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IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
TECHNOLOGY & CONSTRUCTION COURT (QBD)
[2020] EWHC 3609 (TCC)

HT-2020-000226
HT-2020-000291
HT-2020-000292

7 Rolls Buildings
Fetter Lane
London, EC4A 1NL

Thursday, 3 December 2020

Before:

MRS JUSTICE O'FARRELL DBE

B E T W E E N :

THE QUEEN
on the application of

(1) THE GOOD LAW PROJECT
(2) EVERYDOCTOR LIMITED

Claimants

- and -

SECRETARY OF STATE FOR HEALTH AND SOCIAL CARE

Defendant

- and -

(1) CRISP WEBSITES LIMITED (T/A/ PESTFIX)
(2) CLANDEBOYE AGENCIES LIMITED
(3) AYANDA CAPITAL LIMITED

Interested Parties

MR JASON COPPELL QC & Brendan McGurk (instructed by Rook Irwin Sweeney LLP) appeared on behalf of the Claimants.

MR MICHAEL BOWSHER QC & Ewan West (instructed by GDL) appeared on behalf of the Defendant.

MR ALAN BATES appeared on behalf of the First Interested Party.

THE SECOND AND THIRD INTERESTED PARTIES were not present and were not represented

J U D G M E N T

MRS JUSTICE O'FARRELL:

- 1 This is the hearing of the Claimants' renewed oral applications for permission to claim judicial review in respect of the Defendant's decisions to make direct awards of contracts for the supply of personal protective equipment ("PPE") to the Interested Parties pursuant to Regulation 32(2)(c) of the Public Contracts Regulations 2015 ("the PCR 15").
- 2 In general, when awarding public supply contracts falling within the definition in the PCR 15, contracting authorities must comply with the procedures set out in the PCR 15, including the requirements for publication of public procurement competitions and minimum timelines for submission of tenders. An exception to this requirement is Regulation 32, which permits contracting authorities to apply a negotiated procedure without prior publication.
- 3 Regulation 32 of the PCR 15 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 or 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.”
- 4 The Defendant in each of these claims relies on Regulation 32(2)(c) in respect of its procurement of the PPE contracts under challenge in these proceedings.

Factual background

- 5 Prior to the current crisis, demand for PPE by NHS trusts was partly serviced by the NHS Supply Chain, a company owned by the Defendant, and partly through direct buying by the NHS trusts, usually through wholesaler or distributors. Other health and social care organisations were responsible for sourcing their own PPE. Historically, most PPE was manufactured in the People's Republic of China, and was in plentiful supply.
- 6 It is common ground that this situation changed dramatically in March 2020. From about February 2020 the COVID-19 virus surged through Europe and it became

apparent that large quantities of PPE would be needed. On 11 March 2020 the Director General of the World Health Organisation announced that COVID-19 had been classified as a pandemic. In the latter half of March 2020 existing supply chains were disrupted as prices for PPE rose dramatically, transportation to the main manufacturing bases in the People's Republic of China were disrupted and demand increased to unprecedented levels from across the globe. This caused significant worldwide shortages of PPE.

- 7 On 27 March 2020 the Defendant launched its “Coronavirus Support from Business” scheme, encouraging businesses supplying a range of products and services, including PPE, to register at an online portal, to indicate how they might assist the Government's response to the pandemic.
- 8 On 14 March 2020 the defendant established a central email address to which offers to supply products and services could be made.
- 9 On 10 April 2020 the government issued a press release alerting to a national effort on PPE and similar requests for help were made in the Government's daily coronavirus briefings.
- 10 The scheme did not identify specific contracts for which bids were invited, but general specifications were provided by NHS Supply Chain, and applications to supply PPE were invited through the website. Approximately 24,000 offers were made from about 16,000 potential suppliers. Once potential suppliers had registered, the information provided was assessed and verified by a cross-governmental team. The offers were then passed to buying teams, who categorised them based on quantities, price, certainty of supply, and lead times for the PPE.
- 11 One of the interested parties, Pestfix, in Claim 226, registered on the portal on about 30 March 2020. It did not hold itself out as a manufacturer but rather as an agent with the ability to source PPE stocks from producers in the People's Republic of China. Following product checks, commercial negotiations commenced.
- 12 On 13 April 2020 a formal decision was made to award a contract to Pestfix for the supply of isolation suits or disposable coveralls over a period of twelve months, with a value of £32 million.
- 13 On 18 May 2020 notice of the contract award was published in the Official Journal of the European Union (“the OJEU”), through the Tenders Electronic Daily (“TED”) portal. Further, on 4 June 2020 the decision was published in a report by the Tussell Consultancy, factsheet number 3, on "COVID-19 and UK Public Procurement", and in an article in The Times newspaper on the same day.
- 14 The contract award notice set out the following explanation for the use of Regulation 32(2)(c) of the PCR 15:
“Extreme urgency brought about by events unforeseeable for the contracting authority, and in accordance with the strict conditions stated in the Directive.

