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Case No: HT-2020-000442 and CO/4034/2020

Neutral Citation Number: [2021] EWHC 2595 (TCC)

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

Rolls Building
Fetter Lane
London, EC4A 1NL

Date: 30 September 2021

Before :

THE HONOURABLE MR JUSTICE FRASER

- -

Between :

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

- and –

SECRETARY OF STATE FOR HEALTH AND SOCIAL CARE
Defendant

and

ABINGDON HEALTH PLC
Interested Party

Joseph Barrett, Rupert Paines and Stephanie David
(instructed by **Rook Irwin Sweeney LLP**)
for the Claimant
Philip Moser QC, Ewan West and Niamh Cleary
(instructed by **the Government Legal Department**)
for the Defendant
Ligia Osepciu and Cliodhna Kelleher
(instructed by **Bristows LLP**) for the Interested Party

Hearing Date: 21 September 2021

Mr Justice Fraser:

1. In these proceedings the Claimant, the Good Law Project, seeks judicial review in respect of the award of certain contracts by the Defendant, the Secretary of State for Health and Social Care, to the Interested Party ("Abingdon") for the manufacture and supply of rapid Covid-19 antibody tests. These contracts were, at the risk of stating the obvious, part of the Government's response to the Covid-19 pandemic. The Claimant challenges these contract awards, inter alia, as being contrary to the Public Contract Regulations 2015 ("PCR 2015"). These judicial review proceedings were transferred to the Technology and Construction Court by Swift J in an order dated 29 October 2020. They are therefore being heard by a Judge of the TCC who is also nominated as a Judge of the Administrative Court.

2. The Claimant is a not-for-profit campaign organisation that seeks to use the law to protect the interests of the public. They are brought as judicial review proceedings because the Claimant does not have sufficient standing under the PCR 2015 to bring a claim under the regulations themselves as a Part 7 claim. The Claimant is a public interest body, and has come to particular and increasing prominence since the pandemic, as it has challenged the behaviour both of the Government, and also the Cabinet Office, in certain respects concerning the award of a number of contracts. The majority of these were entered into very urgently in 2020 as part of the pandemic response. The three contracts in question in these proceedings were entered into in April, June and August 2020, but their existence is said to have come to light only sometime later in October 2020. A range of criticisms are made concerning the way in which they were awarded. It is not necessary to recite these, or the defences to them, in this judgment on interlocutory matters, and the full scope of the challenges will be determined at the substantive hearing. There are seven grounds of challenge, and permission for these has already been granted by O'Farrell J (on the papers) and Waksman J (at the oral renewal stage).

3. It would be wrong to characterise the Claimant as only challenging procurement decisions; there are other proceedings before the court in relation to pandemic affairs, the award of contracts in unusual circumstances, and lack of transparency in such matters. It is engaged in litigation against different government departments on matters that are very topical. The highly unusual circumstances of 2020 have given rise to large number of cases of this nature.

4. Similar judicial review proceedings concerning other matters, have already been the subject of other judgments. One by O'Farrell J is ***The Good Law Project Ltd v Minister for the Cabinet Office and Public First Ltd*** [2021] EWHC 1569 (TCC), a reserved judgment handed down on 9 June 2021 ("the Public First judgment"). In the Public First judgment, O'Farrell J found that the Claimant had sufficient standing to bring judicial review proceedings, and also found apparent bias on the part of the Minister in that case. Permission to appeal has been granted in that case, and that appeal will be heard in due course by the Court of Appeal. Other first instant judgments include ***The Good Law Project Ltd v Minister for the Cabinet Office and Hanbury Strategy and Communications Ltd*** [2021] EWHC 2091 (TCC), a case concerning the provision of polling and associated services, that judgment being one that concerns admissibility of expert evidence in judicial review proceedings. I will return to that judgment below. In another case, ***The Good Law Project Ltd v Secretary of State for Health and Social Care and Pharmaceuticals Direct Ltd***

[2021] EWHC 1782 (TCC) O'Farrell J considered certain aspects of a different claim by the Claimant against the same Defendant as in these proceedings, but one concerning contracts for the supply of Personal Protective Equipment (also called PPE).

