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Case No: CO/3610/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/02/2021

Before :

MR JUSTICE CHAMBERLAIN

- -

Between :

THE QUEEN
on application of
(1) GOOD LAW PROJECT LIMITED
(2) DEBBIE ABRAHAMS MP
(3) CAROLINE LUCAS MP
(4) LAYLA MORAN MP **Claimant**

- and –

SECRETARY OF STATE FOR HEALTH AND SOCIAL CARE **Defendant**

- -

JASON COPPEL QC and CHRISTOPHER KNIGHT (instructed by **Deighton Pierce Glynn**) for the **Claimants**
PHILIP MOSER QC, EWAN WEST and SIAN MCGIBBON (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 3 February 2021

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Approved Judgment

MR JUSTICE CHAMBERLAIN:

Introduction

1 The First Claimant, the Good Law Project, is a not-for-profit organisation which exists to bring and support public interest litigation within its areas of interest. One of these is "governance". Under this broad heading, it has sought to challenge alleged failures by the Secretary of State to comply with procurement law and policy in relation to contracts for goods and services awarded following the onset of the COVID-19 pandemic. The Second, Third and Fourth Claimants are opposition Members of Parliament for, respectively, Oldham East & Saddleworth, Brighton Pavilion and Oxford West & Abingdon.

2 The present claim was filed on 7 October 2020 against the Secretary of State for Health and Social Care. It does not challenge any individual procurement decision. Its original target was the Secretary of State's failure to comply with:

(a) reg. 50 of the Public Contracts Regulations 2015 (SI 2015/102: "the PCR 2015"), which require him to send for publication a contract award notice ("CAN") not later than 30 days after the award of a contract with a value exceeding the applicable limit; and

(b) the policy and principles set out in Crown Commercial Service documents entitled *Publication of Central Government Tenders and Contracts: Central Government Transparency Guidance Note (November 2017)* ("the Transparency Policy") and *Procurement Policy Note – Update to Transparency Principles (PPN 01/17, February 2017)* ("the Transparency Principles"), which require publication of the provisions of any contract with a value over £10,000.

3 The Claimants added at para. 36 of the Statement of Facts and Grounds that it was "apparent" that the Secretary of State, whether personally or though his officials, had "made and approved a conscious decision to de-prioritise compliance with regulation 50 and with the Transparency Policy and Principles". They refer to this as the "de-prioritisation policy".

4 By an application on 11 January 2021, the Claimants sought to amend the Statement of Facts and Grounds ("SFG") to allege that the Secretary of State had also systematically failed to comply with reg. 108 of the PCR 2015. That imposes an obligation, subject to specified exceptions, to publish a shorter form of the CAN on the Government's "Contracts Finder" website. By reg. 108(4) this must be done "within a reasonable time". In 2015, the Crown Commercial Service issued a document entitled *Guidance on the new transparency requirements for publishing on Contracts Finder* ("the reg. 108 Guidance") which "recommended" that the required information be published no later than 90 calendar days after the contract award date. The Claimants say that the Secretary of State has failed to meet this recommended timescale in a substantial number of cases and that, given that there has been no reasoned decision to depart from it, the failure is unlawful.

5 The Secretary of State submits that permission to amend to plead the breach of reg. 108 should be refused because there is no reason why the point could not have been pleaded from the outset and because it would be unfair to allow a new point to be pleaded so late.

In relation to the remainder of the claim, he points out that the procurement exercises to which the claim relates took place in extraordinary and unprecedented circumstances. The pandemic made it necessary to procure many times more goods and services than would normally be required and in much shorter timescales. A large number of extra members of staff were required. Some were not familiar with procurement processes. The defaults relied upon by the Claimants must be seen in that context.

6 The Secretary of State's case may be summarised as follows. The Claimants lack the necessary standing to bring this claim. The Secretary of State has now complied with the obligation to publish CANs in 100% of cases, the obligation to publish reg. 108 information in 97% of cases and the policy of publishing the provisions of contracts in 85% of cases; therefore the proceedings serve no useful purpose. There is no "de-prioritisation policy", and there never has been. Any remedy the Court could give (including declaratory relief) would be academic and of no practical impact, because the Secretary of State has now "materially complied with his obligations". The outcome for the Claimants would not have been substantially different if the conduct complained of had not occurred. Relief should therefore be refused under s. 31(2A) of the Senior Courts Act 1981 ("the SCA 1981").

7 I have re-ordered the issues as follows:

(a) Do the Claimants or any of them have standing to bring this challenge?

(b) Should the Claimants be permitted to amend the Claim Form and Statement of Facts and Grounds to plead the breach of reg. 108?

(c) Did the Secretary of State have a policy of de-prioritising compliance with his transparency obligations?

(d) Did the Secretary of State act unlawfully by failing to comply with:

(i) the Transparency Policy and Transparency Principles; and/or

(ii) reg. 108 (if permission to amend is granted – see (b) above)?

(e) Should the Court grant declaratory and/or mandatory relief in respect of the Secretary of State's failure to comply with:

(i) reg. 50 (where breach is now admitted); and/or

(ii) the Transparency Policy and Transparency Principles (if the failure was unlawful – see (d)(i) above); and/or

(iii) reg. 108 (if permission to amend is granted – see (b) above – and the failure was unlawful – see (d)(ii) above)?

Applicable law and policy

8 Part 2 of the PCR 2015 implemented the UK's obligations under Council Directive 2014/24/EU ("the Public Contracts Directive"). Part 2 of the PCR 2015 applies to all

contracts whose value exceeds the thresholds in reg. 5. For public supply contracts and public service contracts awarded by central government authorities, the threshold is £122,976.

9 Regulation 18 is headed "Principles of procurement". Regulation 18(1) provides:

> "Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner."

10 Regulation 26 provides that public contracts are to be awarded only if a call for competition has been published, except where reg. 32 permits the contracting authority to apply a negotiated procedure without prior publication.

11 There are various types of competitive procedure. The details do not matter for present purposes. What does matter is that reg. 32(2)(c) allows a contracting authority to use the "negotiated procedure without prior publication" for, *inter alia,* public supply contracts and public service contracts "insofar as it is strictly necessary where, for reasons of extreme urgency brought about by events unforeseen by the contracting authority, the time limits for the open or restricted procedures or competitive procedures with negotiation cannot be complied with". Many of the contracts to which this claim relates were concluded under this provision. This claim is not concerned with whether that was lawful. The Claimants, however, say that the large number of contracts concluded under the reg. 32 procedure is relevant because the absence of prior publication means that the public will have no way of knowing of the existence of a contract unless and until a CAN is published.

12 Regulation 50 provides insofar as material as follows:

> "(1) Not later than 30 days after the award of a contract or the conclusion of a framework agreement, following the decision to award or conclude it, contracting authorities shall send for publication a contract award notice on the results of the procurement procedure.
>
> (2) Such notices shall contain the information set out in part D of Annex 5 to the Public Contracts Directive and shall be sent for publication in accordance with regulation 51.
>
> …
>
> (6) Certain information on the award of the contract or the conclusion of the framework agreement may be withheld from publication where its release—
>
> (a) would impede law enforcement or would otherwise be contrary to the public interest,
>
> (b) would prejudice the legitimate commercial interests of a particular economic operator, whether public or private, or
>
> (c) might prejudice fair competition between economic operators."

13 The form of the CAN is prescribed in Part D of Annex 5 of the Public Contracts Directive. The CAN had to be sent to the EU Publications Office, which would publish it on the EU Tenders Electronic Daily or "TED" portal. Since the end of the transition period on 31 December 2020, the Regulations continue to apply as "retained EU" law within the meaning of s. 2 of the European Union (Withdrawal) Act 2018, with modifications. Publication is now on the UK e-notification service: see the Public Procurement (Amendment etc.) (EU Exit) Regulations 2020 (SI 2020/1319). Both the TED portal and the e-notification service include searchable databases.

14 There is a dispute between the Claimants and the Secretary of State about when the 30-day period begins to run. The Claimants say it is when the contracting authority decides to award the contract, not the date when the contract is concluded. The Secretary of State says it is the latter date. The Claimants respond that, even on that basis, the Secretary of State has breached his obligation to comply with reg. 50 in a widespread and extensive way. That being so, they invite me to measure compliance assuming the correctness of the Secretary of State's construction. I have done so. The parties agree that I do not, therefore, need to determine which of the two constructions is correct. That issue can be left to be decided in a case where it matters.

15 The parties also agree that there is no exception to the obligation imposed by reg. 50(1), although reg. 50(6) may permit the withholding of certain information from the CAN in the circumstances specified. There is no dispute that the workload or resources of the authority provide no justification for non-compliance with the duty in reg. 50(1). Nor, by the same token, does the unprecedented public health emergency with which the Secretary of State was and is faced.

16 Part 3 of the PCR 2015 deals with remedies. It includes Chapter 6, headed "Applications to the Court". Regulation 89 provides as follows:

> "(1) This regulation applies to the obligation on a contracting authority to comply with—
>
> (a) the provisions of Parts 2 and 3; and
>
> (b) any enforceable EU obligation in the field of public procurement in respect of a contract or design contest falling within the scope of Part 2.
>
> (2) That obligation is a duty owed to an economic operator from the United Kingdom or from another EEA state."

17 Regulation 90 is headed "Duty owed to economic operators from certain other states" and imposes the same duty in favour of economic operators from states party to the plurilateral agreement of Government Procurement, an agreement made under the aegis of the World Trade Organisation.

18 Regulation 91 is headed "Enforcement of duties through the Court" and provides as follows:

> "(1) A breach of the duty owed in accordance with regulation 89 or 90 is actionable by any economic operator which, in consequence, suffers, or risks suffering, loss or damage.
>
> (2) Proceedings for that purpose must be started in the High Court, and regulations 92 to 104 apply to such proceedings."

19 Regulations 92-104 make procedural and substantive provision for claims by economic operators for breach of regs 89 or 90.

20 Chapter 7 of the PCR 2015, in Part 4, applies to any contract whose value exceeds the thresholds in Part 2 (subject to exceptions not relevant here): reg. 105(1). It imposes additional obligations that do not derive from EU law, but further the objective of transparency. Regulation 108 applies when a contracting authority sends a CAN for publication or awards a contract based on a framework agreement: reg. 108(1). In those circumstances, the authority is obliged to publish on Contracts Finder some limited information about the contract: "(a) the name of the contractor; (b) the date on which the contract was entered into; (c) the value of the contract": reg. 108(2). That obligation is subject to a power to withhold information where its release "(a) would impede law enforcement or would otherwise be contrary to the public interest, (b) would prejudice the legitimate commercial interests of a particular economic operator, whether public or private, or (c) might prejudice fair competition between economic operators": reg. 108(3).

21 Regulation 108(4) and (6) provide:

> "(4) Contracting authorities shall comply with paragraph (2) within a reasonable time.
>
> …
>
> (6) In complying with this regulation, contracting authorities shall have regard to any guidance issued by the Minister for the Cabinet Office on—
>
> (a) the form and manner in which the information is to be published on Contracts Finder; and
>
> (b) what is a reasonable time… for the purposes of paragraph (4)."

22 The Transparency Policy provides relevantly as follows:

> "2.3 In addition to the legislative requirements, there are policy commitments to publish the associated tender and contract documents in full on Contracts Finder. This applies to all contracts above £10,000, including call-offs from framework agreements. It is your responsibility to publish any call off contracts that you award above this threshold.
>
> 2.4 Documents should be attached to the relevant notice:
>
> a. Tender documents should be attached to the opportunity notice.

> b. Contract documents should be attached to the award notice.
>
> c. Where an opportunity was not advertised, for example a framework call-off, the tender documents should also be attached to the award notice."

23 At §5.1 there is further detail about what must be published:

> "You are expected to publish contracts in full. For the purpose of this requirement, as a minimum, this must include the following (where relevant):
>
> - Specification
> - Terms and Conditions (Ts & Cs)
> - Associated Schedules (which may include the winning tenderer's bid)
> - Where contract specifications or associated schedules contain various diagrams (for example, in some construction contracts), you should publish these where practical (taking into account the any necessary exemptions as set out in section 6) and where the diagrams are already in an electronic format that is likely to be accessible to the public (e.g. word or pdf)."

