IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

IN THE COLONY OF

MONTSERRAT

(Civil)

CASE NO: MNIHCV2013/0015

BETWEEN:

EMMANUEL GALLOWAY
ADRIAN GALLOWAY
CLAYTON WEEKS
Trading as the Galloway Group **Claimants**

And

THE MINISTER OF COMMUNICATIONS WORKS AND LABOUR
THE ATTORNEY GENERAL
THE PUBLIC PROCUREMENT BOARD **Defendants**

Appearances:

Mr. Jean Kelsick for the Claimants, assisted by Mr. Mc Gregor
Miss Jamiel Greenaway and Mrs. Jemmotte-Rodney with her

2015 April 20 : November 06
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[1] **Redhead, J. (Ag):** This is an Application by the Claimants for judicial review which stems from the procurement of a dredging contract of the Plymouth Harbour, Montserrat.

[2] The background facts and circumstances which give rise to this application are that on or about the 16th October 2012 the Government of Montserrat (GoM) entered into a contract with Iceland Drilling Company to provide drilling services of a Geothermal field at St. Georges Hill Montserrat.

[3] It subsequently transpired that the harbour at Plymouth required to be dredged in order to accommodate the berthing of ships transporting drilling equipment of the Iceland Drilling Company, to Montserrat.

[4] On or about 11th December 2012, the first named defendant advertised a contract opportunity for the dredging of the Plymouth Harbour. The notice which appeared on the GoM website invited tenderers to submit bids by the 18th December 2012.

[5] The Claimants contend that the period for the preparation of tenders were exemplarily short.

[6] On the 18th December 2012 the Claimants submitted a tender in response to an advertised contract on the GoM website. There were only two bidders for the dredging of the Plymouth harbour, the Claimant and Wall Trading Ltd (Wall).

[7] The Claimants' bid was for $3,960,000.00 while Wall's bid was for $470,000.00 on the 28th December 2012, the Department cancelled both bids. Then subsequently on the 7th January 2013, the first Defendant granted the contract to Wall to dredge the Plymouth Jetty.

[8] The Claimants seek the following orders

(a) A declaration that the original procurement was:

(i) Unlawful and irrational and/or unfair and/or in breach of the Claimants' legitimate expectations;

(ii) In contravention of the Procurement Regulations;

(iii) In breach of the Defendants' Statutory duties

(b) A declaration that the defendant manifestly erred in identifying Wall as the lowest priced tender in terms of the original procurement exercise.

(c) A declaration that the first defendant's decision on or about the 7th January 2013 to enter directly into a contract with Wall was:-

(i) Unlawful and/or irrational and/or unfair or in breach of the Claimants' Legitimate expectations;

(ii) In contravention of the Procurement Regulations

(iii) In breach of the Defendants' Statutory duties

(d) Damages

(e) Cost

(f) Such other relief as the Court deems appropriate

[9] Learned Counsel for the Defendants, Miss Greenaway, in her skeleton arguments submits: "also to be considered is whether the proper parties to the claim for judicial review are before the Court in this matter."

[10] Learned Counsel, Mr. Kelsick, argues that the proper Defendants are before the Court for the following reasons:

(i) The First Defendant made all the key decisions in the present case.

(ii) The Defendants acknowledge in their pre-trial memorandum that after the termination of the original procurement exercise, the First Defendant… "Still required the execution of the dredging works."

(iii) Mr. Kelsick also pointed to the fact that the memorandum states that the First Defendant "Negotiated with the relevant specialized contractors…" and "made an award to Wall Trading Ltd."

(iv) Mrs. Beverley Mendes in cross examination accepted that the First Defendant was intimately involved in the decision making process in both the abortive procurement exercise and the direct award to Wall

[11] Ms. Greenaway Learned Counsel for the Defendants contends otherwise. In her skeleton argument she submits "…that at no point did the first defendant have a role to play in the award of the contract."

[12] She also contends that the evidence does not reveal that at anytime the First Defendant played a role in the award of the contract. In fact, what the evidence does reveal is that the Permanent Secretary of the Ministry was the party who exchanged correspondence with Wall Trading Ltd. and ultimately signed the contract with Wall Trading Ltd. for the dredging at Plymouth Jetty, according to Miss Greenaway.

[13] Unfortunately, for Learned Counsel to make such submission shows a lack of appreciation that in such situation, ultimate responsibility rests with the Minister.

