Cornwall Council* [2019] EWHC 2211 (TCC), it was held that a bidder which has withdrawn had surrendered its rights to a standstill letter (see [Legal update: Procurement challenge struck out on basis of time-bar and impermissibly wide reading of disclosure obligations on contracting authorities](#) (TCC)).

Where a candidate or a tenderer is informed that it has been rejected (eg prior to contract award), and requests reasons for its rejection in writing, these reasons must be given within 15 days (*Regulation 55, PCR 2015 and Regulation 40, CCR 2016*). Any tenderer that has made an admissible tender can request the characteristics and relative advantages and name of the successful tenderer and the conduct and progress of negotiations and dialogue with tenderers and this information must also be given within 15 days (*Regulation 55(2)*). There is a similar provision in regulation 40(2) of the CCR 2016.

In *Healthcare at Home Limited v the Common Service Agency* [2014] UKSC 49, the Supreme Court (citing *Strabag Benelux NV v Council of the European Union* (Case T-183/00) [2003] ECR II-138) stated that:

“The reasoning followed by the authority which adopted the measure must be disclosed in a clear and unequivocal fashion so as, on the one hand, to make the persons concerned aware of the reasons for the measure and thereby enable them to defend their rights and, on the other, to enable the court to exercise its supervisory jurisdiction.”

The Supreme Court also stated, however, that the contracting authority is not obliged to produce a copy of the evaluation report or to undertake a detailed comparative analysis of the successful tender and of the unsuccessful tender (*Evropaiki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v Commission of the European Communities* (Case C-561/10 P)).

The European Courts have considered the obligation to give reasons in a number of cases (see for example *Evropaiki Dynamiki v European Commission* (26 September 2014) Case T-498/11, *Evropaiki Dynamiki v European Aviation Safety Agency* (25 March 2015) – Case T-297/09, *Evropaiki Dynamiki v European Agency for the Management of Operational Cooperation at the External Borders (FRONTEX)* (2015) – Case T-554/10, *Veloss International SA v European Parliament* (Case

T-667/11), *Case T-691/13, -Ricoh Belgium NV v Council of the European Union*, *Case T 556/11- European Dynamics Luxembourg SA and others v European Union Intellectual Property Office* (27 April 2016), and *European Dynamics Luxembourg SA, Case T-481/14*.

Further exceptions: framework agreements

The standstill rules do not apply to call-off contracts made under a properly tendered framework agreement, though they do apply to the tender for the framework agreement itself (*Regulation 86(1) and (5)(c), PCR 2015*). For more information on framework agreements, see [Practice note, Framework agreements let under the public procurement regime](#). See also Ask, Do you have to provide feedback to unsuccessful tenderers on the individual characteristics and relative advantages of all successful tenderers to a multi-framework?

Automatic suspension

Further to regulation 95 of the PCR 2015, an automatic suspension on entering into the contract takes effect when proceedings are issued and the contracting authority is aware that proceedings have been issued.

That suspension remains in force until the court brings it to an end by an interim order under regulation 96(1) of the PCR 2015 or the proceedings are determined, discontinued or otherwise disposed of (*Regulation 95, PCR 2015, Regulation 56, CCR 2016*).

The contracting authority may apply to the court to bring the automatic suspension to an end or modify the suspension. On hearing the application, the court must consider whether, if the suspension were not in operation, it would be appropriate to make an interim order and it may lift the suspension only if it considers that it would not be appropriate to make such an interim order (*Regulation 96, PCR 2015 and Regulation 57(2), CCR 2016*). This has been interpreted to mean that the court should apply the test for injunctive relief set out in the American Cyanamid principles and consider whether there is a serious issue to be tried, whether damages would be an adequate alternative remedy for either party and if not whether the balance of convenience favours the contracting authority entering into the contract.

The court will generally require the claimant to give a cross undertaking as to damages in return for upholding the suspension further to regulation 96(3) of the PCR 2015 or regulation 57(3) of the CCR 2016, and will consider its ability to give such an undertaking in assessing the adequacy of damages. The effect of the cross undertaking is that the claimant could be liable for the additional costs incurred by the contracting authority (and possibly the successful bidder) in

delaying its tender award process in circumstances where the contracting authority successfully defended the claim.

Light touch regime contracts

Regulations 96 of the PCR 2015 and 56 of the CCR 2016 (the automatic suspension provisions) apply to light touch regime tenders.

Courts approach to applications to lift automatic suspension

There have been numerous High Court applications to lift automatic suspensions. Each is decided on its facts but discernible trends and relevant considerations can be identified. The most significant or recent cases are summarised below.

In *Indigo Services (UK) Limited v The Colchester Institute Corporation* [2010] EWHC 3237, challenging the award of a contract for the provision of cleaning services, the court applied the standard *American Cyanamid* test and concluded that the balance of irremediable prejudice pointed clearly in favour of lifting the suspension. It noted that the claimant's limited prospects of success weighed in favour of lifting the suspension.

The approach taken by the court in *Indigo Services* was followed in *Excel Europe Limited v University Hospitals Coventry and Warwickshire NHS Trust* [2010] EWHC 3332 (TCC) in relation to a framework tender for the operation of an NHS purchasing function. The court gave weight to the public interest in the efficient and economic running of the NHS in allowing the authority to enter into the contract.

In *The Halo Trust v Secretary of State for International Development* [2011] EWHC 87 (TCC), the court applied the *American Cyanamid* test in lifting a stay to allow the authority to proceed with a contract for the clearance of landmines. Akenhead J conducted a detailed examination of the merits of the case and found that there was no serious issue to be tried but also confirmed that the balance of convenience would favour lifting the stay. He noted that damages would be an adequate remedy for the claimant on the basis that the loss of profit would be "readily assessable" by forensic experts, that the delay in entering into the contract would be disproportionate given the relative weakness of the claim and that the public interest favoured proceeding with the contract.

In *Metropolitan Resources North West Ltd v Secretary of State for the Home Department* [2011] EWHC 1186 (Ch), it was held that the prejudice to the Border Agency and potentially to asylum seekers in not proceeding with the contract far outweighed the difficulties which could arise in assessing damages for the claimant and the stay was lifted.

Automatic stays were also lifted in the two Scottish cases of *Elekta Ltd v The Common Services Agency* [2011] CSOH 107 and *Clinical Solutions v NHS24* [2012] CSOH 10. In both cases, the court was influenced by the weakness of the claims, the public interest in maintaining NHS services and the long time to trial.

The first cases to maintain a stay were *Clinton v Department for Employment and Learning* [2012] NIQB 2 (June 2011) and *First4skills Ltd v Department for Employment and Learning* [2011] NIQB 59 (January 2012), in which the Northern Ireland High Court refused applications by the authority to lift the automatic suspensions relating to contracts for the provision of training services in the same procurement exercise.

In *The Newcastle upon Tyne Hospital NHS Foundation Trust v Newcastle Primary Care Trust* [2012] EWHC 2093 (July 2012), relating to a tender for diabetic retinopathy services, the court lifted a suspension on the grounds that damages would not be an adequate remedy for the defendant and the balance of justice favoured lifting the stay. Tugendhat J stated that it was “common ground” that the court is entitled to have regard to the public interest and, on the facts, the effect of maintaining the stay would be that the defendant would have to award an interim contract to the claimant which would not be just. The court was also influenced by the long time to trial.

In a case decided under the previous regime, *Covanta Energy Ltd v Merseyside Waste Disposal Authority* [2013] EWHC 2922 (TCC), concerned the procurement of a high value and long term contract for a new waste disposal facility for which the procurement process (using the competitive dialogue procedure) lasted over six years. The basic approach to these cases set out by Coulson J (as he then was) has been much followed in applications to lift. He referred to the assessment of where the “least risk of injustice” lies and the question “Is it just, in all the circumstances, that a claimant should be confined to his remedy in damages?”. He held that damages would not be an adequate remedy for the claimant due to the difficulties in and speculative nature of quantification. He considered that it would, in particular, be virtually impossible to assess damages arising from alleged failures in the way the competitive dialogue procedure was conducted over a number of years. Coulson J concluded that the balance of convenience was in favour of granting an injunction. In particular, the impact of a further delay in the award of the contract would be modest given the length of the procurement procedure. Further, if the injunction was not granted and the claimant was successful at trial, its financial claim would be considerable and would result in a burden on tax payers.

