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Case No: HT-2020-000457 (CO/3564/2020)

Neutral Citation Number: [2021] EWHC 2091 (TCC)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
TECHNOLOGY AND CONSTRUCTION COURT (QB)

Rolls Building
Fetter Lane
London, EC4A 1NL

Date: 27 July 2021

Before :

THE HONOURABLE MR JUSTICE FRASER

- -

Between :

THE QUEEN
on the application of
THE GOOD LAW PROJECT LIMITED
Claimant

- and –

MINISTER FOR THE CABINET OFFICE
Defendant

and

HANBURY STRATEGY AND COMMUNICATIONS LIMITED
Interested Party

Robert Palmer QC and Brendan McGurk
(instructed by **Rook Irwin Sweeney LLP**)
for the Claimant
Philip Moser QC, Ewan West and Anneliese Blackwood
(instructed by **the Government Legal Department**)
for the Defendant
The Interested Party did not appear on the application

Hearing Date: 23 July 2021

Mr Justice Fraser:

1. In these proceedings the Claimant, the Good Law Project, seeks judicial review in respect of an award of a contract by the Defendant, the Minister for the Cabinet Office, to the Interested Party ("Hanbury") for the supply of services. These services were to assist the Government in terms of policy development, and emergency messaging to the public, as part of the response to the Covid-19 pandemic. The Claimant challenges the award of that contract as being contrary to the Public Contract Regulations 2015 ("PCR 2015"). These judicial review proceedings were transferred to the Technology and Construction Court by Swift J in an order dated 29 October 2020. They are therefore being heard by a Judge of the TCC who is also nominated as a Judge of the Administrative Court.

2. I have already handed down a judgment on an application by the Minister for a stay of the substantive proceedings, for the reasons explained therein at [2021] EWHC (TCC) 1937. I granted the stay sought by the Minister. That judgment was handed down on 9 July 2021, and its effect included vacating the substantive hearing that was then fixed for 26 July 2021.

3. There were however some outstanding matters which I anticipated could and should be agreed, if possible, prior to the stay coming into force. These matters concerned evidence that had been served by the Claimant, whose admissibility was challenged by the Minister. If these matters could not be agreed, then I explained at [16] and [17] of that judgment, they would be resolved after a short hearing before the court. This was to take place during the week of 19 July 2021. It was, with hindsight, somewhat naïve of me to anticipate agreement, and perhaps inevitably, that hearing was required. It may also have been somewhat optimistic of me to have expected only a short hearing. Regardless of this, it seemed both sensible and proportionate for the outstanding matters concerning admissibility of evidence, to be resolved before the stay came into effect. This is my judgment on that application.

4. By the time of the hearing one of the matters, concerning the evidence of Mr Jolyon Maugham QC, had resolved itself because the Minister had conceded the locus standi of the Claimant to bring these proceedings. The outstanding matter therefore concerned evidence adduced by the Clamant which the Minister maintained was expert evidence and for which permission of the court was required under CPR Part 35. I explain this further below.

5. The Claimant is a not-for-profit campaign organisation that seeks to use the law to protect the interests of the public. It is a public interest body, and has come to particular prominence since the pandemic, as it has challenged the behaviour of the Government, and the Cabinet Office, in certain respects concerning the award of a number of contracts which were entered into very urgently in March/April 2020 as part of the pandemic response. It not only challenges procurement decisions; there are other proceedings before the court in relation to pandemic affairs, the award of contracts in unusual circumstances, and lack of transparency in such matters. It is engaged in litigation against different government departments on matters that are very topical.

6. Similar judicial review proceedings of this nature, concerning other matters, have already been the subject of a judgment by O'Farrell J in ***The Good Law Project Ltd v Minister for the Cabinet Office and Public First Ltd*** [2021] EWHC 1569 (TCC), a

reserved judgment handed down on 9 June 2021 ("the Public First judgment"). In the Public First proceedings, the Minister challenged whether the Claimant had sufficient standing to bring the challenge by way of judicial review. O'Farrell J found that it did. She also found apparent bias on the part of the Minister in that case. It is because of the appeal against that finding in those proceedings that I issued a stay of the instant proceedings, at the application of the Minister.