[14] Ms. Greenaway argues that if the First Defendant was involved in the procurement process, his involvement would have been improper given his lack of statutory authority. Learned Counsel contends that Cabinet was the body that made that decision that the Financial Secretary of the Ministry of Finance, the Permanent Secretary of the Ministry of Communications, Works and Labour and the Director of the Public Works Department were to negotiate with the relevant specialized contractors to ensure the dredging of Plymouth Jetty was completed.

[15] I ask the question, is not Public Works Department the same as Communication and works, for which the First Defendant is the Minister?

[16] Indeed, Philip Chambers Permanent Secretary in the Ministry of Communications and Works signed on behalf of the GoM.

[17] Learned Counsel Mr. Kelsick in his written submission argues that the cabinet direction authorized "The Financial Secretary supported by the Permanent Secretary Communications and Works and the Director of Public Works to negotiate with the relevant specialized contractors." Cabinet's decision was implemented jointly by Ron Beardsley as Director and Phillip Chambers as Permanent Secretary. The First Defendant as the Minister of their department is responsible and liable for their actions.

[18] In my view there can not be any argument against that view.

[19] In **Carltona Ltd v Commissioner of Works**[1]

Lord Green M.R reminds us:-

> "The duties imposed upon Minister and the powers given to Ministers are normally exercised under the authority of the Ministers by responsible officials of the department. Public business could not be carried on if this were not the case. Constitutionally, the decision of such an official is of course, the decision of the Minister. The Minister is responsible, it is he who must answer before Parliament for anything that his officials have done under his authority."

(See also Quorum Island (BVI) Ltd v Virgin Islands Environmental Council[2]

[20] Mr. Kelsick argues that the First Defendant entered into negotiations and concluded the contract that is ultimately challenged. The Claimants contend that the actions of the First Defendant were unlawful and irrational. In these circumstances it is competent to seek judicial review of the actions of the Minister.

[21] The Third Defendant is a correct party in relation to the original procurement exercise. The Public Procurement Board has responsibility for the conduct of the underlining procurement exercise.

[22] Learned Counsel for the Claimants contends that to the extent that the ultimate responsibility for both decisions rests with the cabinet, the Attorney General is the correct party to be cited in the proceedings.

[23] In fact in our Courts there are replete examples that when the Government is sued the Attorney General by virtue of the fact that he is the legal representative of the government, he is named as a party. See for e.g. **The Prime Minister and Juno Samuel v Sir Gerald Watt KCN Q.C.**[3]

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[1] 1943 2 All ER 560 at page 563 b-c
[2] HCVAP/2009/2 Court of Appeal
[3] ANUHCAP2012/0005 AN Antigua and Barbuda para 33

[24] **In Richard Frederick and another v Comptroller of Customs[4].** The Court of Appeal made the pronouncement at paragraph 34, Janice George Creque as she then was and Justice of Appeal instructs us that:- "What is clear is that a claim form seeking constitutional relief must be served on the Attorney General. This, however, does not preclude to other persons being joined as defendants. That is also clear from the general tenor of CPR 56. The case law of this jurisdiction is replete with such examples.

In the instant case the acts complained of are those of the Comptroller of Customs. Even if the Comptroller was not named and served as a party, power is given to the Court to direct that he be heard."

[25] Mr. Kelsick contends that even if the wrong parties have been cited, having regard to the courts powers, under CPR 56 this would not prohibit the court from adjudicating on the relevant matters outlined in these written submissions.

While I agree with the submission that under CPR 56 the Court has wide powers, I have great difficulty in coming to the conclusion that the Court could make any order against any party who is not before the Court as a named party in the proceedings.

It should be noted that in the **Quorum Island case** the Court of Appeal Substituted the Minister for the Attorney General during the hearing of the appeal.

[26] I humbly agree that the Court of Appeal, could do so and orders made from the time of substitution could be made against the minister and not the Attorney General. From the time she became a party to the proceedings orders could be made against her.

[27] In any event having regard to the foregoing, I entertain absolutely no doubt that the Defendants are the proper party to these proceedings.

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Mr. Kelsick in his written skeleton arguments makes the obvious point that the Procurement Regulations did not award the contract to Wall to dredge the Plymouth Harbour. Regulations 20 (1) provides:

> "A procuring entity shall subject to sub regulation (2) use of public tendering for the procurement of goods, construction and service.
>
> 21 (1) "A procuring entity may engage in procurement by means of restricted tendering in accordance with this regulation when -
>
> (a) The goods, construction or service by reason of its highly complex or specialized nature, is available only from a limited number of suppliers or contractors;
>
> (b) The estimated cost of the procurement contractor is below $20,000.00 or
>
> (c) The time and cost required to examine a large number of tenders would be disproportionate to the value of the goods, construction or service to be procured.