In *DWF LLP v Secretary of State for Business Innovation and Skills* [2014] EWCA Civ 900, concerning a procurement process for the award of multiple contracts by the

Insolvency Service, the Court of Appeal ruled that the suspension should be lifted as regards the contracts to be awarded to the highest scoring bidders, but maintained in respect of the bids at issue. The court held that damages would not have been an adequate remedy for the claimant if it was successful at trial as the assessment of damages would require answering a number of speculative questions relating to the claimant’s chances of winning the contract and how its losses (including loss of reputation) should be quantified. By contrast, the Insolvency Service was unlikely to have difficulties in sourcing services up to the date of trial, given that the period was short and it had access to other framework agreements and advisers.

In *NP Aerospace Ltd v Ministry of Defence* [2014] EWHC 2741 (TCC), the court granted an application of the Ministry of Defence to lift the automatic suspension on the award of a contract for the conversion of armoured vehicles. The court considered that there was a serious issue to be tried, but concluded that damages would be an adequate remedy for the claimant. Further, the balance of convenience lay in lifting the automatic suspension as it would not be contrary to the public interest to further delay the contract as this could have a serious impact on the training and operational capability of the Army.

In *NATS (Services) Ltd v Gatwick Airport Ltd & Anor* [2014] EWHC 3133 (TCC), the court ruled that Gatwick Airport Limited (GAL) should not be able to enter into a new contract for the provision of air traffic control services, pending the outcome of an expedited hearing of the claim. GAL argued that it was not a utility caught by the relevant regulations. Ramsey J held that there was a serious issue that GAL was a utility and that damages would not be an adequate remedy for NATS given, in particular, the difficulty in assessing damages for loss of a chance and the reputational loss that could be suffered if it were to lose the Gatwick contract (given its importance to the air traffic control sector). He ruled that the balance of convenience favoured maintaining the suspension given that NATS’ interest in the new 10 year contract weighed heavily and that a further delay of 6 to 12 months should be viewed in the context that there had already been a delay of two and a half years in the procurement process.

In *Group M UK Limited v Cabinet Office* [2014] EWHC 3659 (TCC), the court lifted the automatic suspension of the decision to award a single supplier framework for media planning and buying services. Akenhead J found that there was no serious issue to be tried, but that in any event damages would be an adequate remedy for the claimant, adding that any risk of reputational loss could still be addressed by proceeding with the claim. Also in *Group M UK Ltd v Cabinet Office* [2014] EWHC

3863 (TCC), the court ruled that a successful tenderer should, in principle, be awarded its costs of participating in a hearing in support of the contracting authority's successful application for the automatic suspension to be lifted where its evidence was of importance to a key aspect of the claim.

In *R (Edenred (UK Group) Limited) v HM Treasury and others* [2014] EWHC 3555, it was held that while there was a public interest in avoiding delay to the introduction of the Tax Free Childcare scheme, there was a clear public interest in compliance with the law and given arrangements for an expedited trial, the suspension should be maintained.

In *Solent NHS Trust v Hampshire CC* [2015] EWHC 457 (TCC), the court lifted the automatic suspension on the award of a contract for adult substance misuse recovery services. The court concluded that there was a serious issue to be tried, but that damages would be an adequate remedy for the claimant. The balance of convenience also lay in favour of lifting the suspension as this would ensure that vulnerable service users would benefit sooner from more fully integrated and improved services as envisaged by the new contract.

In *Bristol Missing Link Ltd v Bristol City Council* [2015] EWHC 876 (TCC), the court refused the application to lift. Coulson J held that damages would not be an adequate remedy for the claimant, which was a non-profit making organisation and bid for the contract making no allowance for profit and a minimal claim for loss of overheads. Further, it was accepted that loss of the contract would have a "catastrophic" effect on the claimant's ability to provide other services for vulnerable women in Bristol and impact on its reputation in a manner which could not be compensated. Conversely, the disadvantages to the Council of not lifting the suspension were either non-existent or negligible. The delay would not be significant and, most importantly, there was no evidence that such a delay would be damaging to users of the services provided under the contract. For more information, see [Legal update, High Court refuses to lift suspension on award of contract by Bristol City Council](#).

In *Counted4 CIC v Sunderland CC* [2015] EWHC 3898 (TCC), Carr J maintained the suspension on the basis of Counted4's evidence that it would lose its unique workforce due to TUPE transfer by reason of the fact that the workforce was predominantly engaged on the contract being tendered (for which Counted4 was the incumbent) and would be unable to continue with the claim. On the evidence, the court was not persuaded that the current service was in need of urgent replacement and ordered an expedited trial. The merits were not considered so weak or so strong as to be a material factor in either direction. The claimant resisted

provision of any cross undertaking on the basis that it was a not for profit company and the court ordered a limited undertaking based on the additional costs that the defendant was able to identify.

In *OpenView Security Solutions Limited v The London Borough of Merton Council* [EWCA] [2015] EWHC 2694 (TCC), the court lifted an automatic suspension on the basis that damages were an adequate remedy for the claimant and there were no other factors which led the court to conclude that an injunction should not be granted. Arguments based on the difficulties in making a loss of chance damages assessment and reputational risk were rejected.

In *Kent Community Health NHS Foundation Trust Claimant and NHS Swale Clinical Commissioning Group and NHS Dartford, Gravesham and Swanley* [2016] EWHC 1393 (TCC) the automatic suspension was lifted on the basis that a delay in entering into the tendered contract for NHS services was contrary to the introduction of new arrangements (with Virgin Care) that were considered by the CCG to be in the best interests of the people of Kent and that a delay pending trial would cause issues as a result of a mobilisation during the busy winter period. This was not a compensatable loss for the CCG. The balance of convenience did not support the maintenance of the stay and the status quo (the award of the contract) favoured lifting the suspension.

In *Perinatal Institute v Healthcare Quality Improvement Partnership* [2016] EWHC 2626, the court lifted the automatic suspension on the awarding of a contract. Jefford J considered that damages would be an adequate remedy for the claimant and this was sufficient to lift the suspension. Moreover, while the court recognised the public interest in the proper application of the PCR 2015, the fact that this was a procurement designed to reduce perinatal mortality supported the HQIP case that it should be allowed to enter into the contract and the claimant's case did not seem strong. (See [Legal update: Automatic suspension lifted in a public procurement challenge on basis damages an adequate remedy \(High Court\)](#)).

For a case deciding that a hearing of an application for specific disclosure should come before a hearing to decide whether or not to lift an automatic suspension, see *Alstom Transport UK Ltd v London Underground Ltd and another* [2017] EWHC 1406 (TCC) and [Legal update, Hearing of application for specific disclosure should come before procurement dispute hearing to decide lifting of suspension of contract completion \(High Court\)](#).

In *Central Surrey Health Limited v NHS Surrey Downs CCG*, [2018] EWHC 3499, the court decided to maintain the automatic suspension of a proposed contract for adult community services. Any damages claimed by the

claimant (CSH) would be based on loss of chance, which was difficult to quantify. Losing the contract would have a knock-on effect on the community generally and possibly an adverse effect upon CSH's other contracts and cause CSH reputational damage. The balance of convenience strongly favoured the maintenance of the status quo pending an expedited trial. CSH was required to give a cross-undertaking in damages to both the CCG and the successful tenderer. See [Legal update, Application to lift automatic suspension of contract award in procurement proceedings refused \(TCC\)](#).

In *Lancashire Care NHS Foundation Trust, Blackpool Teaching Hospitals NHS Foundation Trust v Lancashire County Council* [2018] EWHC 200 (TCC), the claimants were the incumbent providers of the tendered children's health services. Stuart Smith J (as he then was) held that damages would not be an adequate remedy for the claimants due to loss of key staff through TUPE who managed contracts for children's services across the catchment area of the Trusts but would be an adequate remedy to the council as the current services could be maintained pending trial and an accountancy exercise then carried out to calculate any loss in not awarding the contract. The court was able to offer an expedited trial and the balance of convenience was overwhelmingly in the Trusts' favour. The suspension was maintained. See [Legal update, Application to lift automatic suspension rejected in procurement dispute \(High Court\)](#).

