IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
[2021] EWHC 2422 (Admin)

No.CO/2123/2020

Royal Courts of Justice

Thursday, 26 August 2021

Before:

MRS JUSTICE EADY DBE

B E T W E E N :

THE QUEEN
(on the Application of
CATHY GARDNER and FAY HARRIS) — Claimants

- and -

(1) THE SECRETARY OF STATE FOR HEALTH AND SOCIAL CARE
(2) NHS COMMISSIONING BOARD (NHS ENGLAND)
(3) PUBLIC HEALTH ENGLAND — Defendants

MR J. COPPEL QC, MR R. PAINES and MR R. HOGARTH (instructed by Sinclairslaw) appeared on behalf of the Claimant.

SIR JAMES EADIE QC, MR Y. VANDEMAN and MR C. BISHOP (instructed by the Government Legal Department) appeared on behalf of the First and Third Defendants.

MS E. GREY QC (instructed by DAC Beachcroft) appeared on behalf of the Second Defendant.

J U D G M E N T
(**via Microsoft Teams**)

MRS JUSTICE EADY:

Introduction

1 This claim concerns the policies, acts and omissions of the defendants, relating to measures adopted for the protection of care homes and their residents during the first wave of the Coronavirus pandemic in the period February to June 2020.

2 After a contested hearing on 19 November 2020, Linden J gave permission for the claimants' claims for judicial review to proceed on all grounds. Subsequently, on 6 May 2021 this matter was listed for a full hearing over three days commencing 19 October 2021.

3 By order of 5 August 2021, Cheema-Grubb J considered various interlocutory applications made by the parties. Declining to accede to a request for an oral hearing of the applications, Cheema-Grub J increased the time listing for the substantive hearing to four days, but (relevantly) refused the claimants' applications for specific disclosure and to cross-examine the defendants' witnesses, and refused the defendants' application to adjourn the final hearing, and to instead list this matter for a two day procedural hearing over those days.

4 The claimants having applied for their applications to be renewed at an oral hearing, this matter now comes before me. Specifically, I am concerned with the following applications:

1) The claimants renewed applications for:
   (a) specific disclosure,
   (b) further information and
   (c) cross-examination of witnesses.
2) If those applications are granted, the application of the first and third defendants (supported by the second defendant), to stay the substantive hearing in this matter pending the expected public inquiry.
3) The application of the first and third defendants (again supported by the second defendant), to permit the filing of further witness evidence by all defendants and for such other directions as might be necessary to ensure the claim is ready for trial.

5 I heard submissions on these applications at an in-person hearing on 25 August 2021 and am today providing my oral judgment by way of video hearing.

The Background.

6 The claim for judicial review in this matter was filed on 12 June 2020. It is brought by two members of the public, whose fathers both died in care homes in April/May 2020 of actual or probable Covid-19. Both deaths followed the discharge into a care home of NHS patients who were Covid-positive. The claimants' fathers were amongst some 20,000 care home residents who died of Covid-19 in the first wave of the pandemic. I am told that was more than 5 per cent of the total care home population.

7 The claimants make detailed criticisms of the defendants' policies and decisions in relation to care homes between February and June 2020. In particular, they complain that six policies failed to lawfully address the principal routes of transmission of Covid-19 to care home residents (by other residents, by external visitors, and by care home staff), namely (and I adopt the abbreviations used by the claimants for ease of reference):

1) The March PHE Policy.
2) The March Discharge Policy.
3) The April Admissions Guidance.
4) The April Action Plan.
5) The May Support Policy; and

6) The Revised June Admissions Guidance.