[28] **Open Tendering**

> (2) "A procuring entity may use a method of procurement other than open tendering proceedings in accordance with regulations 21, 22 and 23 and shall include in the record kept under regulation 9 of a Statement of the grounds and circumstances on which it relies to justify the use of that particular method of procurement"

[29] "Open Tendering" is defined in Regulations as involving… publicly publishing a request or invitation for tenders and considering all submissions received in response to the invitation."

[30] Mr. Kelsick contends that this is the normal method that should be utilized, unless Regulations 21, 22 and 23 cannot be invoked. Learned Counsel for the Claimants argues that the present case, the dredging solution that was implemented by Wall was not highly complex or technical. It simply involved dredging the material and depositing it in deeper water.

[31] I agree that open tendering should be utilized as in the present case. Regulations 21, 22 and 23 cannot be invoked.

[32] I agree with Mr. Kelsick, Regulations 20 (2) 21, 22 and 23 cannot be relied on. Therefore, the Defendants were obliged to conduct a procurement exercise that complied with open tendering requirements of the Procurement Regulations, such a procurement exercise would have required, as an absolute minimum, an invitation to tender and to be published in the appropriate forums. In that regard tender documentation should have been produced and an appropriate time table should have been set for interested parties to submit tenders; Mr. Kelsick contends that none of this was done.

[33] I now examine the award of the contract to Wall to dredge the Plymouth Jetty. There were two bidders, which were the Claimants and Wall whose initial bid was for $470,000.00 while the Claimants' bid was $3,960,000.00.

[34] On 28th December, Phillip Chambers, Permanent Secretary of the 1st Defendant wrote to both tenderers informing them that their tenders had been unsuccessful. The letter said among other things "Thank you for responding to our invitation, we look forward to your continued participation." On or about 3rd January 2013, The Cabinet of Montserrat gave an order to the Financial Secretary and the Director of Public Works "to negotiate with the relevant specialized contractors to ensure that the dredging of Port Plymouth takes place prior to the arrival of the Drilling Rig for the Geothermal exploration Project."

[35] In my considered opinion, The Cabinet would have no legal basis for making such an order, especially if it was meant to abrogate the Procurement Regulation, as it seems the case following the subsequent action of the first Defendant.

[36] 20 (1) mandates:- A procurement entity shall subject to sub-regulation (2) use public tendering for the procurement of goods construction and services.

[37] In my opinion, sub-regulation (2) is inappropriate to the case at bar.

[38] Following the cancellation of the Procurement exercise, the 1st Defendant contacted the Iceland Drilling Company to see if they could perform the required dredging works. I ask why? The answer seems to me that there was a deliberate attempt to keep out the Claimants; again, I ask why? It seems to me that by the evidence the Claimants were competent to perform the drilling of the Plymouth Harbour.

[39] It is my view that there are lots of strange and unexplained dealings surrounding the granting of the contract to Wall to dredge the Plymouth harbour. I refer to them hereunder.

[40] As between Wall and the Claimants, in my view, the Claimants were more qualified than Wall to undertake the project. As a matter of fact it is questionable whether Wall was capable of undertaking the dredging of the Plymouth harbour. This is borne out by the fact that Wall would sublet the dredging to another company that is "First Aquatic Solutions" of St. Maarten. And then on 3rd January in an email named its subcontractor as St. Kitts Marine Works. Moreover Wall's letterhead states that it is a Company that acts as:- " Shipping agents, brokers, suppliers of concrete aggregates, trucking and heavy equipment rentals". The Claimants on the other hand are Civil Engineers and Building Contractors with many years of experience.

[41] The Procurement Authority and the Government would have known that Wall was subcontracting the drilling of the Plymouth harbour.

[42] In an affidavit filed by Ron Beardsley, Director in the Ministry of Works and Labour at the relevant time, at paragraph 68 thereof deposed:

> "Given the fact that Wall Trading Ltd. was the only company in Montserrat who had undertaken dredging work in Montserrat, they were asked to submit a proposal for the dredging of the Plymouth Jetty and they submitted a proposal…"

[43] Learned Counsel for the Claimants, contends that no credible explanation is provided in the Defendants' affidavit as to why preferential treatment was given to Wall apart from Ron Beardsley at paragraph 68 in his affidavit.

[44] He says that Ron Beardsley's affidavit is not credible. At the time Wall was approached, Ron Beardsley and/or the first Defendant had in their possession an application made by Wall for contractors all risk in insurance cover respecting the dredging operations. In that application Wall named "Aquatic Solutions" – St. Maarten as subcontractors.

