

# White Paper Conference 2023

## Expert Evidence and Confidentiality

**Fionnuala McCredie K.C.**  
**Keating Chambers**

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What are the implications of the Siemens v HS2 litigation on expert evidence, and how do you uncover effective confidentiality workarounds for clients?

- Siemens v HS2 28.9.22
- The law
- The impact
- Confidentiality
- Effective workarounds?
- Transparency, confidentiality and the new dawn...

# £300 Billion a year



£300 billion a year is spent on public procurement  
£1 in every £3 of public money spent annually



# Siemens v HS2 28.9.22 (1)



- Challenge to the award of the contract for the rolling stock for HS2
  
- Permission for expert evidence sought on:
  - Factors affecting “dwell time” (technical, operational and behavioural)
  - Whether the design met relevant mandatory train technical specifications (“TTS”) particularly in relation to dwell time
  - Adequacy of modelling work on winning bid
  - Effect of design modifications to JV’s train design on price and compliance with TTSs

# Siemens v HS2 28.9.22 (2)



- Siemens' submissions included that:
  - the design and construction of a novel very high speed train was technically and factually complex
  - Expert evidence was necessary to provide a technical explanation as to the interaction between the tendered design and the TTS
  
- Siemens' application for expert evidence was rejected.

# BY v Covent Garden 2012 (1)



The Judge relied upon the judgment of Coulson J (as he then was) in BY, where he found:

- Where the issues are concerned with manifest error or unfairness, expert evidence will not generally be admissible in JR or procurement cases
- It is going too far to say expert evidence can never be admissible in procurement cases. It may be required by way of technical explanatory evidence, or where it is relevant and necessary to reach a conclusion on manifest error.

# BY v Covent Garden 2012 (2)



- The Judge went on to say that the questions for the Court were:
  - Is this a claim where the technical background is so complex that explanatory expert evidence required?
  - Is this an unusual case where expert evidence on some or all aspects of the tender evaluation process is required in order to allow the Court to reach a proper view on the issues of manifest error or unfairness?



In preferring the narrower range of issues for the expert proposed by the D, HHJ Davies relied upon **Law Society v the Lord Chancellor** (Leggatt LJ and Carr J (ASTW)) [40]

*“the relevant question was whether or not expert evidence was necessary to make obvious to the unskilled person, including for such purposes the Judge, that the reasoning which led to the decision was vitiated by a technical error which, once explained, could be shown to be incontrovertible”*

[2019] EWHC 2358 (TCC), [2019] EWHC 3635 (TCC)

[2018] EWHC 2094

# Stagecoach v SoS for Transport



## 2019 Rail Franchising Litigation

Four bidders challenged the risk sharing arrangement in relation to pensions for sections of the Railway Pension Scheme stipulated by the SoS in three rail franchise competitions.

The Judge ordered expert pension evidence of his own motion (which was both a rare moment of unity amongst the parties and a considerable relief). No reasons were given but it was generally accepted that the technical background was so complex that explanatory expert evidence was required.

[202] EWHC 1568 (TCC)

This was a challenge to a procurement for face masks.

The Claimant sought expert evidence on four issues, three of which related to the construction of the relevant directive.

In reliance upon Coulson J in BY, Fraser J (AHTW) gave permission for expert evidence only one - on the issue of what the contents of a testing report evidencing compliance with the BS should include, because that was not a matter of construction (the directive being silent upon that).

[2021] EWHC 1817 (TCC)

