

TRANSCRIPT OF PROCEEDINGS

Ref. HT-2020-000457

Neutral Citation: [2021] EWHC 1083 (TCC)

**IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)**

7 Rolls Buildings
Fetter Lane
London

Before THE HONOURABLE MRS JUSTICE O'FARRELL DBE

IN THE MATTER OF

GOOD LAW PROJECT LIMITED (Claimant)

-v-

**MINISTER FOR THE CABINET OFFICE (Defendant)
HANBURY STRATEGY & COMMUNICATIONS LIMITED (Interested Party)**

**MR R PALMER QC and MR B McGURK appeared on behalf of the Claimant
MR P MOSER QC and MISS HAFEZJI appeared on behalf of the Defendant**

**JUDGMENT
16th APRIL 2021**

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MRS JUSTICE O'FARRELL:

1. This is the claimant's application for a cost-capping order in the context of a challenge by way of judicial review. The application is opposed by the defendant primarily on the grounds that these are not public interest proceedings, and further, that the claimant has, or could make available, sufficient funds for the litigation.

2. The judicial review in question concerns the defendant's decision on 30 June 2020 to award a contract to the interested party, Hanbury, for provision of online and telephone polling and ancillary services. The grounds on which the decision is challenged, for which permission was given by this court on 5 February 2021, are firstly, that there was a lack of transparency; secondly, that there was apparent bias; thirdly, that there was no basis for making a direct award under regulation 32(2)(c) of the regulations of 2015 and fourthly, that the seven-month contract award that was made was disproportionate.

3. The circumstances in which the application is made is that the defendants have indicated that their costs for this matter are estimated to be in excess of £450,000. The matter has been identified by the parties as requiring a one-day hearing of the matter.

4. The claimant's position, which is supported by the evidence of Mr Maugham, in his witness statements, is that the claimant would be unable to continue with this judicial review challenge if no cost-capping order were to be made by the court.

5. The court's power to make a cost-capping order in a case of this kind is set out in the Criminal Justice and Courts Act 2015. Section 88 provides as follows:

“(1) A cost-capping order may not be made by the high court in connection with judicial review proceedings except in accordance with this section and sections 89 and 90”.

“(2) A cost-capping order is an order limiting or removing the liability of a party to judicial review proceedings to pay another party's costs in connection with any stage of the proceedings.”

“(3) The court may make a cost-capping order only if leave to apply for judicial review has been granted.”

6. The jurisdiction of the court to make a cost-capping order is set out at section 88(6):

“The court may make a cost-capping order only if it is satisfied that

(a) the proceedings are public interest proceedings;

(b) in the absence of the order, the applicant for judicial review would withdraw the application for judicial review or cease to participate in the proceedings; and

(c) it would be reasonable for the applicant for judicial review to do so.”

7. Section 88(7) provides that:
“The proceedings are public interest proceedings only if -
- (a) an issue that is the subject of the proceedings is of general public importance;
 - (b) the public interest requires the issue to be resolved; and
 - (c) the proceedings are likely to provide an appropriate means of resolving it.”

8. Section 88(8) provides that:
“The matters to which the court must have regard when determining whether proceedings are public interest proceedings include -
- (a) the number of people likely to be directly affected if relief is granted to the applicant for judicial review
 - (b) how significant the effect on those people is likely to be, and
 - (c) whether the proceedings involve consideration of a point of law of general public importance.”

9. This morning, Mr Palmer QC, leading counsel for the claimant, has drawn the court’s attention to the decision of Ouseley J in *The Queen on the application of Beety v Nursing and Midwifery Council* [2017] EWHC 3579, in particular at paragraph 8 where it was clarified that the criteria set out in subsection 8 are not determining criteria as to the court’s jurisdiction to make a cost-capping order; they are matters that must be considered by the court.

10. Turning, then, to the matters in dispute between the parties, firstly, sub-sections b and c of section 88(6) are, in my judgment, satisfied. I do not think that there was any serious challenge to that. Mr Maugham has produced evidence that in the absence of a cost-capping order, the claimant would withdraw the application for judicial review or cease to participate in the proceedings; further, it would be reasonable for the applicant for judicial review to do so. It has been suggested by Mr Moser QC, leading counsel for the defendant, that the financial model used by the claimant, which is a not for profit organisation, is to generate publicity for its various causes, in particular through applications such as this and the other cases for judicial review that it has brought, and therefore could in theory generate further funds by additional publicity. However, there is clear evidence from Mr Maugham in his witness statement that the claimant in this case would not pursue these judicial review proceedings if it continued to be exposed to the liability that is currently in excess of £450,000. Such liability would be in addition to the claimant’s own costs which are estimated to be between £60,000 (at discounted rates) and £110,000 (at full rates). I accept that evidence.

11. The key issue between the parties is whether these proceedings constitute public interest proceedings for the purpose of section 88(6)(a).

12. The claimant's position is that these are public interest proceedings. The claim concerns expenditure of substantial sums of public money via a contract award which the court has ruled, by way of permission, was arguably disproportionate and capable of being impugned on the ground of apparent bias. Therefore, it is in the public interest that there is proper scrutiny of the contract award in issue.

