IN THE COURT OF APPEAL, CIVIL DIVISION

REF: **CA-2022-000414**

The Good Law Project and Another –v– **The Secretary of State for Health**

CA-2022-000414

ORDER made by the Rt. Hon. Lord Justice Coulson

On consideration of the appellant's notice and accompanying documents, but without an oral hearing, in respect of an application for permission to appeal

Decision

Appellants' application for permission to appeal against the Order of O'Farrell J dated15 February 2022:
REFUSED

Reasons

Background

1 The appellants brought judicial review proceedings in respect of the award of various PPE supply contracts by the respondent to PestFix, Clandeboye and Ayanda. In a detailed judgment dated 12 January 2022 ([2022] EWHC 46 (TCC)), O'Farrell J ("the judge") rejected the claims. In particular, in respect of the contracts awarded to PestFix and Ayanda, she found that, although the respondent's operation of the High Priority Lane was a breach of the obligation of equal treatment under the Public Contract Regulations ("PCR") and therefore unlawful, it was highly likely that the outcome would have not had been substantially different and that the contracts would have been awarded to PestFix and Ayanda in any event.

2 The appellant now seeks permission to appeal against the judge's order, although the applications concern the findings in respect of PestFix and Ayanda only; there is no appeal in respect of the Clandeboye contracts. For the reasons set out below, I have concluded that the proposed appeal has no prospect of success and that the application for permission to appeal should therefore be refused. Before turning to the individual grounds, there is one overarching reason why, in my judgment, this application must be refused.

No law, only fact

3 The six Grounds of Appeal, and the 85 paragraphs of the skeleton argument, do not suggest that the judge made any errors of law or principle. Instead the criticisms of the judge concern her assessment of the factual evidence. The skeleton argument in particular amounts to an attempt to reargue the facts, seeking to suggest that the judge placed too much emphasis on one particular strand of the evidence and did not place sufficient emphasis on another.

4 This court will not interfere with the findings of fact of the trial unless compelled to do so: see *FAGE UK Limited and Anr v Chobani Limited and Anr* [2014] EWCA Civ 5 at [114]. In explaining the reasons why that was so, Lewison LJ noted that "in making his decision the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping." That is a particularly apposite observation in the present case, where the judge had to consider a mass of evidence and produced a judgment which ran to 519 paragraphs, almost all of which were concerned with facts, not principles.

5 Furthermore, it is also important to emphasise that this was a decision of a TCC judge who could not be more of a specialist in the area of public procurement law. The very limited circumstances in which permission to appeal against the findings of such a specialist judge are summarised in *Wheeldon Brothers Waste Limited v Millennium Insurance Co limited* [2018] EWCA Civ 2403.

6 In my view, the appellants have come nowhere near to demonstrating that they have any sort of prospect of persuading this court that it should or could interfere with the judge's findings of fact, particularly in the light of the guidance in *FAGE* and *Wheeldon*. In essence, the appellants would need to show that the judge's findings of fact were so extraordinary that they were findings which no reasonable judge could have reached on the evidence. The appellants do not put their case so high, nor could they. But that then only leaves the appellant with its invitation to this court to 'island hop' through the evidence which, in the absence of any compelling reason to do so, this court must decline.

7 Turing to the individual grounds, I start with Ground 2, because it seems to me that that is the most important and its success or failure dictates much of the rest of the application for permission to appeal.

Ground 2: Section 31(2A)

8 The judge found, in respect of the PestFix and Ayanda contracts, that the respondent had acted unlawfully in conferring preferential treatment by allocating them to the secret High Priority Lane. However, she went on to find at [401], [403], and [518] that it was highly likely that, even if they had not been allocated to the High Priority Lane, the outcome would not have been substantially different and these contracts would still have been awarded to PestFix and Ayanda. The "highly likely" test is imposed by s.31(2A) of the Senior Courts Act 1981.