In *DHL Supply Chain Ltd v Secretary of State for Health and Social Care* [2018] EWHC 2213 (TCC) O'Farrell J held that DHL, as the incumbent provider, would lose a skilled workforce due to TUPE transfer and this would cause damage (for example, in bidding for new contracts) which would be difficult to quantify. Equally, the suspension could cause damage to NHS logistics which would be difficult to compensate. Damages were adequate for neither party. However, the public interest militated in favour of lifting the suspension for several reasons, including the benefits of the new logistics contract. The public interest in ensuring compliance with procurement law would be satisfied by the trial and did not weigh in favour of maintaining the suspension. See [Legal update: DHL fails to secure summary judgment and continuation of automatic suspension in NHS logistics contract procurement challenge \(High Court\)](#).

In *Bombardier Transportation UK Ltd v London Underground Ltd* [2018] EWHC 2926 (TCC), the court found that the prestige and size of the contract (to supply tube trains) was such that damages would not be adequate for the claimant, but equally the delays inherent in maintaining the suspension would cause non-financial losses to the defendant including loss of benefits to the traveling public. There was no court availability for an expedited trial and a need to

replace ageing rolling stock meant that the balance of convenience favoured the lifting of the suspension.

In *Circle Nottingham Limited v NHS Rushcliffe Clinical Commissioning Group* [2019] EWHC 1315 (TCC) (17 June 2019) the court held that the suspension of an award of a contract for NHS elective services should be lifted. The claimant, as incumbent provider of the services, argued that there would be uncompensatable damage to Circle Group's reputation as a result of losing the contract. Sir Antony Edwards-Stuart held that the adequacy of damages test was confined to the claimant itself (a subsidiary company) rather than its corporate group and damages was an adequate remedy to the claimant. On the balance of convenience, Circle presented evidence that the successful bidder's mobilisation programme was unrealistic and risked patient interests. The judge also expressed reservations but was not able to determine which party's evidence was correct or where the balance of convenience lay and maintaining the status quo (ie the contract award) was held to cause the least irremediable prejudice. See [Legal update: Suspension of clinical commissioning group's contract award lifted under regulation 96, PCR 2015 \(TCC\)](#).

In *Alstom Transport UK Ltd v Network Rail Infrastructure Ltd* [2019] EWHC 3585 (TCC) (20 December 2019), O'Farrell J lifted the automatic suspension. Damages were held to be adequate to Alstom given its ability to bid for contracts based on common standards throughout Europe and damages would be quantifiable. By contrast, delays to safety improvements and the wider impact on the travelling public could not be compensated in an adequate remedy for Network Rail. In considering the balance of convenience, the urgent need to replace degraded assets could not await the outcome of an expedited trial and possible appeal. The public interest in ensuring compliance with the procurement rules and the risk of having to pay out twice (to the claimant in damages as well as the successful provider) were considered neutral factors. As in the *Kent CCGs* and *Circle* case, the status quo was considered to be allowing the award of the contract to Siemens.

In *Neology UK Ltd v Newcastle-upon-Tyne City Council* [2020] EWHC 2958 (TCC), the court dismissed an application for summary judgment and ordered the automatic stay to be lifted. The court rejected the claimant's evidence that the loss of the contract would drive it from the market and held that it was not unjust, in all the circumstances, that Neology be confined to its remedy of damages. The balance of convenience came down in favour of lifting the stay. Otherwise, there would be substantial delay in implementing the mandatory Clean Air Zone on Tyneside. The merits of the claim also appeared quite weak. (See [Legal update: Application for](#)

[summary judgment dismissed and automatic stay lifted in procurement claim \(High Court\)](#)).

In *Mitie Ltd v Secretary of State for Justice* [2020] EWHC 63 (TCC) (22 January 2020) the court lifted the suspension on the basis that it would not be unfair or unreasonable to confine the claimant to a remedy in damages and it was not a case where the underlying merits strongly favoured one party or the other.

In *Draeger Safety UK Ltd v The London Fire Commissioner* [2021] EWHC 2221 (TCC), the court refused to lift the automatic suspension pending an expedited trial. The case related to a challenge to the award of a contract for the supply of respiratory protective equipment (RPE) to the London Fire Brigade. For the claimant, the outcome of the case would be closely monitored by other fire and rescue services throughout the UK and could set the standard for improved RPE, following the Grenfell Tower Inquiry and it was “arguable” that the claimant would suffer loss for which damages were not an adequate remedy. For the defendant, delays to the operational benefits arising from replacing sub-optimal RPE could not be compensated in damages. In considering the balance of convenience, the court was able to offer a five-day expedited trial. It was held that the short delay to trial did not have a significant impact on the progress of RPE improvements and that maintaining the stay would preserve all remedies and give rise to the least risk of injustice. (See [Legal update, Public procurement: automatic suspension retained on balance of convenience \(High Court\)](#)).

In *Vodafone Ltd v Secretary of State for Foreign, Commonwealth and Development Affairs and another* [2021] EWHC 2793, (in a case related to the procurement of a prestigious contract for secure electronic communications), Kerr J held that the balance of convenience and justice favoured maintaining the automatic suspension until a preliminary issue (on the lawfulness of an award on the basis of initial tenders, without further negotiation) had been tried on an expedited basis. Further to the claimant’s request for expedition, a trial window had been identified for the preliminary issue, in January 2022, (three months later). Kerr J considered that this strengthened the proposition that it would not be just to confine Vodafone to its remedy in damages and held that the defendants were adequately protected by the claimant’s undertaking in damages if the preliminary issue trial was a viable proposition. It would not be just to confine the claimant to its remedy in damages given the unquantifiable loss of opportunities to bid for and win other contracts on the back of this high prestige contract and, while not perfect, the hearing of a preliminary issue was a viable solution which caused the least irremediable prejudice. The court also made an interim order under regulation

96(1)(b) of the PCR 2015 that the defendants could enter into a conditional contract with the successful bidder in advance of the trial of the preliminary issue.

In *Kellogg Brown & Root Limited v Mayor’s Office for Policing and Crime and Metropolitan Police Service* [2021] EWHC 3321 (TCC), Smith J noted the possibility of a three to six day trial window in March 2022 (three months after judgment on the application to lift) but (rejecting the approach taken by Kerr J in *Vodafone*) declined to consider the possibility of expedition in assessing the justice of the case in the context of adequacy of damages. The court held that if damages are an adequate remedy to the claimant, the normal outcome is that the suspension is lifted and the question of time to trial only then comes into play in special circumstances, such as where the period to trial was being used as an instrument of financial oppression or might put the continued existence of the claimant at risk. The claimant failed to show that there was (at least) a real prospect that the loss of the new contract caused irrecoverable reputational loss and the suspension was lifted. The application for expedition was considered in the context of the balance of convenience and rejected on its merits (see below for discussion of expedition).

In *Camelot UK Lotteries v The Gambling Commission* [2022] EWHC 1664 (TCC) a challenge was brought by the incumbent provider (Camelot UK), Camelot Global and others to the award of the national lottery concession contract. This judgment of O’Farrell J related to the application to lift the suspension. It was held that damages were an adequate remedy for Camelot UK. Although as a special purpose vehicle (SPV) established to run the UK Lottery it would stand to lose to the successful tenderer all or substantially all its staff and assets if the suspension was lifted, this was the “normal incident” of failing to win the competition. Camelot Group and IGT were and would remain leading competitors in the global lottery marketplace and arguments based on loss of reputation were not sufficient to show that damages would be inadequate. Conversely, the Gambling Commission owed duties under the National Lottery Act 1993 and any delay in the implementation of the new licence would cause loss to recipients of lottery funding which could not be compensated in damages. The suspension was lifted.

