

Public procurement judicial review—disclosure and expert evidence (*R (on the application of Good Law Project Ltd) v Secretary of State for Health and Social Care*)

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Public Law analysis: The Good Law Project (GLP), a not-for-profit campaign organisation, judicially reviewed the award of certain contracts by the Secretary of State for Health and Social Care (SSHCS) to the Interested Party (Abingdon) for the manufacture and supply of rapid coronavirus (COVID-19) antibody tests. As regularly occurs with procurement judicial reviews, this claim was transferred from the Administrative Court to the Technology and Construction Court (TCC). The case came before Mr Justice Fraser on an interlocutory basis to deal with case management issues. He ordered the SSHCS to pro-vide further disclosure and refused to allow him to rely on an expert report which did not comply with the requirements of CPR 35. Written by Jonathan Lewis, barrister at Henderson Chambers.

R (on the application of Good Law Project Ltd) v Secretary of State for Health and Social Care [\[2021\] EWHC 2595 \(TCC\)](#)

What are the practical implications of this case?

This decision serves as an important reminder to public bodies that the court will take no less a rigorous approach to case management in procurement claims simply because they are brought by way of judicial review (applying *R (AB) v Chief Constable of Hampshire* [\[2019\] EWHC 3461 \(Admin\)](#)). As Fraser J put it:

‘...parties in judicial review proceedings are not entitled to some wider indulgence in this respect, nor are the rules to be applied less strictly simply because a case concerns public law.’ (at para [41])

Further, while only permissible in exceptional circumstances, this decision reveals that standard disclosure and expert evidence might be allowed in judicial review claims where the circumstances merit them.

What was the background?

GLP brought this quasi-procurement challenge by way of judicial review because it did not have sufficient standing under the Public Contract Regulations 2015, [SI 2015/102](#) to bring a claim under those regulations as a Part 7 claim (at para [2]). It challenged the award of three contracts to Abingdon, which were entered into in April, June, and August 2020. The existence of these contracts only came to light in October 2020 (at para [2]). The challenge was brought on seven grounds (which were not explored at this interlocutory hearing). This was one of a number of such claims brought by GLP against the SSHSC.

What did the court decide?

GLP had raised concerns that the SSHSC had given inadequate disclosure in some regards. Fraser J noted that disclosure is not routinely ordered in judicial review proceedings generally, as the facts are rarely in dispute, but that this case was different and an approach akin to standard disclosure had been adopted (at para [6]). This approach had been adopted because there was widespread disagreement about some of the details, such as date ranges, and whose email accounts should be searched. One point of contention was that GLP sought disclosure of emails from a person who had been acting as an unpaid special adviser to the government (at para [6]). His emails to Abingdon would not have been caught by the existing disclosure orders (at para [7]). Fraser J decided that it would not be fair to hear and decide such an application in the absence of the adviser (and potentially his employer), who should be given the opportunity of adducing evidence or making submissions as to why such an order ought not to be made (at para [7]). He suggested that GLP ought to make an application for third-party disclosure and serve it upon the adviser.

Fraser J recorded that he had ordered that certain ‘repositories’ of the former SSHSC should be subject to search using the agreed search terms and date range (at para [8]). The former SSHSC had accepted that he had used private email accounts and WhatsApp messages during the relevant period. [CPR 31.7\(2\)\(a\)](#) to [\(d\)](#) set out the factors relevant to deciding the reasonableness of a such for documents. Fraser J concluded that the SSHSC would have been ‘centrally involved’ in the decisions under challenge (at para [8]). He noted as

some data on some civil servants' devices had been deleted, search of the SSHSC's email accounts was 'more likely to yield documents not otherwise currently available'.

Fraser J concluded that the relevant requirements for the disclosure order sought were satisfied and that it was reasonable and proportionate to make such an order in all the circumstances (at para [9]). However, he said that 'nothing untoward should be read into the making of such an order' but that it was required to ensure that suitable repositories (including the SSHSC's email accounts) are searched, as they were likely to contain relevant documents which ought to be disclosed to GLP.

In the remainder of the judgment, Fraser J dealt with the SSHSC's application to adduce expert evidence. He sought to adduce the evidence of an expert economist in response to GLP's ground seven, which was the allegation that sums granted to Abingdon comprised unlawful state aid to that company to conduct research and advance its own commercial business interests, and that these sums were therefore an unlawful public subsidy (at para [11]). In her report, the expert concluded that sums advanced to Abingdon were on market terms.

Fraser J observed that expert evidence is only rarely permitted in judicial review proceedings (at para [13]). He referred to his decision in another claim brought by GLP (*The Good Law Project Ltd v Minister for the Cabinet Office and Hanbury Strategy and Communications Ltd* [2021] EWHC 2091 (TCC)), where he summarised the relevant authorities concerning when permission would be considered for expert evidence in judicial review proceedings. He further referred to the Administrative Court Guide (at section 20.2). One of the areas where expert evidence is when the court proceedings require an understanding of technical matters (as established by Mr Justice Collins in *R (Lynch) v General Dental Council* [2003] EWHC 2987 (Admin), expanding the categories identified in *R v Secretary of State for the Environment, ex parte Powis* [1981] 1 WLR 584). Fraser J accepted that consideration of the economics of state aid was sufficiently technical that such evidence could, in principle, clear the hurdle of being 'reasonably required' under CPR 35.1 and further held that this was one of the rare judicial review cases in which expert evidence was appropriate.

Fraser J briefly considered issues about the nature of the evidence that the SSHSC wished to adduce (whether it was ex post evidence that was inadmissible (at para [16])). However, it was not necessary to reach a conclusion on that issue, given that Fraser J found that the expert report did not comply with the requirements of CPR 35.1. Primarily, the report revealed there had not been compliance with the principle that experts for both parties must have access to the same material (at para [25]).

Fraser J said that:

'...in order properly to consider expert evidence, the court ought to be able to consider the material upon which the expert's conclusions are based, and an opposing expert is entitled to consider that same material.' (at para [25])

He further observed that in considering breaches of CPR 35 rules 'one must also bear in mind that there is a duty of candour in judicial review proceedings generally' (at para [32]) and stated that instructions for an expert to act in litigation 'ought to come from—and that expert's work is subject to scrutiny by—the instructing solicitors acting in the case, not from some other firm of solicitors' (at para [33]).

Case details:

- Court: Technology and Construction Court (QB), Business and Property Courts, High Court of Justice
- Judge: Mr Justice Fraser
- Date of judgment: 30 September 2021

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