7. Given the concession to which I refer at [4] above, the matters for resolution now only concern two pieces of evidence upon which the Claimant wishes to rely. The first is a witness statement of Jean Frost dated 18 June 2021, and the second is the evidence of Nick Moon. That latter evidence was originally contained in a witness statement, also dated 18 June 2021. To meet (and potentially one imagines, to satisfy) the objections of the Minister that Mr Moon's evidence was expert evidence, the same evidence was re-served by the Claimant in a different form, namely in a document headed "Expert Report of Nick Moon" which is dated 13 July 2021. The contents of Mr Moon's witness statement, and his later report, are the same, although the latter includes a declaration pursuant to CPR Part 35 and Practice Direction PD35 reciting his awareness of, and compliance with, an expert's duties under Part 35. Mr Moon is the Director of Moonlight Research Ltd, and also the Secretary of the British Polling Council ("BPC"), an association of polling organisations that publish polls and are committed to what is called promoting transparency in polling.

8. Within Mr Moon's expert's report, which is 33 paragraphs long, there are nine paragraphs which the Claimant accepts contain opinion evidence. The remainder are said by the Claimant to be factual evidence. Of the nine paragraphs – which I shall refer to as the blue paragraphs, as they were highlighted blue in the report used for the application – either the whole of some of the paragraphs (such as paragraph 11), or parts of paragraphs only (such as in paragraph 8) are accepted by the Claimant as containing expert evidence and therefore requiring permission, due to the terms of CPR Part 35 where a party seeks to rely upon the evidence of an expert.

9. The Minister submits that all of the evidence of both Ms Frost and Mr Moon constitutes expert evidence, therefore both require permission under CPR 35, which the Minister maintains ought not to be given. Strictly speaking, even if the evidence (apart from the blue paragraphs of Mr Moon) is evidence of fact, it requires permission as there is no current general permission for reply evidence by the Claimant in any event. But different considerations apply if the evidence is expert evidence, as the court has a duty under CPR Part 35 to restrict expert evidence to that reasonably required to resolve the proceedings.

10. I shall consider the specific evidence under challenge in this application, and then deal with the principles that govern expert evidence in judicial review generally. I will also consider some of the evidence adduced by the Minister to which the Claimant's evidence is said to be responsive. Mr Palmer QC for the Claimant draws my attention to the evidence of Mr Alex Aiken, the Executive Director for Government Communications at the Cabinet Office, and Mr Dominic Cummins, the Prime Minister's main political adviser at the time and to whom all special advisers reported, in order to make good his submission that the bulk of this evidence is factual evidence in reply. I have considered all of the evidence adduced by the parties in considering this application, even if I do not specifically refer to it all.

11. In the judgment where I granted the stay referred to at [2] above, I drew the parties' attention to two potentially relevant decisions in respect of expert evidence in

procurement proceedings, in order to guide and hopefully assist them when considering how to agree these matters, in order hopefully to avoid a contested application. These were ***Bop-Me Ltd v Secretary of State for Health and Social Care*** [2021] EWHC 1817 (TCC) and ***BY Development Ltd v Covent Garden Market Authority*** [2012] EWHC 2546 (TCC). However, due to the nature of the submissions made at the hearing on 23 July 2021, and in order (one hopes) to assist in other procurement challenge cases between these parties that are already before the court, I will approach this more from first principles than might otherwise be expected.

12. Firstly, it is necessary to consider the evidence itself. I will not repeat the whole of the statement, but some of the evidence of Ms Frost that is challenged is of the following nature. I shall give a selection by way of example:

"7. I note paragraphs 9-13 of the DGR which explain why, "in summary, the former Chief Adviser (Dominic Cummings) considered that Hanbury was the only organisation that could (a) deliver the services that were needed (b) start immediately and (c) devote their maximum effort and resources and provide the requisite frank advice. No other firm could meet all three of those requirements even if they might have met one of them."

8. There is nothing unique or even unusual about the services supplied by Hanbury. They are conventional opinion polling services (ie quantitative research) which any reputable opinion polling organisation would be able to supply e.g. online polling, telephone omnibus polling, provision of data tables, data processing and analysis from multiple sources and provision of reports from polling.

9. I have also viewed Hanbury's website. I cannot find any information on their website to suggest that their skills are different from other large scale polling providers, or that they have unique abilities. In my view, there are many other award-winning suppliers who have equivalent and better knowledge and skills than Hanbury. Several research and opinion polling companies exist which routinely handle large scale data sets at speed. They have systems in place for the integration and handling of such data. This is a normal requirement……"

13. In respect of some of Mr Cummings' evidence, she states the following:

"19. At paragraph 20 Mr Cummings states that he and a colleague, Ben Warner, "had a tried and tested formula with Hanbury that worked very well." However, Mr Cummings does not explain what this formula was or entailed or, therefore, explain why only Hanbury could provide this service.