COVID-19 is serious and its consequences pose a risk to life. Cabinet Office published PPN 01/20, 'Responding to COVID-19' on procuring with extreme urgency in March 2020 which states that contracting authorities may enter into contracts without competing or advertising the requirement where certain tests are met:

- (1) there are genuine reasons for extreme urgency as there is a significant public health risk requiring immediate action as a result of COVID-19;
- (2) the COVID-19 situation is novel, and the contracting authority could not have reasonably foreseen these events;
- (3) it is not possible to comply with the timescales of another procedure due to the urgent requirement to obtain the [supplies] being contracted for. Additionally, there are many buyers competing for the same supplies. It is imperative that security of supply is maintained. Demand for equipment is high and there is little or no incentive for suppliers to participate in competitive procurement procedures; and
- (4) the situation is not attributable to the contracting authority."

Thus it followed very closely the wording of Regulation 32(2) and (4).

- 15 The Regulation 32(2)(c) procedure was used for additional PPE contracts in respect of the other interested parties, that is Clandeboye and Ayanda.
- 16 On 28 April and 18 May 2020 the Defendant concluded two contracts with Clandeboye for the supply of PPE with values of £14.28 million and £93.24 million respectively.
- 17 On 29 April 2020 the defendant concluded a contract with Ayanda for the supply of PPE with a value of £252,500.

Proceedings

- 18 Proceedings were started initially on 15 June 2020, when the Claimants issued a claim for judicial review in respect of the decision to award the contract to Pestfix.
- 19 On 22 July 2020 a similar claim was issued in respect of the decisions to award contracts to Clandeboye.
- 20 On 29 August 2020 the claimants issued a claim for judicial review in respect of the decision to award the contract to Ayanda.
- 21 Each claim was initially started in the Administrative Court, and subsequently transferred to the TCC.

- 22 In each case the relief sought is a declaration that the contract award decision was unlawful, and orders quashing both the decision and the contract executed pursuant to that decision.
- 23 The amended grounds of claim are materially the same against the defendant in respect of each of the relevant contracts, and I summarise them as follows:
- i) First of all, in relation to ground 1, it is said that there was no lawful basis for making a direct award under Regulation 32(2)(c). The Claimants' case is that as at 13 April 2020, in the case of Pestfix, the Defendant had been aware of the need to procure PPE for at least two months: the Government had been issuing guidance on the use of PPE from early February 2020; joint procurement of PPE commenced across the EU on or around 24 February 2020; PPN 01/20 was published in March 2020, and the Government put the UK into full lockdown on 23 March 2020. The Defendant, it is said, should have taken steps to procure sufficient levels of PPE in February or March 2020.
 - ii) Ground two is that the direct award of the contract violated treaty principles of equal treatment and transparency. The Claimants' case is that even if the Regulation 32(2)(c) procedure was lawful, there remained an obligation to comply with the principles of transparency, equality of treatment and proportionality as set out in Regulation 18. The Defendant has failed, it is said, to provide evidence that it conducted any or any fair and transparent form of negotiated process, which applied equally as between prospective suppliers.
 - iii) Ground three is that there are no proper reasons permitting the court to assess the lawfulness of the procedure. The Claimants' case is that the Defendant has failed to provide reasons that are sufficient to enable them to understand the basis of the decision and, if necessary, challenge it, or to enable the Court to assess the lawfulness of the procedure.
 - iv) Ground four is that the size and extent of the awards were disproportionate. The Claimants' case is that the urgent need for PPE was not required to be met through the conferral of such valuable contracts for such vast quantities of PPE. It could have been met by a much shorter and / or smaller contract award / awards until such time as the defendant was able to conduct an open competition for the longer-term supply of PPE.
 - v) And finally, ground five is that the contract award was irrational. The Claimants' case is that the award of the contract to the Interested Parties, who had little or no prior experience in the manufacture or supply of PPE, was irrational. In particular, it is alleged that no or insufficient financial or technical verification was undertaken in respect of the potential suppliers, and reliance is placed on inadequate performance of the contracts.
- 24 The Defendant has acknowledged service in each of the claims, indicating its intention to contest the claim, and has served summary grounds for resisting the claim. It is disputed that the Defendant acted in a covert manner. As summarised at paragraph 9 of the summary grounds, it is stated that the award of the contract took place against the backdrop of an unprecedented global emergency, during which the situation in

