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Case No: HT-2020-000442 and CO/4034/2020

Neutral Citation Number: [2021] EWHC 2783 (TCC)

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

Rolls Building
Fetter Lane
London, EC4A 1NL

Date: 22 October 2021

Before :

THE HONOURABLE MR JUSTICE FRASER

- -

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

- and –

SECRETARY OF STATE FOR HEALTH AND SOCIAL CARE
Defendant

and
ABINGDON HEALTH PLC
Interested Party

AND Between :

THE GOOD LAW PROJECT LIMITED
Applicant

and
PROFESSOR SIR JOHN BELL
Respondent

and
THE UNIVERSITY OF OXFORD
Interested Party
On the Application

- -

Judgment (No.2) "Costs of Third Party Disclosure"

- -

Joseph Barrett, Rupert Paines and Stephanie David
(instructed by **Rook Irwin Sweeney LLP**) for the Claimant
Philip Moser QC and Niamh Cleary
(instructed by **the Government Legal Department**) for the Defendant
Cliodhna Kelleher (instructed by **Bristows LLP**) for the Interested Party
Jemima Stratford QC (instructed by **Simmons & Simmons LLP**)
for Professor Bell and the University of Oxford

Hearing Date: 14 October 2021

Mr Justice Fraser:

1. In the substantive proceedings the Claimant, the Good Law Project, seeks judicial review in respect of the award of certain contracts by the Defendant, the Secretary of State for Health and Social Care, to the Interested Party ("Abingdon") for the manufacture and supply of rapid Covid-19 antibody tests. These contracts were entered into as part of the Government's response to the Covid-19 pandemic. The Claimant challenges these contract awards, inter alia, as being contrary to the Public Contract Regulations 2015 ("PCR 2015"). The judicial review proceedings were transferred to the Technology and Construction Court by Swift J in an order dated 5 November 2020. They are therefore being heard by a Judge of the TCC who is also nominated as a Judge of the Administrative Court. One of the grounds for which the Claimant has permission to bring judicial review relates to state aid, said to have been provided to Abingdon by the Defendant both upon the award of the contract, and throughout its life.

2. Satisfactory performance by Abingdon of its contractual obligations to the Defendant is itself controversial as between those two entities. The Defendant considered that Abingdon's performance was inadequate, and terminated its contracts in 2021

3. Further background to the proceedings as a whole is given in an earlier judgment at [2021] EWHC 2595 (TCC) at [2] to [4]. The Claimant is a not-for-profit campaign organisation and brings these proceedings by way of judicial review because the Claimant does not have sufficient standing under the PCR 2015 to bring a claim under the regulations themselves as a Part 7 claim. The Defendant was centrally involved in the Government's response to the pandemic, and entered into a number of contracts very urgently in 2020 as part of its response. The three contracts in question in these proceedings were entered into in April, June and August 2020. Their subject matter was the supply to the Government by Abingdon of one million tests for Covid-19.

4. This judgment concerns the costs of a disclosure application originally brought by the Claimant against the Defendant, but which was broadened somewhat in the circumstances explained below. Part of that disclosure application related to emails both from, and to, Professor Bell in relation to Abingdon's engagement by the Defendant. I have already explained in outline at [6] and [7] in the previous judgment at [2021] EWHC 2595 (TCC) that I considered, as a matter of fairness, that the application on 21 September 2021 could not fully be dealt with in the absence of the Professor (and potentially the University of Oxford, described as his employer), who I considered ought at least to have the opportunity to make submissions. Further, the Defendant had made submissions that even if an order were to be made against the Defendant concerning production of these emails, the Professor would be likely not to provide them in any event, either to the Defendant or to the court. Accordingly, I directed that an application for third-party disclosure should be made against him, this being the procedural mechanism by which his opportunity to make submissions was provided.

5. Because of the unusual circumstances of certain parts of this case, I reserved my decision on costs of the disclosure applications to be provided in this judgment. Some explanatory narrative is required in order to put the cost decisions in their proper context. Also, some of the issues that have arisen in this case could potentially arise in a number of other cases. It may therefore assist in those other cases if some basic principles are explained or repeated to these parties now. There are a number of other

cases on foot with the same main players, and it would be regrettable if this opportunity for them to re-set their approach to litigation was lost.