8 The claimants say that these failings amounted to breaches of legal duties by the defendants. In particular, they allege, first, breaches of Articles, 2, 3, 8 and 14 of the European Convention on Human Rights ("ECHR"). This aspect of their claim is principally put under Article 2, which requires the State to protect the right to life, in respect of which the claimants contend that the defendants owed both a systemic and an operational duty given what they say was the real and immediate risk to life, the actual constructive knowledge of the State of that risk, and a sufficient connection or link with the responsibility of the State. Secondly, the claimants allege failures by the defendants to have regard to relevant considerations in failing to mitigate the risk of Covid-19 infection in care homes, and/or that relevant considerations were disregarded, and that there was a failure to conduct proper inquiries. Thirdly, they allege indirect discrimination on grounds of age and disability, and breach of the public sector equality duty under s.149 of the Equality Act 2010. Fourthly, they allege breaches of the duty of transparency. They seek declarations that the defendants breached those duties and just satisfaction in the form of an acknowledgement of the breach of their human rights. They do not seek any financial remedy.

9 For their part, the defendants say that the claimants' criticisms of the approach taken to mitigate the risk of Covid-19 infections in care homes are unfair and unfounded, particularly having regard to the measures which were taken, the scientific and other advice which the defendants received, and the developing understanding of the nature and degree of risks which the Covid-19 virus entailed. They say that the evidence suggests that their approach did not increase the number of deaths in care homes, and that there is no evidence that the claimants' fathers died as a result of any failings on the part of the defendants. They further deny breaching any legal duty, and contend that this is not a case where the operational duty under Article 2 of ECHR is engaged but, in any event, deny that it was breached. More generally, the defendants complain that the claimants are really seeking to conduct a public inquiry through the courts.

10 In giving permission for this matter to proceed, Linden J was mindful of this criticism, making clear:

> "9. . . . nor will the process of determining the Claim be in the nature of a public inquiry . . . the Claim will stand or fall on whether the claimants are able to establish the specific breaches of legal duties alleged rather than being a process in which the court second guesses the decisions of the defendants, or the rights and wrongs of their actions, in some more general sense."

11 That said, when considering the question of public interest for the purpose of the claimants cost-capping application, Linden J noted that the claims:

> "15. . . . raise issues of law of real and general importance. It is important that those issues are resolved and these proceedings are an entirely appropriate way to raise them. The issues affect a very large number of people, either directly because they are or may be cared for in care homes, or indirectly because they are relatives or friends of people who are cared for in care homes. I accept that if relief is granted it will only formally apply to the claimants, but it is likely to be of comfort to many others and it may assist in future dealings with the present pandemic and other analogous or similar situations."

12 Turning to the procedural history relevant to these applications, after being afforded an extension of time for the filing of evidence, the defendants filed their detailed grounds and witness statements in early May 2021, and a document bundle following a week later. At the same time the defendants disclosed over 5,000 pages of documentation.

13 For the first and third defendants, witness statements have been filed from: Tom Surrey, Director of Adult Social Care Quality in the first defendant; Stuart Miller, Director for Delivery in Social Care for the first defendant (formerly an Incident Director in the first defendant's Pandemic Operational Response Centre); and Susan Hopkins, a Divisional Director in the third defendant, and, from January to August 2020, its National Incident Director for the Covid-19 Response. For the second defendant, a witness statement has been filed from Ian Dodge, National Director of Primary Care, Community Services and Strategy.

14 Each of the defendant's witness statements is lengthy and draws on various documents and other sources in providing the evidence in question. For the first and third defendants it has been explained that the statements are intentionally corporate in nature; the individuals in question could not directly attest to every matter, but speak for the relevant defendants, drawing on a variety of sources to do so, as referenced in footnotes. It is not suggested that every potentially relevant document has been referenced or disclosed, and there are instances in which documents are referred to which have not been the subject of disclosure. It is, however, the defendants' case that they have fully complied with their duty of candour and have provided a fair and frank explanation in the statements read alongside the other materials in the case.

15 Having received the defendants' evidence, in correspondence in mid-June 2021, the claimants complained, however, that this was insufficient to comply with the duty of candour, setting out their expectation of a second extensive disclosure exercise, and asking for further information in respect of the content of the defendants' witness statements. On 7 July 2021 the claimants filed evidence in reply comprising three new witness statements, and further exhibits. On 20 July, the claimants filed an application for specific disclosure, supported by a statement from Mr Conrathe, the claimants' solicitor, and also applied to cross-examine the defendants' witnesses. The claimants application includes some 132 requests for specific disclosure and/or further information.

