

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 1237 (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
29th APRIL 2021**

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MRS JUSTICE O'FARRELL:

1. This is the claimant's application for orders: firstly, under CPR 18 for further information as set out in schedule A to the attached order; secondly, for specific disclosure under CPR 31.12 for searches to be made for documents falling within the classes of documents set out in schedule B to the order.

2. The proceedings before the court concern challenges by way of judicial review, to contracts awarded by the defendant for the supply of personal protective equipment, PPE, from the interested parties in April and May of 2020. There were six contracts awarded to PestFix, two to Clandeboye and one to Ayanda.

3. The grounds on which permission has been granted for the judicial review to proceed are:
 - a. Firstly, it is alleged that the contracts violated the treaty principles of equal treatment and transparency. It is said by the claimants that the defendant has failed to provide evidence that it conducted any, or any fair and transparent, form of negotiated process which applied equally as between prospective suppliers.

 - b. Secondly, it is alleged by the claimants that the defendant failed to provide proper reasons for the contract awards.

 - c. Thirdly, it is submitted by the claimants that the awards of the contracts was irrational. That allegation falls into two parts: firstly, it is alleged that no, or insufficient, financial or technical verification was undertaken in respect of the potential suppliers; and secondly, it is alleged that the use of a high priority lane for certain suppliers in the absence of any stated criteria for referrals to that high priority lane gave rise to an unfair advantage.

4. Mr Coppel QC, leading counsel for the claimants, submits to the court that the information and the documents that are sought today were initially requested by letter dated 14 April 2021, following a consideration of the detailed grounds and evidence filed and served by the defendant in this matter. The defendant's response, which was provided by

way of a letter dated 21 April 2021, in large part failed to answer the requests and/or supply the documents that the claimants contend they were entitled to.

5. The claimants' position is that the information that has been provided through the defendant's evidence, served at the end of March and more recently, has been supplied very late and is incomplete. Mr Coppel's submission is that in the absence of additional information and documents the claimants are unable to interrogate and respond to the defendant's evidence. In short he argues that there is no fair level playing field on which they can pursue their judicial review.

6. The defendant's position is that these requests for information and documents have been made at a very late stage. Essentially, it is submitted that they are not relevant to the grounds for which permission has been given. They will increase the costs of what has already been a very expensive disclosure exercise. No order for regular disclosure on a standard basis was made by the court or indeed sought by the claimants. The time that would be needed to comply with the very broad searches required now by the claimants would derail the timetable for the trial.

7. I have regard to the relevant tests that the court must apply when considering these applications.

8. Starting with the request for further information, CPR 18.1 provides that the court may at any time order a party to a) clarify any matter which is in dispute in the proceedings, or b) give additional information in relation to any such matter, whether or not the matter is contained or referred to in a statement of case. The primary concern of the court is whether the further information that has been sought is necessary and proportionate. The court is concerned to avoid any disproportionate expense. For that reason, any requests that are considered to be by way of fishing will not be permitted.

9. In the context of judicial review, there is specific concern by the court that requests for further information are very rarely sought. Time consuming and expensive interim steps are to be avoided in such proceedings and therefore such requests remain exceptional. But the court will direct such information to be provided when it is necessary to do so in order to resolve the matter fairly and justly. The court takes into account the guidance given by

Dingmans J, as he then was, in *R (Bredenkamp) v Secretary of State for Foreign and Commonwealth Affairs* [2013] EWHC 2480.

10. Essentially, what the court has to do in these cases is to carry out a cost/benefit analysis. There is a matter of discretion to be used but the court at all times is keen to ensure that whatever is ordered is both necessarily and proportionate, having regard to the time and resources available.

11. Turning then to the issue of disclosure and the test to be applied. The application is made under CPR 31.12 which provides that the court may make an order for specific disclosure or specific inspection. The court will take into account all the circumstances of the case when considering whether or not to make an order; in particular, the overriding objective in CPR 1 including the concept of proportionality. The court needs to satisfy itself as to the relevance of the documents sought, whether they are or have been in the relevant party's control and again whether or not the documents are necessary for a fair disposal of the issues in the case.

12. In this case, the claimants also rely on the defendant's duty of candour. This was examined by this court at the hearing last week. In particular the court referred in that hearing to the guidance given in the case of *R (on the Application of Solange Hoareau)* [2018] EWHC 1508 in the judgment of Singh LJ. I do not propose to repeat that guidance. It is summarised by Mr Coppel in his skeleton argument. However, I have specific regard to paragraphs 9, 10, 11 and 20. Essentially, the duty of candour requires the defendant not to act as a defendant, for example, in a commercial case, but to assist the court by providing a full explanation of the relevant facts and the reasons for its decision that is under challenge.

