



Neutral Citation Number: [2021] EWHC 1569 (TCC)

Case No: CO/2437/2020
Case No: HT-2020-000290

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)

Royal Courts of Justice
Rolls Building
London, EC4A 1NL

Date: 09/06/2021

Before :

MRS JUSTICE O'FARRELL DBE

Between :

THE QUEEN
on the application of

THE GOOD LAW PROJECT

Claimant

- and -

MINISTER FOR THE CABINET OFFICE

Defendant

- and -

PUBLIC FIRST LIMITED

Interested
Party

Jason Coppel QC and Patrick Halliday (instructed by **Rook Irwin Sweeney LLP**) for the
Claimant

Sir James Eadie QC, Michael Bowsher QC, Ewan West and Anneliese Blackwood
(instructed by **Government Legal Department**) for the **Defendant**

Hearing date: 15 February 2021
Further written submissions: 25 February 2021

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MRS JUSTICE O'FARRELL

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10.30am on 9 June 2021

Mrs Justice O'Farrell:

1. This is the hearing of the Claimant's claim for judicial review in respect of the Defendant's award of a contract for the provision of focus group and communications support services ("the Contract") without public notice or competition, relying on Regulation 32(2)(c) of the Public Contracts Regulations 2015 ("the PCR 2015").
2. The award of the Contract to the Interested Party ("Public First") was made by the Defendant's letter dated 5 June 2020 and an email from Public First dated 8 June 2020, with an effective date of 3 March 2020 and an expiry date of 2 September 2020.
3. The services and deliverables under the Contract included:
 - i) recruitment and delivery of focus groups and/or mini groups to an agreed specification, covering the general public and key sub-groups defined by demographic, life stage or other agreed criteria;
 - ii) same-day top line reporting and next-day fuller reporting of focus group findings; and
 - iii) on-site resource to support Number 10 Communications.
4. The grounds of challenge relied on by the Claimant are as follows:
 - i) Ground 1: there was no basis for making a direct award under Regulation 32(2)(c). The Claimant's case is that the direct award of the Contract to Public First was not strictly necessary. The Government already had several existing contracts with other suppliers which it could have used to commission the work; alternatively the duration of the Contract and services commissioned under the Contract should have been restricted to a few weeks, enough time to meet the Defendant's needs, while it conducted a competitive procurement of the services.
 - ii) Ground 2: the award of the Contract for a period of six months was disproportionate. The Claimant's case is that even if Regulation 32 were applicable, the Contract should have been restricted to the Defendant's immediate, short term needs, pending a competitive process to procure a longer term supply of the services.
 - iii) Ground 3: the decision to award the Contract to Public First gave rise to apparent bias contrary to principles of public law. The Claimant's case is that the fair minded and informed observer would conclude that there was a real possibility of bias, having regard to the personal connections between the decision-makers and the directors of Public First.
5. The Defendant disputes each ground of challenge:
 - i) In respect of Ground 1, the Defendant's case is that the conditions for making an award under Regulation 32(2)(c) of the PCR 2015 were satisfied. The immediate and continuing provision of the research services provided by Public First were necessary to address the serious public health risks posed by the Covid-19 pandemic. There was no time to run an accelerated procurement under

the open or restricted procedures, competitive procedures with negotiation, or to place a call off contract under any existing framework. Other potential suppliers were not used because they could not provide the requisite services.

- ii) In respect of Ground 2, the Defendant's case is that the award of the Contract for a period of six months was not disproportionate. The scale of the national emergency was unprecedented in peacetime. The provision of the research services was essential to ensure effective communications of vital health messages to the public. The Defendant could not risk the Contract expiring before the peak of the crisis had passed, as to which there was no certainty. It would have been disproportionate to divert resources from other critical tasks to conduct a procurement exercise for these services.
 - iii) In respect of Ground 3, the Defendant's case is that, in all the circumstances of the case, a fair-minded and informed observer, who had knowledge of the facts, would not conclude that there was a real possibility that the decision maker was biased. The decision to award the Contract to Public First was based on its expertise, experience and availability to undertake the required specialist services that had to be delivered at speed. Personal connections were not relevant factors in the decision, as opposed to professional assessment.
6. Further, the Defendant disputes that the Claimant has sufficient standing to bring the challenge by way of judicial review.

COVID-19 pandemic first wave

7. In early 2020 the first wave of the Covid-19 virus surged through Europe. On 11 March 2020 the Director General of the World Health Organisation announced that Covid-19 had been classified as a pandemic.
8. On 13 March 2020 there was widespread cancellation of sporting events, including Premier League football and the London Marathon.
9. On 16 March 2020 the Prime Minister began daily press briefings, urging everyone in the UK to stop non-essential contact and travel to enable the NHS to cope with the pandemic.
10. On 17 March 2020, the European Union closed all its external borders in an attempt to contain the spread of Covid-19.
11. On 18 March 2020 the Government announced that most schools across England would shut from Friday 20 March 2020. The Welsh and Scottish governments also announced that they would close schools.
12. On 20 March 2020 the Government ordered all pubs, restaurants, gyms and other social venues across the country to close. The furlough scheme was announced.
13. On 23 March 2020 the Prime Minister, in a televised address to the nation, imposed the first lockdown, asking the British people to: "Stay at home, protect the NHS and save lives."

14. On 25 March 2020 the Coronavirus Act 2020 was passed, making emergency provision in connection with coronavirus and conferring wide powers on the Government to impose restrictions on the freedom of movement of individuals for public health protection.
15. On 9 April 2020 the UK recorded its highest Covid-19 daily death toll in the first wave of 1,073 deaths.
16. On 10 May 2020 the Prime Minister announced limited plans for the easing of the first lockdown.
17. Through June and July 2020 restrictions were relaxed and replaced with social distancing rules pursuant to revised regulations.

Appointment of Public First

18. Prior to 2020, the Prime Minister's Office and the Cabinet Office obtained information as to public attitudes towards government policy and communication through third party research services. The services included quantitative research, comprising large-scale surveys providing numerical data, and qualitative research, comprising smaller focus groups providing explanations for the opinions and attitudes held by members of the group. Such research services were obtained using a framework operated by the Crown Commercial Service ("the CCS") known as the Research Marketplace Dynamic Purchasing System ("the RM DPS"). The RM DPS allows public authorities to buy market research services by running competitions among a list of registered suppliers.
19. One of the registered suppliers on the RM DPS is Public First. James Frayne, a founder and director of Public First, describes it as a mid-sized agency, specialising in opinion research on complex issues of public policy, as well as policy analysis and communications.
20. In early February 2020, Public First was engaged by the Cabinet Office for a discrete task of providing focus group services to test public opinion and policies in preparation for the Prime Minister's speech planned for later that month, ahead of the budget ("the Narrative Appointment"). These services did not include research connected with Covid-19. Neither Dominic Cummings, then Chief Adviser to the Prime Minister, nor the Rt Hon Michael Gove, Minister for the Cabinet Office and Chancellor of the Duchy of Lancaster, had any involvement in the appointment of Public First to carry out this initial work and it is not the subject of any challenge.
21. By late February 2020 it became apparent that Covid-19 had created a national emergency. The Government decided that it needed an accurate understanding of public opinion to deliver guidance that would influence public behaviour to mitigate the spread of the virus, help prevent the NHS from being overburdened and save lives. The information required included the extent of public knowledge and understanding about Covid-19 and related safety information, existing public behaviour, and the public's response to, and understanding of, the Government's briefings and messaging.
22. A Covid-19 communications hub was established by the Defendant from which to deliver public information. Alex Aiken, Executive Director for Government Communication, convened meetings twice a day, covering the main areas of operation,

and took part in the Prime Minister's briefing meetings. Research on public behaviour for the hub was provided by a number of departments and agencies, including 'Britain Thinks' for the Department of Health and Social Care ("the DHSC") and by the 'Behavioural Insight Team', which procured research services as and when required through the RM DPS.

23. Mr Cummings held a number of meetings with the DHSC, Public Health England ("PHE") and the NHS. At those meetings, there was consensus that clear and effective communication with the public would be necessary to combat the spread of the disease, in the absence of mass testing and tracing, or a vaccine, then but a glimmer of hope on the horizon. Mr Cummings considered that it was essential to obtain information about these matters on a continuous and rapid basis from a number of sources in order to be able to triangulate the data; that is, to compare data from different sources to cross-check its accuracy and form a composite picture. One such source of data was information gathered from focus groups.
24. Mr Cummings expressed concern that the Government's communications were not as effective as they might be and could lead to confusion and concern amongst the public as the first cases of Covid-19 were confirmed in the UK. His view was that PHE did not have the right resources in place to meet the communications requirements of the emerging pandemic; it did not have the people or skills needed to undertake this type of public communication at speed; nor did the DHSC, the NHS or the Cabinet Office. Therefore, he considered that it was necessary to procure focus group services from external providers.
25. Those views were shared with Mr Aiken. On 27 February 2020 Mr Aiken raised with his team the need for urgent focus group testing of Covid-19 issues, the results of which could be provided to No. 10 the following day, as noted in his email dated 27 February 2020:

"Dominic Cummings has raised concerns that the creative approach of the Coronavirus campaigns is not right. Therefore, you will be required to justify the campaign in a meeting hosted by Dominic tomorrow, likely to be at 3pm, though times are to be confirmed.

Please could you contact the creative and research agencies working on the campaign to ensure they are also represented at the meeting as well.

As you know, it's important we get this right so please utilise our teams here as needed ..."
26. Helen Stratton, Head of Insight, Government Communications Service ("GCS"), Prime Minister's Office and Cabinet Office, knew that Public First was scheduled to conduct focus groups in Crawley during the evening of 27 February 2020, as part of their work under the existing Narrative Appointment. She recommended that Public First could re-direct those focus groups to conduct the Covid-19 focus group research.
27. That recommendation was accepted by Mr Aiken:

“We urgently needed research for the meeting on 28 February 2020 so I instructed my team to use the focus groups already planned by Public First under the narrative contract to deliver Covid research instead. I would not normally get involved in focus groups but the nature of the crisis was such that I felt we needed the research and gave the direction. I believe that I told the team that we needed immediate testing of Covid messaging and when Helen Stratton said Public First were running focus groups that night I gave the instruction to utilise and repurpose those groups. I have been told that I participated in a call with Public First that day, however I do not recall this. ”

28. Ms Stratton briefed Public First to change the focus groups in Crawley to Covid-19 research work that evening:

“We briefed Gabriel Milland by telephone on the same day and provided Public First with a discussion guide that had been used by Britain Thinks in their focus groups the previous week.”