9 It should not be thought that the reasons for the judge's conclusion to this effect were limited to the paragraphs to which I have already referred. On the contrary, large parts of the judgment, particularly those parts dealing with PestFix and Ayanda more generally, are part of the background to and explanation for the judge's conclusions. Thus I consider that the 'highly likely' conclusions arose out of [64]-[164] (PestFix); [183]-[217] (Ayanda); [369]-[403] (the operation of the High Priority Lane); and [506] – [512] (the refusal of the declaration). In this way, I consider that the judge's conclusions under s.31(2A) were the result of a detailed analysis of the facts that cannot be repeated. In the words of Lewison LJ in FAGE, that detailed analysis on the facts was not a dress rehearsal, but the first and last night of the show.

10 I turn to the individual complaints at paragraphs 64-67 of the skeleton argument.

11 The first argument in paragraph 64 is that reliance on s.31(2A) was not pleaded by the respondent. I accept that, in other circumstances, that might have given rise to a major difficulty for the respondent. But on a proper analysis of the material, it does not do so here.

12 First, if there had been a real pleading point (in other words, that the argument raised by the respondent was genuinely new, and had not been anticipated in the appellants' evidence), then it should have been taken before the judge. It is too late to raise such a point for the first time on an application for PTA. That suggests that the argument is technical, not substantive. Further support for that can be found in the fact that, regardless of the pleading, the evidence and the submissions made during the trial addressed the issue as to whether or not the High Priority Lane made any difference to the outcome. In other words, the issue was regarded by both sides as important, and treated by them as such. There is no suggestion that there was or could have been any prejudice as a result of the respondent's failure to plead s.31(2A) expressly.

13 The second complaint in paragraph 64 is that the judge was not in a position to reach her 'highly likely' conclusion because she had refused to admit evidence concerning attempts by unsuccessful suppliers to obtain contracts for the supply of PPE who were not on the High Priority Lane. That is a thoroughly bad point. The judge refused to admit those statements for the reasons set out at [290]-[293]: essentially, they were introduced too late, and their introduction would have caused significant prejudice to the respondent. That case management decision is not criticised on appeal. Accordingly, the appellants cannot rely on the judge's proper refusal to allow them to put in late evidence in support of their complaint about her finding, based on the evidence that was admissible, that it was highly likely that the High Priority Lane made no difference in these specific instances.

14 The third point, at paragraph 64(iii), accepts that there was evidence that offers outside the High Priority Lane could be prioritised, based on credibility, volumes offered and the like. The judge's judgment explains why in the case of both PestFix and Ayanda, it was highly likely that that would have happened. There is no arguable basis for disturbing such findings of fact.

15 Paragraph 65 and 66 of the skeleton argument comprise island hopping of the most extreme sort. The judge assessed all the evidence, as she was entitled to do. Cherry-picking bits of the evidence that pointed the other way goes nowhere. By way of example, at paragraph 66(ii), it is alleged that some of the evidence relied on by the judge "fell far short" of establishing a particular test. That is a criticism of the weight attached by the judge to a particular piece of evidence. But that was exclusively a matter for her.

16 Paragraph 67 makes the point that suppliers who were allocated to the High Priority Lane were far more likely to be awarded contracts than those that were not. This statistical imbalance is confirmed at [393]. But of course, whatever the overall position, what mattered was whether or not, because of their history and the volumes offered, these particular contracts to PestFix and Ayanda would still have been awarded anyway.

17 Standing back in respect of Ground 2, it is not hard to understand the source of the appellants' unhappiness: the respondent was found to have been in breach of the Regulations, so the appellants might therefore have expected to obtain the declarations they sought. But s.31(2A) has altered the legal landscape. It requires the court to go beyond issues of breach, and to come to a conclusion as to whether any breaches that were found might have affected the outcome. It was designed to inject some reality into what was often a very sterile debate about whether there had been technical breaches or non-compliance, by requiring the court to ask: did it matter? The balance of competing interests is maintained because

"highly likely" is a high hurdle, but it is fact-sensitive and ultimately a matter for the trial judge.

