

IN THE EASTERN CARIBBEAN SUPREME COURT  
COMMONWEALTH OF DOMINICA

IN THE HIGH COURT OF JUSTICE

(CIVIL) -

DOMHCV2016/199

BETWEEN:-

[1] BUILDERS AND CONTRACTORS ASSOCIATION OF DOMINICA  
(BCAD)

[2] DOMINICA SOCIETY OF ARCHITECTS (DSA)

[3] DOMINICA ASSOCIATION OF PROFESSIONAL ENGINEERS (DAPE)

Applicants

and

[1] THE HONOURABLE MR. ROOSEVELT SKERRIT, MINISTER OF FINANCE

[2] THE HONOURABLE SENATOR MIRIUM BLANCHARD MINISTER OF  
PUBLIC WORKS AND PORTS

[3] KENDELL JOHNSON, PERMANENT SECRETARY, MINISTRY OF PUBLIC  
WORKS AND PORTS

[4] CENTRAL PROCUREMENT BOARD comprising ROSAMUND EDWARDS,  
MATHAN WALTER, EMILE LANCELOT AND PATRICK PEMBERTON

[5] OSCAR SEAMAN, CHIEF PROCUREMENT OFFICER

Intended Respondents

Appearances:

Mr Reginald Armour, SC with him Mr Kevin Williams and Miss Vanessa Gopaul for the Intended Applicants

Mr Anthony Astaphan, SC with him Mrs Tameka Hyacinth Burton, Solicitor General and Mr Lennox Lawrence for the intended First, Second and Third intended Respondents

Mr Roger Forde, QC with him Miss Arthlyn Nesty for the intended Fourth and Fifth Respondents

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2016:     October 3  
           December 2, 9  
2018:     July 31  
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The appearances as stated in the previously published judgment have been corrected pursuant to Part 42:10 of CPR 2000.

RULING

[1] STEPHENSON J.: “Judicial Review was a judicial invention to secure that decisions made by the executive or by public bodies accord to law even if the decision does not otherwise **involve and actionable wrong**”.<sup>1</sup> “**Judicial review involves interference by the court with a decision made by a person or body empowered by Parliament or the governing law to reach that decision in the public interest. A litigant may only invoke interference by the court with such a decision if the litigant pleads plausible allegations which, if substantiated at the trial, will demonstrate that the decision was not reached in accordance with law.**”<sup>2</sup>

[2] This is an application for leave to file Judicial Review, to review the decision to award of a contract (**‘The Contract’**) by the Government of Anguilla (**‘The Government’**) on the 13<sup>th</sup>

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<sup>1</sup> Per Lord Templeman in *Mercury Ltd –v- Electricity Corporation of New Zealand (PC)* 1994 1 WLR 521 @ 526 (A)

<sup>2</sup> *ibid*

April 2016 to NSG **Management and Technical Services Limited (“NSG”)** for rehabilitation works to be conducted in the area of the Roseau River.

[3] This application was brought by three Professional Organisations in Dominica namely Builders and Contractors Association of Dominica (BCAD), Dominica Society of Architects **(DSA) And Dominica Association Of Professional Engineers (DAPE)**. (**the Applicants**) These organisations are all involved in the building and construction industry in Dominica.

[4] The intended Respondents are the Minister of Finance, Minister of Public Works and Ports, The Permanent Secretary of the Ministry of Public Works and Ports, the Members of the **Central Procurement Board including the Chief Procurement Officer**. (**the Respondents**)

[5] The application for leave was adjourned to open court and arguments were presented and each party was given the opportunity to file closing submissions.

[6] The application for leave was strenuously opposed by the intended Respondents who all have made submissions in that regard.

[7] It is well established law that the requirement for leave to file a claim for judicial review is designed to filter out claims which are groundless or hopeless at an early stage.

[8] **Part 56.2(1) of the Civil Procedure Rules 2000 (“CPR”)** requires that an application for judicial review is to be made by a person who has a sufficient interest in the subject matter of the application. There is no doubt in this case that the applicants have a sufficient interest in the subject matter of the application.