20. If having experience of servicing UK Government contracts was a pre-requisite for the supplier, Crown Commercial Service ("CCS") could easily have supplied to the Cabinet Office a full list of all the suppliers registered on the Research Marketplace Dynamic Purchasing System ("DPS"), which had experience of providing opinion polling services to UK Government departments. I am aware that the UK Government already uses a range of suppliers including Kantar, Ipsos MORI and Savanta. There is no reason to suggest that any other research and opinion polling organisations could not have responded rapidly to a brief and then been put through an accelerated appointment process."

14. Although as I have explained at [8] above the blue paragraphs of Mr Moon's report are accepted by the Claimant as being expert evidence for which permission is required, the remainder is not so accepted. Examples of some of the latter paragraphs which the Minister maintains are expert evidence and require permission under CPR Part 35, but which the Claimant maintains is evidence of fact, are as follows:

"18. I note Alex Aiken's statement that "there was no time in the critical situation that we were in to conduct formal procurements for the services that we required" and that "there is also the question of resourcing a procurement. Drafting a specification and assessing bids takes time and the team was already working all available hours to meet the demands of the crisis."

19. I know of no reason why a sample of suppliers on the Research Marketplace Dynamic Purchasing System ("DPS") could not have been contacted with a very brief outline of the requirement and a request to those with capacity to meet that requirement to express an interest, and to provide an outline proposal and a costs estimate. Nor I do know of any reason why that could not have been done by others within the same time period as Hanbury in fact did so, given that they provide the same services.

20. In particular, I have seen Hanbury's proposal for "Coronavirus Polling", at MCO1/7-8, referred to at paragraph 40 of Alex Aiken's statement. Again, I see no reason why a requirement for a similar proposal could not have been provided to other companies at the same time, which stipulated for a response within a very short timescale.

21. At paragraph 40 of his statement, Alex Aiken states that he asked Ben Warner why it was being proposed that they should use Hanbury. He states that his "recollection is that Ben's view was that we were doing a lot of "just in time" daily polling but Hanbury were good at longitudinal polling, that is conducting and analysing polls with a large sample size so we had plenty of data to give a clear understanding of different demographics and groups…"

22. This is an inaccurate description of longitudinal polling. Longitudinal polling actually means interviewing the same respondents repeatedly over a period of time, thus allowing measurement of change at individual level. I see that Hanbury's proposal for "Coronavirus Polling", at MCO1/7-8 uses the correct meaning of longitudinal research, but the fact that Alex Aiken's statement makes no reference to this raises the question of the extent to which such research was carried out, if at all. However, the main point I wish to make is that many other companies carry out longitudinal polling.

23. At paragraph 42 of his statement Alex Aiken states that "the poll size was very significant…we needed to stand up the poll very quickly and few agencies appeared able to offer us that scale of polling (YouGov already being required to do the daily polling)." At paragraph 22 of Dominic Cummings' statement, he acknowledges that Hanbury relied on external panel suppliers.

24. YouGov's position within the market is unusual, if not unique, in that they have their own panel of respondents that they recruit, manage, and refresh. All, or almost all, of the other pollsters who use online polling buy in samples from a number of

panel suppliers, who in turn find survey respondents using a wide variety of methods. Although YouGov's panel is very large, it is finite, and it is possible that it was not capable of providing the numbers of respondents needed. However, I would be very surprised if Hanbury did not use the same sources of respondents that most of their competitors use, and this means that anyone else using the same sample suppliers would have been able to supply the same volumes.

25. At paragraph 56 of his statement Alex Aiken states that Hanbury "could provide the service at a pace and scale the rest of the market could not match." I do not see how this conclusion could have been drawn, when no other suppliers were invited to bid."

15. I do not accept that evidence of this type is expert evidence, or that the Claimant needs permission through CPR 35 to have it admitted. It is predominantly either evidence of fact, or comment. As comment it is not entirely helpful, in that whether Mr Moon understands how conclusions were drawn or not will not exactly assist the court, but I do not consider it is expert evidence. I return to comment at the end of this judgment.

16. The only exception to that conclusion in terms of the extracts above (other than the blue passages, which are accepted by the Claimant as requiring such permission, which I deal with below) is – possibly – the meaning of "longitudinal polling". That is obviously a term of art or trade term, as well as being a piece of modern jargon. Taking the definition of longitude from Encyclopedia Britannica, this is "a measurement of location east or west of the prime meridian at Greenwich, the specially designated imaginary north-south line that passes through both geographic poles and Greenwich, London." Absent some explanation, one might not necessarily guess that in the world of polling, longitudinal polling has nothing to do with longitude or any other measurement of location, but means polling the same respondents repeatedly over time.

