

Mr Alex Rook
Rook Irwin Sweeney
107-111
Fleet Street,
London,
EC4A 2AB

Our reference JCL/1140935/O49925867.1/JCL

Your reference AIR/AIR/066

3 July 2020

Dear Mr Rook,

The Queen on the application of (1) Good Law Project and (2) Everydoctor Limited (Claimants) v. Secretary of State for Health and Social Care (Defendant) and Crisp Websites Limited (trading as PestFix) (Interested Party) - Claim CO/2144/2020 (transferred to the Technology & Construction Court and renumbered HT-2020-000226)

As you know, we are instructed on behalf of Crisp Websites Limited t/a PestFix.

We write in response to your letter dated 10 June 2020 enclosing your letter before claim to the Secretary of State for Health and Social Care ("**DHSC**") of the same date on behalf of the Good Law Project ("**the PAP Letter**"). We also refer to your letter dated 15 June 2020 on behalf of a further client, Everydoctor Limited ("**the Everydoctor Letter**").

On 15 June 2020 your clients issued a claim for judicial review in the Administrative Court without waiting for substantive responses from either DHSC or our client to the PAP Letter or the Everydoctor Letter. In doing so, your clients sought an interim order requiring DHSC to respond to the PAP Letter by 24 June 2020.

Following the transfer of the claim to the Technology and Construction Court, an order was made by Mrs Justice O'Farrell on 24 June 2020 setting out a timetable for pre-action correspondence. DHSC was required to respond to the PAP Letter by 1 July 2020 and has done so ("**the DHSC Response**"), and our client's deadline for its response is today.

In responding to you, our client adopts the points already made on behalf of DHSC in the Government Legal Department's letter of 1 July 2020 and adds the further observations set out below.

Our client considers that the claim has been brought on the basis of multiple factual misapprehensions on the part of your clients and is in any event wholly without merit.

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Our client's position is that of an established and respected company that has stepped up to assist DHSC and the National Health Service at a time of unprecedented global crisis. Our client has sought to use its contacts in Asia to secure supplies of urgently-required personal protective equipment ("PPE") for health and social care workers in circumstances where there has been, and remains, a very high level of demand for PPE, meaning that contacts with manufacturers in Asia, and an ability to act quickly and nimbly to agree deals with them, is essential for securing supplies. It is regrettable that our client now finds itself 'caught in the crossfire' of a claim that appears to have been brought partly for political reasons and funded by 'crowdfunding' generated through publicity based on misapprehensions of the factual position.

The claim also represents a very unwelcome distraction for our client, which remains focussed on intensive day-to-day activities speaking with multiple factories in Asia to secure vital PPE supplies. We invite your clients to reflect on the appropriateness of their continuing the claim, especially given the factual clarifications provided in DHSC's response to the PAP letter. We respectfully invite your clients to withdraw the claim.

1. Background

- 1.1 Our client has supplied a broad range of products to more than fifteen NHS Trusts over the last eleven years. (As noted at paragraph 21 of the DHSC Response, some NHS Trusts choose to source PPE themselves rather than work through SSCL.) On every occasion, the products supplied by our client have met the rigorous safety standards required of them: our client is thus an established and reliable source of supplies to the NHS. In the introductory paragraphs to the PAP Letter, you have suggested that our client has never supplied products to be used by the NHS. This is simply untrue – it is an assertion by your clients based on wrong assumptions.
- 1.2 In mid to late March 2020 press reports began to emerge suggesting that the existing NHS Supply Chain was either struggling, or would be likely to struggle, to fulfil the supply of vital PPE to front line workers due to unprecedented global demand.
- 1.3 During the same period, our client was contacted by multiple public bodies, including NHS trusts, with requests for the supply of PPE.
- 1.4 During March 2020, being mindful of the potential crisis in PPE supply facing the NHS and wanting to use its experience and contacts to help, our client's directors began intensive efforts for building a supply-chain which would be able to procure large quantities of medical-grade PPE from China. In building that supply chain, our client drew upon its Company Director's established business network in the Far East. Our client also drew upon the Company Director's personal contacts, including his wife (a veterinary surgeon) and her extended family who are based in China. In circumstances where the difficulties with air travel made it difficult for make visits to China, these family members were able to visit and negotiate directly with factories producing compliant products, in order to secure production space that might fulfil the requirements for PPE supplies including for use in health and social care settings.
- 1.5 The rapid establishment of our client's PPE-focussed supply chain in China was built upon – and was possible only by reason of – the company's experience in sourcing high quality products from factories in China for supply in the UK since 2011.
- 1.6 As described in paragraphs 22 – 26 of the DHSC Response, in light of the growing demand and high risk to the safety of frontline health workers, the Defendant established an application portal for businesses to submit offers to supply PPE at short notice. It was through that portal that our client submitted an indication of availability to supply a range of PPE on 30 March 2020. Our client had already, on or around 27 March 2020, made various efforts to contact DHSC officials to communicate that it could provide assistance with a range of PPE products.
- 1.7 Our client, after having received the technical specifications in relation to the relevant products, then carried out internal technical and quality assurance checks to ensure that the PPE products it was able to source were compliant with the relevant requirements. Our client then submitted

