THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ANTIGUA AND BARBUDA

(CIVIL)

CLAIM NO: ANUHCV 2006/0283

BETWEEN:

NEXT LEVEL ENGINEERING LIMITED

Claimant

And

THE ATTORNEY GENERAL

First Defendant

ANTIGUA PUBLIC UTILITIES AUTHORITY

Second Defendant

WILMOTH DANIEL, MINISTER RESPONSIBLE FOR PUBLIC UTILITIES

Third Defendant

ANTIGUA POWER COMPANY Ltd

Fourth Defendant

Appearances:

Mr. Anthony Astaphan, SC and with him Mr. John Fuller for the Claimant
Mr. Justin Simon, Q.C. and with him Ms. Alicia Aska for the First Defendant and Third Defendant
Mr. Gerald Watt, Q.C. and with him Dr. David Dorsett for the Second Defendant
Mr. Dane Hamilton for the Fourth Defendant

……. …….
2006: November 23 2007: June 18
……

JUDGMENT

BACKGROUND

[1] Thomas J: On 9th June 2006 Next Level Engineering Limited, the Applicant, filed notice of application seeking various orders that are centered on the matter of the supply of electricity generating equipment to the Second Defendant.

[2] On the hearing of the application in Chambers the learned judge ordered that the application be served on all the intended Defendants forthwith together with a copy of the order made then. A date was also fixed for the hearing of the application in open Court. And on that date, being 12th June 2006, it was ordered as follows: 1. The Applicant is granted leave to file and serve a supplementary affidavit within 4 days of today's date. 2. The Defendant's are granted leave to file and serve affidavits in answer within 10 days thereafter. 3. All documents to be relied on to be exhibited to the affidavits. 4. The Applicant is granted 5 days thereafter to file and serve affidavit in reply. 5. The Respondents to file and serve written submissions on or before the 30th June 2006 and the Applicant to file and serve further submissions, if necessary on or before the 7th July 2006. The matter is adjourned for hearing on the 18th July 2006 at 9:00 am.

[3] On the aforementioned adjourned date the trial date was vacated. It was further ordered that the trial date is to be determined by the Court Office. However, the matter was again adjourned to 26th September 2006. On this date it was ordered that skeleton arguments be filed and exchanged and the trial date set for 23rd November 2006. At this hearing in open Court the Court, differently constituted, determined that the application and the substantive matter, if necessary, will be heard at the same time.

THE APPLICATION

[4] The Application is made pursuant to Part 56 of CPR 2000. In this instance Parts 56.2 (1), 56.3 (1) and (2) and 56.4 (1) – (4) are relevant and are in these terms:

> "56.2 (1) An application for judicial review may be made by any person, group or body which has a sufficient interest in the subject matter of the application.
>
> 56.3 (1) A person wishing to apply for judicial review must first obtain leave.
>
> (2) An application for leave may be made without notice.
>
> 56.4 (1) An application for leave to make a claim for judicial review must be considered forthwith by a judge of High Court.
>
> (2) The judge may give leave without hearing the applicant.
>
> (3) However, if –
>
> (a) it appears that a hearing is desirable in the interest of justice;

(b) the application includes a claim for immediate interim relief, or

(c) the judge is minded to refuse the application;

the judge must direct that a hearing in open court be fixed".

[5] The provisions of Part 56.4 (3) of CPR 2000 prescribe the matters that must be considered by the judge in ordering a hearing in open Court. However, the application was never heard or determined.

[6] In a series of affidavits in support of the application for judicial review, Mr. Edward Hadeed, on behalf of the Claimant, gives an outline of the facts and circumstances which gave rise to these proceedings.

[7] The basic outline is as follows. Sometime in November 2005 there was a discussion between the Third Defendant, Wilmoth Daniel, Minister responsible for Public Utilities, and the said Edward Hadeed. The discussion centered on the need to upgrade or increase the supply of electricity in Antigua and Barbuda against the backdrop of the then short falls. This led to the Claimant's officers meeting with the Electricity Manager of the Second Defendant on the said issue. The sequel to this meeting is that the Manager requested the Claimant and others to supply quotations for the supply of generators to the Second Defendant.

[8] Quotations were duly provided by the suppliers, including the Claimant. Based on further meetings between the General Manager, other officers, of the Second Defendant and the Claimant, it is the latter's contention that representations were made to it that there would be a recommendation that its quotation be accepted and the contract be awarded to it. In the final analysis, however, the Claimant's quotations were not accepted and therefore no contract was awarded to it.

[9] It is therefore in this broad context that the question of the application for leave to make a claim for judicial review must be examined.

[10] It is said that in this context the question of standing is a two stage process. "On the application for leave (stage one) the test is designed to turn away hopeless and meddlesome applications only. But when the matter comes to be argued (stage two) the test is whether the applicant can show a strong enough case on the merits, judged in relation to his own concern with it."[1]

[11] Therefore, in terms of the leave stage as far as the Court is concerned there are no legal impediments. In any event, in these circumstances it is academic at this stage. However the wider question of "sufficient interest in the subject matter of the application" as prescribed by Part 56.2 (1) of CPR must be addressed as the final episode.

JUDICIAL REVIEW

[12] Pursuant to the directions of the Court given on 16th October 2006 a fixed date claim form was filed on 6th November 2006. In it the Claimant, Next Level Engineering Limited, claims against the Defendants, being the Attorney General of Antigua and Barbuda, the Antigua Public Utilities Authority, Wilmoth Daniel, Minister responsible for Public utilities and Antigua Power Company Ltd, declarations, orders for certiorari and prohibition, administrative orders and injunctions, jointly and severally under Part 56 of CPR 2000.

[13] The claim is in respect of the following:

(i) The invitation for tenders and award or contract to supply power plants to the Second Defendant.

(ii) The Claimant's tender, which was the lowest, was accepted by officers of the Second Defendant as among other things the Claimant was able to meet the deadline of 31st December 2006 set by the Second Defendant.

(iii) The Claimant's rights created by the request for quotations, presentations and tenders by officers of the Second Defendant, and the submission of the same by the Claimant to the Second Defendant at considerable cost and expense.

(iv) The Claimants rights and/or legitimate expectations of a substantive benefit namely the award of the tender and contract created by the course of conduct

[1] Wade & Forsyth, ADMINISTRATIVE LAW, (9th ed) p. 692

between the Claimant and General Manager and other officers of the Second Defendant.

(v) The Claimant rights and/or legitimate expectations of a substantive benefit namely the award of the tender and contract created by the clear and unambiguous representations made to the Claimant by the said General Manager and/or other officers of the Second Defendant and Third Defendant in relation to the process and award or contract to supply power plants to the Second Defendant.

(vi) The representations made by the General Manager of the Second defendant included a representation that the tender and/or contract would be awarded to the Claimant and that the Second Defendant would apply to the Tenders Board for the tender and/or contract to be exempted from the Tenders Board Act Cap. 424A.

(vii) The representations made by the Third Defendant included the representation that he was, for a number of reasons, not going to get involved in the selection process and that he was leaving the decision on the tender to be made by the Second Defendant's General Manager and his technical team.

(viii) The purported interference and/or directions by the Third Defendant to the Second Defendant not to proceed with the award of a tender or contract to the Claimant to supply power plants in accordance with the representations made by the Second and Third Defendants and the laws of Antigua and Barbuda.

(ix) The unilateral alteration or repudiation of the terms and tender process by the Second and/or Third Defendant and the consideration and/or award or intended award of a tender or contract to the Fourth Defendant (who was not one of the parties invited to supply quotations or bid) on materially different terms and conditions.

(x) The unilateral alteration or repudiation of the representations made to the Claimant by the Second and Third Defendants and upon which it relied to its detriment.

(xi) The purported direction or instructions by the Third Defendant to the Second Defendant to award a tender or contract to the Fourth Defendant (who was not one of the parties invited to supply quotations or bid) in violation of the Claimant's rights and/or legitimate expectations of the Claimant and the laws of Antigua and Barbuda.

(xii) The purported award or intended award of a tender or contract to the Fourth Defendant, Antigua Power Company Limited, by the Second Defendant to supply power plants in violation of the Claimant's rights and or legitimate expectations and laws of Antigua and Barbuda.

(xiii) The purported award or intended award of a tender or contract to the Fourth Defendant is unlawful.

[14] The grounds upon which the claim is based are as follows:

1. The course of conduct and/or representations made by the Second and/or Third Defendants promises and or representations gave rise to an implied contract between the Claimant and Second Defendant.

2. The course of conduct and/or representations made by the Second and/or Third Defendant's promises and/or representations gave rise to a legitimate expectation of a substantive benefit namely the award of the tender and contract.

3. The Claimant is entitled to compensation for the breach of the implied contract and/or its rights and/or legitimate expectation of a substantive benefit namely the award of the tender and contract to supply power plants by the Second and/or Third Defendant inclusive of damages for loss of bargain and profit.

4. The Second and/or Third defendants breached the rights and/or legitimate expectations of the Claimant of a substantive benefit by their unilateral and unlawful acts and conduct in that they, collectively or individually, unilaterally repudiated the tender process and procedure and agreement or intention to award the tender and contract to the Claimant.

5. The Third Defendant acted arbitrarily, unfairly and unreasonably and/or considered irrelevant matters by his unilateral and unlawful acts and conduct in unilaterally repudiating the tender process and procedure and the Second Defendant's agreement or intention to award the tender and contract to the Claimant. And purporting to award or agree to award a contract to the Fourth Defendant.

6. The Third Defendant acted arbitrarily, unfairly and unreasonably and/or considered irrelevant matters by his unilateral and unlawful acts and conduct in unilaterally purporting to award or agree to award a BOOT joint venture contract to the Fourth Defendant.

7. The Second and/or Third Defendants failed insofar as the Fourth Defendant is concerned have acted unlawfully and/or failed to comply with the Tenders Board Act Cap. 424A.

8. The Second and/or Third Defendants are public authorities and in the nature of trustees. Accordingly, they are required to act fairly, equitably and reasonably and in accordance with the law. By their unilateral acts and conduct, the Second and/or Third Defendants have failed to act in accordance with their public duties.

9. The unilateral acts and/or conduct of the Second and/or Third Defendants is unlawful.

10. The Third Defendant acted in bad faith.

[15] The relief and remedies claimed by the Claimant are as follows:

"1. An order that the Claimant is entitled to the award and contract to supply power plants to the Second Defendant.

2. An Order that the Claimant is entitled to its legitimate expectation of a substantive benefit namely the award of the tender and contract by the Second and/or Third Defendant.

3. An order that the Claimant is entitled to damages against the Second Defendant.

4. An order that the Claimant is entitled to damages against the Third Defendant on the footing of aggravated and exemplary damages.

5. An order that the acts and/or conduct of the Third Defendant and in particular his directions to the Second Defendant not to award the contract to the Claimant and/or instead to award it to the Fourth Defendant are arbitrary, manifestly unfair, contrary to law and are unlawful.

6. A declaration that the Claimant is entitled to have its tender and/or contract proceed with and granted by the Second Defendant in accordance with the representations made to it by officers of the Second Defendant and Laws of Antigua and Barbuda.

7. A declaration that the purported award or intention to award the tender or contract to the Fourth Defendant violates the rights and/or legitimate expectations of the Claimant namely the award of the tender and contract and is unlawful.

8. A declaration that the purported award or intention to award the tender or contract to the Fourth Defendant violates and/or will violate the laws of Antigua and Barbuda and is and will be unlawful.

9. A declaration that the unilateral alteration or repudiation of the terms and procedure of the tender process by the Second and/or Third Defendant and the consideration and/or award of the tender or contract to the Fourth Defendant on materially different terms and conditions constitute a breach of the implied contract between the Claimant and Second and/or representations relied on by the Claimant.

10. A declaration that the Second and Third Defendants failed as public authorities to exercise their powers fairly, consistently and in accordance with the law.

11. An order quashing the Second and/or Third Defendant's decision to not to award the tender or contract to the Claimant and apply for exemption from the Tenders Board Act on the ground that the Second and/or Third Defendants acted unlawfully.

12. An order quashing the Second and/or Third Defendant's' decision to award the tender and/or contract to the Fourth Defendant on the ground that the Second and/or Third Defendants acted unlawfully.

13. An order directing the Claimant, the Second and/or Third Defendants to revoke the decisions not to grant the tender or contract to the Claimant and to award it to the Fourth Defendants.

14. An injunction restraining the Second Defendant its servants, agents or whosoever from commencing or continuing with the award of the tender or contract to the Fourth Defendant or any other person pending the determination of this claim.

15. An order that the Third Defendant acted in bad faith when he repudiated the representations and promises made by himself and/or the Second Defendant and agreed to and/or instructed the Second Defendant to enter into the "new deal" with the Fourth Defendant."

[16] The following are the issues for determination:

1. Whether the course of conduct and or representations made by the Second and/or Third Defendants promises and/or representations gave rise to an implied contract between the Claimant and the Second Defendant.

2. Whether the Claimant had a legitimate expectation of being awarded the contract to supply generators to the Second Defendant based on the representation and/or promises made to it by the Second and/or the Third Defendants.

3. Whether the Second Defendant and/or the Third Defendant acted unlawfully.

4. Whether the Joint Venture Agreement between the Second Defendant and the Fourth Defendant is lawful.

5. Whether the Applicant has sufficient interest within the meaning of Part 56.2 (1) of CPR 2000.

SUMMARY OF AFFIDAVIT EVIDENCE

EDWARD HADEED

[17] Mr. Edward Hadeed deposed to four affidavits in support of fixed date claim and one affidavit in reply.

