

SHARPE PRITCHARD

# SHARPE FOCUS

Edition 32

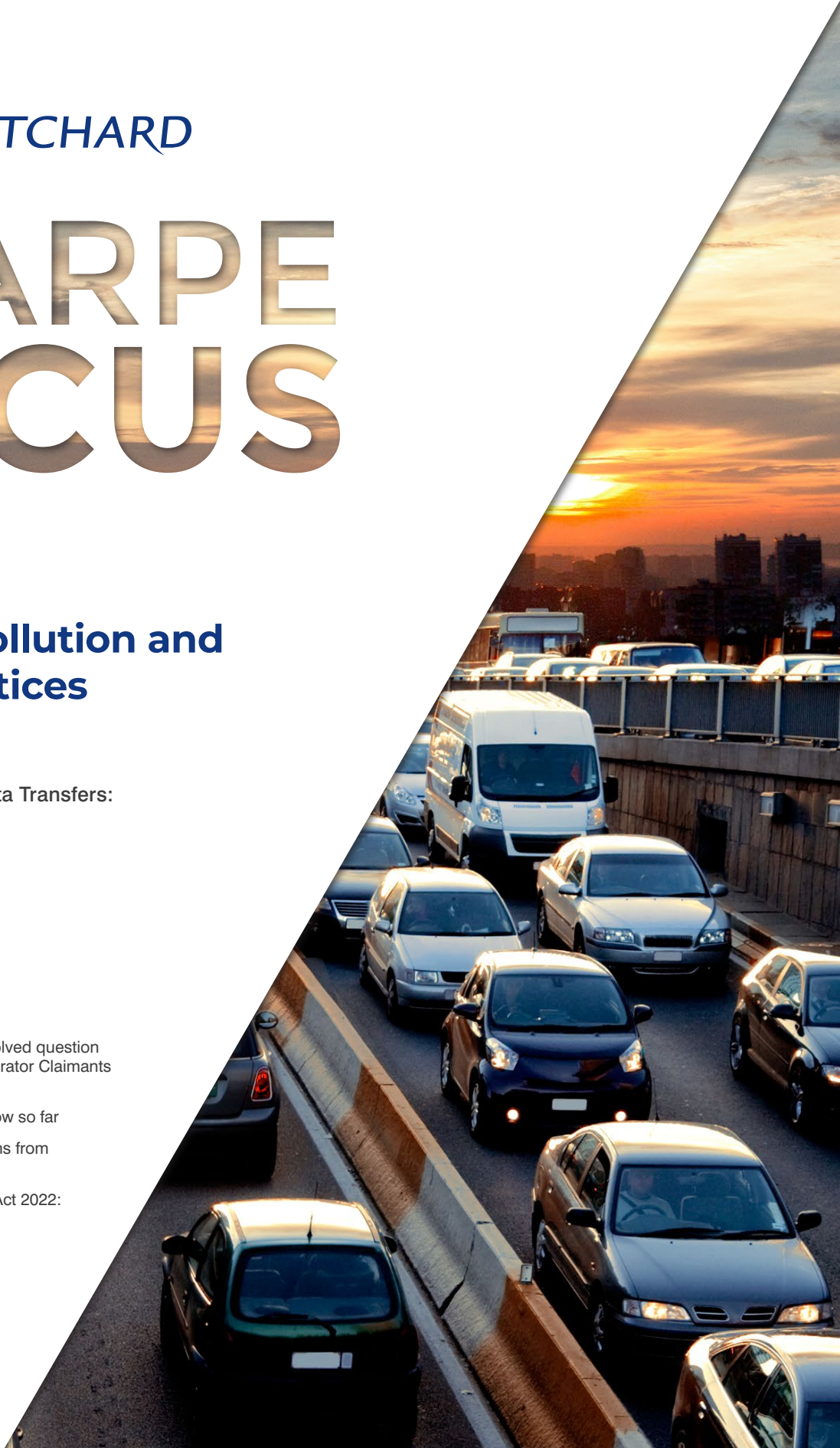
## City centre pollution and working practices