[45] Moreover in Wall's email answer to the request to submit a tender it stated that "It is in a work-relationship with St. Kitts Marine Work Ltd. to achieve the proposed task".

[46] Mr. Kelsick submits that as Ron Beardsley was aware of Wall's need to sub-contract the dredging work, his affidavit evidence lacks credibility in as much as Wall was subcontracting the work, suggests it lacked the necessary skill to perform the task itself.

[47] In my opinion even if Ron Beardsley's affidavit is credible, that does not give any justification to the Defendants to deal with Wall alone and in what appears to be in a clandestine manner. Learned Counsel, Mr. Kelsick contends that, in view of the abortive procurement exercise the 1st Defendant knew or clearly ought to have known that there were two parties that were interested in the Dredging, the failure to invite tenders from both Wall and the Claimants was entirely unjustifiable and a breach of the most basic requirements of natural justice and procedural and substantive fairness.

[48] Ms. Greenaway in her written submissions argues that once the tenders for the original procurement were rejected any statutory duties owed to the Claimants in respect of the original procurement ceased.

[49] Ms. Greenaway also argues that it was not until 8th November 2012, that the Iceland Dredging Company provided the procuring entity with the necessary depths for the Ship to dock at Plymouth Jetty. On the 8th, December 2012, the Iceland Dredging company

indicated that the ship would arrive in Montserrat in the middle of January 2013 and on 10th December 2012, the Iceland Dredging Company submitted to the procuring entity new depth requirement for the ship to dock at Plymouth.

[50] Learned Counsel, Ms. Greenaway argues that considering the time within which the ship was scheduled to arrive and the requirement for the Plymouth Jetty to be dredged to facilitate the berthing of the ship, the procuring entity again published an invitation to tenders on 10th December 2012.

[51] Ms. Greenaway contends that the completion time and cost of undertaking the dredging outlined in the two tender Submissions which were received exceeded that which was anticipated by the procuring entity, hence, the procuring entity decided to reject the tenders in accordance with regulation 34.

[52] According to Ms. Greenaway this ended the procurement process and ceased any duty owed to the Claimants in relation to the procurement process which was commenced by the invitation to tender.

[53] Learned Counsel for the Defendants argues that; "it must be noted that the procuring entity did not merely decide to disregard the Procurement Regulations. In light of the fact that the two previous invitations to tender yielded no results, a decision had to be taken with the limited period of time remaining to avoid serious financial loss to the Government of Montserrat". I have difficulty in understanding this argument.

[54] Ms. Greenaway argues that the cost of delay to the Government in the event that the dredging was not completed on time and the ship could not dock was a demurrage fee of US$10,800.00 per day or EC$27,699.00 per day.

[55] Learned Counsel for the Claimants disputes this assertion by Ms. Greenaway. Mr. Kelsick contends that the contract between the Government of Montserrat and the Iceland Drilling Company does not contain a binding obligation on the part of the Government to pay

damage if the depth of the Plymouth Harbour prevented a ship chartered by Iceland Drilling Company from docking at the Harbour. The assertion by the Defendants that the Government of Montserrat would be liable to pay EC$93,743.91 if the harbour is not dredged before the arrival of the ship, is not supported by the contractual document lodged.

[56] Learned Counsel, Ms Greenaway, argues to avoid such financial loss the procuring entity only had approximately one month from the date of the submission and the estimated arrival date of the ship within which to ensure that the jetty was dredged. Further that, after the rejection of tenders and the cancelation of the tender process, the procuring entity only had approximately two weeks within which to ensure that the jetty was dredged.

[57] Accordingly there was no time to embark on a new tender process as this was not feasible according to Ms. Greenaway. It is beyond doubt that no procurement exercise was involved in the award of the contract to Wall. In other words no public tendering process was conducted.

[58] Mr. Kelsick Learned Counsel for the Claimants argues that it is unclear when private negotiations between the 1st Defendants and Wall began.

[59] It is noteworthy, he contends that Wall submitted a new proposal at 07:59 on 3rd January 2013. According to Mr. Kelsick that was a significant document that would have taken some time to prepare; contact had clearly been made by Wall with a new sub-contractor (St. Kitts Marine Works Ltd.) and a new proposal developed.

[60] Mr. Kelsick argues that, given that the Cabinet decision was only issued on 3rd January 2013, it is clear that negotiations with Wall must have taken place prior to the Cabinet direction being issued.

[61] Mr. Kelsick contends that, that is Significant because on the Claimants hypothesis that the Cabinet direction was not granted prior to 9am on 3rd January 2013, negotiations outside

any recognized procurement exercise under the procurement Regulations and prior to Cabinet direction being issued.