24 At §9.1 it is "advised" that contracts should be published within 20 days following the award of the contract or, if a "standstill period" applies, within 20 days following the end of that period. (The standstill period is the period between the notification of the contract award decision and the final contract conclusion, during which time disappointed tenderers can challenge the decision. In the case of contracts awarded under reg. 32, however, there is no standstill period.)

25 The Transparency Principles explain the rationale for transparency in §1:

> "Transparency and accountability of public service delivery data and information builds public trust and confidence in public services. It enables citizens to see how taxpayers' money is being spent; and allows the performance of public services to be independently scrutinised. It also supports the functioning of competitive, innovative and open markets by providing all businesses with information about public sector purchasing and service providers' performance."

26 In the context of the pandemic, the Cabinet Office published a further document in March 2020 entitled *Procurement Policy Note 01/20 – Responding to COVID-19*, which noted that contracting authorities may be permitted to make direct awards under reg. 32(2)(c) in cases of extreme urgency, but also advised as follows:

> "You should ensure you keep proper records of decisions and actions on individual contracts, as this could mitigate against the risk of a successful

> legal challenge. If you make a direct award, you should publish a contract award notice (regulation 50) within 30 days of awarding the contract."

27 The reg. 108 Guidance provides as follows at §10 in relation to the duty imposed by reg. 108 to publish information on Contracts Finder:

> "The information must be published in a reasonable time and it is recommended that the information be published no later than 90 calendar days after the contract award date."

The parties' positions

28 In most cases, it is sufficient to summarise the contentions of the parties at the hearing without undertaking a minute analysis of how and when those contentions evolved during the course of the litigation. This case, however, is different, because there is now no dispute that, in a substantial number of cases, the Secretary of State breached his legal obligation to publish CANs within 30 days of the award of contracts. There is also no dispute that the Secretary of State failed to publish redacted contracts in accordance with the Transparency Policy and Principles, though the Secretary of State denies that this was unlawful given that the relevant timescales were contained in policy, not law. Much of the argument in respect of reg. 50 and the Transparency Policy and Principles focussed on the question whether the court should grant relief. That being so, it is necessary to consider the correspondence, pleadings and evidence chronologically to see what each party said and when.

The lead-up to the claim

29 The First Claimant has tried to scrutinise in detail the award by the Secretary of State of contracts related to the pandemic. It has done so by piecing together information emerging from various sources. It is now clear that the Secretary of State has made extensive use of the reg. 32 procedure to award contracts without any prior advertisement for tenders. In some cases, the First Claimant has challenged the decision to award individual contracts in that way. This claim is not concerned with the propriety of the decisions to use the reg. 32 procedure in any individual case or generally.

30 The Claimants commissioned research by the procurement consultancy Tussell, which was exhibited to the witness statement of Jolyon Maugham, filed with the claim. It showed that, by the beginning of October 2020, when the claim was filed, the Secretary of State had spent some £15 billion on personal protective equipment ("PPE"), but the value of the contracts made public by that time was only £2.68 billion. The research showed that the average time for publication of CANs was 47 days for COVID-related contracts, compared to 29 days for non-COVID-related contracts. The fact that the average time for publication of CANs was 47 days meant that the deadline set by reg. 50 was likely being breached in a substantial number of cases.

31 The Claimants give three examples of cases which are the subject of separate legal challenge. They say that in each case the decision to award the contract raises questions. There may be answers to these questions. It is no part of my task in these proceedings to consider the reasons for awarding any of these contracts, but it is important to set out

what the Claimants say in order to explain the context to this challenge. The three cases they highlight are:

(a) The award of a contract to Ayanda Capital Limited for the supply of face masks with a contract value of £252 million on or around 29 April 2020. Here, the CAN was published on the TED portal on 2 July 2020 and the reg. 108 notice published on Contracts Finder on 27 July 2020. The contract itself was not published until 4 September 2020, shortly before the response to the Claimants' pre-action protocol letter was due. The Claimants say that more than £160m of the masks purchased were unusable in the NHS and that the contract was agreed with a tiny company created by an associate of the Minister for International Trade and which had been given preferential treatment in competing for the contract through a so-called "VIP lane".

(b) The award of two contracts to Clandeboye Agencies Limited for the supply of gowns with a total contract value of £108 million on or around 28 April 2020. Here, the CANs and contracts were published on the TED portal and the reg. 108 notices published on Contracts Finder on 23 and 24 June 2020. The Claimants say that due diligence on Clandeboye – a company which had previously supplied only confectionery products – was performed weeks after the contracts had been signed and highlighted serious cause for concern.

(c) The award of a contract to Crisp Websites Limited (trading as Pestfix) for the supply of personal protective equipment with a contract value, as apparently amended, of £32 million on or around 13 April 2020. Here, the CAN was published on the TED portal on 18 May 2020. The contract itself was not published until 3 September 2020. Five other PPE contracts were awarded to Pestfix on 14, 16, 17 and 28 April, to a total value of approximately £313 million. CANs for these contracts were only published on the TED portal on 16 October 2020. The issues raised in the proceedings regarding the Pestfix contracts include that Pestfix had never before supplied medical PPE; that Pestfix also benefitted from the VIP lane (for reasons the Claimants say are unexplained); that its financial standing was also not checked until after contracts were signed; and concerns as to the nature and quality of the products it supplied.

32 In the claim relating to the Pestfix contracts, the First Claimant sought disclosure of all other contracts awarded by the Secretary of State to Pestfix. That application was refused by Jefford J at a hearing on 18 August 2020.

The letter before claim and response

33 The Claimants' solicitors, Deighton Pierce Glynn, sent a letter before claim on 23 August 2020 to the Secretary of State and the Minister for the Cabinet Office.

34 The Government Legal Department ("GLD") responded on behalf of both Ministers on 7 September 2020. GLD noted that the letter before claim seemed to follow directly from the First Claimant's unsuccessful disclosure application in the Pestfix claim. They pointed out that the pandemic had given rise to an unprecedented demand for PPE and at the same time had had a profound effect on the market for it. They rejected the "central

allegation" that there was an unpublished policy not to publish COVID-related contracts within 30 days as required by reg. 50. They then said this:

> "DHSC officials are continuing to work hard to publish CANs including for coronavirus-related contracts, and all the information your clients seek will be published as soon as that is practical. We cannot at this stage commit to a precise timeframe, but publication will be complete before any judicial review proceedings attempting to compel publication could take place."

35 GLD explained why publication of CANs was not the straightforward matter the Claimants assumed it to be. They denied that the Secretary of State's omission to publish all COVID-related CANs so far had prevented the Government from being accountable to Parliament and the public for the relevant expenditure, pointing to a review by the National Audit Office of the Government's procurement strategy during the pandemic, which was due to report in late 2020, and an investigation by the Public Accounts Committee, which would involve scrutiny of many of the same contracts for which the Claimants sought information. Reference was made to the 3,949 written questions to and answers from departmental Ministers since 1 March 2020, 121 of which related to procurement.

36 GLD responded to the threatened claim as follows:

> "The Secretary of State does not dispute the importance of the transparency obligations to which DHSC is subject in relation to the award of public contracts. That is precisely why DHSC is currently in the process of publishing CANs for all the contracts that have been entered into during the pandemic. While it is acknowledged that, in the extraordinary circumstances of the current crisis, there have been technical breaches of Regulation 50 of the PCR, there is no unlawful policy of non-publication and all the information whose publication is the relief sought in your client's proposed claim is already going to be published in due course."

37 GLD went on to say that the threatened claim would serve no useful purpose, as "an order mandating the DHSC to continue doing what it is already doing (and it is likely *will have done* by the date of any order) would be nugatory" (emphasis in original). They went further, saying that the claim would be counter-productive:

> "By requiring DHSC to answer a series of highly detailed additional questions and conduct a degree of post-contractual analysis that amounts to an additional workstream of internal audit, your claim is only likely to retard the ultimate publication of CANs and other contractual information via the usual channels, as key officials will inevitably be distracted by having to address your clients' claims instead. Given the need for publication teams to engage with the original procurement teams, publication cannot be readily expedited simply by directing additional administrative resources to the task."

38 In addition, it was said that undue pressure to expedite publication, which was already taking place as rapidly as possible, would "almost inevitably come at the expense of accuracy, ultimately undermining the aim of proper transparency". Finally, GLD noted

that the proposed challenge was in essence a procurement challenge under the PCR 2015 and that the Claimants therefore had no standing to bring it.

39 GLD sent a further letter on 8 September 2020 making a correction that is not material for present purposes.

40 The Claimants' solicitors responded on 11 September 2020. They said this about GLD's letters of 7 and 8 September 2020:

> "In those letters your clients either implicitly or explicitly:
>
> 1. Admit that they are routinely breaching their legal obligations to publish contract awards within 30 days and will continue to commit further breaches. All you are prepared to offer is that the contract awards will be published 'in due course', and that it is likely they will have been published by the date of any order. We read this as suggesting that this litigation will determine the timing of publication.
>
> 2. Admit that they are routinely breaching their policy of publishing the contracts themselves, and will continue to do so. The correspondence is conspicuously silent on the issue of publishing the contracts themselves.
>
> 3. Provide no timescale for addressing these breaches.
>
> 4. Adopt the proposition that so long as any identifiable failures are addressed by the time the Court becomes involved, the claim should be dismissed."

41 The Claimants' solicitors went on to say that the Secretary of State's stance amounted to a decision that his legal obligations were "optional" and "proffering a novel 'passage of time' defence to judicial review". They offered a final opportunity for the Secretary of State to address the "admitted, continuing illegality" by confirming:

> "That a list of unpublished contracts will be provided within a further 7 days. It is not credible for your clients to suggest that this information is not readily available, whilst in the same breath assuring us that they are committed to publishing contract awards eventually. Your clients must know to whom they have agreed to pay vast sums of public money."

42 GLD responded on 17 September 2020. They said this:

> "Your characterisation of the Pre-Action Response, in particular the first four numbered bullet points of your letter of 11 September 2020, is not accepted. Indeed, the position we sought to express is the precise opposite of how you purport to read it. For the avoidance of doubt, no admissions are made in the terms you advance."

43 The letter went on to reiterate the pressure under which the relevant teams were operating and invited the Claimants to reconsider their threat of litigation.

The claim and the Secretary of State's defence and evidence

44 As noted, the claim was issued on 7 October 2020. The Secretary of State understood it as comprising four grounds: failure to comply with reg. 50 (ground 1); failure to comply with the Transparency Policy and Principles without justification (ground 2); acting pursuant to an unpublished policy (ground 3); and unlawfully adopting a de-prioritisation policy (ground 4). (As will become clear, grounds 3 and 4 were not in reality separate: the unpublished policy *was* the alleged de-prioritisation policy.)

45 The Claimants described the Secretary of State's failure to comply with the legal obligations imposed by reg. 50 and with policy as "continued and continuing" and "egregious and widespread": SFG, paras 1 and 4.

46 The relief sought was a declaration that "the Defendant has failed and is failing to comply with his legal obligations under regulation 50 and under the Transparency Policy" (SFG, para. 44) and a mandatory order "that the Defendant comply with those obligations in full within 14 days of the order (or such other period as the Court considers appropriate)" (SFG, para. 45).

47 The Secretary of State filed Summary Grounds of Defence on 30 October 2020, inviting the Court to refuse permission on the basis that the claim served no useful purpose and would impose an additional and unnecessary burden which "materially impedes delivery of the very outcome that the claimants seek, namely publication of CANs and the related information as to their terms"; any remedy would be nugatory; by the time the substantive application could be heard, the task on which the Secretary of State had embarked would be complete; and in any event, the outcome for the Claimants would not have been substantially different if the conduct complained of had not occurred. In addition, it was denied that the Claimants had standing.

