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

Neutral Citation Number: [2021] EWHC 1937 (TCC)

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

Rolls Building
Fetter Lane
London, EC4A 1NL

Date: 9 July 2021

Before :

THE HONOURABLE MR JUSTICE FRASER

- -

Between :

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

- and –

MINISTER FOR THE CABINET OFFICE
Defendant

and

HANBURY STRATEGY AND COMMUNICATIONS LIMITED
Interested Party

Robert Palmer QC and Brendan McGurk
(instructed by **Rook Irwin Sweeney LLP**)
for the Claimant
Philip Moser QC, Ewan West and Anneliese Blackwood
(instructed by **the Government Legal Department**)
for the Defendant

Mr Justice Fraser:

1. In these proceedings the Claimant, the Good Law Project, seeks judicial review in respect of an award of a contract by the Defendant, the Minister for the Cabinet Office, to the Interested Party ("Hanbury") for the supply of services. These services were to assist the Government in terms of policy development, and emergency messaging to the public, as part of the response to the Covid-19 pandemic. The Claimant challenges that award as being contrary to the Public Contract Regulations 2015 ("PCR 2015"). Judicial review proceedings in relation to procurement matters, such as these proceedings, are often (if not invariably) dealt with in the Technology and Construction Court by a Judge who is also designated as a judge of the Administrative Court. That is what occurred in this case, the matter being transferred by Swift J in an order dated 29 October 2020.

2. This ruling has been made without a hearing, and on written submissions only, at the request of the parties. The substantive judicial review proceedings are currently intended to be heard on Monday 26 July 2021, with a time estimate of one day. On 5 July 2021 the legal advisers for the Minister issued an application for a stay of those proceedings for the reasons explained further below. The application also sought that the hearing on 26 July 2021 be vacated.

3. The Minister sought a decision on its application without a hearing, a somewhat optimistic course, given that the Government Legal Department must have anticipated (and in this case, actually knew) that the application would be opposed. Although I was prepared to hear the application orally, and invited the parties to make themselves available for a hearing of the application at short notice for this purpose, as matters transpired the Claimant indicated in its written submissions that it was prepared to have the matter dealt with on the basis of the parties' written submissions only, and without a hearing. That is therefore the course I have adopted. However, the parties ought not to interpret this as encouraging future applications generally – particularly urgent applications - to be suitable for disposal without a hearing.

4. By way of background, the Claimant is a not-for-profit campaign organisation that seeks to use the law to protect the interests of the public. It is a public interest body, and has come to particular prominence since the pandemic, as it has challenged the behaviour of the Government, and the Cabinet Office, in certain respects concerning the award of a number of contracts which were entered into very urgently in March/April 2020 as part of the pandemic response. It does not only challenge procurement decisions. It has been widely reported, and is therefore public knowledge, that this very week it has commenced proceedings in relation to the use by Ministers of private email accounts for the conduct of departmental business, something that has recently become highly topical.

5. Returning to the Claimant's challenges to procurement in a time of pandemic, there are already similar judicial proceedings brought by the Claimant in respect of a different contract. Those other proceedings concern the provision of focus group and communications support services by a company called Public First Ltd. Those other proceedings are not only already underway, they have been recently been decided at first instance. They were the subject of a judgment by O'Farrell J in ***The Good Law Project Ltd v Minister for the Cabinet Office and Public First Ltd*** [2021] EWHC 1569 (TCC), a reserved judgment and which was handed down on 9 June 2021 ("the Public First judgment").

6. In the Public First proceedings, the Minister challenged whether the Claimant had sufficient standing to bring the challenge by way of judicial review. O'Farrell J found that it did. However, she also found that the Claimant's challenge succeeded on ground 3, that of apparent bias, due to the connection between the decision-makers at the centre of the Government and those behind Public First. The Claimant therefore succeeded in obtaining a declaration that the decision by the Minister to award the contract in that case gave rise to apparent bias and was unlawful. Two paragraphs of her judgment can be usefully reproduced in this respect:

"[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."