13. Before turning to the general requests that have been made, I should state that I bear in mind the following specific factors in this case. First of all, without ascribing blame to any of the parties, these applications have been made at a very late stage. The hearing of the judicial review is fixed for 17 June 2021. Therefore, regardless of who might be to blame for the timing, it is a factor that the court must take into account when considering what is necessary and what can be achieved in the time available.

14. Secondly, the court has in mind that it has made cost capping orders in respect of both parties, limiting the costs that might be recovered by either party. Although that would never stop the court from ordering either information or a document that was clearly material and necessary for a fair disposal of the issues, it is certainly something to which the court must have regard when considering the extent of any searches that it is ordering any party to make.

15. Turning then to the matters in issue, I start with the application for specific disclosure set out in schedule B. The first item that is sought is relevant Whatsapp and text messages including:

- a. messages to or from Andrew Mills concerning Prosper Mills or Ayanda's offers to supply PPE;
- b. messages to or from members of the PPE cell concerning Prosper Mills or Ayanda's offers to supply PPE;
- c. messages concerning PPE procurement sent to a Whatsapp group consisting of approximately 200 CEOs, or a Whatsapp group consisting of CPOs;
- d. messages sent to or from members of the PPE cell which concerned the handling of offers to supply made by PestFix and Prosper Mill, Ayanda or Andrew Mills; and
- e. messages sent to or from members of the PPE cell which evidence any advantages obtained by suppliers in the VIP lane as a result of VIP status.

16. The claimant's case is that until recently it was not aware of the fact that the defendant had not looked for any relevant documents amongst Whatsapp and text messages and had failed to disclose any. On that basis, it submits that it would be reasonable and proportionate for these searches to be carried out, or, perhaps more realistically, the limited number of searches that it has proposed through its reply submissions.

17. The defendant's position is that it actively considered whether or not there would be any useful purpose served by searching Whatsapp and other text messages. It took the view that it was not necessary because all of the significant communications were made by email. Therefore it concentrated its efforts on identifying relevant documents through emails and other specific platforms that were indicated through other evidence.

18. The defendant's main objection to this request is that if it were to comply, it would be very time consuming and expensive to the tune of some £250,000. In those circumstances, it would be a disproportionate order for the court to make. Further, there is insufficient time to carry out this level of exercise prior to the trial.

19. The approach taken by the defendant to disclosure is explained in the various recent witness statements of Ashley Whelan-Johnson. In my judgment it was a reasonable decision for it to focus its efforts on the searches for documents that were likely to produce relevant documents that were material to the grounds for which permission has been granted. On that basis, wide searches were not made of the some 450 estimated devices to seek out any additional texts or messages.

20. However, in the course of their application the claimants have identified communications that are relevant to the issues the court has to consider and are contained in texts and messages. I consider that the relevant texts and messages will be confined to specific individuals and for a limited period of time. That is because the court is concerned not with the progress of the orders and delivery of supplies, which I accept are likely to be found in many of the texts and messages that might be thrown up by a wide search, but only with the decision-making process concerning the criteria for, and the action of, allocating specific potential suppliers to the high priority lane. Further, it is clear from the emails that have been disclosed that there might be some material via text and messages as to the operation of the high priority lane. In my judgment it would be appropriate for the defendant to carry out some additional but specific and limited searches of Whatsapp and text messages.

21. In that regard I accept Mr Coppel's submission that the relevant period for the search should be 25 March 2020 through to 30 April 2020.

22. The individuals against whom such searches should be made are Mr Cairnduff, Mr Marron, Mr Blackburn, Mr James, Miss Burdon, Miss Lawson, and Mr Dawson. I decline to make an order in respect of the confidential individual or Lord Bethell. Looking at the email to which I was taken, it is quite clear on its face that one can see what was going on in terms of the basis on which the high priority lane would be operated. Therefore no useful benefit would be achieved by carrying out searches in respect of the devices of those individuals.

23. I turn to the second category which is any submissions to, or other communications with, ministers about the establishment and operation of the PPE cell, including in particular the VIP lane and any documents recording instructions, directions or decisions by ministers or the Secretary of State on these topics.

