TRANSCRIPT OF PROCEEDINGS

Ref. (HT-2020-000226;
HT-2020-000419; HT-000291;
HT-2020-000292)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)
[2021] EWHC 1223 (TCC)

7 Rolls Buildings
Fetter Lane
London

Before MRS JUSTICE O'FARRELL DBE

IN THE MATTER OF

GOOD LAW PROJECT LIMITED AND EVERYDOCTOR LIMITED (Claimants)

- v -

SECRETARY OF STATE FOR HEALTH AND SOCIAL CARE (Defendant)

MR COPPEL QC and MR HALLIDAY appeared on behalf of the Claimants

MR BOWSHER QC and MR WEST appeared on behalf of the Defendant

JUDGMENT
22nd APRIL 2021

Transcribed from the official recording by eScribers
Central Court, 25 Southampton Buildings, London WC2A 1AL
Tel: 0330 100 5223 | Email: uk.transcripts@escribers.net | auscript.com

MRS JUSTICE O'FARRELL:

1. This is the claimant's application, issued on 12 April 2021, for an order that the defendant files and serves the detailed grounds for contesting the claim and any written evidence that is to be relied upon without redacting names of any individuals concerned within 48 hours.

2. There was a second limb to the application concerning the provision of screenshots and other contemporaneous evidence in relation to the applications by the interested parties to the defendant's online portal. That information has been provided by the defendant and is no longer in issue.

3. The claimants have a further application, issued on 19 April 2021, for an order that the defendant provide a witness statement explaining the parameters and method followed for its disclosure exercise, in particular to identify custodians and keyword searches carried out.

4. The applications are opposed by the defendant. In respect of the redaction application the defendant's position is that the approach taken to date (whereby names of junior officials are redacted save for any from whom witness evidence has been served) is appropriate but the defendant has proposed (with a limited number of exceptions) to provide all documents in an unredacted form into the confidentiality ring that has been established by the parties, which include six client representatives from the claimants.

5. In respect of the disclosure application the defendant's position is that this is not a conventional Part 7 claim; it is a claim for judicial review. The usual rules on disclosure do not apply and are not necessary in this case.

6. The background to these claims can be summarised very shortly. The applications are made in the context of an ongoing judicial review challenging the defendant's decisions to make direct awards of contracts for the supply of personal protective equipment (PPE) to the interested parties pursuant to Regulation 32(2)(c) of the Public Contracts Regulations 2015.

7. The grounds of challenge for which permission has been granted by this court are: firstly, that the direct awards made without notice or competition did not meet the

defendant's obligations of equal treatment and transparency; secondly, that no proper reasons were given for the direct contract awards; and, thirdly, that the contract awards were irrational, in the sense that inadequate financial or technical verification was undertaken and/or there was inappropriate use of a high priority lane to identify the relevant contracting suppliers.

8. The substantive hearing of the judicial review has been fixed for 17 May 2021, with a current estimate of six days (to include judicial reading time). That is, of course, less than one month from today's date.

9. I start by turning to what I consider to be a very helpful summary of the legal position by Singh LJ in the Divisional Court judgment of *Salonge Hoareau v Bancoult* [2018] EWHC 1508. Without reading every word of the relevant paragraphs, the relevant legal principles set out by Singh LJ include the following:

> "[9] … Disclosure is not automatic in judicial review proceedings. … One reason for this is that the nature of the issues in judicial review proceedings differs from most civil litigation. It is usually both unnecessary and inappropriate for the court to resolve factual disputes. The issues are usually ones of law.
>
> [10] That said, factual issues can arise, for example, in deciding what happens when an argument is made that a public authority failed to follow the rules of procedural fairness.
>
> [11] Nevertheless, even in the human rights context it is usually unnecessary for the court to resolve disputes of fact as distinct from forming an evaluation of those facts. In those cases where the court does have to consider whether to order specific disclosure - as the House of Lords made clear in *Tweed v Parades Commission for Northern Ireland* [2007] 1 AC 650, paragraph 3–
>
> > '... the test would always be whether, in the even given case, disclosure appears to be necessary in order to resolve the matter fairly and justly.'
>
> [12] In the same case the House of Lords made it clear that there is no warrant even in such a context for 'fishing expeditions.'…

[13] One of the reasons why the ordinary rules about disclosure do not apply to judicial review proceedings is that there is a quite separate but very important duty which is imposed on public authorities which is not imposed on other litigants. This is the duty of candour and the co-operation with the court, particularly after permission to bring the claim for judicial review has been granted. This duty goes back at least to the decision of the Court of Appeal in *R v Lancashire County Council, ex parte Huddleston* [1986] 2 All ER 941 …

…

[16] ... Sir John Donaldson MR [stated]

> 'This development [of judicial review] has created a new relationship between the courts and those who derive their authority from the public law, one of partnership based on a common aim, namely the maintenance of the highest standards of public administration.
>
> … It is for the respondent to resist [the] application if he considers it to be unjustified, but this is a process which falls to be conducted with all the cards face upwards on the table and the vast majority of the cards will start in the authority's hands.'