29. Public First provided the responses from the focus groups to the coronavirus campaign material the following day.
30. At 3pm on 28 February 2020 a Covid-19 campaign meeting was held at No. 10 to formulate a strategy to ensure that effective communications could be used in responding to the pandemic. Attendees at the meeting included Ms Stratton, Mr Aiken, Mr Cummings and representatives of Britain Thinks. Gabriel Milland and other representatives from Public First also attended so that they could provide feedback from their recent focus group research.
31. At the meeting on 28 February 2020, a decision was made to continue the public opinion and behaviour research using focus groups.
32. Following a strong recommendation from Mr Cummings, Mr Aiken decided that Public First should conduct those focus groups, alongside Britain Thinks.
33. Ms Stratton had reservations about the value of using Public First as set out in her email dated 28 February 2020 to Cheryl King-McDowall, Deputy Director for Professional Standards at GCS:

“An interesting meeting at number 10, and the post meet has just finished.

Dominic Cummings and Alex requested that Britain Thinks (DH's research agency) and Public First (our agency on the narrative work) book in focus groups for throughout next week to continue testing comms material and emerging news in parallel with each other (I did question the value but Alex was clear he wanted this to progress and would pay)...”

34. Ms Stratton met with Public First to devise a programme for the focus group work to be carried out over the weekend and the following week. By email of Friday 28

February 2020, Mr Frayne confirmed that Public First could start the focus groups from Tuesday 3 March 2020 but the urgency with which the work was required would increase the recruitment fees. He stated:

“If you would like to go ahead, I will need to get recruitment started tomorrow certainly to meet our Tuesday deadline. And I therefore need to get clearance this evening to start the process.”

35. Ms Stratton provided the outline plan to Mr Aiken that evening and approved expenditure to allow initial recruitment to start. The following morning Mr Aiken approved the proposal.
36. The initial focus group work was carried out at the beginning of March 2020. On 5 March 2020, Mr Frayne of Public First indicated that it could provide further focus group services for the following week.
37. Catherine Hunt, Head of Insight and Evaluation for the Prime Minister's Office and Cabinet Office communication team, raised internal requests for a purchase order to be set up to cover the initial costs, noting that no contract was yet in place for the initial narrative testing work or for the Covid-19 focus group work carried out by Public First.
38. Thereafter, Mr Aiken authorised the use of further focus group services and the associated additional expenditure on an iterative basis.
39. On 16 March 2020, at the request of Mr Cummings, Mr Milland of Public First was seconded to the communications hub to provide additional support in respect of the Covid-19 focus group work.
40. By email dated 21 March 2020 Mr Aiken requested the CCS team to put in place a formal agreement for Mr Milland's secondment and to agree a monthly remuneration for Public First. Responding on 23 March 2020, Simon Soothill, Category Director at the CCS, suggested that Mr Milland's services should be charged through Public First.

The Contract

41. On 6 and 19 March 2020 Ms Stratton expressed her concern to Ms Hunt that there was no formal contract in place in respect of the work carried out by Public First.
42. Ms Hunt was similarly concerned by the situation as set out in her email of 17 March 2020:

“... this agency is the one who are Dom Cummings / Lee Cain's mates, and hence getting all our work with no contract BUT are also spending much money on doing all our ridiculous groups, so keen that they're paid and don't start whining about us when it's not our fault. I know it's not you!! ...”

43. Ms Hunt is frank about deficiencies in the procedures and controls in place at this time:

“At this point, as far as I was aware, there was no senior person within the GCS team with overall responsibility for overseeing contract and payment processes and there was a lack of clarity

about who was expected to make the decision about how Public First would be paid, including contractual arrangements ...

In my view and experience, the lack of clarity around finance and budgeting processes was symptomatic of wider administrative issues within GCS at this point. Processes and responsibilities for budgeting, procurement, contracts, team management and hiring and commercial and human resources issues were - from my perspective - generally opaque, confusing or not in place ...”

44. On 23 March 2020 Nicola Westmore, Deputy Director in the Covid-19 Communications Hub within the GCS, sent an email to Mr Soothill at the CCS, regarding the Covid-19 focus group work by Public First:

“Another one - this is the other part of the Public First ask.

Public First have been asked to provide a focus group service for us to help understand the sentiment of the public on a regular basis. The email attached sets out the cost of this service to date and going forward. I suspect we will want to use the service for at least the next 12 weeks but if things stabilise we may be able to decrease the frequency.

We need to establish a contractual mechanism to buy this service.”

45. Ms Stratton entered into discussions with the CCS to review the scope of work and fee proposals from Public First and set up a purchase order for the work. Her recollection was:

“I do not think that there was really any consideration of running a competition, even on an accelerated basis. I think the reason for not doing so was that services that were seen as critical to the government’s Covid-19 response were needed immediately. Therefore our primary concern was getting Public First signed up contractually to deliver the services.”

46. The initial proposal made by Ms Stratton to CCS was for a contract with a duration of six months from March 2020, with provision to extend up to nine months and a maximum contract value of £2.5 million. Ms Stratton’s intention was to avoid any gap in the services provided if the crisis persisted beyond July 2020 and the Defendant needed to run a competitive tender at that stage.

47. However, concern was expressed by the CCS as to the value and duration of the proposed contract in the absence of any competition as set out in an email dated 8 April 2020:

“... I'm uneasy with ref to the value and the contract term of £2.5m and 9mths. It's a lot of money and if we continue to have a need after 12 weeks I hold a view that we should be tendering

the work. It's not a difficult thing to re tender and there are other suppliers who could and should be provided with the opportunity. This value and term will be difficult to articulate to others if questioned as the current estimate up until the end of July is £1m. The procurement notices allowing us to direct award is to enable us to stand up suppliers quickly so that we can dedicate ours and others time to addressing the immediate emergency needs.

... could you re assess the term and amount please? ”

48. The scope of the proposed contract was reconsidered and by late April 2020 it was agreed that a contract award would be made to Public First for a period of six months from 3 March 2020, with a maximum value of £840,000.
49. On 21 April 2020 the CCS requested the Defendant to produce a business case for making the direct contract award to Public First for the purpose of preparing a procurement strategy report:

“The customer needs to provide clear justification as to why the supplier was chosen, as opposed to any other, and what checks have been made to ensure the supplier has the capability to perform the required services.

Covid is no longer unforeseen unfortunately, however, I note the contract appears to have been made already in early March so the decision making process at that time should be documented in the PSR.

The recommendation is that urgent direct awards should not exceed 6 months and should, where possible, incorporate the Ts and Cs of a CCS commercial agreement. So, STA would not be appropriate for this requirement. ”

50. In response, on 22 April 2020 Ms Stratton produced the following rationale:

“● With the escalating seriousness of the Coronavirus outbreak in the UK there was an immediate and urgent need to understand public attitudes and behaviours around Covid19 to inform the development of Government messages and communication with the general public.

● Public First was already undertaking a programme of research at the request of Alex Aiken, Executive Director Government Communications, to inform development of new Government narrative. They therefore had the infrastructure in place to respond to this urgent requirement, and switched the focus of their work to supporting the Covid19 response from 3rd March.

● Research was required immediately to support the Government's response - the service would have been interrupted

by running a new full procurement exercise, presenting significant risks to the Government's ability to develop effective public communications relating to the coronavirus outbreak.

- The contract period is for 6 months starting from March 3rd. This is the period during which it is envisaged that qualitative research will be required to inform public communications on the Government's evolving response to coronavirus (i.e. as lockdown measures are lifted, social distancing measures are revised, etc).

- Continuity of this service as the Government's response to coronavirus evolves is vital - Public First has built up a bank of knowledge about how to communicate with the general public on this issue, which is and will be built on at each stage of the response.

- The contract is for provision of services as required by the Cabinet Office - it is a contract ceiling and not a guaranteed level of spend. If, for example, it becomes evident that fewer focus groups per week are required, Cabinet Office will scale down the work accordingly.

- Public First is a registered supplier on the Research Marketplace DPS and therefore fulfills the requirements for entry to that framework.”

51. The CCS prepared a strategy and award report dated 26 May 2020, recommending the direct award of the Contract to Public First.
52. On 2 June 2020 the contract award was signed off by Claire Pimm, the director with overall responsibility for the Covid Communications Hub.
53. By letter dated 5 June 2020, the CCS, on behalf of the Defendant, notified Public First of its decision to award the Contract (“the Decision”):

“I am writing to inform you that Cabinet Office (the “Customer”) proposes to make an award of a contract to you to provide extremely urgent deliverables as part of the response to unforeseeable consequences of the COVID-19 pandemic on the terms set out in this letter (the “Contract”).

Due to unforeseeable consequences of the current COVID-19 pandemic, Cabinet Office reasonably anticipates that the Public Contracts Regulations 2015 will apply to this Contract and the Parties shall ensure that there is a lawful basis for awarding the Contract under the Public Contracts Regulations 2015 and/or any applicable procurement rules. Due to unforeseeable consequences of the current COVID-19 pandemic, this may include in particular justifications under Regulation 32 of the

Public Contracts Regulations 2015 or such other applicable or equivalent provision.

In the light of the extreme urgency of the current situation and as you are already a supplier on Research Marketplace Dynamic Purchasing System RM6018 (the "DPS Contract"), the Contract shall be based on the DPS Contract's Contract Terms as follows:

1. The Supplier shall supply the Services and the Deliverables to complete the Project as specified in Annex A to this letter as if Annex A to this letter was each of a Letter of Appointment and a Statement of Work for the Project comprising of each of a Customer Project Specification and a Supplier Proposal.
 2. The Contract Charges relating to the Project are specified in Annex A to this letter.
 3. The Special Terms set out in the Statement of Works at Annex A to this letter apply to the Contract. The Special Terms set out in Annex A to this letter are terms of this letter.
 4. The Effective Date of the Contract will be 3rd March 2020.
 5. The Customer and the Supplier acknowledge and agree that:
 - 5.1. each of the Effective Date and the Project Commencement Date occurred before the date on which the Parties documented the terms of the Contract;
 - 5.2. the terms of the Contract documented in this letter are all of the terms upon which the Parties agreed to contract on and from the Effective Date; and
 - 5.3. no other written or oral agreements, representations or understandings exist between them in respect of the subject-matter of this Contract.
 6. The Expiry Date of the Contract will be 2nd September 2020.
 7. This Contract is not conditional upon the receipt of a Guarantee.
 8. The documents from the DPS Contract specified in Annex B to this letter are incorporated into the Contract (the "Incorporated Documents"). If any of the Incorporated Documents conflict with any of the terms of this letter, the terms of this letter prevail..."
54. On 8 June 2020 Public First notified the CCS that it accepted the award of the Contract on the terms set out in the letter of 5 June 2020, with retrospective effect from 3 March 2020.

