TRANSCRIPT OF PROCEEDINGS

Ref. HT-2020-000442

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
(TECHNOLOGY AND CONSTRUCTION)

Neutral Citation Number: [2021] EWHC 844 (TCC)

7 Rolls Buildings
Fetter Lane
London

Before THE HONOURABLE MR JUSTICE WAKSMAN

IN THE MATTER OF

GOOD LAW PROJECT LIMITED (Claimant)

-v-

SECRETARY OF STATE FOR HEALTH AND SOCIAL CARE (Defendant)
ABINGDON HEALTH LIMITED (Interested party)

MR J BARRETT appeared on behalf of the Claimant
MR P MOSER QC appeared on behalf of the Defendant

JUDGMENT
29th MARCH 2021
(AS APPROVED)

DISCLAIMER: The quality of audio for this hearing is the responsibility of the Court. Poor audio can adversely affect the accuracy, and we have used our best endeavours herein to produce a high quality transcript.

WARNING: Reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

MR JUSTICE WAKSMAN:

1. This is the claimant's application to renew orally its application to bring judicial review proceedings against the government, the defendant, the Secretary of State for Health and Social Care. The renewal application is dated 10 March, the underlying decision on paper, which was made by O'Farrell J, was done on 3 March. By that decision she refused permission on all seven grounds advanced except for ground 2 which, as matters stand, will be going to a substantive hearing. The claimant, by this application, renews its application for permission on grounds 1, 3, 5, 6 and 7. Ground 4 is not pursued.

2. The background to this matter can usefully be taken from the helpful summary given by Mrs Justice O'Farrell. The essence of the challenge concerns two contracts granted by the defendant to the interested party, Abingdon Health Plc, to develop, manufacture and purchase lateral flow antibody tests to detect the number of individuals in the UK who had been infected by the Coronavirus and therefore might have immunity, and I would add to that not merely on a large-scale statistical basis but for individual use at home as well.

3. On 4 April 2020 a national testing strategy was produced by the defendant with five key targets or pillars. The only two I need refer to are pillar 3 and pillar 4. Pillar 3 is mass antibody testing to detect if people have been infected and could therefore develop immunity, with the potential for home use, and pillar 4, surveillance testing to identify what proportion of the population already have the virus, using a high accuracy antibody test.

4. Let me just interpose here that so far as the level of accuracy of the AB tests, that is key. Otherwise, you would have extensive and very risky or dangerous numbers of false negatives; that is people who have been told they do not have the antibodies and therefore did not have the virus when in fact they did, or alternatively false positives; those who have been told they have got the antibodies and have had the virus when they did not. The degree of accuracy is extremely important. The extent to which false negatives can be avoided is called sensitivity, the extent to which false positives can be avoided is called specificity. The target percentages are very high.

5. So far as antibody tests which have the capacity to be used at home on a large scale and rapid basis, the medicines and healthcare products regulatory agency, the MHRA, has dictated that you need a 98 per cent success rate for both sensitivity and specificity. Slightly less accuracy requirements are in play for what are called "professional use tests" which are tests that are conducted in laboratory conditions and which could be used in the broader-based statistical analyses involved with surveillance testing.

6. To return to the summary, on 11 April the defendant entered into its first contract with Abingdon, which was for the development of a test to be used at home that was not for initial research. Under that, all intellectual property rights would be retained by the defendant.

7. On 2 June there was an advance supply agreement with Abingdon. It rather has the shape of a letter of intent because the parties were obliged to negotiate in good faith, to enter into a potentially large-scale supply. Agreement at this stage was to fund the purchase of components for up to 10 million test kits. There was a deadline of 31 July to obtain not only CE marks which, to an extent, are self-produced or self-certified, but also the MHRA own approval.

8. On 14 August there was a third contract. It was a supply agreement with Abingdon for one million laboratory-based antibody tests which could be used, and in fact were ultimately used with the appropriate approvals for the surveillance testing, but then what is, in effect, an option for nine million home-use antibody tests, but that was conditional on Public Health England approval as well as that from the MHRA.

9. After these proceedings were commenced and after the deadline for obtaining that validation had expired, the defendant chose to exercise its rights and cancel the contract because there had been no MHRA approval for the antibody tests.