Most recently, in *Medequip Assistive Technology Limited v The Royal Borough of Kensington and Chelsea* [2022] EWHC 3293 (TCC), the court was considering an application to lift together with an application for expedition in a case concerning community equipment services. Kerr J held that the question of whether to lift the suspension should be addressed on the basis that there will be an expedited hearing because (1) that approach is most favourable for the claimant

and (2) if the suspension is maintained fairness to the defendant and interested party (the successful bidder) will call for expedition. However, the court held that given a likely trial duration of 12 to 14 days, the earliest time when the matter will be determined will be the beginning of 2024. On adequacy of damages to the claimant, arguments based on loss of reputation, loss of scale of the business, lost opportunities for innovation and lost staff were rejected but the claimant raised a sufficiently arguable contention that damages were inadequate based on the difficulty in quantifying damage resulting from the use of unpublished criteria. However, this interest failed to outweigh the interests of the defendant and interested party in entering into the contract earlier than the date of likely determination of the case. The suspension was lifted.

Applications to lift are often consented to before they are heard. The question of costs can then be contentious.

In *Iridium Concesiones de infraestructuras SA & Others v Transport for London* [2019] EWHC 3589 (TCC), the claimant consented to the application eight days prior to the hearing. Waksman J held that the defendant should be paid only 60% of its costs to reflect the fact that the defendant did not provide the reasons for seeking the claimant's consent to lift the suspension prior to the application being made.

In *Aquila Heywood Ltd v Local Pensions Partnership Administration Ltd* [2021] EWHC 114 (TCC) (25 January 2021), the defendant decided to re-evaluate tenders in recognition of the fact that errors had been made and then issued a second award decision (in favour of the same bidder) and sought the claimant's consent to lift the automatic suspension. Correspondence ensued on discontinuance, the application was made and the issue subsequently arose as to who should pay for the costs of the application to lift. The claimant argued that the defendant should pay its costs on the basis that the application was unnecessary because there was no suspension in place. Pepperall J held that the suspension in regulation 95 of the PCR 2015 applied to the challenged decision and that once the original decision had been removed (due to the re-score), the suspension no longer applied and the application was unnecessary. On this basis, the claimant was the successful party for the purposes of costs. However, the claimant had asserted in correspondence that the suspension applied to the second decision and the defendant was only ordered to pay half the claimant's costs.

Summary

While it is true that most applications to lift are successful, each one depends on its facts and the strength of the evidence.

In relation to large, prestigious contracts (as in *NATS*) the reputational loss to the claimant as incumbent in losing the contract can be decisive in maintaining the stay. But it isn't always. Evidence is needed to show at least a real prospect that the reputational loss was irrecoverable in damages. Where (as in *Alstom v NRIL* or *Camelot*) the claimant is a global operator the loss of a large significant contract may be remediable in damages.

Conversely, where a claimant is a not for profit single contract entity or can otherwise show that its ability to service its business is fatally undermined by the loss of skilled staff through TUPE, damages may also be inadequate (as in *Bristol* or *Counted4*). However, the fact that an SPV set up to run a contract would lose its business if it fails on the retender is not sufficient in itself (*Camelot*).

The claimant will generally need to show that the irremediable damage is to itself not to its group (as in *Circle*) and should therefore consider suing on behalf of the group company as well as the bidding entity, provided they have standing. By contrast, the defendant can more readily point to non-financial damage to the public or its public service mission, whether that is healthcare needs (*Kent CCGs*) or the traveling public (*Bombardier*). Those public interest considerations may weigh either in assessing adequacy of damages to the defendant or the balance of convenience.

The effect of delay in entering into the contract (on for example the introduction of improved healthcare services or new rolling stock) and time to trial will be considered (*DWF*) in the balance of convenience not (following *Kellogg* rather than *Vodafone*) in assessing the adequacy of damages.

The public interest in not paying twice (to a claimant as well as the winning tenderer) will only be a consideration in very large cases (such as *Covanta*). There is also a public interest in procurement being carried out properly but there is no presumption in favour of a set aside remedy rather than damages (*Alstom*).

Assuming a serious issue, which is generally conceded by the defendant, the merits will only weigh, exceptionally, where they are clearly strong or weak.

Where the balance of convenience is even, the court may decide to maintain the status quo, that it will generally define as maintaining the award decision even if that means changing the supplier (*Kent CCGs*, *Circle*).

If the stay is maintained, the court will generally require cross undertakings which may favour the interested party (successful provider) as well as the defendant. However, particularly where the claimant is a small entity, the defendant (and interested party) should be

ready to evidence the nature of the damage that could be caused by the suspension (*Counted4*).

Causation

As explained under Standing, regulation 92(1) of the PCR 2015 (regulation 52 of the CCR 2016) provides:

“A breach ... is actionable by any economic operator which, in consequence, suffers, or risks suffering, loss or damage.”

An arguably stricter test applies to causation for damages under regulation 98(2)(c) of the PCR 2015 (regulation 58 of the CCR 2016):

“The court ... may award damages to an economic operator which has suffered loss or damage as a consequence of the breach.”

The test on causation in procurement challenges was summarised in *Mears Limited v Leeds City Council* [2011] EWHC 1031, by Ramsey J at paragraphs 205 to 209. The claimant must establish loss or damage, or a risk of loss or damage, by reason of the breach. There must be a real or significant, rather than a fanciful chance, that the claimant would have been successful if the rules had been followed.

Typically, a claimant, such as an unsuccessful bidder, needs to show that absent the breaches it either would have been awarded the contract or stood a real chance of winning.

If, for example, a claimant does not come second, but comes third or fourth, it may struggle to show that it has or may have suffered loss or damage as a result of a breach related to scoring.

In *Traffic Signs & Equipment Limited v Department for Regional Development & Department of Finance and Personnel* [2011] NIQB 25, concerning a tender process for 21 contracts, it was held by the Northern Ireland High Court that the contracting authority was in breach of the public procurement rules by applying a 60/40 price/quality split when the appropriate weighting should have been 80/20 and this manifest error affected the result for six of the 21 contracts. However, the plaintiff would only have been successful on three of the six contracts had the proper weighting been used. Therefore, the plaintiff was only entitled to a remedy in relation to those three contracts (see [Legal update, Northern Ireland High Court ruling on price/quality split in evaluation of tenders](#)).

The causation issue often arises in the context of disclosure applications where the claimant is seeking to gather evidence to bridge the gap in scores between its own bid and that of the successful tender.

In *Geodesign Barriers Limited v the Environment Agency* [2015] EWHC 1121 (TCC), Coulson J (as he then was)

noted that, having come sixth in the tender, it would be a “tall order” for the claimant to show that in addition to the winning bid, each of Bids A, B, C and D (all ranked higher than the claimant) should have been rejected. Nevertheless, in that case, the absence of any evaluation report or other contemporaneous records supporting the evaluation decisions raised questions of transparency in the tender process and Bids A to D were ordered to be disclosed. (For more information, see [Legal update, High Court ruling on claimant’s requests for specific disclosure in public procurement dispute](#) and [Legal update: case report, High Court refuses application to extend time to serve particulars of claim until a date after disclosure of documents in procurement dispute](#)).

In *Accessible Orthodontics Ltd and another v National Health Service Commissioning Board* [2020] EWHC 785 (TCC) (21 April 2020), the court refused an application by the claimants that the NHS Commissioning Board disclose the marks of the other tenders which scored higher than the claimant and the accompanying reasoning. This was because (unlike in *Geodesign*) there was no pleaded case on the scoring of other tenderers. (See [Legal update, Amendments to PCR 2015 claim permitted as they supplemented core claim \(High Court\)](#)).

In *Royal Cornwall Hospitals NHS Trust v Cornwall Council* [2019] EWHC 2211 (TCC), the claimant did not submit a bid, and could not, therefore, show that it had suffered loss or risked suffering loss.

In cases of breach of transparency, it may be possible to establish causation without showing that the claimant ought, on the correct scores, to have been the successful tenderer. For example, in *Lancashire Care NHS Foundation Trust, Blackpool Teaching Hospitals NHS Foundation Trust v Lancashire County Council* [2018] EWHC 1589 (TCC), Stuart-Smith J (as he then was) held that:

“The failure to provide transparent and comprehensible reasons prevents the Court from making a reliable assessment of material error in circumstances where only a very modest adjustment in scores (for either Tenderer) would be decisive. That is sufficient to demonstrate the materiality of the breach under Issue 1(a), in which case it is common ground that the decision of the Defendant to award the tender to Virgin must be set aside.”