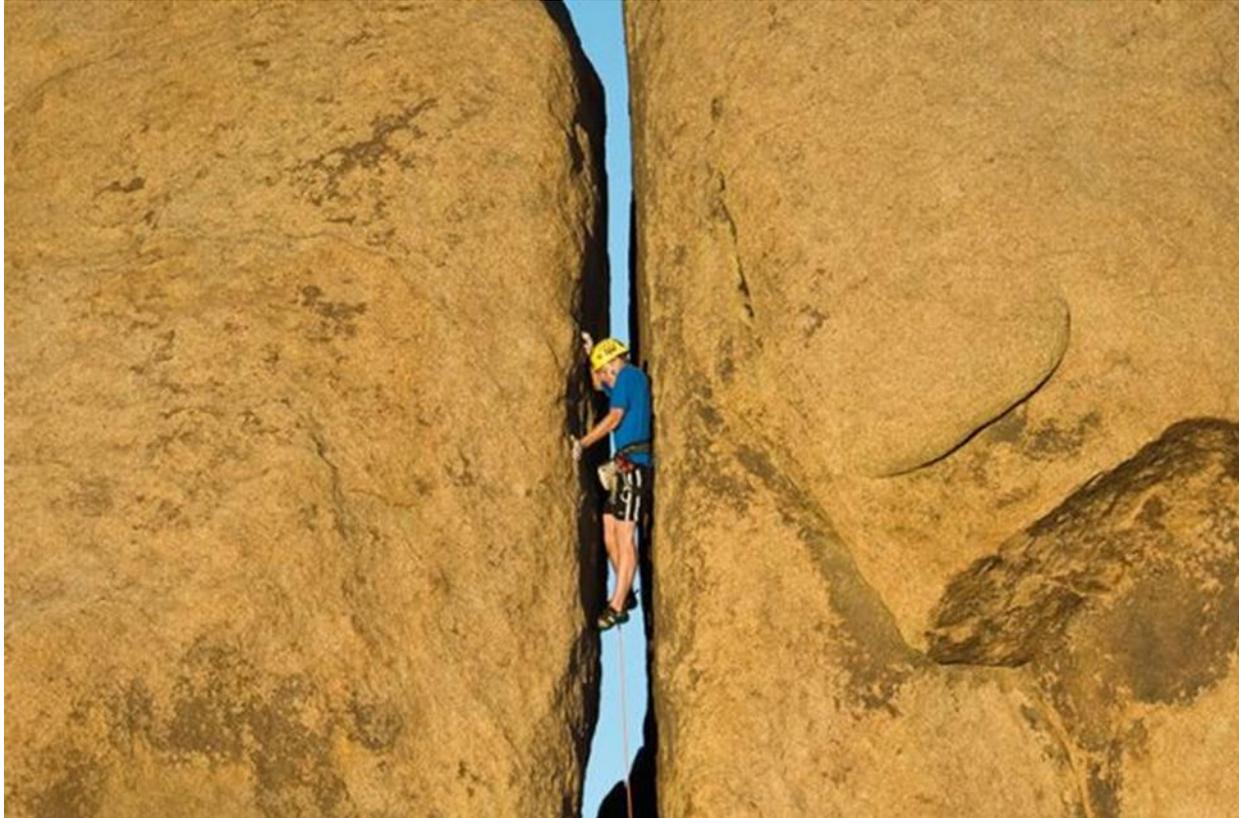
# Atos IT Services v The Met Office



- Challenge of the procurement of a new supercomputer
- The parties were agreed that expert evidence of high performance computing was required, but disagreed as to the extent of, and issues. Held:
  - Expert evidence was admissible as to the explanation of technical terms, the context of the procurement and the capacities and structures of the relevant computer systems but not as to the equivalence or otherwise between them
  - The argument that expert evidence is needed to ensure the parties were on an equal footing can only have very limited weight in procurement cases – that apparent imbalance is a consequence of the exercise in which the Court is engaged – namely was it a manifest error, not whether the decision was objectively right or wrong

➤ [2022] EWHC 42 (TCC)

# What does this mean?



# A rock and a hard place...



- Inequality of arms is not of itself a factor in favour of the admission of expert evidence (Atos)
- It may be admissible:
  - because of a complex technical background
  - to make obvious that a decision was vitiated by a technical error, which, once explained, can be shown to be incontrovertible (Law Society) or
  - where expert evidence on some or all aspects of the tender evaluation process is required in order to allow the Court to reach a proper view on the issues of manifest error or unfairness (BY)