55. On 12 June 2020 notice of the Contract award was published on the Government 'Contract Finder' website.

Services provided and payments made

56. From early to mid-March 2020 Public First and Britain Thinks ran daily focus groups on Covid-19 materials and messages. Ms Hunt set out in her first witness statement a summary of the work carried out by Public First under the Contract, including the following:

- i) providing a continuous read on public mood throughout the first few months of the COVID-19 crisis, enabling the Government to understand public concern, reaction to emerging events and government announcements and plan overall strategy accordingly;
- ii) testing government messaging in early March 2020 to find the most effective way of providing the public with information and communicating the 'Contain' strategy in place at that stage;
- iii) shaping the early 'Stop the Spread' campaign to change public behaviour to limit the transmission of Covid-19;
- iv) testing the most effective ways to inform the public of Covid-19 symptoms at the time when knowledge of the virus was very limited and many of its symptoms were ambiguous;
- v) providing advice on the most effective way to communicate with the public during the fast-moving events of March and early April 2020, leading to the press conference format featuring the Prime Minister and medical experts;
- vi) testing language and messaging that led to development and communication of key policies during March 2020, including closing schools and the full national lockdown;
- vii) testing and developing the 'Stay Home' campaign to persuade the public to maintain desired behaviours during lockdown;
- viii) testing the impact of lockdown on vulnerable audiences, including those with long-term health conditions, single parents, those on precarious incomes and younger people and providing advice on how to maximise compliance;
- ix) using moderators from a range of communities and faith groups to research the impact of Covid-19 on them.

57. Public First was responsible for testing the "Stay at home, Protect the NHS, Save lives" message.

58. On 22 March 2020 Mr Frayne of Public First reported on the outcome of testing this message:

"We tested a new line: "Stay at home, protect our NHS, save lives". This was received extremely positively across the groups

– by far the most successful piece of specific communications we tested. People liked its directness and bluntness; they thought it fit the times perfectly. When they were crying out for the Government to get tough and to start being much blunter with people, this chimed with their concerns.”

59. By email dated 25 June 2020 Ms Hunt indicated that Public First could be instructed under the Contract for policy testing other than Covid-19 related health communications.
60. In July 2020, the services provided by Public First under the Contract were extended to cover qualitative research into EU exit topics and themes, re-building the economy following the Covid-19 crisis and attitudes to the UK Union.
61. The total sum paid to Public First under the Contract was £564,393.67 in respect of the following services:
 - i) £58,000 paid on 18 March 2020 in respect of focus groups on Covid-19 messaging over the period 3 March to 15 March 2020 in the following locations: London, Manchester, Bristol, Brighton and Liverpool;
 - ii) £42,000 paid on 2 April 2020 in respect of focus groups on Covid-19 narrative/policy testing over the period 17 March to 24 March 2020 in the following locations: London, Swansea, Notts/Derby, Watford and Altrincham;
 - iii) £15,000 paid on 2 April 2020 in respect of focus groups on Covid-19 narrative/policy testing over the period 24 March to 26 March 2020 in the following locations: Altrincham, Barnsley and Walsall;
 - iv) £103,860 paid on 20 April 2020 in respect of: (a) focus groups on Covid-19 narrative/policy testing over the period 26 March 14 April 2020 in the following locations (online): Walsall, Bexley, London, Birmingham, Newcastle, Portsmouth, Bristol, Leeds, Norwich, Blackpool and, Yorkshire and St. Albans; and (b) Mr Milland's on site resource during that period;
 - v) £51,233.04 paid on 30 April 2020 in respect of: (a) 14 focus groups on Covid-19 narrative/policy testing (including hard-to-reach and BAME) over the period 16 April to 23 April 2020; and (b) Mr Milland's accommodation costs during that period;
 - vi) £78,187.07 paid on 27 May 2020 in respect of: (a) focus groups on Covid-19 narrative/policy testing (including hard-to-reach and BAME groups) in the following locations: Nottingham, Liverpool, Walsall, Portsmouth, Newcastle, Glasgow, Norwich, Aberystwyth, Manchester from 26 April to 12 June 2020; and (b) Mr Milland's on site resource and accommodation costs during that period;
 - vii) £39,777.23 paid on 9 June 2020 in respect of: (a) focus groups on Covid-19 narrative/policy testing (including, hard-to-reach and BAME groups) from 14 May to 28 May 2020; and (b) Mr Milland's on site resource and accommodation costs during that period;

- viii) £78,336.33 paid on 8 July 2020 in respect of: (a) focus groups on Covid-19 narrative/policy testing (including, hard-to-reach and BAME groups) from 2 June to 2 July 2020 in the following locations: Plymouth, Newcastle, Manchester, London, Croydon, Leeds, Liverpool, Glasgow, Brighton, Birmingham, Nottingham, Leeds, Manchester, Newbury, Bradford, Sheffield, Telford, Norwich, Plymouth and Hull; and (b) Mr Milland's on site resource and accommodation costs during that period;
- ix) £98,000 paid on 14 August 2020 in respect of focus groups from 9 July to 27 July 2020 in Bexley, Derby, Edinburgh, Glasgow, Bradford, Newcastle, Plymouth, Great Yarmouth, Bristol, South Cambridgeshire, Manchester, Stoke, Inverness and Highlands relating to the Government's post-coronavirus economic renewal work and matters relating to the UK Union.

Proceedings

- 62. On 10 July 2020 the Claimants issued a claim for judicial review in respect of the decision to award the Contract to Public First on the following grounds:
 - i) there was no basis for making a direct award under Regulation 32(2)(c) of the PCR 2015;
 - ii) the award of the Contract for a period of six months was disproportionate;
 - iii) the decision to award the Contract to Public First gave rise to apparent bias contrary to principles of public law.
- 63. The claim was issued in the Administrative Court and subsequently transferred to the Technology and Construction Court.
- 64. The relief sought in the Amended Statement of Facts and Grounds is:
 - i) a declaration that the Decision of 5 June 2020 to award the Contract to Public First was unlawful;
 - ii) an order quashing both the Decision and the Contract executed pursuant to that decision;
 - iii) such other relief as is necessary to give effect to the Court's judgment.
- 65. On 17 November 2020 Jefford J granted permission to apply for judicial review on the three grounds set out above.
- 66. The following witness statements were produced:
 - i) Jolyon Maugham QC, founder and director of the Claimant - statement dated 30 July 2020;
 - ii) Anne-Marie Irwin, solicitor and partner at Rook Irwin Sweeney LLP, solicitors acting for the Claimant - statements dated 30 July 2020 and 20 January 2021;
 - iii) Lord Wood, director of the Claimant – statement dated 2 February 2021;

- iv) Jan Gooding, President of the Market Research Society - statement dated 9 February 2021;
 - v) Alex Aiken, Executive Director for Government Communication - statement dated 21 December 2020;
 - vi) Catherine Hunt, Head of Insight and Evaluation for the Prime Minister's Office and Cabinet Office Communication team - statements dated 21 December 2020 and 10 February 2021;
 - vii) Dominic Cummings, main political adviser to the Prime Minister between July 2019 and November 2020 – statement dated 21 December 2020;
 - viii) Helen Stratton, Insight, Evaluation and Behavioural Science team for the Prime Minister's Office and Cabinet Office – statement dated 21 December 2020;
 - ix) Nicola Westmore, Deputy Director in the Covid-19 Communications Hub within the GCS – statement dated 21 December 2020;
 - x) Simon Soothill, Category Director at the Crown Commercial Service, responsible for the marketing, communications and research category team – statement dated 21 December 2020.
67. On 20 January 2021 the Claimant issued an application for permission to re-amend the Statement of Facts and Grounds. This Court granted permission to the Claimant to rely on the Amended Statement of Facts and Grounds as that had been served on 30 July 2020 and the parties had proceeded on the assumption that it set out the case that would be considered at the hearing. However, the application for the proposed re-amendments served on 20 January 2021 sought to introduce a new ground of challenge very shortly before the hearing. There was inadequate explanation for the very late application. The proposed re-amendment would cause disruption to the Defendant's preparation for the hearing, resulting in prejudice to the Defendant that could not be compensated for by an award of costs. Therefore, the court refused permission for those re-amendments for the reasons set out in the Order dated 28 January 2021.
68. On 20 January 2021 the Claimant issued a further application for permission to rely on additional witness statements. This Court permitted the Claimant to rely on those witness statements, save that the references to anecdotal or opinion evidence from unnamed sources were struck out as inadmissible for the reasons set out in the Order dated 28 January 2021. In particular, the evidence of "Ms A" and "Mr B" was hearsay opinion evidence that was not relevant to the issues the Court had to decide. Neither individual sought to give evidence on any factual issues in the claim. The parties were directed to agree the necessary revisions, failing which the court would deal with any outstanding dispute in the hearing.
69. The parties agreed the consequential revisions to the witness statements, save for limited passages highlighted in yellow in the bundle. The court has read those remaining passages as part of the evidence on which the Claimant wishes to rely but considers that they do not assist the court in deciding the issues in this judicial review. Therefore, the court has not considered it necessary to resolve the outstanding dispute on this matter.

70. On 10 February 2021, the Claimant issued an application for permission to rely on two new witness statements, from Lord Wood and Ms Gooding. The Defendant consented to that application, subject to permission for it to rely on a second witness statement from Ms Hunt. The court approves the consent order drafted by the parties, whereby permission is given for those additional statements to be admitted as evidence.