its formal offer overnight on 4 April 2020. During the following week, the DHSC carried out its own in-depth quality review, including verification of the certificates described at paragraph 38 of the DHSC Response, along with (*inter alia*) certificates of conformity, supporting test results where applicable, pictures, addresses and locations of manufacturing plant.

- 1.8 As described in paragraph 37 of the DHSC Response, the initial purchase order for supply included isolation suits, gloves and face masks, with a total value of £108,601,069, for which contract documentation was received on 13 April 2020. However, the scope of the contract was subsequently revised to comprise only Isolation suits, bringing the total value down to £32,436,000. The contract was for the supply of two million isolation suits, including freight logistics.
- 1.9 Manufacturing of the products to be supplied under the contract is now complete. The first consignment arrived at Heathrow on 5 May 2020, and flights have continued on a routine basis since. As a result, around 90% of the products to be supplied under the contract have already arrived in the UK. On arrival at Heathrow, the products are transferred to the DHSC's central logistics facility in Daventry within 2 – 7 days. DHSC carry out routine safety checks on products stored at Daventry in advance of their deployment into hospitals. As noted at paragraph 41 of the DHSC Response, the products will be subject to further safety tests prior to use.
- 1.10 The final consignment of the products is expected to be delivered by air to Heathrow by 14 July 2020. Once that final consignment has been processed and transferred to DHSC's central logistics facility at Daventry, our client will have completed its performance of the contract to which your claim relates. (This is a point to which we return further below in relation to the reasons why it would be appropriate for your clients to withdraw their claim.)
- 1.11 There have been no recalls, complaints or incidents bringing into question the fitness for purpose of the products supplied under the contract. Our client has admirably and courageously stepped into the potential supply gap faced by the Defendant during this unprecedented crisis and played its part in helping ensure that front line workers have access to essential protective equipment. There is no evidence, and it is untrue and entirely unfair to suggest, that the products supplied by our client have put anyone at risk. The assertion in the Everydoctor Letter that Everydoctor's members have been put at risk is utterly without foundation. The reality is that, insofar as Everydoctor's members have received any PPE supplies that were sourced through our client's efforts, those efforts have helped keep those members safe whilst they have been performing their vital work.

2. The grounds of claim are without merit and the Claimants should withdraw the claim

- 2.1 As noted above, our client adopts the points made in the Government Legal Department's letter of 1 July 2020 on behalf of DHSC. The contract between our client and DHSC to which the claim relates was indeed urgent and was lawfully placed with our client by way of a direct award. Your suggestions that, at the time when the contract was placed, the supplies were not required "urgently" as a result of unforeseen circumstances is plainly wrong. Our client was sufficiently nimble and well-connected to be able to get supplies of vital PPE into the UK at a time when established PPE suppliers more familiar to your clients were not as able to respond.
- 2.2 Nor was there impropriety of any kind in relation to the process by which the contract came to be placed with our client. Our client responded to DHSC's emergency scheme for the urgent supply of PPE at short notice along with another 24,000 potential suppliers. It is manifestly wrong to suggest that our client received any special access to that scheme. On the contrary, its offers of help were evaluated alongside the offers of thousands of other applicants.
- 2.3 Also unsustainable are your clients' assertions that there are public interest concerns regarding the safety and suitability of PPE supplied by our clients. Those assertions are based on wholly unsubstantiated allegations with regard to the safety, quality or fitness for purpose of the products supplied by our client to the Defendant. Our client's products have been assessed by all appropriate authorities as meeting the required standards, and have been (and continue to