…

[18] … A particular obligation falls upon both solicitors and barristers acting for public authorities to assist the court in ensuring that these high duties on public authorities are fulfilled.

[19] One important aspect of the duty of candour and co-operation which should be emphasised and is not always fully appreciated is that it may tend if a different direction from what usually happens when disclosure is required or ordered in the sense of disclosure of documents. Simple disclosure of documents might suggest that all that the public authority has to do is give a lot of documents to the claimant's representatives, but this may, in truth, overwhelm them and obfuscate what the true issues are.

[20] The duty of candour and co-operation which falls on public authorities, in particular on HM Government, is to *assist the court* with full and accurate explanations of all the facts relevant to the issues which the court must

> decide. … It is the function of the public authority itself to draw the court's attention to the relevant matters ... 'the good, the bad and the ugly.' This is because the underlying principle is that public authorities are not engaged in ordinary litigation trying to defend their own public interests. Rather, they are engaged in a common enterprise with the court so as to fulfil the public interest in upholding the rule of law."

12. I set out those legal principles at the outset because it seems to me they cut across both of the two applications that are being made today.

13. I turn, then, to the first issue, which is that of the redactions that have been made. I am urged to have regard to the guidance prepared by the government itself in relation to judicial review proceedings and with specific regard to paragraph 4.3, which deals with redaction, and the material redacted should only be material for which a right or duty to withhold can be maintained. The guidance states–

> "Do not withhold altogether where you can redact. Do not redact where you can disclose. Redaction should only be performed on a copy of the original. Redactions should not destroy the meaning of the document. If it does, consideration should be given to withholding the whole document."

It also states that–

> "As with the rest of the disclosure exercise, a record should be kept of the actions taken in relation to a document, the reasons for them and those involved in taking them."

14. The evidence that is relied upon by the claimants in support of this application is the second witness statement of Mr Rook dated 12 April 2021. In that statement Mr Rook has explained the difficulties encountered by the claimants in understanding the defendant's case by reference to some of the documents which have been redacted. Examples are given within the statement of redactions that the claimants consider to be unwarranted; for example, reference to individuals who were significantly involved in procuring the relevant PPE contracts, those involved in allocation of the potential suppliers to the fast lane track and those involved in exercises of due diligence in relation to the potential contracts.

15. The claimant's case is that the extent of the redactions that have been made makes reading and understanding the documents confusing and difficult, includes individuals who played a critical part in the relevant events, includes the redaction of those who performed technical assurance on the interested parties' offers and extends to redaction of names included in the defendant's witness statements. It also is submitted that it appears to include more senior individuals, contrary to the defendant's assertion that only the names of junior employees have been redacted.

16. Mr Coppel QC (leading counsel for the claimants) submits that, firstly, there is no obligation or requirement on the part of the defendant to make these redactions in order to comply with its obligation under the data protection legislation. I accept that submission. An exception to the data protection obligations is where the court has either ordered that the detail of an individual be disclosed or where they are required for the purposes of ongoing litigation.

17. Secondly, it is submitted by Mr Coppel that the defendant has no obligation to redact the names; therefore, in accordance with its own guidance, the defendant should be required to unredact them in order to avoid difficulties for the court and the claimant's understanding of the evidence.

18. Further, it is submitted that the redactions that have been carried out do not comply with the defendant's duty of candour. Many of the redacted names, it is submitted, are relevant and therefore fall within the duty of candour. The blanket approach of deeming a name to be undisclosable simply because an individual is not senior is not an accurate way of assessing the significance of that individual to the relevant events.

19. A significant argument that is put forward by Mr Coppel today is that the court must have regard to the principle of open justice, which is not only must this judicial review take place in a public hearing, but the public must be able to both see and understand the evidence that is deployed so as to properly understand the proceedings.

