Is There a Place for Judicial Review in Procurement Challenges?

by Colin Ricciardiello
Partner
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Introduction and Background

Colin Ricciardiello
Partner

Procurement law and the Public Contracts Regulations ("the Regulations") which enact that law on a day to day basis are concerned with imposing duties owed to economic operators by contracting authorities and providing remedies for breaches of those duties. As things stand there is, however, scope for non-economic operators to bring procurement challenges in very restricted circumstances. It is difficult to distil those circumstances into easy to apply practical principles. In a recent judgment in *R (Wylde) & Others v. Waverley Borough Council*[1] the standing of non-economic operators to bring procurement challenges by judicial review was again considered by the Administrative Court.

The Waverley case was similar in background to an earlier decision in *R (Gottlieb) –v- Winchester City Council)*[2] which caused quite a good deal of controversy and discussion for a number of reasons. One was the fact that the claimant was Councillor Gottlieb, a member of Winchester City Council. As a councillor from the majority political group, he was personally funding a judicial review challenge against his own Council's decision to vary a development agreement for the extensive redevelopment of Winchester City centre. Mr Gottlieb claimed that the proposed changes were not permitted by procurement law.

Apart from the "headline grabbing" aspects of *Gottlieb*, the judgment was interesting and notable because:-

[1] [2017] EWHC 466
[2] 2015 EWHC 231 (Admin)

- It added to decided procurement law cases on the scope for lawfully modifying a contract post award (and some of the crucial modifications were held to be unlawful).
- Councillor Gottlieb was obviously not an economic operator but was still held to have sufficient standing to bring a judicial review claim based on an infringement of procurement law.

Permission to appeal was granted by the Court of Appeal but the appeal was abandoned because Winchester City Council terminated the development agreement. When granting permission the Court of Appeal said in relation to standing "… *whether Mr Gottlieb has a sufficient interest to bring the challenge at all is a serious point and is worthy of consideration by the full court*".

In *Waverley* two of the claimants were Waverley councillors; the others were members of Farnham civic societies. All were Waverley Council tax payers. They challenged Waverley's decision to vary a development agreement which would extensively develop part of the town centre in Farnham, Surrey. They alleged that the proposed variations to the development agreement could not be lawfully effected without a fresh procurement. The most prominent challenge was to a change to the "Viability" condition precedent which involved the developer reducing its profit and the Council reducing a minimum sum for the value of the development site. Without these variations the developer would not have proceeded with the scheme it had designed - a scheme which the claimants had opposed for many years and well before the proposed modifications were formulated and made public. Importantly, Waverley had gone to great lengths, through the CPO route, to secure the development site and if there was a fresh procurement then it would have sought a similar scheme (on the site it had assembled) to the one which would be delivered if the proposed modifications to the development agreement proceeded.

The "sufficient standing" question in *Gottlieb* was considered after the judge heard the whole of the procurement law based challenge as to the lawfulness of the proposed modifications. That was usual as a sufficient interest point is to be taken with the legal and factual context as the requirement is to show sufficient interest in the matter to which the judicial review claim relates. However, in *Waverley* a different procedural approach was taken and (by consent) the court decided on the claimants' standing as a threshold question by a trial of a preliminary issue. A similar procedural approach was also taken in *R (Unison) v. NHS Wiltshire Primary Care Trust*[3] – a case which featured heavily in *Waverley* - where it was held that the non-economic operator claimant (a trade union) did not have sufficient standing. In *Waverley* the threshold issue proceeded despite an earlier decision granting the Claimants permission to apply for judicial review.

[3] [2012] EWHC 624

Superficially, the facts in *Waverley* appeared to be similar to Gottlieb but there were great differences and that placed Waverley in a much stronger position than Winchester to show that the modifications were permitted under procurement law. However, (and unlike in *Gottlieb*) as Waverley won on the sufficient standing preliminary issue, it was unnecessary to go into those differences.

Having decided that the claimants did not have sufficient standing, their claim was dismissed. That decision conflicts with *Gottlieb* on standing but is more in keeping with the restrictive approach adopted in *Unison*.