[18] In his affidavit sworn to on 1st June 2006 the deponent gives the circumstances in which he became involved initially with the Third Defendant and later with an officer of the Second

Defendant in connection with power generating equipment. He says that at his meetings with the officer of the Second Defendant, Mr. Lyndon Francis, requests were made of certain named manufacturers of generating equipment for quotations but that he was also invited so to do by letter at a later date.

[19] Based on this invitation the deponent avers that three different quotations were supplied to the Second Defendant. Following this a presentation was made to the Second Defendant at its invitation. This was followed by a meeting with all the Managers of the Second Defendant.

[20] According to the deponent, on 22nd April 2006 Mr. Esworth Martin, Financial Controller of the Second Defendant, made certain representations to him concerning the Claimant's quotations. Similar representations were also made by the General Manager, Mr. Chaku Symister, of the said Second Defendant. The deponent also says that the General Manager also informed him that the Second Defendant intended to request an exemption from the tender process under the Tenders Board Act.

[21] The deponent says further that on 24th April 2006 the said General Manager of the Second Defendant informed him a decision was taken at a higher level to disregard all offers made and instead the Second Defendant will be entering into a joint venture with the Fourth Defendant and as such generators will not be purchased. Instead electricity will be purchased from the Fourth Defendant.

[22] In his affidavit filed on 15th June 2006 Edward Hadeed, the deponent gives details of statements which he heard being made by the Third Defendant and the Prime Minister on divers occasions on radio and in Parliament concerning the generation of electricity in Antigua and Barbuda.

[23] In his third supplementary affidavit, Edward Hadeed seeks to address what he termed "allegations" made in Chaku Symister's affidavit concerning the Claimant's proposals with

respect to the purchase of generators. At the same time some issues raised in the affidavit of Esworth Martin are also addressed.

[24] In the remainder of his affidavit the deponent concerns himself with technical details about generators his company intended to supply to the Second Defendant. Mention is also made of the matter of the joint venture and in particular the time at which the Claimant became aware of this matter and whether or not it was invited to partake thereof.

[25] The fourth supplementary affidavit was filed on 24th August 2006 and in it Edward Hadeed deposes that he takes issue with two matters raised by the Third Defendant in his affidavit. The first is the issue of Sulzer engines – their manufacturers and availability while the second concerns the "alleged" benefits of the proposed joint venture.

LYNDON FRANCIS

[26] Mr. Lyndon Francis' affidavit was filed on 27th June 2006. In it he says that he is the Electricity Manager of the Second Defendant with primary responsibility for the generation and distribution of electricity throughout Antigua and Barbuda.

[27] The deponent says that in November 2005 he received a mandate from the Second Defendant's General Manager to inquire into the supply of new manufactured engines availability for commissioning in time for World Cup 2007. In his regard he was to identify three top quotes for referral to the Tenders Board with a view to getting approval to move to negotiate a final contract for subsequent consideration.

[28] Lyndon Francis details his meeting, in or about 12th December 2005, with Edward and Tony Hadeed in connection with the said mandate and his subsequent letter to them entitled 'Request for Quotation'. The deponent also makes the technical point at this time that the Claimant had no legal existence and his dealings were Electronic Technology International (Antigua) Ltd (ETI) through the said Edward and Tony Hadeed.

[29] For the most part in the rest of the affidavit the deponent address the manner in which the quotes were dealt with and his evaluation of the various engines offered.

ESWORTH MARTIN

[30] Mr. Esworth Martin in his affidavit filed on 30th June 2006 says that he is the Finance Manager of the Second Defendant.

[31] The deponent at paragraph 2 of his affidavit addresses certain statements or representation attributed to him by Edward Hadeed in his affidavit filed on 1st June 2006. These are denied.

[32] At paragraph 5 of his affidavit the deponent outlines the circumstances that gave rise to the decision being taken that "… it was in the best interest of the Second Defendant and the entire nation of Antigua and Barbuda to enter into a joint Venture agreement with the Fourth Defendant."

[33] The deponent also gives detailed reasons as to why the Claimant was not asked to participate in the joint venture process. Also detailed by the deponent is the cost savings to the Second Defendant and the prospect of a sustained efficient supply of energy with increased capacity. Further still, the affiant contends that:

> "The most significant benefit in my estimation of this Joint Venture Proposal is the opportunity for public participation in the ownership of the Joint Venture which will at the end of the day, given the present generation crisis, be the best solution for the people of Antigua and Barbuda and more importantly it is the State's National Interest to move forward with this Joint Venture as the other alternatives either to rent engines or purchase old engines would ultimately cost the Second Defendant and the people of Antigua and Barbuda substantially more in the long run".

LEON CHAKU SYMISTER

[34] Mr. Leon Chaku Symister swore his affidavit on 4th July 2006 in his capacity as General Manager of the Second Defendant.

[35] At paragraphs 3 to 7 the affiant speaks to the fact that the Second Defendant has statutory authority to generate electricity and also the circumstances existing with respect to such

generation which he terms a "generating crisis". Therefore, according to the General Manager, the Second Defendant embarked upon a plan "to increase its generating capacity to satisfy the anticipated demand for World Cup 2007 as a result of the construction boom and the desire to start supplying some of the major hotels with electricity, the peak demand is expected to reach 60MW". In this regard the Electricity Manager was requested to seek quotes from persons who could supply "new generator sets". One such person was a newly formed entity the Claimant (and which replaced ETI) which subsequently held discussions with the Second Defendant.

[36] With respect to the quote the deponent says that it was not recommended to the Tenders Board for certain technical reasons and the Claimant was informed accordingly.

[37] According to the General Manager, given the situation faced by the Second Defendant, a determination was made that a partner was needed who could assist in financing the acquisition of generator sets and sourcing them immediately. In the result, discussions were held with the Fourth Defendant along the lines of a joint venture Project.

[38] Finally, with respect to the joint venture, the General Manager tenders this averment:

> "The Joint Venture proposal of the Second and Fourth Defendants is in the best interest of the Second Defendant and the people of Antigua and Barbuda in that the Venture will ultimately lead to reduction in the operating cost of the Second Defendant and the cost of electricity to consumers. Further the citizens of Antigua and Barbuda will be presented with the unique opportunity of purchasing shares in the new venture."

WILMOTH DANIEL

[39] In his affidavit sworn to on 17th July 2006, Mr. Wilmoth Daniel says that he is a Member of Parliament for the State of Antigua and Barbuda with Ministerial responsibility for Works, Transportation and the Environment.

[40] At paragraph 2 of the said affidavit the affiant recalls the meeting with Edward Hadeed at V.C. Bird International Airport but contends that it was Edward Hadeed who initiated the discussion on supplying the Second Defendant with engines. The affiant contends further

that prior to this meeting he had no knowledge that the said Hadeed could source engines or of his expertise in the field of power generation.

[41] Regarding the question of the control of power generation by one company, he said he did not agree with this position but it was his personal view and has not strayed from it even with the advent of the joint venture.

[42] According to Minister Daniel, the impression conveyed to him is that the Second Defendant had awarded a contract to the Claimant to supply certain generating equipment and had suddenly pulled the rug. He says that it is his further impression that Edward Hadeed and Garfield Abbott wished him to intercede in order to ensure that the contract was awarded to the Claimant. Further still, he said that he had no intention to intervene in view of certain criticisms made of him in a report.

[43] It is the contention of the Minister that at the behest of Edward and Tony Hadeed, he did arrange a meeting for them with the Second Defendant on 28th April 2006. He contends further that: "During the meeting the Electricity Manager made it clear that there were some serious concerns with the Claimant's quote in that the Claimant's engines were based on outdated technology for which Wartsila no longer offered technical support as the engines could not be found anywhere in Power Generations in the Caribbean. Further, the Claimant, a new company could not demonstrate a proven track record in providing large scale generations of the size envisaged".

[44] According to the deponent, at the end of the meeting of 28th April 2006, both Edward Hadeed and Garfield Abbott expressed an interest and willingness to be a part of the proposed joint venture.

[45] Finally, Minister Daniel denies having usurped the authority of the management team of the Second Defendant. Nor did he make the decision for the Second Defendant to entertain a joint venture with the Fourth Defendant.

AFFIDAVITS IN REPLY

EDWARD HADEED

[46] On 29th June 2006 Edward Hadeed filed an affidavit in reply in which, according to him, was intended to reply to that of Lyndon Francis.

[47] In this regard the deponent says that he is surprised at the content of Francis' affidavit since he was not aware of an issue regarding the choice or age of the generators or that no recommendation would be made with respect to the Claimant. It is also contended by the deponent that he was not aware of the report of December 2005 prepared by the said Lyndon Francis. The deponent contends, however, that two proposals were submitted – one relating to Wartsila Sulzer generators and another on 20th January 2006 with respect to Wartsila Vasa LN 32 generators.

GARFIELD ABBOTT

[48] In his affidavit filed on 1st June 2006 the affiant, Mr. Garfield Abbott, avers that he is the Secretary of the Claimant. He says he had conversation with the Defendant on 23rd April 2006 concerning the decision with respect to purchase of generators at which time the said Third Defendant convey to him his personal stance on the matter.

[49] Concerning the Build Own and Operate agreement with the Fourth Defendant the deponent contends that he was disappointed especially since the Claimant had relied on representations made by the Second Defendant, its General Manager and the Third Defendant in making its quotations, tenders and presentations to the Second Defendant.

KIERON PINARD BYRNE

[50] Mr. Kieron Pinard Byrne is a chartered accountant who swore an affidavit in reply, at the request of Edward Hadeed, in order to advise on the proposed joint venture. The affidavit was filed on 28th August 2006.

[51] At paragraph 10 of his affidavit the deponent refers to his letter of 17th August 2006 in which his views are expressed and which he says are true. He then continues: "… the allegations that the Second Defendant and country of Antigua and Barbuda will achieve any or any significant benefits from the proposed joint venture between the Second and Fourth Defendants and in particular those mentioned by Esworth Martin in his affidavit are unfounded".

ISSUE NO. 1

WHETHER THE COURSE OF CONDUCT AND/OR REPRESENTATIONS MADE BY THE SECOND AND/OR THIRD DEFENDANT'S PROMISES AND/OR REPRESENTATIONS GAVE RISE TO AN IMPLIED CONTRACT BETWEEN THE CLAIMANT AND THE SECOND DEFENDANT

[52] These entire proceedings are concerned with judicial review which is concerned with the lawfulness or otherwise of the exercise of power by a public authority[1].

[53] In CHIEF CONSTABLE OF THE NORTH WALES POLICE v EVANS [1982] 1 WLR 1155, 1173 Lord Brightman said that:

> "Judicial review is concerned not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will … under the guise of preventing the abuse of power, be itself guilty of usurping power."

[54] The broader picture is painted by Lord Templeman in REG v INDEPENDENT TELEVISION COMMISSION, *Ex parte* TSW BROADCASTING Ltd, The TIMES 30th March 1992 by saying that:

> "Parliament may by statute confer powers and discretions and impose duties on a decision maker who may be an individual, a body of persons or a corporation …. When Parliament has not provided for an appeal from a decision maker the counts were not to invent an appeal machinery …. The courts had invented the remedy for judicial review not to provide an appeal machinery but to ensure that the decision maker does not exceed or abuse his powers."

[55] A public authority in a broad sense is a person or body which exercises governmental functions and which, by definition, are public in nature or are concerned with the public at large and more importantly public finance.

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[1] See for example: Mercury Energy Limited v Electricity Corporation of New Zealand [1994] 1 WLR 521 (PC)

[56] Usually a public authority may arise by virtue of the prerogative, primary or subordinate legislation and, of course, the Constitution.

[57] There can be no doubt that the Public Utilities Authority ("the Authority") is a public authority or body. Its legislative basis is the PUBLIC UTILITIES ACT CAP. 359 which is comprehensive in its objectives.

[58] In section 2 ""Minister" means the Minister responsible for public utilities; and "public utilities" means services authorized under this Act for supplying electricity, providing and maintaining telephone services and telephones and supplying water …."

[59] Section 3 of the Act establishes the Authority in these terms:

> "There is hereby established a body to be called the Public Utilities Authority which shall be a body corporate with perpetual succession and a common seal with power to purchase, take, hold and dispose of land and other property to enter into contracts, to sue and be sued in its name and to do all things necessary for the purpose of this Act."

[60] Also of relevance is section 5 (1) of the Act which vests in the Authority the exclusive right to generate electricity. The section reads thus: "Subject to subsection (2), the Authority shall have the exclusive right to generate, distribute, supply and sell electricity within Antigua and Barbuda and to perform services incidental thereto."

[61] There is therefore no doubt that the Authority has power to enter into contracts. Further, it is common ground that the Claimant was, at the very least, seeking to conclude a contract with the Authority, being the Second Defendant, for the supply of generators. That being the case, the immediate question to be determined is whether the question of an implied contract falls within the ambit of judicial review.