17. But many trades use terms in an unusual way, or a way contrary to their dictionary meeting, and I do not accept that it is expert evidence governed by CPR Part 35 for someone involved in that trade to tell the court the customary meaning of that term. It may not even prove controversial, and the meaning of this within the world of polling might even be agreed.

18. In my judgment, therefore, other than the passages accepted by the Claimant within Mr Moon as being expert evidence (the blue paragraphs), none of the other evidence in Mr Moon's report, and none of the evidence in Ms Frost's witness statement, is expert evidence properly so called. It is evidence of fact, or comment. I shall return to whether the Claimant can or should be given permission for it after I have considered the principles governing expert evidence and made a ruling on the paragraphs the Claimant accepts need permission under CPR Part 35.

19. The correct place to start in terms of the principles that govern applications for permission to rely upon expert evidence, where the proceedings in question are judicial review proceedings (which these are) is the Administrative Court Guide. This explains at section 20.2 the approach of the court to the grant of permission for expert evidence under CPR Part 35. In particular, section 20.2.1 states the following:

"The nature of a judicial review claim means that expert evidence is rarely reasonably required in order to resolve a claim for judicial review. The Court is not determining the merits of the decision under review but is concerned with the lawfulness of the exercise of the power in question. It will seldom be necessary to consider evidence which goes beyond the material before the decision-maker at the time the decision was taken (see ***R (Law Society) v Lord Chancellor*** [2018] EWHC 2094 (Admin) at [36]; ***R (AB) v Chief Constable of Hampshire Constabulary*** [2019] EWHC 3461 (Admin) especially at [117]). The situations in which expert evidence may be admissible are summarised in ***R (Law Society) v Lord Chancellor*** especially at [37] and [39]. The views of experts as to whether the decision under challenge is lawful will not be admissible as those views are not reasonably required to resolve the proceedings."

20. The relevant dicta of the Divisional Court in ***R (Law Society) v Lord Chancellor*** [2018] EWHC 2094 (Admin) specifically referred to in the Guide above, states the following. Leggatt LJ and Carr J (as they both then were) heard a judicial review in respect of the funding of legal aid, in respect of which both parties had sought to rely upon expert evidence for which neither party had permission from the court. They explained:

"[36] The use of expert evidence in judicial review proceedings, as in all civil proceedings, in the High Court is governed by CPR Part 35. CPR 35.1 restricts expert evidence to "that which is reasonably required to resolve the proceedings." It follows from the very nature of a claim for judicial review that expert evidence is seldom reasonably required in order to resolve it. That is because it is not the function of the court in deciding the claim to assess the merits of the decision of which judicial review is sought. The basic constitutional theory on which the jurisdiction rests confines the court to determining whether the decision was a lawful exercise of the relevant public function. To answer that question, it is seldom necessary or appropriate to consider any evidence which goes beyond the material which was before the decision-maker and evidence of the process by which the decision was taken – let alone any expert evidence.

[37] The classic statement of the extent to which evidence other than evidence of the decision under challenge is admissible in judicial review proceedings is that of Dunn LJ in ***R v Secretary of State for the Environment, ex parte Powis*** [1981] 1 WLR 584, 595. The categories identified in that case can be summarised as follows:

a) Evidence showing what material was before or available to the decision-maker;

b) Evidence relevant to the determination of a question of fact on which the jurisdiction of the decision-maker depended;

c) Evidence relevant in determining whether a proper procedure was followed; and

d) Evidence relied on to prove an allegation of bias or other misconduct on the part of the decision-maker.

[38] Although these categories are a useful and well-established list, it would be wrong to treat them as if they were embodied in statute or as necessarily exhaustive. That is particularly so as public law has developed in ways which were not in contemplation when the ***Powis*** case was decided. In ***R (Lynch) v General Dental Council*** [2003] EWHC 2987 (Admin) Collins J was prepared to allow some extension of the possibility of admitting expert evidence beyond the ***Powis*** categories in a case

where a decision is challenged on the ground of irrationality. The judge accepted that, where an understanding of technical matters is needed to enable the court to understand the reasons relied on in making the decision in the context of a challenge to its rationality, expert evidence may be required to explain such technical matters.