Ground 1 – Regulation 32(2)(c)

71. The issue is whether the Defendant was entitled to rely on Regulation 32(2)(c) of the PCR 2015 to make a direct award of the Contract without any competition.
72. The Claimant's ground of challenge is set out at paragraph 24 of the Amended Statement of Facts and Grounds:
- “(i) it was not “strictly necessary” to use the negotiated procedure without prior publication for this Contract;
 - ...
 - (iv) the Cabinet Office could have complied with the time limits for competitive procurement of the Contract under the open, restricted and/or DPS procedures under PCR 2015.”
73. Additional grounds pleaded, that there was no extreme urgency, or that any extreme urgency did not result from unforeseeable events, were not pursued at the hearing.
74. Mr Coppel QC, leading counsel for the Claimant, submits that:
- i) There was no need to make a direct award to Public First because the Government already had several existing contracts with suppliers which it could have used to commission this work, such as Britain Thinks, Jigsaw, Engine and the Behavioural Insights Team.
 - ii) Even if it was lawful to make a direct award of work to Public First during March 2020 to meet its urgent and immediate needs, the Defendant has not proven that it was strictly necessary to award directly a six-month contract, or to continue commissioning services from Public First under the Contract in April, May, June and July 2020.
 - iii) In any event, it was not strictly necessary to make a direct award of a contract which covered non-urgent services. The Defendant used the Contract to commission services which significantly exceeded the scope of Covid-19 communications.
75. The Defendant's position is that it was entitled to rely on Regulation 32(2)(c) in making a direct award of the Contract to Public First. Mr Bowsher QC, leading counsel for the Defendant, submits that:
- i) There was an urgent requirement for the immediate and continuing provision of the services as a consequence of the serious, rapidly developing and unpredictable public health situation.

- ii) There was no time to run an accelerated procurement under the open or restricted procedures, or through the dynamic purchasing system.
- iii) There were no viable alternative providers who could arrange focus groups of the kind required and on the scale necessary to perform the tasks that were required.

The PCR 2015

76. When awarding public supply or service contracts which have a value that is not less than the relevant threshold, contracting authorities must comply with the procedures set out in the PCR 2015, including the requirements for publication of public procurement competitions and minimum timelines for submission of tenders.
77. Regulation 26 sets out the general rule that there must be a competition for public contracts:
- “(1) When awarding public contracts, contracting authorities shall apply procedures that conform to this Part.
 - (2) Such contracts may be awarded only if a call for competition has been published in accordance with this Part and the Public Contract Directive, except where regulation 32 permits contracting authorities to apply a negotiated procedure without prior publication.
 - (3) Contracting authorities may apply –
 - (a) open or restricted procedures as regulated by this Part...”
78. Regulation 27 provides that under the open procedure, any interested economic operator may submit a tender in response to a call for competition, advertised by publication of a contract notice. The minimum time limit for the receipt of tenders is 35 days from the date on which the contract notice is sent, although that period may be shortened where prior information has been published or the tenders are submitted electronically.
79. Further, Regulation 27(5) states:
- “Where a state of urgency duly substantiated by the contracting authority renders impracticable the time limit laid down in paragraph (2), it may fix a time limit which shall be not less than 15 days from the date on which the contract notice is submitted.”
80. Regulation 28 provides that under the restricted procedure, any economic operator may submit a request to participate in response to a call for competition by providing the information for qualitative selection that is requested by the contracting authority. The minimum time limit for the receipt of requests to participate is 30 days from the date on which the contract notice is sent (or from the invitation to confirm interest where

prior information calling for competition has been published). The minimum time limit for receipt of tenders is 30 days from the date on which the invitation to tender is sent. Again, those periods may be shortened where prior information has been published or the tenders are submitted electronically.

81. Further, Regulation 28(10) states:

“Where a state of urgency duly substantiated by the contracting authorities renders impracticable the time limits laid down in this regulation, they may fix –

- (a) a time limit for the receipt of request to participate which shall not be less than 15 days from the date on which the contract notice is sent, and
- (b) a time limit for the receipt of tenders which shall not be less than 10 days from the date on which the invitation to tender is sent.”

82. Regulation 34 provides for the use of a dynamic purchasing system:

“(1) Contracting authorities may use a dynamic purchasing system for commonly used purchases the characteristics of which, as generally available on the market, meet their requirements.

(2) The dynamic purchasing system shall be operated as a completely electronic process, and shall be open throughout the period of validity of the purchasing system to any economic operator that satisfies the selection criteria.

(3) The dynamic purchasing system may be divided into categories of products, works or services that are objectively defined on the basis of characteristics of the procurement to be undertaken under the category concerned.

...

(5) In order to procure under a dynamic purchasing system, contracting authorities shall follow the rules of the restricted procedure, subject to the following provisions of this regulation.

(6) All the candidates satisfying the selection criteria shall be admitted to the system ...

(7) Where contracting authorities have divided the system into categories of products, works or services in accordance with paragraph (3), they shall specify the applicable selection criteria for each category.

...

(9) The minimum time limit for receipt of requests to participate shall be 30 days from the date on which –

- (a) the contract notice is sent, or
- (b) where a prior information notice is used as a means of calling for competition, the invitation to confirm interest is sent.

...

(11) The minimum time limit for receipt of tenders shall ... be at least 10 days from the date on which the invitation to tender is sent.”

83. Regulation 32 of the PCR 2015 provides:

“(1) In the specific cases and circumstances laid down in this regulation, contracting authorities may award public contracts by a negotiated procedure without prior publication.

(2) The negotiated procedure without prior publication may be used for public works contracts, public supply contracts and public service contracts in any of the following cases:-

...

(c) insofar as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for the open or restricted procedures of competitive procedures with negotiation cannot be complied with.

...

(4) For the purposes of paragraph (2)(c), the circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting authority.”

84. The European Commission has issued guidance on the operation of the EU procurement regime during the pandemic: “Guidance on using the public procurement framework in the emergency situation related to the COVID-19 crisis”. The Guidance includes the following explanation as to the circumstances in which Article 32 of Directive 2014/24/EU (from which Regulation 32 was derived) might be engaged:

“1. Introduction

...

Concretely, the negotiated procedure without publication allows public buyers to acquire supplies and services within the shortest possible timeframe. Under this procedure, as set out in Art. 32 of Directive 2014/24/EU (the 'Directive'), public buyers may negotiate directly with potential contractor(s) and there are no publication requirements, no time limits, no minimum number of candidates to be consulted, or other procedural requirements. No procedural steps are regulated at EU level. In practice, this means that authorities can act as quickly as is technically/physically feasible – and the procedure may constitute a de facto direct award only subject to physical/technical constraints related to the actual availability and speed of delivery.

...

2.2 If urgency requires it, the Directive foresees a substantial reduction of the general deadlines: under the open procedure, the deadline for the submission of tenders may be reduced to 15 days in cases of duly justified urgency; under the restricted procedure, the deadline to submit a request for participation may be reduced to 15 days and to submit an offer to 10 days. This allows for a speedy award of the contract.

2.3 In cases of extreme urgency – negotiated procedure without publication. As contracting authorities derogate in this case from the basic principle of the Treaty concerning transparency, the European Court of Justice requires that the use of this procedure remains exceptional. All the conditions have to be met cumulatively and are to be interpreted restrictively (see, for instance cases C275/08, *Commission v Germany*, and C-352/12, *Consiglio Nazionale degli Ingegneri*). A 'negotiated procedure without publication' allows contracting authorities to negotiate directly with potential contractors; a direct award to a preselected economic operator remains the exception, applicable if only one undertaking is able to deliver within the technical and time constraints imposed by the extreme urgency.

...

2.3.4 Negotiated procedures without prior publication may offer the possibility to meet immediate needs. They cover the gap until more stable solutions can be found, such as framework contracts for supplies and services, awarded through regular procedures (including accelerated procedures)..."

85. The Defendant published similar guidance: "Procurement Policy Note - Responding to COVID-19" ("PPN 01/20") which included the following:

"... in responding to COVID-19, contracting authorities may enter into contracts without competing or advertising the

requirement so long as they are able to demonstrate the following tests have all been met:

- 1) There are genuine reasons for extreme urgency, eg:
 - you need to respond to the COVID-19 consequences immediately because of public health risks, loss of existing provision at short notice, etc;
 - you are reacting to a current situation that is a genuine emergency - not planning for one.
- 2) The events that have led to the need for extreme urgency were unforeseeable, eg:
 - the COVID-19 situation is so novel that the consequences are not something you should have predicted.
- 3) It is impossible to comply with the usual timescales in the PCRs, eg:
 - there is no time to run an accelerated procurement under the open or restricted procedures or competitive procedures with negotiation;
 - there is no time to place a call off contract under an existing commercial agreement such as a framework or dynamic purchasing system.
- 4) The situation is not attributable to the contracting authority, eg:
 - you have not done anything to cause or contribute to the need for extreme urgency.

Contracting authorities should keep a written justification that satisfies these tests ...

You should limit your requirements to only what is absolutely necessary both in terms of what you are procuring and the length of contract ...”

86. Although the Commission Guidance and PPN 01/20 are not part of the PCR 2015, and do not have the authority of legislation or case law, they reflect the position under Regulation 32(2)(c), which can be summarised as follows.
87. Use of the Regulation 32(2)(c) procedure is a departure from the normal requirement that public contracts above the relevant thresholds must be subject to an open, transparent and competitive process. As such, it should be reserved for exceptional circumstances which make the alternative procedure strictly necessary.

88. The exceptional circumstances in which Regulation 32(2)(c) will be engaged are clearly stated and require little explanation:
- i) there must be a state of extreme urgency;
 - ii) such urgency must be caused by unforeseeable events not attributable to the contracting authority;
 - iii) such urgency must prevent the contracting authority from complying with the stipulated time limits for the other procurement procedures in the PCR 2015.
89. The burden of proving the requisite circumstances for invoking Regulation 32(2)(c) is on the Defendant. Derogation from the rules relating to procedures for the award of public procurement contracts must be interpreted strictly: *Commission v Greece* C-394/02 [2005] ECR I-4732, at [33].
90. In each case it is a question of fact, objectively ascertained from the oral and documentary evidence, as to whether the necessary circumstances existed at the time the decision was made to award the contract using the Regulation 32(2)(c) exception.
91. As part of that objective determination, in considering whether there was sufficient time for a contracting authority to carry out a procurement exercise using an expedited timetable for the open or restrictive procedure, the court may take into account evidence as to the minimum time needed to conduct such procurement in practice. The time needed must make allowance for preparing the tender documentation, evaluating the tenders and communicating the awards: *Salt International v Scottish Ministers* [2015] CSIH 85 at [46].
92. If Regulation 32(2)(c) is engaged, a contracting authority is permitted to negotiate directly with potential contractors; there is no requirement to publish a call for competition as explained in the Opinion of Advocate-General Jacobs in Case C-525/03 *Commission v Italy* [2005] ECR I-9408 at [47]:
- “If the conditions for derogation are satisfied, and a negotiated procedure without prior publication of an invitation to tender is thus justified, there can be no requirement for advertising. The principles which flow from the Treaty cannot impose a requirement of publicity which has to be satisfied even when the directives expressly provide for a derogation, or that derogation would be nugatory.”
93. Even if Regulation 32(2)(c) is engaged, the scope and duration of the procurement in question must be limited to what is strictly necessary. However, it is important to emphasise that the role of the court is to assess the lawfulness of the procurement process conducted by the contracting authority. The court does not have power to carry out its own assessment on the merits as to what alternative course the contracting authority might have taken against a number of legitimate options.