5. These parties – both the Claimant and the Secretary of State – therefore have a greater interest than most in conducting cost-effective and efficient litigation. There are a number of different sets of proceedings between them. The Claimant raises money by way of donation and crowd-funding. The Secretary of State is, by definition, expending public money. Whether the current stance of these two parties on procedural matters is explained simply by the volume of litigation between them presently, or for other reasons, is not entirely clear. However, the hearing on 21 September 2021 is one of four full-day interlocutory hearings that have, or will have, taken place within the short period July to October 2021. I urge greater co-operation upon the parties. Matters that ought to be agreed are being contested, and this can only vastly increase these parties' collective expenditure on legal costs.

6. The hearing on 21 September 2021 was required in order to decide a number of different matters, some of which were contentious disclosure issues. Disclosure is not routinely ordered in judicial review proceedings generally, as the facts are rarely in dispute. This case is different, and although an approach akin to standard disclosure has been adopted, there was widespread disagreement between the parties about some of the details, such as date ranges, and whose email accounts should be searched. The vast majority of these issues were decided by me in the usual case management way, without reserved or detailed reasons. In respect of some of the disclosure sought by the Claimant, the Secretary of State had already gone some way (prior to, or at, the hearing) to agreeing certain aspects of the application, without going as far as the Claimant wanted. One element could not be fairly dealt with at the hearing. This concerned emails from and to Professor Sir John Bell ("the Professor") who was at the material time acting as an unpaid special adviser to the Government (his title being the Life Sciences Champion), having been appointed in May 2014. The role was, and is, to provide independent advice and challenge to Ministers on Government policy. The Professor is an eminent academic at the University of Oxford and is alleged by the Claimant to have been instrumental in the award of the contracts to Abingdon. Because of his particular status, he did not have a Government email account and used his University of Oxford email account.

7. The Claimant seeks disclosure of certain of the Professor's emails, and it is clear that emails between him and Abingdon would not currently be caught by any of the disclosure orders already made. In my judgment, it would not be fair to hear and decide such an application in the absence of the Professor (and/or potentially the University of Oxford), who should be given the opportunity of adducing evidence or making submissions as to why such an order ought not to be made. The submissions made by the Secretary of State on this subject thus far are that the Department has no control over such electronic communications by the Professor (which are undoubtedly documents), regardless that they might have been part of the Department's conduct of its affairs relevant to the award of the contracts. It is also submitted that even if an order were made against the Secretary of State, the Professor would be likely not to provide such documents. The Claimant seeks an order regardless. In all the circumstances, that part of the Claimant's application can only fairly be heard after a proper application for third-party disclosure has been issued and served on the

Professor (with notice to the University too), and it will come back before the Court in the first part of October.

8. On another element of the disclosure application, I ordered that certain repositories (as defined in the draft order) of the former Secretary of State, the Rt Hon Matt Hancock MP, should be subject to search using the agreed search terms and date range. Although I gave brief reasons at the hearing and offered detailed written reasons to follow, I was told by Mr Moser QC that there was no need, on the part of the Secretary of State, to have those latter detailed reasons and so I have not provided any. It is accepted by the Secretary of State that private email accounts and WhatsApp messages were used by Mr Hancock during the relevant period. CPR Part 31.7 sets out the factors relevant to deciding the reasonableness of a such for documents, and these are at Part 31.7(2)(a) to (d). Certain emails already disclosed clearly state that all ministerial submissions had to go through, and be approved, by Mr Hancock. It was submitted that his involvement was "limited" but that does not mean it was not important. He was centrally involved (as one would expect, given the circumstances) in decisions such as the ones under scrutiny in this case. Additionally, the data on other devices which one would normally expect to be available and disclosed (such as mobile phones being used by Ms Berry, a senior civil servant) has been deleted or erased. This makes a search of Mr Hancock's email accounts more likely to yield documents not otherwise currently available as a result of the disclosure exercise thus far undertaken by the Secretary of State. For some communications, such as those between Mr Hancock and Ms Berry, the only way of obtaining them is by having these locations or repositories he was using searched.