[9] The Court is also required on an application for leave to consider whether there is undue delay. The Court is required at the application for leave stage to direct its mind to the

question of sufficient interest and form a prima facie view based on the material before the court.<sup>3</sup>

[10] At the leave stage, the applicants must show that they have an arguable case with a realistic prospect of success. In *Sharma v Browne-Antoine*<sup>4</sup> it was held that

**“The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy ... But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application. As the English Court of Appeal recently said with reference to the civil standard of proof in *R (N) v Mental Health Review Tribunal (Northern Region)* [2006] QB 468, para 62, in a passage applicable, *mutatis mutandis*, to arguability: **“the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities.”** It is not enough that a case is potentially arguable: an applicant cannot plead potential arguability to **“justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory processes of the court may strengthen”****

[11]The case must not be potentially arguable with the hope that interlocutory processes will strengthen the case. RE: *Matalulu –v- DPP*<sup>5</sup>

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<sup>3</sup> IRC Case per Lord Diplock IRC p 642 (F-H)

<sup>4</sup> 69 WIR 387 at page 388.

[12]The court at this stage of the proceedings must also take into consideration the nature and **gravity of the issues in determining the “sufficiency and cogency” of the evidence which it will be taking into consideration to justify the grant of leave.**” Re: *Mitchell –v- Georges*<sup>6</sup>

[13]In deciding an application for leave to file a claim for judicial review, the court is not concerned with the merits of the decision in question nor is the court required to perform an in depth analysis of the applicants’ **case. It is the legality, rather than the merits, of the decision;** the jurisdiction of the decision maker and the fairness of the decision making process that occupies the **court’s attention at this time.** Re: Diplock LJ in *Inland Revenue Commissioners –v- National Federation of Self Employed and Small Business Ltd*<sup>7</sup>.

[31]The applicants contend that the issues for the **court’s** determination at this stage of the proceedings is as follows:

- a) Whether there is an arguable case with a realistic prospect of success that is:
  - i. Whether or not the award of the Contract was subject to the Act?
  - ii. Whether or not the procurement procedure as provided for by the Act was followed in this case resulting in the award of the contract and;
  - iii. Whether there was a failure to act and/or to discharge their statutory duties and or functions on the part of the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents which was unlawful?
- b) Whether or not the applicants have standing to apply for Judicial Review?
- c) If sections 87(1), 88 and 89 of the Act oust the **Court’s jurisdiction** to exercise its power of review over the Respondents’ decision?

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<sup>5</sup> [2003] LRC 712 at 733.

<sup>6</sup> @ para 49 per Rawlins JA

<sup>7</sup> (1981) 2 All E R 93

- d) Has there been a delay on the part of the applicants which debars them from applying for Judicial Review?<sup>8</sup>

[14]It is the applicants' **main** contention that the award of the contract is unlawful because it was not awarded within the confines of the Public Procurement and Contract Administration Act.<sup>9</sup> (**'The Act'**)

[15]It is well established law that the court can only interfere with an act of the executive if it is shown that the authority contravened the law, or where the express and implied statutory powers have been exceeded. Statutes often lay down procedures and rules before powers are conferred and where there is a failure to observe stipulated procedures Judicial Review will lie. Where there is an invalid decision Certiorari will also lie.

[16]It is for the person who asserts that the authority has contravened the law to establish that proposition. The Court in such circumstances is only concerned with the process not the decision.

[17]By and pursuant to the Act the respondents are empowered among other things to:

- a. approve major or complex procurements in accordance with the Act or regulations;
- b. ensure that the procurement contracts for goods, services and works are designed to provide best value for the procuring entities.

[18]Do the applicants have an arguable case with a prospect of success? The applicants of course submit and urge the court to find that they do and the respondents urge the court to find that they do not and that applicants' application must be struck out.

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<sup>8</sup> Paragraph 19 of the Applicants submissions in support of their application for leave filed on the 30 September 2016

<sup>9</sup> Act Number 11 of 2012 passed in January 2013

[24]The applicants submitted that they have a good arguable case with a reasonable prospect of success and leave should be granted to them.

## SECTION 109 OF THE PROCUREMENT ACT

[25]It was submitted on behalf of the applicants that regard should be had to section 109 of the Act and consideration has to be given as to whether the MOU constituted part of the procurement proceedings within the meaning of the Act so as to exclude the bidding requirement of the Act?

Section 109 states

109. (1) A procuring entity may continue any procurement proceedings in respect of the procurement of goods, services or works—

(a) commenced before the coming into operation of this Act; and

(b) which have not been determined, terminated or completed,

as if this Act were not enacted, but the provisions of this Act shall apply to any contract which is awarded or executed as a consequence of such proceedings.

(2) Where –

(a) a procurement contract is executed before the commencement of this Act; and

(b) the procurement contract is still subsisting,

this Act shall apply to the procurement contract as if that procurement contract were executed under this Act.