SUBMISSIONS

[62] Learned counsel for the Second Defendant made the following submissions on behalf of the Second Defendant, and by their adoption by learned counsel, on behalf of the First and Third Defendants:

> "With regard to 'ground' 1 that pertains to an implied contract, it is respectfully submitted that the whole issue of whether there existed an implied contract or not is a matter of private law and not public law. BLACKSTONE CIVIL PRACTICE 2003 at para. 74.5 states the legal position with utmost clarity:
>
> > 'The existence of a contractual relationship [our emphasis] or a decision based upon the consent of the parties will always make it difficult to establish that the decision is amenable to judicial review *(R v. Criminal Injuries Compensation Board, ex parte Lain [1967] 2 QB 864; R v National Joint Council for the Craft of Dental Technicians (Dispute Committee), ex parte Neete* [1953] 1 QB 704."

[63] The issue of the formation or determination of a contract in the scheme of judicial review was addressed frontally by the Privy Council in MERCURY ENERGY LTD v ELECTRICITY CORPORATION OF NEW ZEALAND, *supra.* Lord Templeman speaking for the Board addressed the issue in these terms at page 528:

> "The terms of the contractual arrangements and the existence of a monopoly are no indication that when the defendant decided to terminate the contractual arrangement it was acting unreasonable in the sense indicated by the *Wednesbury* case or that the defendant was acting in bad faith or for improper or ulterior motives. The express statutory duty of the defendant is to pursue its principal objective of operating as a successful business, by becoming profitable and efficient, by being a good employer and by exhibiting a sense of social responsibility."

[64] His Lordship continued in this way at page 529:

> "It does not seem likely that a decision by a state enterprise to enter into or determine a commercial contract to supply goods or services will ever be the subject of judicial review in the absence of fraud, corruption or bad faith."

[65] JUDICIAL REVIEW OF ADMINISTRATIVE ACTION (5th ed.) by De Smith, Woolf & Jowell also reflects the position of the law as enunciated by the Privy Council. It is stated as follows:

> "... as with statute and the prerogative – merely to assert that a decision has its legal source of authority in contract provides little general guidance as to whether or not such action will or ought to be subject to judicial review. The picture is complex. In some instances the courts have been prepared to use their supervisory jurisdiction and apply judicial review principles to what may be characterized as contractual relationships, whereas in other cases the existence of a contract or potential contractual relationship has been given as a reason for action not being susceptible to judicial review."

[66] The point as to the scope of judicial review is also noted by Clive Lewis, JUDICIAL REMEDIES IN PUBLIC LAW (2004) at page 73:

> "Judicial review is only available against public law bodies in public law matters. There are occasions when the body in question is undoubtedly a public body which is in principle amenable to judicial review but where the particular issue under consideration does not involve any public law mater but rather involves private law rights."

[67] The point being made by DE SMITH WOOLF & JOWELL, on the one hand, and Clive Lewis on the other, is that in the midst of judicial review of public law matters, the courts at the time of review do consider the justiciability of private law issues. In this regard the case of R v. WEAR VALLEY DC., EXP. BINKS [1985] 2 ALL ER 699 is cited by DE SMITH, WOOLF & JOWELL.

[68] This case however turned on a question of natural justice where a street trader's informal licence was revoked without giving him a hearing. In questioning the decision it was held that the question whether the council was regulating a statutory or an informal market was irrelevant to the application of the rules of natural justice. It was held further that: "Since the applicant had been given permission to trade in a place to which the public had access at all times and since the council had a discretion whether to allow street trading in the market place, the situation was akin to the operation of an informal market and, furthermore, since the applicant would be deprived of her livelihood, it followed that for both those reasons the rules of natural justice applied to the ending of the arrangement under which the applicant was allowed to trade."

[69] The case of R v LEGAL AID BOARD, ex parte DONN & CO (a firm) [1996] 3 ALL ER 1 is even more instructive. The issue in this instance concerned the invitation to tender by the Legal Aid Board for a contract to represent generic plaintiffs in a multi-party action.

[70] The applicants were submitted on tender but were unsuccessful. They applied for judicial review of the committee's refusal of their tender, contending, *inter alia*, that the committee's decision-making process was justiciabe in public law. The headnote reads in part as follows:

> "The decision-making process of a legal aid committee in awarding a contract to solicitors for the conduct of a multi-party action was justiciable in public law.
> Treating the nature and purpose of the selection process and its consequences as one indivisible whole, the function exercised by the committee, the purpose for which they were empowered to act and the consequences of their decision-making process all clearly indicated that it would be wrong to characterize the matter for review as one of private law, and irrespective of whether there was a remedy in private law, the public dimensions of the matter were of a quality which made it justiciable in public law."

[71] Therefore, while the courts have recognized that some matters that are grounded in private law may be subject to judicial review depending on the 'public nature' of the matter or whether the public at large is or can be affected. But even then the review is confined to the decision making process rather than the decision. This brings us back to the holding in MERCURY ENERGY LTD v. ELECTRICITY CORPORATION OF NEW ZEALAND, *supra.*

[72] The short answer therefore is that the matter of an implied contract is not justiciable in judiciable review proceedings.

[73] Learned Counsel for the Defendant Mr. Dane Hamilton attacks the question of implied contract on the fundamentals. For him, whether the contract is express or implied the fundamentals still apply. Reliance was placed on the following learning from CHITTY ON CONTRACTS (25th ed.) at paragraph 12:

> "Contracts may be either express or implied. The difference is not one of legal effect but simply of the way in which the consent of the parties is manifested. Contracts are express when their terms are stated in words by the parties. They are often said to be implied when their terms are not so stated, as, for example, when a passenger is permitted to board a bus: from the conduct of the parties the law implies a promise by the passenger to pay the fare, and a promise by the operator of the bus to carry him safely to his destination. There may also be an implied contract when the parties make an express contract to last for a fixed term, and continue to act as though the contract still bound them after the term has expired. In such a case the court may infer that the parties have agreed to renew the express contract for another term. Express and implied contracts are both contracts in the true sense of the term, for they both arise from the agreement of the parties, though in one case the agreement is manifested in words and in the other case by conduct. Since, as we have seen, agreement is not a mental state but an act, an inference from conduct, and since many of the terms of an express contract are often implied, it follows that the distinction between express and implied contracts has very little importance, even if it can be said to exist at all."

[74] According to learned counsel, there were three proposals from the Claimant but no acceptance by the persons lawfully entitled to effect acceptance. He also questions whether the letter at TB p. 109 (Request for Quotation) was an invitation to treat. For him, if it was the Claimant made no offer.

[75] The Court accepts the basic proposition that if the quotations were offers there was no acceptance by the Second Defendant. This on the fundamentals of the law of contract removes the substratum of an implied contract.

[76] The Claimant's answer to these submissions is that there case is not grounded on express or implied contract but a contract based on good faith. According to Mr. Tony Astaphan, SC once a person is led to believe that a contract will be awarded then the contract of good faith arises. For this proposition the following cases cited at TB p. 244 are relied on:

HER MAJESTY IN RIGHT OF ONTARIO AND WATER RESOURCES COMMISSION v RON ENGINEERING & CONSTRUCTION EASTERN Ltd [1981] SCR 111

BEN BRUINSMA & SONS LTD v THE CORPORATION OF THE CITY OF CHATHAM [1984] 29 BLR 148

CHINNOCK AGGREGATES LTD v ABBOTSFORD (MUN. DIST) [1990] 1 WWR 624

PRATT CONTRACTORS v PALMERSTON NORTH CITY COUNCIL [1994] 1 NZLL 469

BLACKPOOL AND FLYDE AERO CLUB LTD v BLACKPOOL BOROUGH COUNCIL [1990] 1 WLR 1195

[77] The case of BLACKPOOL AND FYLDE AERO CLUB LTD v. BLACKPOOL BOROUGH COUNCIL is instructive. This case concerned a concession to operate pleasure flights which the Plaintiffs did since 1975. When the concession came up for renewal tenders were invited and six persons including the Plaintiffs tendered.

[78] Due to the negligence of the Defendant's staff the letter box was not cleared properly and the Plaintiffs tender was not available for consideration and the concession was awarded to a tender lower than that of the Plaintiffs. In an action for breach of contract and negligence the first instance judge agreed and ruled that the express request for tenders by the Defendant gave rise to an implied obligation on then to perform the service of considering tenders duly received. Liability therefore rested on the Defendant.

[79] The appeal was unsuccessful and it was held that an invitation to tender was normally no more than an offer to receive bids, but that circumstances could exist whereby it gave rise to binding contractual obligations. It was further held that although contracts were not to be lightly implied, on examination of what the parties said and did established a clear intention to create a contractual obligation on the part of the Defendants to consider the Plaintiffs tender in conjunction with all other conforming tenders or at least that the

Plaintiff's tender would be considered if others were; and that, accordingly the Defendant's failure rendered them contractually liable to the Plaintiffs.

[80] There are two distinguishing points concerning this case, as with the others cited: They are cases purely in private law and in all cases also there was an award of a contract pursuant to an invitation to tender. In any event, it is the view of the Court that the cases cited do not support the proposition of law advanced by learned counsel for the Claimant given the fact that no contract was awarded as a consequence of the quotations.

ISSUE NO. 2

> WHETHER THE CLAIMANT HAD A LEGITIMATE EXPECTATION OF BEING AWARDED THE CONTRACT TO SUPPLY GENERATORS TO THE SECOND DEFENDANT BASED ON THE REPRESENTATIONS AND/OR PROMISES MADE TO IT BY THE SECOND AND/OR THE THIRD DEFENDANT.

[81] Wade & Forsyth[1] in discussing abuse of discretion within the context of unreasonableness, being a substantive ground for judicial review, come to the following conclusion:

> "Inconsistency of policy may also amount to an abuse of discretion, particularly when undertakings of intent are disregarded unfairly or contrary to the citizen's legitimate expectation. The Privy Council in holding the Government of Hong Kong must honour its published undertaking to treat each deportation case on its merits, has applied 'the principle that a public authority is bound by its undertakings as to the procedure it will follow, provided that they do not conflict with its duty."

[82] The Claimant's case revolves around this basic proposition: The policy repudiation on 24th April 2006 without notice to the Claimant gives rise to the deprivation of rights and legitimate expectations that there are rights in public law which the Claimant is entitled to enforce. These arose out of promises and representations made to the Claimant. Therefore, as a result, the case is not about contractual rights but about imposing judicial review to ensure compliance with the law and fairness in order to protect legitimate rights arising out of the process.

[83] The question now becomes this: What are the promises and/or representations made to the Claimant that could give rise to a legitimate expectation?

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[1] *Op cit* at p. 372

[84] Allegations or claims in this regard are contained in the various affidavits of Edward Hadeed which may be summarized thus.

[85] There was a meeting between the Third Defendant and the said Edward Hadeed at V.C. Bird International Airport at which time the question of power generation was discussed. At this time also Edward Hadeed was encouraged to proceed with an inquiry in this regard. Shortly thereafter Hadeed (along with four other companies) were invited to tender for the supply of generators to the Second Defendant. This resulted in a total of three quotations from Edward Hadeed and based on these quotations Hadeed was invited to make a presentation to the management team of the Second Defendant. This was followed by a second presentation.

[86] At paragraphs 18 to 20 of his affidavit of 1st June 2006 Edward Hadeed contends as follows:

> "18. On April 22 while returning from a vacation in Miami I placed a telephone call to Mr. Elsworth Martin, [sic] The Financial Controller of the Second Defendant to inquire about the current position of the generator purchase contract. Mr. Martin advised me that he along with several of his colleagues were in full support of the Claimant's quotation and tender and that they have all agreed that it was the best presented to the Defendant so far. He further insisted that the General Manager, Mr. Chaku Symister was taking too long to make a decision and that if it were left up to the Tenders Board that Next Level would have to be awarded the contract, since its quotation and tender was the most comprehensive in every area of consideration.
>
> 19. On 23rd April 2006 I initiated a telephone conversation with Mr. Chaku Symister to find out where our proposal stood. During the conversation Mr. Symister indicated to me that he was going to be guided by his senior mechanical engineer Mr. Ernest George and Mr. Watley Rose and it was his intention to recommend that the contract for the supply of the generators be awarded to the Claimant as it had met all of the benchmarks and requirements of the Second Defendant.
>
> 20. I was also told by Mr. Chaku Symister that in addition to recommending the Claimant the Second Defendant was going to request an exemption from the tender process under the Tenders Board Act. The exemption was required because time was of the essence and the Second Defendant wanted generators installed by December 2006."

[87] The next event in the process came on 24th April 2006 when, according to Mr. Edward Hadeed, a telephone call was made to the General Manager of the Second Defendant. The deponent says that Mr. Symister informed him then that "…. a decision was taken on a higher level to disregard the offers made by all other companies and that the Second Defendant will be entering into a new joint venture proposal with the Fourth Defendant on

a build own operate (BOOT) basis, as a result the Second Defendant would no longer be purchasing their own generators but would be purchasing electricity from the Fourth Defendant."

[88] In his affidavit filed on 15th June 2006 Edward Hadeed makes references, to several statements of the Third Defendant on public radio and in Parliament concerning the control of electricity generation by a single company.

[89] The other side of the promises and representations equation is taken up by Leon Chaku Symister, Lyndon Francis, Esworth Martin and Wilmoth Daniel.

[90] In his affidavit filed on 4th July 2006, Mr. Symister acknowledges that discussions were held with the Claimant regarding the quote submitted consequent on an invitation so to do. But he says: "At all times it was made absolutely clear to the Claimant that these discussions were explanatory and that the Second Defendant was not obligated to engage the Claimant or accept its quote."