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# PROCUREMENT BILL – INITIAL IMPRESSIONS FROM THE FIRST DRAFT



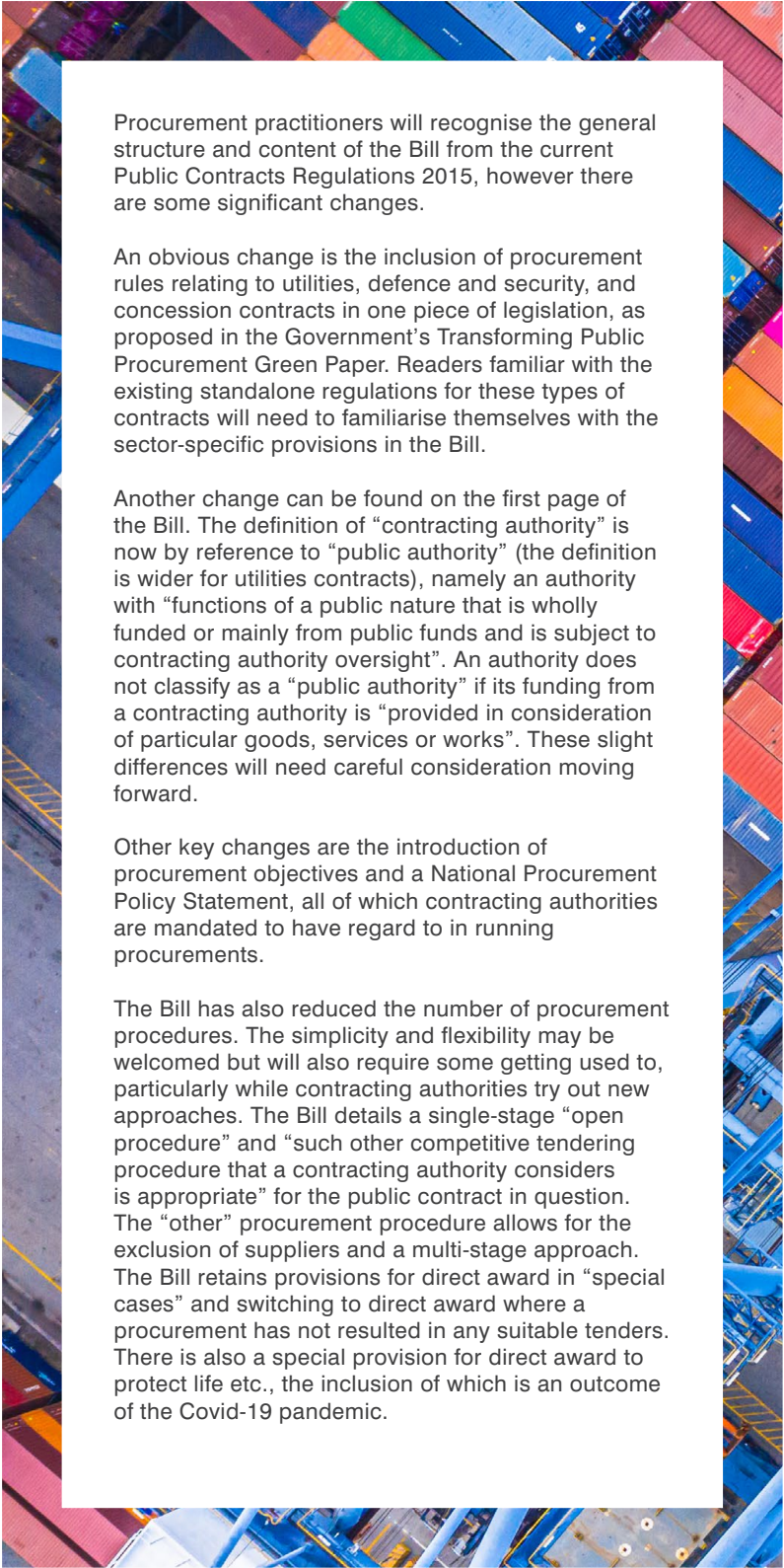




The first draft of the long-awaited **Procurement Bill** (the ‘Bill’) was published on 12<sup>th</sup> May, the day after the Queen’s Speech. The Bill had its second reading in the House of Lords on 25<sup>th</sup> May, and we expect to see changes to the legislation as it makes its way through the parliamentary process. The Bill is substantial with 116 clauses, in 13 parts and 11 schedules.

Here, Legal Director Juli Lau, and Associate Sophie Mcfie-Hyland, explore some of the key points within the draft Bill and their impact on the procurement process and specific sectors.





Procurement practitioners will recognise the general structure and content of the Bill from the current Public Contracts Regulations 2015, however there are some significant changes.

An obvious change is the inclusion of procurement rules relating to utilities, defence and security, and concession contracts in one piece of legislation, as proposed in the Government's Transforming Public Procurement Green Paper. Readers familiar with the existing standalone regulations for these types of contracts will need to familiarise themselves with the sector-specific provisions in the Bill.

Another change can be found on the first page of the Bill. The definition of "contracting authority" is now by reference to "public authority" (the definition is wider for utilities contracts), namely an authority with "functions of a public nature that is wholly funded or mainly from public funds and is subject to contracting authority oversight". An authority does not classify as a "public authority" if its funding from a contracting authority is "provided in consideration of particular goods, services or works". These slight differences will need careful consideration moving forward.

Other key changes are the introduction of procurement objectives and a National Procurement Policy Statement, all of which contracting authorities are mandated to have regard to in running procurements.

The Bill has also reduced the number of procurement procedures. The simplicity and flexibility may be welcomed but will also require some getting used to, particularly while contracting authorities try out new approaches. The Bill details a single-stage "open procedure" and "such other competitive tendering procedure that a contracting authority considers is appropriate" for the public contract in question. The "other" procurement procedure allows for the exclusion of suppliers and a multi-stage approach. The Bill retains provisions for direct award in "special cases" and switching to direct award where a procurement has not resulted in any suitable tenders. There is also a special provision for direct award to protect life etc., the inclusion of which is an outcome of the Covid-19 pandemic.

Other areas of interest are the sections in the Bill relating to dynamic markets and open frameworks. There was much anticipation regarding open frameworks, and the Explanatory Notes explain that this is "a scheme under which new suppliers can be added to the scheme at set times during its lifetime". The language of the Bill differs from the Green Paper and refers to open frameworks as a scheme of successive frameworks re-awarded on substantially the same terms. An open framework only needs to open at certain times and expires in 8 years, it will not be permanently open to new suppliers like a dynamic market, but will allow a degree of flexibility to authorities where it has not been provided under the existing framework provisions.

Other significant changes relate to transparency. An evident area where transparency has increased can be seen in the provisions relating to notices.

Contracting authorities must issue the following notices in the relevant circumstances:

- Planning and pipeline notice where contracting authorities consider they will spend more than £100 million under relevant contracts in the coming financial year;
- Tender Notice;
- Contract Award Notice;
- Contract Detail Notice;
- Contract Change Notice, when applicable;
- Dynamic Market Notice where a dynamic market is to be established;
- Transparency Notice where direct awarding in special cases and switching to direct award;
- Payment Compliance Notice; and
- Below Tender Threshold Notice, where applicable.



There are also a couple of voluntary notices namely, planned procurement and pre-market engagement notices. Meanwhile, contracts themselves must be published where they are valued over £2 million. Although many of the notices will be familiar to contracting authorities, it will be important to gear up to meet these requirements, particularly for smaller contracting authority procurement teams.

Another new area of transparency is the requirement to publish key performance indicators ("KPIs") for contracts over £2 million. Contracting authorities must set and publish at least three KPIs. They will not apply if it is not appropriate to the subject of the contract to monitor performance, and the provisions do not apply to frameworks, concession contracts or light touch contracts.

The government has also taken the opportunity to disapply the duty on local authorities under s.17 of the Local Government Act 1988 in relation to the procurement rules. The disapplication will mean that local authorities will not be in breach of their obligations under s.17 where complying with their obligations under the Procurement Bill, recognising the non-commercial considerations within the legislation. This will be a welcome change, clearing up any inconsistency between legislation.