6. In my earlier judgment at [7] I explained that "These parties – both the Claimant and the Secretary of State – therefore have a greater interest than most in conducting cost-effective and efficient litigation. There are a number of different sets of proceedings between them. The Claimant raises money by way of donation and crowd-funding. The Secretary of State is, by definition, expending public money. Whether the current stance of these two parties on procedural matters is explained simply by the volume of litigation between them presently, or for other reasons, is not entirely clear. However, the hearing on 21 September 2021 is one of four full-day interlocutory hearings that have, or will have, taken place within the short period July to October 2021. I urge greater co-operation upon the parties. Matters that ought to be agreed are being contested, and this can only vastly increase these parties' collective expenditure on legal costs".

7. There is a point at which judicial encouragement to sensible and reasonable behaviour must give way to concrete steps in order to make the same point clear. The Civil Procedure Rules have the overriding objective at CPR Part 1.1(1) of "enabling the court to deal with cases justly and at proportionate cost". Specific elements of that are identified: at Part 1.2(a) as ensuring that parties are on an equal footing; at Part 1.2(b) of saving expense; and at Part 1.2(c) dealing with the case in ways which are proportionate (iv) to the financial position of each party. Under CPR Part 1.2(a) the court must seek to give effect to the overriding objective when it exercises any power given to it by the Rules.

8. The power to award costs is a discretionary one and is contained in CPR Part 44.2(1). This means that the court must seek to give effect to the overriding objective when it exercises its power under CPR Part 44. CPR Part 44.2 sets out the general rule, which is that the unsuccessful party will be ordered to pay the costs of the successful party, and also the different considerations to be taken into account when the court is considering the circumstances of the case and the conduct of the parties.

9. The ability to order third party disclosure is contained in CPR Part 31.17. The requirements for such an order, which is discretionary, are set out at CPR Part 31.17(3) and are, in summary, that the documents sought are likely to support the case of the applicant or adversely affect the case of one of the other parties, and that disclosure is necessary in order fairly to dispose of the claim or to save costs. If those jurisdictional hurdles are surmounted, the court has a discretion whether to make such an order. The unusual nature of this has been referred to in different cases, including by Eady J in ***Henry v News Group Newspapers Ltd*** [2011] EWHC 1364 (QB) who described the "exceptional and intrusive nature of this jurisdiction". In that claim a newspaper organisation sought third party disclosure both from an NHS Trust, and the Commissioner of the Metropolitan Police, to assist its defence to a libel claim brought by a social worker following the death of a child. The learned judge stated at [6]:

> "The court will be aware throughout of the exceptional and intrusive nature of this jurisdiction. It should never be regarded as a matter of routine. The conditions for making an order, as identified above, will need to be strictly fulfilled. The court will always need to be wary of categories which are loosely or unnecessarily broadly defined and to be alert for requests which appear to be of a "fishing" nature."

10. I respectfully repeat and endorse that passage.

11. The general rule in respect of orders for disclosure against a person who is not a party is to be found under the heading "costs payable by or to particular persons" at CPR Part 46.1(2). This rule deals with special cases of costs. On applications such as this one against a non-party, the general rule is that the court will award the person against whom the order is sought that person's costs, both of the application and of complying with any order made on the application. However, the court may make a different order under CPR Part 46.1(3), having regard to all the circumstances, including at (a) the extent to which it was reasonable for the person against whom the order was sought to oppose the application.

12. Having explained that general framework, I shall turn to the detail of the application, but only in sufficient detail that my order in terms of costs can both be seen in context, and also be properly understood.

13. Professor Bell is a highly distinguished academic at Oxford University, where he is the Regius Professor of Medicine, a post he has occupied since 2002. He also holds a number of other roles in public life and is on the board of some major companies. His specialist areas are immunology and genetics. He was appointed the Government's Life Sciences Champion in 2011, and received a letter of appointment some time later which is dated May 2014. That post is an unpaid one, and Professor Bell in his witness statement has explained that none of the expenses incurred in his performing this role, even travel expenses, are reimbursed by the Government. To be fair to the Government, it is recited in his appointment that he did not intend to claim any. It is a purely voluntary and altruistic role. He is plainly not an employee of the Defendant, nor is he a civil servant. The relevant Minister when he was appointed was the Minister for Universities and Science.