18 For these reasons, I consider that the appellants have no prospect of successfully appealing on Ground 2.

Ground 1: Redactions

19 The appellants sought to remove the redactions in the open documents relating to pricing information, although the figures were unredacted in the confidential material. The judge refused that application. Somewhat surprisingly, the appellants make their dissatisfaction with that decision the very first ground of their appeal. I say surprisingly because, in my view, the appellant's argument is both hopeless and irrelevant. It is at best a satellite issue with no wider significance.

20 The judge set out her summary of the applicable principles at [236] – [270]. It is not suggested that this analysis was in any way wrong or flawed.

21 The complaint is hopeless because a decision as to what, if any, information should remain redacted for the purposes of the open trial (even where the information is apparent from the confidential bundle) is a case-management decision for the judge under r.32.1. This court will not interfere with these kinds of decision which, in any sort of significant trial, can number in their hundreds. It was for the judge, as the manager of the trial, to decide what evidence, if any, should remain redacted during that trial.

22 Furthermore, I consider that the judge was right to say that the pricing information was ultimately of no relevance to the issues before the court. The appellants complain that the judge adopted a different approach as to relevance to that adopted by the respondent. So she did, but she would not be the first judge who concluded that neither side had a proper appreciation of an issue of relevance or admissibility.

23 But ultimately, the real point is that none of this matters. The evidence was before the judge and was referred to at trial. The judge knew what the unredacted figures were; so did everyone with access to the confidential bundle. No injustice, prejudice or difficulty has been identified in the appellant's skeleton argument arising from the fact that the figures remained redacted in the open material. The point is not linked to any of the substantive Grounds of Appeal.

24 For these various reasons, I conclude that Ground 1 has no prospect of success.

Grounds 3 and 4: Financial Due Diligence

25 These Grounds are advanced at paragraphs 68-78 of the appellants' skeleton argument. There is no criticism of the judge's summary of the principles at [441] – [448].

26 Instead, the complaints raised are again concerned with matters of fact. The appellants complain about the weight given by the judge to particular elements of the evidence and the lack of weight given to others. Ultimately the appellants seek to reargue the case on the evidence on which they failed before the judge. For the reasons set out above, none of that is a legitimate basis for an appeal.

27 The judgment sets out the particular evidence upon which the judge relied: [89] – [93] in respect of PestFix; [203] – [214] in respect of Ayanda; leading to [463] – [478], which contained her findings on due diligence. That was a cogent analysis of the evidence which was plainly open to the judge.

28 Furthermore, the arguments at 68-78 ignore the factual context, and in particular the urgent requirements imposed by the global pandemic. An assessment can, in one factual situation, amount to a breach of due diligence whilst, in another, that same assessment can be in accordance with due diligence. The factual context is paramount. The appellants' criticisms make no allowance for that at all. But the judgment properly does: see in particular [449] – [455].

29 The judge made a very careful assessment of the circumstances in which the nine challenged contracts were awarded. She did not shy away from the fact, that in some instances, the awarding of these contracts was "very high risk": see [476] by way of example. But she concluded that ultimately it was a matter for the respondent as to what weight he placed on the various risks identified. The judge's conclusion was that the respondent's approach to financial due diligence was rational. That conclusion was, at the very least, available to her on the evidence. The is therefore no prospect of a successful appeal on these grounds.

Grounds 5 and 6: Other Rationality Grounds

30 Ground 5 is a very specific complaint that the judge was wrong to conclude that the technical assurance on the SPC4 gowns was rational. Ground 6 concerns masks with ear-loops rather than head straps. It is alleged that the masks should have had the latter, and the decision to award contracts in respect of masks with the former was irrational.

31 For the reasons set out below, I reject those submissions as unarguable.

32 First, the summary of the principles at [441] – [448] is not criticised. Secondly the appellants ignore – but the judge did not – the relevant factual context: see [449] – [455] again. See also [490] in respect of Ground 5, where she referred to "an urgent demand for surgical gowns, requiring a rapid decision to

secure the order."