9. Taking all the factual aspects of the case into account, I concluded that all the relevant requirements for such a disclosure order were satisfied. Such an order was reasonable and proportionate in all the circumstances. Nothing untoward should be read into the making of such an order. The order is required to ensure that suitable repositories (including his email accounts) are searched, as these are likely to contain relevant documents which need to be disclosed to the Claimant.

10. However, in respect of another part of the day's business, namely an application by the Secretary of State to adduce expert evidence, although I gave my decision at the end of the hearing, I indicated that I would provide detailed written reasons afterwards for refusing that application. This judgment contains those reasons.

11. Ground seven of the Claimant's grounds for judicial review relates to state aid. The Claimant maintains that the 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. There are more complex elements of the way the state aid ground is put by the Claimant (it is contained in paragraphs 119 to 121, and paragraphs 121A to 121D of the Re-Amended Statement of Facts and Grounds) but that is a sufficient summary for present purposes. To meet that case, the Secretary of State sought to adduce expert evidence.

12. The evidence in question is contained in a report dated 25 August 2021 by Ms Nicole Robins, an expert economist who is a partner at Oxera Consulting LLP based in Belgium ("the August Report"). She heads their state aid practice, and was named Economist of the Year in the Global Competition Review Awards 2020. The substance of the conclusions in the report is that the sums advanced to Abingdon were on market terms. The report is within the Confidentiality Ring and certain parts of it

are accepted as being confidential, and I will not refer to its contents widely for that reason. She had prepared an earlier report dated 15 July 2021 ("the July Report"), and this was served shortly before the earlier procedural hearing before me on 23 July 2021. The Claimant objected to permission being given for the July Report for a number of reasons. These objections were repeated, and advanced with greater force, in respect of the August Report. I shall deal with them below.

13. Permission of the court is required for expert evidence under CPR Part 35.4(1), and the court has a duty to restrict it to that reasonably necessary under CPR Part 35.1. Further, an expert must comply with the requirements of Part 35 and the Practice Direction thereto, PD 35. Expert evidence is only rarely permitted in judicial review proceedings. In ***The Good Law Project Ltd v Minister for the Cabinet Office and Hanbury Strategy and Communications Ltd*** [2021] EWHC 2091 (TCC), one of the cases to which I have referred at [4] above, I briefly reviewed the relevant authorities concerning when permission would be considered for expert evidence in judicial review proceedings. At [21] to [25] of that judgment the relevant principles were set out, including the statement in the Administrative Court Guide, which explains at section 20.2 the approach of the court to the grant of permission for expert evidence under CPR Part 35. One of the areas where such evidence is required is when the court proceedings require an understanding of technical matters. This is a category (or sub-category) of case accepted by Collins J in ***R (Lynch) v General Dental Council*** [2003] EWHC 2987 (Admin) as expanding the categories identified in the judgment of Dunn LJ in an earlier case, namely ***R v Secretary of State for the Environment, ex parte Powis*** [1981] 1 WLR 584, 595. There are a number of more recent authorities repeating that expert evidence will be permitted in judicial review cases where technical matters must be understood. One of these is ***BY Development v Covent Garden Market Authority*** [2012] EWHC 2546 (TCC), in which Coulson J (as he then was) considered at [21] and [22] where expert evidence would be permitted on technical matters that arise, in that case where the challenge concerned manifest error or unfairness.

14. The relevant ground in this case relied upon by the Secretary of State as being sufficiently technically complex is that of state aid. Mr Moser submits that the expert report of Ms Robins, the expert economist, is necessary in order to understand and properly consider the factual evidence under Ground 7. I am not persuaded the contents of the report are essential or necessary properly to consider this ground, or the defences to it. However, I accept that consideration of the economics of state aid is sufficiently technical that such evidence could, in principle, clear the hurdle of being "reasonably required" under CPR Part 35.1. In other words, the fact that expert evidence is rarely permitted in judicial review proceedings, and the requirement that the Secretary of State must demonstrate that this is one of those rare cases where such evidence could be permitted, is a hurdle which is cleared in this case in the Secretary of State's favour.