(See [Legal update, Opaque contract award decision set aside \(High Court\)](#) and [Legal update: Blog post: To re-score or not to re-score: procurement challenge of health care services tender](#)).

However, where it is established that there was manifest error in the scoring of bids, the court will generally go on to rescore bids in order to assess the materiality of the errors, whether they made a difference to the tender

outcome and thus whether the breach caused loss (see *EnergySolutions EU Ltd v Nuclear Decommissioning Authority* [2016] EWHC 1988 (TCC) (29 July 2016) at paragraphs 296 to 297,786).

In *Bechtel Limited v High Speed Two (HS2) Limited* [2021] EWHC 458 (TCC), a claim was brought by the unsuccessful tenderer in the procurement for the construction partner contract for Old Oak Common Station (one of the two Southern Stations on the HS2 network), a project with a target cost of over £1bn. Bechtel alleged that there were manifest errors in the scoring, inadequate records in breach of the transparency principle, that the winning bid should have been disqualified for being abnormally low due to a lack of resources and that the winning bid and the contract had been unlawfully modified. Following a three-week trial on liability and causation, Fraser J rejected substantially all of Bechtel's allegations. He also found that, in the event that Bechtel had been ranked first, it would have been disqualified from the competition by HS2 for failing to remove a fundamental qualification from its bid which would have shifted the financial risk profile of the contract substantially to the detriment of HS2. Bechtel's case therefore also failed on causation grounds because it could not show that it suffered or risked suffering loss as a result of any of the alleged breaches.

The test for causation of loss or damage under regulation 98 can also be met by a loss of chance where the contract ought to have been but was not tendered openly and, on the counterfactual of an open tender, the claimant would have had a real chance of being successful. See also the analysis of Kerr J in *Consultant Connect* at issue 10, where the chance was identified as 50%. [Legal update, Challenge to joint procurement for contract to supply the NHS largely succeeds and breaches sufficient to justify an award of damages and payment of civil penalties \(High Court\): Standing to bring a claim under the PCR 2015 \(issue two\), Was loss and damage suffered \(issues eight and nine\)?](#).

Appropriate remedy

Where brought as a pre-contract remedy and in circumstances where the automatic suspension has been maintained, the court will decide whether damages or setting aside the award decision is the most appropriate remedy.

In *Mears Limited v Leeds City Council* [2011] EWHC 1031 (TCC) at paragraph 223, Ramsey J set out the relevant considerations in deciding on an appropriate remedy for breach of the procurement rules (in a tender relating to social housing improvement works where the claimant was excluded at an early stage of the competitive dialogue). These included the time that

would be taken to retender the services, the absence of any interim contract pending any retender, the possibility that an interim contract could be challenged on procurement grounds and the fact that damages would be an adequate remedy for the claimant. He concluded that damages would be the most proportionate remedy.

In *Woods Building Services v Milton Keynes* [2015] EWHC 2011 (TCC), following a trial on liability, the High Court held that the council's tender evaluation process was fundamentally flawed with numerous manifest errors in the scoring. Coulson J (as he then was) made adjustments which significantly reduced the score awarded to the successful bidder, EAS, and marginally increased the score awarded to Woods. As a consequence, the contract was clearly awarded to the wrong bidder. (See [Legal update, High Court finds manifest errors by local authority in tender evaluation](#).) Subsequently, in *Woods Building Services v Milton Keynes* [2015] EWHC 2172 (TCC), Coulson J ruled on the appropriate remedy. He was invited, but declined, to order that the contract should be awarded to Woods. He stated that a mandatory injunction requiring a Council to enter into a contract would only be granted in exceptional circumstances, it would be inappropriate to order that the contract be awarded to Woods given that the process was flawed and that damages was an adequate remedy. The judge ordered that the claimant was entitled to damages with the quantum to be assessed at the appropriate time. In this case, it was indicated that the defendant would conduct a re-procurement and the judge pointed out that this could affect the level of damages, the implication being that the loss would be mitigated if Woods were successful on the re-tender. (See [Legal update, High Court ruling on remedy following finding that local authority made errors in tender evaluation](#)).

The issue of mandatory relief also arose in *MLS (Overseas) Ltd v the Secretary of State for Defence* [2018] EWHC 1303 (TCC). The court had previously established, following the liability trial, that the defendant had acted unlawfully in rejecting the claimant's tender and that, had the published criteria been applied properly, it would have been awarded the contract. In considering remedies, O'Farrell J considered whether the defendant should be ordered to set aside the award of the contract (to SCA) and award the contract to the claimant or whether it should be confined to a remedy in damages. Applying the guidance in *Mears* and *Woods*, she ordered that the award to SCA be set aside and made a declaration that it would be lawful for the MoD to award the contract to MLS. (See [Legal update: case report, Award decision of MoD set aside but court declines to award contract to bidder whose tender was unlawfully rejected \(TCC\)](#)).

Damages and abandonment

A damages claim may be made prior to or following the award of the contract. Damages are based on the profits (and contribution to fixed overheads) lost to the claimant as a result of the breach and/or wasted bid costs. The level of damages recoverable depends in part on whether the evidence indicates that the claimant would have been awarded the contract in the absence of the breach or merely whether it has lost the opportunity to bid in a fair and transparent tender procedure. In the latter case, the most that the claimant can hope to recover is a proportion of the lost profit to reflect the likelihood of being awarded the contract if the rules had not been breached (See *Harmon v House of Commons (1999) 67 Con L.R. 1*, at paragraphs 199-213) (see also *Lancashire County Council v Environmental Waste Controls Limited [2010] EWCA Civ 1381*, where the loss of chance was held to be 50% as the tender was a “two-horse race”).

In *F P McCann Ltd v Department for Regional Development [2020] NIQB 51*, the High Court of Justice in Northern Ireland handed down a detailed judgment on the quantification of damages for loss of a chance in a procurement claim. The plaintiff (McCann) had submitted a joint tender to the DRD for a road construction project. McCann's bid had been rejected as abnormally low, but the court had, in an earlier judgment, held that DRD was in breach of regulation 30 of the PCR 2006, was guilty of a breach of duty to McCann and that McCann was entitled to an award of damages on the basis that its bid ought to have been reconsidered and it had therefore lost an opportunity to be awarded the contract. Colton J held that McCann was entitled to damages totalling 50% of the loss of profit claimed on the basis that it was not clear whether the court would have awarded the contract to the claimant. As to wasted tender costs, the court held that this would only be recoverable if all other parts of the claimant's claim fail, as loss is calculated on the basis that the claimant would have won the contract and tender costs are a cost of doing business. No award was made in relation to loss of future opportunities (due to not being awarded the contract in question) as this was deemed highly speculative. (See [Legal update, Court quantifies damages for loss of chance in procurement exercise \(High Court of Justice in Northern Ireland\)](#)).

See also *Consultant Connect* where the claimant's loss was also judged to be 50%. See [Legal update, Challenge to joint procurement for contract to supply the NHS largely succeeds and breaches sufficient to justify an award of damages and payment of civil penalties \(High Court\): Was loss and damage suffered \(issues eight and nine\)?](#)

A damages claim may also be made or pursued following the abandonment of an award decision.

In *Amey Highways Ltd v West Sussex Council [2019] EWHC 1291 (TCC)*, the court held that a finding that an abandonment decision was lawful does not remove an accrued cause of action which arose in an economic operator's favour prior to the decision where a breach of duty by the authority can be proved to have caused the operator loss or damage. To be awarded damages, the claimant must therefore show (1) one or more breaches in the absence of which it would have been the successful tenderer and (2) that on the balance of probabilities it would then have been awarded the contract *ie* that there was no other reason to abandon the tender process. For a discussion of this case, see [Legal update, Abandonment of procurement will not affect accrued cause of action \(TCC\)](#). See also [Ask, What is the effect of the decision in Amey Highways Ltd v West Sussex County Council \[2019\] EWHC 1291 \(TCC\)?](#)

In *MSI-Defence Systems Limited v The Secretary of State for Defence [2020] EWHC 1664*, the claimant challenged a decision to rewind a tender and reinvoke bids (using amended scoring guidance) after initial bids had been assessed and sought damages based on the accrued cause of action arising from the defendant's failure to award the contract to the claimant. Pending resolution of this claim, the claimant participated in the rewind procedure. The defendant sought (and failed) to strike out the claim on various grounds. These included on grounds of proportionality on the basis that the claimant ought to have sought an interim remedy as it was still participating in the procurement and might yet win the contract. This argument was rejected by the court on the basis that failure to seek injunctive relief is not a good reason to strike out and the outcome of such an application would be doubtful. The damages claim in *MSI* was considered by the court to be “on all fours” with *Amey v West Sussex*.