16 In resisting the claimants' requests and application to cross-examine, in correspondence in reply, the defendants objected that they had already provided very extensive disclosure, more than sufficient to comply with their duty of candour and to enable the court to justly and fairly resolve the issues in this judicial review.

17 In refusing the claimants' applications in these respects, Cheema-Grubb J largely agreed with the defendants, observing that the proceedings had been ongoing for a year and had been set down for a hearing in October 2021, and explaining her view that: "*The comprehensive requests for further disclosure are extremely wide-ranging and disproportionate*" and that she saw: ". . .*no basis for ordering cross-examination at the substantive hearing of this claim. Such a step, unusual for review proceedings, would only be taken after a comprehensively justified application and I am not satisfied by the grounds put forward.*"

18 The claimants now seek to renew those applications at this oral hearing.

19 When this matter was considered by Cheema-Grubb J, there were also indications from the parties of their intention to file yet further applications, in particular from the defendants. Notwithstanding Cheema-Grubb J's steer to the contrary ("*These are not encouraged*"), the

defendants have applied to adduce further witness statement evidence in response to the claimants' reply evidence.

The Relevant Legal Principles.

20 Judicial review defendants are subject to a duty of candour, which has been described as imposing: "*A very high duty on Central Government to assist the court with full and accurate explanations of all the facts relevant to the issue that the court must decide*" (See *Secretary of State for Foreign & Commonwealth Affairs v Quark Fishing Limited* [2002] EWCA Civ 1409, per Laws LJ with whom the other members of the court agreed, at para.5). As Sir John Donaldson MR put it in *R (Huddleston) v Lancashire County Council* [1986] 2 All ER 941 at p.945 F, judicial review is:

> ". . . a process which falls to be conducted with all the cards face upwards on the table, and the vast majority of the cards will start in the authority's hands."

21 Amongst the important features of the duty of candour is that witness evidence filed by a defendant must:

> ". . . not either deliberately or unintentionally obscure areas of central relevance; and those drafting them should look carefully at the wording used to ensure that it does not contain any ambiguity or is economical with the truth." (See *R(Citizens UK) v Secretary of State for the Home Department* [2018] 4 WLR 123 at para.106(4)).

And where documents significant to a challenged decision are referenced, it is good practice that they should be exhibited to the statements subject to any considerations of confidentiality or proportionality (See per Lord Bingham at para. 4 *Tweed v Parades Commission of Northern Ireland* [2007] 1 AC 650).

22 The duty of candour does not, however, give rise to a duty to disclose documents *per se*; although defendants may discharge their duty through the disclosure of documents (and may be encouraged to do so, where that is a means of ensuring the court is informed of the relevant facts underlying, and the reasons for, a decision), they are not ordinarily required to give the sort of standard disclosure which might be required under CPR31; disclosure, as opposed to compliance with a duty of candour, is not required in judicial review proceedings unless the court so orders. (See PD54A, para.10.2). That is so, even if the documents in question are referenced in witness statements filed in the proceedings (See per Lewis J (as he then was) at para. 80 *R(Sustainable Development LLP) v SSBEIS* [2017] EWHC 771 (Admin).

23 Indeed, as the court explained in *R(Al-Sweady) v Secretary of State for Defence (No 2)* [2010] HRLR 2, orders for disclosure in judicial review proceedings are usually unnecessary, not only because the defendant will normally comply with the duty of candour, but because, typically, the facts are not in dispute, or are only relevant to explain the context in which the issues of law arise. In *Al-Sweady* it was, however, stated that: "*The position is different in many human right cases brought under the ECHR . .* " because such cases: "*tend to be very fact-specific*" and "*will call for a careful and accurate evaluation of the facts*." (see *Al-Sweady* at para. 23, referring to the judgment of Lord Bingham in *Tweed* at p.654). That duty was, it was further observed, heightened and even more acute in a case which concerns the most important and basic rights under the ECHR, namely the right to life under Article 2, and the prohibition of inhuman or degrading treatment under Article 3. Where claims relate to those most basic of human rights: "*It must be incumbent on this court to consider with great care and to apply intense scrutiny*" to the claim. (See *Al-Sweady* at para. 26).