relation to the availability of PPE was changing on an hourly basis. Nonetheless the Secretary of State acted transparently, in particular through publicising the government's strategy for securing offers of PPE; inviting offers from potential suppliers; and dealing with them fairly, in particular by applying publicised standards based upon current standards. Reliance is placed on the widespread use of the Regulation 32(2)(c) procedure by other EU member states.

25 This is amplified, starting at paragraph 21 of the Defence:

“The change in both the demand and supply side of the PPE market occurred very quickly and very dramatically. In the NHS demand for PPE increased between 5-fold and 2,500-fold, depending on the category of item. The effect of such increased demand, which was being replicated on a global scale, led to a wholesale change in the relevant market dynamics. In particular, market power shifted decisively in favour of suppliers, such that the competition was no longer between suppliers to satisfy government or buyer demand, but between different national health authorities to secure commitments to supply.

On a number of occasions supplies which had been offered for supply to the UK ended up being sent to another country that made a higher priced offer for the same goods. Some countries banned PPE exports entirely. Indeed, the EU itself introduced legislation which required specific member states to obtain licences for PPE if they wished to export it.

Given the uncertainties of supply there was an inevitable incentive to stockpile, with consequent effects upon the availability of supplies. Some suppliers were induced by more attractive financial offers to renege on existing contractual commitments. Some commercial purchasers engaged in speculative buying, and there was a worldwide shortage of some of the necessary raw materials, incentivising the placing of orders in excess of likely demand.

In these circumstances, suppliers were demanding significant advance payment. Some other countries were offering to pay substantial sums of cash upfront to overseas producers, in order to secure immediate commitments, and then stockpiling the PPE. When new sources of supply did come onstream these offers would often only be open for twenty-four hours. If negotiations were not concluded in this time, stocks would simply be lost to another country instead.”

26 Against that background the Secretary of State pleads that it was impossible to run any kind of competitive tendering process or market testing exercise. The rapidly shifting availability of supply on the ground required decisions to be taken in hours rather than days or months. Suppliers who found themselves inundated with highly attractive offers from across the world would simply have had no incentive to respond to a UK call for tenders, or to hold off from committing their product on the favourable terms available elsewhere, rather than await the outcome of a UK competition.

- 27 In summary, in a matter of only a few days, the UK moved from a situation where it had to match predictable need with a steady and established supply of PPE to one in which demand had become unpredictable because the scale and impact of the pandemic was unknown; existing supply chains were clearly and materially insufficient; and PPE had to be obtained in the face of surging and unprecedented global demand. That required an entirely new approach to procurement.
- 28 The Interested Parties have set out their summary grounds for resisting the claims, broadly supporting the stance taken by the Defendant.
- 29 The Claimants, rather unusually, served a reply in each of the claims in August 2020.
- 30 On 18 August 2020 a directions hearing was held at which the Court gave permission to the parties to file submissions by 1 September 2020, following which a decision on permission to claim judicial review would be made on the papers as soon as possible, and ordered a four-day hearing of the matter, subsequently fixed for 22 February 2021.
- 31 On 17 November 2020 Jefford J issued her decision on each of the applications for permission to apply for judicial review. In respect of the Pestfix and Clandeboye claims, the Court granted permission to the Claimants to challenge the decisions by way of judicial review on grounds two and three, but refused permission on grounds one, four and five. In respect of the Ayanda claim, the Court granted permission to the Claimants to challenge the decision by judicial review on grounds two, three and five, but refused permission on grounds one and four.