20. Mr Bowsher QC (leading counsel for the defendant) submits that, first of all, the defendant has explained the basis on which the redactions have been made in the fifth

witness statement of Ms Whelan-Johnson and the fourth witness statement of Mr Marron. In general terms, the basis on which redactions have been made is to protect the identities and contact details of junior members of staff who have a reasonable expectation of privacy. Although their names appear in a number of the documents, their identities are not relevant to the facts of the case and they played no part in the decision-making that is the subject of scrutiny by this court.

21. Mr Marron explains that if the court were to allow the application for publication of those identities it would be disproportionately distressing to the vast majority of junior civil servants whose names would be released due to the high likelihood of media scrutiny and harassment connected to this claim.

22. A further ground of concern is those whose names cause sensitivity, such as civilian and military personnel from the Ministry of Defence and other departments who work in sensitive areas. A number of such individuals volunteered to assist in the procurement effort but there are security reasons for which the defendant would wish to maintain the confidentiality of those individual's identities.

23. The starting point for the court is always the important principle of open justice. I accept Mr Coppel's general submission that, wherever possible, it is necessary for the court to hold hearings in public. It is not a discretion. It is necessary for the court to hold proceedings in public. With that goes an obligation to ensure that the submissions and evidence that is deployed by the parties in open court should, as a general rule, also be made available to any member of the public who wishes to see and/or hear that evidence and those submissions.

24. However, there have always been a number of exceptions to that general rule, some of which arise regularly in procurement claims, of which this is a species, albeit that it is made by way of judicial review as well as the more conventional procurement challenges that come before this court.

25. It is not uncommon in procurement challenges for relevant documents to include commercially sensitive information, or information that is sensitive on national security grounds, particularly, for example, when the court is considering a public procurement for

some defence service or contract. In those circumstances it is accepted by the court that it is appropriate for some of the material to be seen only by the court, counsel, solicitors and a small group of the parties, either in a redacted or unredacted form.

26. For that purpose, confidentiality rings are, as a matter of routine, used in procurement cases. Indeed, in this case the parties have entered into a confidentiality arrangement, which has been the subject of a consent order put before this court. That is to ensure that those who are responsible for directing and conducting the proceedings have access to all relevant information in unredacted form, but also to ensure that the information that is made public does not trespass on issues of commercial sensitivity, national security or other sensitive issues. Therefore, there is nothing unusual in the way in which the matter has been conducted to date.

27. In terms of the redaction of the identity of specific individuals who do not fall into the categories of those with commercially sensitive information or the national security issue, it does not follow that those names are automatically to be made public.

28. This matter was considered - albeit in a different context - in the case of *Shah v HSBC Private Bank Limited* [2011] EWCA Civ 1154 by the Court of Appeal. The first relevant question is whether the redacted information is relevant, in the sense that it supports the claimant's case or adversely affects that of the defendant. So the starting point for the court is to consider whether the names of the individuals in respect of whom it is sought to put into the public domain are relevant to the issues that the court has to decide. If the identity of the party to a document is of no relevance to the issues, then there is no obligation on the defendant to make those names public.

29. These cases are all very fact-specific. The general guidance, namely, that: "Well, it depends" applies in this case as it would in any other case. It is a matter of considering each individual document or categories of document and each individual or categories of individual in order to establish whether or not the identity of those individuals is relevant to an issue that the court has to decide.

30. In broad terms, in my judgment the identity of an individual will be relevant if they were a senior individual involved in the procurement that is in question before this court. In

particular that includes any criteria that was set for selection, allocation of the cases to the high priority lane, together with the technical and financial appraisals carried out and, of course, those who were involved in the decision-making to award these contracts to these interested parties and to discount other interested parties.

31. I also consider that, in general terms, even if an individual was not senior, if they had significant involvement in the referral of individuals to the high priority lane or significant involvement in the technical or financial appraisals, then, prima facie, such individuals are likely to be relevant.

32. In my judgment junior members of staff are unlikely to be relevant in terms of their identity and/or their contact details. Therefore, prima facie, the likelihood is that there would be no obligation on the defendant, as part of its duty of candour, to disclose the details of those individuals. I also accept that issues of commercial sensitivity and issues of national security may also be justification for redactions.

33. The obvious starting point - as I think I have indicated during the course of the submissions before me - is that the defendant has already offered to disclose into the confidentiality ring the unredacted versions of the documents. I consider that that is the appropriate step that should be taken in this case.

34. I am not prepared to make a blanket order that all those documents should be disclosed openly to the claimants. The reasons for that are that, firstly, I accept that the defendant's evidence indicates good grounds for withholding the identity of a number of the individuals who are currently named in the documents but subject to redactions for the reasons that I have already given.