24 The claimants in the present case place weight on those observations in *Al-Sweady*, contending that the same approach should be applied in the present proceedings. I bear in mind, however, that the observations of the court in *Al-Sweady* in relation to disclosure were made in the context of the prior decision to make orders for cross-examination:

> "An important consequence of the orders for cross-examination was that disclosure was needed to enable effective and proper cross-examination to take place . . ." (see para. 22).

Cross-examination is not a usual feature of judicial review proceedings (indeed, as PD54A, para. 10.3 provides: "*It will rarely be necessary in judicial review proceedings for the court to hear oral evidence*."), but it was required in *Al-Sweady* because there were what were called "*hard-edged*" questions of fact which ". . . *represented an important exception to the rule precluding the court substituting its own view in judicial review cases*." In that regard, the court noted the distinction drawn by Lord Mustill in *R v Monopolies & Mergers Commission ex parte South Yorkshire Transport Ltd)* [1993] 1 WLR 23, 32 D-F, between: "*a broad judgment whose outcome could be overruled only on grounds of irrationality*" and "*a hard-edged question where there is no room for legitimate disagreement*."

25 It is right that in *Al-Sweady* the court envisaged that the need for cross-examination might arise more frequently in cases where there were crucial factual disputes relating to the jurisdiction of the ECHR and the engagement of its Articles (see para. 18), but I do not read that as laying down a general rule in that regard. The question is whether the nature of the dispute requires that cross-examination takes place and, therefore, whether an obligation to provide disclosure should arise akin to that in a case proceeding to trial in an ordinary Queen's Bench action (See *Al-Sweady* at para. 27). That, it seems to me, is also the approach reflected in the Treasury Solicitor's Guidance on discharging the duty of candour in disclosure in judicial review proceedings at para. 1.5. Similarly, in *Tweed* whilst also envisaging that disclosure applications might increase in frequency given the more fact specific nature of human rights challenges, it was made clear that orders for disclosure should still not be automatic: "*The test will always be whether, in the given case, disclosure appears to be necessary in order to resolve the matter fairly and justly*." (see *Tweed* at para. 3).

26 Moreover, an order for disclosure will not be made in order to "*unpick the decision*", see *R (John-Baptiste) v DPP* [2019] EWHC 1130 (Admin) at para.7, where this was characterised as a fishing expedition.

27 As for a request for further information, under CPR Rule 18.1 the court may order a party to clarify any matter which is in dispute, and give additional information in relation to any such matter. Per PD 18, para. 1.2 requests must be confined to what is "*reasonably necessary and proportionate*" to enable the requesting party "*to prepare his own case or to understand the case he has to meet.*" In judicial review proceedings it has been held that:

> "An approach similar to that adopted in *Tweed* should be taken to CPR Part 18 request for further information, namely that such further information will be ordered when it is necessary in order to resolve the matter fairly and justly." (See per Parker LJ in *R(Huddleston) v Lancashire County Council* [1986] 2 All ER 941 at 947).

28 Returning to the question of cross-examination, in *Bubb v Wandsworth LBC* [2012] PTSR 1011, it was made clear that this would be permitted only in the "*most exceptional of cases*", (see per Lord Neuberger MR, at paras. 24 to 25), explaining the principle behind this approach as follows:

> "24 . . . As its name suggests, judicial review involves a judge reviewing a decision, not making it; if the judge receives

> evidence so as to make fresh findings of fact for himself, he is likely to make his own decision rather than to review the original decision . . .
>
> 25 In the overwhelming majority of judicial review cases, even where the issue is whether a finding of fact should be quashed on one or more of the grounds identified by Lord Bingham, [in *Tweed*] there should be no question of live witnesses . . ."