...”

[32] Learned Senior Counsel Armour submitted that the term procurement was defined in the Act and that Act gives guidance as to how the term a procurement proceedings were to be construed as follows:

“Procurement” includes a direct award, a lease, rental or any activity or process related to the purchase of goods, services or works;”<sup>10</sup>

References to “participating in procurement proceedings” shall be construed to include references to—

- (a) submitting a bid, proposal or quotation;
- (b) making an offer for the procurement for goods, services or works; and
- (c) executing a procurement contract.<sup>11</sup>”

[33] The applicants submitted that the terms procurement proceedings mentioned in Section 109 of the Act ought to be construed consistently with the references to “participating in procurement proceedings” as defined in section 2(2). Learned Counsel made reference to and relied on the learning from Bennion on Statutory Interpretation<sup>12</sup> which states

*“It is firmly established that an Act or other instrument must be read as a whole. Lord Walker of Gestingthorpe said ‘a holistic approach would seem to accord with the universally acknowledged need to construe a statute as a whole’. Holmes J said ‘you let whatever galvanic current may come from the rest of the instrument run through the particular sentence.’ ... Coke referred to doctrine as *ex visceribus actus* (from the guts of the Act.) He said it is the most natural and genuine exposition of a statute to construe one part of it by another: ‘for that best expresseth the meaning of the makers ... and this exposition is *ex visceribus actus*”<sup>13</sup>*

*“The doctrine of construction as a whole looks primarily to the case where the wording and arrangement of the entire instrument were effected by one drafter; who used consistency throughout. It presupposes precision drafting, rather than disorganized composition. As Pierce says:*

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<sup>10</sup> Section 2(1)

<sup>11</sup> Section 2(2)

<sup>12</sup> 5<sup>th</sup> Edition at pages 1156 -1157 and 1160

<sup>13</sup> Ibid page 1156



***“The issue will ultimately turn on the view the court forms of the care exercised by the draftsman in his choice of words. If it should be shown that a word has been used with different meanings in an Act, then the argument for consistent interpretation cannot stand. If on the other hand it is clear that a word is used throughout an Act to convey one meaning, then the burden of showing that there was an inconsistent use should be regarded as difficult to discharge.”***

...

*Construction as a whole requires that, unless the contrary appears, three principles should be applied. These are that every word in the Act should be given a meaning, the same word should be given the same meaning, and different words should e given different meanings.”<sup>14</sup>*

...

***“Some words to be given same meaning. It is presumed that a word or a phrase is not to b taken as having different meaning within the same instrument, unless this fact is made clear. Where therefore the context makes it clear that the term has a particular meaning in one place, it will be taken to have that meaning elsewhere.”***

[34] Learned Senior Counsel Armour urged that court to find that the term procurement proceedings as used in section 109 must be referring to a formal process involving submissions or bids/proposals/quotations, the making of an offer for the procurement of goods, services or works and the execution of a procurement contract. Learned Senior Counsel further urged the court to find that preliminary or informal discussions with a prospective contractor or public consultations by the Government of Dominica with NSG by its side would not constitute procurement proceedings within the meaning of the Act.

[35] It was also submitted on behalf of the applicants that the respondents have not presented the Court with any evidence that there were any procurement proceedings existing before

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<sup>14</sup> Ibid page 1157

the Act. That the Memorandum of Understanding (The MOU) which was exhibited by the respondents only purported to show that NSG was selected as the contractor to design and construct the West Bridge and that a review of the document in the opinion of the appellants disclosed that the MOU was nothing more than a document setting out the expectations of the parties which were subject to the contract. Further, that a perusal of the terms of the MOU makes no reference to bid, proposal, quotation or offer for services of works.

[36] It was further contended on behalf of the applicants that the contents of the MOU showed that the parties were in fact agreeing that procurement proceedings as contemplated by the Act were being undertaken by the parties and that the dates as stated on the design contract and the construction contract infers that the parties were engaged in procurement negotiations after the coming into operation of the Act.

[37] The applicants contend that they have an arguable case with prospect of success on this aspect of the case based on the interpretation of Procurement Proceedings as they have submitted and upon the examination of the documents presented by the Respondents, that there is evidence when taken as a whole, to show that the respondents were in fact involved in procurement proceedings and based on the dates of the various contracts that this activity was done after the Act was promulgated, which belies the respondents' contention that the contract was signed Pursuant to the MOU which was outside of the time that the Act came into being.