7. Mr Cummings was at the time the Chief Adviser to the Prime Minister. He was centrally involved in the Government's response to the pandemic and provided witness evidence, referred to in the Public First judgment, and his involvement formed part of the submissions made by the Claimant (summarised at [133] of O'Farrell J's judgment) which founded the claim of apparent bias.

8. Turning to the contract in the instant proceedings, which was awarded to Hanbury for online and phone polling and ancillary services. The Government wished to use these services to help it in forming policy, and also to help inform and influence the behaviour of the general public, in terms of its pandemic strategy. Neither a contract award notice nor the contract itself was published, and The Guardian newspaper was responsible for publishing the first public information about this contract. The same report stated that the services under the contract commenced on 16 March 2020. Similar issues, and similar witnesses, are involved in both sets of proceedings. I will not recite them in this short ruling but the central involvement of certain individuals, including Mr Cummings, and the arguably close pre-existing relationships, feature in the evidence. They will doubtless also be a feature of the detailed legal arguments that will be deployed at the substantive hearing. The issue of apparent bias also arises.

9. The reason for the Minister's application to stay these proceedings is that, following the Public First judgment and the consequential order of 21 June 2021, the Minister has applied to the Court of Appeal for permission to appeal. Given the significant similarities between the two matters, the Minister by his legal representatives submits

that it would be of benefit to the court in the instant proceedings if the appeal in Public First were to be determined first. In the instant proceedings, as in Public First, the court will have to consider whether apparent bias arises in the context of an emergency procurement under Regulation 32(2)(c) PCR 2015. As a result, the points of law in respect of apparent bias, upon which permission to appeal has been sought in the Public First case, are highly likely to be relevant to the determination of the second ground relied upon by the Claimant in these proceedings.

10. It is also said that it would minimise costs and be in accordance with the overriding objective for any appeal (or permission to appeal, were that to be refused) to be determined in the Public First proceedings, before the instant Hanbury proceedings were heard.

11. The Claimant opposes this application. Firstly, the Claimant submits that the application to vacate the hearing of 26 July 2021 is made late, and the work required in order to prepare skeleton arguments for that hearing is well underway, if not substantially done. Secondly, the Claimant relies upon the fact that permission to appeal was applied for by the Minister directly to the Court of Appeal, and not to the judge herself, and also that the application for permission was lodged with the Court of Appeal on 30 June 2021, the last day upon which this could be done under the rules. Thirdly, the Claimant maintains that there is, as yet, no appeal, as permission has not been given.

12. I am not persuaded that those are good grounds for opposing the application. An application for permission to appeal can be made direct to the Court Appeal, or to the judge herself; this is expressly provided for in CPR Part 52(2)(b). There is nothing in this point. So far as lateness is concerned, the application for permission was lodged on 30 June 2021 (within the 21 days permitted by the rules from the judgment itself) and a letter from the Government Legal Department was sent on 1 July 2021 to the Claimant seeking its agreement to stay these proceedings. The application was then issued promptly, and in a sense the relative lateness of the application arises purely from the date when the Public First judgment was handed down. So far as the decision by the Minister to decide to appeal is concerned (and there is some curiosity in so far as the initial decision appears to have been one not to appeal) these are important matters, and the time available under the rules was utilised. I do not consider that this should count against the Minister, if the main point is a good one, namely the similarity of issues in the same case. If the rules grant a party 21 days to lodge such an application, and a party complies with that time limit, I do not see why that should count against a party who wishes to appeal. These are also somewhat complex issues; permitting a Minister and his or her department the full period available under the rules is entirely sensible.