29 Acknowledging that the cross-examination of witnesses is not usual in judicial review proceedings, the claimants nevertheless remind me that:

> ". . . the court retains a discretion to order or to permit cross-examination, and it should do so if cross-examination is necessary if the claim is to be determined, and is seen to be determined, fairly and justly." (See per Stanley Burton LJ in *R (Bancoult) v SSFCA* [2012] EWHC 2115 (Admin) at para 14.)

30 Ultimately, whether cross-examination is appropriate in a judicial review claim will depend on the issues raised by the claim in question, the extent of the factual disputes raised, and the conduct of the defendant in discharge of its duty of candour; see *R(Jedwell) v Denbighshire County Council* [2016] PTSR 715 at paras. 50 to 55).

The Claimants' Applications: Submissions, Discussion and Conclusions.

31 It is the claimants' case that the nature of the grounds of challenge in this case, in particular those founded upon the ECHR, mean that the facts are central to a degree unusual in judicial review. They argue that whether the defendants are held to have taken reasonable steps to protect life, will be intensely sensitive to what the defendants knew, and what they ought reasonably to have known, at the material time, about:

a) Covid-19 and how it is transmitted.
b) The capability of care homes to safely care for Covid positive patients, including their ability to obtain and use personal protective equipment ("PPE"), and implement infection prevention and control ("IPC"), and the risk of asking them to do so.
c) The feasibility and likely efficacy of policy measures which were not taken, or not taken until it was too late, to reduce the risk of Covid infection, including isolation, testing, infection control guidance, PPE guidance, restriction on visitors, and restrictions on staff movements.

32 In his statement, in support of the claimants' applications, Mr Conrathe contends that the grounds of claim in this case require detailed consideration of the circumstances pertaining in the first wave of the pandemic in order to assess the lawfulness of the defendants' decisions and policies. He then summarises the evidential position in respect of particular issues:

1) In relation to the transmission of Covid-19, it is said that there is a factual dispute between the parties as to when the defendants knew, and when they ought to have known, of the risk of transmission by those with very mild symptoms, those who were infected but in the pre-symptomatic stage, or by those who were infected but asymptomatic. Contrary to the defendants' pleaded case, the claimants say the evidence shows that the defendants were aware, or at least should have been aware, of the risks of these different forms of transmission at a very early stage.
2) As for the evidential dispute in relation to Covid-19 testing capacity and NHS bed capacity, it is the claimants' case - attested to in their expert evidence - that, contrary to the position of the defendants in these proceedings, there was in fact: "*significant excess unused testing capacity*" in March and April 2020, and it was

not necessary to discharge hospital patients into care homes, without testing or quarantine, to free-up beds for seriously ill Covid-19 patients.

3) In relation to the evidential position regarding the defendants IPC and PPE guidance, it is said that this makes clear the claimants' contention, supported by their expert evidence, that the efficacy of the guidance (which was, in any event, said to be inadequate) was limited in the care home setting, in particular in relation to a workforce without relevant training.
4) And in respect of the evidence relating to the nature and magnitude of the risk caused by the defendants policies of discharge, without testing or quarantine, it is the claimants' case that the policies and measures under challenge "*led directly or indirectly to the deaths of more than 20,000 vulnerable care home residents*", whilst the defendants contend that the alleged policy failures were not responsible for any significant number of outbreaks in UK care homes.
5) Moreover, in relation to the various contentions made by the claimants as to the bases for the decisions made by the defendants at this time, Mr Conrathe says that the fair determination of this aspect of the claim will require scrutiny of the reasons given for those decisions which will, in turn, depend on the defendants disputed and contested factual assertions, and the court will need to determine what was or was not taken into account by the relevant decision makers.