Even if damages are not pursued, the abandonment of a procurement following the issue of a claim can also give rise to difficult arguments on costs. In *Accessible Orthodontics (O) Ltd and Accessible Orthodontics LLP v National Health Service Commissioning Board [2021] EWHC 44 (TCC)*, certain procurements for NHS orthodontic services were abandoned in June 2020 due to the effects of the COVID-19 crisis and the need to reassess dental needs. The remaining issue was the treatment of costs. The abandonment effectively delivered part of the relief sought in the claims in that the award was withdrawn. However, the principles in *M v LB Croydon [2012] 1 WLR 2607*, which govern the issue of who is the successful party for cost purposes following settlements, did not quite fit the facts as the abandonment was made for valid extraneous reasons and there was no compromise of the claim. Ter Haar J ruled that it was necessary to look at whether the achievement of the relief is caused by the litigation and that here the abandonment did not shed light on

who was the successful party. The court held that the likely outcome was not tolerably clear and the default position was therefore that there was no order as to costs. Notably, the judge did penalise the defendant for indicating that it would agree to a mediation and then later withdrawing from the mediation. The order to pay the claimants' costs wasted by the failed mediation process reflected the court's encouragement of ADR.

Sufficiently Serious Breach

In *Energy Solutions EU Ltd v Nuclear Decommissioning Authority* [2016] EWHC 1988 (TCC) (judgment of 29 July 2016), Fraser J found that the defendant had awarded scores on a manifestly erroneous basis, that the successful bidder ought to have been disqualified and that, following scoring changes, the claimant ought to have been successful, with damages to be assessed. In *Energy Solutions EU Ltd v Nuclear Decommissioning Authority* [2016] EWHC 3326, the court determined issues relating to the application of the *Francovich* conditions for state liability under EU law. It was held that an individual breach by the NDA of its obligations was sufficiently serious to warrant an award of damages if it was a breach of obligation in relation to a threshold requirement, or one that was designated "pass/fail". The other multiple breaches were also sufficiently serious. In answer to the question whether a failure to award a contract to a tenderer whose tender ought to have been assessed as the most economically advantageous tender is in itself sufficiently serious to warrant an award of damages, Fraser J answered Yes.

In *Nuclear Decommissioning Authority v Energy Solutions EU Ltd (now called ATK Energy EU Ltd)* [2017] UKSC 34, the Supreme Court held that a claimant was only entitled to damages where the breach was sufficiently serious to merit an award of damages in accordance with the *Francovich* conditions and the matter did not need to be referred to the ECJ.

While the Supreme Court did not provide separate guidance on the application of the *Francovich* conditions, the principles to be considered were set out by Lord Clyde in *Reg v Secretary of State, Ex p. Factortame* [2000] 1 AC 524, HL and summarised by the Court of Appeal in *Delaney v Secretary of State for Transport* [2015] 1 WLR 5177 at [36] and by Kerr J in *Consultant Connect* at [332] as:

"(i) the importance of the principle which has been breached; (ii) the clarity and precision of the rule breached; (iii) the degree of excusability of an error of law; (iv) the existence of any relevant judgment on the point; (v) the state of the mind of the infringer, and in particular whether the breaches were deliberate or inadvertent; (vi) the behaviour of the infringer after it has become

evident that an infringement has occurred; (vii) the persons affected by the breach, including whether there has been a complete failure to take account of the specific situation of a defined economic group; and (viii) the position taken by one of the Community institutions in the matter."

In *Consultant Connect* it was held (Issue 11), applying the *Factortame* principles, that the manipulation of the process to ensure that a certain bidder (Cinapsis) won was sufficiently serious to justify damages.

In *Braceurself Limited v NHS England* [2022] EWHC 2348 (TCC), it was held by Nissen J that a single breach occurred, comprising two manifest scoring errors. Given that the scores of the successful and second placed bidder were very close, the claimant would have been successful had the breach not occurred. On the test of Fraser J in the *NDA* case, this would in itself mean that the breach was sufficiently serious. However, applying the *Factortame* principles, it was held that although NHS England had made a manifest error, which changed the tender outcome, the breach was not sufficiently serious for damages. The single breach made by NHS England (NHSE) was at the excusable end of the spectrum. The misunderstandings were minor and the procurement was overall a well-run exercise. The breach was inadvertent and occurred in good faith. NHSE's purpose was to maximise access to publicly funded orthodontic services for those who have a disability. The loss of this contract may have been significant for the claimant but it was not existential, it had remained in business and the case was far removed from a case such as *NDA*, which concerned multiple breaches in a multi-billion pound contract. Further, this was a case in which the breach had a very low impact on wider public access to orthodontic treatment. See [Legal update, Damages claim dismissed because breach of procurement rules was not sufficiently serious \(TCC\)](#).

In *Bromcom Computers plc v United Learning Trust and another* [2022] EWHC 3262 (TCC), Waksman J held that errors made in assessing bids for a management information system were sufficiently serious for an award in damages. He noted the difference in approach between *NDA* and *Braceurself* and that these were very different cases on the facts. He was content to adopt the approach that in assessing the eight factors in *Factortame*, *no single factor is decisive and that a balancing exercise must be performed. In this case, the Trust had made a number of manifest errors in assessing the bids including the use of an averaging methodology rather than a proper moderation process and, if these errors had not been made, the claimant would have won by a significant margin. The rules broken were generally clear; it could not be said that this was overall a well-run procurement exercise and there were no factors which weighed in the Trust's favour.*

Courts' approach to applications for expedited trial and to stay proceedings

The principles applicable to an application for expedition were set out by Lord Neuberger in *WL Gore Associates GMBH v Geox SPA [2008] EWCA Civ 622 at [25]* by reference to four factors: (i) whether the applicant has shown good reason for expedition; (ii) whether expedition would interfere with the good administration of justice; (iii) whether expedition would cause prejudice to the other party; and (iv) whether there are any other special factors.

The case of *Joseph Gleave & Son Limited v Secretary of State for Defence [2017] EWHC 238 (TCC)* concerned a dispute about an on-going procurement of over 6,000 product lines of hand tools for essential military needs. The claim was issued on 10 November 2016 and the application for expedition was heard at a CMC on 3 February 2017. The tender process was to be completed at the end of February 2017, and the award of the contract was scheduled for early May 2017. The claimant sought an expedited trial in March 2017 so that the outcome of its challenge would be known before the contract was awarded, whilst the defendant sought a stay of the proceedings until after the contract award. The court rejected the application for an expedited trial on the basis of the delay in proposing expedition, the complexity of matters to be covered at trial and the breadth of disclosure required. Given also that the claimant was still involved in the procurement and could still be awarded the contract, the court held that the appropriate order was to stay the claim until 10 May 2017, when the contract was expected to be awarded. (See [Legal update: High Court confirms trial expedition principles for procurement claims](#)).

The issue of expedition frequently arises in the context of applications to lift automatic suspensions. In *Kellogg*, the application for expedition failed on the basis that it would interfere with the good administration of justice and be inconsistent with the overriding objective because: (1) disclosure may be more extensive than anticipated by the claimant, (2) the pleadings could require amendment following disclosure, (3) it may be necessary to call 21 witnesses and the preparation of their statements would be time consuming and (4) the parties could not sensibly be ready for the trial date (March 2022) being proposed by the claimant.