[91] At paragraph 16 of his affidavit the General Manager continues:

> "At all material times the Claimant, more specifically Edward Hadeed, acknowledged that the discussions were explanatory and that the Second Defendant was not bound by the same. In fact, Mr. Edward Hadeed at a meeting with the Second Defendant's Management Team on 4th April 2006 in the presence of the Claimant's technician who had travelled from Lebanon and who had forgotten his hearing aid, and therefore had extreme difficulty on communicating, in addition to the language barrier, Edward Hadeed expressed the sentiment that his company recognized that the costs that it had incurred up to then was the cost of doing business."

[92] At paragraph 30 of the affidavit the following is deposed:

> "It is my considered view that the discourse which transpired between the Claimant and the Second Defendant were merely preliminary discussions intended for information and for budgetary purposes only and included four (4) other companies all of which were duly considered by the Second Defendant."

[93] At this juncture it is important to note that the contents of paragraphs 15, 16 and 30 of the General Manager's affidavit, as set out above, are denied by Edward Hadeed in his affidavit of 14th July 2006.

[94] Other aspects of the Chaku Symister's affidavit which bear on the question of promises and representations are these:

1. It is admitted at paragraph 21 that Edward Hadeed was informed on 23rd April 2006 that no decision had been made but guidance on the decision would come from the recommendations of the Second Defendant engineers.

2. It is denied that Edward Hadeed was told that Ernest George and Watley Rose would provide guidance. The reason given is that Ernest George is not a Senior Mechanical Engineer and Watley Rose is not an engineer.

3. It is also denied that there was any suggestion to the Claimant that he would be awarded the contract. Further the award of the Contract is the exclusive domain of the Tenders Board.

4. It is recalled that in a conversation with Minister Maginley saying that the Claimants quote was the best one on the table. However in expressing that personal opinion he did not have the benefit of the Electricity Manager's Report or the e-mail from Rodney George.

5. It is admitted that Edward Hadeed was told that the decision to purchase generators in an entirely different manner; but it is denied that he was told the decision was taken at a higher level.

6. It is denied that Edward Hadeed was told that the General Manager's recommendation was overturned by the Third Defendant.

7. It is admitted that when the Claimant was informed that the Second Defendant was no longer considering its quote, no agreement had been reached with respect to the joint venture.

[95] Lyndon Francis' affidavit in regard to the issue of promises and representation may be summarized in this way: He was generally not impressed with the generators which the Claimant proposed to supply as they were not "front runners". This is based on his own investigations and then the content of an e-mail from Rodney George, Vice-President of Wartsila Caribbean Inc. In this connection this is what he deposes at paragraph 19 of his affidavit: "Mr. Rodney George's e-mail confirmed my suspicions that the Sulzer ZA 40S is an old engine design and cannot be found in power generators anywhere in the Caribbean and as such, the very critical technical support from the manufacturers would be difficult".

[96] Apart from the product, the deponent also says that he was unimpressed with the follow up presentation by the Claimant on 4th April 2006 especially in view of the difficulties encountered with their technical person. For this reason, the Electricity Manager says this: "In light of which I find it incredulous that Mr. Edward Hadeed in paragraph 17 of his affidavit of 1st June [2006][1] would have the temerity to suggest that 'the General Manager and the other Managers appeared very satisfied and the meeting ended'.

[97] At paragraph 16 of his affidavit the deponent contends as follows:

> "It was during that said meeting that I vividly recall the Second Defendant's Chief Electrical Engineer, Mr. Andre Matthias, posing the question what would the Claimant do if it were not ultimately awarded a contract to supply generators to the Second Defendant. Either Edward or Tony Hadeed responded that they would only request the return of their document and that they were not interested in filing any lawsuit against the Second Defendant."

[98] Further, at paragraph 20 of his said affidavit Lyndon Francis gives the circumstances and results of his comparison of generators to be supplied by MAN B & W and Next Level Engineering Limited. His conclusion is that "… the MAN B&W proposal is more valuable". He then continues at paragraphs 21, 22 and 23:

> "21. My report referred to in paragraph 20 herein was disseminated to the General Manager of the Second Defendant on the very day[2] and as such I am astounded by the suggestions made by Mr. Hadeed … in paragraphs 19, 20, 21 and 22 of his Affidavit of 1st June 2006, for it is inconceivable to think in light of such overwhelming evidence that the General Manager of the Second Defendant would have given the assurances as alleged or at all.
>
> 22. In light of my statements in Paragraphs 15, 18, 19 & 20 herein. I take strong issue with the statement made by Edward Hadeed in Paragraphs 28 and 29 of his Affidavit of 1st June 2006. For to my mind, Mr. Hadeed would have been at the very least delusional to harbour the view that he had addressed my concerns to the satisfaction of the Management Team. He has absolutely no grounds for saying that the meeting of 28th was stage managed or was a sham, in fact, it is my expert opinion as contained in my reports which the Second Defendant relied upon in arriving at its decision thus there was no necessity for any other Manager to speak to the issue at the meeting of 28th April 2006.
>
> 23. Contrary to Paragraph 32 of the Affidavit of Edward Hadeed of 1st June, 2006, at no time did I even hint, suggest, infer, imply or commit the Second Defendant to accepting the Claimant's proposals. What I sent to the Claimant was a request for quotation for budgetary purposes only. Consequently, it is inconceivable that the Claimant could have concluded from what occurred between December 2005 through April 2006 that a contract could have been awarded to it as there was never any offer made by the Second Defendant let alone acceptance of that offer by the Claimant …."

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[1] Affidavit says "2060"

[2] Being 11th April 2006 as stated at paragraph 20.

[99] Mr. Esworth Martin, the Finance Manager of the Second Defendant, in his affidavit of 30th June 2006 takes issue with paragraph 18 of Edward Hadeed's affidavit of 1st June 2006.

[100] It will be recalled that in the said paragraph 18 Hadeed deposed that on "April 22" he had a conversation with the said Esworth Martin at which time he was advised that he, Martin, along with several of his colleagues were in full support of the Claimant's quotation and tender and that they have all agreed that it was the best presented to the Second Defendant so far.

[101] However, while Esworth Martin recalls the conversation, he denies the essence of Hadeed's account. What the deponent does say at paragraph 20 of his affidavit is that a decision on the matter could not be made by APUA's Management Team. Instead, the decision fell within the exclusive domain of the Tenders Board.

[102] The deponent avers further:

> "3. I did however mention to Mr. Hadeed that some members of the team were impressed with the Claimant's generator sets but that at the end of the day we would have to be insulated by the Tender's Board's decision as there was more than one quote to be considered.
>
> 4. At the time I conversed with Edward Hadeed I had seen neither Mr. Francis's report nor the e-mail from Mr. Rodney George of Wartsila. I subsequently saw both of these documents, as a consequence of which I find it difficult to maintain any argument that the Claimant's quote was the best quote received. Thus, contrary to Mr. Edward Hadeed's assertions in paragraph 29 of his affidavit of 1st June 2006 the meeting of 28th April 2006 was neither stage managed nor a sham. For by the time, all the relevant managers of the Second Defendant would have been possessed of the Lyndon Francis report of 11th April 2006 and the letter from Rodney George of Wartsila."

[103] Minister Wilmoth Daniel in his affidavit of 17th July 2006 admits that he met Edward Hadeed at the airport on 23rd November 2005 but contends that it was Hadeed who initiated the discussion on supplying the Second Defendant with engines.

[104] The Minister also admits making public statements on more than one occasion to the effect that no one company should have total control of power generation in Antigua and Barbuda. But it is his averment that these were personal views which he continues to hold, even after the joint venture agreement.

[105] At paragraph 10 of his affidavit the Minister avers that: "Contrary to the statements and suggestions of Edward Hadeed, at no time did I even usurp the authority of the Management team of the Second Defendant and substitute my own decision for the Second Defendant's decision."

SUMMARY

[106] It is the Claimant's contention that promises and representations were made to Edward Hadeed.

[107] An analysis of the evidence of all of the affiants does not reveal any promises made to Edward Hadeed. However there is evidence of representations.

[108] The evidence is that there are a number of denials by the persons who may have made representations. For example, Lyndon Francis says that on technical grounds he was never impressed with the generators offered by the Claimant's. He went on to say that he never hinted, suggested, inferred, imply or commit the Second Defendant to accepting the Claimant's proposal. This deponent even questioned how the General Manager of the Second Defendant could have given the assurances he is alleged to have given in the face of such overwhelming evidence.

[109] In his affidavit in reply Edward Hadeed, on behalf of the Claimant, expresses surprise at the content of Mr. Francis' affidavit generally and in particular the issue of the choice or age of the generators. According to Hadeed, there were several telephone conversations between them and this was never mentioned.

[110] In the case of Minister Daniel he admits that he made statements on public radio regarding the question of power generation in Antigua and Barbuda being under the control of a single company. He says, however, that these are his personal views which he still holds, even after the joint agreement involving the Fourth Defendant.

[111] But even if the views expressed are not personal, the question is whether they represent the Ministry's policy or that of the Government. The Court is of the view that even if they represent policy they cannot be confined to the Claimant alone. Further, the Court is of the further view that there are no representations contained in what the Third Defendant Minister said on public radio. Even further, Mr. Jerry Watt, QC contends that whatever the Third Defendant may have said in Parliament cannot bind the Second Defendant. The Court agrees.

[112] This leaves the representations admitted by Esworth Martin to the effect that some members of the team were impressed with the Claimant's generators but that at the end of the day there was more than one quote and the decision rested with the Tenders Board.

[113] The other representation is that made by the General Manager to Minister Maginley by telephone but in the presence of Edward Hadeed. It is to the effect that the Claimant's tender was the best on the table. This is admitted by Chaku Symister.

[114] With these representations being admitted, the question then becomes whether either or both of them can give rise to a legitimate expectation on the part of the Claimant.

SUBMISSIONS

[115] The following are the submissions on behalf of the Claimant:

> "1. The law relating to the enforceability of a legitimate expectation of a substantive benefit has developed significantly since 1994 and there is no reason why the same principles should not be applied to the statutory power to contract. [See R v Devon County Council Ex parte Baker [1995] 1 ALL ER 73 and R v North and East Devon Health Authority, Ex parte Coughlan [2001] QB 213]. In C.O. Williams Construction Limited v The Attorney General of Barbados, the Courts were all of the view that judicial review was available and there was no suggestion that judicial review was confined to certain limited grounds.
>
> 2. The law recognizes that rights or legitimate expectations and indeed of a substantive benefit are created by express representations and promises made by a public authority. However, a legitimate expectation is no longer confined to procedural matters or the right to be heard. A legitimate expectation may give rise to and confer a substantive benefit. On the facts of this case, there is no question that the express representations and promises were made by the Second and/or Third Defendants created the expectation of a substantive benefit; namely the request for exemption from the Tenders board and grant of the contract. Further, the Claimant is also entitled to rely on the Third Defendant's public statements

concerning his policy and that of his Ministry. [See R v Secretary of State for the Home Department, Ex parte Ruddock [1987] 1 WLR 1482.

3. The Second and/or Third Defendants are public authorities and are therefore obliged to act fairly and consistently, and ought not to be allowed to resile from promises made of a substantive benefit . [See R v Devon County Council Ex parte Baker [1995] 1 ALL ER 73 and R v North and East Devon Health Authority, Ex parte Coughlan [2001] 1 QB 213]. It is the Claimant's case that it is entitled to the substantive benefit promised it by the Second Defendant. That entitled is supported by the representations and promises made by the Third Defendant particularly those relating to his policy! The representations and promises were not in conflict with any statutory duty or obligation. On the contrary, they were entirely consistent with the law and the Tenders Board Act Cap 424 A as amended by the Tenders Board (Amendment) Act No 8 of 2002.

4. Accordingly, the Second and Third Defendants ought not to be allowed to repudiate the representations and promises and the implied contractual rights or legitimate expectations that were created by their representations, promises and conduct. Alternatively, the unilateral repudiation of the representations and promises made and the award of "a new deal" to or in favour of the Fourth Defendant is manifestly unfair and constitutes an arbitrary exercise of power and/or abuse of power. See H.T.V Ltd v Price Commission [1976] ICR 170 at page 185 to 186 and Attorney General of Hong Kong v Ng Yuen Shiu [1983 2 A.C. 620 and Seereeram Bros Ltd v The Central Tenders Board and Trinidad Contractors Ltd added as a party by Order dated 30th September 1991 H.C.A. 312 and R v Devon County Council Ex parte Baker [1995] 1 ALL ER 73 and R v North and East Devon Health Authority, Ex parte Coughlan [2001] QB 213.

5. Public authorities including Ministers must, in the exercise of their powers and the grant of State contracts or expenditure of public funds act transparently, fairly and in accordance with the law. State property is not private property and cannot be dealt with arbitrarily or at the Minister's whim and fancy. Therefore, once a Corporation such as the Second Defendant has made a decision to buy or recommend the award of a contract, after a process of tendering, quotations and meetings, it would be manifestly unfair and an abuse of power for the Third Defendant to unilaterally repudiate the process and instruct the award of the or a contract on materially different terms to the Fourth Defendant. See Seereeram Bros Ltd v The Central Tenders Board and Trinidad Contractors ltd added as a party by Order dated 30th September 1991 H.C.A 3123 of 1991 and Central Inland Water transport Corporation v Ganguly (1986) 3 S.C.C 156) and Dutta Associates Put Ltd v Indo Mercantiles Put Ltd (1997) 1 S.C.C 53.