33 At this stage it is, of course, difficult for me to reach any concluded view on these issues, but with the benefit of the summary thus provided by Mr Conrathe, I am not persuaded that it is necessary to take the unusual step of directing that there should be oral evidence and cross-examination in this case. The issues identified do not suggest the same kind of hard-edged factual dispute as arose in *Al-Sweady*. Moreover, to the extent that there are disputes that are other than differences of opinion or judgment, the factual foundations for the different views expressed are stated, with the relevant source (whether documentary or otherwise) referenced in the witness statements that have been filed. Where it is said that any such view is irrational or perverse, or that there was a failure to take reasonable and proportionate measures in response, those are points that can be made good in submission. There is, furthermore, a risk that cross-examination would seek to unpick the decisions made and to encourage the court to remake those decisions for itself. As Linden J made clear when giving permission, the process by which this claim is to be determined is not in the nature of a public inquiry. The claim will stand or fall on whether the claimants are able to establish the specific breaches of legal duties alleged; it will not be the court's role to second guess the decisions of the defendants, or the rights and wrongs of their actions, in any more general sense.

34 I have further considered whether the position adopted by the defendants in these proceedings means that cross-examination would be required if the claim is to be seen to be determined fairly and justly. Again, I am not persuaded that that is a necessary step. The evidence disclosed by the defendants is extensive and the witness statements filed provide a detailed narrative of the history, explaining the bases of the decisions reached at various stages. This is not a case where the defendants conduct to date would itself provide grounds for permitting cross-examination.

35 I turn then to the applications for specific disclosure and further information. I have not directed that there should be cross-examination in this case and so no additional onus of disclosure arises as a result in that regard. Again, the question is whether the further disclosure sought appears to be necessary in order to resolve the matter fairly and justly. This is not a case where the defendants have failed to provide extensive disclosure, or where there has been a failure to engage with the detail of the claim in the witness evidence. The concern of the claimants is, however, not with the extent of the material already provided, but with what that does not include. Their objection is that much of what has been disclosed was already in the

public domain, and what is omitted is the very material that might be expected to reveal how decisions were made, on what bases and by whom. They complain that the defendants lack of engagement with the specific request for disclosure and/or further information means that it is impossible to be certain whether there has been full compliance with the duty of candour.

36 In making this complaint the claimants focus on the first and third defendants, accepting that the second defendant, by letter of 7 July 2021, has explained its understanding of, and its approach to, its obligation to comply with the duty of candour, setting out how it went about its search for relevant communications and documentation. The claimants also acknowledge that the unprecedented circumstances faced at the beginning of the pandemic might have impacted upon normal decision-making processes and record-keeping, as explained at paras. 6-9 of Mr Surrey's first witness statement. The claimants express concern, however, that the absence of so much of the paper trail that might otherwise have been expected, coupled with a failure to explain how the first and third defendants have approached the search for relevant material and the lack of any detailed engagement with the request for specific disclosure and further information, means that there is no assurance that the full and frank explanation required has been provided. In particular, they highlight the absence of disclosure of WhatsApp and text messages, although such material of that nature as has been put into the public domain through other means, might suggest that this was a regular form of relevant communication at the time.

37 For the defendants, it is objected that the disclosure exercise undertaken was extensive and took up considerable resources. It was said at the oral hearing that members of the legal team had sifted through some 15,000 pages to produce the material ultimately disclosed. As for the (WhatsApp and text) messages referred to, the court has been told that this is an issue that has not been fully resolved, although the provisional view was that this was unlikely to be a source of further relevant material.

38 There are, in my judgment, a number of difficulties with the claimants applications for disclosure and further information, largely due to the underlying assumptions on which they are based. First, the claimants ask the court to adopt an approach akin to that in *Al-Sweady*, when this claim does not give rise to the same kind of hard-edged factual questions and is not, for the reasons I have already explained, a case were cross-examination (with the consequential further disclosure that would require) is necessary. Secondly, the applications effectively ask the court to assume a failure to comply with the duty of candour. At this stage, however, it has not been demonstrated that the defendants' witness statements serve to obscure areas of central relevance, and the criticism made pre-supposes an obligation to provide disclosure of documentation akin to a contested trial on the evidence, rather than a judicial review. Thirdly, and more generally, the extent of the 132 requests made assumes a broad range of inquiry going beyond the role of the court in this matter, and disproportionate to its task. I therefore decline to make the orders requested.