Post-contract remedies

Ineffectiveness

The remedy of ineffectiveness may be sought once the contract has been entered into (*Regulation 98, PCR 2015 and Regulation 59, CCR 2016*). This involves a

declaration of ineffectiveness by the court, with the effect that prospective obligations under the contract are cancelled.

Grounds for ineffectiveness

The grounds for ineffectiveness are:

- Where the contract has been awarded without the prior publication of a contract or concession notice in circumstances where a contract or concession notice was required (illegal direct award).
- Award of the contract without complying with the rules on standstill or suspension (see *Standstill and Automatic suspension*), such that the economic operator has been deprived of the possibility of starting proceedings (or pursuing them to a proper conclusion) before the contract was entered into, combined with a breach of the public procurement rules which has affected the chances of the claimant operator obtaining the contract.
- Award of call-off contracts with a value in excess of the applicable public contract threshold under a framework or dynamic purchasing system in breach of applicable requirements. This third ground is not available under the CCR 2016. For more information on the applicable thresholds, see [Checklist, Public procurement thresholds](#).

(*Regulation 99, PCR 2015 and Regulation 60, CCR 2016*.)

Derogations from ineffectiveness

The grounds for ineffectiveness are subject to the following specific derogations:

- **No contract or concession notice:** the ground based on illegal direct award does not apply if all the following are satisfied:
 - the contracting authority (or utility) considered the award without prior publication of a contract notice to be permitted by the applicable procurement regulations;
 - a voluntary transparency notice was published (formerly in the OJEU, now in *Find a Tender* further to changes brought about by the Public Procurement (Amendment etc.) (EU Exit) Regulations 2020 (*SI 2020/1319*) and subject to transition arrangements for procurements launched prior to the end of 2020 (see [Practice note, Public procurement in the UK: Procurement procedures pending at the end of transition period](#))) expressing the contracting authority's or utility's intention to enter into the contract; and
 - the contract was not entered into before the end of a standstill period of at least ten days, beginning with the day after the date on which the voluntary transparency notice was published.

The voluntary transparency notice (also known as a voluntary ex-ante transparency (VEAT) notice) must contain:

- the name and contact details of the contracting authority or utility;
 - a description of the object of the contract;
 - a justification of the decision to award the contract without a contract or concession notice;
 - the name and contact details of the operator to be awarded the contract; and
 - other information that the contracting authority or utility considers it useful to include.
- **Non-compliance with call-off rules.** The third ground for ineffectiveness based on non-compliance with call-off rules (for frameworks and dynamic purchasing systems) does not apply if the contracting authority:
 - considered that the rules on frameworks or dynamic purchasing systems had been followed;
 - had voluntarily complied with the standstill period provisions; and
 - did not enter into the contract before the end of the standstill period.

The ineffectiveness remedy is not discretionary and if the court is satisfied that any of the grounds for ineffectiveness apply, it must make a declaration unless Regulation 100 applies (overriding reasons relating to a general interest) (*Regulation 98(2), PCR 2015 and Regulation 61, CCR 2016*).

The regulations provide that:

- The economic interest in the effectiveness of the contract may be considered as an overriding reason only in exceptional circumstances, if ineffectiveness would lead to disproportionate consequences (*Regulation 100(2), PCR 2015 and Regulation 61(2), CCR 2016*).
- However, economic interests directly linked to the contract (such as the legal costs, or the costs of delay in the execution of the contract, the costs of a new tender or of changing the operator) cannot constitute such overriding reasons (*Regulation 100(3) and (4), PCR 2015 and Regulation 61(3) and (4), CCR 2016*).

Limitation

There is a special limitation period for ineffectiveness claims under regulation 93 of the PCR 2015 (regulation 54, CCR 2016), which is either:

- 30 days from the date of publication of a relevant contract award notice (ie including the justification for not having published a prior notice) or of informing the economic operator of the conclusion of the

contract and providing a summary of the relevant reasons (ie those to which the operator would be entitled under *Regulations 55(2) of PCR 2015, 40(2) of CCR 2016*); or

- Six months from conclusion of the contract.

The court's ability to extend the general time limits where there is a good reason for doing so does not apply to the time limits applicable to the ineffectiveness remedy (*Regulation 92(4), PCR 2015 and Regulation 53(4), CCR 2016*).

Caselaw on ineffectiveness

On 13 July 2011, the court struck out an application for a declaration of ineffectiveness of a contract for the design, supply and maintenance of high speed trains on the basis that it was clear that the claim could not succeed. The court concluded that the claimant could not make out the grounds for ineffectiveness in the UCR 2006 (which mirror those in the PCR 2015). In relation to the first ground, Eurostar had in fact published an OJEU "qualification notice" and the tender had been conducted on the basis of a qualification system as permitted by the UCR 2006. It was held, therefore, that while there may have been material changes to the contract after contract award, there was nevertheless a relevant notice which was capable of being related to the procedure and the contract ("a mechanistic test") and the first ground could not be satisfied. Under the second ground, there was either no breach of the standstill period or, if there had been, this had not prevented the claimant from bringing proceedings before the contract was awarded. In any event, the claim for a declaration of ineffectiveness had been brought out of time (*Alstom Transport v Eurostar International Ltd and another (Rev 1) [2011] EWHC 1828 (Ch)*). For more information see [Legal update, High Court strikes out ineffectiveness claim in relation to contract awarded by Eurostar](#).

On 11 September 2014, the ECJ gave its ruling in *Italian Interior Ministry v Fastweb SpA (C-19/13)*, in which a contracting authority had published a VEAT notice in respect of its decision to use the negotiated procedure without prior publication of a contract notice. The ECJ held that the VEAT notice must disclose clearly and unequivocally the contracting authority's reasons for considering it legitimate to award the contract without prior publication of a contract notice, so that interested persons are able to decide with full knowledge of the relevant facts whether they consider it appropriate to bring an action and so that the review body is able to undertake an effective review (see [Legal update, ECJ ruling on application of exceptions to the ineffectiveness remedy](#)).

In *Lightways (Contractors) Limited v Inverclyde Council [2015] CSOH 169*, the Scottish Court of Session held

that the award of a call-off contract under a framework agreement was ineffective. The council had awarded the contract to a company which was not the group company that was actually party to the framework agreement. The court concluded that this was not a mere clerical error that could just be rectified and rejected an argument based on the principle of proportionality. The court also held that the principle of proportionality could not be applied to limit the entitlement of an economic operator to challenge an alleged breach of a contracting authority's duty to comply with procurement legislation. Therefore, the court held that the decision to award the call-off contract was ineffective under Regulation 49(5) of the Public Contracts (Scotland) Regulations 2012. For more information, see [Legal update, Scottish Court of Session finds framework agreement call-off contract ineffective](#).

In *Faraday Development Ltd v West Berkshire Council* [2018] EWCA Civ 2532 (14 November 2018), the Court of Appeal made a declaration of ineffectiveness in relation to a development agreement. The court allowed an appeal against the dismissal of an application for judicial review of the local authority's decision to enter into a development agreement for the disposal of land to the developer (SMDL). The council had entered into a development agreement with SMDL but had not followed a procurement process under the PCR 2006, the procurement rules in force at the time of the agreement. It had issued a VEAT notice stating that it believed that the agreement was outside the procurement regime. The Court of Appeal held that although the development agreement was not a "public works contract" at the time it was entered into, its provisions meant that the council had effectively agreed to act unlawfully in the future, committing itself to acting in breach of the procurement regime (when SMDL proceeded to draw down the land). Further, the claim for a declaration of ineffectiveness was not precluded by the council's VEAT notice which was incorrect or, at best, misleading in describing the object of the contract as an exempt land transaction. Further, the notice did not "alert a third party to the real nature of the transaction" as it did not mention the detailed provisions for the design and execution of a large development. It failed to meet the standard in *Fastweb* and as such could not prevent the court making a declaration of ineffectiveness. See [Legal update: case report, Development agreement containing contingent obligations on developer was "public works contract" under PCR 2006 \(Court of Appeal\)](#).