[116] The following submissions were tendered on behalf of the Second Defendant and by adoption also on behalf of the First, Third and Fourth Defendants:

"56. The learning as given in Blackstone Civil Practice 2003 at para 74.18 is that in order to qualify for protection under the head of substantive legitimate expectation, the following qualities are necessary:

(a) The representation or expectation sought to be relied upon must be clear, unambiguous and unqualified;

(b) The applicant must be within the class of persons entitled to rely upon the representation or alternatively it must be reasonable for the applicant to rely upon it;

(c) There must usually be reliance upon the representation to the detriment of the applicant, although the claimant need not always demonstrate detriment *(R (Bibi) v Newham London Borough Counci*l [2003] 1 WLR 237); and

(d) There must be no overriding public interest which would entitle the respondent to renege from its representation.

57. The following points of note in the leading case of *R* v *North and East Devon Health Authority, ex p Coughlan* [2001] QB 213 ("*Coughlan"*) on the issue of the right to judicial review arising out of an abuse of power and frustration of legitimate expectations:

(1) Even if an expectation is reasonable and legitimate there may be good reasons why a public body needs to act so as to defeat the legitimate expectation. When the legitimacy of an expectation has been established by the court and this expectation has been frustrated the court has the task of "weighing the requirements of fairness against any overriding interest relied on for the change of policy" (*Coughlan* at [57].

(2) Public bodies must "remain free to change policy; its undertakings are correspondingly open to modification or abandonment" (*Coughlan* at [64]).

(3) In whatever context public bodies change their policies. "The court's task in all these cases is not to impede executive activity but to reconcile its continuing need to initiate or respond to change with the legitimate interests or expectations of citizens or strangers who have relied, and have been justified in relying, on a current policy or an extant promise" (*Coughlan* at [65]).

(4) A change in policy can be "justified if there is an overriding public interest. Whether there is an overriding public interest is a question for the court" (*Coughlan* at 76]).

(5) Judicial review is available if a public body makes a policy change that is *Wednesbury* unreasonable, defies comprehension or is irrational. Judicial review is also available if the policy change amounts to an abuse of power, and this is a matter for the court to determine (*Coughlan* at [81]).

(6) "Policy being (within the law) for the public authority alone, both it and the reasons for adopting or changing it will be accepted by the courts as part of the factual data – in other words, as not ordinarily open to judicial review. The court's task – and this is not always understood – is then limited to asking whether the application of the policy to an individual who has been led to expect something different is a just exercise of power" (*Coughlan* at [82]).

58. Schieman LJ giving the judgment of the English Court of Appeal in R (*Bibi v Newham London Borough Council* [2002] 1 WLR 237 at [19] stated:

> 'In all legitimate expectation cases, whether substantive of procedural, three practical questions arise. The first question is to what has the public authority, whether by practice or by promise, committed itself; the second is whether the authority has acted or proposes to act unlawfully in relation to its commitment; the third is what the court should do'.

59. It is respectfully submitted that in the instant case and with respect to the Applicant, the answer to the first question of what did the Second Defendant commit itself to is "Nothing". The report of Mr. Francis, Electricity Manager for the Second Defendant, clearly indicates

that the option put forward by the Applicant was not viewed as a favoured option and accordingly it cannot be said that the Second Defendant had committed itself to sourcing engines from the Applicant.

60. The answer to this question, it is respectfully submitted, is dispositive of the case and the need for consideration of the second and third questions falls away (R *(Bibi) v Newham London Borough Counci*l [2002] 1 WLR 237 at [21]).

61. It is respectfully submitted that even if the Applicant had a legitimate expectation that it would be awarded a contract (which expectation the Second Defendant denies) there was an overriding public interest that justified the Government frustrating the expectation of the Applicant, to wit:

    (1) The age of the engines to be supplied by the Applicant,

    (2) The difficulty of servicing and/or the unavailability or spare parts for the engines,

    (3) The unproven track record of the Applicant, compared to that of the Fourth Defendant, and

    (4) the costs, financial and cash flow implications involved in sourcing engines from an independent supplier (including the Applicant) versus the financial arrangements that would attend to a joint venture with the Fourth Defendant.

62. Moreover, it is respectfully submitted that there was NOT a reasonable legitimate expectation that the Applicant would be awarded a contract as an independent supplier or that it would form part of a joint venture. The Applicant by letter dated 2nd May 2006 addressed to the Honourable Prime Minister (a letter not produced by the Applicant but by the Honourable Minister responsible for Public utilities), expressed an interest in becoming a joint venture partner with the Second Defendant, while explicitly admitting that "Perhaps we are out of time". At that time the Applicant was aware that the Second Defendant and the Government were no longer seeking to expand the nation's electricity generating capacity by contracting with independent suppliers. That was an option that the Applicant knew was no longer on the table for the Applicant or for any other company. Accordingly, the Applicant cannot claim it had a legitimate expectation with respect to being awarded a contract. If there was no legitimate expectation then there can be no frustration of the same.

63. The Applicant's letter of 2nd May 2006 indicates that the Applicant was hoping against hope that it would be part of a joint venture with the Government and was making an unsolicited proposal (this not being the first time that it was making an unsolicited proposal) to be considered as a joint venture partner.

64. It is respectfully submitted that the facts, particularly the Applicant's letter of 2nd May 2006, fail to disclose an arguable case that the legitimate expectations of the Applicant were frustrated."

[117] Legitimate expectation may arise from a course of conduct[1] or from a stated policy or undertaking whether written or otherwise.[2]

[118] Some of the relevant learning as contained in JUDICIAL REVIEW OF ADMINISTRATIVE ACTION reads thus at paragraph 8-037:

> "The scope of the legitimate expectation has been the subject of intense discussion; it is still in the process of evolution. It is founded upon a basic principle of fairness that legitimate expectation ought not to be thwarted. The protection of legitimate expectation is at the root of the constitutional principle of the rule of law, which requires regularity, predictability, and certainty in government's dealings with the public."

[119] It continues at paragraph 8-046 as follows:

> "The terms of the representation by the decision maker (whether express or implied from past practice) must entitle the party to whom it is addressed to expect legitimately, one of two things:
>
> (1) that a hearing or other appropriate procedure will be afforded before the decision was made; or
>
> (2) that a benefit of a substantive nature will be granted or, if the person is already in receipt of the benefit, that it will be continued and not be substantially varied."

[120] Further, in R v BOARD OF INLAND REVENUE ex parte M.F.K. UNDERWRITING AGENCIES Ltd and others [1990] 1 ALL ER 91, 110 Bingham LJ re-stated the basic principles and then added the overriding element of fairness:

> "In so stating these requirements I do not, I hope, diminish or emasculate the valuable developing doctrine of legitimate expectation. If a public authority so conducts itself as to create a legitimate expectation that a certain course will be followed it would often be unfair if the authority were permitted to follow a different course to the detriment of one who entertained the expectation, particularly if he acted on it. If in private law a body would be in breach of contract in so acting or estopped from so acting a public authority should generally be in no better position. The doctrine of legitimate expectation is rooted in fairness. But fairness is not a one-way street. It imports the notion of equitableness, of fair and open dealing to which the authority is as much entitled as the citizen."

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[1] See: Marks v. Minister of Home Affairs [1984] 35 WIR 106; Mc Innes v. Onslov-Fane [1978] 3 ALL ER 211.

[2] Attorney General of Hong Kong v. Ng Yuen Shui [1983] 2 AC 629, Reg. v Secretary of State for the Home Department, Ex parte Ruddock [1987] 1 W.L.R 1482.

[121] As noted before, the law relating to legitimate expectation is in the process of evolution. That said, the Court accepts that the summary of the law in BLACKSTONE CIVIL PRACTICE 2003, as quoted by learned counsel for the Second Defendant, and further modified by R v. NORTH AND EAST DEVON HEALTH AUTHORITY, Exp. COUGHLAN [2001] QB 213 represents the law. Accordingly, the constituents as stated will be analysed. However, before this legal journey begins it is of some importance to re-state the basic or critical facts that operate. They are these: The Second Defendant required new generators and invited tender for the supply of such generators from five persons but only four supplied tenders. In the end, no tender was accepted and the generators were obtained by way of joint venture with the Fourth Defendant. Also critical is that Tenders Board Act the award of a contract under or pursuant to a tender did not rest with the Second Defendant but with the Tenders Board unless that public authority granted a waiver of that procedural requirement of which there was none.

REPRESENTATION OR EXPECTATION SOUGHT TO BE RELIED UPON MUST BE CLEAR UNAMBIGUOUS AND UNQUALIFIED

[122] It will be recalled that Edward Hadeed in his affidavit evidence deposed that Esworth Martin told him that Mr. Martin, and several of his colleagues were in full support of the Claimants quotation and tender and agreed that it was the best presented. For his part Martin does not deny that he made the representation. The differences lie in details. For according to him he said that he and some of his colleagues on the management team were impressed with the Claimants quotation but that at the end of the day it was the Tenders Board's decision as there was more than one quote.

[123] The other representation came from the General Manager who admitted that he told Edward Hadeed that his quote was the best on the table. But he added that it was his personal view. Edward Hadeed recall is different. He deposed that Chaku Symister told him that apart from being the best quote he was going to recommend it and also request a waiver. These differences hardly matter since according to Wade & Forsyth at page 655 judicial proceedings are "ill suited" to resolve factual disputes.

[124] Therefore, regardless of which ever version is accepted, can it be said that the representations were clear, unambiguous and unqualified. In this regard there are two facts which urge an answer in the negative. The first is that saying that a quote was the best when someone else has to make a final decision and also the fact that there were other quotes and even further there is no evidence as to how many quotes would go before the Tenders Board in these circumstances.

[125] The case of R v SECRETARY OF STATE FOR THE HOME DEPARTMENT ex p OLONILUGI [1989] Imm. A.R. 135 is instructive on the question of a clear and unambiguous representation to a single person. In this case an immigration officer represented to the application that based on the stamps in her passport and other factors, she would have no difficulty in gaining re-entry to Britain if she did leave. Relying on the representation the applicant left Britain and had difficulty on her attempt to return. Her application for judicial review based on legitimate expectation succeeded.

THE APPLICANT MUST BE WITHIN THE CLASS OF PERSONS ENTITLED TO RELY UPON THE REPRESENTATION OR ALTERNATIVELY IT MUST BE REASONABLE FOR THE APPLICANT TO RELY UPON IT

[126] That the Claimant falls within the class of persons entitled to rely on the representation is not in doubt given the fact that it was invited to tender and did tender for the supply of generators. But was the reliance reasonable?

[127] In the case of Esworth Martin, it is common ground that he is the Finance Manager of the Second Defendant. And while cost is one dimension of generators, the other aspect is of a highly technical nature. In this context learned counsel for the Fourth Defendant Mr. Dane Hamilton said that he was not qualified to deal with such matters and if he did he took a stroll in the woods.

[128] That said, Mr. Edward Hadeed was fully aware of Mr. Martin's position at the Second Defendant. For one thing at paragraph 14 of his affidavit of 1st June 2006 he deposed that he was at a meeting in Mr. Symister's Officer on 22nd March 2006 at which all the manager's, including Mr. Esworth Martin, were present. Then at paragraph 18 of the said

affidavit the said affiant deposes to conversations with the Financial Controller on 22nd April 2006.

[129] There can be no doubt that Mr. Edward Hadeed was fully aware also that Mr. Chaku Symister was the General Manager of the Second Defendant who was also present at the meeting of 22nd March 2006.

[130] In the context of the quotes this is what Mr. Symister deposed in his affidavit of 4th July 2006 at paragraphs 15 and 16:

> 15. At all times it was made absolutely clear to the Claimant that these discussions were exploratory and that the Second Defendant was not obligated to engage the Claimant or accept its quote.
>
> 16. At all material times the Claimant, more specifically Edward Hadeed acknowledged that the discussions were exploratory and that the Second Defendant was not bound by the same. In fact, Mr. Edward Hadeed at a meeting with the Second Defendant's Management Team on 4th April, 2006 in the presence of the Claimant's technician who had travelled from Lebanon and who had forgotten his hearing aid, and therefore had extreme difficulty in communicating, in addition to the language barrier, Edward Hadeed expressed the sentiment that his company recognized that the costs that it had incurred up to then was the cost of doing business."

[131] All of the foregoing stems from the letter from the Electricity Manager to Tony Hadeed dated December 13, 2005. It reads in part as follows:

> "Dear Mr. Hadeed
>
> Request for Quotation
>
> The Antigua Public Utilities (APUA) is presently reviewing its Generator Expansion needs and at this time wishes to gather certain information for budgetary and planning reasons. In this regard, the Authority hereby requests a budgetary proposal including delivery for an 'Engineering Procurement and Commission [EPC]' Turkey Contract for the supply of the following options at a green field site …."

[132] Concerning the representations this is what Lyndon Francis, the Electricity Manager deposes at paragraph 21 of his affidavit of 27th June 2006:

> "21. My report referred to in Paragraph 20 herein was disseminated to the General Manager of the Second Defendant on the very day[1] and as such I am astounded by the suggestions made by Mr. Edward Hadeed in paragraphs 19, 20, 21 and 22 of his Affidavit of 1st June 2006 for, it is inconceivable to think in light of such overwhelming evidence that the General Manager of the Second Defendant would have given the assurances alleged or at all".

[1] Being 11th April 2006

[133] For his part the General Manager contends that when he made the representations to Edward Hadeed he was not in possession of the Electrical Manager's report.