48 At paras 21-22, this was said:

> "21. In so far as the relevant legal framework is concerned, the Secretary of State does not dispute the obligation contained in regulation 50 PCR 2015, neither does he dispute the existence or contents of the various documents which the Claimants identify and label as the 'Transparency Policy and Principles' (SFG, §§5-20). In particular, the Secretary of State does not dispute the importance of the obligation of transparency to which he is subject in the award of public contracts.
>
> 22. However, the Secretary of State does refute, in the strongest terms, any suggestion that to the extent that he may not yet have complied with the terms of regulation 50 PCR 2015 or followed the Transparency Policy and Principles in respect of any particular contracts that evidences *'widespread non-compliance'* and/or that he has made a conscious decision to de-prioritise compliance. The facts indicate that any such contention is without foundation."

49 Mostyn J granted permission to apply for judicial review on the papers on 12 November 2020 on grounds 1, 2 and 4 (using the Secretary of State's categorisation) and refused it in relation to ground 3. Any renewed application for permission on ground 3 was to be

rolled up into the substantive hearing. (As I have noted, with the benefit of submissions at the hearing, it can be seen there is in reality no separate ground 3, so it has been unnecessary to consider the question of permission to apply for judicial review on that ground.) Mostyn J observed that it was arguable that the Claimants have standing to bring the claim and continued as follows:

> "If the defendant were to give formal binding undertakings to the court in respect of his intended timely compliance with his legal obligations, then consideration would have to be given by the claimant as to whether it is a proportionate use of the court's resources for the claim to continue."

50 The Secretary of State filed Detailed Grounds for Resisting the Claim ("DGRC") and evidence on 26 November 2020. They characterised the claim as a challenge to "an alleged failure" to comply with reg. 50 and "an alleged failure" to comply with the Transparency Policy. Paragraphs 29-30 were in identical terms to paras 21-22 of the Summary Grounds of Defence, set out at para. 48 above.

51 Accompanying the DGRC was a witness statement from Rick Webb, Head of Procurement in the Commercial Directorate Department for Health and Social Care. Mr Webb is an expert in procurement. He had been aware of the obligation imposed by regs 50 and 108 and of the reg. 108 Guidance. He did not, however, know about the Transparency Policy until August 2020. Until that time, he had thought that the policy was to publish contracts within 90 days of award (whereas the policy was to publish within 20 days of the award or the end of the standstill period). Mr Webb said this:

> "18. There is no DHSC policy, unpublished or otherwise, not to comply with the requirements of Regulation 50 PCR or otherwise act in a non-transparent manner. On the contrary, even during the recent pandemic when DHSC's procurement activity has had to increase exponentially (as to which see further below), I have consistently reminded the procurement teams of their obligations in this regard, and contract information and the redacted contracts themselves continue to be published online on a daily basis.
>
> 19. Nor has there been any decision, request, or guidance that transparency should be deprioritised because of the crisis. It is true that in the early stages of the pandemic, resources were principally focused on making goods and services available for the pandemic response and keeping the NHS open at a moment of national crisis. However, this does not mean that transparency obligations were ignored. Our priority in the first instance is always to publish a CAN where required, given the legal deadline to publish within 30 days; in view of the resource constraints and further difficulties explained below, we have focused on this before putting contract information on Contracts Finder, given that the legal obligation here under Regulation 108(4) PCR is only to publish the information on the domestic platform 'in a reasonable time'."

52 Mr Webb gave further relevant detail as to scale of the procurement exercise undertaken as a result of the pandemic. The total value of contracts raised by the department during the 2019 to 2020 tax year was approximately £1.2 billion. In the current year, more than £17 billion of COVID-related contracts had already been awarded by the time Mr Webb

made his statement in November 2020. These were not discretionary or long-term supply agreements, but predominantly contracts for vital products necessary to keep frontline health workers and the wider public safe and to treat those who were already infected. There were five "pillars" within the Department's procurement program: ventilators; testing; medicines; PPE and medical devices; and non-clinical goods and services. Responsibility for leading procurement on these pillars was allocated between senior leaders in the Department, NHS England & NHS Improvement, NHSX and Cabinet Office. Large numbers of additional personnel had to be brought in to support this work at very short notice. This included over 400 buyers from the Ministry of Defence and the Government Commercial Function to support the work procuring PPE alone. Test & Trace was launched on 28 May 2020 and now comprises some 3,987 civil servants and contingent workers, 307 of whom are members of the commercial team. The Department's core teams were involved in cross-cutting activities, such as demand forecasting, data reporting, supply engagement and contract/logistics support. All the various teams were also supported by number of external professional advisors brought in to provide additional assistance and expertise in the context of the crisis.

53 The Department's procurement-related activity was undertaken using a range of external systems. Information that would usually be stored in a single e-procurement system was dispersed between shared mailboxes and at least four other IT systems. The need to second staff from other departments complicated matters further, as each department has its own IT system which cannot usually be accessed by staff in other departments. Giving access to secondees is not straightforward.

54 Mr Webb explained the publication of contract information is also not straightforward. CANs in particular cannot be withdrawn or amended once published (although the Secretary of State's counsel accepted that a new CAN in respect of the same contract could be published). They therefore have to go through a full "mini audit" procedure before they are sent the publication to make sure that the information contained in them is accurate. Where this is done by staff who are not involved in the original procurement, this will not be a simple task. It is a "complex, labour-intensive and time-consuming process, complicated by the fact that DHSC cannot independently access information held by other Departments". There were particular difficulties in the early stages of the pandemic, when in some cases contracts were negotiated on the Department's behalf by officials from other Government departments and there was uncertainty about who was responsible for publication. However, Mr Webb said that these difficulties were now in the past.

55 Mr Webb explained that one of the most time-consuming elements of the process has been redacting contracts in advance of publication, in accordance with the Freedom of Information Act 2000, especially where this has had to be done by new, inexperienced staff.

56 Mr Webb circulated guidance to procurement teams within the Department and the executive agencies for which the Secretary of State was responsible, such as Public Health England ("PHE") and the Medicines and Healthcare Products Regulatory Agency ("MHPRA"). This included a reminder of the legal obligation to publish a CAN within 30 days. Nonetheless, the scale and complexity of the procurement exercise meant that "regrettably, a backlog emerged in respect of the publication of CANs, CF notices [i.e. reg. 108 notices] and redacted contracts". Mr Webb explains the steps that have been

taken to address this backlog. These have included the deployment of additional personnel. But it was "overly simplistic" to suggest that rapid recruitment would have resulted in the notices and redacted contracts being published sooner. This is because it would have taken time for new staff to become fully acquainted with the systems and procurement structure. Training them would have taken existing members of staff away from their important tasks.

57 Under the heading "Current status of publication of information relating to COVID-19 contracts", Mr Webb indicated that, as of 25 November 2020, 530 CANs had been published, comprising 93% of the contracts for which a CAN is required (not including certain contracts entered into by executive agencies for which the Secretary of State was responsible, where he says compliance with transparency obligations is a matter for the agencies themselves); and 513 reg. 108 notices had been published on Contracts Finder, comprising 68% of the contracts awarded more than 90 days ago for which such a notice is required. Further details are given of the percentages within some of the five pillars. As to the provisions of the contracts themselves, the Department's systems did not currently have the functionality to report on whether contract documentation had been published. However, Mr Webb undertook a sampling exercise across the different pillars. He looked at 49 CANs and found that 39 (80%) had redacted contract information attached.

58 Finally, Mr Webb explained "why the same problems that led to late publication are not now likely to recur". One reason was that the procurement effort at the start of the pandemic meant that there are stocks in place to meet future need, so the procurement landscape has stabilised. In addition, Mr Webb had recruited a full-time Governance and Assurance Manager, who he had asked to "come up with a reporting mechanism that can be adhered to even in circumstances where the scale and complexity of procurement increases rapidly".

59 In a second statement dated 23 December 2020, Mr Webb gave further details and exhibited various documents. He also updated the figures given in his first statement. As of Thursday 17 December 2020, 563 CANs had been published, comprising 99% of the contracts for which a CAN was required (not including certain contracts entered into by executive agencies for which the Secretary of State was responsible, where compliance with transparency obligations is a matter for the agencies themselves); and 667 reg. 108 notices had been published on Contracts Finder, comprising 90% of the contracts awarded more than 90 days ago for which such notices were required.

60 A further update was given by GLD in a letter of 22 January 2021. As at 21 January 2021, the position was that:

> "(a) Excluding contracts awarded less than 30 days before that date, the Department has awarded a total of 592 contracts for which publication of a CAN is required. All 592 CANs have been published.
>
> (b) Excluding contracts awarded less than 90 days before that date, the Department has awarded a total of 892 contracts for which publication of a Contracts Finder notice is required. Of those, 823 Contracts Finder notices have been published (i.e. 92%)."

61 Neither of Mr Webb's first two witness statements includes information as to the proportion of CANs that were published within the time limit set by reg. 50 or as to the proportion of reg. 108 notices published within 90 days of the contract award.

Mr Maugham's second witness statement

62 On 11 January 2021, the Claimants filed a second witness statement from Jolyon Maugham. Mr Maugham drew attention to a report by the National Audit Office ("NAO") entitled *Investigation into government procurement during the COVID-19 pandemic* (HC 959), published on 26 November 2020, which said at para. 3.27 that, for over half of contracts with a value exceeding £25,000 awarded up to the end of July 2020, details had not been published. This did not seem to tally with the Secretary of State's evidence. Mr Maugham pointed out that the Secretary of State's figures excluded contracts entered into by executive agencies including PHE and the MHPRA. Since the Secretary of State remained responsible for these agencies, the Secretary of State should be able to evidence compliance for these contracts too.

63 Mr Maugham went on to make a number of points based on the NAO's 26 November 2020 report. The NAO had found persistent breaches of the Government's transparency obligations in other contexts (para. 3.26). It noted that directly awarded contracts accounted for well over half the overall value of contracts entered into by the Government (para. 2.5), that Cabinet Office spending controls were disapplied in relation to these contracts (para. 3.8), that some were entered into before due diligence checks had been carried out (para. 3.19) and that many were not properly documented (paras 3.21 to 3.22). The NAO had also said that a "high priority lane" had been created and that suppliers processed through that lane were ten times as likely to secure contracts as those processes through the ordinary lane. Mr Maugham drew attention to the NAO's conclusion (in para. 25 of the Summary):

> "While government had the necessary legal framework in place to award contracts directly, it had to balance the need to procure large volumes of goods and services quickly, with the increased commercial and propriety risks associated with emergency procurement. We looked in detail at a sample of contracts selected on a risk basis. Although we found sufficient documentation for a number of procurements in our sample, we also found specific examples where there is insufficient documentation on key decisions, or how risks such as perceived or actual conflicts of interest have been identified or managed. In addition, a number of contracts were awarded retrospectively, or have not been published in a timely manner. This has diminished public transparency, and the lack of adequate documentation means we cannot give assurance that government has adequately mitigated the increased risks arising from emergency procurement or applied appropriate commercial practices in all cases. While we recognise that these were exceptional circumstances, there are standards that the public sector will always need to apply if it is to maintain public trust."

64 Mr Maugham referred also to a second NAO report, *The supply of personal protective equipment (PPE) during the COVID-19 pandemic* (HC 961), published on 25 November 2020. This included details of the three largest PPE contracts – with Full Support Healthcare Ltd (for £1,717 million), Supermax Healthcare Ltd (£366 million) and

Guardian Surgical (£295 million). Mr Maugham pointed out that these contracts had not been published and that, in any event, they made up only a small proportion of the PPE contracts awarded.

65 Mr Maugham said this at para. 12 of his second witness statement:

> "These failings also matter because they erode public trust that taxpayers' money is being spent wisely, and that it will not just be handed to the well-connected, with lax safeguards. Had publication been made in good time, and proper transparency been in place, the existence of the 'VIP' channel (later renamed 'high-priority lane') may have more quickly come to the attention not only of MPs and others seeking to scrutinise the Government's activities, but also to economic operators, who may then have been able either to challenge awards made using it or to investigate its operation themselves. In any event, transparency would have better enabled a more level playing field, rather than benefitting those who had the right 'connections' to Ministers and officials."