Extreme urgency

94. The starting point is to consider the services that the Defendant decided to procure. In February 2020, as Covid-19 surged through Europe and quarantine areas were introduced in Northern Italy, it became apparent that any strategy to fight the spread of the virus would involve the provision of advice and information to the public on health, and might involve the imposition of restrictions on personal freedoms that in normal circumstances would be unthinkable.
95. The UK Government had to decide what advice and information should be given to the public; whether it would impose any restrictions for protection of public health; if so, when, to what extent and how it could achieve compliance. It was a matter for the Defendant to determine what qualitative or quantitative research should be undertaken to provide the Government with the information needed to make those decisions.
96. At the end of February 2020 the Defendant decided that it needed further qualitative research to inform its communications strategy for the Covid-19 crisis. Mr Cummings set out in his witness statement the basis for his view that such additional research should be undertaken by external resources:

“The public health crisis developed quickly in February 2020. As the seriousness of the situation escalated, it became clear to me that, while there were very many brilliant officials who made enormous efforts throughout this crisis, Public Health England (“PHE”) did not have the right resources in place to meet the government’s communications requirements of the emerging pandemic. They had never dealt with any public health issue on this scale in the past. They did not have the people or skills needed to undertake this type of public communications at speed. Neither did the DHSC, the NHS or the Cabinet Office...

The country was facing an unprecedented national emergency. Thousands of lives were at stake, hundreds of billions of pounds were at stake. The extra money spent on doubling the focus groups and polling was essentially irrelevant in those circumstances. A few people did raise the question of how we could justify this as value for money. I responded that this was not the normal world, we were in a once-a-century pandemic and many thousands of pounds here was trivial if it helped us save lives and minimise economic destruction...

I said at various times that we needed more focus groups, we needed to triangulate the data, to get as many focus groups as possible booked in as quickly as possible and not to worry about the cost.”

97. The Defendant was entitled to decide that it needed further research on effective public communications through the use of additional focus groups. It is not for the court to evaluate that decision, substitute its own decision as to what was required by way of response to the Covid-19 pandemic or to trespass on the Defendant’s communications policy or strategy. The issue for the court is whether the Defendant has established that it was faced with a situation where, having determined an appropriate response, it was required to act as a matter of extreme urgency.

98. The perceived urgency of the situation was explained by Mr Cummings in his witness statement:

“There is no doubt that the Covid pandemic represented a situation of extreme urgency where immediate action was required to save lives. Focus groups were a crucial part of the Governments’ communications strategy...In my opinion it would have been not only foolish but deeply unethical to delay procurement by even 24 hours given the situation we faced in February 2020.”

99. In my judgment, the Defendant has established that it was required to act with extreme urgency. The Government had the unenviable task of making immediate decisions on policy and strategy in the face of the impending public health crisis. The Defendant decided that additional focus group research would provide crucial feedback that would inform that decision-making. The urgency was a consequence of the serious, rapidly developing and unpredictable public health emergency caused by the Covid-19 pandemic.
100. It is no longer part of the Claimant’s grounds of challenge that the urgency created by the Covid-19 pandemic was foreseeable, or that the Defendant did anything to cause or contribute to the extreme urgency for a communications response generated by the crisis.

Inability to comply with time limits in the PCR 2015

101. The Defendant’s position is that there was no time to run an accelerated procurement under the open or restricted procedures. The expedited timescale was 15 days for the open procedure, which was wholly unrealistic given the fast-moving nature of the Covid-19 pandemic. Likewise, there was insufficient time to place a call-off contract under an existing framework or through the dynamic purchasing system.
102. Ms Hunt stated in her second witness statement:

“there was no time to run a procurement exercise at all in late February/early March 2020 given the urgency of the requirement ... let alone a procurement that would have taken several weeks (... the qualitative procurement exercise that we ran in July 2020 took over two months from start to finish and a significant amount of my team’s time and resource).”

103. Mr Soothill explained in his witness statement that the CCS uses the Dynamic Purchasing System (“DPS”) as part of its procurement framework for market research services. Suppliers can apply to join the DPS at any time, and customers are able to use a filtering system to generate a list of potential suppliers suitable to meet their particular requirements. Unlike a traditional framework contract, there is no provision by which a contract can be awarded under the DPS without a further procurement process being undertaken. His estimate is that under normal circumstances it takes six to eight weeks to run a call-off procurement under the RM DPS, although an expedited procedure would be possible:

“The six to eight week timeline is calculated on the basis that everything is in place at the start of the process: all the documents and papers put together and the customer knowing exactly what it wants to do. On an accelerated basis, the very quickest process possible would be two weeks, though this again assumes that all of the bid documentation is already in place at the start of those two weeks and that then gives suppliers very little time even to read the tender and ask clarification questions before they have to return their bid. As such, a procurement on this kind of timescale would only be possible for the simplest of requirements.”

104. Ms Hunt’s experience was that the RM DPS procurement timetable would not have provided the necessary expedition in this case:

“The RM DPS allows public authorities to buy market Research Services by running competitions among a list of registered suppliers. My experience is that this is a slow process. While I understand from colleagues in CCS that it is possible to procure services on the RM DPS in as little as 4-6 weeks, my own experience is that it has always taken longer. In any event, 4-6 weeks is too long when an urgent need arises to research new government policy or messaging.”

105. Mr Aiken’s evidence was that such a procurement exercise could not be undertaken given the extreme urgency of the situation:

“There was no time in the critical situation in which we were operating to conduct formal procurements for the services that we required. Normal procurement using the Research Marketplace Dynamic Purchasing System (“RM DPS”), a CCS framework for the provision of social, economic and market research services, takes 6-8 weeks in practice, which was impractical in the circumstances. Even an expedited procurement of two weeks would have taken too long, our need was immediate. There is also the question of resourcing a procurement. Drafting a specification and assessing bids takes time and the team was already working all available hours to meet the demands of the crisis. In these circumstances, the only option available was to rely on regulation 32(2)(c) of the Public Contracts Regulations 2015.”

106. This evidence has not been challenged seriously by the Claimant. Mr Coppel suggested that the Defendant could have implemented the accelerated procedure through the RM DPS, identified by Mr Soothill, to shorten the timescale for the procurement. However, even the accelerated procedure would have taken a matter of weeks, rather than days. This would not meet the requirement for immediate research services. In any event, that submission carries with it an implicit acknowledgement that the specified procedural timetables laid down in the PCR 2015 could not be achieved, a basis on which Regulation 32(2)(c) would be engaged.

107. Although Ms Gooding made a valid point that the procurement exercise could have been conducted on a virtual basis, that would not have made any significant reduction to the time required for a competition. The minimum period for return of tenders under the expedited open procedure could be reduced to ten days but that would not include the time required to prepare the invitation to tender, the evaluation process or notification of the contract award. Against the requirement for immediate focus group work, that timescale could not be accommodated.
108. Mr Coppel's primary submission focuses on a different point, namely, that there was no need to make a direct award to Public First because the Defendant already had several existing contracts with suppliers which it could have used to commission this work, such as Britain Thinks, Jigsaw, Engine and the Behavioural Insights Team. I reject that submission for the following reasons.
109. Firstly, Regulation 32(2)(c) is not concerned with the identity of the economic operator that could provide the most economically advantageous tender; it is concerned only with the procurement process and whether the time limits specified for the other procedures could be satisfied. The Defendant was at liberty to decide that it wished to obtain services from an agency with whom it did not have an existing contract. The evidence is clear that the time limits specified in the PCR 2015 could not be satisfied because the research was needed as a matter of extreme urgency.
110. Secondly, although the Defendant had already engaged Britain Thinks to carry out focus group services, it wanted to instruct a different agency for the additional work. It has provided an explanation for that decision, namely, to obtain data from different sources to check the reliability of the conclusions drawn from the focus group responses. The additional focus group work for which Public First was instructed was intended to run parallel to the work by Britain Thinks so that there would be a separate strand of information against which the Defendant could determine its strategy. For the reasons set out above, it is not a matter for the court to scrutinise the Defendant's decision to procure additional research; the issue for the court is whether, having decided to procure additional research, the Defendant needed the same as a matter of extreme urgency so as to make compliance with the time limits for any alternative procedure unachievable.
111. Thirdly, the suggestion that the Defendant could have used an existing 'on-call' contract with Jigsaw would not have circumvented the necessity of relying on Regulation 32(2)(c). As the Claimant notes in its skeleton, the contract with Jigsaw had already been extended and would expire in March 2020. If, as appears to be the submission, Jigsaw should have been offered the opportunity to provide the focus services instead of Public First, this would have necessitated a fresh procurement exercise. But, as set out above, the urgency of the situation did not allow the luxury of time for a competitive tender exercise.
112. Fourthly, the Claimant has submitted that the Defendant could have instructed the additional focus group work through an existing 'on-call' contract with a creative agency, Engine. However, the Claimant recognises that Engine did not conduct focus groups. The suggestion that Engine might have been offered the opportunity to sub-let such work would not have avoided reliance on Regulation 32(2)(c) for the reasons set out in respect of Jigsaw above.

113. Fifthly, the Claimant has suggested that the Defendant might have been able to commission the focus group work through the Behavioural Insights Team. Ms Stratton explained in her witness statement that the Insight, Evaluation and Behavioural Science Team formulated the parameters for research requirements and managed the research carried out by third party agencies. Therefore, this route would not avoid the need for a fresh procurement exercise and the argument would fail for the reasons set out above.