14. There were three express terms of his appointment that merit reproduction here.

    1. He was to ensure that his "work and messaging aligns with wider Government policy on health life sciences".

    2. He was to comply with the seven principles of public life, which were contained in his appointment by way of hyperlink to them on the Government website at Gov.uk.

    3. The letter stated "We should particularly draw your attention to the need to avoid actual or perceived conflicts of interest….."

15. Two of the seven principles of public life, which are also sometimes known as the Nolan Principles, are as follows. All seven of them apply to anyone who works as a public office-holder. The two of particular relevance to these applications are:

    "1.4 Accountability

    Holders of public office are accountable to the public for their decisions and actions and must submit themselves to the scrutiny necessary to ensure this.

    1.5 Openness

    Holders of public office should act and take decisions in an open and transparent manner. Information should not be withheld from the public unless there are clear and lawful reasons for so doing."

16. The Professor became a public office-holder when he accepted the post of Life Sciences Champion. However, Professor Bell, when appointed to that post, was not given a Governmental or Departmental email account. He therefore conducted all of

the work and communications in which he was engaged by virtue of that position by using his Oxford University email account.

17. When the pandemic struck, Professor Bell was asked by the Defendant to become involved in a project to obtain lateral flow tests (now widely known as "LFT") for conducting antibody testing on the population at large. His important position within the life sciences community meant he was ideally placed to do this. He identified Abingdon as a suitable company and contracting party and recommended them to the Government. It is the contracts that the Defendant entered into with Abingdon that lie at the very heart of this judicial review.

18. Professor Bell was also involved in a number of other extremely important and time-pressured activities directly relating to the emergency. As a single example, he was leading the negotiations on the AstraZeneca vaccine on behalf of the University of Oxford. This judgment does not need to narrate the importance of that work, nor its time-critical nature, and there is no doubt that Professor Bell found himself in the very centre of the emergency response.

19. In these judicial review proceedings, the Defendant, who is under a duty of candour, decided to offer standard disclosure (which is not routinely used in judicial review proceedings) to the Claimant. There was some agreement between the parties about search terms, date ranges, custodians and so on. There were some disagreements which have been resolved by the court, but these are not relevant for present purposes. Professor Bell was identified by the Defendant at an early stage in this process as what was called a "VIP Custodian". However, none of the Defendant's disclosure included any of his emails.

20. The Claimant therefore brought an application seeking these. The Defendant's stance was that none of them were within the Defendant's "control", as Professor Bell was not an employee and had used his Oxford University email account.

21. The real difficulty at the heart of both these applications – namely the one against the Secretary of State, and the consequential one directly against Professor Bell himself personally – is encapsulated in a submission made by Mr Moser QC for the Defendant at the hearing on 21 September 2021. This was that, even if an order was made against the Defendant in respect of Professor Bell's emails, the Professor would not comply with it. This was an entirely accurate submission, based squarely on the evidence that was available at that hearing. This exhibited communications to the Government Legal Department from solicitors acting for Oxford University in response to requests for voluntary disclosure. The University's solicitors simply refused to provide these communications. In strict jurisdictional terms, an order against the Defendant would not be an order against Professor Bell, because he was not at that stage a party to the proceedings. It was that stance that made it essential that Professor Bell had to be heard, or at least be given the opportunity to be heard, before the relevant order could be properly considered, and potentially made in respect of these emails. Making an order against an individual requiring disclosure of emails from his employer's email servers without giving either the individual or employer the opportunity to be heard would be against natural justice. It also meant a third party disclosure application was necessary. That submission by Mr Moser was entirely justified, given the text of two emails in particular from the solicitors acting for the University that had been sent in response to requests that the emails be provided on a voluntary basis. These perfectly reasonable requests were met with outright refusals.