66 Mr Maugham went on to question the suggestion that the preparation of CANs was complex and time-consuming and exhibited the CANs published in relation to Ayanda, Clandeboye and Pestfix, which the First Claimant was challenging separately. Those are said to show that, apart from the explanation as to why the contract was awarded without open competition (an explanation which is identical in all three cases), the information in a CAN is confined to basic data that should not take long to collate.

The skeleton arguments

67 The Claimants' skeleton argument was filed on 27 January 2021. In para. 5, their counsel said this:

> "There is no serious dispute that the Defendant failed to comply with his transparency obligations… : see the often regrettably opaque admissions at Detailed Grounds, §§18, 28, 37, 38, 39(a)."

68 In response, the Secretary of State's counsel says this in footnote 2 of his skeleton argument, filed on 29 January 2021:

> "It is conspicuous that out of the many references the Claimants provide in this paragraph of their skeleton argument to the Secretary of State's Detailed Grounds, they fail entirely to reference paragraphs 29 and 30. Those paragraphs cannot sensibly be read in any other way than as an admission that the Secretary of State accepts that he is bound by the obligations in regulation 50 and, as at the date of the Detailed Grounds, that he had not complied with them in full."

Mr Webb's third witness statement

69 On the same date as the Secretary of State filed his skeleton argument, Mr Webb made a third witness statement, giving up-to-date figures. These indicate that:

(a) A CAN has now been published for all 446 contracts awarded by the Secretary of State on or before 7 September 2020 (the date on which the Secretary of State responded to the letter before claim) for which a CAN would be required. 127 (28%) were published within 30 days of the contract award date.

(b) A CAN has now been published for all 520 contracts awarded by the Secretary of State on or before 7 October 2020 (the date on which the claim was filed) for which a CAN would be required. 303 (58%) were published within 30 days of the contract award date.

(c) A Contracts Finder Notice has now been published for at least 395 of the 409 contracts awarded by the Secretary of State on or before 9 July 2020 (90 days before the claim was filed) for which a CF Notice would be required. Data relating to how many such notices were published within 90 days of the contract award date is not available.

(d) A Contracts Finder Notice has now been published for at least 686 of the 705 contracts awarded by the Defendant on or before 7 October 2020 for which a CF Notice would be required. 292 (41%) were published within 90 days of the contract award date.

(e) 647 of the 765 contracts awarded on or before 17 September 2020 (20 days before the claim was filed) that were valued at £10,000 or more have now been published Data relating to when contracts were published is not available.

70 These figures do not include certain contracts entered into by executive agencies of the department (Public Health England and the Medicines and Healthcare Products Regulatory Agency) or 20 PPE contracts (comprising 10 cancelled contracts and 10 contracts for which documentation cannot be located).

The position at and after the hearing

71 The final form of the declaratory relief sought by the Claimants was set out in a note which I invited Mr Coppel to file after the hearing:

> "(1) The Defendant has systematically failed to comply with his obligations under regulation 50 of the Public Contracts Regulations 2015 to send the required contract award notice to the [EU Publications Office] for publication within 30 days of an award of the contract for supplies and all services relating to COVID-19.
>
> (2) The Defendant has systematically failed to comply with his obligations under regulation 108 of the Public Contracts Regulations 2015 to publish the required contract award notice on Contracts Finder within a reasonable time of an award of a contract for supplies and/or services relating to COVID-19.
>
> (3) The Defendant has unlawfully failed to comply with Government policies to publish on Contracts Finder within the timescales set out in those policies [sc. the Transparency Policy and Principles] copies of contracts for supplies

> and/or services relating to COVID-19, redacted in accordance with those policies."

72 Mr Coppel's note does not explain what is meant by "systematically" in (1) and (2).

73 The mandatory relief sought was as follows:

> "(1) The Defendant shall, within 14 days, comply with his obligations under regulation 50 of the Public Contracts Regulations 2015 to send for publication the required contract award notice in respect of all awards of contracts for supplies and/or services relating to COVID-19 made 16 days or more before the date of this Order of which he is aware and for which he is responsible (including, for the avoidance of doubt, relevant contracts awarded by executive agencies of the Department of Health).
>
> (2) The Defendant shall, within 28 days, send for publication on Contracts Finder contract award notices in respect of all awards of contracts for supplies and/or services relating to COVID-19 made 62 days or more before the date of this Order of which he is aware and for which he is responsible (including, for the avoidance of doubt, relevant contracts awarded by executive agencies of the Department of Health).
>
> (3) The Defendant shall, within 56 days, publish on Contracts Finder copies of all contracts for supplies and/or services relating to COVID-19 of which he is aware and for which he is responsible (including, for the avoidance of doubt, relevant contracts awarded by executive agencies of the Department of Health). Such contracts shall be redacted only insofar as would be lawful had they been requested in a request made pursuant to the Freedom of Information Act 2000."

74 On 8 February 2021, Mr Webb filed a fourth witness statement explaining the position in relation to the contracts awarded by the executive agencies for which the Secretary of State is responsible. As at 22 January 2021, CANs had been published for 2 of the 18 contracts for which one was required. The current position (as at 8 February 2021) was that a CAN had been published for 10 contracts awarded by PHE on or before 7 September 2020 for which a CAN was required and for 14 contracts awarded by PHE on or before 7 October 2020 for which a CAN was required. PHE officials had indicated that they expected to complete publication of up to 20 outstanding CANs by no later than 22 February 2021.

75 Mr Webb also gave some updates, including minor corrections to the information previously given.

76 When circulating the draft of this judgment, I pointed out to counsel that the figures in Mr Webb's third witness statement (and set out in para. 69 above) did not seem to be correct. If (as logic suggests) the 520 contracts awarded on or before 7 October 2020 included the 446 awarded on or before 7 September 2020, then even if all the CANs for contracts awarded between these dates had been published on time, the number of CANs published on time could not have increased from 127 to 303. In response to this query, the Secretary of State's counsel confirmed in a note that there was an error in this part of

Mr Webb's evidence. The figures set out at para. 69(a) and (b) above are not correct. Nor are the figures set out at para. 69(d). It will take some further days to ascertain the true position. It is not necessary for me to await these final figures before handing down this judgment, because the Secretary of State accepts that "a significant number of [CANs and reg. 108 notices] were not published within 30 or 90 days" and "the number [of CANs and reg. 108 notices] not published timeously can only be greater than previously thought".

Issue (a): Standing

The key case law

77 There are a number of decisions on standing in the context of the procurement regimes which preceded the PCR 2015.

78 In *R (Kathro) v Rhondda Cynon Taff County Borough Council* [2001] EWHC 527 (Admin), [2002] Env LR 15, local residents sought to challenge the proposed determination of a planning application which involved a private finance initiative ("PFI"). One of the grounds was that the use of a negotiated tendering procedure for the purposes of the PFI was contrary to the Public Services Contracts Regulations 1993. Richards J rejected that ground (and the others) on the merits. However, he added this at [77]:

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

79 In *R (Chandler) v Secretary of State for Children, Schools and Families* [2009] EWCA Civ 1011, [2010] PTSR 749, the Court of Appeal (Sir Anthony May P, Arden and Toulson LJJ) had to consider a judicial review claim by a mother of school-age children. She sought to challenge a decision by the Secretary of State to approve an expression of interest in sponsoring a new academy school. The main ground of challenge was that the procurement did not comply with the Public Contracts Regulations 2006 ("the PCR 2006"). Arden LJ (giving the judgment of the court) dismissed that ground substantively. She went on, however, to consider whether the claimant had standing, albeit the issue was "academic": [69].

80 Arden LJ considered three bases on which the claimant asserted standing. First, it was said that she would have standing to bring a common law challenge to the rationality of the decision; and, that being so, the EU principle of equivalence meant that she must also have standing to complain about breach of the procurement regime. This argument was rejected at [71], because a rationality challenge was insufficiently similar to a challenge under the Regulations.

81 Secondly, it was said that the issue was an important one, which ought to be capable of being tested in judicial review proceedings. But at [72], Arden LJ said that this was not enough to confer standing:

> "Economic operators can test the question of legality. It would drive a coach and horses through the requirement for standing if the importance of the issue justified standing in such circumstances. It would mean that people with no real interest in the question could bring judicial review proceedings."

82 Thirdly, it was said that, if the claimant had an interest in the relief to be granted, she should be entitled to advance all available legal arguments in support of that relief. As to that, Arden LJ said:

> "77. Forbes J [the first-instance judge]… accepted the submission that a failure to comply with any of the 2006 Regulations gives rise only to a private law claim. Such a conclusion has potentially far-reaching implications. It means that a person who is not an economic operator entitled to a specific remedy under regulation 47 can never bring judicial review proceedings in respect of that failure unless he can bring himself within the exceptional type of claimant in the *Law Society* case. We consider that the judge's proposition goes too far. The failure to comply with the 2006 Regulations is an unlawful act, whether or not there is no economic operator who wishes to bring proceedings under regulation 47, and thus a paradigm situation in which a public body should be subject to review by the court. We incline to the view that an individual who has a sufficient interest in compliance with the public procurement regime in the sense that he is affected in some identifiable way, but is not himself an economic operator who could pursue remedies under regulation 47, can bring judicial review proceedings to prevent non-compliance with the 2006 Regulations or the obligations derived from the Treaty, especially before any infringement takes place: see generally *Mass Energy Ltd v Birmingham City Council* [1994] Env LR 298, 306, cf *Kathro's* case [2001] 4 PLR 83, where Richards J held that the claimants were not affected in any way by the choice of tendering procedure. He may have such an interest if he can show that performance of the competitive tendering procedure in Directive 2004/18 or of the obligation under the Treaty might have led to a different outcome that would have had a direct impact on him. We can also envisage cases where the gravity of a departure from public law obligations may justify the grant of a public law remedy in any event. However, while the court is in general bound to ask itself why a public law remedy is necessary when private law remedies are available, once permission to bring judicial review proceedings has been given, then, unless it is appropriate to deal with standing as a preliminary issue, there is likely to be little point in spending valuable court time and costs on the issue of standing. In that situation, we would not encourage the court to embark on a complex argument about standing. This will especially be the case where standing is a borderline issue.
>
> 78. However, in this case the observations of Richards J in *Kathro's* case are particularly apposite. Ms Chandler states in her witness statement that she is

> sceptical about academy schools. She fears that they select the most gifted children as pupils. She is concerned that academy schools are run more like businesses than schools. Her first choice would be for her children's school to be run by the local education authority. What Ms Chandler wants to happen is that there should be a competition to determine who should run the new school in Camden and she suggests that she should have the right to be consulted if the public procurement regime applied. In fact there would be no consultation of the kind she seeks. Ms Chandler is not challenging the Secretary of State's decision because of any interest that she has in the observance of the public procurement regime but because she is opposed to the institution of academy schools. She is thus attempting, or seeking, to use the public procurement regime for a purpose for which it was not created. In all the circumstances, it would, in our judgment, be outside the proper function of public law remedies to give Ms Chandler standing to pursue her claim."

83 In *R (Gottlieb) v Westminster City Council* [2015] EWHC 231 (Admin), a councillor sought to challenge the decision to authorise variations of a contract between the council and a developer on the ground that there had been a failure to comply with the 2006 Regulations. Lang J said this:

> "152. It is well-established that a direct financial or legal interest is not required to establish standing to bring a claim for judicial review: *R v Inland Revenue Commissioners ex parte National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, at 694B-C; *R v Secretary of State for the Environment ex parte Rose Theatre Trust Co.* [1990] 1 QB 504, at 520D. Although there is a specific remedy for economic operators under the 2006 Regulations, this does not preclude claims for judicial review by those who are not economic operators (e.g. *R (Law Society) v Legal Services Commission* [2007] EWCA Civ 1264).
>
> 153. This claim is distinguishable on the facts from *R (Chandler) v Secretary of State for Children, Schools and Families* [2010] LGR 1, where the court held that the claimant lacked standing to bring a judicial review claim because she did not have any interest in the observance of the public procurement regime, being motivated by her political opposition to academy schools. In contrast, the Claimant in this case does not pursue any ulterior motive. He seeks what the procurement process is intended to provide, namely, an open competition to allow Winchester to select the development which best fulfils its needs."