15. The next obstacle raised by the Claimant to the Secretary of State being granted permission for the expert report is one of law. Mr Barrett for the Claimant submits that the report is an *ex post facto* analysis seeking to justify reliance on the Market Economy Investor Principle or MEIP. This is a principle that can arise in situations that would arguably constitute state aid. Essentially, it is that "a private investor of a comparable size operating in normal conditions of a market economy could have been prompted to make the investment in question"; Commission Guidance on the Notion of State Aid, OJEU C/262/1 (19 July 2016). In other words, given state aid is

something provided by the state, the MEIP is that the "aid" was on commercial market terms which, hypothetically, a private investor would or could have made.

16. Mr Barrett maintains that such *ex post* evidence is inadmissible as a matter of law. He relies upon two European authorities, namely ***Commission v EDF*** ECLI:EU:C:2012:318 and ***Land Burgenland v Commission*** ECLI:EU:C:2013:682. The former case includes a summary of the relevant case-law that states:

"Whether a State intervention is in line with market conditions must be examined on an ex ante basis, having regard to the information available at the time the intervention was decided upon. In fact, any prudent market economy operator would normally carry out its own ex ante assessment of the strategy and financial prospects of a project, for instance, by means of a business plan. It is not enough to rely on ex post economic evaluations entailing a retrospective finding that the investment made by the Member State concerned was actually profitable."

17. In other words, simply because an investment (or aid provided by the State) might turn out to be profitable, does not mean that the intervention in question by the State was not state aid. The MEIP requires consideration of the information available at the time. This is what "ex ante" means in this context in the passage above. Ex post means an evaluation not available at the time and prepared later or afterwards. Mr Barrett says the August Report is an *ex post* evaluation and hence inadmissible.

18. Mr Moser, for his part, relies upon other dicta both in the ***EDF*** case and also that of ***Land Burgenland***, to demonstrate that such evidence can potentially be admissible. I am not prepared at this procedural stage to dismiss this application by the Secretary of State on this legal ground advanced by Mr Barrett. It is not determinative of the application. I do not need to decide this point of law at this stage of the proceedings, and in my judgment it would be undesirable to do so. This is for the following reasons.

19. The applications set down for hearing on 21 September 2021 were varied and lengthy. The time available for legal argument on this point of law was limited by the time the hearing reached that stage – no more than about 30 or 40 minutes in total. More detailed submissions from both parties would be required in order to rule on such a definitive point of law in any event. It is a potentially complex point of law.

20. Mr Moser did sufficient, in the time he had available, to demonstrate to me that his submissions on this were reasonably arguable. If that were not the case, I would not hesitate to make a definitive ruling on the point. Reasonably arguable points of law are usually dealt with at the stage of the substantive hearing. That is not to say that Mr Barrett and the Claimant would be shut out from arguing such a point of law at the substantive hearing. However, it would be disproportionate and undesirable to conduct a full mini-trial now, on that single point of law, in order to decide the application. Far more lengthy legal submissions would be required from both parties in order properly to consider and decide such an important point.

21. The Notice by the Commission summarising the case law upon which Mr Barrett relies dates from 2016. It takes no account of the pandemic, or conditions prevailing during the pandemic. This was a worldwide emergency. For example, the case of ***EDF*** dates from 2012. Normal market conditions and expected preparation of business plans by market investors in the ordinary course of things are matters that could, reasonably arguably, be said not to apply, or fall to be considered differently, in the very different context of the Covid-19 emergency. These were not "normal market

conditions". It is by no means a clearly settled point, in my judgment, that evidence of the type which the Secretary of State seeks to adduce here is not admissible as a matter of law.

22. It is, in any event, unnecessary to decide that point of law in order fairly to resolve the application. This is because the August Report, as with the July Report that preceded it, fails to comply with the Civil Procedure Rules and fails to comply with the principles that underpin the deployment of expert evidence in court proceedings, both judicial review as well as other areas of law. These principles are well known and are grounded in fairness and equality of arms. Indeed, one of these principles was specifically brought to the attention of the Secretary of State by the court itself at the July hearing, and part of the purpose of the interval between that hearing and this one was to give Ms Robins, and those who instruct her, sufficient time to cure these central defects in her later report. That opportunity was ignored. If anything, as I will now explain, because the August Report can be compared with the July Report, these breaches are more pronounced in the August Report than they were before.