[62] In my opinion, Mr. Kelsick's reasoning cannot be faulted in light of the fact that there is evidence that Cabinet does not sit before 9:00 am.

[63] That is what prompted me to remark above that the dealings with Wall seemed to have been clandestine. **(See Paragraph 35)**

[64] Moreover the email that was sent by Wall at 07:59 on 3rd January 2013 states: "Due to severe time constraints we have had to find aggressive albeit expensive method". Learned Counsel for the Claimants argues that the logical inference from that statement is that someone had informed Wall of the timetable for the work prior to 3rd January 2013.

[65] It is note-worthy; Mr. Kelsick observes that the affidavits lodged by the Defendants do not address what discussions took place with Wall in this period. No documents or any discussions that must have taken place had been lodged. Hard copies of any emails that may have passed between the 1st Defendant and Wall during the critical period 29th December 2012 to 2nd January 2013 were not adduced into evidence by the Defendants. Mrs. Beverley Mendes admitted in cross examination that she checked the Ministry's records and no such emails were archived.

[66] Mr. Kelsick contends that holding any verbal discussions with Wall or alternatively, failing to archive any emails exchanged with Wall is a clear breach of Section 807 (3) and 81 (2) (i) and (iv) of General Orders.

[67] There is a troubling issue for me in this case i.e. the absence of Philip Chambers as a witness or any evidence from him in this case.

[68] Philip Chambers was at the relevant time the Permanent Secretary in the Ministry of Communications, Works and Labour. In my view he played a pivotal role in the award of

the contract with Wall, yet there is no affidavit evidence from him to explain why or the reasoning behind the granting of the contract to Wall.

[69] At the date of the hearing, the Court was informed that the Permanent Secretary in the Ministry of Education is Mr. Phillip Chambers. This means that he is still employed by the Government of Montserrat. Yet he did not appear in court or put in any affidavit evidence. Instead Mrs. Beverley Mendes the present Permanent Secretary in the Ministry of Communications, Works and Labour, who was appointed from the 1st April 2013, was the only witness for the Defendants.

[70] It should be noted that the date of the contract with Wall was on the 09th January 2013 some months before the appointment of Mrs. Mendes to the post of Permanent Secretary in the 1st Defendant's Ministry. She admitted in cross examination that she had no knowledge of the relevant events having been appointed as Permanent Secretary after the contract with Wall.

[71] I find it is very disturbing that in view of this, the Defendants would put forward Mrs. Mendes as their main and only witness. Was that an attempt in my view to shield Phillip Chambers and so suppress facts?

[72] There can be no argument against the fact that the first Defendant on 9th January 2013 entered into a written contract with Wall for the sum of $570,000.00 to carry out the dredging of the Plymouth Harbour following private negotiations between them. The value of that contract at time of negotiation was $1,470.000.00. It contained no disposal plan and no indication that the dredged material would be disposed of in an environmentally sound manner.

[73] The initial bid which was before the Public Procurement Board for Wall was $470,000.00.

[74] Mr. Kelsick on behalf of the Claimants contends that, had the contract been made with them, and had they been advised that there was no requirement to comply with

environmentally sound method of disposal, they could have tendered at a much lower rate than their original tender. They could have carried out the works for EC$396,193.62. This evidence Mr. Kelsick contends was not contradicted or challenged by way of cross-examination. The Defendants could have saved $173,806.38 of public funds if the Claimants had been invited to tender.

[75] Mr. Kelsick in his written submission contends that the Procurement Regulations are designed to ensure transparent and fair competition in the award of public contracts. They also ensure that the contracting authority gets the best value for tax payer's money and that contractors bidding for public contract enjoy a level playing field. Such open and transparent competition in the area of public contracts is not only in the interest of tenderers but also the general public. In support Mr. Kelsick refers to **Portenaire Ltd v Department of Finance vs Personnel[5].**

[76] In the case at bar the playing field is so far from level. In my considered opinion, apart from the fact that there was secret negotiation with Wall, it was given preferential treatment.

[77] In fact, I come to the irresistible conclusion that there was a determination on the part of the 1st Defendant and/or the government from the beginning to award the dredging contract to Wall.

[78] I say this for the following reason: Wall's tender also included a contract between the Government of Montserrat, the Montserrat Port Authority and Wall dated 17th December 2012, that was the day before Wall submitted its tender in relation to the Dredging Opportunity.