22. As I have explained, Professor Bell is the Regius Professor of Medicine at Oxford University, and has been centrally involved in the UK's response to the pandemic. I wish to make it clear that the solicitors acting for him are also acting for the University, and indeed Ms Stratford QC in her submissions made it clear that Professor Bell was being advised by the University. It is not suggested by anyone, and I am certainly not suggesting, that by taking that stance, Professor Bell had separately decided himself what the correct approach should be to the requests made by the Government Legal Department, and that he personally had chosen to refuse them. He was leaving the matter to the solicitors acting for the University, and being guided by the University. However, that stance by the University's solicitors was, in my judgment, wholly unreasonable and needs to be taken into account when considering the correct costs order.

23. The third-party disclosure application was therefore served, and witness evidence in opposition lodged. A skeleton argument was also served by Ms Stratford for both the Professor and the University also opposing the application. As it happens, the day before the hearing on 13 October 2021 the University (and therefore Professor Bell) changed their stance and in the event, the underlying issues went by consent. Disclosure was offered and a suitable order is being drafted. Costs remained controversial, hence this judgment.

24. The approach I have explained at [22] above was not only wholly unreasonable, but it made the procedural mechanism adopted essential so that the matter could be considered by the court fairly. Courts rarely make orders against parties that are not represented; where they do, it is a narrow exception and tightly policed by the court. Such exceptional orders must always be justified by the specific facts and types of orders sought (such as Freezing Injunctions, or in matters of extreme urgency) and will always expressly include an early opportunity for the unrepresented party to be heard, and to apply to the court for discharge or variation of the order.

25. That stance of refusal was also, as a preliminary view on my part, potentially wrong. I have not heard full oral argument from all the parties, although I have received their written skeleton arguments, and I have read all the authorities relied upon. What I have to say on this substantive point should not therefore be taken to have the same status as though I were deciding it after hearing full argument, and resolving it with finality. However, given the terms of Professor Bell's appointment, by which he expressly agreed to submit himself to the scrutiny necessary to ensure accountability, and also only to withhold information if there were "clear and lawful reasons for so doing", I do not consider that there would be a valid basis for refusing to produce emails of the nature sought by the Claimant. An order of the court requiring disclosure of emails conducting this type of Government business, even if that order were made against the Department for whom he was acting (rather than against him personally) is an order that, by the express terms of his appointment, I consider ought to be complied with. There would be no clear and/or lawful reason for withholding information (by way of emails on Government business) if there were in existence a court order requiring their disclosure.

26. If the pragmatic and reasonable approach adopted by the University from 13 October 2021 onwards had in fact been adopted in July, August or even September 2021, then the vast bulk of the costs of the application would have been simply avoided and need never have been incurred.

27. It may be sensible for Government Champions – and there are a number of these, not simply in the life sciences field – to be provided, in the future, as a matter of routine with Government email accounts. As a pragmatic suggestion, someone in Professor Bell's situation at the time could continue to use whichever email account he chose, University or otherwise, and merely copy to his Government email account any emails he sent on Department business, such as the emails the subject of these applications here. Custody of electronic communications in a fast moving technological world can present a range of legal issues that are not routinely encountered; physical location of the servers (and hence the jurisdiction governing them) being one such issue, but there are a number more. There are a variety of ways that proper retention by the Department of emails can be achieved. Whichever process is adopted, the situation that pertained here until 13 October 2021 should not arise in the future.

28. One point made by the University, in the witness statement lodged by Mr Bough, the Head of the General Commercial & Charities Legal Team at the University's Legal Services Office, is that the University would not allow Professor Bell voluntarily to disclose those emails against the wishes of the University. This point was not taken separately by Professor Bell (who given the eventual consent to the order, appears to me to have taken an entirely reasonable stance personally thus far). Given he was using his University email account, I do not consider that Professor Bell's compliance with the University's position can be criticised. However, I do not see why "the wishes of the University" should be seen as trumping the interests of justice, if these emails are properly disclosable (which they clearly are). The University took the view that both confidentiality and General Data Protection Regulations ("GDPR") meant disclosure could not be provided without a court order. That may very well be correct, but it does not mean that opposition to a court order is itself justified. In the event, a court order is being made (its precise and detailed terms the subject of consensual drafting) and, with the exception of costs, by consent. There is no reason why the outbreak of consensus on the substance of the application had to wait until the very last minute. The court is well placed to consider the reasonable requirements of confidentiality (one of the University's concerns) on the one hand, with the wider interests of justice and the importance of the rule of law on the other.