10. Both the June and the August contracts were subject to the advertisement and competitive tender regimes laid down by the Public Contracts Regulations 2015, but there is an alternative procedure which can be followed, and I agree it is not useful to use the word "exception" because that automatically implies some, perhaps, higher level of scrutiny. A different procedure, a much truncated procedure and one which does not involve, critically, advertisement or the usual competitive tendering, is laid down by regulation 32(c). This has been used by various government departments, it will not be thought unsurprisingly, in the current circumstances, to procure supplies in very urgent cases. The case of the urgent procurement of PPE equipment has already gone to the Court of Appeal which has decided that there was no arguable case of any breach of regulation 32, which is what I am concerned with so far as ground 1 is concerned. That decision, of course, does not bear directly on this case and I have to decide it on the facts of this case.

11. I now turn to the individual grounds, and I will do so in the order in which Mr Barrett, and broadly speaking, Mr Moser, took them. It will be seen from what I have concluded that after having had the benefit of extensive written and oral submissions, I differ somewhat from the particular conclusions reached by O'Farrell J.

12. One of the difficulties with which the defendant has to live in this case is that it has provided relatively little by way of firm documentary evidence so far as the actual decision-making process is concerned, and therefore there is an extent to which, as the claimant says, all it can do is rely upon the legitimate inferences which it can raise from the materials which it has seen.

13. So on that basis I deal first of all with what I will call ground 6(1). That is apparent bias, and I stress apparent bias and not actual bias. The broad facts giving rise to this allegation are not in dispute. Professor John Bell was Head of the defendant's National COVID Testing Scientific Advisory Panel and he chaired the defendant's first test approvals group. This procurement is all about antibody tests and their ultimate approval.

14. Whatever else may be said, it cannot be said without further disclosure, which has not been provided, the professor was clearly involved in the decision-making apparatus so far as the defendant's side of things is concerned. He cannot be regarded as some mere minion.

15. On the other hand, he is an employee of Oxford University, being the Regius Professor of Medicine. Oxford University is itself one of a number of organisations which has formed a consortium called the UK Rapid Test Consortium. This was, in fact, the subcontractor to Abingdon Health.

16. The extent to which Abingdon Health itself had any expertise is open to serious doubt; it was in financial difficulty and the intention all the way along was that it was going to subcontract its responsibilities under its contracts to the RTC, so on the face of it you have an individual of some significance who was on both sides of the contract. I should add that it is also said that so far as the AH/RTC side of things is concerned, he was going to lead their team that would be developing the test for the defendant.

17. As I have already indicated, there is very little by way of evidence as to how the first contract emerged, and in particular whether it was the defendant, through Professor Bell, that approached AH, or whether it was the other way round, but there is a sense in which, of course, Professor Bell was, in any event, there on both sides of the contract.

18. The sequence of events, at least as portrayed by the claimant - and they do not seem to be seriously in doubt – the claimant actually says Professor Bell first approached AH, within a day or two AH approached the relevant Minister, Lord Bethell on 1 April. There was a departmental memo recommending a research contract for AH on 2 April. On 4 April the testing strategy was produced. On 8 April, the call to arms, as it has been called, to develop for pillar 3 was published by the government. The research contract was awarded on 6 April and then, as I have mentioned, the general call to arms actually came through two days later.

19. Now, in my judgment it is not very hard to see that, in the absence of a very full explanation as to how the initial contact and contract actually came about, the fair-minded observer in possession of all the relevant facts might think that the award of these contracts to this organisation involving this individual were influenced by Professor Bell's association with the defendant as the other contracting party. There might be a good explanation for this, but the difficulty is I do not have the evidence before me to consider that.

20. Mr Moses said in his submissions that this is a disguised attempt to allege actual bias. I do not agree. Very often, what can and what can only be properly alleged, and all that needs to be alleged, is apparent bias, and I do not see any difficulty about that. It does not mean there is some nefarious conspiracy. The test is that of what the fair-minded observer might think there is a risk of happening.

21. It is said that this was something which could not, in fact, be awarded to anyone else. Well, I am not sure what the relevance of that is here, but if that was the basis on which this was allowed to go ahead in the decision-making documents, then they could have been produced, but they were not.

22. At one point it was said nobody else had a successful test at that stage. Well, it is perfectly true, but the original purpose of this - and this resonates with some of the other grounds – is not that one was going to expect a supply the following day. On the basis that there were not antibody tests which as at March and April had satisfied the requirements, and nobody's tests did, the key thing was obviously to get on and have them developed, because that was the only thing that could be done. On that basis, I am quite satisfied that there is an arguable case for apparent bias. It is likely to feed in, in any event, in my judgment, to ground 2, which is already going to a substantive hearing.