84 The Court of Appeal granted permission to appeal on the basis that the question of standing was worthy of consideration by that court, but the matter never proceeded to a hearing.

85 In *R (Wylde) v Waverly Borough Council* [2017] EWHC 466 (Admin), [2017] PTSR 1245, two councillors and three members of local civic societies sought to challenge a council's decision to amend the terms of a redevelopment contract. The ground of challenge was that the decision had been taken in breach of the PCR 2006. Permission was granted, but the question of standing was considered as a preliminary issue. Dove J

held at [38] that Arden LJ's observations in *Chandler* (and Richards J's in *Kathro*) had not been intended to suggest that anyone who did not have an "ulterior" or "improper" motive would have standing. Rather, he said:

> "39… The approach taken by the Court of Appeal in *Chandler's* case [2010] PTSR 749 is in my view clearly grounded in a conventional approach to an assessment of standing. However, that conventional approach, focused upon the purpose and policy of legislation being invoked, leads to a much more restrictive qualification for standing in procurement cases than would apply in judicial review generally.
>
> 40. It is clear from the 2006 Regulations… that the purpose of those Regulations and the Directive which lies behind them, is firstly, to provide for an open and transparent system for the competition for public contracts in the interests of securing a fair and efficient market for those contracts and secondly, to provide a bespoke system of remedies for those parties who are directly involved in competing for such contracts and participating in the market for them. This regime is quite clearly tightly focused on those directly engaged with and actively seeking the benefit of obtaining public contracts that fall within the scope of the 2006 Regulations. The public interest is no doubt served by these aims and objectives of the 2006 Regulations (for instance, by fostering value for money and the objective evaluation of bids for public works), but that is very different from saying that it follows that any member of the public could have an interest in the enforcement of those Regulations which should be recognised by the grant of standing in judicial review. It is in my view entirely consistent with the purpose of the Regulations to confine standing in any judicial review claim brought outside the extensive range of remedies available to economic operators, and by a person who is not an economic operator, to only those who 'can show that performance of the competitive tendering procedure… might have led to a different outcome that would have had a direct impact on him'."

86 Thus, Dove J held at [41] that, whilst a trade association might satisfy the test, a council tax payer or concerned local resident or member of the local authority cannot without more bring themselves within it, because the procurement decision would have no direct impact on them. At [42], Dove J said this:

> "It follows that I do not feel able to follow the approach which was taken by Lang J in *Gottlieb's* case… for the following reasons. Firstly, it is pertinent to note in my opinion that Lang J recognised that for the claimant in that case to be found to have standing to bring the claim it would be necessary to distinguish *Chandler's* case. For the reasons I have already given that must be right. I am, however, unable to accept Lang J's reasons for distinguishing *Chandler's* case and reaching the conclusions which she did. Her grounds for distinguishing the claimant in *Gottlieb's* case from *Chandler's* case, set out in para 153, related to considerations of ulterior motive, which she considered existed in *Chandler's* case but which did not arise in the case before her as the claimant genuinely wanted to have an open competition for the procurement of the development partner for the development. The difficulty with that analysis is that in my view it does not engage with the reason why

> there is the restricted test for standing set out in *Chandler's* case, namely the policy, aims and objectives of the 2006 Regulations and their focus on the interests of economic operators. As I have set out above, in my view what was being examined in para 78 of the Court of Appeal's decision in *Chandler's* case was not directly related to ulterior motive but rather a demonstration of the distance between the interests of the claimant and the policy and purpose of the public procurement regime. It appears clear that had the *Chandler* test been applied in *Gottlieb's* case the claimant in that case would not have established that he had standing to bring the claim."

Submissions for the Secretary of State

87 The Secretary of State denies that any of the Claimants has standing to bring this claim. He submits that, properly understood, each of the grounds (including the additional ground the subject of the application to amend) relates to an allegation that the Secretary of State breached an obligation imposed on a contracting authority when conducting a procurement. The relevant obligations arise either from the PCR 2015 or from published policies associated with them. The PCR 2015 contain a specific remedial regime in Part 3. But that access to that regime is limited to economic operators, as defined in reg. 2, to whom alone the duties imposed by Parts 2 and 3 are owed. Although reg. 108 is in Part 4, rather than Part 2, its purpose is clearly to extend the publication duties owed under reg. 50. If the latter are owed for the benefit of economic operators, so must be the duty imposed by reg. 108.

88 The Secretary of State contends that the PCR 2015 provide a "complete canon for regulating the award of public contracts". Thus, for an economic operator, if a claim under the Regulations may be brought, a claim for judicial review may not: *Cookson and Clegg Ltd v Ministry of Defence* [2005] EWCA Civ 577.

89 The Secretary of State accepts that there may be circumstances where a party other than economic operator may seek to obtain a public law remedy for breach of the Regulations: see eg *R (Unison) v NHS Wiltshire Primary Care Trust* [2012] EWHC 624 (Admin). However, in *Chandler*, the Court of Appeal was astute to ensure that the challenger has an interest in the observance of the public procurement regime and that the regime is not used for a purpose other than that for which it was created.

90 Reliance was placed on *Wylde*. The proposition that the transparency obligations are designed to protect economic operators is said to be established for the purposes of the Public Contracts Directive by the decision of the European Court of Justice in Case C-375/17 *Stanley International Betting* ECLI:EU:C:2018:102.

91 None of the Claimants is an economic operator. In those circumstances, the Secretary of State submits that they lack standing to pursue this challenge. As to the Second to Fourth Claimants, as MPs, they have other ways of holding the Government to account. Even if the First Claimant had standing, the Second to Fourth Claimants did not: see, by analogy, *R (Jones) v Commissioner of Police of the Metropolis* [2020] 1 WLR 519, [61]-[62]. More generally, the fact of the NAO's investigation supplies another more appropriate avenue for investigating the matters complained of here.

Submissions for the Claimants

92 The Claimants make two principal points in response.

93 First, they note that the claim is not brought solely in respect of breach of the PCR 2015. The complaint about the failure to publish the contracts themselves (ground 2) is a common law complaint, as is the complaint that an unpublished de-prioritisation policy has been operated (ground 3). The Claimants say that it is well recognised that a claimant with a genuine interest in the scrutiny of public administration has standing to bring judicial review proceedings: *R v Secretary of State for Foreign and Commonwealth Affairs ex p. World Development Movement* [1995] 1 WLR 386, 392-396; *R v Secretary of State for Foreign and Commonwealth Affairs ex p. Rees-Mogg* [1994] QB 552. More generally, it is well established that claimants acting in the public interest can have standing in the absence of other challengers: *R (Feakins) v Secretary of State for the Environment, Food and Rural Affairs* [2004] 1 WLR 1761, [21]; *R v Somerset County Council ex p. Dixon* [1998] Env LR 111, 121. This is especially so where the breaches alleged are in part admitted, since the merits of the claim are relevant to standing: *World Development Movement*, at 395.

94 Second, the Claimants say they also have standing to challenge the failure to comply with regs 50 and 108. Breach of the obligations imposed by those provisions is a public law wrong and standing to challenge such a wrong is not limited to economic operators; others can challenge provided only that they have an interest in observance of the public procurement regime and are not seeking to use it for a purpose other than that for which it was created: *Chandler*, [77]-[78]. Hence, in *Gottlieb*, Lang J held that a councillor was entitled to bring proceedings for breach of the Regulations. Here, the Claimants' interests align precisely with the purposes for which the procurement regime was created. *Gottlieb* should be followed in preference to *Wylde*, which misinterprets the reasoning of the Court of Appeal in *Chandler*. In any event, the 2015 Regulations have a broader purpose than the 2006 Regulations and the previous case law, insofar as it imposes a restrictive test for standing, should be treated with caution for that reason also.

95 As to the possibility of other challengers, the Claimants note that there has been no challenge by any economic operator to any breach of the Secretary of State's transparency obligations. That is not surprising since there would be no possible financial benefit in any such challenge. The Claimants go further and submit that, if a challenger had to meet the test in reg. 91 of the Regulations (i.e. to show loss or damage or the risk of it arising out of the breach), it is difficult to see how anyone could ever challenge a failure to comply with reg. 50.

Discussion

96 Since the early 1980s, the courts of England and Wales have generally adopted a liberal approach to the question of standing. Two important propositions can be derived from the Divisional Court's judgment in *World Development Movement* at 395G-H and the case law cited there. The first is that, particularly once permission has been granted, "the merits of the challenge are an important, if not dominant, factor when considering standing". The second is that a non-governmental organisation with genuine expertise and experience in the area of decision-making under challenge may have standing depending on a holistic assessment of other factors: "the importance of vindicating the

rule of law…; the importance of the issue raised…; the likely absence of any other responsible challenger…; the nature of the breach of duty against which relief is sought…; and the prominent role of the applicants [in the relevant subject area]". See also Auburn, Moffett and Sharland, *Judicial Review: Principles and Procedure* (2013), §24.26; *R (Jones) v Commissioner of Police for the Metropolis* [2020] 1 WLR 519 (Div. Ct), [38], and *R (McCourt) v Parole Board* [2020] EWHC 2320 (Admin) (Div. Ct), [31]-[32].

97 However, the application of these general principles is acutely sensitive to context. This is because the question whether it is necessary to confer standing to vindicate the rule of law depends, among other things, on the availability in principle and in practice of alternative challengers and alternative remedies.

98 The case law on which the parties have focussed in this case applies the general principles relevant to standing to the particular context of challenges to individual procurement decisions alleging breaches of the relevant procurement regime. With that context in mind, the proper starting point is the judgment of the Court of Appeal in *Chandler*. The reasoning in that case was strictly *obiter*, but is nonetheless entitled to considerable weight, carrying as it does the imprimatur of such a distinguished constitution. (Although the regime under the PCR 2015 differs in certain respects from that under the PCR 2006, the aims of the regimes are similar and the differences are not material.)

99 I draw the following propositions from the reasoning of the Court of Appeal in *Chandler*:

(a) In the context of an individual procurement decision, a failure to comply with the 2006 Regulations is an unlawful act and thus "a paradigm situation in which a public body should be subject to review by the court", even where there is no economic operator who wishes to bring private law proceedings: [77].

(b) A claimant may have standing to challenge an individual procurement decision if:

(i) despite not being an economic operator, he "has a sufficient interest in compliance with the public procurement regime in the sense that he is affected in some identifiable way" by the challenged decision (for example, because compliance "might have led to a different outcome that would have had a direct impact on him"); or

(ii) "the gravity of a departure from public law obligations" justifies the grant of a public law remedy: [77].

(c) The recognition that standing may arise in situation (ii) shows that, even where the challenge is to an individual procurement decision, the Court of Appeal in *Chandler* did not intend to make it a precondition of standing that the claimant could show that he was personally "affected in some identifiable way" by the challenged decision. This is consistent with the general principles enunciated in *World Development Movement*.

(d) Alongside the "gravity" of the breach alleged, the court must also consider whether there are other more appropriate ways for the alleged breach to be litigated. In the context of an individual procurement decision, that requires a recognition of the

special remedies available under the procurement regime. In that context, "[e]conomic operators can test the question of legality" (see [72]), so, "the court is in general bound to ask itself why a public law remedy is necessary when private law remedies are available": [77]. This too is consistent with the identification in *World Development Movement* of "the likely absence of any other responsible challenger" as a factor relevant to standing.

(e) In considering whether a public law remedy is necessary, the court should consider whether the claimant is "attempting to use the public procurement regime for a purpose for which it was not created": [78]. The two examples of cases where the claimant failed this test, *Chandler* itself and *Kathro*, were both cases in which the claimant had no "interest in the observance of the public procurement regime" but was seeking to use that regime as a tool with which to challenge a decision to which she or he was opposed. This again seems to me to be consistent with the focus in *World Development Movement* on the experience, expertise and aims of the challenger.

(f) Unless it is appropriate to deal with standing as a preliminary issue, once permission to apply for judicial review has been granted, courts are not encouraged to spend valuable court time on the issue of standing, especially in a borderline case: [77].