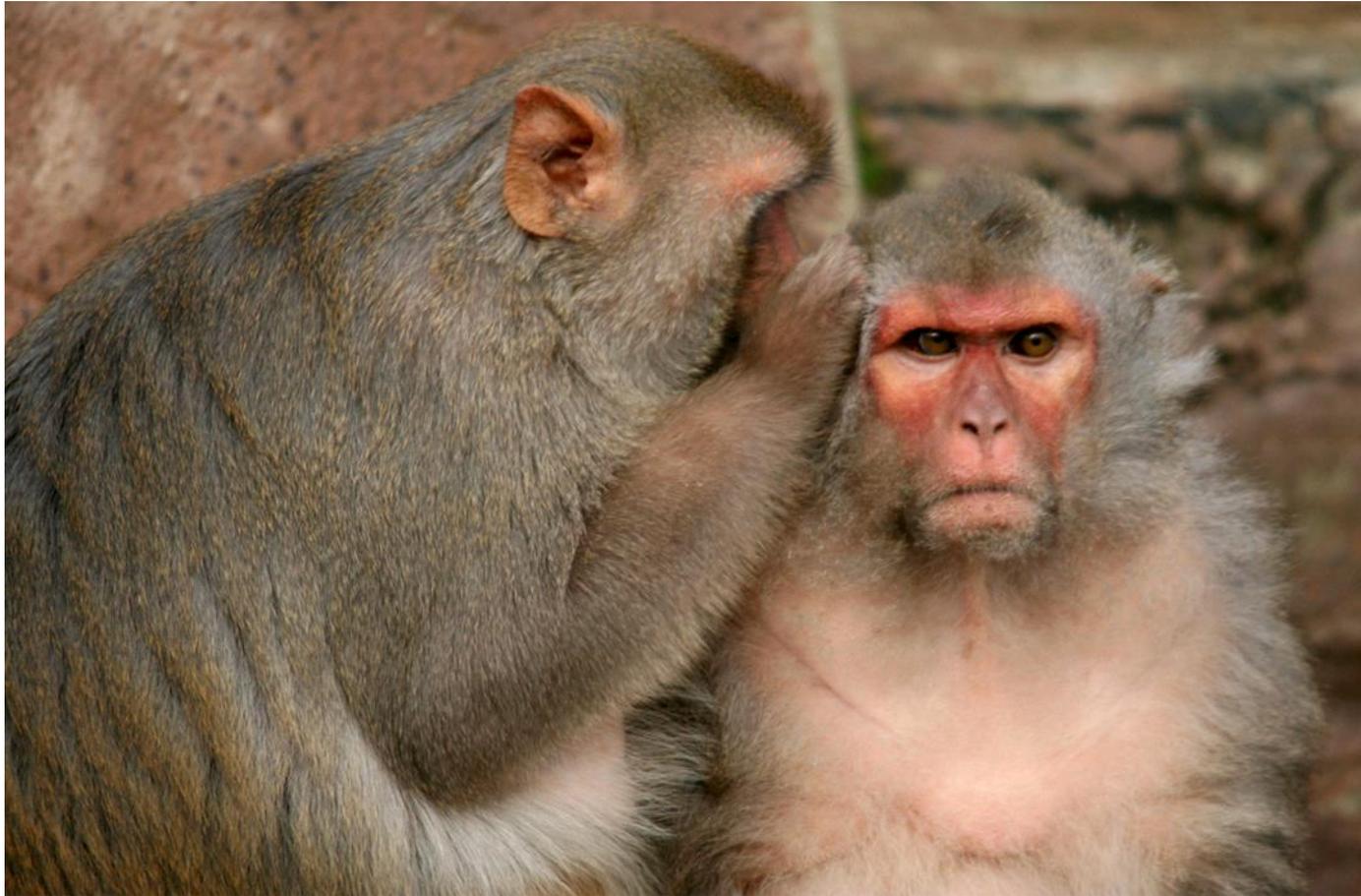
# And to make it worse...



## Confidentiality

- Whilst confidentiality is no barrier to disclosure it is still a significant brake on disclosure, engaging the interests of others (“Interested Parties”) – e.g., the successful bidder, other bidders in a live competition, regulators whose interests and confidential information must be protected
- Confidentiality rings are the solution that the Courts have adopted to balance those interests: But...

# Confidentiality Rings





- This continues to cause delay and serious difficulties for challengers (and CAs) in complex procurements.
- **Coulson J Geodesign v EA** [2015] EWHC 1211 (TCC) para 53

*“It would be wrong to hobble the claimant’s preparation of its case by refusing to allow documents to be disclosed into the confidentiality ring to anyone other than lawyers... all too often, detailed issues arise out of the subject matter of the bids which the lawyers are simply unable to address”*



**SRCL v NHS** [2018] EWHC 1985 (TCC) Fraser J supplemented the general guidance with the relevant factors for procurement cases:

- IPs have the right to make representations before their material is disclosed
- The Court/parties have a range of options to preserve confidentiality and remain consistent with justice
- It is not a solution for a solicitor of the challenger to be required to give primary evidence of fact and if that were a risk, it is a powerful factor in favour of expanding the CR

# Workarounds - Client access to the ring (3)



- Usually anyone who knows about the procurement cannot give the required undertakings without blighting their career
- Retired employees may be prepared to, but they retired for a reason which makes them less accessible - a major disadvantage in the (inhuman) timescales of procurement law
- That is exacerbated by drip fed disclosure and a 30 day limitation period
- Retired employees not members of the bid team

# Workarounds – Experts in the ring



# Workarounds – Expert(s) in the ring



- The required undertakings are usually a significant deterrent, especially for high profile, long running large projects – HS2 paradigm example
- Having an expert in the ring to assist with pleadings and cross examination is of course helpful but not comparable with an expert explaining to the Court why the reasoning that led to the decision was vitiated by a technical error

# Transparency, confidentiality and the new dawn...



- Transparency agenda runs through each part of the Bill <sup>1</sup>
- Aim to deliver world-leading standards of transparency in public procurement<sup>1</sup>
- The challenge for the future is to square that ambition with the twin fetters of the
  - current restrictive approach to expert evidence; and
  - significant disadvantage faced by challengers when much of the contentious material is placed in a confidentiality ring to which the client decision makers do not have access

<sup>1</sup>The Procurement Bill – a summary guide to the provisions 16 June 2022

# New Regulations, new rules of court, new court procurement guide?



- The new Regulations are due to be laid before Parliament in the new year
- It is to be hoped that new rules of Court/ a new/amended court guide can
  - simplify the drafting of confidentiality rings
  - promote early inclusion of clients/experts
  - restrict unduly onerous undertakings,
  - promote early disclosure
  - restrict claims for confidentiality to that which is genuinely confidential
  - to promote transparency and even the playing field

# Thank you for listening