23. That leads me on to 6(2), national preference. The claim here is that the defendant in contracting with this particular organisation was doing so with a preference to other

companies that were in the frame, and some of them have certainly made, through the media, their feelings known about this in that they had an offer in, and when I asked Mr Moser as to whether, in fact, anyone had offered this to the defendant, because the suggestion had been nobody had come forward apart from Abingdon, his response - obviously on instructions - was somewhat more nuanced than that. It was that no-one had come forward with a suitable solution. Well, that is a rather different thing.

24. The points that are simply made by the claimant here is that there are numerous references made to the fact that this is a homegrown product; a British product; a British solution to the issue of being able to obtain antibody tests. Mr Moser says, well, that is just all spin. The difficulty about that is I cannot decide that at this stage, not in the absence of seeing the documents. On the face of it there was a clearly expressed preference for the organisation to be British, and that would offend the relevant principles, as they then applied under EU law and also under public law, so, as with apparent bias, I consider there is an arguable case to go forward so far as that is concerned.

25. One then comes to state aid. Mr Moser says that it is not necessary. Well, that is always a slightly dangerous argument to make because if it is unnecessary the respondent could say "Well, we'll let it in because it's not going to damage us in any way, it's not likely to allow the claimant to win where they otherwise wouldn't have done" but that concession is not made. The point is that under Article 107(2) to (3), the TFEU precludes any undertaking which is granted indirectly or directly through state resources, which is selective.

26. Now, there are a number of grounds of justification, even if state aid has happened, but the defendant here has chosen not to rely on any of them, at least it has not relied on any of them for the purpose of today's hearing. It is simply said that there is no coherent case for state aid been made out.

27. Well, I disagree with that. The way in which it is articulated in the note is to say, well, it has funded Abingdon's research costs, it has funded the component costs, even if it all goes awry the Department gets the costs back, and it has entered into a substantial contract, admittedly with an option element, and on the face of it it is said, well, that is a public subsidy. That it may be a laudable public subsidy or one which was urgent and pressing in the circumstances does not affect whether it is state aid or not where there has been no justification which is put forward. So I do not agree that this is an incoherent claim, it is sufficiently coherent. If there is some need to amend, I will hear the parties on it afterwards, but the defendant maintained its position that it was incoherent and I disagree. If it is coherent, the truth is there is no real answer to it at this stage. Therefore that is arguable.

28. I then turn to what has, to some extent, been the main battleground before me today, which is ground 1. That concerns regulation 32. What that says in terms is that "The negotiated procedure without prior publication may be used for public works contracts, public supply contracts and public services contracts in any of the following cases" and (c) is the relevant one – "insofar as is strictly necessary where for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, time limits for open and restricted procedures or competitors' procedures cannot be complied with" and (4) "For those purposes circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting authority".

29. There is an alternative procedure of accelerated procedure under regulation 27 which would allow for 15 days' accelerated procedure, but under this one, not even the 15-day accelerated procedure needs to be used, provided that regulation 32 is complied with.

30. I do agree with the defendant here that it seems to me that, largely, this challenge by the claimant has morphed into an objection to the identity of this particular contracting party, which is not really what the requirements of 32(2)(c) are about. It may go to apparent bias or state aid or national preference, and I have indicated that there is enough in those arguments to go forward, but this is a different point. One has to show that the time limits cannot be complied with for reasons of extreme urgency due to unforeseen events and that the negotiated non-advertised procedure is strictly necessary.

31. Some flavour of the position at the time can be gained from what was said last year. If we all go back to last year, one can remember vividly the situation almost exactly a year ago; there was lockdown; it was unclear whether, at that stage, there would be a reliable antibody test. The relationship between possessing antibodies and immunity was not clear. The question of a successful vaccine was a long way down the horizon. It is easy to look back with hindsight and think that things could have been done much more speedily.

32. The truth was that in March and April, because no existing test had passed the validation, there had to be a staged process. The first stage in the process was to undertake research. If that research looked sufficiently promising, then one started to look at some form of contractual framework, and the final stage would be the supply contract itself.