[79] The contract states, inter alia:

"WHEREAS WALL TRADING LTD is desirous of working on the Plymouth Jetty for the purpose of Dredging sand and other volcanic materials between the 7th day of January 2013 and the 30th day of January 2013." Learned Counsel, Mr. Kelsick submits that the

[5] [2007] N1QB 100, act para 13

inclusion of the said recital in the contract is significant for two reasons. First the contract was made while the abortive tender process was ongoing and secondly, Beverley Mendes did not deny in cross examination that the jetty had never been dredged of volcanic materials.

[80] Mr. Kelsick invites the court to infer that the recital is evidence of the 1st Defendant's preferential treatment to Wall in that it paved the way for the subsequent direct award of the dredging contract to Wall.

[81] I am not only persuaded and draw that inference, but also fortify my view, that there was a determination by the 1st Defendant from the inception to award Wall with the contract to dredge the Plymouth harbour.

[82] The evidence in this case shows clearly that the tender for the dredging of the Plymouth harbour was managed as a departmental tender[6].

[83] The letters from Lindorna Brade, Chairman of the Public Procurement Board to Mr. Galloway speaks eloquently to that fact.

[84] The Defendants' actions were clearly in breach of the **Public Finance/Management and Accountability/Procurement Regulations 2012[7] as amended (The Regulations).**

[85] Section 33 (1) of the Regulations mandates:

> "The procuring entity shall promptly transmit all tenders received from suppliers after opening of tender to.
>
> (a) Departmental Tenders Committee – if the value of the tender is less than $100,000.00 or Public Procurement Board of the value of the tender exceeds $100,000.00"

[6] See the letter from Lindorna Brade, Chairman of the Public Procurement Board dated 2nd March 2013
[7] S.R.O 11 of 2012

[86] The above is clear and without any ambiguity the tenders were above $100,000.00. It can not by any stretch of the imagination, be governed by:-

(A) Departmental Tenders Committee. In other words the Departmental Committee has absolutely no authority to deal with tenders over and above $100,000.00.

[87] **In Quorum Island (BVI) Ltd v Virgin Islands Environmental Council**[8] Rawlins C.J. opined:

> "It is a primary tenet of the rule of law that a public authority must act or make decisions within the bounds of power conferred on it by law. An authority that acts outside of their power, acts ultra vires its discretion or illegally. Illegality may result from doing that which is authorized by law or by refusing or omitting to do that which the law mandates. It may also result where the public authority purports to act under discretion but acts on irrelevant considerations or bad faith or for an improper purpose. In other words an administrative decision is illegal if the decision maker contravenes or exceeds the terms of the power which authorized the decision, or if the decision purports an objective which the conferring power did not contemplate. It follows that, in order to determine whether an administrative act or decision is illegal the court as the guardian of legality must first construe the authorizing power; determine its terms, scope and purpose and measure the decision or action against this."

[88] In the case at bar it is quite obvious that the Departmental Committee did that which it was unauthorized to do, when it purported to deal with a contract in which the bids were over $100,000.00. And therefore its decision to award Wall the Dredging contract, was illegal, null and void and of no effect.

[89] Finally, I consider the question of legitimate expectation.

[8] HCVAP 2009/21 at paragraph 30

[90] In **Regina v Inland Revenue Commissioners ex-parte M.F.K. Underwriting Agents Ltd.**[9] Bingham L.J. reminds us:

> "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."

[91] In this instant case the Defendants initially properly proceeded by way of the public Procurement Procedure in spite of some flaws and irregularities contained therein, such as advertising. The Claimants took part in the procurement procedure. The procedure was discontinued. That created a legitimate expectation in the Claimants, that the proper procedure would be adhered to in future and they would be invited to take part in the bidding process to dredge the Plymouth Jetty.

[92] In the circumstance, it would be grossly unfair to permit the Defendants to follow a different course by engaging with Wall in a private contract to dredge the Plymouth harbour to the detriment of the Claimants.

[93] Moreover, the terms of the letter to the Claimants refusing the tender of the Claimants and Wall's, the abortive tender, says in part as follows:-

> "….we look forward to your continued participation."

[94] That statement, in my considered opinion in and of itself creates a legitimate expectation that the Claimants would participate in any dealings or contract for the dredging of the Plymouth harbour.

[95] Finally on this aspect of the case, I refer to the method of advertising for bids for the Dredging of the Plymouth harbour. It was advertised only on Government website contrary to Regulations 24 (1) and 52 (1) because it was not advertised on a website created or designed by the Public Procurement Board.

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[9] (1990) 1 W.CR 1545 at 1569.

[96] From the evidence it is clear that there was no public publishing of a request or invitation to tender, which in my view is the requirement for open tendering.