Legal background to the Waverley Judgment

In *R (Chandler) v Secretary of State for Children, Schools and Families*[4], the Court of Appeal suggested that a narrowly defined class of non-economic operators might be able to rely on a breach of the Regulations to found a claim for judicial review. Mrs. Chandler was a resident of Camden in London and a parent of children of secondary school age. She sought to challenge by judicial review Camden's decision to enter into a sponsorship agreement for an academy in Camden which she claimed should have been procured. In reality her motive was opposition to the principle of academies for personal reasons. The court held she was not within that class of non-economic operators. The identification of that narrow class of possible claimant stems from the qualified and obiter statements at paragraph 77 to 78 of Chandler:-

> *"We incline to the view that an individual who has a sufficient interest in compliance with the public procurement regime in the sense that he is affected in some identifiable way, but is not himself an economic operator who could pursue remedies under Regulations 47, can bring Judicial Review proceedings to prevent non-compliance with the 2006 Regulations or the obligations derived from the Treaty…*
>
> *He may have such an interest if he can show that performance of the competitive tendering procedure … might have led to a different outcome that would have had a direct impact on him...*
>
> *What Ms Chandler wants to happen is that there should be a competition to determine who should run the new school in Camden … Ms Chandler is not challenging the Secretary of State's decision because of any interest that she has in the observance of the public procurement regime because she is opposed to the institution of academy schools. She is thus attempting, or seeking, to use the public*

[4] [2010] LGR 1. As observed by the Northern Irish Court of Appeal in Traffic Signs and David Connolly's Application [2012 NICA 18) the obiter remarks were put in quite a tentative way – "incline to the view that". What is more, paragraph 69 of the judgment notes the non-economic operator right of action point was academic, it had not been fully argued in the normal way and the court was therefore dealing with the point "quite shortly". David Connolly was a 50% shareholder in the company which had lost the competition but was still held to have insufficient standing.

procurement regime for a purpose for which it was not created. In all of these circumstances, it would, in our judgment, be outside the proper function of public law remedies to give Ms Chandler standing to pursue her claim".

So far as using the public procurement regime to stop the object of procurement was concerned, the court in *Chandler* endorsed the judgment of Richards J. at paragraph 77 in *Kathro*[5]. Richards J. held at paragraph 77:

"*The claimants have not been shown to be affected in any way by the choice of tendering procedure. They have seized on the point simply as a fall-back way of trying to stop the project. I see no wider public interest to be served by allowing a challenge, and in all the circumstances the claimant should not in my view, be regarded as having sufficient interest for the purposes of the PFI challenge*".

Clearly the Court of Appeal was not saying in *Chandler* that it was enough for a non-economic operator to pass the normal judicial review standing test – there had to be something more which directly affected them. If it were otherwise then Mrs. Chandler would have satisfied the usual test of standing because: (a) she sought a competition (paragraphs 9 and 78); (b) there were at least two other potential contractors who had expressed a serious interest in funding the sponsorship agreement (paragraph 8); (c) she was a parent of children entitled to a place in secondary education in Camden and therefore "*had an immediate interest in the standard of secondary schooling*" in the area (paragraph 70).

Chandler was applied in *Unison* where the claimant was a trade union seeking judicial review of a decision by NHS bodies to contract out certain services to a third party without a competition (the procurement law issue being whether there was valid use of a framework agreement). It was held that *Unison* did not have standing and in so doing the attempt to equate the standing test in a normal judicial review claim by a non-economic operator for breach of the Regulations was rejected. The judge (Eady J.) stated at paragraph 9:

"Given the statutory structure of the Regulations, and the underlying policy as embodied in the corresponding European Directive, it is likely that breaches of the Regulations are more often going to give rise to private rather than public law remedies, which are going to be relatively rare. It is thus important to focus carefully upon the suggested criteria in the Chandler case and not to interpret them too freely … moreover, in the particular context of procurement; there has apparently been a

[5] R (Kathro) v Rhondda Cynon Taff CBC [2001] 4PLR 83.

> *decision by the legislator to confine the specified remedies to commercial competitors. That too needs to be borne in mind when attempts to give effect to the obiter dicta in Chandler"*

At paragraph 10 of the judgment, the judge suggested that the kind of persons who might pass the Chandler test would be those who were themselves significantly affected by the grant or withholding of a particular contract e.g. a supplier to an economic operator, or a trade association representing economic operators.

The Judgment in Waverley

Waverley's case on insufficient standing was that: (1) under existing case law the claimants were unable to establish standing; (2) the remedy of judicial review for infringement of procurement law is not available to non–economic operators.

The judge found for Waverley on the first argument so there was no need for him to consider the much wider second principle. That will have to wait for another day (and perhaps it is only for the Court of Appeal to say that its own dicta in *Chandler* should not be followed).