29. For all those reasons, I am not persuaded that this is a suitable case for application of the general rule under CPR Part 46.1(2) resulting in an order that Professor Bell and Oxford University should have their costs of the application under CPR Part 46.1(2)(a). I do not therefore need to consider the points made by the Claimant that the sum sought by the University on summary assessment of just under £140,000 is extraordinarily high. I will restrict myself to the simple observation that for a hearing that was suggested by Ms Stratford's solicitors as capable of being heard in about 2 hours, such a sum would take some effort in justifying as reasonable.

30. I consider that this is a suitable case where the justice of the case requires a different order under CPR Part 46.1(3). Having regard to all the circumstances requires me to have specific consideration at Part 46.1(3)(a) of the extent to which it was reasonable for the person against whom the order was sought to oppose the application. I consider that it was not reasonable to oppose it, and also that the stance taken over a number of weeks (until the day before this hearing) made resolution of the issues extremely expensive. A different course should have been adopted. The Government Legal Department and Mr Moser could have been relied upon to advance and argue such grounds as were sound ones on behalf of the University. They would have done

so with their usual skill. These grounds could have included that Professor Bell's communications with Abingdon were not within the Defendant's control. Had the University (and therefore also Professor Bell, who was entirely guided by them) been content to abide by that outcome, whatever it may have been, that could have been indicated in advance of the hearing on 21 September 2021. Everything that followed that hearing has proved somewhat unnecessary, in my judgment. The blanket refusals from the University's legal advisers in July and August were extremely unhelpful, and their continuation throughout September and up to 13 October 2021 ultimately very expensive for all involved.

31. Mr Moser does not seek an order for any of the Defendant's costs of the applications, although he has made it clear that he does resist any order against the Defendant that he should pay anyone else's costs. Mr Barrett seeks the Claimant's costs, which he maintains should be paid by Professor Bell and the University. Ms Kelleher does not seek Abingdon's costs from any party either.

32. Having given the matter careful consideration, I consider that the correct order on the applications is that each party – the Claimant, the Defendant, Abingdon, Professor Bell and the University – should bear its own costs. I note in passing (and hope) that Professor Bell does not have any of his own, and his costs are in reality costs being borne by the University. Each party bearing their own costs is a just outcome in all the circumstances, given the highly unusual features of this application. The Claimant's application was originally far too wide in any event, and has been narrowed a great deal. The consent order currently being drafted is a pragmatic outcome, but it is one that should have been reached some weeks ago, and it should not have required the impending cliff edge of a hearing in the High Court for it to have been resolved. Leaving matters to the last minute to resolve is one certain way of increasing costs, and it ought to be avoided.

33. I turn therefore to the next head of costs, namely the costs of the exercise, which are costs under CPR Part 46.1(2)(b). The Defendant has offered to bear these costs in the first instance, with the necessary exercise being performed by DLA Piper and Anexsys, the third-party electronic disclosure provider. DLA Piper have been instructed by the Government Legal Department to perform the disclosure exercise generally. Both the Defendant, and indeed the Claimant, expressed some considerable alarm at the likely level of expenditure by the University (and Professor Bell) were the current solicitors of their choice to be used, given the schedule of costs of £140,000 lodged with the court simply for the application. That has hourly rates for the partner at £630, and for associates at both £483 and £450. One single hour of those three people together would cost over £1,500.