100 These principles provide a proper basis for denying standing to some, perhaps many, claimants who wish to challenge individual procurement decisions, but cannot show that they will be affected in an identifiable way by the challenged decision. In such cases, the court may conclude that the decision challenged is one which could have been challenged by economic operators or by other persons directly affected. In the absence of a challenge by such a person, the court may then decide that the alleged breach is not of such gravity that there is a pressing need for the issue to be determined at the instance of a challenger who is not directly affected. Such a conclusion may be particularly likely in a case where the challenger is seeking to use the procurement regime as a tool with which to attack a decision to which he is opposed for other reasons.

101 I would not, however, go as far as Dove J did at [40] of his judgment in *Wylde* in concluding that the effect of *Chandler*, even in a challenge to an individual procurement decision, is to "confine standing in any judicial review claim brought outside the extensive range of remedies available to economic operators, and by a person who is not an economic operator, to only those who 'can show that performance of the competitive tendering procedure… might have led to a different outcome that would have had a direct impact on him'." That seems to set up as a test or precondition for standing a situation which the Court of Appeal presented as an example of a case where it would be appropriate to accord standing. To "confine" standing in that way would be inconsistent with the Court of Appeal's express recognition in *Chandler* (in line with the principles in *World Development Movement*) that, in some cases, the gravity of a departure from public law obligations could justify the grant of a public law remedy.

102 In any event, even if I were to accept in whole the reasoning in *Wylde*, the decisions challenged in *Chandler*, *Gottlieb* and *Wylde* were all individual procurement decisions. In such cases, economic operators would have a strong incentive to challenge the decision if it were properly challengeable. Here, by contrast, what is challenged is not the decision

to award a particular contract, nor the decision to use a particular procedure for the award of a particular contract, nor even the failure to publish a CAN in any particular case. Even focussing on ground 1 alone, the target of the Claimants' challenge is much broader and more general: the Secretary of State's repeated failure, across the whole class of contracts awarded in the context of the pandemic, to comply timeously with the obligation imposed by reg. 50 in cases where that obligation applies.

103 Mr Moser's response was to say that even conduct of this kind would in principle be challengeable by an economic operator if (but only if) he could show that, in consequence, he had suffered, or risked suffering, loss or damage. But it is difficult to envisage how that test could ever be satisfied in practice. An important purpose of the requirement to publish a CAN is to alert the public, including economic operators who might have hoped to be awarded the contract themselves, to the fact that a contract has been awarded. This purpose is particularly important in a case where the contract has been awarded without a competitive tender, because in such a case the public, including economic operators, may have no idea that the public body concerned was even looking to award the contract. If the failure complained of is a failure to comply with transparency obligations, an economic operator seeking to satisfy Mr Moser's test would presumably have to argue that, had the obligation been complied with, the public body *might* have published a CAN for a contract in which he *might* have had an interest and this CAN *might* have revealed something that would have enabled him to bring a claim for damages. It seems very doubtful that this would satisfy Mr Moser's test: there are just too many imponderables. But even if the test could in principle be satisfied, an economic operator would have little incentive to bring a challenge in circumstances where the prospect of any material benefit was so speculative.

104 A challenge alleging breach of the transparency obligations imposed by the PCR 2015, and by associated policies, is accordingly not one that an economic operator can realistically be relied upon to bring. The position of the First Claimant in this regard is relevantly analogous to that of the World Development Movement. It has a sincere interest, and some expertise, in scrutinising government conduct in this area. There is no allegation (and no evidence) that it is seeking to use the public procurement regime as a tool for challenging decisions which it opposes for other reasons. There is no dispute about the importance of the transparency obligations it claims have been breached. As to the "gravity" of the alleged breaches, they relate to contracts worth (at least) several billion pounds; and there is a pleaded allegation (in respect of which permission has been granted) that they result from a deliberate policy on the part of the Secretary of State. To my mind, there is a powerful public interest in the resolution, one way or the other, of the issues raised.

105 For these reasons, the First Claimant has standing to bring this claim.

106 The Second to Fourth Claimants are, however, in a different position. I have no doubt that they have a genuine and sincere interest in the issues the subject of this litigation. The fact that someone is a Member of Parliament does not, in and of itself, prevent her from having standing. But the availability of a better placed challenger remains an important – and often determinative – factor in considering whether it is necessary to accord standing to a person who is not herself directly affected by the decision challenged or the relief sought. Where there is already a claimant or claimants with standing, there

is no reason to accord standing to additional parties. As the Divisional Court said in *Jones*, [2020] 1 WLR 519, at [62]:

> "…it is important to remind parties of the need to ensure that those who bring claims for additional review are limited to those best placed to bring the claim. This is because adding unnecessary claimant is likely to increase the costs of the litigation, if only by requiring solicitors to send out extra reports on the litigation. It is also because parties to an action are in a distinct position, for example by receiving a confidential draft of the judgement of the time when it is circulated to the parties for typographical and other corrections before it is handed down in court."

107 It is particularly important that this guidance is adhered to in cases where the parties sought to be added are politicians. No doubt, the addition of politicians as parties may raise the profile of the litigation. It may make it easier to raise funds. But these are not proper reasons for adding parties. In a case where there is already a claimant with standing, the addition of politicians as claimants may leave the public with the impression that the proceedings are an attempt to advance a political cause, when in fact their sole legitimate function is to determine an arguable allegation of unlawful conduct.

108 Given that the First Claimant has standing to bring this claim, I hold that the Second to Fourth Claimants do not.

Issue (b): Permission to amend

The law on amendment of pleadings in judicial review

109 CPR r. 54.14 provides that the court's permission is required if a claimant seeks to rely on grounds other than those for which he has been given permission to proceed. Such applications must generally be made more than 7 clear days prior to the substantive hearing: see CPR PD 54A para. 11.1. This was done in the present case.

110 In *R (Dolan) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1065, at [119], the Court of Appeal endorsed a passage from the judgment of Singh LJ in *R (Talpada) v Secretary of State for the Home Department* [2018] EWCA Civ 841, at [68]. Singh LJ had drawn attention to the need to ensure that grounds of appeal are clearly and succinctly set out and that only those grounds for which permission has been granted are pursued. He noted that grounds "have a habit of 'evolving' during the course of proceedings… Many months after the formal close of pleadings and after evidence has been filed". At [67], he had emphasised that "public law litigation must be conducted with an appropriate degree of procedural rigour".

The Claimants' submissions

111 The claim as originally filed challenged the Secretary of State's failure to comply with reg. 50 and with the Transparency Policy and Principles. It did not allege breach of reg. 108. The application to amend to plead breach of reg. 108 was made on 11 January 2021. In a witness statement accompanying that application, the Claimants' solicitor, Adam Hundt, said that Mr Webb had in both his witness statements "(a) directly drawn attention to the transparency obligations applicable under regulation 108…; (b) repeatedly

accepted the same 'backlog' issues of publication arising in relation to regulation 50 apply to the duty to publish on Contracts Finder under regulation 108…; and (c) [has] given updated publication figures in both respects to show the improved level of compliance over time and the backlog being cleared".

112 Mr Hundt went on to say that the Claimants consider that Mr Webb's evidence includes a clear admission that the Secretary of State's obligation under reg. 108 "was repeatedly breached in relation to COVID-19 contracts during 2020, and that a backlog was allowed to form which was still to be cleared at the end of the year". Accordingly, the Claimants considered it appropriate for the claim to be amended in the light of the evidence now filed. That evidence contained all that was required to respond to the allegation of a breach of reg. 108.

113 As to timing, Mr Hundt notes that the Secretary of State's evidence was served in two batches, on 26 November and 23 December 2020. He says that it would not have been appropriate to make the application to amend in advance of receiving all the Defendant's disclosure.

The Secretary of State's response

114 The Secretary of State objects to the application to amend for five reasons. First, it is said that the application is a paradigm of the kind of rolling approach to judicial review recently deprecated by the Court of Appeal in *Dolan* at [118]. Breach of reg. 108 could and should have been pleaded at the outset. The only possible reason for the lateness of the amendment is that the Claimants originally overlooked the point. Second, the Secretary of State does not accept that the amendment arises out of his own evidence. Third, it is said that the Claimants wrongly seek to elide the requirements of reg. 108 with the Government's policies on transparency. Fourth, if the Claimants were given permission to plead a breach of reg. 108, the Secretary of State would need an opportunity to serve relevant evidence, in particular to explain the relationship between reg. 108 and the published policies on transparency. Fifth, it is said that the application to amend is based on factual allegations that the Secretary of State has failed to publish the details of three high-value contracts; and these factual allegations are wrong.

Discussion

115 I do not consider that it would be appropriate to allow the application to amend, for three reasons.

116 First, the present application is not an example of the "rolling" approach to judicial review deprecated in *Dolan*, because the conduct which the Claimants seek by the amendment to challenge is not conduct arising after the original challenge. But the need for procedural rigour identified by Singh LJ in *Talpada* (and endorsed in *Dolan*) remains pertinent. There was nothing to stop the Claimants from including the allegation of breach of reg. 108 in the claim as originally drafted. The material they needed to plead ground 1 was discovered through their own research. They could have gathered the material needed to plead the breach of reg. 108 by the same means (i.e. by looking on Contracts Finder and comparing the total value of the pandemic-related contracts for which reg. 108 notices had been published with the total reported value of pandemic-related contracts awarded).

117 Second, the legal position in relation to reg. 50 is different from that in relation to reg. 108. The former contains a hard deadline for publication of CANs. The latter imposes an obligation to publish within a reasonable time. This means that the Claimants are obliged to rely on the recommendation in the reg. 108 Guidance as supplying the deadline of 90 days. But the Secretary of State does not admit that there was a legal obligation to comply with this recommendation or that the failure to meet the 90-day timescale was unlawful in the particular circumstances of the pandemic. So, the Claimants are wrong to say that Mr Webb's evidence contains an admission that the Secretary of State acted unlawfully in this regard.

118 Third, although the Secretary of State chose to provide some figures to show when reg. 108 notices were published on Contracts Finder, he has not given a full explanation of the way in which resources were allocated to this task or the thinking behind it (save to say that resources were focussed on meeting the hard deadline for publication of CANs rather than the recommended timescale for publication of the reg. 108 notice: see the extract from Mr Webb's evidence at para. 51 above). If I were to permit the Claimants' amendment, I would have to assess the Secretary of State's compliance with reg. 108 without the benefit of evidence from him directly addressing and responding to this allegation. In circumstances where the point could have been pleaded at the outset, that would be unfair.

119 The Claimants' application to amend the Claim Form and pleadings is therefore refused.

Issue (c): Was there a deliberate policy of deprioritising compliance with transparency obligations?

120 This issue can be dealt with very shortly. The Claimants' pleaded allegation (see SFG, para. 36) was this:

> "In circumstances of widespread breach by the Defendant of regulation 50 and of the Transparency Policy and Transparency Principles, it is apparent that the Defendant – whether personally or through his officials – has made and approved a conscious decision to de-prioritise compliance with regulation 50 and with the Transparency Policy and Principles."

121 That allegation is squarely addressed and squarely denied by the Secretary of State both in the response to the letter before claim (see para. 36 above) and in Mr Webb's first statement (see para. 51 above).

122 A court hearing a claim for judicial review normally accepts the written evidence of the defendant unless exceptionally there is an application to cross-examine the deponent or it is obviously in conflict with other written evidence before the court.

123 In this case, there was no application to cross-examine Mr Webb. The Claimants pointed to a few other documents from which they said a policy of de-prioritising compliance with reg. 50 and the Transparency Policy and Principles could be inferred. In my judgment, none of these comes close to providing a proper basis for going behind Mr Webb's clear denial that such a policy ever existed:

(a) The evidence is clear that, in April 2020, Mr Webb reminded staff responsible for procurement of the importance of adherence to transparency obligations, including the obligation imposed by reg. 50.

(b) An email of 3 September 2020 indicates that the Government's Chief Commercial Officer (Gareth Rhys-Williams) was seeking an explanation for the Department's non-compliance. A further email of 2 October indicates that he had "requested that we accelerate compliance". This hardly evidences a deliberate policy of de-prioritisation.