24. The claimants' position is that the establishment and operation of the high priority lane is a central issue within this judicial review and that therefore it would be of value to have any documents if and insofar as they exist. The defendant's position is that the documents requested by the claimants have not been identified by the defendant's search already carried out. However, it does not indicate the precise extent of such search by reference to search terms, dates and individuals.

25. In my judgment the instructions, directions or decisions by ministers or the Secretary of State as to the establishment and criteria for selecting potential suppliers for the high priority lane is a material issue in this judicial review. It would be reasonable, necessary and proportionate to ensure that the defendants had carried out a sufficient search for these categories. Therefore, I will order the defendant to carry out a search across its current database of documents for communications with ministers and the Secretary of State about the establishment and criteria for selecting potential suppliers for the high priority lane, including any documents recording instructions, directions or decisions by those ministers or the Secretary of State on these topics.

The third category that is sought is any communications a) by and with Steve Oldfield, concerning the offers to supply made by PestFix; and/or b) by and with any minister or official of the Department for International Trade concerning the offers to supply made by Prosper Mills, Ayanda or Andrew Mills. The defendant's position is that some searches have been carried out; anything produced by Mr Oldfield has been disclosed.

26. I have looked at the emails that generated the reference, firstly, to Mr Oldfield and then onwards, in respect of the high priority lane. It is a relatively limited exchange. It was a fairly straightforward case of receiving a reference and passing it on; anything more is unlikely to assist in the matters that the court has to deal with. The disclosure given is reasonable and I do not consider that any further searches should be carried out.

27. In relation to b), again, the defendant's position is that the request that is now made is extremely broad and it is irrelevant to the issues with which the court has to deal. I accept that. The documents produced indicate that proper searches have already been made regarding offers to supply and the claimants have sufficient material in order to advance their case at the forthcoming hearing.

28. Therefore, I make no order in relation to item 3.

29. Category 4 concerns any documents which evidence the fact that the VIP list was widely advertised across government as a way of more quickly triaging offers from suppliers.

30. I can deal with this shortly. I accept the defendant's submission that this is simply too wide and too vague to justify any order for specific disclosure at this late stage. The court is concerned with the decision making in this case, namely, whether the decisions to establish and operate a high priority lane, and the decisions to award these specific contracts to these suppliers were lawful. It is for the defendant to explain the basis on which those decisions were made. Documents indicating whether the high priority lane was widely advertised across government is unlikely to advance the case of the claimants and/or provide any assistance to the court.

31. I then turn to schedule A which is the further information that is sought. Happily, a number of these have now been resolved through additional information provided by the defendant and therefore only a limited number are still in issue.

32. Item 1 concerns PestFix's allocation to the VIP lane. The request is for information about Andrew Flockhart who sent an email on the 27th of March 2000 requiring PestFix to be added to the VIP list. I decline to order any further information to be provided in that regard. The relevant emails indicate that Mr Flockhart was just passing on the contact that he had been sent by Mr Oldfield. There is no benefit to finding out any further information about that. What the claimants really want to know is what instructions were given to those who were passing on the requests and the criteria that were being used for the offers to be passed through in the first place, that will not come from Mr Flockhart.

33. The second item raises a question: “Does the defendant accept that there is no contemporaneous documentary evidence of the due diligence on PestFix by Miss Washer and by DHC Finance as described in paragraph 8 of Miss Washer’s witness statement?” The court refuses to require the defendant to answer this. I have read Miss Washer’s witness statement and in particular paragraph 8. She is very clear about what she received, what was and was not there, what she did and what documentary records were available. Therefore, the claimants have this information already.

34. I take items 3 and 4 together because they both concern the issue of any advantage of being in the high priority lane. The submission made by Mr Coppel is that the claimants wish to understand and consider any evidence as to the extent to which there was any advantage to being a member of the high priority lane suppliers. The defendant’s position is that this has already been dealt with in the witness statement of Mr Marron. It arises out of the witness statement of Mr Cairnduff, which deals with the high priority lane that was established and the orders that were placed with those in the high priority lane. At paragraph 12, he states that proportionately more suppliers coming through the high priority lane were awarded contracts. At paragraph 13 he sets out the benefits of the high priority lane for potential suppliers. Mr Marron in his fifth witness statement sets out the statistics that were provided to the National Audit Office and set out in their report, which showed that a high proportion of suppliers in the high priority lane were awarded contracts as opposed to those outside the high priority lane. That does not come as any surprise to the court because the purpose of the high priority lane was to identify quickly the most promising suppliers. The real issue that the court has to decide is how the priority lane was operated and the criteria that were applied to determine who was on it. It is clear that some benefit will have been derived from the presence of suppliers in the high priority lane but the court is not concerned to go into the detail of each offer and acceptance or rejection of the suppliers, of which there are thousands.