39 That said, having heard oral argument on these applications I am persuaded that there is a need for greater clarity as to the approach of the first and third defendants in ensuring compliance with the duty of candour. In contrast to the explanation provided by those acting for the second defendant, no account has been provided of the steps taken by these defendants to ensure compliance. In particular, there was a lack of clarity as to the first and third defendants' positions in relation to less formal means of communication that, on Mr Surrey's account, may well have taken on a greater significance in the particular circumstances faced at the relevant time. I consider the court would be assisted by a short witness statement explaining the steps undertaken, and any decisions taken as to particular categories of documents or material, so that there can be clarity in this regard, and in the hope that this might avoid unhelpful speculation at some later stage. Given the order that I am going to go

on to make on the defendants' own application, I will direct that this statement be filed and served by 4 p.m. on 10 September 2021.

The Defendants' Applications.

40 Given the decision I have made on the claimants' applications, the issue of a stay cannot arise; there is no reason for the hearing of this claim not to proceed on its present listing.

41 On the application for permission to file further witness statements in response to the claimants' reply evidence, whilst it would be preferable for the court to have sight of the proposed statements before making any decision, I accept that the limited time available, and the fact that these steps are being taken during the vacation period, has rendered this impractical. At the same time, it seems sensible to ensure that the parties' respective responses to each other's positions have been made clear in good time for the final hearing. I therefore give permission to the defendants to file and serve further concise witness statement evidence, strictly limited to those matters that arise from the claimants' reply evidence. I will not set a page restriction, but make clear that the statements should be limited in the manner I have directed. Those statements are to be filed and served by 4 p.m. 10 September 2021.

42 More generally, the defendants raised concerns as to the manageability of the claim if it is to be determined in the four day listing in October. I share those concerns, and make the following directions as a result. I direct that a list of issues is to be agreed; that would normally be required at least seven days before the hearing but, in this case, I consider that the issues should by now be clear and identifiable and it would be helpful for that list to be drawn up in advance of the finalisation of skeleton arguments; I propose that this also be done by 4 p.m. on 10 September 2021. (More generally, I should make clear that I am proposing dates in respect of these additional directions. If, when the parties are drawing up the order following this hearing, they reach agreement for different dates then I am happy for those to be changed; but in the absence of such an agreement, it can be taken that these are the dates that I am imposing).

43 I also consider it would be helpful for an agreed timetable for the hearing to be filed 14 days before the start of the hearing. As for skeleton arguments, I note that the Practice Direction provides that skeleton arguments should be limited to 25 pages, unless the court otherwise directs. The first and third defendants have proposed that any skeleton arguments be limited to no more than 35 pages; that seems to me to be a sensible course, and I so direct. I do not limit the size of the bundle at his stage, but remind the parties of their obligation to assist the court and to adopt a proportionate approach; I expect the compilation of the bundles to reflect those obligations.

MRS JUSTICE EADY: Are there any matters arising?

MR PAINES: I am grateful, my Lady. I think there are potentially two matters arising, the first of which is costs, and I think it is agreed between the parties that in light of the costs capping order, the appropriate order is costs in the case. You will have seen in Mr Justice Linden's order that the cost capping order is relatively low, and in practical terms the ultimate result will lead to a costs recovery manifestly insufficient for any party's incurred costs. I should say I have just seen Ms Grey QC pop up, but that was agreed between me and Mr Vandeman this morning; he was going to take instructions on the point. I have not actually spoken to her about it.

The second issue is permission to appeal, and we would respectfully submit that we should have permission to appeal, first, on disclosure. Sir James accepted yesterday that material went to the ultimate decision makers, the Ministers, by informal and piecemeal routes rather than in formal Ministerial submissions, and that that material has not been disclosed. Likewise, Ministers received scientific advice, which he said was crucial. We submit simply that on the authorities, particularly *R(National Association of Health Stores)*, that must mean material which is necessary, fairly and justly, to dispose of the claim. That is the material which the Minister saw, and we are entitled to it, and the fact that it was not given in a formal manner is no answer to that.