34. Ms Stratford QC explained that the "preferred option", as she put it, was for the University to use its own solicitors. She explained a number of concerns the University had, were DLA Piper to perform this task. She accepted there were safeguards that could be put in place to deal with those concerns, such as undertakings that the material would be kept confidential, would only be used for the purposes of the litigation, and would be returned at its conclusion, with all copies deleted. She also raised the issue of confidentiality agreements from the specific solicitors at DLA Piper. Mr Moser did not suggest that these were insuperable obstacles, and in any event the use of what are called "confidentiality rings" is widespread in litigation under the PCR 2015. They rarely present an issue. Further, some of these safeguards are already included in the rules that parties must observe about the limited use of

disclosure. The Defendant's motivation in wishing to use DLA Piper (and offering to pay for it) was their lower rates, and the fact that personnel at that firm are already "up to speed" in terms of the proceedings. It will therefore be more economical. The Defendant is content to bear the costs of that exercise, and for there to be an order to that effect.

35. The Claimant did not want to bear the costs of the exercise. Mr Barrett submitted that given his application against Professor Bell was only contingent upon the similar application against the Defendant, there was no reason why the Claimant should do so. He also submitted that given the relatively sparse financial depth of the Claimant, compared to the Defendant and the University of Oxford, it would be very difficult for the Claimant to meet such an order. The Claimant is a not-for-profit organisation.

36. The University of Oxford is a charity, although one of a rather different scale and history than most. I do not consider that the court should in this respect undertake a balance of the relative merits of an educational charity on the one hand, an organisation such as the Claimant on the other, or their different objects. However, I do consider that the court should keep in mind the overriding objective generally, and also the points I have set out at [7] above. These are at CPR Part 1.2(a) ensuring that parties are on an equal footing; at Part 1.2(b) saving expense; and at Part 1.2(c)(iv) dealing with the case in ways which are proportionate to the financial position of each party.

37. Taking all those factors into account, the correct order to make under CPR Part 46.1(2)(b) in this unusual case is that the Defendant bears the costs of the exercise (as he is content to do) and for DLA Piper and Anexsys to be used. The points of concern made by Ms Stratford QC can be dealt with by means of the drafting of the order, and establishment of a confidentiality ring if necessary. If the University of Oxford chooses, for reasons of its own, to use its existing solicitors, then it is of course perfectly free to do so. I am not ordering the University to use any particular firm of solicitors, and I am not in a position to do so in any event. However, if the University does choose to do so, then it will, in the unusual circumstances of this case, have to bear the costs of doing so itself.

38. Finally, both at the hearing of 12 October 2021 when a further witness statement from Professor Bell was discussed in court, and also at the hearing of 14 October 2021, reference was made to the contents of different witness statements already served in these proceedings. Professor Bell has also explained, in his witness statements, his human reaction to some of the criticisms being made by the Claimant. He feels somewhat aggrieved that work he undertook with the national interest in mind, without remuneration, has led to the degree and type of criticism now directed at him. I exempt counsel on all sides from the following observation, but it seems to me that there is a degree of heat and intensity in these proceedings that has no place in litigation. Emotions appear, in some quarters, to be running somewhat high. The parties have already agreed (and I have approved) an order to keep the names of junior civil servants involved within a confidentiality ring, to avoid the real risk that they may find themselves exposed to abuse on social media. That there is a need for such an order at all speaks volumes. The emotional temperature requires correction.

39. It is very important that the following is borne in mind by any readers of this judgment, or anyone who may have read press reports of what has already taken place in court. I have already explained at [9] in my judgment at [2021] EWHC 2595 (TCC) that nothing untoward should be read into my order in relation to the disclosure of

emails and WhatsApp messages from the Rt Hon Matt Hancock MP concerning the subject matter of the litigation. Similarly, nothing untoward should be read into my orders in relation to costs, or into the ventilation by the parties in court of what are (at this stage) simply allegations in relation to the substantive issues. Such matters can only be resolved after the substantive hearing, which has now – most regrettably – had to move from December 2021 to May 2022 to accommodate a variety of other procedural steps. These include those consequential upon the Claimant re-amending its case on Ground 7 concerning state aid.

40. It is of central importance that all of the parties to this litigation now focus on the over-riding objective, and cost effective conduct of the action until that substantive hearing takes place. Endless interlocutory attrition is not only in nobody's interests, it is positively discouraged. The parties may find that they engage in such behaviour in the future entirely at their own cost.