35. Secondly, the confidentiality ring has been set up precisely to deal with these sorts of difficulties, namely where the defendant wishes to withhold from the wider public documents that it accepts need to be disclosed to the court and to the claimants.

36. Of course, the claimants may wish to challenge some of the redactions. The appropriate way of doing that is for the documents to be unredacted and disclosed in the

confidentiality ring. Then the claimants can make any challenges as they see fit with regard to specific individuals, individual documents and/or categories of individuals or documents.

37. Thirdly, I note that the confidentiality ring in this case includes not just the lawyers involved in preparing and presenting the case, but also extends to six representatives of the claimants' organisations. Quite properly, what that means is that those who are directing the challenge also have an opportunity to consider the documents that have been disclosed in their unredacted form so as to form a view as to which to challenge, if any.

38. There is, of course, an exception to the unredacted nature of the documents to be disclosed into the confidentiality ring, which is that is any that are held back on grounds of security issues.

39. Mr Coppel accepted in his submissions that that might be a justification for continued redaction. It is clear that that must be the case. However, I do consider that it is incumbent on the defendant to explain to the claimants the categories of document or the categories of individuals in respect of whom they are not proposing to unredact those details.

40. This can be dealt with in a similar way to the court's approach to matters of privilege. Obviously it is not necessary to spell out the precise role of an individual because that would be to give away the information that is being protected. Nonetheless, it must be possible for some explanation to be given so that the claimants can take a view upon whether they accept that or wish to challenge it.

41. Therefore, in terms of the redactions, what I will do is order that the unredacted documents should be disclosed into the confidentiality ring by 4 pm on Wednesday, 28 April 2021.

42. The court turns then to the second application being made by the claimants for disclosure. The starting point is that Ms Ashlie Whelan-Johnson for the defendant has produced her fourth witness statement, dated 29 March 2021, in which she has explained the nature of the disclosure exercise that has been carried out. She explains the collation of the documents from various sources, the various tags that were applied in order to identify those that were relevant and not, duplication exercises, TAR appraisal and then review of the

remainder. That, in my judgment, was sufficient in terms of the initial exercise that was required by a defendant in a judicial review case where no disclosure order had been made.

43. I am aware of the guidance notes produced by the defendant that refers to the need for various details to be given such as would normally apply in respect of disclosure under CPR 31 but that guidance refers to those matters applying where the court has ordered disclosure. In this case, there has been no order for disclosure to date.

44. The application by the claimants is supported by Mr Rook's witness statement dated 19 April 2021 in which he expresses concern that the defendant has failed to identify the search terms or custodians and that he is concerned that there are a number of categories of documents - such as WhatsApp and various texts - that would be expected to have been disclosed but have not been. On that basis, he concerned that the defendant has not complied with its duty of candour in disclosing all of the documents that might be relevant and necessary for the fair disposal all of this issue.

45. Having regard to the legal principles that I cited from the *Hoareau* case earlier, I am satisfied that there has been a sufficient explanation given by Ms Whelan-Johnson in her fourth witness statement of the exercise that the defendant carried out. That was against the backdrop of neither party have having come to the court and asked for directions in relation to disclosure, having failed to agree the appropriate approach in this particular case.

46. I observe at this stage that, in general, in this court, if the parties think that disclosure is likely to be a significant issue, as it very often is, it is incumbent on them to start discussing that as soon as possible. If there is not an agreed approach, they should not sit back and wait and to see what happens but should be proactive in bringing it before the court. I say that not to admonish the parties in this case; I am aware that they are all engaged on a number of different challenges that have taken up enormous time and energy, but to encourage them in other cases to be proactive in bringing these matters before the court. Regardless of the nature of the disputes between the parties, the court encourages parties to raise at an early stage matters that they consider to be important on which they require either the court's direction or the court's guidance.

47. The difficulty that now arises is that time is running out to deal with any of these issues before the hearing.

48. I am satisfied that the defendant has explained adequately what exercise it has carried out. It may well be that the claimant has good grounds on which to seek an order for specific disclosure. To date it has not produced an application for specific disclosure. That would be the right way forward if the claimants are concerned that they have not had sight of all of the relevant and appropriate documents that they need in order to properly prepare for the forthcoming hearing. So I would urge them, if they wish to make an application for specific disclosure, to do so as soon as they possibly can. Otherwise I fear that the hearing date may not be viable.

49. For those reasons, the court declines to make the order that is sought by the claimants in relation to disclosure. The appropriate way forward is for an application for specific disclosure to be made.

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