[39] We would extend this principle to a situation where – as in the present case – it is alleged that the decision under challenge was reached by a process of reasoning which involved a serious technical error. It would be glib to suppose that, if an error in reasoning requires expert evidence to explain it, a challenge to the decision on the ground of irrationality cannot succeed. In ***Gibraltar Betting and Gaming Association Ltd v Secretary of State for Culture, Media and Sport*** [2014] EWHC 3236 (Admin) para 100, in the context of a challenge to a measure under EU law as "manifestly inappropriate", Green J said:

"An error which is far from being obvious or palpable may nonetheless prove to be fundamental. For instance, a decision or measure based upon a conclusion expressed mathematically might have been arrived at through a serious error of calculation. The fact that the calculation is complex and that only an accountant, econometrician or actuary might have exclaimed that it was an 'obvious' error or a 'howler', and even then only once they had performed complex calculations, does not mean that the error is not manifest… An error will be manifest when (assuming it is proven) it goes to the heart of the impugned measure and would make a real difference to the outcome."

[40] The same point in principle applies, in our view, to a challenge based on irrationality. A decision may be irrational because the reasoning which led to it is vitiated by a technical error of a kind which is not obvious to an untutored lay person (in which description we include a judge) but can be demonstrated by a person with relevant technical expertise. What matters for this purpose is not whether the alleged error is readily apparent but whether, once explained, it is incontrovertible."

21. I am of course bound by, and follow, that approach explained by the Divisional Court. There are three further points that ought to be made. Firstly, these proceedings are being heard in the TCC, but there is no different approach to permitting expert evidence in judicial review proceedings being heard by a TCC and Administrative Court judge, than there would be were these proceedings being heard solely in the Administrative Court. It makes no difference whatsoever.

22. Secondly, the instant proceedings also include challenges under the relevant procurement regulations, in this case the PCR 2015. Again, there is no different, wider, or more relaxed approach to the grant of permission of expert evidence simply because the regulations are engaged, than there would be in what might be called "pure judicial review". The same principles apply to the issue of expert evidence and they are as explained above.

23. Thirdly, consideration of whether an understanding of technical matters is required, which is a category (or sub-category) of case accepted by Collins J in the ***Lynch*** case as extending the categories in the ***Powis*** case, is precisely the ratio of both the ***Bop-Me*** and the ***BY Development v Covent Garden*** cases that I drew to the attention of the parties. Those latter two cases are examples of that very category where expert evidence may be permitted; they do not establish new guidance. Additionally, as set out clearly at [21] in ***BY Development v Covent Garden*** and at [17] in ***Bop-Me***, the judgments of both Coulson J (as he then was) and I have made it clear that such cases

will be unusual. It is a rare judicial review or procurement case in which expert evidence will be given the necessary permission under CPR Part 35.

24. Having set out those basic foundations for giving permission for expert evidence under CPR 35 in judicial review cases such as this one, I shall turn to the specific submissions of the parties.

25. Mr Palmer QC for the Claimant relied upon ***Interflora Inc v Marks & Spencer plc*** [2013] EWHC 936 (Ch), a decision of Arnold J (as he then was). This was to establish the principle that a party might be permitted to rely upon evidence from an expert other than through the portal of CPR Part 35. In that case, objection was taken to documents which are explained at [18] in the judgment, namely Ofcom Media Literacy Audits, other reports by Ofcom, a document from Google and another from YouGov. There were also academic articles of a scientific nature published in academic journals. Counsel for Marks & Spencer submitted that Interflora needed permission from the court under CPR 35 to do so. This argument was rejected. I do not consider that this authority assists the Claimant here.

26. Mr Palmer also sought to rely upon the Practice Note in ***Fenty v Arcadia Group Brands (t/a Topshop)*** [2013] EWHC 1945 (Ch), a decision by Birss J (as he then was) concerning admissibility of expert evidence in trade mark and passing off cases. That case deals with a witness giving evidence concerning the circumstances of the trade, the nature of customers and such like. Such a witness might deploy their experience in the relevant trade in order to bolster the content of their evidence, or to be put it another way, seek to have that evidence given greater weight by the court than it otherwise might be given. This is to add credibility. That case concerned T-shirts sold bearing an image of the famous pop star Rihanna on the front. No permission from Rihanna herself, or from any company deriving rights from her, had been obtained by those marketing and selling the T-shirts. The trade mark claim was settled, but the passing off claim was proceeding to trial, the essential issue being whether purchasers would be likely to be deceived into believing that the T-shirt was approved by, or connected with, Rihanna herself.