[38] Learned Senior Counsel for the applicants submitted that the MOU is nothing more than a document which sets out the expectations of the parties, that an examination of the terms of the MOU (and Counsel did quote some of the terms as examples) revealed that the parties to the MOU were in fact agreeing that procurement proceedings as contemplated by the Procurement Act for the Contract would be undertaken at a later stage that is when the contracts were being negotiated. Learned Senior Counsel Armour then noted that the both

the Construction Contract and the Design Contract were signed after the Act came into being.

[39] Mr Armour SC also submitted that a perusal of the contracts shows that in the contracts there is no mention of the MOU as the proposal or any other document constituting a procurement proceeding within the meaning of the Act which further underscores their submission that the MOU is merely an expression of intent that the parties would engage in procurement proceedings sometime in the future.

[40] It was ultimately submitted regarding this aspect of the case that the applicants have shown this Court that the MOU which the respondents are seeking to use as evidence of the fact that there were procurement proceedings in existence prior to the Act coming into being and thereby making the decision to award the contract outside of the provisions of the Act is in fact an impermissible device to be utilised to circumvent the supervisory jurisdiction of the Court and that in those circumstances the applicants have an arguable case with a reasonable prospect of success.

[41] Learned Senior Counsel Mr Anthony Astaphan on behalf of the first three respondents submitted that the application brought by the applicants is for leave to review the respondents' decision to award the Contract to NSG. That it is the decision to award the contract that is before the Court for review and not the actual contract.

[42] Senior Counsel Astaphan also contended that the decision to award the contract was part of the MOU proceeding which falls to be considered outside of the Act. Learned Senior Counsel made reference to and relied on the section 109 (1) of the Procurement Act which provides

*“A procuring entity may continue any procurement proceedings in respect of the procurement of goods, services or works— (a) commenced before the coming into operation of this Act; and (b) which have not been determined,*

*terminated or completed, as if this Act were not enacted, but the provisions of this Act shall apply to any contract which is awarded or executed as a consequence of such proceedings.”*

[43] **It was Mr Astaphan’s submission that section 109 of the Procurement Act is a transitional provision** and that once procurement proceedings have started and have not been determined the procurement will continue as if the Act had not been brought into effect and therefore the decision to award the contract is not to be considered within the confines of the Act. That it therefore follows, that the decision to award the contract cannot be contrary to the Act and an application to review and challenge the decision as such has no hope of succeeding. In those circumstances Leave cannot be given to review the decision.

[44] Learned Senior Counsel Astaphan submitted that in the MOU the parties to the contract were considering and agreeing the scope of the works to be done and this was all part and parcel of the procurement proceedings as referred to in the Act.

[45] Learned Queen Counsel Roger Forde on behalf of the third, fourth and fifth defendants joined and adopted the arguments made on behalf of the first and second defendants as presented by learned Senior Counsel Mr Astaphan.

[46] Queens Counsel Mr Roger Forde submitted that the definition of procurement proceedings tendered by the applicants is misconceived in that the interpretation proffered by them was derived from the definition of participating in procurement proceedings as provided by section 2(2) of the Act. Learned Queens Counsel further submitted that this section offers more assistance in determining what is meant by “participating” in the procurement process in that it makes reference to:

- a. Submitting a bid;
- b. Making an offer; and
- c. Executing a contract

[47] It was submitted that to apply the meaning as urged by the applicants would mean that a public entity may only award a contract after a bidding process which would lead to an absurdity and would not provide a contextual interpretation of the transitional provision.

[48] It was submitted on behalf of the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents that sections 33 and 34 of the Act is not applicable to the contract in the case at bar. That there was no requirement for the bidding process prior to the award of the contract.

[49] It was contended by Queens Counsel Forde that section 109 of the Act says where procurement proceedings commence before the Act that the contract so awarded is not subject to the Administration provisions of the Act as set out in part VII of the Act. It was submitted that the words contained in that section are to be given their natural and ordinary meaning unless doing so would lean to a meaning that is absurd.

[50] Learned Queens Counsel Forde urged the court to pay regard to the whole act when construing the section and the meaning given of the section must be consistent with the context of the whole Act. Mr Forde submitted that where a particular word or phrase is not defined that it is established law that it is not permissible to take the meaning of the particular word or phrase from another Act.

[51] It was contended on behalf of the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents that section 109 of the Act is a **transitional provision and that in the circumstances “procurement proceedings” cannot be** construed in such a manner that there should be a bidding process prior to the Act continuing after the commencement of the Act. That such a construction would lead to an absurdity because there would be nothing to transition.