(c) There is some material to suggest that the urgency with which compliance was pursued was driven by inquiries from the press and by the threat of legal proceedings: see Mr Webb's emails of 14 May 2020 (drawing attention to a potential article in *The Guardian* about non-compliance) and 25 August 2020 (following receipt of the Claimants' letter before claim). But this does not show "a conscious decision to de-prioritise compliance" beforehand.

124 The Claimants' ground 3 is, therefore, not made out.

Issue (d)(i): Did the Secretary of State act unlawfully by failing to comply with the Transparency Policy and Principles?

The Claimants' submissions

125 The Claimants submit that a public authority is obliged to act consistently with published policy: *R (Kambadzi) v Secretary of State for the Home Department* [2011] 1 WLR 1299, [36]. Here, the Government has not sought to vary or modify the Transparency Policy and the Secretary of State's evidence does not suggest that anyone considered the time limit for publication of contract provisions (20 days from the contract award date or the end of the standstill period) inappropriate in the context of the pandemic. Indeed, the evidence is that Mr Webb simply did not know about the Transparency Policy.

The Secretary of State's response

126 The Secretary of State denies that he was required to "comply" with what is expressly only guidance. In any event, the relevant timescales are only advisory and the Secretary of State has now materially complied with any publication requirement which arises. There has been no failure to observe the principle of transparency which the Transparency Policy and Principles pursue.

Discussion

127 Failure to follow published policy, absent good reason for departing from it, is an established ground for judicial review. The proposition is well-established: see *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245, [26] (Lord Dyson), [202] (Lady Hale) and [313] (Lord Phillips). See also *R (Lee-Hirons) v Secretary of State for Justice* [2016] UKSC 46, [2017] AC 52, [17] (Lord Wilson) and [50] (Lord Reed).

128 In this case, the Transparency Policy says that it is "advised" that contracts should be published within 20 days following the award of the contract or the end of the standstill period. Does that in some way attenuate the obligation to comply (absent good reason to depart from it)? In my view, the answer is "No", for three reasons.

129 First, there is no uniform drafting style for the policies adopted by public bodies. Some talk about what the public body "should" or "must" do, some "recommend" and others "advise" a particular course of action. When drafting policy, there is generally no need to distinguish strictly between the mandatory and the hortatory, because policy can always be departed from for good reason.

130 Second, some policies, by their own terms, will leave a measure of discretion or leeway to the decision-maker. In that case, a decision-maker acting under the discretion or within the leeway will not need to supply a good reason for departing from the policy, because he will be acting within its terms. Whether any particular policy confers such a discretion or leeway will be a matter of construction. The construction of policy is a matter for the court. In construing policy, the court will read the relevant words in context using the normal aids (including, in particular, consideration of the mischief at which it was aimed and the legislative and factual context).

131 Third, in this case the 20-day time limit is framed in precise terms by reference to the contract award date or the end of the standstill period. It is part of the Government's "policy commitments" to publish contract documents (see §2.3, set out at para. 22 above). It is an important element of the Government's commitment to transparency, whose aims are explained in §1 of the Transparency Principles (set out at para. 25 above). One of these aims is to support "the functioning of competitive, innovative and open markets by providing all businesses with information about public sector purchasing and service providers' performance". That aim would be significantly undermined if the time limit were to be understood as imposing no legal constraint at all on Government, even in the absence of good reason for departing from it.

132 It follows that, in my judgment, the Secretary of State had a common law duty to comply with the Transparency Policy absent good reason to depart from it.

133 In this case, there is no evidence that anyone in Government took a decision to disapply or extend the 20-day time limit because of the difficulties caused by the pandemic. On the Secretary of State's evidence, which I accept, there was no conscious decision to de-prioritise compliance with his transparency obligations. Furthermore, Mr Webb has candidly admitted was not even aware of the time limits in the Transparency Policy.

134 I doubt whether a public body could ever justify departure from a published policy on the basis of a reason not considered at the time of the departure but only *ex post facto*. But I do not have to decide that question. The Secretary of State's evidence provides a cogent explanation of his historic failure to comply with both reg. 50 and the Transparency Policy, but this explanation amounts to an excuse, not a justification. There is nothing in it to suggest that the Secretary of State or anyone else in Government formed the view, even after the event, that the time limits in the Transparency Policy should have been, or should now be, modified.

135 It follows that, in my judgment, the Secretary of State acted unlawfully by failing to comply with the Transparency Policy.

136 In the light of my refusal of permission to amend, issue (d)(ii) does not arise.

Issue (e): Relief

Starting point: the Secretary of State's unlawful conduct

137 By the time of the hearing, the Secretary of State had produced figures showing the extent of his compliance with reg. 50. As noted above, the figures are to be corrected. But the Secretary of State accepts that they show that the Secretary of State acted in breach of the legal obligation imposed by reg. 50, and therefore unlawfully, by failing to send CANs for publication within 30 days of the contract award in a significant number of cases. Mr Webb's third statement showed that CANs were published late for 217 (42%) of the 520 contracts awarded on or before 7 October 2020 to which that obligation applied. It is now known that the number of late CANs was in fact even greater.

138 Equivalent figures are not available for the number of contracts valued at £10,000 or more in respect of which the Secretary of State failed to publish the provisions of the contracts themselves within 20 days following the contract award date or the end of the standstill period. All that is known is that, of the 765 contracts above the threshold value awarded on or before 17 September 2020, 647 had been published by the time of Mr Webb's third witness statement on 29 January 2021. It can be reasonably inferred that a substantial number were published late and that this constituted a breach of the Transparency Policy in circumstances where there was no good reason to depart from it. This was also, therefore, unlawful.

139 The witness statements of Mr Webb make clear that the situation facing him and the Department more generally, particularly in the first few months of the pandemic, was an unprecedented one. Large quantities of goods and services had to be procured in very short timescales. This required the use of new staff, internal and external to Government, who were not familiar to the procurement systems used by the Department. It is understandable that attention was focussed on procuring what was thought necessary to save lives. The documents indicate that Mr Webb sought to remind those responsible for individual procurements of the transparency obligations of which he was aware. In a substantial number of cases, however, these were not complied with.

140 The obligations imposed by reg. 50 and by the Transparency Policy and Principles serve a vital public function and that function was no less important during a pandemic. The Secretary of State spent vast quantities of public money on pandemic-related procurements during 2020. The public were entitled see who this money was going to, what it was being spent on and how the relevant contracts were awarded. This was important not only so that competitors of those awarded contracts could understand whether the obligations owed to them under the PCR 2015 had been breached, but also so that oversight bodies such as the NAO, as well as Parliament and the public, could scrutinise and ask questions about this expenditure. By answering such questions, the Government "builds public trust and public confidence in public services": see §1 of the Transparency Principles. One unfortunate consequence of non-compliance with the

transparency obligations (both for the public and for the Government) is that people can start to harbour suspicions of improper conduct, which may turn out to be unfounded.

141 I turn now to the parties' submissions on the question of relief.

The Claimants' submissions

142 The Claimants say that, in these circumstances, they are entitled to two forms of relief: first, declaratory relief in the form set out at para. 71 above; second, a mandatory order requiring the Secretary of State to comply with his obligations in respect of any contracts where the CAN or contract provisions have not yet been published: see para. 73 above.

143 In support of their application for declaratory relief, the Claimants rely on a number of authorities which confirm the appropriateness of declaratory relief where a breach of legal obligation is established: *R v Speyer* [1916] 1 KB 595, 613 (Lord Reading CJ); *R (ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs* [2013] UKSC 25, [2013] 3 CMLR 29, [37] (Lord Carnwath); and *R (Hunt) v North Somerset Council* [2015] 1 WLR 3375, [12] (Lord Toulson).

144 As to the application for a mandatory order, the Claimants relied on a later judgment of the Supreme Court in the *ClientEarth* litigation: [2015] UKSC 28, [2015] 3 CMLR 15, [30]-[31] (Lord Carnwath).

The Secretary of State's response

145 For the Secretary of State, Mr Moser submitted that there is now no practical relief that the court could grant. There are no CANs and only a small number of contracts which remain to be published. To the extent that there remains material to be published, this is not because the Secretary of State does not wish to publish, but because there is still information to collate and/or redact.

146 Mr Moser relied on Lewis, *Judicial Remedies in Public Law* (6th ed., 2020), §§12-01 to 12-04 and 12-019 to 12-022, and the case law there cited, for the proposition that the court need not grant a remedy where it is no longer necessary or where the issues have become academic or of no practical significance. He says that this is bolstered by the judgment of the Court of Appeal in *Dolan*, at [25], [39]-[41] and [115(iv)] and relies additionally on *R (Lee-Hirons) v Secretary of State for Justice* [2017] AC 52, where the Supreme Court refused a formal declaration because its judgment had clarified the law sufficiently.

147 Mr Moser said that the *ClientEarth* cases were very different. They arise out of a breach, persisting for several years, of the United Kingdom's obligations to comply with binding limits in the Air Quality Directive. In that case, enforcement action was urgently required at national and/or EU level. Here, by contrast, the admitted breaches took place against the backdrop of an unprecedented international health crisis and in circumstances where there was nothing to indicate any intention on the part of the Secretary of State not to publish the relevant notices.

148 In addition, Mr Moser relies on s. 31(2A) of the SCA 1981.

Discussion

149 I start with the question of a mandatory order. In my judgment, such an order is not appropriate in this case. The data provided by the Secretary of State for compliance with reg. 50 and with the Transparency Policy indicate that there remains some work to do, particularly in relation to the publication of contract provisions. The information provided in Mr Webb's fourth witness statement indicates that PHE (for which the Secretary of State is responsible) also has some work outstanding. But the overall picture shows the Secretary of State moving close to complete compliance. The evidence as a whole suggests that the backlog arose largely in the first few months of the pandemic and that officials began to bear down on it during the autumn of 2020. I have no doubt that this claim has speeded up compliance. The evidence does not suggest a continuing default of the kind that justified mandatory relief in the second *ClientEarth* case. As the *ClientEarth* litigation shows, the grant of such relief presupposes substantial continuing non-compliance with legal obligations in circumstances where remedial work under the court's supervision is required. Here, the evidence as to the scale of the matters now outstanding (albeit limited to contracts awarded before the claim was issued) is not such as to warrant continued supervision by the court.

150 I turn, therefore, to the question whether declaratory relief is appropriate. In the first *ClientEarth* judgment, the first instance judge (Mitting J) declined to grant a declaration because it would "serve no purpose other than to make clear what is already conceded" (that the UK was in breach of the requirements of the Air Quality Directive): see the passage quoted in [26]. The Court of Appeal dismissed the appeal, holding that Mitting J's "substantive judgment speaks as a declaration" and that "no substantive issue of effective judicial protection arises from his failure to grant a formal declaration": see at [27]. Lord Carnwath (delivering the judgment of the Supreme Court) took a different view. At [37], he said this:

> "The court is satisfied that it should grant the declaration sought, the relevant breach of art.13 having been clearly established. The fact that the breach has been conceded is not, in the court's view, a sufficient reason for declining to grant a declaration, where there are no other discretionary bars to the grant of relief. Such an order is appropriate both as a formal statement of the legal position, and also to make clear that, regardless of arguments about the effect of arts 22 and 23, the way is open to immediate enforcement action at national or European level."

151 In *Hunt*, the claimant sought judicial review of a local authority's decision to approve a budget. The claim failed at first instance but on appeal to the Court of Appeal, the claimant established that the local authority had acted unlawfully. The claimant asked the Court of Appeal to make a quashing order, but that court declined to do so. The Supreme Court rejected the claimant's submission that the Court of Appeal should have granted a declaration to mark the established illegality, but only because the claimant had not asked for one below. However, at [12] Lord Toulson (with whom the other members of the Court agreed) said this:

> "…in circumstances where a public body has acted unlawfully but where it is not appropriate to make a mandatory, prohibitory or quashing order, it will usually be appropriate to make some form of declaratory order to reflect the

> court's finding. In some cases it may be sufficient to make no order except as to costs; but simply to dismiss the claim when there has been a finding of illegality is likely to convey a misleading impression and to leave the claimant with an understandable sense of injustice. That said, there is no 'must' about making a declaratory order, and if a party who has the benefit of experienced legal representation does not seek a declaratory order, the court is under no obligation to make or suggest it."