27. The term given to evidence of the type considered in that case was trade evidence. As stated at [36], witnesses would give evidence of this type where the "aim is to seek to ensure that costly survey evidence of little probative value is eliminated from trade mark and passing off cases". This case does not assist Mr Palmer either. This is for two reasons. Firstly, as set out at [39], this was not expert evidence. The Practice Note states:

> "But, in my judgment, in a trade mark and passing off case, evidence of the factual circumstances of a trade by a person in that trade, even when they deploy their experience in that trade to bolster what they are saying, is not necessarily "expert evidence" within CPR Part 35".

28. Secondly, of the eight different witnesses (the total number on both sides) whose evidence was subject to scrutiny of this nature, the evidence of only one – Mr Robison, a music industry consultant - was found to be expert evidence and hence needing permission under CPR 35 (the findings are at [41] to [50]). The evidence of the others was not. Categorisation of specific evidence in other cases, and whether it fell within CPR Part 35 or not, cannot help in the instant case, particularly when those other cases are, as here, concerned with trade mark and passing off claims.

29. Mr Moser, for his part, drew my attention to certain other cases. One was ***SPE International Ltd v Professional Consultants (UK) Ltd*** [2002] EWHC 881 (Ch), a decision by Rimer J. Although there was not sufficient time for Mr Moser to make oral submissions on this case, it is a well-known authority to all those in specialist courts where expert evidence is routinely deployed. This is because, between [68] and [73], Rimer J explains a great deal of what was wrong with the expert evidence for SPE in that case, including such classic statements as follows. The expert in question was called Mr Dean.

1. "With respect to Mr Dean, I doubt if there has often been an expert less expert than he".

2. "Mr Dean's main difficulty is that he has no relevant expertise".

3. "Mr Dean made no note of the instructions he was given, because he said there was no need – he said he had a fairly good memory".

4. "….until he gave evidence, he had never heard of, let alone, read Part 35 of the CPR….As a result, he approached his task with manifest incompetence."

5. "As for Mr Dean's report itself, much of its work had in fact been done not by him, but by his wife."

6. "His evidence itself displayed a lack of independence, and betrayed that he really regarded his primary role as being to present and defend SPE's case."

30. Unsurprisingly in those circumstances, the whole of Mr Dean's evidence was rejected by Rimer J as inadmissible. That judgment is a useful collation of a number of different problems with expert evidence, which there coalesced in one single case. There have been numerous others over the years, including others very recently. However, it does not take matters on this application much further forward in any direction.

31. Another authority relied upon by Mr Moser was that of Hildyard J and Chief Master Marsh in the well-known ***RBS Rights Issue Litigation*** [2015] EWHC 3433 (Ch). In a procedural judgment, the court considered whether expert evidence should be allowed under CPR Part 35 on the issue of "investment information/equity analysis". By the time the decision came to be considered, the claimants opposed the grant of permission (having been previously supportive of such evidence being admitted) and the defendants pursued the necessary permission alone. The decision of the court was that permission would not be given, but that the defendants could apply again later, the reasoning being at [50] to [62]. Essentially, the proposed evidence was not seen as strictly necessary to enable the court to consider whether the statutory test under section 87A of the Financial Services Markets Act 2000 was met.

32. This case does not assist Mr Moser to any appreciable degree. He drew my attention to a passage at [14] in which the following was stated:

"Thus, the first issue is whether there is a recognised body of expertise governed by recognised standards and rules of conduct relevant to the question which the Court has to decide. Unless there is, the Court should decline to admit evidence which *ex hypothesi* is not evidence of any body of expertise but rather the subjective opinion of the intended witness."

I accept that as a statement of principle. However, one difficulty for Mr Moser in terms of the second part of that passage in the ***RBS Rights Issue Litigation*** is if it is

going to be applied in the way Mr Moser seeks in these proceedings, it would apply as much to some of the evidence relied upon by the Minister as it would to that, say, of Ms Frost. Mr Cummings frankly states at paragraph 23 of his witness statement his view that he is an expert on "polling and in this area" generally, that there was "a gap in government expertise in relation to this type work", and he provides what he describes as his "expert opinion".

33. This is undoubtedly a subjective expression of Mr Cummings' opinion. It is not suggested in any of the evidence for either party in these proceedings that there is a recognised body of expertise governed by recognised standards and rules of conduct relevant to polling. There are people who have experience of polling; Ms Frost is one of them, as she is the Chief Executive of the Market Research Society, which she describes as the professional, trade and regulating body of the market, opinion and social research sector. However, on its website the MRS describes itself as a "research association" which is rather different than what is usually understood as a "regulating body". One of the benefits of membership on the website for MRS states "Whatever your level of experience, sector or discipline, MRS membership guarantees you a respected profile among colleagues, clients and employers" (emphasis added). This is rather different than what the court would usually describe as "a recognised body of expertise". One could, perhaps, apply to become a member of MRS this afternoon and be a member by this evening. There is a joining fee of £40 and an annual membership charge of £158, although this is discounted for students. That membership would not confer expertise in the sense that is usually understood by the court.