13. The defendant's position is that these are not public interest proceedings. The relief that the claimant is seeking is a declaration that the award of the contract was unlawful but the number of people likely to be directly affected by that relief and the effect on those people of the relief is very limited because the claimant isn't challenging an ongoing decision, policy or practice and it is not seeking a quashing order. The impugned contract was awarded in respect of an unprecedented event, which is highly unlikely to arise in the same way again. Notwithstanding the defendant's position that it has acted lawfully, it has, in any event, already taken steps to improve its processes and practices around emergency procurements, as explained in the witness statement of Sarah Harrison of the Cabinet Office. In those circumstances, it is submitted by Mr Moser that there would be no practical impact of a decision by the court on this judicial review.

14. Further, it is submitted by the defendant that the proceedings do not, in any event, raise a point of law of general public importance. Reliance is placed on the fact that another case has been brought by the claimant against this defendant, the Public First case, which has already been heard by the court, although judgment is still outstanding. The issues in that case are similar in character to these proceedings and therefore any of the significant issues that arise in this case, Mr Moser submits, would, in any event, be dealt with by the Public First case.

15. I start by considering whether or not there is a matter of general public importance raised by these proceedings as required by section 88(7)(a). I am satisfied that there is. This matter concerns the direct award of a public contract without publicity or competition. The issue is whether it was unlawful to award a contract in that way, that is whether the defendant can rely upon regulation 32(2)(c) of the PCR 2015 for this purpose.

16. Further, there is a serious issue raised as to whether or not there was any apparent bias. The court emphasises that this case does not concern allegations of actual bias; the case is whether the circumstances in which the contract was awarded, the identity of the individuals making the relevant decisions, and any connections they might have had to the interested party were such as to give rise to apparent bias. Those matters go to the heart of what amounts to good governance. There is clearly a public interest in ensuring that public contracts are awarded both lawfully and in accordance with any applicable regulations requiring transparency, fairness, equality and the absence of apparent bias.

17. The court has been taken by both parties to the National Audit Office Investigation and to the Boardman report. I do not find those reports to be of particular assistance. I accept that it is of relevance for the parties to identify the fact of an investigation outside these court proceedings and the defendant's proposal to ensure that, insofar as there are any gaps in its procurement procedures, or matters that can be improved, that those should be dealt with as matter of expediency. However, the existence of those investigations do not detract from the value of proper judicial scrutiny to determine whether the award in this case was lawful.

18. The second part of the public interest proceedings test at section 88(7)(b) is whether the public interest requires the issue to be resolved by these proceedings; and further at section

88(7)(c) whether the court proceedings are an appropriate means of resolving it, in particular through the proceedings being brought by the claimant.

19. I am satisfied that there is a part for the court to play in considering the legality of the procurement procedures used in this contract that goes beyond the appropriate investigation into this contract and others being carried out by, or at the behest of, the National Audit Office. It is appropriate that there should be a public hearing at which the court will consider the evidence and make a decision on the lawfulness of this particular procurement.

20. I then turn to the matters that I have to take into account under section 88(8). That includes the number of people likely to be directly affected if relief is granted, how significant the effect on those people is likely to be, and whether the proceedings involve consideration of a point of law of general public importance.

21. I accept Mr Moser's submission that the number of people likely to be directly affected if relief is granted is relatively limited; likewise there will be an insignificant effect on those people. Primarily, that is because it was a one-off contract and it has since been concluded. There is no ongoing procurement process or long-term contract such as regularly comes before this court on procurement challenges that would be directly impacted by any declaration of unlawfulness.

22. However, as I indicated when making the cost-capping order in the PPE claims case (HT-2020-000226 and others), there is a legitimate interest by taxpayers and others in whether or not procurement on the part of the government is carried out using good governance procedures and with integrity. To that extent there is some impact on them in terms of the relief that is sought.

23. More significantly, I consider that this case raises a point of law of general public importance. The issue concerns the ambit of regulation 32(2)(c) and the circumstances in which it will be engaged. The regulation provides for an exception to the general procurement rules and provides that the negotiated procedure without prior publication may be used for public contracts insofar as is strictly necessary, where, for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for the open or restrictive procedures of competitive procedures with negotiation cannot be complied with. Whether the Covid-19 pandemic justified the government in making a direct award without competition in this case will raise an issue of law regarding the ambit of the regulation against the factual scenario that existed in respect of this contract.

24. Such issue is not the same as the issue that arises in relation to the PPE contracts, which concerns transparency obligations. It is not the same as the issue that arises in the Public First case. Although I accept Mr Moser's submission that the issues in the Public First proceedings are similar in character to the issues that arise in these proceedings, they are not the same. The ambit of regulation 32 may be different for different types of contract. This issue has not yet been considered by the courts so as to produce a body of authority as to where the line should be drawn in these cases.