Finally, it should be noted that various provisions of the Bill are to be implemented by the Secretary of State, likely resulting in the need to navigate several pieces of secondary legislation as and when these come into force.

This article touched on some key points from the Bill, please look out for further updates as we continue to explore the implications of the Bill and any amendments.

**We advise contracting authorities on all manner of issues relating to public procurement and our experts are on hand to guide authorities through the intricacies of the procurement reforms and to advise on any other procurement related issues. If you would like further advice and assistance in relation to any issue raised in this article, please contact us.**



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# DON'T ALL STAND AT ONCE! THE UNRESOLVED QUESTION OF STANDING FOR NON-ECONOMIC OPERATOR CLAIMANTS IN PROCUREMENT CHALLENGES







As explored in our article in **Edition 30 of Sharpe Focus**, the not-for-profit campaign organisation Good Law Project (GLP) has brought several challenges against central Government departments relating to contracts awarded during the COVID-19 pandemic. Whilst generating political intrigue among the wider public, for procurement lawyers the interest of these cases focusses on the courts' approach to whether, and when, a non-economic operator claimant (non-bidder), such as GLP, possesses the requisite standing to challenge a procurement process via judicial review.

The previous decisions in the High Court decided this issue favourably for GLP, prompting concern amongst contracting authorities that the floodgates for a new avenue of challenge had opened. However, following the Court of Appeal's decision in *R (Good Law Project) v Minister for the Cabinet Office*<sup>1</sup> and the High Court's most recent decision in *R (GLP & Runnymede Trust) vs The Prime Minister and the Secretary of State for Health and Social Care*<sup>2</sup> it appears that those concerns may be unfounded and, in the least, the issue of standing for those without a commercial interest in a procurement is a question which is 'ripe for review'.

In this article, Senior Associate, Lorraine Spurling, summarises the recent jurisprudence on this important issue.



## High Court Decisions

Following reports which suggested emergency procurements at the height of the COVID-19 pandemic were conducted without compliance with proper procedure, GLP brought challenges to a number of Government procurement decisions via judicial review, succeeding in the High Court on four notable occasions.

In each case, the preliminary issue of standing was considered by the High Court who repeatedly demonstrated a willingness to bestow standing on GLP despite their non-economic operator status.

### ***R (GLP) v Secretary of State for Health and Social Care***<sup>3</sup>

In a case regarding direct contract awards using Regulation 32(2)(c) of the Public Contracts Regulations 2015 (PCR), the High Court held that the Secretary of State had breached both Regulation 50<sup>4</sup> and the Government's own Transparency Policy in awarding the contracts without publishing a Contract Award Notice.

On the issue of standing, Chamberlin J summarised the relevant case law with an emphasis on the obiter reasoning of the Court of Appeal in *R (Chandler) v Secretary of State for Children, Schools and Families*<sup>5</sup>. In a passage which has been cited in subsequent GLP cases, Chamberlin J cited Chandler as authority for the proposition that:

*"[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...; or*
- (ii) The gravity of a departure from public law obligations "justifies the grant of a public law remedy"*<sup>6</sup>

In the absence of an economic operator who could realistically bring the challenge – and given both the value of the contracts and GLP's expertise in this area – the Court held there was a powerful public interest in granting GLP standing to bring the challenge.

### ***R (GLP) v Minister for the Cabinet Office and Public First Ltd***<sup>7</sup>

In GLP's second high-profile challenge – this time relating to a contract for the provision of 'communication services' in the pandemic – the High Court again determined that GLP's sincere interest in promoting good public administration, alongside the gravity of the issues invoked by the case, justified the scrutiny of the Court.

After adopting the approach to standing summarised above, O'Farrell J went on to conclude – on the substantive issues – that while GLP failed to demonstrate that the Government's decision to directly award a contract without prior advertisement had breached its obligations under the PCR, it nonetheless succeeded in arguing that the decision had given rise to "apparent bias" under common law.

This first instance decision – now successfully appealed as discussed below – raised the prospect of what the Court of Appeal went on to describe as *"the creation of a common law procurement regime-light"*<sup>8</sup> in which contracting authorities could face procurement challenges derived entirely from public law obligations, from those with no commercial or personal interest in the procurement.

### ***R (GLP) v Secretary of State for Health and Social Care & Abingdon Health Plc***<sup>9</sup>

In a case which sparked interest because it required disclosure of the former Health Secretary's personal communications, GLP's standing to bring a claim was again reiterated. In this instance, the challenge related

to the direct award of three contracts for the production of rapid COVID-19 antibody tests and the issue was considered in a preliminary hearing in the TCC.

### ***R (Good Law Project and another) vs Secretary of State for Health and Social Care and others***<sup>10</sup>

In GLP's most recent victory, the High Court found that the Government's operation of a 'VIP lane' for awarding contracts to suppliers under Regulation 32(2)(c) of the PCR was unlawful on grounds it breached the EU principles of equal treatment and transparency (codified in Regulation 18).

Addressing the issue of GLP's standing, O'Farrell J once again reiterated the interpretation of Chandler as adopted in *R (GLP) v Secretary of State for Health and Social Care*. In this instance, concluding that in the absence of a disgruntled bidder to bring the claim, *"the gravity of the alleged breaches...support a finding of standing so as to enable review by the courts"*<sup>11</sup>.

### ***"Ripe for Review"***

In February 2022, the Court of Appeal allowed the Minister of State for the Cabinet Office's appeal against the first instance decision in *R (GLP) v Minister for the Cabinet Office and Public First Ltd*.

The appeal – made on the substantive grounds that the application of Regulation 32(2)(c) effectively nullified other obligations with regard to transparency and bias – did not explicitly cover the issue of GLP's standing as a non-economic operator. However, obiter remarks by Lord Burnett of Maldon CJ querying both GLP's standing and the applicability of common law principles to a procurement challenge, have cast some doubt on the longevity and scope of the trend for non-economic operators to bring procurement challenges via judicial review.