The judge held that in assessing standing it is necessary to look at the legal framework in which the decision complained of was made and its purpose. The purpose of the framework here was to provide transparent and fair competitions between economic operators when they sought the award of obtain public contracts. The public interest was served through the aims of the Regulations but that was different to non-economic operators having standing to bring judicial review claims to enforce the Regulations. In undertaking the purpose of the legislation assessment, the judge looked at procurement challenge cases brought by non-economic operators where standing was considered. That included *Kathro* and *R (Law Society) v Legal Services Commission and others*[6] where it was observed that: (a) the Law Society was a professional body which represented a body of economic operators; (b) it also represented a defined and named group of solicitors; (c) it had statutory functions relating to the profession. The argument that The Law Society had insufficient standing was rejected.

The claimants understandably relied heavily on *Gottlieb* as two of their number were also councillors and would be affected by the development if it went ahead in the town where they lived and were all council tax payers.

They sought to distinguish their position from *Kathro* and *Chandler* by saying they held genuine public spirited concerns to obtain alternative proposals through a new tender; they could not be excluded for having insufficient

[6] [2007] EWHC 1848

standing as they said they had no motive ulterior to the observance of procurement law.

With regard to motive, the judge decided: (a) there was an unnecessary emphasis on the motives of the claimants (although there was a lot of evidence showing that their opposition to the development pre-dated the proposed modification of the development agreement); (b) *Kathro* and *Chandler* were not about ulterior motives for bringing the claim but rather showed the "*gulf*" between the claimants' interests and the policy and purpose of the procurement legislation. That purpose was to secure public contracts that complied with procurement law. As a result, the judge held that judicial review was only available to non-economic operators who could show that compliance with procurement law might have led to a different outcome and that would have direct impact on them. As for "*impact*" the judge followed the *Unison* approach and held that bodies akin to a trade association could be directly affected. At paragraph 41 the judge accordingly held that "... *it is clear that a council tax payer, or concerned local resident, or member of the local authority cannot without more bring themselves within the test. There is no direct impact upon them as a consequence of the alleged failure in any procurement requirements*".

That conclusion is at odds with *Gottlieb* (and it is noteworthy that *Unison* was not referred to in *Gottlieb*) where, in order to hold that there was sufficient standing, it was necessary to distinguish Chandler. In Waverley, the Gottlieb basis to distinguish Chandler was rejected as it did not "engage" with the restricted Chandler test for standing – "*It appears clear that had the Chandler test been applied in Gottlieb the claimant in that case would not have established that he had standing to bring the claim*".

In summary, on applying *Chandler* in *Waverley* the claimants could not show that: the varied contract would produce a different outcome – Waverley would have still sought the scheme to which the claimants objected and there was no evidence that a competing interest was available[7]; nor was there was any direct impact on them as they were 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 proxy for status as an economic operator*".

Conclusions from Waverley

- The class of non-economic operators who can challenge a procurement decision by judicial review has been reduced since the Gottlieb ruling on standing was not followed in *Waverley* and the more restrictive *Chandler* and *Unison* approach was adopted.

[7] This was demonstrated in Waverley by the publication of a Voluntary Transparency Notice ("VEAT") under Regulation 99. No economic operator responded to the publication of that notice

- To have standing, a non–economic operator claimant has to: (a) be directly affected in the capacity of someone akin to an economic operator like a trade association; and (b) show that the outcome of the procurement process could have been different were it not for the alleged infringement of procurement law.

- The judge in *Waverley* did not consider that a claimant's motive for challenging a procurement matter was a decisive factor but it is suggested that in the light of how motive featured in the *Kathro* and *Chandler* reasoning, evidence of motive will still be useful. Even in *Waverley* it did have some relevance.

- Procedurally, any defendant who has a standing point to take would be well advised to do so as a threshold issue as in Unison and Waverley.

- The value of a VEAT was underlined in showing that: (a) if no economic operator was interested in a modification, then the court should be slow to allow a non-economic operator's challenge; (b) in Waverley the outcome would not have been different as no economic operator responded to Waverley's VEAT and showed interest in offering something different.

This note was prepared by Colin Ricciardiello who acted for Waverley Borough Council, and is a partner in Sharpe Pritchard's projects department, specialising in dispute resolution.

E: cricciardiello@sharpepritchard.co.uk

T: 020 7405 4600

SHARPE PRITCHARD
Solicitors and Parliamentary Agents

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Sharpe Pritchard LLP Elizabeth House Fulwood Place London WCIV 6HG
@sharpepritchard
T 020 7405 4600 F 020 7405 4646 E enquiries@sharpepritchard.co.uk W www.sharpepritchard.co.uk