> THERE MUST USUALLY BE RELIANCE UPON THE REPRESENTATION TO THE DETRIMENT OF THE APPLICANT, ALTHOUGH THE CLAIMANT NEED NOT ALWAYS DEMONSTRATE DETRIMENT.

[134] It is the Claimant's case that it relied upon the representations and as such this gives rise to a legitimate expectation of being awarded the contract. What the Claimant has not done is to show the detriment suffered as a result of such reliance.

> THERE MUST BE NO OVERRIDING PUBLIC INTEREST WHICH WOULD ENTITLE THE RESPONDENT TO RENEGE FROM ITS REPRESENTATION.

[135] The leading case in this regard is R v NORTH AND EAST DEVON HEALTH AUTHORITY Ex parte COUGHLAN [2001] QB 213. The case concerns eligibility criteria published by the health authority relating to long term National Health Service Care based on guidance from the Department of Health. The applicant was disqualified after a determination that she did not meet the criteria. This came after the applicant had been initially assured that a certain health facility would be her home for life because of her long-term disablement.

[136] The decision to close the health facility was quashed and the was dismissed. The headnote reads in part thus:

> "That if a public body exercising a statutory function made a promise as to how it would behave in the future which induced a legitimate expectation of a benefit which was substantive, rather than merely procedural, to frustrate that expectation could be so unfair that it would amount to an abuse of power; that, in such circumstances, the court had to determine whether there was a sufficient overriding interest to justify a departure from what had previously been promised; that in view of the importance of the promise to the applicant, the fact that it was limited to a few individuals and that the consequences to the health authority of honouring it were likely to be financial only, the applicant had a legitimate expectation that the health authority would not resile from its promise unless there was an overreaching justification for doing so; and that, in the circumstances, including the fact that the quality of the alternative accommodation to be offered to the applicant was not known, the closure decision was an unjustified breach of that promise which constituted unfairness amounting to an abuse of power."

[137] One of the critical points about the case is that in those circumstances the matter of finance was not an overriding public interest.

[138] In HALMINDER SINGH ARORA v UNION OF INDIA [1986] 3 SCR 63, the Supreme Court of India states some well established propositions of law in relation to the power of the State to contract: The Government may contract with any person but in so doing the State or its instrumentalities cannot act arbitrarily. It is open to the State to adopt a policy different from the one in question.

[139] The instrumentalities referred to above must be an obvious reference to statutory organs of the State such as, in this case, the Public Utilities Authority. This organ, as noted above, is a creature of statute with a power to contract so that the same principles apply.

[140] Mr. Esworth Martin at paragraph 5 of his affidavit gave the following as the reasons for the change in policy from tender to supply generators to a joint venture to acquire them:

> "Armed with the unfavourable Sulzar engines report and given the fact that a subsequent inquiry to MAN B&W revealed that it was no longer able to provide the Second Defendant with engines in time for Cricket World Cup 2007 and faced with the deepening crisis in electricity generations with the short lead-up time to commission new engines coupled with the reality that the normal time span between placing an order for engines and delivery of the said engines being 12-18 months, the decision was taken that it was in the best interest of the Second Defendant and the entire nation of Antigua and Barbuda to enter into a Joint-Venture Agreement with the Fourth Defendant."

ANALYSIS

[141] There can be no doubt judicial review applies to a statutory power of a public authority to contract like any other power or discretion as it can be abused and as such give rise to illegalities. Therefore, legitimate expectation may be a ground upon which any action based on representations or undertakings given in the exercise of such power may be impugned.

[142] The distinguishing feature in this case is the fact that while there were representations concerning a certain tender which rests against the background of the intention to award a contract. However, in this case a change in policy resulted in no tender being accepted but yet the argument of legitimate expectation prevails. In other words, the legitimate expectation was that a contract would be awarded to the Claimant. But there was no such award to anyone.

[143] In many of the leading cases on tender with a view to the award of a contract, there was in fact an award of a contract. The challenge in such circumstances is therefore aimed at the process by which one tender or a higher tender is awarded over a lower tender, see: C.O. WILLIAMS CONSTRUCTION LIMITED v BLACKMAN AND ANOTHER [1994] 45 WIR 94.

[144] According to learned counsel for the Claimant Mr. Tony Astaphan, SC the Claimant's case is not about contractual rights but about imposing judicial review in order to achieve compliance with the law. With that submission there can be no dispute. What is critical is the imposition.

[145] This concession by the Claimant concerning rights is of immense importance having regard to some of the Claimant's submissions. The point is that while a right may be in issue, its existence is not a condition precedent to the grant of judicial review. What matters for judicial review purposes is at least sufficient interest.

[146] But if the Claimant's case is not about contractual right it must relate to the legal/factual matrix giving rise to a legitimate expectation. A Court never acts in vain and the further point is that the question of a contract to supply generators was abandoned. So the question then becomes whether or not a legitimate expectation can still subsist.

[147] In fact Mr. Dane Hamilton advances the argument that there is no tender in issue. The Court agrees having regard to the provisions of the TENDERS BOARD ACT.

[148] This necessitates a return to the five sub-heads which must be satisfied in order to gain protection under the head of legitimate expectation.

[149] Based on the evidence before the Court and incorporated into this judgment, except for the question of reliance on the representation, all the other sub-heads or constituents are negative.

[150] First, there is the requirement that the representation must be clear unambiguous and unqualified. To say to a person that your tender is the best on the table in the context of

other tenders cannot be unambiguous and clear. The added factor is that neither the Finance Manager nor the General Manager is vested with the authority to award the contract. Further still, the Tenders Board itself in awarding a contract is hemmed in by a number of complex rules so that it need not even accept the lowest bid. In this regard section 24 of the TENDERS BOARD ACT is instructive. It reads thus:

> "24. (1) After offers have been opened the Board or a committee shall, at such time or times as may be deemed necessary or expedient, consider the offers so received.
>
> (2) The Board shall after taking into account
>
> (a) the quality of the articles;
>
> (b) in the case of works or services, the financial technical and administrative competence of the persons making the offer;
>
> (c) the reasonableness of the prices being offered accept the lowest offer except where it has good reason to justify the acceptance of an offer higher than the lowest offer."

[151] The foregoing dictates a return to Mr. Hamilton's contention that there is no tender in issue. It is supported by a number of facts. First, section 20 of the TENDERS BOARD ACT the invitation to tender must come from the Tenders Board. Therefore, the request for quotations by the Second Defendant would be accurate. However at stage they are not tenders. In fact the invitation to tender must come from the Tenders Board. Secondly, the abandonment of the 'quotes' put the 'tenders' out of contention.

[152] The Court has not interpreted the requirement of reasonableness as importing *Wednesbury* reasonableness and the attempts to modify[1] its extreme threshold but merely as an objective test – a lower threshold (proportionality).

[153] On the basis of an objective test the evidence suggests overwhelming that it was totally unreasonable for the Claimant to rely on the representations made by the two functionaries employed by the Second Defendant. Additionally, the Court draws the reasonable inference that given the supplying of three quotations, by the Claimant and the interaction

[1] According to Wade & Forsyth, *op cit*, page 371. "The Wednesbury doctrine is now in terminal decline but the coup de grace has not yet fallen, despite calls for it from very high authorities. And see for example: R (DALY) v SOS FOR THE HOME DEPARTMENT [2002] 1 AC 532; R v. (ALCONBURY DEVELOPMENT LTD) v. SOS FOR THE ENVIRONMENT TRANSPORT AND THE REGIONS [2003] 2 AC 295.

by its officers with many of the functionaries employed by the Second Defendant, plus the Minister, at least Mr. Edward Hadeed would have known that it was unreasonable to rely on the representations. Also it may be that the Claimant's very late entry into the sphere of power generation and knowledge of engine manufacturers may have contributed to the unreasonableness of its reliance.

[154] Even further the Claimant, through Mr. Edward Hadeed, admits that he was advised that there were three other quotes.

[155] Therefore, given the Court's inference concerning Mr. Edward Hadeed's interaction with officers of the Second Defendant, it is reasonable to infer further that the Claimant was aware that established names such as Wartsila and MAN B&W had submitted quotations and of their track record in the manufacture of power generating equipment. In any event, the Claimant is deemed to know that by virtue of 24 (1) of the PUBLIC UTILITY ACT three material considerations of the Tenders Board in the acceptance of an offer are "… the financial, technical and administrative competence of the persons making the offer. Notwithstanding the absence of a tender, the foregoing must be stated as it was the Claimant's legitimate expectation that it would be awarded the contract which could not be lawfully awarded by anyone employed by the Second Defendant or even the Third Defendant. And, as a footnote, the Claimant was only incorporated on 10th March 2006.

[156] In relation to the requirement under consideration there is the added requirement that it must be reasonable for the applicant to rely on the representation. This must necessarily be in the negative.

[157] Finally, on the question of overriding public interest, the averment from the Finance Manager's affidavit speaks directly to this issue; and given the cogent reasons advanced it cannot be said that the change in policy is unreasonable, defies comprehension or is irrational. Fundamentally, however, the reasons advanced constitute an overriding public interest.

[158] The submissions advanced by learned counsel for the Claimant do not address the foregoing requirements.

[159] The submissions may be summarized as follows:

1. A substantive benefit can arise from an express representation and promise by a public authority.

2. Public authorities ought not to be allowed to resile from promises made of a substantive benefit.

3. The Claimant ought not to be allowed to repudiate the promises and representations and the implied contractual rights and legitimate expectations.

4. Public authorities, including Ministers, must exercise their powers fairly and transparently.

[160] The Court has no difficulty in understanding these submissions. Essentially, they point to fairness rather than to the technical criteria attached to legitimate expectation. In any event they do not shake the Second Defendant's submissions. The point must also be made that the entire question of legitimate expectation must be and has been considered in the context when it is claimed to have arisen and the circumstances giving rise to the claim still subsisted.

[161] Special mention is warranted in respect of the question of the State or its instrumentalities resulting from promises and representation. What is significant and critical in this case is the fact that the subject matter of the promise or representation disappeared with the change in policy which the authorities[1] recognize as part of the State's prerogative as with its statutory organs as prescribed by statute. No doubt depending on the particular facts a cause of action may arise.

[162] In all the circumstances and having regard to the law and the facts the Court agrees with the Defendants that the Claimant had no legitimate expectation of being awarded the contract to supply generators to the Second Defendant.

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[1] See for example: Regina v. North and East Devon Health Authority, Ex parte Coughlan, *supra*.

[163] It will be recalled that Bingham LJ in R v BOARD OF INLAND REVENUE Ex parte M.F.K. UNDERWRITING AGENCIES Ltd, *supra*, introduced the element of fairness into the legitimate expectation equation. That said, the question is: Was there fairness in relation to the Claimant?

[164] The answer to this question rests on three main issues: First as Mr. Dane Hamilton points out, no other person submitted three quotations. And it matters not that they were requested or otherwise. Secondly, in accordance with good business practice after certain decisions were taken the following was communicated to the Claimant by the General Manager of the Second Defendant:

> "Dear Mr. Hadeed,
>
> Please be advised that after careful deliberations and extended discussions and consideration the Antigua Public Utilities Authority regrets to inform you that it cannot accept your proposal to provide 2 x 4.3 MW Gen Sets at this time.
>
> The Authority wishes to thank you for the efforts extended in attempting to meet its needs. We wish you all the best in your endeavours.
>
> Respectfully yours,
>
> Leon Chaku Symister
> General Manager
>
> cc: Hon. Wilmoth Daniel – Minister of Works, Utilities, Transportation and Environment."

[165] In this regard Mr. Hamilton makes the further point that the letter in reality refers on the third quotation which is an indication that the parties were not ad idem. The third issue is that the Claimant made two presentations based on their quotes.

ISSUE NO. 3

WHETHER THE SECOND DEFENDANT AND/OR THE THIRD DEFENDANT ACTED UNLAWFULLY

[166] Judicial review is concerned with legality. And it is settled law since the case of COUNCIL OF CIVIL SERVANTS UNIONS v. MINISTER FOR THE CIVIL SERVICE (1984) 3 ALL ER 935 that the

three basic broad heads upon which such legality or otherwise can be determined by a review Court. They are: illegality, irrationality and procedural impropriety.

[167] The relevant extracts from Lord Diplock's speech in which he seeks to give a synopsis of the grounds of review are at pages 950-951:

> "By 'illegality' as a ground of review I mean that the decision maker must understand correctly the law that regulates his decision making power and give effect to it. Whether he has or not is par excellence a justiciable question to be decided.
> By 'irrationality' I mean what can now be succinctly referred to as 'Wednesbury unreasonableness. It applies to a decision that is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.
> I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice."

[168] Irrationality is a substantially comprehensive head and includes sub-heads such as: improper purpose, bad faith, fettering (restricting) on discretion, acting unreasonably and relevant/irrelevant considerations.

[169] It is against this wide spectrum of the law that the actions of the Second and Third Defendants must be examined.

SECOND DEFENDANT

[170] In the context of the matter the actions by and on behalf of the Second Defendant revolve around the following: The invitation to submit a quotation on generators with a view to entering into a certain contract, a change of that policy objective, the question of a waiver from the Tenders Board and the joint venture with the Fourth Defendant.