Duration of the Contract

114. Mr Coppel submits that even if it were lawful to make a direct award of work to Public First during March 2020, the Defendant did not prove that it was “strictly necessary” to award directly a six-month contract, and to continue commissioning services from Public First under that Contract in April, May, June and July 2020. Mr Soothill’s evidence was that an accelerated procurement under the RM DPS could have been completed in two weeks, following preparation of bid documents. Even if the immediate focus group work could not await a competition, by the end of March 2020 it would have been possible to follow the procurement procedure in the PCR 2015. Reliance is placed on the CCS email of 8 April 2020 to Ms Hunt and Ms Stratton, expressing concern that the contract should be tendered for any work required beyond twelve weeks.
115. Mr Bowsher’s response is that, in the circumstances of an unprecedented global pandemic, it was unclear how long the need for the services would continue. It was clearly important that there should be continuity in their provision, at least until such time as it was possible to effect a handover. The six-month term of the Contract, when formalised, was a maximum period. In practice, the arrangements operated on a “pay as you go” basis at the outset and that flexibility remained hard-wired into the contractual arrangements as formalised.
116. I reject the Claimant’s argument that the contract period was too long on the basis that it is wholly dependent on the benefit of hindsight. The services which Public First were instructed to carry out did not comprise a discrete piece of work with a fixed time for completion. The purpose of the focus group work was to provide feedback in respect of the Defendant’s communications to the public as Government policy was formulated and revised to accommodate the changing circumstances presented by the pandemic. Ms Stratton was concerned that there should be no gap in the provision of research services, if required, as the pandemic progressed:

“We were concerned the contract might expire while the pandemic needs were still ongoing and that demand for research might increase. Preparing and conducting a procurement in the middle of the pandemic seemed unrealistic. As such we were hoping to build sufficient contingency into the contract both in terms of duration and value.”

117. As set out above, the Defendant has established that the services procured from Public First were urgently required and that there was insufficient time to comply with the time limits in the PCR 2015. Although the Defendant must demonstrate that the Contract period was no longer than strictly necessary, Regulation 32(2)(c) does not limit the duration of any contract falling within its ambit to the shortest period of time required to conduct a competitive procurement exercise. At the time of the instruction to Public

First, no one could foresee the extent or duration of the pandemic. The gravity of the situation, through March and April 2020, when the terms of the Contract were drafted, did not give any comfort to the Defendant that the crisis would be over within a few weeks. Against that extreme urgency and uncertainty, the contract period of six months was justified as strictly necessary.

Scope of the Contract

118. Mr Coppel submits that the Defendant used the Contract to commission services which significantly exceeded the initial scope of research for communications to mitigate the spread of the virus. From 18 March 2020, the work by Public First did not focus on testing the Government's public campaign materials in order to change public behaviour; instead, it focused on "narrative/policy" testing, i.e. helping to formulate Government policy on matters such as whether to ease the lockdown, and assessing the popularity of the Government's response to the crisis. The later work on Covid recovery, skills, planning and Union policy was not urgent so as to justify reliance on Regulation 32(2)(c). Further, the number of focus groups organised by Public First was excessive and therefore not justified.
119. Mr Bowsher submits that the Claimant's case on this issue flies in the face of reality and the serious challenges facing the Government during the pandemic. The work carried out by Public First included testing how the public health requirements dictated by the scientific advice would be communicated best to the public and thereafter reinforced and, where alternative strategies existed, which of those would be most effective. It is not open to the Claimant to seek to supplant its views as to the amount of focus groups necessary as compared to the number organised by Public First on behalf of the Defendant.
120. The scope of the services was defined in Annex A of the Contract as:
- i) recruitment and delivery of focus groups and/or mini groups to an agreed specification, covering the general public and key sub-groups defined by demographic, life stage or other agreed criteria;
 - ii) same-day top line reporting and next-day fuller reporting of focus group findings; and
 - iii) on-site resource to support Number 10 Communications.
121. The services were described in very general terms. This reflected the Defendant's requirement for flexibility so that it could instruct the necessary work as the situation unfolded, as explained by Ms Hunt in her second witness statement:

"Public First was involved in testing public reaction to different policy options at a point when the Government was having to rapidly develop new policies to impose, then maintain and finally relax social distancing rules that would alter public behaviours on an unprecedented scale and hence save lives...

At all times, Public First's work was directed by members of the Insight and Evaluation team in the Covid Communication Hub

and was aimed at informing government policy and supporting communications at a time of crisis and determining which policies, strategies and messages were most likely to be effective and thus most likely to influence the changes of behaviour necessary to contain the effects of the pandemic.”

122. The secondment of Mr Milland to the Defendant to provide support for the communications hub formed part of the Public First services and was explained by Mr Cummings as based on Mr Milland’s relevant experience in government, communication and research.
123. The Claimant’s criticism that the Defendant did not confine the scope of the commission to urgent research but used the Contract to procure non-urgent services does not give rise to a legitimate ground of challenge. This judicial review is limited to the lawfulness of the Contract and does not extend to scrutiny of subsequent performance. As set out above, the court’s role is not to substitute its own assessment as to what was required by way of the precise number of focus groups, the ambit of the topics covered, any additional support staff or the identity of such support staff. The scope of services defined in the Contract corresponded with the scope of work identified by the Defendant as required. Against the extreme urgency and uncertainty of the situation, the general specification for the services required under the Contract on a rolling basis was justified as strictly necessary.

Finding on ground 1

124. For the reasons set out above, in my judgment, the Defendant was entitled to rely on Regulation 32(2)(c) of the PCR 2015 in awarding the Contract to Public First:
 - i) the extreme urgency caused by the Covid-19 pandemic was unforeseeable, unpredictable and not attributable to the Defendant;
 - ii) the Defendant determined that it needed additional qualitative research carried out immediately to inform its policy and strategy on public communications in response to the pandemic;
 - iii) the time limits for a conventional public procurement could not be complied with and would not have generated a contract for the services that were needed immediately;
 - iv) procuring the services under the Contract was strictly necessary; the Defendant decided that it needed such services as part of its response to the Covid-19 pandemic and failure to provide effective communication of the message necessary to change public behaviour would have put at risk the health of the public.

125. It follows that the Claimant’s challenge on Ground 1 fails.

Ground 2 - Proportionality

126. The Claimant’s Amended Statement of Facts and Grounds alleges at paragraphs 27 and 28:

- “27. Even if the Defendant was permitted to make a direct award under regulation 32(2)(c) of PCR 2015, that award was required to be proportionate insofar as such awards are a derogation from the requirement to conduct an open and competitive tender process.
28. The Decision was disproportionate and outwith the proper bounds of regulation 32(2)(c) because any urgent need that had arisen was not required to be met through the conferral of a six-month contract, and could have been met through a much shorter contract award until such time as the Defendant was able to conduct a competition for the longer term supply of focus group and communications services. PPN 01/20, which is guidance published by the Cabinet Office, states that the length of a contract awarded under regulation 32(2)(c) must be limited “only to what is absolutely necessary” (page 4). That requirement was not met in this case ...”
127. Mr Coppel’s submission is that proportionality in this context requires the Defendant to show that its purchasing without competition did not go beyond what was absolutely necessary in the circumstances. That will ordinarily mean that any direct award must be of short duration and limited scope in order to meet urgent and immediate, short-term needs, pending a more competitive process to procure longer-term services.
128. He submits that any urgent need that had arisen was not required to be met through the conferral of a six-month contract, and could have been met through a much shorter contract award until such time as the Defendant was able to conduct a competition for the longer-term provision of the services. Further, services purchased under the Contract included non-urgent work (in particular: duplicating existing work by other research agencies; running an excessive number of focus groups; and testing public attitudes to policies on skills/employment and planning, and to the UK ‘Union’).
129. Mr Bowsher relies on his submissions made under Ground 1. He submits that the evidence shows the Defendant could not risk the Contract expiring before the peak of the crisis had passed. That was unknown at the time of the award. Against that backdrop it is not seriously arguable that a six-month contract was disproportionate nor that the scope of services was excessive. That is even more so when the arrangements had been conducted on a “pay as you go” basis from the outset and could be terminated at any time, even when the Contract was formalised. Finally, an important part of an assessment of proportionality is the impact upon those charged with a procurement of a replacement contract. That is a factor which militated strongly against an initial award which was too short.
130. As recognised by both parties, there is substantial overlap between Grounds 1 and 2. These points were addressed by the parties and considered by the court in relation to Ground 1.
131. For the reasons set out in relation to Ground 1, the award of the Contract for a period of 6 months was not disproportionate. The Claimant’s challenge on this ground fails.

Ground 3 – Apparent Bias

132. The Claimant's Amended Statement of Facts and Grounds alleges at paragraph 32:

“The fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Defendant, in choosing to award the Contract to PFL, and in deciding to award PFL a contract with a value of £840,000, was biased in favour of PFL, in the light of:

- (i) the longstanding and close personal and professional connections between (a) PFL's directors and owners and (b) the Rt Hon Mr Gove, Mr Cummings and the Conservative Party, as described in paragraph 9 above;
- (ii) the decision to award the Contract to PFL without any form of competition;
- (iii) the ability of other providers, such as YouGov PLC and the Kantar Group, to provide the Contract services; and
- (iv) the extremely high price of the Contract (£840,000) for only 6 months' focus group and communications services.”

133. Mr Coppel submits that the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility of bias, for the following reasons:

- i) In choosing to award this highly valuable work to Public First, at a cost of £564,394 to the public purse, the Defendant should have considered nothing other than issues of quality and price, i.e. value for money.
- ii) It was Mr Cummings who required that Public First be used for this work. He accepts that he has longstanding personal relationships with Public First's owners and directors. He should, on account of his friendship, have recused himself from deciding whether Public First should be awarded very substantial sums of public money.
- iii) The appearance of bias is aggravated by Mr Cummings approach to selecting Public First, without considering any other providers and without following any ordinary or proper competitive procurement process.
- iv) Mr Cummings' intervention caused significant consternation amongst Cabinet Office civil servants and unhappiness amongst other market researchers.
- v) The award by-passed already existing routes for the lawful procurement of similar services, which were simply not considered.
- vi) The Contract was not restricted to immediately required work. The use of Public First to perform the work on the 'Union' between Scotland and the rest of the UK was a personal choice of the Defendant who also has close personal, and previous working, relationships with the owners and directors of Public First.

134. Sir James Eadie QC, leading counsel for the Defendant, submits that, having possession of all the facts and having considered them carefully, and without undue suspicion, the informed and fair-minded observer would in this case have concluded:
- i) There was an urgent need for the organisation of focus groups and associated services. Although other organisations were already providing some of those services to Government, it was entirely reasonable to engage a further company not least so that data could be supplemented and triangulated. In any event, Public First was able to put provision of the relevant services in place immediately.
 - ii) Those services would have a critical input into the Government's key messaging at a time of national emergency, when it was vital to protect public health and avoid the NHS being overwhelmed. In particular, the use of focus groups would enable the Government to understand how best to convey messages to the public so that they would act appropriately and give effect to the strategy the Government was seeking to follow and based upon the scientific advice it was receiving.
 - iii) The relevant services were required immediately, in circumstances where every day mattered in terms of disseminating the Government's key messages, aimed as they were at the protection of the public and the NHS, and where any kind of competitive process would mean that provision of services was unduly delayed.
 - iv) It was vital that the services could be provided immediately and reliably, and that their output could be trusted.
 - v) The cost of the services to be provided was fair and reasonable in the light of prevailing market rates.
 - vi) The Defendant was not entering into a long-term arrangement but rather proceeding on a "pay as you go" basis which meant that the services could be terminated at any point, as remained the case when the Contract was finalised.
 - vii) Mr Cummings was uniquely placed, given his experience and expertise, to be able to form a rapid view on which organisation might best be able to deliver the Government's urgent requirements. The fact that Public First and individuals within it were known to him was unsurprising given the close-knit industry. Acquaintance or friendship from past professional engagement is unobjectionable. The decision here was evidently founded on an assessment, based on experience, of Public First's professional ability, not friendship.
 - viii) The award of the Contract was approved by Alex Aiken, the Executive Director of Government Communication.