[97] Mr. Kelsick argues that the requirement to advertise public tendering is mandatory. Contract opportunities cannot be awarded pursuant to private negotiations between a procuring entity and a single supplier.

[98] I agree, that is why, in my view, I said it is necessary that there should be public publishing of the request for tenders.

[99] Mr. Kelsick argues that this is a fundamental failure which justifies the grant of the Orders sought by the Claimants. I am persuaded by that argument. In the premises the Claimants are entitled to remedies they seek.

[100] It is hereby declared that the original procurement was

a. unlawful and irrational
b. in contravention of the Procurement Regulation
c. in breach of the Defendants statutory duties

(B) It is hereby declared that the defendants manifestly erred in identifying Wall as the lowest priced tender in terms of the original procurement exercise.

(C) It is hereby declared as follows:- that the 1st Defendant's decision on or about 7th January 2013 to enter directly into a contract with Wall was

i. Unlawful, unfair and in breach of the Claimants' legitimate expectations
ii. In contravention of the Procurement Regulations
iii. In breach of the Defendant's Statutory duties

(D) Damages

(E) Costs

[101] I now address the question of damages. Mr. Kelsick Learned Counsel for the Claimant argues that the Claimants are entitled to an award of damages for breach of the Procurement Regulations.

[102] He contends that the Procurement Regulations clearly envisage scope for damages to be awarded for non-compliance, unless specific provision is made to the contrary.

[103] Learned counsel refers to Procurement Regulation 9 (5) and 34 (3). He argues that the Legislature made specific provision for breaches that would not result in a claim for damages. This clearly demonstrates that breaches of the other fundamental requirements would give rise to a claim in damages. This argument in my opinion must certainly be compelling, I am persuaded.

[104] Mr. Kelsick contends that this position is in line with other international procurement statutes.

[105] In the United Kingdom the Public Contract Regulation 2015 and the Public Contracts (Scotland) Regulation provide a remedy in damages where there has been a failure to comply with regulations **(See Mears v Leeds City Council)**[10] **also (Aquatron Marine Ltd v Strathclyde Fire Board**[11]**.)**

[107] In **M v Home Office**[12] Lord Woolf opined:

> "There appears to be no reason in principle why a statute places a duty on a specified Minister or other officials which creates a cause of action, an action cannot be brought for breach of Statutory duty claiming damages or for an injunction, in the limited circumstances where injunctive relief would be appropriate

[10] [2011] EWHC 1031 at paras
[11] [2007] CSOH
[12] [1994] IAC 377 at 412 Letter 4

against the specified Minister personally by any person entitled to the benefit of the cause of action."

(See also Lurick Management and Consulting Services Limited v Attorney General Trinidad and Tobago."[13])

[107] The Court may also award damages pursuant to its powers under the provisions of the **CPR[14]**.(See also **Fire Service Association v Public Service Commission, St. Lucia[15])** In particular the court may on a claim for judicial review award

a) Damages

[108] In light of the foregoing I have absolutely no doubt that this court can award damages in this matter.

[109] Learned Counsel for the Claimants contends that in their statement of claim, the Claimants quantified damages as follows $660,110 representing their net profit, if their tender bid or the abortive tender process had been accepted, expenses of $19,262.56 incurred by the Claimants in preparing their bid.

[110] On 30th May 2014, Adrian Galloway filed a Supplementary affidavit in which he reduced the Claimants' Claim for loss of net profit to $66,032.27. This Counsel argues represents the net profit the Claimants would have realized if they had tendered using the same disposal method utilized by Wall when it carried out the dredging work.

[111] At trial Learned Counsel, Ms. Greenaway for the Defendants submitted that the Claimants were precluded from claiming the lesser sum of $66,032.27 for loss of profit as they failed to amend their claim form.

[112] This to my mind, was a very strange and not a common sense approach to adopt for the simple reason, that if the Claimants are successful the liability of the Defendants would be

[13] UK PC 2001 at para 19
[14] Civil Procedure Rules 2000 56.8(2)(a)
[15] SLUHCV 2010/0013

reduced by some $594,000.00. Even if the defendants were successful, that sum would not benefit the Defendants except in an award of costs.

[113] In my considered opinion which is to be learned from that, is, that if you have a technical point you do not insist on that point unless it is to the benefit of your client.