33 Thirdly, also in respect of Ground 5, as the judge herself pointed out at [490], the gowns issue arose during the course of the hearing and it did not allow the respondents or the interested parties time to carry out a proper investigation. The judge considered the documents before the court and concluded that any mistake as to whether the order was for sterile or non-sterile gowns – if such a mistake was made - was not such as to render the decision to award the SPC4 contract irrational. Given the way that the matter arose during the trial, that way of approaching the issue was justified.

34 Fourthly, as to Ground 6, the judge dealt with this comprehensively at [491]-[493]. She noted Mr Moore's acceptance that this was an error and that, "if judged as part of competitive procurement under PCR procedures, might constitute a manifest error". But she went on to note, in the absence of a competition, and in the context of the public health emergency, it was not an error that amounted to irrationality. She also concluded that the masks did not fail testing on the grounds that they had ear-loops rather than head straps, which also indicated that the error was not material.

35 Fifthly, in respect of both Grounds 5 and 6, the appellants ignore the particular evidence on which the judge relied: [130] – [141] for SPC3; [142] – [156] for SPC4; [184] – [217] for Ayanda; leading to [486] – [499] which contained her findings on technical assurance. Again, that was a cogent analysis which, at the very least, was open to her.

36 Finally, also in respect of both Grounds 5 and 6, I consider that the judge was right to say that it was not appropriate for the court to scrutinise every aspect of these decision in minute detail. Rationality is a high hurdle. In the round, on the evidence identified, the judge concluded that appellants had not made out these Grounds. There is no prospect of a successful appeal against those findings.

37 For all these reasons, therefore, I conclude that Grounds of Appeal 5 and 6 have no prospect of success.

Some Other Compelling Reason

38 It is not clear to me whether the appellants are seeking to suggest that, irrespective of the merits or otherwise of their proposed appeal, there is some other compelling reason for the court to grant permission. If that is their case, I would reject that submission. As I have endeavoured to point out, these were factual issues on which the judge came to a series of conclusions which were plainly open to her. Some of them are tied back to case management decisions as to the admissibility or otherwise of certain evidence. Accordingly, this is not a case on which any wider point of principle or practice arises, and there is therefore no other compelling reason to grant permission to appeal.

39 For those reasons, permission to appeal is refused.

Information for or directions to the parties

Mediation: Where permission has been granted or the application adjourned:

Does the case fall within the Court of Appeal Mediation Scheme (CAMS) automatic pilot categories (see below)? Yes/No (delete as appropriate)

Pilot categories:

- All cases involving a litigant in person (other than immigration and family appeals)
- Personal injury and clinical negligence cases;
- All other professional negligence cases;
- Small contract cases below £500,000 in judgment (or claim) value, but not where principal issue is non-contractual;
- Boundary disputes;
- Inheritance disputes.
- EAT Appeals
- Residential landlord and tenant appeals

If yes, is there any reason not to refer to CAMS mediation under the pilot? Yes/No (delete as appropriate)

If yes, please give reason:

Non-pilot cases: Do you wish to make a recommendation for mediation? Yes/No (delete as appropriate)

Where permission has been granted, or the application adjourned

a) time estimate (excluding judgment)
b) any expedition

Signed:
Date: 28 April 2022

By the Court

Notes

(1) Rule 52.6(1) provides that permission to appeal may be given only where –
   a) the Court considers that the appeal would have a real prospect of success; or
   b) there is some other compelling reason why the appeal should be heard.

(2) Where permission to appeal has been refused on the papers, that decision is final and cannot be further reviewed or appealed. See rule 52.5 and section 54(4) of the Access to Justice Act 1999.

(3) Where permission to appeal has been granted you must serve the proposed bundle index on every respondent within 14 days of the date of the Listing Window Notification letter and seek to agree the bundle within 49 days of the date of the Listing Window Notification letter (see paragraph 21 of CPR PD 52C).

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