Legal principles

135. The rules of procedural fairness require that a public decision-maker must act impartially, putting aside any personal prejudices; the decision-maker must act without bias.

136. There is no suggestion of actual bias in this case. The allegation is that the circumstances in which the Contract was awarded to Public First gave rise to apparent bias.
137. The common law test for apparent bias was formulated by Lord Hope (citing Lord Phillips of Worth Maltravers MR in *In re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700) in *Porter v Magill* [2002] 2 A.C. 357 at [102]-[103]:
- “The court must first ascertain all the circumstances which have a bearing on the suggestion that the [decision maker] was biased. It must then ask whether those circumstances would lead a fair minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the [decision maker] was biased.”
138. The “fair minded and informed observer” is a person who reserves judgment until both sides of any argument are apparent, is not unduly sensitive or suspicious, and is not to be confused with the person raising the complaint of apparent bias: *Helow v Secretary of State for the Home Department* [2008] UKHL 62 per Lord Hope at [1]-[3]; *Almazeera v Penner and others (Cayman Islands)* [2018] UKPC 3 at [20].
139. The fair minded and informed observer does not act on the basis of first impressions or preconceptions but considers the evidence carefully, distinguishing between what is relevant and irrelevant, having particular regard to the specific factual circumstances: *Gillies v Secretary of State for Work and Pensions* [2006] UKHL 2 per Lord Hope at [17].
140. An informed observer takes a balanced approach and appreciates that context forms an important part of the material to be considered: *Helow* per Lord Hope at [3].
141. Although it is a natural starting point for a defendant authority, the decision-maker cannot meet a claim of apparent bias simply by giving evidence, either detailing what was in his or her mind at the time he or she took the impugned decision, or asserting that he or she was not biased: *Porter v Magill* per Lord Hope at [104]; *R (Georgiou) v London Borough of Enfield* [2004] LGR 497 per Richards J at [36]. Likewise, a claim of apparent bias is not established simply by reference to the subjective evidence of others who express concern or unhappiness with the circumstances in which the decision was taken or the outcome of the decision. The test is an objective test based on the fictitious fair minded and informed observer.

Personal and professional connections

142. Public First is a public policy research agency established by Rachel Wolf and James Frayne, its directors. Mr Frayne and Mr Cummings were co-founders of a think-tank, the New Frontiers Foundation. In 2011 Mr Frayne was appointed to work as Director of Communications for the Department of Education, where he worked alongside Mr Cummings, who was then a special adviser to the Rt Hon. Michael Gove.
143. Ms Wolf formerly worked as an adviser to the Rt Hon Mr Gove and has worked for Mr Cummings.

144. Mr Milland is a former civil servant. Between 2013 and 2015 he worked as Director of Communications at the Department of Education. In 2015 he moved to the Ministry of Justice as Head of External Communications and in 2016 he moved to the Cabinet Office as Deputy Director to Mr Aiken, with responsibility for media relations.
145. Mr Cummings gave candid evidence as to his personal and professional connections with Public First:
- “I am friends with James Frayne, Rachel Wolf and Gabriel Milland. I have not met James Frayne since 2016. I have previously worked with them in government and outside. For example, both James Frayne and Gabriel Milland worked at the Department for Education (“DfE”) when I was Special Adviser at DfE (2011-2015). James Frayne and I worked on the euro campaign 20 years ago, other political issues, and set up the campaign to fight the proposed formation of a regional assembly in north-east England in 2004. I have talked to them extensively about focus groups and public opinion over many years.”
146. The fact that individuals at Public First were known to and had worked with those involved in the decision making, including the Defendant and Mr Cummings, is insufficient to establish apparent bias. Having regard to the specialised nature of the public policy and communications research industry, it is unsurprising that those involved might have developed professional and/or personal friendships over the years working within government departments. I accept the submission of Sir James Eadie that those acquaintances did not preclude Mr Cummings from making a lawful judgment as to whether Public First was suitable for appointment to carry out the research work needed. That factor alone was not a ground for his recusal, particularly as his existing relationship with the directors of Public First was a matter of public record.
147. However, the existence of personal connections between the Defendant, Mr Cummings and the directors of Public First was a relevant circumstance that might be perceived to compromise their impartiality and independence in the context of a public procurement. As such, it was incumbent on those involved in the appointment of Public First to ensure that there was a clear record of the objective criteria used to select Public First over other research agencies so that they could allay any suspicion of favourable treatment based on personal or professional friendships.
148. It is instructive that Regulation 24 of the PCR 2015 makes the following provisions for the avoidance of conflicts of interest:
- “24. - (1) Contracting authorities shall take appropriate measures to effectively prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures so as to avoid any distortion of competition and to ensure equal treatment of all economic operators.
- (2) For the purposes of paragraph (1), the concept of conflicts of interest shall at least cover any situation where relevant staff members have, directly or indirectly, a financial, economic or

other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure.

(3) In paragraph (2) - “relevant staff members” means staff members of the contracting authority, or of a procurement service provider acting on behalf of the contracting authority, who are involved in the conduct of the procurement procedure or may influence the outcome of that procedure; and

“procurement service provider” means a public or private body which offers ancillary purchasing activities on the market.”

149. Although Regulation 24 is primarily concerned with the avoidance of actual conflicts, it is a useful indicator of the circumstances in which a conflict might arise or the circumstances that might give rise to apparent bias.

Absence of competition

150. The general requirement for open, transparent and competitive procurement exercises in accordance with the PCR 2015 provides important procedural safeguards against allegations of actual or apparent bias. In particular, the use of published specifications and selection criteria enables contracting authorities to demonstrate that the procedure has been fair and impartial.
151. For the reasons set out in respect of Ground 1, the Defendant was entitled to appoint Public First without conducting a competitive tender. The conditions for making an award under Regulation 32(2)(c) of the PCR 2015 were satisfied on the facts of this case. As Regulation 32(2)(c) was engaged, it exempted the Defendant from issuing a public call for competition.
152. The award of the Contract to Public First was approved by Mr Aiken. The terms of the proposed contract were scrutinised by the CCS, resulting in revisions to the value and term of the Contract. The CCS issued a strategy and award report, recommending the direct award of the Contract to Public First. The contract award was signed off by Ms Pimm. Notice of the Contract award was published on the Contract Finder website. Thus, there was full compliance with the procedural formalities for the Contract.
153. The permitted departure from the usual procedural requirements of the PCR 2015 did not constitute a circumstance giving rise to apparent bias as alleged by the Claimant. However, in the absence of a tender competition, it was incumbent on the Defendant to ensure that it could demonstrate that the procurement was nonetheless fair and impartial, namely, by producing evidence that objective criteria were used to select Public First over other research agencies.

Failure to consider other providers

154. The decision to engage Public First to carry out the focus group research work was made on the recommendation of Mr Cummings, as he explained in his witness statement:

“I am a special advisor and as such I am not allowed to direct civil servants. However, as a result of my suggestion I expected people to hire Public First. The nature of my role is that sometimes people take what I say as an instruction and that is a reasonable inference as people assume I am often speaking for the Prime Minister. Civil servants could have disagreed and did disagree with my suggestions all the time and my response depends on my expertise of the matter in hand and other circumstances. On this occasion, I was an expert, I had just assembled a team of people to work on mass communication a few weeks earlier in the election campaign, I knew what the basic pillars of organising a communication campaign are and I expected people to listen to me.

I had no involvement in the contractual arrangements with Public First or their remuneration.”

155. Mr Aiken’s evidence is that there was no alternative but to appoint Public First for this work:

“It would have been utterly impractical to instruct someone else. The assumption was that we should use the existing researchers.

When I receive a request, I consider how best to deliver it. Because Public First were already in place, with focus groups set up and they were trusted by No.10, it was reasonable in the circumstances to ask them to continue. It was the most efficient and value for money way of getting desperately needed research urgently.”

156. Ms Hunt’s view is that Public First had particular experience and expertise in the services that were required and there was no suitable alternative at that time:

“... in my view only two companies in the market had the scale and expertise to provide these services in March 2020, being Public First and Britain Thinks. Both were ultimately needed to provide COVID-19 qualitative research services given the scale of the research sought. Both had the ability to understand a tricky and sensitive brief and how government narrative and policy is made. They were trusted and known to be capable of debriefing under pressure, including to very senior special advisors. Significantly they were both already doing work for the government at the point when the Covid-19 crisis first hit, Public First for us and Britain Thinks for the Department of Health and Social Care (“DHSC”), giving them an insight into emerging events and public mood. Given the speed at which events were moving, we did not have time to brief a brand new agency or for them to get up to speed with the urgency of the developing crisis. Infection rates were rising, people were dying and research would be instrumental in helping the government decide the best response to the crisis.

The only other qualitative agency with whom we had a contract at this point was Jigsaw. In my view they did not have the policy experience to carry out this work, which was both about developing policies and measures to address the rising Covid infection rate and effective communication to drive unprecedented behaviour change across the entire country. Jigsaw instead later led on research that looked at how to develop effective communication for vulnerable and hard to reach audiences.

The only other research agency with whom we had a contract in place at that time was YouGov. This was for polling only and did not cover focus groups. Whilst YouGov does have limited capability to carry out focus groups, they do not have the experience to do work at this scale or to turn research around at the pace that was needed (the same is true of Kantar in my view, another primarily quantitative agency with whom we have also worked during the Covid crisis). Also, they had not carried out groups for us before, and would not be able to hit the ground running, which was of fundamental importance ...”