The applications

- 32 On 20 November 2020 the Claimants issued applications to renew their requests for permission at an oral hearing in relation to the grounds on which permission had been refused.
- 33 On 25 November 2020 the claimants issued a further application for permission to rely on the additional witness statements produced by Jolyon Maughan QC and Dr Julia Patterson. That additional evidence includes an article and information from the BBC regarding Pestfix, and two reports by the National Audit Office, one dated 18 November entitled, "Investigations into government procurement during the COVID-19 pandemic" and the second dated 25 November entitled, "The supply of Personal Protective Equipment during the COVID-19 pandemic".
- 34 It is of course unusual for a claimant to seek to introduce new evidence on an oral renewal of an application for permission. However the Defendant does not object to the introduction of this evidence and the Claimants have agreed that the Court could take note of it on a *de bene esse* approach. Therefore, that is what I propose to do.

Applicable test

- 35 I start by reminding myself of the relevant test for granting permission. This is helpfully summarised in the White Book notes at paragraph 54.4.2, which provide:

“Permission will be granted only where the court is satisfied that the papers disclose that there is an arguable case that a ground for seeking judicial review exists which merits full investigation at a full oral hearing, with all the parties and all the relevant evidence.

...

The purpose of the requirement for permission is to eliminate at an early stage claims which are hopeless, frivolous or vexatious and to ensure that a claim only proceeds to a substantive hearing if the court is satisfied that there is a case fit for further consideration. The requirement that permission is required is designed to, in the words of Lord Diplock in *R v The Inland Revenue Commissioners, ex parte National Federation of Self Employed and Small Businesses Limited*:

prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending, although misconceived.”

Submissions

- 36 Mr Coppell QC, leading counsel for the Claimants in each of the three claims, submits that the claims raise serious complaints about matters of exceptional public interest, as evidenced by the grant of permission on some of the grounds granted by Jefford J.
- 37 Mr Coppell submits that the claims merit full investigation at a hearing with the benefit of all the relevant evidence, relying in particular on what is alleged to be the Defendant's failure to provide disclosure of documents concerning the full details of the contract award procedures and evaluations; and further breaches of the duty of candour, as to which three specific grounds have been identified by Mr Coppell.
- 38 Firstly, it is submitted that the Defendant failed to make any disclosure of what has been described as the "high priority lane" through which offers by Pestfix and Ayanda came to the Defendant's attention as potential contractors. Processes were set up on 2 April 2020 which followed up on leads from government officials, ministers, senior NHS staff and other health professionals, which were then used as a basis for fast tracking suppliers for consideration of the award of contracts.
- 39 Secondly, it is submitted by Mr Coppell that the defendant failed to disclose that insufficient financial checks were carried out before awarding the contracts to the interested parties. Reliance is placed on the fact that in the National Audit reports it was identified that retrospective technical and financial checks were carried out in relation to Pestfix and Clandeboye. In respect of the financial checks, Pestfix was graded as Amber, and Clandeboye was graded as red.
- 40 Thirdly, Mr Coppell relies upon emails published by the Health & Safety Executive, matters that were not disclosed by the Defendant, in which there is a suggestion that Pestfix isolation suits have been not approved for use in the NHS on the grounds that they were misdescribed and / or the certificates were not valid for the required PPE. I

should add in relation to that particular issue there clearly is a perhaps complicated issue over nomenclature and exactly what the contract required Pestfix to supply, and whether or not that has in fact been complied with.