23. These breaches are as follows. In order properly to consider them, first I will set out the framework within which expert evidence will be admitted by the court.

24. Experts owe an over-riding duty to the court, above any duty that they owe to the parties instructing them. The basic and underlying theme to the use of experts is one of independence and fairness. This much must be uncontroversial. Certainly from the time of the seminal case of ***The Ikarian Reefer*** [1993] 2 Lloyds Rep 68 onwards, there can be absolutely no doubt that experts owe such a duty, but it existed long before that. For example, an expert's "special duty" was referred to almost one hundred years ago by Tomlin J in ***Graigola Merthyr Co Ltd v. Swansea Corporation*** [1928] 1 Ch 31.

25. An important component of that duty is that experts for both parties must have access to the same material. Expert evidence cannot fairly be considered by the court if one expert has an unfair advantage, or access to material to which an opposite number has no comparable access. Equally, 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.

26. This was specifically stated at [237](1) in ***ICI Ltd v Merit Merrell Technology Ltd*** [2018] EWHC 1577 (TCC) where I said:

> "The principles that govern expert evidence must be carefully adhered to, both by the experts themselves, and the legal advisers who instruct them. If experts are unaware of these principles, they must have them explained to them by their instructing solicitors. This applies regardless of the amounts at stake in any particular case, and is a foundation stone of expert evidence. There is a lengthy practice direction to CPR Part 35, Practice Direction 35. Every expert should read it. In order to emphasise this point to experts in future cases, the following points ought to be borne in mind. These do not dilute, or change, the approach in ***The Ikarian Reefer.*** They are examples of the application of those principles in practice.
>
> 1. Experts of like discipline should have access to the same material. No party should provide its own independent expert with material which is not made available to his or her opposite number."

27. This is expressly set out in the rules themselves. CPR Part 35 states at Part 35.1 "Experts and those instructing them are expected to have regard to the guidance

contained in the Guidance for the Instruction of Experts in Civil Claims 2014 at www.judiciary.gov.uk." That guidance expressly states at paragraph 30 that "experts should try to ensure that they have access to all relevant information held by the parties, and that the same information has been disclosed to each expert in the same discipline."

28. Paragraph 3.2(3) of the Practice Direction to Part 35 states in part:

> **"3.2** An expert's report must:
>
> (1) give details of the expert's qualifications;
>
> (2) give details of any literature or other material which has been relied on in making the report;
>
> (3) contain a statement setting out the substance of all facts and instructions which are material to the opinions expressed in the report or upon which those opinions are based."

29. This is expressed in mandatory terms – "must". The important nature of this requirement was, again, re-stated recently in ***Dana UK Axle Ltd v Freudenberg FST GmbH*** [2021] EWHC 1413 (TCC) by Joanna Smith J, in a case where one party's experts had participated in numerous discussions with that party itself without solicitors being involved. She referred at [72] to the "free flow exchange of information between the Experts and FST's employees and in-house technical specialists, through extensive email exchanges, numerous telephone and video conferences and at site visits, apparently with no, or very little, oversight from Fladgate [the instructing solicitors]" as an example of the "serious flaws in the conduct of FST's experts" which did not meet "the appropriate standards". That judgment was handed down in May 2021, and because the outcome in that case was the refusal to permit any of FST's experts to give evidence, has had wide publicity.

30. In any event, the principle of identification of material relied upon by one expert, and its availability to the other party, is not only well known and central, it was expressly brought to the attention of the Secretary of State and his advisers by the court itself at the hearing on 23 July 2021. This requirement had been wholly ignored in the July Report. Ms Robins referred extensively in that version of the report simply to "discussions" she had had with Abingdon (and also unnamed personnel in the Secretary of State's department, "DHSC"). Examples include those in paragraphs 1.18, 2.6, 3.5, 3.10, 4.6, 4.10, 4.14, 4.18, A1.2 and A1.3 of the July Report. Phrases in that report such as "I understand from discussions with DHSC", "based on my discussions with the DHSC" and "I understand that" abound. One particular example is a conclusion "based on data from the DHSC". No details at all were provided of this material, the personnel from whom it came, or even a summary of what it was. These are obvious deficiencies.