Describing the issue as ‘ripe for review’<sup>12</sup>, the Court noted that it was an unprecedented outcome for “a party with no potential interest in a contract [to obtain] a declaration of unlawfulness on the basis of apparent bias in respect of a decision by a public body to grant a private law contract”<sup>13</sup>.

This more measured approach to standing has now been restated in the decision of the High Court in *R (GLP & Runnymede Trust) vs The Prime Minister and the Secretary of State for Health and Social Care*. The case was brought on the grounds of indirect discrimination, breach of the public sector equality duty and apparent bias in relation to the appointment of four people to roles critical to the Government’s response to the COVID-19 pandemic.

Following a detailed analysis of the issue of standing, the Court found that “not everyone who has a strong and sincere interest in an issue will necessarily have standing”<sup>14</sup>. Further, in response to GLP’s argument that they possessed standing on the basis of their Articles of Association, the Court noted that an organisation cannot “confer standing upon itself by drafting its objects clause so widely that just about any conceivable public law error by any public authority falls within its remit”<sup>15</sup>.

Consequently, whilst the Court did determine that there had been a breach of the public sector equality duty, the Court was clear that GLP did not have standing to bring the claim and the declaration was made entirely in respect of the application made by Runnymede Trust.

These most recent judgments suggest early concerns that the interpretation of *Chandler* as adopted in the High Court would bring a tidal wave of alternative procurement challenges by “interested” non-economic operators may have been unwarranted. In any event, with numerous further cases being brought by the GLP, we should soon have a clearer understanding as to whether the Courts will now ensure that the floodgate is firmly shut.



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<sup>1</sup> [2022] EWCA Civ 21

<sup>2</sup> [2022] EWHC 298 (Admin)

<sup>3</sup> [2021] EWHC 2091 (TCC)

<sup>4</sup> Regulation 50 requires contracting authorities to publish a Contract Award Notice “not later than 30 days after the award of contract or conclusion of the framework agreement”.

<sup>5</sup> [2009] EWCA Civ 1011; [2010] PTSR 749

<sup>6</sup> [2021] EWHC 2091 (TCC) at [99]

<sup>7</sup> [2021] EWHC 1569 (TCC)

<sup>8</sup> *R (GLP) v Minister for the Cabinet Office and Public First Ltd* [2022] EWCA Civ 21 at [76]

<sup>9</sup> [2021] EWHC 2595 (TCC)

<sup>10</sup> [2022] EWHC 46 (TCC)

<sup>11</sup> [2022] EWHC 46 (TCC) at [505]

<sup>12</sup> [2022] EWCA Civ 21 at [6]

<sup>13</sup> [2022] EWCA Civ 21 at [8]

<sup>14</sup> [2022] EWHC 298 (Admin) at [22]

<sup>15</sup> [2022] EWHC 298 (Admin) at [57]





# BIODIVERSITY NET GAIN – WHAT WE KNOW SO FAR







In November 2021, in the midst of the media attention surrounding COP26, the UK Parliament passed what the Government has hailed as the “World-leading” Environment Act 2021 to “protect and enhance our environment for future generations”. However, much of the Act does not come into force until the Secretary of State makes regulations to that effect.

In this article, Associate Emily Knowles considers a key element of the Act – the statutory duty for biodiversity net gain and what this means for developers and local planning authorities.



## NPPF and Planning Policies

The planning system has long had at its heart an overarching environmental objective to protect and enhance the environment.

The National Planning Policy Framework (NPPF) 2021 states that planning policies and decisions should minimise impacts on, and provide net gains for, biodiversity, and requires that opportunities to improve biodiversity in and around developments should be integrated as part of their design, especially where this can secure measurable net gains for biodiversity.

The delivery of biodiversity net gain is also referred to in the Planning Practice Guidance and National design guidance.

However, until the Act, the planning system had stopped short of imposing a statutory requirement to secure biodiversity net gain.

## Biodiversity Net Gain in the Environment Act

The Act will amend the Town and Country Planning Act 1990 so that all planning permissions (subject to exemptions and transitional provisions) will be deemed to be subject to a pre-commencement condition to secure the 'biodiversity gain objective' is met. This will be achieved through the submission of a biodiversity gain plan to be approved by the local planning authority (LPA) prior to implementation.

The objective will be met if the biodiversity value attributable to development exceeds the pre-development value of the onsite habitat by at least 10%. The biodiversity value will be calculated in accordance with the biodiversity metric – a document produced or published by the Secretary of State. Biodiversity Metric 3.0 was published by Natural England in July 2021 – see [this link](#). Biodiversity value is made up of:

- post-development biodiversity value on-site (i.e. on-site enhancements);
- biodiversity value of any registered off-site biodiversity gain allocated to the development (i.e. off-site enhancements or use of land off-site), and
- the biodiversity value of any credits purchased (essentially a monetary contribution).

The biodiversity gain plan submitted to the LPA must include proposed steps to be taken as part of the development to minimise the adverse effects of the development on biodiversity through any of the available methods.

Any enhancements, whether on-site or off-site, will need to be maintained for at least 30 years post-completion, and this will be secured either through planning conditions, section 106 agreements, or conservation covenant agreements. Conservation covenants are also dealt with by the Environment Act.

It will also be possible for developers to purchase credits from the Secretary of State to meet the objective, however the mitigation hierarchy applies and therefore the preference is for avoidance, mitigation and then compensation for loss.

## What don't we know?

The provisions in the Act relating to biodiversity net gain and the biodiversity gain objective are not yet in force and will require further regulations to be made before they become operative. Regulations will also be required to add details that are yet unknown. Certain matters which can be amended or added to by regulations include:

- The relevant percentage by which post-development biodiversity must exceed pre-development biodiversity;
- The period for which enhancements must be maintained (this cannot be less than 30 years);
- How biodiversity value will be measured (the metric can be amended);
- What will actually constitute on-site and off-site improvements and how these are valued;
- How determinations as to biodiversity gain plan shall be determined including the factors that LPAs can take into account when making a decision.