Secondly, perhaps an aspect of that on the informal communication routes, the WhatsApps, you referred in your judgment, my Lady, to what Sir James said yesterday that essentially the defendant is thinking about it and thinks that it probably will not give any disclosure, but has not come to any conclusive view. We say, with respect, that that is no answer to our application. It is clear on the published material that that was a regular form of communication on significant issues between Ministers and the Prime Minister. It falls within the duty of candour, and there is really no reason why it cannot be disclosed. So, fully accepting that your Ladyship's decision is an interlocutory one, we say we should have permission to appeal on those matters.

On cross-examination we say that this is an *Al-Sweady* case, and that particularly given the nature of the statements as they are at present, we should be entitled to permission to appeal on that issue as well.

I think that is all I need to say on consequentials, my Lady, unless I can assist.

MRS JUSTICE EADY: Thank you. Does anybody else wish to say anything?

MS GREY: If I may, my Lady, briefly. As my learned friend, Mr Paines, has just explained, the agreement on costs did not actually include us, and I think, certainly in relation to the thing that has taken up the bulk of the court's time and preparation, the application for specific disclosure and cross-examination, the court dismissed it against the defendants, specifically against D2. I am slightly unhappy as a matter of principle with costs in the case, because that would give the cost to the claimants on this application should they succeed in the claim as a whole, and certainly in respect of D2 I would simply ask for defendant's costs, that is D2's costs, in the case, so they would not go to the claimant in any event. I acknowledge that the

effects of the cost capping order may make this slightly academic, but it does seem a little wrong in principle to have that possibility of the claimants recovering the costs of this application when it has, in effect, been dismissed really wholesale.

MRS JUSTICE EADY: Thank you. Mr Vandeman, do you wish to say anything?

MR VANDEMAN: My Lady, nothing really further from me on costs. I have nothing to say. As Ms Grey says it is basically academic, but I see the force in what she says in principle. Then on to permission to appeal, of course we resist it. I do not think Mr Paines has really added to what Mr Coppel said yesterday, so we resist it for the reasons that you have already given in your judgment.

MRS JUSTICE EADY: Thank you. Yes, Mr Paines, do you want to say anything in reply?

MR PAINES: Just to respond on costs, my Lady. The order of Mr Justice Linden at p.387 is in the case management bundle, if you have that.

MRS JUSTICE EADY: Yes.

MR PAINES: And it is para. 3 at the bottom of the page, going over to the next page. So, first, Ms Grey is right that the discussion this morning did not include her client, but the cost capping order does. It is a cap on collective advocate liabilities. The reality is that the true costs of any party will dramatically exceed those caps and, in my submission, it is not merely partly academic it is entirely academic to make interlocutory orders for costs in principle, in circumstances in which everything is going to be netted off at the end of the proceedings, and it will simply lead to unwelcome mathematics.

MRS JUSTICE EADY: Thank you. If everybody has said everything they want to, let me just deal with those two matters.

44 Having given my judgment in this matter, two issues were raised, the first relating to costs. It is the position of the claimants that the correct order should be costs in the case, whereas, certainly for the second defendant at least, it is said that it should be the defendants' costs in the case, the claimants' applications having been refused.

45 The reality is, as everybody recognises, that the effect of the cost capping order granted by Linden J, means that this an entirely academic exercise. Whatever is ordered it is plain that the actual cost will far exceed the cap, and it seems to me appropriate not to spend further time on it, or to potentially generate future academic arguments; accordingly I order costs in the case.

46 In relation to the second matter, the claimants seek permission to appeal on both the question of disclosure and cross-examination. This is a case management, interlocutory decision, and I have given my reasons for my decision in my oral Judgment; I do not give permission. If the claimants wish to take it further that is something they will have to take up with the Court of Appeal.

MRS JUSTICE EADY: Is there anything else?

MR PAINES: Nothing, thank you. I am grateful.

CERTIFICATE

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