- 41 The Claimants maintain that in relation to grounds one and four, the circumstances in which Regulation 32 was invoked were not unforeseeable and / or were attributable to the Defendant. It has not been established by the Defendant that it was not feasible to use any of the accelerated competitive procedures or call off from framework agreements. Further, the volume of supplies purchased went beyond what was strictly necessary for the Defendant to procure by an unadvertised non-competitive process.
- 42 Reliance is placed by Mr Coppel on the National Audit Office report of 25 November 2020, which referred to the heavy use of stockpiling by the Defendant, stating that as at the end of September 2020 the Defendant expected to build up a stockpile of four months' worth of PPE by November, and that on the rates of distribution of PPE experienced so far, the PPE which had been ordered by the Defendant by the end of September 2020 could last for around five years, with variations across the different types of PPE.
- 43 Mr Coppel further submits that none of the explanations provided by the Defendant to date regarding the award of the contracts to Pestfix, Clandeboye and Ayanda suggest that the Defendant made any attempt to assess whether what it was purchasing by those contracts was necessary to fulfil immediate short-term needs, having regard to the nature and quantity of PPE to be supplied under those contracts, and the nature and quantity of PPE which the Defendant had already agreed or would shortly agree to purchase from other suppliers, or any attempt to assess whether it was feasible to adopt an accelerated competitive procedure for the items that were not needed immediately.
- 44 Further, Mr Coppel states that there is evidence that the relevant contracts involved the supply of PPE which was not necessary for immediate use in that there are supplies that still remain in storage.
- 45 Mr Bowsher QC, leading counsel for the Defendant, submits that insofar as ground one is concerned, the court correctly held in the written decisions that it was not arguable that the Defendant was not entitled to rely upon Regulation 32(2)(c) in deciding to award the three contracts that are the subject of the claims. He submits that as the Court held, the Claimants' case identifies a factual basis on which the need for PPE was foreseeable in February but does not address the extent to which that need increased and market conditions radically changed, and / or any basis on which a fairly competitive tender process ought to have been commenced at that time or thereafter, and been completed so as to meet the need for PPE. In the light of that factual position, Mr Bowsher's submission is that it is unarguable that the circumstances giving rise to urgency were attributable to the Defendant.
- 46 In relation to ground four, that is the proportionality argument, Mr Bowsher submits that the Court on the papers was correct to find that, in the unprecedented circumstances of the pandemic where stocks were being rapidly depleted, and where the course of the pandemic was uncertain, it was unarguable that the term or scope of the contracts were disproportionate. He submits that the Claimants effectively seek to assert that the Defendant should have been endowed with a degree of foresight as to the future

available supply and precise demand for PPE that is unrealistic and far-fetched given the unprecedented circumstances and the nature of the global market conditions for PPE in the early months of the pandemic.

Discussion and decision

- 47 The Claimants have raised legitimate questions as to whether the Government should have been more prepared for a pandemic of this nature, and should have obtained stocks of PPE before the pandemic by reference to a pandemic exercise carried out in 2016, or earlier in the pandemic when it first appreciated that PPE would be needed to treat patients with the virus. Those questions raise issues of public health policy, and government decision-making generally. However, in these proceedings, the court is concerned only with the lawfulness of the decision-making exercise regarding the procurement; whether the procedures adopted were fair and in accordance with the PCR 15 and EU Treaty principles.
- 48 I accept Mr Coppell's submission that, as set out in the extract from *Arrowsmith*, a strict approach should be taken to any derogations from the general rules of procurement, and that it is for the Defendant to justify the use of any such derogation.
- 49 In this case the PPN 01/20 issued in March 2020 permitted the use of Regulation 32(2)(c) provided that the circumstances were such as to justify such use in line with the wording of the Regulation, namely that there was extreme urgency, it was unforeseeable, it was impossible to comply with normal procurement procedures, and the urgency was not attributable to the contracting authority.
- 50 The European Commission guidance, issued on 1 April 2020, likewise permitted the use of Regulation 32(2)(c). It identified the use of shortened deadlines, where that might be appropriate to obtain relevant supplies of PPE, but it also referred to the use of Article 32(2)(c) in the Directive. It stated at paragraph 2.3.4 of the guidance that such procedures, if necessary, should only be used to cover the gap until more stable solutions could be found. I note that it appears to be common ground that the Article 32(2)(c) procedure has been used generally by other member states within the EU, although the precise extent is not in evidence before the Court.
- 51 The second National Audit Office report referred at paragraphs 2.25 to 2.26 to the following:
“The parallel supply chain has not yet received much of the PPE it ordered, with some of it not yet manufactured. Of 32 billion items of PPE ordered by the end of July, 6.6 billion items have been received by 29 September, and another 5.1 billion items were also in the UK but not yet with the parallel supply chain. Two-thirds of items still to arrive in the UK were expected for delivery before the end of 2020. The department expected large volumes to be delivered to the parallel supply chain in October and November. This has meant that the department has been building up its stock of PPE, and it expects to have four months' worth by November. However, the parallel supply chain has ordered PPE that might provide stocks that would last far longer than four months.