Regulations will also set out types of development to which the deemed condition will not apply. That will be an important thing to look out for.

There is little information as to how biodiversity credits will work, how much they will cost, and whether they will be priced in such a way as to incentivise provision on-site and actually achieve real environmental improvements where needed, as opposed to financial contributions to change elsewhere.

As can be seen, whilst the statutory requirement is eye-catching and impressive, there is a lot of detail yet to be settled and, as always, it is difficult to assess the impact of a policy when so much detail is unknown.

### What does this mean for developers and landowners?

Whilst not yet in force, the legislation represents a trend in policy and public thought and, in the short-term, developers should seek to demonstrate an understanding of that and to increase biodiversity through their projects.

It will also be key to study the provisions in the Act and aim to understand what they require; for example, developers should therefore ensure that they are familiar with the metric and how it works well in advance of this coming into force.

Once in force, the majority of developments will need to comply. Biodiversity value will need to be proven using the specified metric and appropriate enhancements or other mitigation will need to be discussed and agreed with the LPA.

As the biodiversity gain plan needs to be approved before commencement it will be essential for developers and landowners to engage early with the LPA as to the suitability of any proposed on-site enhancements, as well as to the availability of registered sites suitable for habitat enhancement or creation.

This can be done by engaging in early pre-application dialogue with the LPA, obtaining the input of an ecology consultant at an early stage, and by submitting a biodiversity gain plan as part of the planning application.

### What does this mean for Planning Authorities?

The NPPF 2021 and many local planning policies already require applications to demonstrate improvement with regards to biodiversity, and planners should therefore be familiarising themselves with these rules and requirements, as well as the provisions of the Act.

Once the relevant part of the Act comes into force, the LPA will need to consider how it will implement the requirements of the legislation – the valuation of biodiversity net gain will be a complex exercise and require significant expertise to implement. LPAs should consider what resources are available to ensure that they are trained and ready from the get-go.

There will be a need to monitor and ensure that enhancements are provided for a period of 30 years which will clearly involve additional cost and resources for the LPA which will need to be planned for.



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# CITY CENTRE POLLUTION AND WORKING PRACTICES







It has recently been reported that pollution levels in London are expected to reach the highest level recorded since March 2018.

This poses an immediate risk to more vulnerable employees who have underlying health conditions and are working outside.

Here, Juli Bann looks at the key question this raises: does an employer need to take any additional measures to protect the health and safety of employees?



### Who is impacted?

The Government's advice states that, when pollution is at the highest level, adults and children with lung problems, adults with heart problems, and older people, should avoid strenuous physical activity.

Organisations have a duty to provide a safe and suitable environment for all their staff. Many local authorities provide frontline services, which involve staff having to work outside where they are exposed to the increased pollution risk.

Waste removal services, parking attendants, road and grounds maintenance, and housing officers conducting tenant visits are a few examples of staff work predominantly outside.

### What steps do employers have to take to implement safety measures against pollution?

- 1** We suggest employers should consider this Government warning as a trigger to re-assess existing risk assessments for workers.
- 2** In situations where an employer is already on notice that a specific employee(s) has underlying health concerns which may be exacerbated by pollution, we would recommend that an individual risk assessment is conducted or an existing one re-evaluated in consultation with the employee.
- 3** It would be prudent to consider whether an additional Occupational Health assessment would be necessary to inform that consultation.
- 4** Many local authorities outsource certain services to private suppliers. As a result, appropriate safeguards should be included in the service agreement to ensure that the supplier takes suitable measures to protect staff. This should include making specific reference to the risk posed by air pollution.

### Practical Implications

The bottom line is the populations of large cities must deal with pollution on a daily basis and so there needs to be a clear link between the nature of an employee's work and their personal condition to warrant the employer having to make significant protective measures.

Where an employee has reported health concerns the employer will already be on notice, and the increased risk of air pollution should be factored into the protective measures taken.

Sharpe Pritchard has an experienced team of employment solicitors who regularly advises public sector clients on all manner of contentious and non-contentious employment law matters including drafting and reviewing policies. Please contact Juli Bann if you wish to discuss the implications of this article in more detail.



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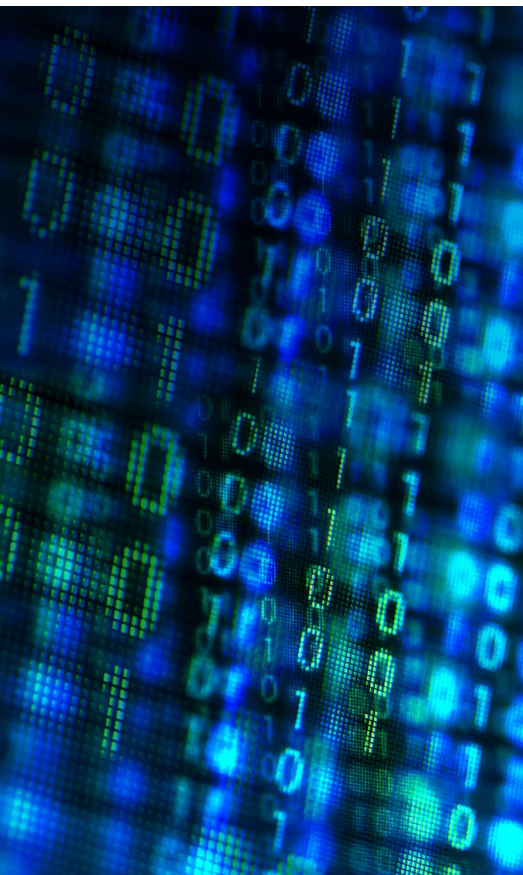
# CHANGES TO INTERNATIONAL DATA TRANSFERS: WHAT YOU NEED TO KNOW



Following a consultation in 2021, the Information Commissioner's Office has issued the International Data Transfer Agreement (**IDTA**) for international transfers of personal data.

This replaces the Standard Contractual Clauses (**SCCs**) that can be currently used to enable transfers of personal data from the UK to other countries.

Here, Associate Charlotte Smith, who specialises in technology and data, explains how the changes to the international data transfer rules will affect your organisation and the actions you need to take.