[114] That having been said, the submission made by Learned Counsel for the Defendants is of no merit, having regard to the case of **East Caribbean Flour Mills Limited v Ormiston Ken Boyea**[16]

[115] Barrow J.A. quoting from Lord Hope's reproduction of the exposition of the judgment of Lord Woof M.R. in **McPhilemy v Times Newspaper Ltd.**[17] Reminds us:

> "On the reduced need for extensive pleadings now that witness statements (and I would add affidavits) are required to be exchanged, should be seen as a clear statement that there is no difference in their Lordships' views on the role and requirement of pleadings.
>
> The position as gathered from the observations of both their Lordships is that the pleader makes allegations of facts in his pleadings. Those alleged facts are the case of the party. The pleadings should make clear the general nature of the case. In Lord Woolf's words which again, I emphasize to the other side now, the case is that it has to meet and therefore to prevent surprise at the trial, the pleadings must contain the particulars necessary to serve that purpose. But there is no longer a need for extensive pleadings which I understand to mean pleadings with an extensive amount of particulars because witness statements are intended to serve the requirement of providing details or particulars of the pleaders case."

[116] Barrow J.A. at paragraph 44 states:

> "It is settled law that witness statements may now be used to supply details or particulars that under the former practice, it was required to be contained in pleadings."

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[16] Civil Appeal No. 12 of 2008 para 43
[17] 1999 3 AU ER 770

[117] Mr. Kelsick argues that on 2nd May 2014, the Court ordered, that an affidavit be treated as witness statements. Based on the principle enunciated in **East Caribbean Flour Mills**, the Claimants were therefore entitled per Mr. Adrian Galloway's Supplemental affidavit filed on 30th May 2014 to reduce their claim for loss of net profit and treat the affidavit as providing the Defendant with adequate notice of the reduction. I am persuaded by this argument. There can be no prejudice to the Defendants as they were provided with ample notice of the case they were to meet.

[118] On the question of incurred expenses, Mr. Kelsick concedes that according to signed tender form submitted by the Claimants to the 1st Defendant, the Claimants not only accepted but also understood they would not be reimbursed for any costs incurred by them in compiling the tenders.

[119] Mr. Kelsick argues that the Claimants are entitled to say that their waiver of their right to claim their incurred expenses extends up to the abortive tender process and not to the Defendants subsequent illegal direct award to Wall.

[120] Even from a common sense approach one would readily agree that the Claimants would not have consented to waive their costs where there was a fundamental breach of the Procurement Regulations particularly where that breach is against the Claimants' interest.

[121] Ms. Greenaway, Learned Counsel for the Defendant in her written submissions argues "that the first and third Defendants are not liable to the Claimants in damages for the loss of profits and costs of preparing the tenders."

[122] Learned Counsel in support of her argument refers to **Harris v Nickerson.**[18]

[123] Ms. Greenaway further contends that the direct award to Wall Trading Ltd that while it can be said that the Procurement Regulations were not strictly adhered to in making the direct

[18] (1873) LR 9 QB 34 D.C

award to Wall Trading Ltd, this was done due to urgency of the situation, that is the need to have the Plymouth Jetty ready to permit the berthing of the ship and to avoid significant financial loss. In my opinion to say that the Procurement Regulations were not strictly adhered to is to overstate the situation because in my view, there was absolutely no adherence to the Procurement Regulations.

[124] The law is quite clear on that. The law must be complied even if it has significant consequences for the administration.

[125] **In Bradbury v Enfield London Borough Council[19].** Lord Denning at page 1344 opined:

> "I must say this: If a local authority does not fulfill the requirements of the law, this court will see that it does fulfil them. It will not listen readily to suggestions of 'chaos.' The Department of Education and the local education authority are subject to the rule of law and must comply with it, just like everyone else. Even if chaos should result, still the law must be obeyed…"

[126] In view of the above, urgency cannot justify the Defendants' failure to comply with the Procurement Regulations which I said is mandatory so in so far as the case at bar is concerned.

[127] The Claimants, I agree have provided a detailed basis for arriving at the sum of $66,032.27 for the loss of profit. This sum would be awarded to the Claimants.

[128] The sum of $19,262.50 would be awarded as the sum for incurred expenses.

[129] There will be judgment for the Claimants against the Defendants in the sum of $85,294.77 and Costs $15,000.00. A total of $100,294.77.

[130] Before I close I must say thanks to Counsel on both sides for their hard work and obviously extensive research which greatly assisted me in producing this judgment. I wish also to

[19] (1976) 1 WLR 1311 at 1324 4

apologise to both sides for writing the “wrong” judgment in the first instance. This was due, mainly to the fact that I had not received your skeleton arguments. What I had before me when I came to write the judgment completely threw me off. Again, I apologise to Counsel on both sides.

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Albert Redhead
High Court Judge