157. Therefore, the Defendant’s position is that:
- i) only two companies in the market had the scale, expertise and experience to provide the requisite services in March 2020, Public First and Britain Thinks;
 - ii) Public First were trusted and known to be capable of undertaking the required services speedily and effectively, and of debriefing under pressure;
 - iii) Public First was already in place conducting the research; therefore, using them was the most efficient and effective way of obtaining urgently needed research;
 - iv) other companies, such as Jigsaw, YouGov and Kantar, did not have the relevant policy experience or had not carried out similar focus group work.
158. The difficulty with that justification is that it was not part of the decision-making process at the time that the decision was taken to appoint Public First and does not stand up to scrutiny for the following reasons.
159. Firstly, no one identified the objective criteria against which Public First was determined to be the appropriate agency for the work. The fact that Public First was considered competent, reliable and honest was a necessary but not sufficient basis on which to select it above others.
160. Secondly, at the time the decision was made, no one undertook any assessment to determine whether Public First was the most appropriate agency to use; neither Mr Cummings nor Mr Aiken considered the possibility of using an alternative agency.
161. Thirdly, the Defendant failed to use the RM DPS to identify potential suppliers. Mr Soothill recommends that the RM DPS should always be used because the database contains a wealth of suppliers (more than three hundred) and operates as a good filtering

system. Despite the ability to use the filtering system to generate a list of potential suppliers to meet the Defendant's particular requirements, this was not attempted.

162. Fourthly, no other agencies were contacted by the Defendant to ascertain whether they had the experience or capacity to conduct the focus group work within the very tight timetable required. Ms Hunt's suggestion that there was no time to brief another agency is not persuasive. At the time of its appointment, Public First was not engaged on Covid-19 related work and therefore had to be briefed. This did not pose an insuperable difficulty for the Defendant. Ms Stratton used the guide produced for Britain Thinks, which was already conducting focus group work, to brief Public First at short notice by telephone. No evidence has been produced to explain why other agencies could not have been briefed in a similar manner.
163. Fifthly, there is no evidence to support Ms Hunt's view that no other agency would have been able to meet the Defendant's needs. She suggests that Jigsaw, which was already engaged by the Defendant, did not have the policy experience to carry out the work. However, Mr Aiken identified that the immediate requirement was for public opinion research on effective messaging; he did not at that stage seek advice on policy. Subsequently, Jigsaw was indeed engaged to carry out focus group work in respect of Covid-19 opinion research, indicating that it did have relevant experience. Ms Hunt suggests that YouGov did not have the experience to do work at the scale or pace required but the agency was not approached to ascertain whether it could meet the Defendant's requirements.
164. The court recognises that everyone involved was acting under immense pressure and the urgency of the Covid-19 crisis did not allow time for reflection. The time constraints justified the Defendant in its derogation from the usual procedures required under PCR 2015. But they did not exonerate the Defendant from conducting the procurement so as to demonstrate a fair and impartial process of selection.
165. Mr Cummings has expressly denied that the appointment of Public First was tainted by any bias on his part:

“Obviously I did not request Public First be brought in because they were my friends. I would never do such a thing ... This was an emergency so in my opinion, the award of the contract without delay was entirely justified. I wanted Public First to be used to provide the necessary focus group services for the reasons set out above. The fact that I knew the key Public First people well was a bonus, not a problem, as in such a high pressure environment trust is very important, as well as technical competence.”
166. That evidence has not been challenged. It is emphasised that the court is not concerned with any suggestion of actual bias. But, as explained above, the absence of actual bias is not in itself a defence to an allegation of apparent bias.
167. The Claimant seeks to rely on consternation expressed by other Cabinet Office officials regarding the appointment of Public First and alleged unhappiness among anonymous market researchers. Those comments carry very little, if any, weight and, for the reasons set out above, such subjective assessments are irrelevant to the issue of apparent bias

that the court must determine. Likewise, the amount paid to Public First and the duration of the Contract are irrelevant to this issue.

Finding on Ground 3

168. The fair minded and informed observer would have appreciated that there was an urgent need for research through focus groups on effective communications in response to the Covid-19 crisis and that those research services were required immediately, necessitating reliance on Regulation 32(2)(c) of the PCR 2015. The fair minded and informed observer would have appreciated that it was vital that the results and conclusions from the research were reliable and that Mr Cummings was uniquely placed, given his experience and expertise, to form a rapid view on which organisation might best be able to deliver those urgent requirements. His professional and personal connections with Public First did not preclude him from making an impartial assessment in this regard. However, the Defendant's failure to consider any other research agency, by reference to experience, expertise, availability or capacity, would lead a fair minded and informed observer to conclude that there was a real possibility, or a real danger, that the decision-maker was biased.
169. For the reasons set out above, the Claimant has established its case that the circumstances in which the Contract was awarded to Public First gave rise to apparent bias.

Standing

170. Section 31(3) of the Senior Courts Act provides that in order to bring a claim for judicial review, a claimant must have sufficient interest in the matter to which the claim relates.
171. When granting permission for the Claimant to proceed to this judicial review, the court expressly reserved the question of standing to be determined at the substantive hearing.
172. The Claimant's position is that it has a sufficient interest in this matter, a public interest challenge to the lawfulness of a direct award of a public contract without competition. The Claimant is a not-for-profit company which aims to use the law to protect the interests of the public. Standing is not limited to economic operators. The merits of the claim support a finding of standing. There is a strong public interest in the lawful award of public contracts using taxpayers money without actual or apparent bias.
173. The Defendant's position is that the Claimant does not have sufficient standing. The PCR 2015 provide a complete canon for regulating the award of public contracts and contain a specific remedial regime in Part 3, expressly limited to economic operators. The Claimant is not an economic operator, is not owed any duties under PCR 2015 and has no rights that can be enforced under that legislation. Although a party other than an economic operator may seek to obtain a public law remedy for breach of the PCR 2015, the circumstances in which it may do so are narrowly prescribed. The Claimant lacks the necessary direct interest because it is merely a campaigning group with no special interest in the communications sector and, in particular, the means by which it contracts in that sector are procured. No other more directly affected group has sought to challenge the arrangements put in place by the Defendant. There is no basis on which the Claimant should be permitted to intervene in arrangements which have not been challenged by any more directly affected party.

174. The leading case on standing is *R (Chandler) v Secretary of State for Children, Schools and Families* [2010] PTSR 749, in which the Court of Appeal considered the test to be applied per Arden LJ, giving the judgment of the court, at [77].
175. Shortly after the hearing of this case, judgment was handed down in *R (Good Law Project Limited & Others) v Secretary of State for Health and Social Care* [2021] EWHC 346 (Admin) in which Chamberlain J considered the relevant authorities on the issue of standing and summarised the relevant legal principles at [99]:

“I draw the following propositions from the reasoning of the Court of Appeal in *Chandler*:

- (a) In the context of an individual procurement decision, a failure to comply with the 2006 Regulations is an unlawful act and thus "a paradigm situation in which a public body should be subject to review by the court", even where there is no economic operator who wishes to bring private law proceedings: [77].
- (b) A claimant may have standing to challenge an individual procurement decision if:
- (i) despite not being an economic operator, he "has a sufficient interest in compliance with the public procurement regime in the sense that he is affected in some identifiable way" by the challenged decision (for example, because compliance "might have led to a different outcome that would have had a direct impact on him"); or
- (ii) "the gravity of a departure from public law obligations" justifies the grant of a public law remedy: [77].
- (c) The recognition that standing may arise in situation (ii) shows that, even where the challenge is to an individual procurement decision, the Court of Appeal in *Chandler* did not intend to make it a precondition of standing that the claimant could show that he was personally "affected in some identifiable way" by the challenged decision. This is consistent with the general principles enunciated in *World Development Movement*.
- (d) Alongside the "gravity" of the breach alleged, the court must also consider whether there are other more appropriate ways for the alleged breach to be litigated. In the context of an individual procurement decision, that requires a recognition of the special remedies available under the procurement regime. In that context,

"[e]conomic operators can test the question of legality" (see [72]), so, "the court is in general bound to ask itself why a public law remedy is necessary when private law remedies are available": [77]. This too is consistent with the identification in *World Development Movement* of "the likely absence of any other responsible challenger" as a factor relevant to standing.

- (e) In considering whether a public law remedy is necessary, the court should consider whether the claimant is "attempting to use the public procurement regime for a purpose for which it was not created": [78]. The two examples of cases where the claimant failed this test, *Chandler* itself and *Kathro*, were both cases in which the claimant had no "interest in the observance of the public procurement regime" but was seeking to use that regime as a tool with which to challenge a decision to which she or he was opposed. This again seems to me to be consistent with the focus in *World Development Movement* on the experience, expertise and aims of the challenger.
- (f) Unless it is appropriate to deal with standing as a preliminary issue, once permission to apply for judicial review has been granted, courts are not encouraged to spend valuable court time on the issue of standing, especially in a borderline case: [77]."

- 176. I agree with, and gratefully adopt, the above summary as setting out the relevant legal principles applicable in this case.
- 177. The parties requested and were granted permission to file further written submissions in order to address the impact of that judgment on the issue of standing in this case. The court is grateful to counsel for their clear and succinct additional submissions.
- 178. In my judgment the Claimant has sufficient interest in bringing this judicial review to establish standing.
- 179. Firstly, the Claimant is a non-governmental organisation with expertise and experience in holding the Government to account in respect of its public procurement decisions. It has a sincere interest in promoting good public administration, including compliance with the PCR 2015 and lawful conduct of the public procurement regime. It has no ulterior motive in pursuing the challenge.
- 180. Secondly, the current claim is not one that an economic operator can realistically be relied on to bring. The context is the award of a public contract in circumstances where, for justifiable reasons, there has been no competition. Therefore, unlike most public procurements, there is no disgruntled bidder, who could be expected to challenge any perceived failings in the procurement process that were sufficiently serious potentially to affect the outcome. Any attempt by another economic operator to bring a challenge

would face a very high hurdle to establish financial loss and therefore another economic operator would be unlikely to risk the legal costs of proceedings.

181. Thirdly, the gravity of the issues raised, concerning the Defendant's public law obligations against the background of an unprecedented public health crisis, justify the scrutiny of the court and, where appropriate, the grant of a public law remedy.

Conclusion

182. For the reasons set out above, the Claimant's challenge to the Defendant's decision to award a contract to Public First and the award of the Contract fails on Grounds 1 and 2 but succeeds on Ground 3.
183. The Claimant is entitled to a declaration that the Decision of 5 June 2020 to award the Contract to Public First gave rise to apparent bias and was unlawful.
184. Following hand down of this judgment, the hearing will be adjourned to a date to be fixed for the purpose of any consequential matters, including any applications for permission to appeal, and any time limits are extended until such hearing or further order.