## Does the UK GDPR allow international transfers of personal data?

Under the UK GDPR, personal data cannot be transferred outside of the UK unless the transfer is to a country with an 'adequacy decision' or if an appropriate safeguard (as described in the GDPR) is in place.

The IDTA will be an appropriate safeguard that can be used and, like SCCs, will likely be the most common appropriate safeguard used. The purpose of the IDTA is to place obligations on the exporting and importing parties to ensure that data subjects will continue to have enforceable rights and remedies even if their personal data is transferred outside of the UK.

## Why is the IDTA needed?

There are a number of reasons as to why the IDTA has been introduced:

**1** Brexit. SCCs are a tool that could be used by any European Economic Area country to transfer personal data to a country outside

of the EEA (unless the importing country had an adequacy decision or another safeguard in law could be used). Following the UK leaving the EU, the UK can put in place its own appropriate safeguards. The EU Commission also introduced a new form of SCCs in 2021, which do not apply to the UK.

**2** GDPR. The current form of SCCs was written before the GDPR was issued in 2016 and therefore in places the SCCs were out-dated. Therefore, the IDTA has been written to align with the UK GDPR.

**3** The case of *Schrems II*. The most notable outcome of the *Schrems II* case in 2020 was that it struck down the EU-US Privacy Shield, which allowed transfers of personal data from the EU (and UK) to the USA. However, the case also commented upon the use of SCCs, noting that exporting organisations should also be carrying out impact assessments to ensure that the SCCs will be enforceable in the importing country. The IDTA has been drafted to reflect such requirements.



**4** It better reflects different processing activities. The current form of SCCs in the UK only reflects controller-to-controller or controller-to-processor transfers. The IDTA offers more flexibility. For example, it recognises processor to sub-processor transfers of personal data.

As an alternative to the IDTA, the Information Commissioner's Office has also issued the SCC Addendum. The SCC Addendum can be used as an addendum to the new form of EU SCCs and will be of most use to multinational organisations that are making data transfers under the UK GDPR and the EU GDPR. The IDTA, therefore, will likely be of more use to UK-based public bodies who are transferring personal data.

#### **When do I need to start using the IDTA?**

The IDTA (and the SCC Addendum) comes into force on 21 March 2022.

Nevertheless, you can continue to use the old form of SCCs for contracts concluded on or before 21 September 2022. You will then have until 21 March 2024 to transition from the old form of SCCs and move to the IDTA.

#### **What should I do now?**

You should use the new form of IDTA for new international data transfers taking place on or after 21 March 2022, if the transfer is to a country without an adequacy decision, or if there is no other appropriate safeguard you can rely on.

For existing contracts, review which of those contracts involve an international transfer of personal data and which use the old form SCCs to protect that transfer. If that contract will not expire prior to 21 March 2024, then you will need to work with the other contracting party to put the IDTA in place.



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# LEASEHOLD REFORM (GROUND RENT) ACT 2022: GRINDING GROUND RENT TO A HALT







The Leasehold Reform (Ground Rent) Act 2022 (“the 2022 Act”) was granted Royal Assent on 8 February 2022. Partner, Gemma Duncan and Solicitor, Christos Paphiti, examine the changes and impact of the new legislation for the real estate sector.

## Ground rent limited to 'a peppercorn'

The 2022 Act will restrict ground rents (and any associated administration fees) on newly created long leases of houses and flats (with some exceptions) to an annual rent of 'one peppercorn', i.e. at no financial value.

## Which leases will be caught by the 2022 Act?

The 2022 Act will apply to residential long leases (i.e. for a term longer than 21 years) granted for a premium. The 2022 Act will also apply to the extended term of any lease extension. The 2022 Act is not retrospective and will only apply to leases which are granted from the date the legislation comes into force (expected to be within the next 6 months), with the exception of retirement properties where new leases will not be caught until 1<sup>st</sup> April 2023.

In a situation where a lease variation results in a surrender and regrant of an existing residential long lease the new lease will be caught by the 2022 Act whether or not it is granted for a premium.

The following leases are excluded from the scope of the 2022 Act:

- Business leases
- Statutory lease extensions of houses and flats
- Community housing leases
- Home finance plan leases ('rent to buy')

In relation to shared ownership leases, any Tenant's rental element will be caught by the Act, but landlords will still be able to charge rent on any retained share of the property.

## Sanctions

If, in contradiction of the 2022 Act, a new lease or lease extension is granted which includes escalated or reviewed ground rent, the landlord

could be subject to a fine by the local authority of between £500 to £30,000 in each case.

A leaseholder also has the right to apply to the First-Tier Tribunal (Property Chamber) which has the power to order:

- i) a declaration that the ground rent should be read as being a peppercorn rent; and
- ii) recovery of any ground rent paid as a result of demands for payment made in contravention of the 2022 Act, together with interest.

## Impact

- Landlords will need to ensure that their standard terms for qualifying leases are amended so that ground rent provisions do not charge more than one peppercorn.
- Landlords will need to be mindful of the provisions of the 2022 Act when dealing with variations to current leases which could amount to a surrender and re-grant.
- Enforcement can be taken against past and current landlords, and ground rent (plus interest) can be recovered from anyone acting on a landlord's behalf, e.g. property agents.
- It is important to note that the 2022 Act is not retrospective and does not apply to leases which have already been granted, although there is increasing pressure on the UK Government to introduce legislation which would extend these rules to existing leases, and after recent action by the CMA some large developers have already voluntarily committed to remove terms from their leases which result in significant increases in ground rent over time.