Between March and July, the volume of PPE that it distributed to frontline organisations averaged about 503 million items per month. There is a lot of uncertainty about future requirements for PPE. However, if this rate of distribution were to continue, then the 32 billion items that have been ordered by the parallel supply chain by 31 July could last around five years. The parallel supply chain's initial estimate of the PPE that would be required nationally anticipated an enormous increase compared with pre-pandemic use, but actual use has been lower than this although still far higher than pre-pandemic use.”

- 52 It is common ground that by mid-March 2020 the WHO had classified COVID-19 as a global pandemic, there was an urgent need for very large quantities of PPE, supply chains had been disrupted, there was a global shortage of PPE and prices had escalated such that it was a suppliers’ market. Perhaps most importantly, by that stage there was great uncertainty as to the scale and duration of the pandemic and therefore the need for further PPE supplies in the future.
- 53 In those circumstances, it is not properly arguable that Regulation 32(2)(c) was not engaged. The event, the global pandemic, was unforeseeable. There was extreme urgency; the NHS and other key workers were desperate for immediate supplies of PPE. The time limits for a conventional public procurement could not be complied with and would not have generated the supplies that were required; the supplies were needed immediately and it was a suppliers’ market. The alternative procedure was strictly necessary; failure to secure the supplies that were needed would put at risk the health of the NHS workers and other key workers in frontline positions. Finally, the pandemic and the global shortage of PPE were not attributable to the Defendant. For those reasons, I refuse permission to challenge the contracts by way of judicial review on ground one.
- 54 I also consider that ground four, the issue of proportionality, is not properly arguable for the reasons given by Jefford J. The Claimants' case is that effectively the Defendant went too far in placing contracts. However, it seems to me that this argument is made with the benefit of hindsight. It is easy to argue that the UK now has great stockpiles of PPE that it does not need. However, at the time of the award of the contracts, going back to April 2020, and consideration of them, no one knew the extent of the pandemic. A second wave was then predicted, as it turns out correctly. No one knew when we would reach the peak. No one knew how many people would be impacted. In those circumstances it would have been foolhardy to limit the supplies of PPE to what was immediately necessary, and risk a similar shortage crisis before a competition could be concluded. That would have been to put lives at risk.
- 55 In any event, as is set out by the Defendant in its pleaded grounds of resistance, the scope and duration of any of the contracts would fall within a broad range of discretion on the part of the Secretary of State. On the basis of the pleadings, submissions and evidence before the Court, I do not consider that ground four is properly arguable.
- 56 I now turn to ground five, irrationality. The pleaded case is set out at paragraph 79 in the Pestfix pleadings, but it is in similar terms in the other claims, as follows:

“On the limited facts currently known to the Claimants, the award of such a valuable contract without advertisement, any form of competition or any discernible process as to the selection of contractors from the thousands of suppliers who have offered to make supplies of PPE, to a company engaged in the business of pest control with little or no prior experience in the manufacture or supply of PPE was irrational. The irrationality of this award is compounded by the facts that have arisen since the commencement of these proceedings, including:

- (a) the fact that it was not, as published, a contract for £108 million but £32 million, a fact that might not have become public absent this challenge;
- (b) the fact that Pestfix was not capable from its own resources of purchasing a fraction of the contracted supply, and required a prepayment of 75 per cent in violation of clear guidance on COVID related procurement practice;
- (c) the fact that no or no sufficient financial or technical verification was undertaken, either in relation to Pestfix or its Chinese suppliers; and
- (d) the fact that the PPE, the subject of the contract, has only partly been supplied, and late, and where that which has been manufactured and transported has not been tested for compliance with technical and safety standards, has not been delivered to a single frontline NHS worker, and remains in a warehouse in the Midlands.”