[171] It has already been established that section 8 of the PUBLIC UTILITIES ACT empowers the Public Utilities Act to enter into contracts. Therefore as such issuing invitation to submit a quotation with a view to entering into a contract is a necessary and cognate power of the Authority. In like manner, it has been noted that the State and its instrumentalities have

the power to change policy, see: HALMINDER SINGH ARORA v UNION OF INDIA (1986) *supra* and REGINA v. NORTH AND EAST DEVON HEALTH AUTHORITY, Ex parte COUGHLAN [2001] QB 213. Additionally, section 16 (3) of the INTERPRETATION ACT, CAP 224 provides that:

> "Where an enactment empowers any person or authority to do any act or thing, all such powers shall be deemed to be also given as are reasonably necessary to enable that person or authority to do that act or thing or as are incidental to the doing thereof."

[172] The syntax of the above provision leaves no doubt that the foregoing provision applies to the Authority and in particular to section 8 (1) of the PUBLIC UTILITIES ACT.

[173] The question of seeking a waiver from the provisions of the TENDERS BOARD ACT, CAP. 424A is governed by the new section 4 (2) of that Act with the power being vested in the Tenders Board. However, with a change in policy by the Second Defendant the need for such waiver fell into abeyance.

[174] In so far as the joint venture is concerned, this at the end of the day is a contract. However, there is the question whether such a transaction escapes the purview of the Tenders Board. The answer to this query rests on the definition 'statutory body" which in section 2 of the Act is defined as "any local government, commissioner, a body corporate established by an Act of Parliament and a company limited by liability of which the Government is the majority shareholder." It means therefore that, quite unusually, the jurisdiction of the regulatory or governing body is set out in a definition. The point is that jurisdiction is a substantive matter. However, the long title to the Act (not the preamble), being an aid to interpretation, does assist as it says that the TENDERS BOARD ACT is:

> "An act to establish a tenders Board for the procurement and supply of articles and materials; the award of contracts for the execution of works and the provision of services for the Government of Antigua and Barbuda, any corporate body established by an Act of Parliament or any company limited by liability in which the Government is the majority share-holder; and to do other things connected therewith."

[175] The affidavit evidence of the Finance Manager is also relevant. He deposes as follows at paragraphs 6 and 7 of his said affidavit:

> "I am informed by the Second Defendant's Solicitor and do verily believe that there is no legal requirement to seek the approval of the Tenders Board in the proposed Joint Venture

> Agreement as the parameters of the Agreement are such that APUA will become a minority shareholder in a private company which is soon to be formed, clearly placing the Joint Venture Agreement outside of the scope of the Tenders Board Act which is limited in application to Government, Statutory Corporations and to private companies where Government/the Statutory Corporation is the major shareholder.
>
> The scope of the Joint Venture is such that the Fourth Defendant will own 55% of the new company with the Second Defendant owning 45% of the new company. The Fourth Defendant has secured the availability of a new 17 MW Wartsila engine which is available immediately and is in a position to fully finance the same with the Second Defendant being indebted to the Fourth Defendant to the extent of 45% of the value of the amount financed. The Joint Venture will acquire a further 33.9 MW of power in the near future and the existing Power Purchase Agreement between the Second and Fourth Defendants will immediately terminate and be replaced by the Joint Venture Agreement on the same shareholdings ratio between the Second and Fourth Defendants."

[176] In all the legal circumstance it is the conclusion of the Court that the joint venture does not fall within the jurisdiction of the Tenders Board. This of course does not exclude judicial review.

[177] On the whole the Court determines that there is nothing in the evidence or in any submission by learned counsel for the Claimant which gives rise to any ground of judicial review mentioned above. In short, it is the determination by the Court that the Second Defendant's actions are *intra vires* the PUBLIC UTILITIES ACT and the TENDERS BOARD ACT.

THIRD DEFENDANT

[178] As far as the Third Defendant is concerned the evidence reveals that his actions are confined to the following: conversations with Edward Hadeed, statements on public radio and in Parliament alleged directions to the Second Defendant and acting in bad faith.

[179] The evidence is that Mr. Edward Hadeed and the Minister had an initial conversation in the context of a quest by the Authority to seek increased generating capacity. At the time the Authority fell within the portfolio of the Minister.

[180] According to Dr. Francis Alexis in, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION, "Informed action harms no good cause".[1] This was said in the context of an exposition on the law respecting abdication and dictation to convey the idea that a functionary, armed with a

[1] Doctoral thesis, Cambridge University (1980) at page 214

discretion, can solicit the opinions of others[1] as well as other information on the subject so long as he does not allow policy or a decision to be dictated to him. Concerning abdication the learned jurist says: "What an administrator may not do is to unlawfully abdicate his own discretion in favour of the view of others or succumb to the dictation of others." So that there can be no illegality if the Minister merely seeks information without attempting to exercise the powers of the Authority.

[181] The statements made by the Third Defendant have already been examined in terms of promises and representations and found wanting in that regard. Outside of that the Minister is free to speak on issues falling within his purview.

[182] The other matter is that of directions to the Second Defendant in terms of a decision with respect to the joint venture. The allegation comes indirectly in one instance and by way of hearsay evidence in another. For instance, Mr. Edward Hadeed at paragraph 22 of his affidavit of 1st June 2006 deposes that:

> "On 24th April 2006, at about 1:00 pm I made another telephone call to the General Manager of the Second Defendant Mr. Chaku Symister. During that telephone conversation Mr. Symister advised me that a decision was taken at a higher level to disregard offers made by all other companies and that the Second Defendant will be entering into a new joint venture proposal with the Fourth Defendant on a build own operate (BOOT) basis; as a result, the Second Defendant would no longer be purchasing their own generators but would be purchasing electricity from the Fourth Defendant."

[183] The Third Defendant's response to this allegation reads in this way:

> "10. Contrary to the statements and suggestions of Edward Hadeed, at no time did I ever usurp the authority of the Management team of the Second Defendant and substitute my own decision for the Second Defendant's decision. Further, at no time did I make the decision for the Second Defendant to entertain a Joint Venture with the Fourth Defendant. This proposal was brought before the Cabinet by the Management team of the Second Defendant and it was the Cabinet of Antigua and Barbuda that made the decision to embark upon this Joint Venture proposal as evidenced by the attached extracts of the Cabinet Minutes relating to the decision in question which are annexed hereto and marked "WD2"."

[184] In this regard the submission by the Claimant is that there is no evidence to support the contention that the decision regarding the joint venture was made by the Cabinet. The

[1] *Op* Cit, p.215

answer to that must be that a member of the Cabinet has given that evidence and it stands uncontradicted.

[185] The Claimant's further contention regarding the giving of directions by the Third Defendant appear to overlook the fact that by virtue of section 37 of the PUBLIC UTILITIES ACT the Minister is imbued with a power to give directions regarding policy and the Authority is mandated to give effect to such directions. However, the use of the word 'policy' connotes directions of a general character rather than of a specific character- what, but not by whom. In any event the Minister has said in evidence, in effect, he exercised no such power.

[186] It is of some importance to note that the evidence of Mr. Martin at paragraph 5 of his affidavit outlines the background and circumstances in which the decision was taken "… in the best interest of the Second Defendant and the entire nation of Antigua and Barbuda …."

[187] To say that the Third Defendant acted in bad faith is not a matter to be taken lightly. This stems from the jurisprudence developed in relation to this sub-head of irrationality or unreasonableness.

[188] One of the earliest cases on the subject is RONCARELLI v DUPLESSIS [1959] 6 DLR (2d) 689 which concerned the treatment of a particular religious sect by the then Premier of Queblic, Mr. Duplessis. In that case the Court equated the action taken with malice. Mr. Justice Rand posed this question: "What could be more malicious than to punish this licensee for having done what he had an absolute right to do in a matter utterly irrelevant to the Alcoholic Liquor Act?"

[189] De Smith, Woolf & Jowell[1] put the matter into its true perspective in administrative law in these terms:

> "Fundamental to the legitimacy of public decision-making is the principle that official decisions should not be infected with motives such as fraud (or dishonesty) malice or personal self-

[1] *Op Cit* @ paragraph 13-010

> interest. These motives which have the effect of distorting or unfairly biasing the decision-maker's approach to the subject of the decision, cause the decision to be taken in bad faith or for an improper purpose (the term 'improper' here bearing a connotation of moral impropriety). Some of the decisions based on bad faith will also violate the ground of illegality, as the offending motive may take the decision outside of the 'four corners' of the authorised power. Irrespective of whether this be so, any ingredient of bad faith may in itself cause a decision to be invalid."

[190] The short answer to any allegation on the part of the Third Defendant is that it has not been shown on the evidence that he took any decision which was tainted with malice, or for an improper purpose or bad faith. In fact, in his affidavit he deposed that he did not usurp the authority of the Management team of the Second Defendant and further that he did not make the decision regarding the joint venture. It has not been shown otherwise.

ISSUE NO. 4

WHETHER THE JOINT VENTURE AGREEMENT BETWEEN THE SECOND DEFENDANT AND FOURTH DEFENDANT IS LAWFUL

[191] This issue can be treated in short order as it falls fundamentally within the Authority's power to contract on the one hand and the Tenders Board lack of jurisdiction over the matter on the other.

[192] The Authority's power to enter into contracts, as contained in section 3 (1) of the PUBLIC UTILITIES ACT but it is to some extent circumscribed by section 2 of the TENDERS BOARD ACT.

[193] In this instance the company to be established pursuant to the agreement will have the Authority as a minority shareholder. Therefore, the Tenders Board is devoid of jurisdiction and the Authority's plenitude of power to enter into contracts plus all powers "as are reasonably necessary" to enable the Authority to enter into contracts or "as are incidental to the doing thereof."[1]

[194] On this issue, too, a fine point of statutory interpretation arises in relation to the definition "statutory board" as contained in section 2 of the TENDERS BOARD ACT. Under this

[1] See: INTERPRETATION ACT, CAP. 224, section 16 (3), *supra*

definition the Tenders Board has jurisdiction over *inter alia*, a body corporate established by an Act. This points to the Public Utilities Authority. But it also has jurisdiction over a company limited by liability if the Government is the majority shareholder. "Government" is defined to mean the Government of Antigua and Barbuda but under that Act and under the INTERPRETATION ACT. This excludes a body corporate in which the Authority is a shareholder and as such leaves the Authority free to roam. However, it is the view of the Court that the prevailing rule of statutory interpretation – purposive construction[1] can supply the omission of the legislature. So that it matters not that the shares in the new joint venture company are held by the Authority rather than the Government per se. In this way the clear legislative intent would not be frustrated. Some support for this conclusion or interpretation can be derived from Lord Templeman's speech in MERCURY LTD V ELECTRICITY CORPORATION OF NEW ZEALAND, *supra* at page 526 where he removes the statutory body and Government divide by saying that: "A state enterprise is a public body; its shares are held by ministers who are responsible to the House of Representatives and accountable to the electorate. The Defendant carries on its business in the interests of the public."

[195] It is therefore the conclusion of the Court that the joint venture agreement between the Second Defendant and the Fourth Defendant is lawful notwithstanding the fact that there may be a view it cannot achieve its stated objective of 'most significant benefit'.[2]

ISSUE NO.5

WHETHER THE APPPLICANT HAS SUFFICIENT INTEREST WITHIN THE MEANING OF PART 56.2 (1) OF CPR 2000

[196] The issue of 'sufficient interest' is not new. It is well traversed in public law and has its origins in the then English Rules of the Supreme Court Ord. 53, r. 3 (5) in relation to application for judicial review.

[1] See: Pepper v Hart [1993] 1 ALL ER 42, 50 per Lord Griffith. But for heavy body blows on the doctrine see: Robinson v SOS for Northern Ireland [2002] UKHL 32, 39 per Lord Hoffman.
[2] See Exhibit 'KPB4' annexed to the affidavit in reply of Kieron Pinard Byrne filed on 28th August 2006.

[197] Writing in the context of the English legislation, De Smith, Woolf and Jowell contend at paragraph 2-024 that:

> "It is clear that the term sufficient interest is being given a generous interpretation by the courts. They will assess the extent of the applicant's interest against all the factual and legal circumstances of the application. If the administrative action which the applicant wishes to challenge interferes directly with the applicant's personal or public rights or has adverse financial consequences for him then this will be an obvious case in which he will have standing. The statute which governs the administrative action which is the subject of the application may expressly or impliedly indicate that the applicant has an interest in the subject matter of the application."

[198] The learned authors continue at paragraph 2-036 in this way:

> " 'Sufficient interest' should therefore be regarded as being an extremely flexible test of standing. The more important the issue and the stronger the merits of the application, the more ready will the courts be to grant leave notwithstanding the limited personal involvement of the applicant; thus a reporter and the National Union of Journalists have been regarded as having sufficient interest to apply for judicial review to quash an order prohibiting the publication of a report of committal proceedings made by magistrates under the Contempt of Court Act 1981. The prohibition interfered with the freedom of the press. A person whose telephone was taped, but not someone who had telephoned him, can seek judicial review of a possible warrant issued by the Secretary of State authorizing the interception of communications."

[199] The prevailing jurisprudence on the matter of standing in this context rests on the House of Lords decision of INLAND REVENUE COMMISSIONERS v NATIONAL FEDERATION OF SELF EMPLOYED AND SMALL BUSINESSES Ltd [1981] 2 W.L.R 722. In this case, the respondent sought leave to apply for judicial review with respect to a certain amnesty granted by the Inland Revenue to a group of workers with respect to non-payment of taxes over a period.