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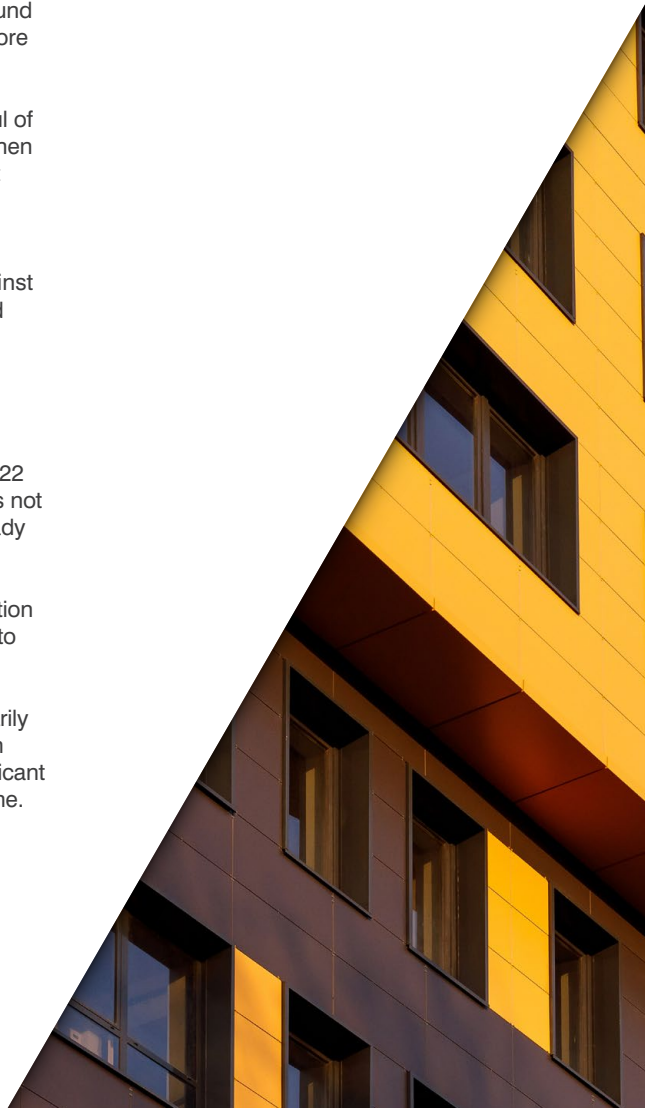
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# LANDMARK PROCUREMENT CHALLENGE JUDGMENT ON THE TIME LIMIT FOR COMMENCING PROCEEDINGS



When it comes to reported UK procurement challenge judgments under the Public Contracts Regulations 2015, there is a surfeit of cases on the consequences of not commencing proceedings in time and when the Court will find that there is a good reason to extend time.

So, it might be a little surprising to note that a recent judgment traversed a novel point for the English court to decide in this area. That is, if proceedings are started late, but before the standstill period expires, does the fact that the standstill period has not elapsed amount to a good reason to extend time?¹

Here, Partner, Colin Ricciardiello, who was the solicitor for the London Borough of Lewisham, outlines the facts of the case.



Since the judgment in *Access For Living v. London Borough of Lewisham* [2021] EWHC 3498(TCC) we know that the answer is: “No. It is not a good reason to extend time”.

At first blush the timings of these two matters ought not to interact as the standstill period under Regulation 87(3) is shorter (most commonly it is at the end of the 10th day after the Regulation 86 award decision notice is received) than the time limit to commence proceedings under Regulation 92(2), being 30 days from the date of actual or constructive knowledge that the grounds for starting a claim had arisen.

If the grounds of knowledge to bring the claim arose from the contents of the award decision notice, then the standstill period and the time limit for starting a claim commence at the same time – namely from receipt of the award decision notice.

However, it is commonplace to extend the standstill period in cases where the parties are corresponding at the pre-action stage and indeed the Technology & Construction Court’s guidance on such challenges encourages sensible extensions as a part of the objective to avoid the commencement of unnecessary claims.

Also, when it comes to whether there is a good reason to extend time, the interplay between the two is not immediately obvious since they are doing two different things. Until its expiration, the standstill period *prevents* a contracting authority from entering into a contract with the successful tenderer whereas the 30-day period controls the deadline for *commencing* proceedings.

The two elements do though come together in this way – if proceedings are commenced during the standstill period, then that engages the contract-making suspension under Regulation 95 and so ensures the continuance of the bar to entering into the contract in issue. That in turn gives the court the jurisdiction to award the wide remedies under Regulation 97 which are only available if the contract in issue has not been entered into.

Access is a charity and an incumbent provider who relied heavily on a work stream from Lewisham. It had been disqualified from an adult social care procurement for failing to meet a Quality scoring threshold. It was informed of that decision by a notice dated 7 February 2020 (but received on 9 February 2020) and that a standstill period was being observed.

Accordingly, the 30-day time limit expired on 9 March 2020, but the claim was started on 11 March 2020. There was no dispute over whether the claims based on the information in that notice had been commenced out of time – they were two days late. However, they were still commenced before the extended standstill period expired because an extension had been agreed to 13 March 2020.

As it emerged from Access’ evidence it accepted that the reason for the lateness was an error on its solicitors’ part in “conflating” or they “equated” the extension of the standstill with a corresponding extension of limitation. It was also conceded that this error was not in itself a good reason to extend time.



That concession was rightly made as the test was whether there is a good reason to grant an extension, not whether there was a good reason for not commencing in time – *Amey Highways Ltd v West Sussex County Council* [2018] EWHC 1976 (TCC), a case where an extension was granted.

In its proceedings, Access claimed that the reasons in its notice showed that Lewisham had misapplied an unambiguous award criteria. In the alternative, a complaint was made that the ITT was vague and breached the principle of transparency. If so, Lewisham argued knowledge of that breach ran from the date of publication of the ITT – 29 October 2019 – and so there was no power to extend in respect of that claim as 3 months from then had long expired.

The court had before it two applications: Lewisham’s (based on its “limitation defence”) to strike out the claim and summary judgment; and Access’ to extend time to commence proceedings.

The judge, Jefford J., struck out the claim and refused Access’ application. She did though hold that it was reasonably arguable that knowledge of the ITT transparency claim did not arise until Access knew of Lewisham’s interpretation and that was only known when it received the notice on 9 February 2020. However, as the time in respect of that claim also ran from that date, it too was time barred.