13. I consider that there is sufficient similarity between the two cases, and the central issue of apparent bias, that the application should succeed. The substantive hearing of 26 July 2021 ought not to take place until the Minister's application for permission to appeal has been considered by the Court of Appeal and either (1) refused; or (2) the appeal itself has been decided. The findings of O'Farrell J in the Public First judgment at first instance are persuasive, but not binding, on the judge hearing the substantive application for judicial review in the instant proceedings. If the appeal is heard, the decision of the Court of Appeal on the apparent bias issue will be binding. Equally, if permission to appeal is refused by the Court of Appeal, this means that the Minister will have failed to have satisfied either of the tests in CPR Part 52(6)(a) or

(b). The first of those tests would mean that the Court of Appeal would have decided that the Minister's challenge to the judge's findings of apparent bias would have no real prospects of success. This will be of great assistance, not only to the court, but also to the parties.

14. I accept that given the way that the dates have worked out, and those for skeleton arguments to be served for the substantive hearing, a substantial amount of work will have already been done. However, that work will not be wasted. When the substantive hearing takes place, the skeleton arguments will be required in any event. Although it may be inconvenient for legal advisers to put this work to one side for the moment, as it were, the amount of costs wasted is not likely to be anything other than modest. That possible disadvantage has to be balanced against the considerable advantage, in terms of the legal issues, and the matters I have explained at [13] above.

15. For those reasons therefore, I am persuaded that the fair, cost-effective and proportionate course is to vacate the substantive hearing on 26 July 2021. However, I am not persuaded that the correct course of action is to impose a stay as of today, because there is one outstanding matter which was to be dealt with initially at the substantive hearing on 26 July 2021. That is the Claimant's own application dated 18 June 2021 seeking to adduce evidence from Jane Frost, Nick Moon (both witness statements of 18 June 21), and the passages of Jolyon Maugham QC that are opposed by the Minister which appear in a redacted statement dated 1 October 2020.

16. That matter ought to be capable of agreement, and it would be sensible for it to be resolved before the stay comes into force. If I simply impose a stay now, then there is a risk that the application in respect of the Claimant's evidence will find itself in limbo. It is sensible to resolve that one outstanding matter now, and then impose the stay. It essentially concerns whether that evidence is opinion evidence, and if it is, should it be admitted. The parties' attention is drawn to two potentially relevant decisions in this respect to assist them, namely ***Bop-Me Ltd v Secretary of State for Health and Social Care*** [2021] EWHC 1817 (TCC) and ***BY Development Ltd v Covent Garden Market Authority*** [2012] EWHC 2546 (TCC).

17. The parties are entitled to know now that the substantive hearing of 26 July 2021 will not proceed, and that the stay will be imposed 14 days from today. Within that time, either the parties need to agree the outcome of the Claimant's application of 18 June 2021, or it will need to be resolved by the court. Accordingly, the order on the Minister's application will therefore be as follows:

    1. The substantive hearing of the Claimant's application for judicial review on 26 July 2021 is vacated.

    2. Within 7 days of the communication by the Court of Appeal of any refusal of the Minister's application for permission to appeal in ***The Good Law Project Ltd v Minister for the Cabinet Office*** [2021] EWHC 1569 (TCC) (case number HT-2021-000192), the Claimant is to apply to the Listing Officer of the Technology and Construction Court for a case management conference, time estimate one hour.

    3. In the event that the Minister is given permission to appeal, the parties are to be given a period of 28 days from the handing down of the judgment of the Court of Appeal to consider any amendments that may be advised to their pleadings, and thereafter to apply to the Listing Officer of the Technology and Construction Court for a case management conference, time estimate one hour.

4. The parties are to liaise and attempt to agree the Claimant's application dated 18 June 2021. In the event that agreement is not reached by 12 noon on Monday 19 July 2021, they are to notify the court immediately after that deadline has passed. The Claimant's application dated 18 June 2021 will then be listed (at short notice) for hearing during that week, and before 23 July 2021, with a time estimate of one hour.

5. In the event that the parties reach agreement referred to in paragraph 4, the proceedings will be stayed immediately upon that agreement being reached. In the event that the hearing at paragraph 4 is necessary, a stay will be imposed after the decision at that hearing.

5. Costs of the application of 5 July 2021 reserved.