34. Ms Frost goes to considerable lengths to explain why membership of the MRS is valuable and/or important, and she draws the attention of the court to the fact that Hanbury (to whom the contract in question was granted) is not a member of MRS. However, that does not mean she is giving evidence as an expert, or that this evidence is of a character which can properly characterised as expert evidence requiring compliance with, and permission from the court under, CPR Part 35.

35. That is not to say that either Mr Cummings, Ms Frost, or anyone else involved in polling is not vastly experienced in the fields in which they have been engaged, and in respect of which they give evidence in these proceedings. It is rather to demonstrate that if there is a bright line to be drawn between evidence of fact given by someone with experience and expertise on one side of it, and objective expert evidence which requires the permission of the court under CPR Part 35 on the other, wherever that line is drawn in this case, they will both fall the same side of it.

36. Mr Moser is right that the first issue for the court is to consider whether there is a recognised body of expertise governed by recognised standards and rules of conduct relevant to the question which the court has to decide. In the field of polling, I doubt that decision is in favour of the Claimant. Indeed, I find that it is not. I will however continue to consider the matter, in case I am wrong about that.

37. I have already expressed the view that none of Ms Frost's evidence is expert evidence and the Claimant does not need permission under CPR Part 35 for it. Mr Moon's blue paragraphs however are expert evidence – this is conceded – and this concerns two areas. One is political polling at paragraphs 8 to 16, dealing with one of the questions he was instructed to answer, namely whether the inclusion of Sadiq Khan (the Mayor of London) and Sir Keir Starmer (HM Leader of the Opposition) in Hanbury's polling constituted party political polling.

38. The second is where he provides evidence in response to the Minister's claim that only Hanbury could have carried out the polling work required by the Minister. This is at paragraph 33 of his report.

39. Dealing with the first of those, political polling, I refuse permission for those paragraphs. This is for three reasons. Firstly, as I have said at [36], there is no recognised body of expertise governed by recognised standards and rules of conduct relevant to the field of polling.

40. Secondly, turning to the content of the evidence (and regardless of the first reason, this second reason is wholly compelling on its own), it is not relevant evidence in any event. Unless evidence is relevant, it cannot be admissible (whether expert or factual evidence). The inclusion of two Labour party figures in the polling – whether justified for the reasons given by the Minister's evidence or otherwise, and whether right or wrong, political or not – does not go to the issues on this application for judicial review. The Claimant has permission to bring judicial review on four Grounds, granted by O'Farrell J and included in her order dated 5 February 2021. They are Ground 1, that the award was lacking in transparency; Ground 2, apparent bias (due to the personal connection between Hanbury, the Minister and Mr Cummings and their pre-existing dealings); Ground 3, that there was no basis for making a direct award under Regulation 32(2)(c) of PCR 2015; and Ground 4, that awarding a contract with a 7 month duration was disproportionate in the circumstances. Under none of those grounds is the inclusion of questions in the polling relating to Mr Khan or Sir Keir Starmer relevant.

41. The final reason for refusing permission is that even if it were relevant, that evidence is not reasonably necessary for determination of the issues in these judicial review proceedings.

42. Turning therefore to the second area, in respect of which there is but one passage in paragraph 33 of Mr Moon, this relates to accuracy of other polling organisations and whether anyone else would, or could be, as good at polling as Hanbury. Mr Cummings said in his witness statement the following on this subject:
"YouGov are second best to Hanbury and could potentially do the work, but not to the same standard or at the same speed as Hanbury, as evidenced by the election where the results of our polling was far more accurate than that of anyone else, including YouGov."
By "our polling" he means the polling of Hanbury.