25. I also note that although it has been said that this pandemic is unprecedented and will not be repeated, no one can be certain whether or not this pandemic will be repeated. In any event, regulation 32 is not limited to public health emergencies. It is conceivable that it could apply to other emergencies, other unforeseen events. Therefore, the issue in this case is not the same as the issue that the court will determine in the Public First case.

26. In relation to the issue of apparent bias, the issues of law are very well established and the court will simply apply those established principles of law to different facts.

27. Therefore, in relation to regulation 32(2)(c) there is a point of law that will be of general public importance, the public interest requires the issue to be resolved and the proceedings are likely to provide an appropriate means of resolving it. For those reasons, I am satisfied that in this case the proceedings amount to public interest proceedings.

28. The court then has to consider, having regard to all of the circumstances of the case, whether it should exercise its discretion to make a cost capping order in this case. Section 89 states that:

“(1) The matters to which the court must have regard when considering whether to make a cost-capping order in connection with judicial review proceedings, and what the terms of such an order should be, include -

(a) the financial resources of the parties to the proceedings, including the financial resources of any person who provides, or may provide, financial support to the parties;

(b) the extent to which the applicant for the order is likely to benefit if relief is granted to the applicant for judicial review;

(c) the extent to which any person who has provided, or may provide, the applicant with financial support is likely to benefit if relief is granted to the applicant for judicial review;

(d) whether legal representatives for the applicant for the order are acting free of charge; and

(e) whether the applicant for the order is an appropriate person to represent the interests of other persons or the public interest generally.”

(2) A cost-capping order that limits or removes the liability of the applicant for judicial review to pay the costs of another party to the proceedings if relief is not granted to the applicant for judicial review must also limit or remove the liability of the other party to pay the applicant’s costs if it is.”

29. The claimant submits that the appropriate order for the court to make would be to cap liability for each party at £100,000. The defendant’s position is that the claimant’s liability should be capped at £200,000 and that its liability should be capped at £50,000.

30. The defendant accepts that the claimant will not benefit financially from these proceedings, and nor will any of its funders. Therefore, the court must consider the factors at (a), (d) and (e).

31. As to (a), the financial resources of the parties to the proceedings, the claimant has produced some evidence as to the funds that it has available. The updated position is that it has approximately £1.5 million in reserves, of which £725,000 is required to be kept aside for

six months' running costs and funding ongoing cases. That leaves approximately £830,000 available, but of that sum over £500,000 will be required for the Public First and the PPE claims. Potentially a further very significant sum, of between £400,000 and £600,000, would be required for the Abingdon case, although a cost-capping order application, I understand, is being made in that case.

32. Looking at that evidence, it is quite clear that the claimant has limited funds, whereas the defendant has the ability to secure funds from the treasury, although as stated in the judgment in the PPE case, I don't accept that the defendant is a bottomless pit. There are serious funding constraints in relation to the defendant's funds; in particular, if the defendant is required to pay significant costs in respect of one claim, it may make its resources unavailable to fund other matters. Therefore, its funds are not unlimited, but by comparison, the claimant's funds are very limited.

33. I accept Mr Moser's submission that the way in which the claimant chooses to allocate its available resources to different cases is a matter for the claimant. It is open to the court to take into account all of the circumstances that go to the claimant's available funding. That could include the way in which the claimant has chosen to spend those available funds, such as whether it is seeking to pursue these proceedings with the benefit of a CCO where it could choose to limit the number of cases that it decided to fund, leaving aside funds that would then be available for this particular case. The court should not be faced with a claimant who simply says "Well, I will start as many claims as I wish and because of the large number of claims I will never be able to pay any of the costs that might be incurred by the defendant". As a matter of principle, there must come a point where the court needs to consider that difficult issue. However, that point has not yet been reached. I am satisfied on the evidence produced by Mr Maugham that the claimant is managing its funds in an appropriate way. I note that Mr Moser was very careful to clarify that he was not alleging any impropriety on the part of the claimant.

34. In this case the difficulty faced by the claimant is the very large estimate of the defendant's likely costs in this case, namely in excess of £450,000. As Mr Moser submitted, these claims can be expensive to fight, this is not a straightforward judicial review case, it is, in essence, a procurement challenge, and the nature of the allegations made mean that the defendant will incur significant costs through the necessary factual investigation and disclosure exercises. Regardless of that, these costs are still very high. Without further explanation from the defendant, I consider that they appear to be disproportionate for a one day hearing, even in a complicated procurement case.

35. I have been taken to the judgment of Haddon-Cave J (as he then was) in *The Queen on the application of The Plantagenet Alliance Limited v Secretary of State for Justice* [2013] EWHC 3164, in particular the principles set out at [59]. The court takes those matters into account when considering whether to make any order in this case, and if so, what order. I consider that it would be reasonable and proportionate to make a cost-capping order in this case. The appropriate level of cost cap applied to each party should be £120,000. That will enable the parties to limit both their costs and those of their opponent in the knowledge that there is limited liability, but also recognising that the extent of the factual investigation in this case prior to the one-day hearing is a substantial one that comes at a cost. For those reasons I will make a cost-capping order limiting liability for each party in the sum of £120,000.

We hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

This transcript has been approved by the Judge