- be) of obvious benefit to the NHS staff who are currently being kept safe by those products in their daily work.
- 2.4 Your clients have themselves acknowledged the risk that their claim may '*divert resources to litigation*', but ("*however*") request that the contract nonetheless be set aside on the basis of their '*safety concerns*'. Nowhere in any of the materials provided by your clients for the purposes of their claim, however, is any detail provided as to what specifically those safety concerns are. Nor have your clients provided any evidence supporting such concerns. Instead, the claim is brought on the basis of an unsubstantiated inference based on the fact that our client's business activities prior to the Covid crisis did not consist in supplying PPE specifically for use in healthcare settings, but instead consisted in supplying PPE and other products for use in another safety-critical sector (namely use of airborne chemical products). It appears, not least from statements made by representatives of your clients on social media, that they have rushed to conclude that a supplier of PPE in the context of pest control could necessarily not be fit to source and supply PPE suitable for healthcare use.¹ But such views are based on nothing more than prejudice and disclose no objective or evidence-based ground for concern as to the safety or suitability of any PPE supplied by our client.
- 2.5 Our client is highly experienced in sourcing PPE and is well placed to ensure that the PPE it purchases and supplies is specified correctly for the required use. Further, your clients' implicit assumption that PPE used in pest control activities is of low quality or grading is simply wrong. The products supplied by our clients for the protection of users of airborne chemicals are of extremely high quality, and subject to numerous rigorous safety standards and routine checks.
- 2.6 Your clients appear to have little regard for the disruption that the claim is causing to our client and to its efforts to source PPE for the NHS. Our client is an enterprise with only a very small number of employees, which has been willing to assist the UK-wide effort to respond to the Covid emergency by using its contacts in the Far East to help DHSC source urgently-needed PPE in fast-moving international markets. Our client's core personnel remain heavily engaged in that activity on a day-to-day basis, spending much time speaking to factories in Asia, as well as logistics providers, in circumstances where fast action is required in order to secure available supplies of PPE. Time spent addressing this claim has distracted from that vital activity and will continue to do so if this claim proceeds further.
- 2.7 Your clients appear also to have no concern with respect to the damage being caused to our client's reputation as a result of the ongoing social media campaign being waged on the basis of inaccuracies, for generating 'crowdfunded' donations to fund the litigation. The true object of the campaign and the litigation appears to be political, namely to level criticisms at the current government.² The harm to our client's reputation is simply 'collateral damage'. This is very unfair to our client, especially in light of its having stepped up to help the NHS at a critical time. It is self-evident that your clients have suffered no harm as a result of the decision under challenge – rather, the members of Everydoctor are likely to have substantially benefitted from the decision through access to PPE that, but for our client, might not have been available as quickly or at all.
- 2.8 For all these reasons, the claim that your clients have issued is factually and legally baseless. The claim should therefore be promptly withdrawn; but if it is not, then we will invite the Court to knock out the claim at the permission stage.
- 2.9 A further reason why the claim should be withdrawn, or permission should be refused, is that it will be moot by the time of any substantive hearing. As noted above, delivery of the supplies purchased under the contract is expected to be completed by the middle of this month. Given

¹ The Claimants' social media campaigners have revealed their bias towards companies based on such companies other lines of business in a range of comments, such as their criticism of another company awarded a contract which operates in the food sector: <https://twitter.com/JolyonMaugham/status/1275777144875073536>.

² Tweet by Jolyon Maugham of Good Law Project dated 24 June 2020 soliciting support for crowd funding the litigation, stating that "*Dominic Cummings' post Brexit procurement regime seems to involve shovelling vast sums of public cash out of the door to the weirdest companies*": <https://twitter.com/JolyonMaugham/status/1275778121929809920>.

that your clients are seeking relief in the form of an order setting aside the contract *with prospective effect only*, it is apparent that the relief being sought would be of no practical utility. The PPE ordered under the contract will not only have already been delivered by our client, but will largely have already been used by doctors and nurses in their lifesaving endeavours.

- 2.10 Further, even if your clients were to succeed in establishing any unlawfulness on the part of DHSC, and even if the contract had not already run its course, the remedies being sought by your clients would be inappropriate. Our client has acted in good faith in assisting DHSC in securing supplies of PPE for the NHS. In these circumstances, it would be grossly unfair to our client – as well as impracticable – for the contract to be set aside. Given that remedies in judicial review are discretionary, it seems very unlikely that the Court would think it right to grant any remedies, especially as neither of your client is an economic operator that has been seeking to supply PPE to DHSC.

3. **Next steps**

- 3.1 We invite your clients to withdraw their claim. Should our client be required to acknowledge service of and respond to the claim, it will seek to recover from your clients all costs incurred in doing so and reserves the right to apply for security for those costs.

Yours faithfully

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cc. Ashlie Whelan-Jones, Government Legal Department, Commercial Law Group