31. These details could, however, have been provided in the August Report. They plainly ought to have been. Not only was this not done (even in summary form) but the requirement to identify such material was entirely circumvented and avoided. The August Report included exactly the same conclusions as those reached in the July Report from the discussions referred to, but this time that latter report deleted any reference to those discussions having taken place at all. It stated that the source of the

information leading to the same conclusions was something else entirely. In other words, reading the August Report alone, one would never know that those earlier discussions had taken place, how many there were, when they had taken place and with whom, let alone what they constituted or what material was provided to the expert. In one particularly egregious instance, reference to the discussions leading to a particular conclusion was changed, so that the same conclusion was stated as being derived from an inference. This was in paragraph 4.10:

July Report: "Based on discussions with DHSC and Abingdon, I understand that Abingdon did not expect to achieve a profit under the funding agreement."

August Report: "I infer that Abingdon did not expect to achieve a profit under the funding agreement, based on the fact that the £10.27m funding corresponds exactly to the costs of purchasing these raw materials mostly from third party suppliers."

32. The conclusion or understanding was plainly, in the July Report, based on information given to the expert from both civil servants and Abingdon personnel. There is no reason not to have identified those discussions properly, and every reason to have done so. Further, these are not minor or isolated instances; this approach occurs throughout the August Report. Nowhere are the previous discussions (clearly stated in the July Report as having occurred) properly identified, nor is the material that was given to the expert provided. This approach is contrary to the rules and simply not acceptable. This would in any event be a serious breach, but one must also bear in mind that there is a duty of candour in judicial review proceedings generally. Ms Robins is based in Brussels and her CV makes clear that she gives evidence in a number of different legal jurisdictions. Whatever the approach in those jurisdictions to expert evidence, the rules that experts must follow which are imposed by the courts in this jurisdiction are clear and must be observed.

33. Whether this is caused by the fact that Ms Robins and Oxera were not even instructed by the Government Legal Department ("GLD"), who are acting for the Secretary of State in these proceedings, is not clear. However, the fact remains that she was instructed by Clifford Chance LLP, a well-known City firm, but they are not the solicitors instructed to act in this litigation. The reason for this is not provided in the supporting witness statement of Mr Brierley, who simply refers to that arrangement and the fact that the GLD provided the relevant contracts and documents to Clifford Chance, who then provided these on to the expert. Mr Moser sought to provide some explanation in oral submissions, namely that there was some sort of procurement arrangement whereby Clifford Chance were entitled to instruct government experts. I do not understand that explanation, but in any event 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. I can think of no good reason why the GLD would wish to adduce evidence from an expert for the Secretary of State in these proceedings, yet not to instruct that expert itself, nor to provide the relevant material to (and provide the necessary supervision of) the expert itself, but to do so through another firm of solicitors.

34. Mr Brierley in his written evidence supporting the application also states that interviews were arranged by Clifford Chance for civil servants to have with Ms Robins' practice Oxera. Whilst itself also surprising (although probably a result of Clifford Chance instructing Oxera) it also means the GLD itself was not involved. This makes the inclusion of the details of the information provided in these interviews relied upon by the expert in the August Report even more important. It also means

that another firm of solicitors were involved in those separate discussions, and the content of them ought to have been recorded and ought to be available. This makes the failure in the August Report, to which I have already referred, of even greater concern.

35. However, even that is not the entirety of the discussions between Oxera and the sources of the information used by Ms Robins. This is because Mr Brierley goes on to explain that "Oxera made independent arrangements with Abingdon Health Limited to obtain further documents and information". Such "independent arrangements" with Abingdon, the Interested Party, are nowhere identified in either report. The August Report does identify documents relied upon, as one would expect (and as is required under the rules) in Appendix A5. But the other "information" is not identified anywhere, and absent Mr Brierley's witness statement of 15 July 2021 one would not even know such information had ever been provided to Ms Robins, because it is not identified in either of her reports in any event.