In *AEW Europe LLP and others v Basingstoke and Deane Borough Council* [2019] EWHC 2050 (TCC) (26 July 2019), the claimants sought a declaration of ineffectiveness against the council in respect of a development agreement entered into between the

council and Newriver Leisure Limited (NRL). The council had published an OJEU Notice seeking bids in relation to the regeneration of a leisure park, but the disputed development agreement incorporated an expanded scheme. The claimants argued that the OJEU Notice did not make provision for the nature and extent of the retail facility contemplated in the development agreement. The council argued that the claim for a declaration of ineffectiveness was misconceived because the contract was advertised and a tender process followed. On consideration of a preliminary issue relating to the availability of such a declaration, the court held that, even assuming that there was a breach of procurement law as alleged by the claimants, a declaration of ineffectiveness was not available to them:

- There had to be an effective notice capable of being related to the procedure and the contract awarded. The council had published a wholly valid OJEU Notice and there was a sufficient and close connection between the OJEU Notice and the development agreement.
- Regard could and should be had to the fact that the OJEU Notice sparked the competition.
- The regulation dealing with ineffectiveness operated by looking to the existence or absence of an OJEU Notice which involved the application of a "mechanistic test", the benefit of which was that it would be easier to apply in a commercial context.

See [Legal update: Effective OJEU contract notice defeats claim for declaration of ineffectiveness \(High Court\)](#).

In *Consultant Connect Limited v NHS Bath and North East Somerset, Swindon and Wiltshire Integrated Care Board* [2022] EWHC 2037, the court held that the third ground of ineffectiveness was made out given that the contract was based on a framework agreement and awarded in breach of the requirements of regulation 33(11) of the PCR 2015. However, Kerr J accepted that "overriding reasons relating to a general interest" required that the effects of the contract should be maintained, given the impact on patient care of abruptly stopping the service to two of the three CCGs. Kerr J therefore made an order shortening the contract and ordered payment of civil penalties (of £8,000 and £10,000). (see [Legal update, Challenge to joint procurement for contract to supply the NHS largely succeeds and breaches sufficient to justify an award of damages and payment of civil penalties \(High Court\): Was loss and damage suffered \(issues eight and nine\)?](#)).

Light touch regime and sub-central authorities (PCR 2015 and CCR 2016)

For the same reason as explained above in relation to the standstill requirements, it appears that the ineffectiveness provisions do not apply to either light

touch regime tenders or tenders conducted by sub-central authorities (using the restricted or competitive negotiated procedure) under the PCR 2015 because the PCR 2015 do not require a “contract notice” to be published in relation to these tenders.

It also appears that the ineffectiveness provisions, in relation to the standstill requirements, do not apply to light touch regime tenders under the CCR 2016, because the CCR 2016 do not require a “concession notice” to be published in relation to these tenders.

Framework agreements

“Contract” is defined to include a framework agreement for the purposes of Chapter 6 of the PCR 2015 which deals with remedies. This means that where a framework tender is challenged after the framework agreement is entered into:

- The set aside remedy will not be available (*Regulation 97, PCR 2015*); but
- The ineffectiveness remedy will be available if the (first or second) grounds for ineffectiveness are met.

Where a declaration of ineffectiveness is made in respect of a framework agreement, it does not follow automatically that call-off contracts entered into pursuant to that framework are also ineffective (*Regulation 103, PCR 2015*). A separate declaration would be required in relation to each specific call-off contract, and such a declaration would need to have been applied for within the relevant time limits.

Some practical considerations on ineffectiveness

- **First ground.** The ineffectiveness remedy could be available in circumstances where an existing contract is renewed or amended in a material way and which therefore triggers a new obligation to conduct a tender process. Such material modifications in the absence of a tender process already give rise to risks of damages claims for contracting authorities (see *Presstext Nachrichtenagentur v Republik Oesterreich (Bund), Case C-454/06* as codified in *regulations 72 of the PCR 2015 and 43 of the CCR 2016*). For more information see [Practice note, Varying public contracts](#).
- **Third ground (not applicable to concession contracts).** Given that the ground relating to call-off contracts is not available if a standstill period is held before award of the call-off contract, it may be prudent to apply a standstill before entering into call-offs as a matter of course in order to avoid the ineffectiveness risk, assuming all other requirements in relation to call-offs are met.

The consequences of ineffectiveness

The consequence of a declaration is that those obligations under the contract that have yet to be

performed are not to be performed (*Regulation 101, PCR 2015 and Regulation 62(1), CCR 2016*). The court may make any order that it thinks appropriate for addressing the implications of the declaration and any consequential matters arising (*Regulation 101(3), PCR 2015 and Regulation 62(3), CCR 2016*).

That power should not be exercised in a way which is inconsistent with provisions agreed by the parties to the contract for the purpose of regulating their mutual rights and obligations in the event of a declaration being made, subject to the proviso that this rule does not apply where the provisions agreed are “incompatible with the requirement” of the ineffectiveness remedy.

Contractual provisions

The PCR 2015 and CCR 2016 effectively encourage parties to make contractual provision for the consequences of ineffectiveness. The parties can agree that, for example:

- Property or other resources will transfer back in the event of a declaration.
- Payments for services not received or works not commenced shall be repaid.
- The parties will agree a mutually acceptable cessation plan for the orderly running down and handover of services and the treatment of confidentiality, physical assets and IP rights.
- Possibly, compensation to the contractor for its loss of profits.
- Such provisions would survive the declaration.

The prospect of ineffectiveness may give rise to some inventive contract drafting. For example, in cases where material changes or extensions to a contract are made without a re-tender, contractual provisions could be agreed whereby a “fall back” position (a non-material modification or extension) would take effect in the event of a declaration of ineffectiveness.

A clear severability provision could remove the material amendments in the event of a declaration.

However:

- If the parties were to agree that, in the event of a declaration, the ineffective contract would be replaced by another contract with equivalent rights, this would clearly undermine the effectiveness of the remedy and be incompatible with the regulations.
- Contracting authorities and successful contractors may be wary of including provisions governing the effect of a declaration for fear that the court may interpret them as an admission that the contract or contract variation was unlawful.

For more consideration of the use of contractual provisions to address a declaration of ineffectiveness,

see [Checklist, Ineffectiveness: issues to consider when drafting a public procurement collateral contract](#).

Determination by the court

The regulations also provide that the court may address issues of restitution and compensation as between the parties to the contract so as to achieve an outcome that the court considers to be just in all the circumstances (*Regulation 101(4), PCR 2015 and Regulation 62(4), CCR 2016*).

The court could therefore order compensation to the parties based on equitable doctrines, such as compensation to reflect the value of services or goods received by each of the parties and to avoid unjust enrichment. For more information on types of order that a court may make, see [Practice note, Remedies: restitution: Services rendered by the claimant to the defendant \(quantum meruit and quantum valebat\)](#).

There may, in practice, be no need for the court to rule on the consequences of the declaration as between the contracting parties (in particular, where the parties agree what would happen in the event of a declaration).

Financial penalties and contract shortening

The remedies rules provide that where a declaration is made, the court must also order the contracting authority to pay a financial penalty (*Regulation 102, PCR 2015 and Regulation 63(1), CCR 2016*).

In addition, the remedy of damages may be available.

Further, where the court has decided, on the grounds of overriding general interest, not to grant a declaration, it must impose a financial penalty and/or require the duration of the contract to be shortened. This also applies in circumstances where the court is satisfied that there has been a breach of the standstill or suspension obligation, but does not make a declaration (either because none was sought or because the court is not satisfied on other grounds that a declaration should be made).

When ordering a financial penalty or contract shortening, the court's "overriding consideration is that the penalties must be effective, proportionate and dissuasive" (*Regulation 102(4), PCR 2015 and Regulation 63(4), CCR 2016*). The court will have regard to:

- The seriousness of the breach.
- The behaviour of the contracting authority or utility.
- The extent to which the contract remains in force (if it is shortened).

(*Regulation 102(5), PCR 2015 and Regulation 63(5), CCR 2016*.)

Any penalties are payable to HM Treasury.

See [Legal update, Challenge to joint procurement for contract to supply the NHS largely succeeds and breaches sufficient to justify an award of damages and payment of civil penalties](#). See [What remedy should be granted: \(issue 9\) \(High Court\)](#).

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