43. Mr Moon stated this in paragraph 33 of his report:
"Hanbury did not publish polls during the 2019 election, so I am not in a position to comment on how accurate they were. I am, however, in a position to say that it is simply not true that Hanbury's polling was "far more accurate than that of anyone else, including YouGov". YouGov did indeed perform relatively poorly in the 2019 election, but many other pollsters did extremely well. *There are many ways of assessing pollster reliability, but the best single figure is probably how close a pollster was to predicting the actual gap between the two main parties.* Kantar, Opinium and Survation all had final polls where the Tory lead was less than 1 percentage point different from the election result. *This is effectively the best a poll can hope for*, so while it is possible that Hanbury performed as well as this, they

cannot possibly have performed better. *I expect that all 3, and Kantar in particular, could potentially have delivered this contact if they had been offered the opportunity.*"

44. I have italicised the blue passages within this paragraph. I refuse permission for the whole of this paragraph with the exception of the single sentence beginning "Kantar". This is for the following reasons (in addition to there being no recognised body of expertise as explained at [36], which would be required). If Mr Moon cannot say how accurate Hanbury's polls were, then he cannot logically say that "it is simply not true" that they were not more accurate than other companies. Those statements are wholly contradictory and illogical. The sentence explaining the accuracy of Kantar, Opinium and Survation is unexceptional, referenced with a footnote, and I will allow that sentence as evidence of fact. The remainder of the paragraph simply adds nothing. It cannot be said to be reasonably necessary for the disposal of the proceedings.

45. There is far more to this case, and evidence of far greater probative value and importance, than how accurate Hanbury's polling was. Mr Cummings believed it was the best available. However, reading the Detailed Grounds of Resistance and the Minister's evidence as a whole, that is not why Hanbury were chosen. It is part of the reasoning, but only a small part. The court will not be assisted by Mr Cummings saying Hanbury was the best in the world, and Mr Moon saying no, it was not, in order that the court can come to a qualitative view on this. The Claimant should not conclude that by disallowing the bulk of paragraph 33 they are not permitted to challenge the statements of fact made by Mr Cummings regarding Hanbury's skills or accuracy at polling. The point will evidently remain in issue, and to meet it the Claimant is permitted to show that Kantar, Opinium and Survation all (or each) predicted the 2019 general election result gap between the two main winning parties as being within 1 percentage point of the actual result. However, one does not need an expert (even if Mr Moon is one) to say that greater than 99% accuracy in a poll is a good result. It could be said to be stating the obvious. However, and as Mr Moser so aptly put it when he was concentrating on Mr Moon's blue paragraphs, these other passages add nothing.

46. It is therefore necessary to return to the factual evidence of Ms Frost, and the remainder of Mr Moon (for the latter, the paragraphs other than 8, 10 to 16, and 33) and consider whether permission should be granted for that evidence as responsive evidence of fact.

47. I consider that such permission should be granted to the Claimant for this evidence of fact in reply. The reason for this can be expressed shortly. Ground 2 is a claim of apparent bias. That is precisely category (d) of the four categories explained by Dunn LJ in the case of ***Powis***, which is reproduced in [37] of ***R (Law Society) v Lord Chancellor***, and which I have quoted at [20] above. The factual evidence contained within Ms Frost and Mr Moon's evidence is relevant and admissible on the question of apparent bias, and responds to factual statements in the evidence of the Minister.

48. For those reasons therefore, the whole of Ms Frost's statement, and the other passages of Mr Moon, are admissible and I give permission for them. Mr Moon's evidence must be re-submitted in witness statement (rather than expert's report) form, as was done originally, but with the offending paragraphs, that I have identified in the text of this judgment above, removed. In so far as these other paragraphs contain comment rather than evidence, I do not propose to go through line by line and remove or

specify each comment and have it struck through. That exercise has nothing to recommend it, is unnecessary, and it would be disproportionate to do so.

49. The weight given to the different evidence will be considered by the judge tasked with the substantive judicial review hearing, and that will be done in accordance with the normal approach of the court. Ordinarily, few (if any) judges will be much impressed by witnesses making comments, or telling the court how much expertise they possess in particular fields. These observations must not be interpreted as being critical of any witness in particular, for any particular party in these proceedings. However, the better way to deal with such matters is often for counsel, at the substantive hearing, simply to submit to the court passages where the submission is that little weight ought to be given to specific parts of the evidence of that nature. That is usually a more cost effective and sensible way to proceed than having a full-blown interlocutory battle. There is no risk that the hearing will be prolonged, unduly or at all, by permitting the limited comments included in the statements of Ms Frost and Mr Moon presently to remain.

50. Finally, although I invited submissions on costs at the conclusion of the hearing, the parties were hampered in doing so, in the sense that they did not know the outcome of the application in its full detail. The most proportionate way to deal with costs, therefore, is for me to reserve the costs of the application. The stay that I have ordered will now operate, and this matter will not proceed further until the Court of Appeal decision on the Public First judgment to which I have referred at [6] above.