[200] In reversing the lower Court's decision to grant the respondent leave to seek judicial review, the House of Lords held as follows: "Looking at the matter as a whole, the Divisional Court although justified on the ex parte application in granting leave, ought, having regard to the nature of 'the matter' raised ought to have found that the federation merely as a body of taxpayers had shown no sufficient interest in that matter to justify its application for relief, the federation had completely failed to show any conduct of the revenue that was ultra vires or unlawful the federation, having failed to show any grounds for believing that the revenue had failed to do its statutory duty, had not shown an interest sufficient in law to justify any further proceedings by the court on its application".

[201] The following dicta from the Lord Diplock's speech reflect the current jurisprudential position in so far as 'sufficient interest' is concerned. First at page 739 he said this:

> "The need for leave to start proceedings for remedies in public law is not new. It applied previously to applications for prerogative orders, though not to civil actions for injunctions or declarations. Its purpose is to prevent the time of the Court being wasted by busy bodies 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 actively misconceived".

[202] And later on the same page His Lordship continued thus:

> "My Lords, at the threshold stage, for the federation to make out a prima facie case of reasonable suspicion that the board is showing a discriminatory leniency to a substantial class of taxpayers had done so for ulterior reasons extraneous to good management, and thereby deprived the national exchequer of considerable sums of money, constituted what was in my view reason enough for the Divisional Court to consider that the federation or, for that matter, any taxpayer, had a sufficient interest to apply to have the question whether the board was acting ultra vires reviewed by the Court. The whole purpose of requiring leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage. If, on a quick perusal of the material then available, the Court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief. The discretion that the Court is exercising at this stage is not the same as that which it is called upon to exercise when all the evidence is in and the matter has been fully argued at the hearing of the application".

[203] Lord Wilberforce in the same case elaborates further on the legal methodology:

> "... it will be necessary to consider the powers or the duties in law if those against whom the relief is asked, the position of the applicant in relation to those powers and duties, and the breach of those said to have been committed. In other words, the question of sufficient interest cannot be taken together with the legal and factual context .... This, in the present case, necessarily involves the whole question of the duties of the Inland Revenue and the breaches or failure of those of which the Federation complains".

[204] In CHIEF IMMIGRATION OFFICER OF THE BRITISH VIRGIN ISLANDS v BURNETT [1995] 50 WIR 153, Floissac CJ came to this conclusion:

> "A complainant will be held to have locus standi by way of relevant or sufficient interest in an factual or intended decision or action of a public authority if the decision or action disappointed or threatens to disappoint the complainant's legitimate expectation that certain benefits or privileges will be granted to him or that certain rules of natural justice or fairness would be observed in relation to him before the decision or action is taken."

[205] Therefore, it is now noted in ADMINISTRATIVE LAW (9th ed.) by Wade & Forsyth at page 656 that: "A necessary first step is to obtain leave of the court, which will be granted only if an arguable case is shown". In support of this proposition the case of R v INCOME TAX SPECIAL

COMMISSIONER exp. STIPPLECHOICE Ltd [1985] 2 ALL ER is cited. And in this case the Court held that the applicant company had shown a good arguable case that the information on which the Revenue had relied before the Commissioner could not reasonably lead to the conclusion that it had ceased to trade on the relevant date.

[206] Similarly in R v SECRETARY OF STATE FOR THE HOME DEPARTMENT exp. SWATI [1986] 1 WLR 477 the threshold of 'an arguable case' was also applied. And in the circumstances the Court held that there was nothing in the facts or in the evidence to justify the conclusion that the immigration officer's decision [to refuse entry] was unreasonable.

[207] The basic circumstances in which the Claimant became involved in the matter of generators and the electricity supply in Antigua and Barbuda and its involvement in this connection with officers of the Second Defendant and the Third Defendant were outlined above. In addition the Court considers that the following extracts from the affidavit of Edward Hadeed, sworn to and filed on 1st June 2006, to be important and as such must be re-stated with respect to the question of an arguable case:

> "22. On 24th April 2006, at about 1:00 pm I made another telephone call to the General Manager of the Second Defendant Mr. Chaku Symister. During that telephone conversation Mr. Symister advised me that a decision was taken at a higher level to disregard offers made by all other companies and that the Second Defendant will be entering into a new joint venture proposal with the Fourth Defendant on a build own operate (BOOT) basis, as a result, the Second Defendant would no longer be purchasing their own generators but would be purchasing electricity from the Fourth Defendant.
>
> 23. I was very disturbed by what was said to me by the General Manager of the Second Defendant for a number of reasons. First, the Fourth Defendant was not asked to participate in the process as the intention was for the Second Defendant to buy its own generators from other suppliers. Second, we were told the Second Defendant would recommend that that the contract be awarded to the Claimant and an exemption requested from the Tenders Board and, third, the basis of the proposed or intended contract which the Fourth Defendant were on materially different terms to those offered to the Claimant. The Claimant was never given an opportunity to submit any quotation/tender in relation to those terms.
>
> 24. Fourth, the Third Defendant had repeatedly stated publicly that good governance and indeed the public interest required that companies other than the Fourth Defendant participate in the supply of electricity to the Second Defendant and Courtney. Now, in what appears to be a most naked volte face, the Third Defendant reneged on the public statements when he, without any prior consultation, notification, or tender, instructed the Second Defendant that the contract not be awarded to the Claimant and that the Second Defendant enter into a BOOT arrangement with the Fourth Defendant. The

BOOT arrangement with the Fourth Defendant is for the supply of 17.5 mega watts of power".

[208] In his submissions in support of application for leave, Mr. Tony Astaphan, SC advanced the following:

"3. The Claimant submits that there is no question that its application is not "*misguided or trivial".* On the contrary it is the case for the Claimant that its application has raised more than "*an arguable case*" in relation to;

(i) Its rights or legitimate expectation of a substantive benefit created by the express representations and promises made to it by the second and/or Third Defendants.

(ii) Its compliance with the criteria required for the tender and contract for the supply of generators by and to the satisfaction of the Second Defendant.

(iii) The unequivocal nature of the express representations and/or promises made to the Claimant by the Second Defendant.

(iv) The clear and unequivocal representations made to officers of the Claimant by the Third Defendant as to the intended process to be used for the purchase of generators and supply of electricity.

(v) The publicly stated policy of the Third Defendant regarding the need to diversify the supply and suppliers of electricity and move away from the supply by the Fourth Defendant.

(vi) The reliance placed by the Claimant on the said representations and/or promises made by the Second Defendant and representations and publicly states ministerial policy made by the Third Defendant to its obvious detriment.

(vii) The violation or breach of the Claimant's rights and/or legitimate expectation of a substantive benefit caused by the unilateral and unlawful acts of Third Defendant.

(viii) The violation or breach of the Claimant's rights and/or legitimate expectation of a substantive benefit caused by the Second Defendant's failure to (a) seek an exemption under the provisions of section 20 as amended by The Tenders Board Amendment Act No 8 of 2002 and (b) grant the promised contract to the Claimant.

(ix) The obligations of the Second and Third Defendants as public authorities and/or fiduciaries to act fairly and in accordance with promises made and the law.

(x) The Third Defendant's bad faith.

(xi) Its entitlement to the relief claimed and damages.

4. It is also the Claimant's contention that in view of all the facts and law before the Court at this stage it is entitled to the interim remedies sought by it. Any other course of action would cause it irreparable harm".

[209] On behalf of the Second Defendant, and by adoption the First, Third and Fourth Defendants, Mr. Jerry Watt, QC tendered the following submissions:

> "4. While we do agree that the Applicant must raise an 'arguable case', we respectfully submit that the Applicant must by its affidavit present evidence clearly show not only that its case is not 'misguided or trivial' but it must also show that there are prima facie grounds that the decision made by the Second Defendant not to proceed to award a contract for the purchase of generating equipment to the Applicant – or indeed to forward its quotations and/or proposals to the Tenders Board – was invalid. In so doing it must show an arguable case with respect to one of the following (a) Illegality, (b) Irrationality, and (c) Procedural impropriety.

The submissions end in this way:

> "It is respectfully submitted that the Applicant has failed to show an arguable case that the actions of any of the Defendants was tainted by (i) illegality, (2) irrationality (bad faith, Wednesbury unreasonableness, failure to take into account relevant matters, or abuse of power/frustration of legitimate expectations) or (3) procedural impropriety. Having failed to do so the Applicant's application ought to be denied."[1]

ANALYSIS

[210] In terms of application to seek judicial review, the statutory requirement of 'sufficient interest', from the NATIONAL FEDERATION case onwards,[2] the Courts have interpreted this requirement to mean that the Applicant must show a prima facie case, or an arguable case. And the fact that Lord Diplock in the NATIONAL FEDERATION case explained that the need for leave has as its purpose the prevention of the Court's time being wasted 'by busybodies with misguided or trivial complaints' at the threshold stage. Also of some considerable significance in this regard is the fact that under Part 56.4 (1) and (2), an application for leave must be heard "forthwith" and in so doing the Judge may grant such leave "without hearing the applicant".

[211] However, it is not sufficient for an officer of the Claimant merely to swear a number of affidavits which then lead to a prima facie or arguable base. This must, as always, be seen in the legislative and factual context.

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[1] The submissions advanced on behalf of the Second Defendant/Respondent were adopted by the First and Third Defendants/Respondents and also by the Fourth Defendant/Respondent.

[2] See: R v Secretary of State for the Home Department exp. Swati and R v. Commissioner for Special Purposes of the Income Tax Acts exp. Stipplechoice Ltd, supra.

[212] The following summary in BLACKSTONE'S CIVIL PRACTICE 2001 at paragraph 74.30 with respect to standing is critical at this stage. It reads thus:

> " The test for deciding whether a claimant has sufficient interest was considered by the House of Lords in *R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617. The court held that not only was standing a ground in itself upon which permission could be refused, it should also be considered at the substantive hearing after the relevant law and facts were examined in full. The court added that there are different tests for standing at the permission and the substantive stages. At the former stage it is merely a 'threshold' question for the court, designed to weed out frivolous or vexatious cases. However, at the substantive hearing the claimant must be able to show a strong case on the merits, judged in relation to the claimant's own concern with the subject matter of the claim (*R v Monopolies and Mergers Commission, ex parte Argyll Group plc* [1986] 1 WLR 763). Since R v *Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Businesses Ltd*, the courts have adopted a broad and flexible approach to this test. The more important the issue and the stronger the merits of the claim, the more ready will the courts be to grant permission, notwithstanding the limited personal involvement of the claimant."

[213] The basic legislative context is that the Second Defendant is a body established by the PUBLIC UTILITIES ACT, Cap. 359.[1] It has power to contract and it has the "exclusive right to generate, distribute, supply and sell electricity within Antigua and Barbuda and to perform services incidental thereto"[2]. Further, the Authority may give written permission to person to generate and supply electricity at any place within Antigua and Barbuda.[3] On the other hand, the Third Defendant has legal and constitutional responsibility for the said Authority.

[214] As outlined above, the Claimant's case is that it had certain interactions with the Second and Third Defendants concerning the supply of generators. Further, that certain representations were made to it concerning a contract. However, in the end it was not awarded any such contract.

CONCLUSION

[215] The prevailing rules mandate that the matter of standing by way of sufficient interest must be determined as the final issue rather than as a preliminary issue. On that basis the Court has analysed a number of issues raised by the Claimant with the following results: 1. The

[1] Section 3 (1)
[2] Section 5 (1)
[3] Section 5 (2)

issue of an implied contract is not part of the fabric of judicial review. Further, even with an implied contract the fundamentals in this regard must be present which they are not in this case. 2. The Claimant had no legitimate expectation that it will be awarded a contract to supply generators based on representations by officers of the Second Defendant or of the Third Defendant since, inter alia, it was unreasonable to rely on such representations. 3. Neither the Second Defendant nor the Third Defendant acted unlawfully in relation the quotations sought with respect to the purchase of generators. 4. The joint venture agreement does not fall within the jurisdictional purview of the Tenders Board and the joint venture agreement between the Second Defendant and the Third Defendant is lawful.

[216] The Court therefore agrees with learned senior counsel, Mr. Jerry Watt, QC that : "There is nothing put forward by the Claimant that can bring the Court to a finding that the actions of the Second Defendant or Third Defendant fall within the law in relation to the grounds of judicial review as set out by Lord Diplock in the CCSU case.

[217] It is therefore the conclusion of the Court that the Claimant does not have sufficient interest to make application for judicial review in these proceedings as it was unable to show a strong case on the merits.

[218] On the matter of costs which necessarily follows, it is noted that the rule is that where a person seeks to enforce his rights costs are not usually awarded. This case falls within that matrix but it has the added feature in that damages on the footing of aggravated and exemplary damages are claimed.

ORDER

[219] IT IS HEREBY ORDERED as follows:

1. The application by the Claimant for judicial review is dismissed.
2. The Claimant must pay the Defendants' costs either to be agreed or in default of agreement in accordance with Part 65.5 of CPR 2000.

[220] The Court wishes to record its deep appreciation for the research and the high level of advocacy in this case by learned counsel on all sides.

Errol L. Thomas
Judge

ADDENDUM

[221] The matter of inviting tenders is a fundamental import in the context of the entire Governmental structure. Added to that is the fact that this case bears a novel point. For these reasons the numerous Commonwealth authorities on this issue and kindred issues cited by learned counsel on all sides are contained in the APPENDIX to this judgment in the interest of scholarship and future guidance.