33. One of Mr Barrett's main points here was that it clearly was not urgent, or the urgency had been brought about by the defendant itself, which is not allowed under regulation 32, because in April 2020 everybody knew they needed tests. Well, of course everybody knew they needed tests, but that does not mean that you could throw a contractual switch, as it were, and contract with someone to produce those tests immediately, because the truth was that no sufficiently accurate test had yet been developed, so I consider that the comparison of the position in August or in June with April is a false one. The underlying points are obvious and, in this respect, I agree with the view taken by O'Farrell J. The global pandemic; obviously unforeseeable. There was extreme urgency.

34. One of the reasons why the need to develop the tests was so urgent was because, potentially, they could be used to see if people had the Coronavirus and/or had immunity, which in turn could have had an impact on the possibility of easing the severe social restrictions, so it is difficult to think of a greater situation of urgency so far as the obtaining of tests is concerned. The first thing that had to be done was to find someone who could at least develop the test, and that was something which had to be done, in my judgment, as a matter of extreme urgency, and that explains the very sharp timescale for the awarding of a contract to somebody in April to do the research.

35. As Mr Moser said, this is not manufacturing widgets, this is science in a fairly undeveloped state where things cannot just be done in a couple of weeks, and therefore one had to wait to see what the results were. On the face of it, one was entitled to wait to see what happened in the June contract and then, on the basis of that, to see whether to go forward on the August contract. The June contract was a matter of urgency in turn, and that, of course, is the first one that was subject to the procurement regulations, because one needed

then to get on, get the components, which I am told were in short supply, and I am not going to gainsay that at this stage – to get the components to make at least the first 10 million antibody tests. That was a situation of extreme urgency and it was one, again, where the contract needed to be awarded right away and not wait even 15 days.

36. Then, when one comes to the August contract, in my judgment the same applies. There was at least sufficient confidence that someone should be awarded a contract to develop the test so as to make it available in the sort of numbers which would provide real assistance going forwards.

37. In my judgment, the claimant's challenge here, (a) is really focusing again on identity. What it is really concentrating on, in my judgment, is an argument about discrimination against others, or in favour of this particular contracting party, but that is not really what regulation 32 is all about and the situation was urgent to get the research done in April, to get that moving along in terms of starting a process using components with the research that had been done in June, and then to start the process of manufacture, provided that the tests met the validation procedures in August. That, in my judgment, renders unarguable any argument about the application of regulation 32.

38. I add one point to this. It became clear in the course of argument that Mr Barrett's ground 3 point about proportionality is accepted. It is not really a free-standing point. What he was really saying is that the regulation also requires that whatever the contract is awarded is strictly necessary; you do not award a vast contract under this procedure where a smaller contract will do.

39. Well, I agree that, within bounds, that comes into the strict necessity test here, but these were relatively limited contracts. The June contract was to get the components with a view to developing the test at the time against a deadline of 31 July. That is relatively modest. So far as the August contract was concerned, that was on the footing that one million would be purchased and there was only an option to purchase the other nine million. That seems to me to be relatively modest as well. For those reasons that does not change the position in relation to regulation 32. If there was a free-standing point on disproportionality, that is not arguable either.

40. When O'Farrell J dealt with it and she talked about the range of reasonable decisions, she was not getting the law wrong, she was referring to what is sometimes called the margin of appreciation, when one is using the usual concept of proportionality, which in any event is not now relied upon in that precise way.

41. That leaves only irrationality here. There are really two elements to this. The first element is as to why the June contract was entered into when it is said the Tameside duty of inquiry had not been fulfilled. The defendant's evidence, or put in through its grounds, admittedly fairly tersely, is to the effect that by the time of the June contract it was Abingdon whose tests had shown more potential success than any of the others, and that might well be sufficient so far as that is concerned.

42. I do have a problem with the August contract though, because the July contract said that the validation had to be done by 31 July, before you go on to make the August contract, but there was not any validation by 31 July. It seems that the June contract was more or less

ignored and then one simply went into a further contract. Now, this is not about urgency, this is about the contract and this particular organisation, because of it had failed to get a validated test by 31 July, it is unclear why the defendant decided nonetheless to deal with this entity for the purpose of larger scale production. Now, there may be an answer to this, but if there is it is not one which has been produced in the materials before me, so I am going to allow that ground.

43. So the upshot is this. I disallow, I do not grant permission, for JR on either ground 1 or on ground 3, but I do grant permission on grounds 5, 6 and 7. I will now hear the parties on any consequential matters. I note that O'Farrell J, because she allowed ground 2, has already given some directions as far as that is concerned, but I do not know whether there is anything more that needs to be done about it.

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

This transcript has been approved by the Judge