[52] It was further contended on behalf of these respondents that were there in no definition of procurement proceedings as exists in the case at bar, it is necessary to give the words there ordinary and natural meaning.

[53] Learned Queens Counsel Forde submitted that when one looks at the definition of procurement in section 2 of the Act, there is no specific definition, in fact, what is provided is what procurement includes and in the circumstances it is necessary to define proceedings in order to obtain a definition of procurement proceedings.

[54] It was further contended by Mr Forde that the definition of proceedings found in the Oxford Dictionary is **“an event of series of activities with a set procedure”** and therefore in the circumstances of this case **“procurement proceedings”** should be defined as **“an event or series of activities involving the award of a lease, rental or any activity or process related to the purchase of goods, services or works”**.

[55] Learned **Queen’s** Counsel submitted that procurement proceedings is really a process relating to the purchase of goods and services, that this definition has been derived from the literal and purposive rules of construction which is consistent with the definition as stated in the proposed **“Procurement and Contract Administration Act 2015”**.

[56] **Queen’s Counsel** Forde further submitted that the undisputed evidence which has been adduced in this matter was that the contract which was signed in June 2015 which had its genesis in the MOU which was signed in 2014. That the MOU represented the culmination of activities and processes and a series of events which related to the purchase of goods and **services contained in the Contract. That these activities constituted “procurement proceedings” as contemplated by section 109 of the Act and in the circumstances of the case** no bidding process was required as contended by the applicants.

COURTS CONSIDERATIONS

[57] Public procurement is generally concerned with ensuring that public contracts of specified types are awarded on a fair, competitive and transparent basis. The term public procurement refers to functions that are exercised by a specified public authority when purchasing goods, works and/or services from third parties<sup>15</sup>. When considering a procurement regime one is normally concerned with the process leading up to the award of a contract to a specific party. Effective public procurement is said to be essential for good governance and good public services.

[58] Public sector procurement in Dominica is governed by the Procurement and Contract Administration Act 2012. (“The Act”) Much has been said in the submissions about the procurement process.

[42] Learned Senior Counsel Armour urged this court to look at the Act as a whole to discern the meaning of the term procurement process. His submission in this regard is noted.

[43] The basic learning on procurement teaches that, simply put, the procurement process comprises of a three stage process and without going into any detail, these three stages are as follows:

- i. Pre procurement;
- ii. Tender process and contract and award;
- iii. Contract and supplier management

[44] Basically it is clear from this very broad description of the procurement process that is as the word process suggests something that happens over a period of time.

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<sup>15</sup> Introduction to Public Procurement – Office of Government Commerce – Government of the United Kingdom

[45] There is no specific definition of procurement proceedings in the Act however it is noted that in section 2 of the Act the “interpretation section” it states the construction to be placed on “participating in the procurement proceedings” as follows:

“References to “participating in procurement proceedings” shall be construed to include references to—

- (a) submitting a bid, proposal or quotation;
- (b) making an offer for the procurement for goods, services or works; and
- (c) executing a procurement contract

I agree with the submissions of Learned Queen’s Counsel **Forde’s** submission that this definition offers assistance in determining the meaning of participation in the process.

[59] One of the many functions of a Court is to authoritatively construe legislation that is, to determine the legal meaning so far as is necessary to decide a case before it. To ascertain the meaning of a word the Court is permitted to consider definitions contained in a dictionary or other reference material. Re: R –v- Bates.<sup>16</sup> An Act has to be read as a whole; and is to be interpreted in such a way as to give effect to its purpose or object.

[60] The objective of legislative interpretation is to ascertain the intention of the legislature as expressed in the Act considering it as a whole and in its context. Re: AG’s Reference (No 1 of 1981) <sup>17</sup> per Lord Lane CJ

**“It is said that the Courts are confined to the meaning which may be legitimately attributed to the statutory context, the courts are concerned with the meaning of the words used in a particular context. In interpreting words used in statutes Judges use conventions of ordinary language and rules of statutory interpretation to determine the meanings of the words used.”<sup>18</sup>**

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<sup>16</sup> [1952] 2 All E R 842 @ 845-846.