35. I accept that the claimants wish to be in a position to challenge any suggestion that the high priority lane offered no more than a very minimal advantage but that is something that they can already do on the material that has been provided. They have detailed witness statements on these issues. They can challenge them in the trial. Therefore, I do not consider that it is necessary or proportionate for the information sought in items 3 or 4 to be provided.

36. Item 5 has been dealt with by the defendant's recent response.

Items 6 and 7 concern the requirements by the defendant for the FFP2 respirators and the contracts that were placed for those respirators. The claimants seek a number of items of information concerning the enquiries that the defendant had made of the NHS prior to placing the orders for these items and also explanations for the placing of those orders. The starting point is that Mr Young and Mr Marron in their witness statements have explained the basis on which they decided to place orders for FFP2 respirators. That is something that the claimants can challenge. The court is going to have to consider whether those explanations justify the placing of those orders if in fact the equipment did not meet the NHS requirements. However, the matter does not rest there because the defendant expressly pleads in its detailed grounds that it relied on advice from Emily Lawson in deciding to go ahead with the orders for FFP2 respirators. In those circumstances, it is appropriate for the claimants to ask for details of that advice. In 6(ii) the request is for the defendant to provide a detailed explanation of the advice from Emily Lawson referred to at paragraph 85 of the detailed grounds, in paragraph 54.2.5 of the statement of Chris Young and in paragraph 18.1 of the statement of Jon Fundrey, and to supply documentary evidence of that advice. I consider that it would be reasonable, necessarily and proportionate for that information to be provided – clearly it will be the best information that is available – so that the claimants can understand the advice that was given which formed the basis of the decision taken by the defendant to proceed with those orders. That is sufficient to deal with the requests in both 6 and 7.

37. Items 8 and 9 concern masks with ear loops and aprons with thumb loops that were ordered. In each case, the claimants seek further information as to when it appreciated that the NHS would not use such materials and whether or not it was in accordance with the NHS technical requirements. In each case, I am satisfied that the defendant has now provided witness statements that explain the basis on which these items were ordered and/or the basis on which those items were considered acceptable for use, in particular the witness statements of Mr Moore and Mr Marron. I am satisfied that that is sufficient information for the claimants to pursue their claims at the forthcoming trial.

38. Items 10 and 11 and 12 have been dealt with by further information recently supplied by the defendants.

39. Item 13 concerns the FPC technical specification. The information that is sought is whether the defendant accepts that BS EN 14605:2005 and AI:2009 were applicable to the coveralls purchased under FPC; if so, did the defendant verify PestFix's compliance with it. I am satisfied that this information, to the extent that it is necessary, has been provided by the witness statements of Mr Moore and Mr Jordan. They set out the basis on which the orders were considered to be appropriate. It is then a matter for the claimants to make submissions as to whether that is sufficient justification or not.

40. Items 14 and 15 and 16, 17, 18 and 19 have now been resolved in that the information has been recently supplied, or indeed was already in evidence by the defendant, so no order is needed.

41. Item 20 concerns the failure rate of the supplies that were provided. The court dismisses that part of the application. The court is not concerned with the performance of the contracts. The court accepts, and it would appear that the defendant has accepted, that it is relevant to look at the specifications that were used and whether or not they met the NHS needs. However, those issues are not affected by actual performance which, as Mr Coppel has accepted, could be for many different reasons. Therefore, I do not consider that it is appropriate or necessary for the claimants to receive that information.

42. Finally, in relation to the Ayanda contract, items 21 and 22 require information as to whether or not contractual terms agreed with Ayanda were exceptional in comparison with other contracts and to explain why, if so, the defendant contracted with Ayanda on terms that were more favourable. In my judgment the precise terms on which the Ayanda contract was agreed are not relevant to the issues that the court has to determine. The two clauses referred to seem fairly self-explanatory and submissions can be made on them. Asking the defendant to explain the basis on which those terms were incorporated into the contracts is not going to advance the case put forward by the claimants. Certainly it does not justify the provision of information at this late stage.

43. I will now hear the parties as to the dates by which the relevant documents and information should be supplied.

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