57 I remind myself that the test in relation to the pleaded ground of irrationality at any hearing is whether any person properly directing itself to the relevant law could reasonably have reached the decision that was reached on the facts and the materials before it; effectively the *Wednesbury* test, albeit adjusted to fit the circumstances of the particular challenge.

58 Starting with the suggestion that Pestfix was a company engaged in the business of pest control with little or no prior experience in the manufacture or supply of PPE, that is an erroneous description of Pestfix, because it ignores its established business as a supplier of PPE, albeit for other purposes, and ignores the basis of the contract award to Pestfix as an agent for procuring PPE from others. As Mr Bowsher submitted, the whole purpose of the new strategy introduced by the Government was to find new sources of PPE because the established supplies could not meet demand.

59 Further, the pleaded subsequent performance of the contracts would not be sufficient to establish irrationality in the award of the same. I should note in that regard that Mr Bates, counsel appearing for the interested party Pestfix in claim 226, wished to stress that Pestfix strongly disputes that it has presented misleading information to the Court, particularly in relation to performance of the contract to Pestfix's knowledge. The isolation suits that were supplied by Pestfix under the contract to which the claim relates complied fully with the Defendant's technical specification, as set out in the contract.

No evidence has been put forward to support a suggestion that any of the certificates were somehow invalid.

60 Further, he makes the valid point that evidence about Pestfix's performance of the contract, or other facts which occurred after the date of the challenged decision, are not relevant to the lawfulness of the decision, which should be judged as at the time when that decision was taken. That is a point that is well made, and in my judgment the pleaded allegations at (a) (b) and (d) of paragraph 79 are not properly arguable for the purpose of judicial review.

61 However, the Claimants have supplied further information for the purposes of this hearing which raise questions as to the basis on which the suppliers were selected. It has become apparent from the National Audit Office reports that the Government established and operated the high priority lane for potential suppliers to be considered for the award of contracts but there was no stated criteria for the referrals to that high priority lane, and the source of the referral was not always recorded.

62 This gives rise to legitimate questions as to the information provided by potential suppliers; the basis on which those offers were assessed and verified; the criteria or the benchmark applied; the criteria that were set regarding pricing, volume and testing; any checks that were made to assess the technical suitability and quality of the product; and financial due diligence in relation to the suppliers.

63 Those questions in my judgment are sufficient to raise an arguable case that the award in question was irrational, either on ground (c) as pleaded, that is no sufficient financial or technical verification, or new subparagraph (e), which is that there were no stated criteria for the referrals to the high priority lane, and the source of the referrals was not always identified and / or justified.

64 As to those grounds, the Defendant submits that the factual issues that have been set out in the National Audio Office reports are not necessarily accepted as accurate and / or complete. I understand that submission. I am not ruling on whether or not the grounds will succeed. All the Court is concerned with at this stage is whether or not the Claimants should have permission to argue those grounds at a substantive hearing.

65 Mr Bates has submitted that permitting the judicial review to be expanded to include irrationality would increase the scope of the challenge to a disproportionate scale. I would like to emphasise that this Court will not permit the challenge to be increased to a disproportionate scale. This Court will ensure that any of the evidence and / or arguments that are put forward in support of the challenge are ones that properly fall within the grounds that have been identified, and in respect of which permission has been granted, no more, no less. The Court will not permit these challenges to be used as a vehicle for a wide-ranging enquiry into government health policy and / or decision-making.

66 In conclusion, the Court refuses permission to the Claimants in the Pestfix, Clandeboye and Ayanda cases on grounds one and four. The Court permits the challenge to go forward in both the Pestfix and Clandeboye cases on the two issues that I have identified in relation to ground 5, that is, irrationality by reference to: (i) the allegations of no sufficient financial or technical verification; and (ii) the allegations of no stated criteria

for the referrals to the high priority lane and/or the source of the referrals was not always identified and / or justified.

CERTIFICATE

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Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
civil@opus2.digital*

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