<sup>17</sup> [1982] QB 848

<sup>18</sup> *Ibid*



[61] In the case at bar we are concerned with the interpretation of section 109 the transitional provision of the Act. It is the contention of all of the respondents that the decision to enter into the contract which the applicants are seeking the Courts leave to have Judicially reviewed on the grounds that the decision is illegal in that it did not comply with the requirements of the Act does not fall within the confines of the Act because the Contract was signed as a result of procurement proceedings that predated the coming into being of the Act and the Contract did not fall within and cannot be considered in view of the Act and in the circumstances leave ought not to be given.

[62] **A transitional provision is a provision that “regulates the coming into operation of [an] enactment and (where necessary) modifies its effect during the period of transition”<sup>19</sup>.**

[63] **“Transitional provisions in an Act or other instrument are provisions which spell out precisely when and how the operative parts of the instrument are to take effect. They serve a useful purpose, since merely to say that an enactment comes into force on ‘a’ is often insufficient to produce a clear legal meaning.”<sup>20</sup>**

[64] The purpose of a transitional provision in legislation is to facilitate the change from one statutory provision to another making special provision for the application of legislation to the circumstances which exist at the time when it comes into force. Re: Britnell –v- Secretary of State for Social Security<sup>21</sup>;

[65] In a similar vein, Thornton says, **that the function of a transitional provision is “to make special provision for the application of legislation to circumstances which exist at the time when the**

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<sup>19</sup> See Halsbury’s Laws of England (LexisNexis 5th ed, 2012), Vol 96 at [694].

<sup>20</sup> Bennion on Statutory Interpretation 6<sup>th</sup> Edition S96 at page 290

<sup>21</sup> [1991] 2 All E R 726 @ 729-730

legislation comes into force”<sup>22</sup> and this was said by the Queensland Court of Appeal in R v Sayers<sup>23</sup>.

[66] **The words of the transitional section of the Act are to the Court’s mind precise and unambiguous and should be given their ordinary and natural meaning.**

[67] It is important therefore to understand what is meant by the term Procurement Proceedings to but section 109 in its proper context.

[68] This court finds itself in agreement with the submissions made by Learned Queen’s Counsel Forde regarding the meaning to be attributed to the words procurement proceedings and I do agree with Learned Queen’s Counsel that to give it any other meaning would render the transitional provision of the act as an absurdity.

[69] The evidence before the court is that the Government of Dominica through its representatives were in discussions with the NSG prior to the commencement of the Act. Therefore it is only fair to say that the MOU as signed is a culmination of the discussions between the Government and NSG.

[70] **For the above stated reasons it is this Court’s finding that the Contract does not fall within the confines of the Act and is in fact excluded and in the circumstances leave cannot be granted.**

[45] At this stage of this application this court is concerned with determining whether or not the applicants have established a prima facie case. The role of the court is to determine whether the applicants have an arguable case on its merits. The court is not concerned at this time to make a determination as to which party has presented the true situation based on their affidavits.

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<sup>22</sup> Ibid at page 730

<sup>23</sup> [1997] QCA 274

[46] I repeat that at the leave stage the court is required to be satisfied that:

- (a) That the applicants have a sufficient interest in the matter;
- (b) The respondents who were the decision makers were required by law to make decisions;
- (c) Alternatively, that the respondents have failed to act in circumstances where they ought to have acted;
- (d) The applicants have established a prima facie case; and
- (e) The matter is one in which this court ought properly to exercise its discretion to grant leave.

[47] In conclusion, I am of the respectful opinion that the decision to enter into the contract with NSG does not fall within the provisions of the Act and therefore even though the applicants have sufficient interest, the decision which they seek to impugn is not subject to the terms of the Act and in the circumstances of the case the applicants do not have an arguable case with a reasonable prospect of success.

[92] As a post script, it is noted that the preparation of this ruling was delayed primarily because initially the soft copy of the first draft of the ruling was unfortunately lost, then the file was destroyed and or misplaced after the passage of Hurricane Maria and requests were made of counsel on both sides of this case to email to me the documents which would have assisted me in writing the decision remotely as I had to leave Dominica following the passage of the storm. Unfortunately, it was only when Junior Counsel for the intended fourth and fifth defendants managed to scan and email to me the requested and necessary documents that I was able to work on preparing this ruling again which was essentially completed to be delivered in January 2018, but upon my return to Dominica I was faced with

the unavailability of full court facilities to ensure the proper editing, presentation and delivery of this ruling. In those circumstances there was an inordinate delay in delivering this ruling and the Court apologises for this and for any typographical errors which may appear herein.

M E Birnie Stephenson  
High Court Judge

[SEAL]

By the Court

Registrar