152 These decisions establish that a claimant who establishes that a public body has acted unlawfully will normally be entitled to a declaration to mark the illegality in cases where no other relief is appropriate. I say "normally", because, as Lord Toulson emphasised, declaratory relief is always discretionary. *Lee-Hirons* is an example of a case where a declaration was inappropriate, but that was in the context of a single, historic public law breach in an individual case. Another circumstance in which it might be appropriate to withhold relief is where the proceedings were unnecessary because the breach was admitted at the outset: it is no part of the court's function to rub a defendant's nose in his admitted breach.

153 In this case, however, even in relation to ground 1, there was much more than a single breach; and the Secretary of State made no clear admission until very shortly before the hearing. The history of the proceedings is unedifying. The Claimants must bear some responsibility for consistently putting the case higher than was warranted, but the lion's share of the blame lies with the Secretary of State:

(a) On receipt of the letter before claim, the sensible course would have been candidly to admit, as the documents now disclosed indicate must have been apparent, that in a substantial number of cases the Secretary of State had breached reg. 50, to explain why this had happened and to undertake to publish the outstanding CANs within a specified reasonable period. If that had been done, this litigation, which by the time of the hearing had cost the Secretary of State alone some £207,000, might not have been necessary.

(b) Instead, the Secretary of State responded to the letter before claim admitting only that there had been "technical breaches" of reg. 50, saying that proceedings would serve no practical purpose and denying the Claimants' standing to bring them: see paras 34-38 above. I asked Mr Moser what was meant by "technical" breaches. He replied, frankly, that the word "technical" added nothing. I infer that the qualifier was inserted in an attempt to suggest, contrary to the fact, that the breaches were trivial or that they had occurred in an insubstantial number of cases.

(c) This prompted a further letter from the Claimants on 11 September 2020, in which they purported to summarise the implicit and explicit admissions which the Secretary of State had made: see para. 40 above. Unwisely, the Claimants themselves used a qualifier to characterise what had been admitted: that the Secretary of State was "routinely" breaching his legal obligations.

(d) This, in turn, enabled the Secretary of State to respond, on 17 September 2020, that the Claimants' characterisation of the Secretary of State's position was "not accepted" and, indeed, that the position was "the precise opposite of how you

purport to read it": see para. 42 above. It is unclear what is the "precise opposite" of an acceptance of routine breach.

(e) By the time the claim was issued, on 7 October 2020, there was no clear admission that the Secretary of State had breached his legal obligations in anything other than a "technical" way. That being so, the Claimants cannot be faulted for issuing the proceedings. When they did so, however, they again reached for pejorative qualifiers: the breaches were, they said, "egregious and widespread": see para. 45 above.

(f) Then came the Summary Grounds of Defence on 30 October 2020: see paras 47-48 above. This was another opportunity for the Secretary of State unequivocally to admit that he had breached the legal obligation imposed upon him in a number of cases, while also putting the breaches into context and explaining them. But there was no such admission. The Secretary of State chose instead to "refute [sic], in the strongest terms, any suggestion that he may not yet have complied with the terms of regulation 50 PCR 2015 or followed the Transparency Policy or Principles in respect of any particular contracts that evidences 'widespread non-compliance'" and not to say whether he admitted any breach at all.

(g) Mr Moser says that it was not known by this time how many breaches there had been and it would accordingly have been "a wrong and misleading position" simply to admit "breach". I do not accept that submission. It was open to the Secretary of State to accept that he had acted unlawfully be failing to publish CANs within 30 days of contract award in a number of cases, to make plain that it was not at that time known what the number was and to undertake to find out and remedy the position. This was not done.

(h) Next came Mostyn J's Order granting permission: see para. 49 above. That provided another "way out" for the Secretary of State: give formal undertakings in relation to the publication of the outstanding CANs and contracts. As Mostyn J said, had that been done, it would have be difficult for the Claimants to argue that it was proportionate to continue with the proceedings. It was not done.

(i) Instead, the Secretary of State filed his DGRC repeating the non-admission in the Summary Grounds of Defence and characterising the claim as challenging (inter alia) an "alleged failure" to comply with reg. 50: see para. 50 above.

(j) I invited Mr Moser to identify any other passages in the DGRC containing such an admission. He drew attention to para. 18, which refers to "admitted, regrettable delays in publication" but does not admit that any legal obligation has been breached, and para. 38, which refers to "any unavoidable non-compliance" but, by carefully using the word "any", does not admit that there has actually been such non-compliance.

(k) It was thus not until 29 January 2021, when the Secretary of State filed his skeleton argument for the hearing, together with Mr Webb's third witness statement, that the Secretary of State gave the figures for the number of cases in which the Secretary of State had complied with the deadline in reg. 50, figures which (as noted) are to be corrected. Even then, despite disclosing these figures, the closest

the skeleton argument came to an admission of unlawful conduct was its footnote 2 (see para. 68 above), in which it was said that paras 29 and 30 of the DGRC "cannot sensibly be read any other way than as an admission that the Secretary of State accepts that he is bound by the obligations in regulation 50 and, as at the date of the Detailed Grounds, that he had not complied with them in full". This suggests that full compliance was something that might happen later, even after the deadline in reg. 50 had passed. In fact, failure to publish within 30 days was itself a breach of reg. 50 which could not be undone.

154 It follows that, even in relation to ground 1, this is not a case in which the Claimants can be criticised for pursuing the claim. The admissions now set out were secured as a result of this litigation and at a late stage of it. On ground 2, of course, the Secretary of State never admitted that his failure to publish contract provisions in accordance with the timescales in the Transparency Policy was unlawful. I have found that it was. In the circumstances, there are no grounds for departing from the ordinary position that a claimant who has established unlawful conduct on the part of a public body is entitled to a declaration to that effect, if a quashing or mandatory order is not appropriate.

155 I am not prepared, however, to grant declarations in the terms proposed by the Claimants in their post-hearing note: see para. 71 above. The Claimants seek declarations that the Secretary of State has "systematically" failed to comply with his obligations under reg. 50 and under the Transparency Policy. That might be taken to suggest that the failure was the result of a system which the Secretary of State has consciously put in place, which would only have been appropriate if the Claimants had succeeded on ground 3. They have not succeeded on that ground, so the word "systematically" will have to come out. The declaration should express the position in neutral terms. The best way of doing this is simply to declare the number and percentage of relevant contracts in respect of which the obligations imposed by reg. 50 and the Transparency Policy were breached. That can be done once the corrected figures are available.

156 Finally, I should address s. 31(2A) of the SCA 1981. That provision applies where the claimant establishes some unlawful conduct, but it is highly likely that the outcome for him or her would not have been substantially different if the conduct complained of had not occurred. In those circumstances the court is obliged to refuse relief. The "conduct complained of" means the conduct (or alleged conduct) of the defendant that the applicant claims justifies the High Court in granting relief: s. 31(8). There is an exception where the court considers that it is appropriate to disregard the requirement in s. 31(2A) "for reasons of exceptional public interest": s. 31(2B).

157 These provisions are easy to apply in a case where the claimant is challenging an individual decision that affects him or her personally. They are more difficult to apply in a case such as the present, where a body such as the First Claimant acting in the public interest challenges a repeated failure by a public body to comply with transparency obligations. In this case, the "conduct complained of" is the failure to publish CANs and contract provisions within the stipulated timescales. The statute requires the court to consider a hypothetical scenario in which this conduct had not occurred. That must mean one in which publication occurred on time.

158 In this case, I consider that the outcome for the First Claimant would have been substantially different if the publication had been on time. In that case, the First Claimant

would have been able to scrutinise CANs and contract provisions, ask questions about them and raise any issues with oversight bodies such as the NAO or via MPs in Parliament; and it would have been able to do so within the timescales provided by the law. In the context of a case where compliance with transparency obligations is the object of the litigation, this would in my judgment have been a "substantially different" outcome. Any other reading of s. 31(2A) would make it effectively impossible for a public interest challenger ever to obtain relief for breach of transparency obligations. There is no indication that s. 31(2A) was intended to have such a radical effect.

159 It follows that it is unnecessary to consider the application of s. 31(2B). If it were necessary to do so, however, I would conclude that the matters in paras 137-140 above constitute "reasons of exceptional public interest" which would justify disregarding the requirements of s. 31(2A) in this case.

Conclusion

160 The First Claimant has succeeded on grounds 1 and 2, but failed on ground 3. It is entitled to declaratory relief, but not a mandatory order. The declaration will be made once the corrected figures have been produced. The Second to Fourth Claimants lack standing and are not entitled to any relief. I will consider further written submissions from the parties on the precise terms of the Order and on consequential matters.

Postscript: recording and broadcasting

161 Prior to the hearing, the Administrative Court Office indicated to the parties that, because of the COVID-19 pandemic, the hearing of this claim would take place remotely using a video-conferencing platform. The Claimants invited me to give permission for a television production company to record and re-broadcast the proceedings in the interests of open justice. They made written submissions in support of that application. The Secretary of State resisted it, on jurisdictional grounds. I refused the application, indicating that I would give my reasons in writing at the same time as the judgment, unless the application was renewed orally at the hearing. The application was not renewed orally. These are my reasons for refusing it on paper.

162 Section 41 of the Criminal Justice Act 1925 imposes a general prohibition on the taking of photographs in court and on the publication of such photographs. This prohibition extends to video recordings: *R v Loveridge* [2001] EWCA Crim 973, [2001] 2 Cr App R 29. Exceptions have been provided by and under statute. None applies to proceedings in the Administrative Court. Section 41 therefore constrains the inherent jurisdiction of the court: *R (Spurrier) v Secretary of State for Transport* [2019] EWHC 528 (Admin), [2019] EMLR 16.

163 The Coronavirus Act 2020 inserted provisions into the Courts Act 2003 about "proceedings conducted wholly as video proceedings". The first provision inserted was s. 85A(1), headed "Enabling the public to see and hear proceedings". It empowers the court to direct that such proceedings may be broadcast (i.e. live-streamed). It also empowers the court to direct that the proceedings be recorded, but only "for the purpose of enabling the court to keep an audio-visual record of the proceedings". Parliament could have authorised recording for broadcast, but did not.

164 The second provision inserted was s. 85B, headed "Offences of recording or transmission in relation to broadcasting". This makes it an offence for a person to make an unauthorised recording or unauthorised transmission of an image or sound which is being broadcast in accordance with a direction under s. 85A. Section 86B(6) provides that a recording or transmission is "unauthorised" unless it is (a) authorised by a direction under section 85A, (b) otherwise authorised (generally or specifically) by the court in which the proceedings concerned are being conducted, or (c) authorised (generally or specifically) by the Lord Chancellor.

165 The Claimants relied on s. 86B(6)(b). They argued that it would make no sense unless the court had power to authorise recording or transmission other than under s. 85A. This is topsy turvy statutory construction. Both the heading and operative language of s. 86B make plain that it is concerned with the creation of an offence and with the delineation of its scope. The function of s. 86B(6)(b) is to make clear that no offence would be committed by a person who records or transmits footage pursuant to an authorisation by the court. That is not surprising. One would not expect something authorised by a court to give rise to criminal liability.

166 Nothing in s. 86B purports to define or expand the scope of the court's powers to authorise broadcast and recording. Those powers are set out in s. 86A. That provision would not have been drafted as it is if the intention were to empower the court to permit recording other than for the purposes of record-keeping.

167 There is accordingly no power to permit proceedings in the Administrative Court to be recorded for the purposes of broadcast, even when the proceedings are conducted wholly as video proceedings.

168 This does not generally, and did not in this case, prevent the public from having access to proceedings conducted wholly by video in the Administrative Court. In line with the Court's usual practice, the cause list published on the day before the hearing included an email address through which any member of the public could apply for access to the online platform. All 19 who applied were able to access and watch and listen to the proceedings in this way. The proceedings were therefore at least as accessible as they would have been if held in court.