36. Mr Moser submitted at the hearing that I ought not to refuse permission. He maintained that if I took the view that such information and discussions ought to be identified, then another opportunity ought to be provided for the Secretary of State (or rather, his expert) to try again to remedy these deficiencies or breaches – or, as Mr Barrett put it, to have a "third bite at the cherry". I am not prepared to allow this third attempt at compliance with the rules for the following reasons.

37. Firstly, this point was clearly brought to the attention of the Secretary of State at the hearing on 23 July 2021 as I have explained. This is not an objection which has suddenly emerged. The Claimant objected to the July Report on very similar grounds, and the court expressly identified the need for discussions and information to be identified. Secondly, no reason at all has been provided for the failure of the August Report to remedy these deficiencies, or why the approach used has been adopted. I will not speculate, but there must be a reason. Thirdly, the substantive hearing of this matter is fast approaching. If the "third report" approach were to be adopted, it would mean the application would have been considered on no fewer than three separate occasions. That is disproportionate. Further, were permission to be given for the third iteration of the report, the Claimant would be entitled to have time to consider it, and to instruct and adduce their own expert evidence. In my judgment there is simply insufficient time available for these different steps.

38. Fourthly, the court has little sympathy with any litigant who simply ignores the rules in this way. Endless opportunities for compliance are not in accordance with the overriding objective. These requirements are not optional extras, only to be complied with by a litigant and their expert if the court states in a specific case that they are to apply. They apply in all cases. They are already contained in CPR Part 35, the accompanying Practice Direction and the Guidance for the Instruction of Experts in Civil Claims 2014. They have also been emphasised in a number of previous decisions. The court has already given the Secretary of State one opportunity to put things right. Fifthly, the Secretary of State is represented by professional legal advisers and the GLD, and there is no good reason to grant such a litigant a third opportunity to comply with the rules.

39. I can do no better than repeat the following dicta, in terms of the importance of litigants obeying the rules. In ***R (on the application of AB) v Chief Constable of Hampshire*** [2019] EWHC 3461 (Admin), the Divisional Court (President QBD with Lewis J, as he then was) emphasised how important it was for parties to comply with

the Civil Procedure Rules, and that this applied equally to public law cases. At [108], "Preliminary Observations" the following was stated in that judgment:

"The conduct of litigation in accordance with the rules is integral to the overriding objective set out in the first part of the CPR and to the wider public interest in the fair and efficient disposal of claims. Public law cases do not fall into an exceptional category in any of these respects. If the rules are not adhered to there are real consequences for the administration of justice." (emphasis added)

40. Specifically in respect of expert evidence in the same case, the following was stated at [118]:

"Secondly, a claimant requires the permission of the court to rely on expert evidence: see CPR 35. As Mr Basu pointed out in argument, these rules have been in place for some considerable time. We would observe, once again, that there is no special dispensation from compliance for public law cases, and the rules must be observed." (emphasis added)

41. There is no excuse for litigants to fail to comply with the rules generally, nor for failures by experts to comply with the requirements of CPR Part 35 specifically. Additionally, 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. In this case, the failures in respect of expert evidence are neither isolated nor unimportant, nor is the court seeking to impose a counsel of perfection upon the Secretary of State's expert. In my judgment, the only suitable and just order on the application to rely upon the August Report is to refuse permission for that evidence for the reasons that I have given.

42. The Secretary of State has already pleaded that consideration was given to the specific issue of state aid at the time the contracts were awarded; this is included in paragraph 120 of the Detailed Grounds of Resistance. Given neither of Ms Robins' reports were in existence then, this contemporaneous consideration cannot have included her expert evidence (a point accepted in paragraph 29 of the Detailed Grounds of Resistance). The decision on this application is not therefore in any way fatal to the Secretary of State's overall defence on the state aid ground, Ground 7. However, regardless of what material of an *ex ante* nature is available to underpin the Secretary of State's consideration of this issue at the time, and what consequences the decision on this application will have upon the way that the different limbs of the defence to the claim of unlawful state aid can be argued, these consequences are a result of the widespread failure to observe the requirements of CPR Part 35. In this instance any blame can only be laid at the door of the applicant.