The judge noted that the 30-day limit was a short one “...but the courts have repeatedly emphasised that it should be observed”. As in many other limitation cases the origin of that approach was identified as being the Court of Appeal’s judgment in *Jobsin v. Department of Health* [2001] EWCA Civ 1241.

In *Jobsin*, the Claimant argued that it did not know it had a claim until it instructed solicitors and that the short extension did not prejudice the Defendant. The judgment in *Jobsin* alluded to:

the “...good policy reason that it is in the public interest that challenges to the tender process of a public services contract should be made promptly so as to cause as little disruption and delay as possible”; and

“.... A wider public interest in ensuring that tenders are processed as quickly as possible.”

A balance between the two competing interests, to allow challenges to be made and the need to ensure such challenges are brought expeditiously, had to be struck. The result of that balance was the time limit.

It was that wider interest which led the judge to decide there would be prejudice to Lewisham if an extension was granted. Thus, commencing proceedings was contrary to that policy and interest and extensions should only be granted if there was a good reason. In *Jobsin*, ignorance of the law and the short duration of the delay were held not to be good reasons.

In respect of the duration of the extension, the judgment in *Access* referred to (and much approved of) the judgment in *Mermec Uk Ltd v Network Rail Infrastructure Ltd* [2011] EWHC 1847 (TCC). At 23 (c)

of that judgment Akenhead J. said:

*“It is said that the delay was only some six or seven days and that there should be an extension for such an insignificant period because it is a relatively short delay. However, there is no point in having a three-month period [as it then was and not 30 days] if what that means is three months plus a further relatively random short period.”*

In addition, Akenhead J.’s judgment in *Mermec* also featured heavily in the judge’s reasoning when it came to what constituted a good reason for extending time and (without being exhaustive) a good reason would include factors which prevent the claim form being issued and which are beyond the control of the claimant; these include illness or detention of relevant personnel.

In *Turning Point Ltd v. Norfolk County Council* [2012] EWHC 2121 a short extension of 14 days was sought and that was said to be reasonable and proportionate but the same judge as in *Mermec* held:

*“That cannot in itself be a good reason because the 30 day period is clearly defined and, if statutorily, what was intended was 30 days plus a reasonable proportionate and short period, that is what the legislators would have written. A good reason will usually be something which was beyond the control of the Claimant; it could include significant illness or detention of relevant members of the tendering team.”*

In this vein it was also decided in *SRCL v NHS Commissioning Board* [2018] EWHC 1985(TCC) that a good reason “...should ordinarily, relate to some factor that has an effect upon the ability of a claimant to issue.

*This is the approach of Akenhead J. In Mermec ...”.*

*SRCL* at [154] usefully summarises the principles when considering the grant of an extension of time and notes that: the categories of good reason are not closed or exhaustively listed; or which factors have relative weight to one another and; a “Lack of prejudice to the defendant is not a determinative factor”.

Jefford J. in *Access* noted that it was unfortunate such applications provoked a trawl through many authorities when the relevant principles were adequately set out in *Mermec* and if there was a need to go further then *SRCL* [154] were sufficient. From that perspective the following principles can be derived from the judgment in *Access* on good reason to extend time;

- It may be a good reason if there is a factor in play beyond the control of the claimant which prevents it from starting a claim in time. There was no reason why *Access* could not have commenced proceedings by 9 March 2020 when the 30 day limit expired as there was nothing outside of their control. *Access* had accepted that the reason for not starting in time was mistakenly equating the standstill for entering into the contract as also acting as a standstill for the purposes of limitation.
- The decision-making strictures applying to *Access* as a charity were significant but that did not stop it from preparing to issue in time if it was properly advised as to the relevant time limit.
- The merits of the claim; the devastating impact of losing the procurement were held not to be relevant and if they were, that would require the court to embark on some preliminary assessment of the merits in every case and that could not have been the intention of the Regulations.



- The fact the delay of two days was short was clearly insufficient reason to extend time. Access submitted that none of the authorities for an extension were concerned with such a short time. If a short delay of one or two days is reason to grant an extension, then why not 3 or 4 days and so on. That was the “random” number of extra days point made by Akenhead in *Mermec* and *Turning Point*.
- The purpose of the short time scale in issuing proceedings was to prevent delay in entering into the contract but in this case, because the standstill period had not expired, such a delay could not arise. Whilst superficially attractive, the judge held that in reality this was a situation of there being no good reason **not** to grant an extension, because there is no prejudice to Lewisham, rather than it being a good reason to grant the extension.

*“If I were to accept that approach, I would in effect, treat lack of prejudice to the defendant as the determinative factor and that would be wrong in principle and not accord with decided cases”.*

The Northern Ireland authority relied upon here (*Henry Brothers v Department of Education for Northern Ireland* [2011] NICA 59) was, it was noted, decided before the English decisions on the principles to be applied. There was little analysis in that case as to why the shortness of the extension was a good reason and such a basis was inconsistent with subsequent English authorities.

There are many instances when a standstill period has ended, the 30-day time limit has expired, but the contracting authority has yet to enter into the contract. If this approach was accepted then, by extension, in all of those cases that would mean that the claimant would have a good reason to start a claim late. In this regard, the emphasis in *Jobsin* is on delay to the whole process and that delay would occur as in this scenario the contract-making suspension would take effect after the Regulations intended that the contract-making should be deferred by the standstill period.

This judgment helpfully summarises and affirms the principles in what is an area of discretion and one need look no further than *Mermec*. In applying those principles, it provides clarity in confirming that extensions of the standstill are not a good reason to similarly extend the time for commencing proceedings.

Practitioners would be well advised to keep the two separate and, to be secure, commence proceedings before the 30 days expires. An alternative would be to obtain agreement that the contracting authority will consent to the court granting an extension and that it will not take a time bar defence.

We know from the judgment in *Amey* that the court has treated consent as a good reason to extend time.



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<sup>1</sup> There is a limited discretion to extend time under Regulation 92(4) if there is a good reason to do so but that discretionary power is restricted to allowing proceedings to be commenced no more than 3 months after the date of knowledge of the grounds to bring the claim – Regulation 92(5).

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