[2018] JMCA Civ 6

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 106/2013

BEFORE: THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MISS JUSTICE J STRAW JA (AG)

BETWEEN	**PAYMASTER JAMAICA LIMITED**	**APPELLANT**
AND	**THE POSTAL CORPORATION OF JAMAICA**	**RESPONDENT**

Douglas Leys QC instructed by LeySmith Lawyers for the appellant

Mrs Nicole Foster-Pusey QC and Miss Tamara Dickens instructed by the Director of State Proceedings for the respondent

17, 18, 19 July, 20 December 2017 and 16 February 2018

SINCLAIR-HAYNES JA

[1] I have read in draft the reasons for judgment of my sister Straw JA (Ag). I agree with her reasoning and conclusions and have nothing further to add.

P WILLIAMS JA

[2] I too have read the draft reasons for judgment of Straw JA (Ag) and agree with her reasoning and conclusion.

STRAW JA (AG)

[3] On 20 December 2017, we handed down our decision in this matter and made the following orders:

> "1. The appeal is dismissed.
>
> 2. The judgment of the honourable Mr Justice Batts J made on 14th November 2013 is affirmed.
>
> 3. Costs to the respondent to be taxed if not agreed."

We promised then that our reasons would follow and this judgment is a fulfilment of that promise.

[4] This appeal challenges the refusal of Batts J to grant leave to Paymaster Jamaica Limited (the appellant) to apply for judicial review of the decision of the Postal Corporation of Jamaica (the respondent) to give termination notice of the contract between the parties dated 1 September 2011. The appellant is asking this court to grant leave and remit the matter to the judicial review court for a hearing on its merit.

Background

[5] The appellant is a limited liability company which is the pioneer of a third party bills collection system in Jamaica using computerized services and products. It provides services to the general public by collecting and processing bill payments, money and data transfers and other transactions by utilizing third party real time multi-payment and remittance system. The chairman and managing director of the appellant is Miss Audrey Marks.

[6] The respondent is a limited liability company incorporated under the Companies Act. It is a government agency operating postal, commercial and remittances services. Mr Michael Gentles is a member of the board and its chief executive officer, Mr Novar Patrick McDonald is a director and company secretary and Mr Lance Hylton is the chairman of the Board of Directors.

[7] In 2000, a contractual relationship developed between both parties. The contract provided for the appointment of the respondent as the sub-agent of the appellant for the purposes of offering the above-described services of the appellant to the public. At that time, the appellant was the only entity which provided those services and there were neither public sector procurement guidelines nor regulations in existence in relation to contracts entered into between government agencies and other parties. In September 2011, the parties renewed this contract for a period of three years which was to expire in August 2014.

[8] On 16 August 2013, the respondent through its officer, Mr Gentles, wrote to the appellant indicating its decision to end the contractual relationship and to terminate the contract within 90 days as provided by clause 18.1 of their contractual agreement. On 24 August 2013, Miss Marks and other representatives of the appellant met with Mr Ian Kelly, the chairman of the finance committee of the respondent, along with other officers in an effort to have the board of the respondent reconsider its decision to terminate the contract.

[9] She was informed that the issue that led to the termination notice concerned outstanding reconciliation, in that commission payments were owed to the respondent in the amount of $3,300,000.00. It is her evidence that she committed to resolve this issue by way of five equal instalments and that the appellant submitted the first payment of $663,000.00, followed by a 2nd payment on 27 September 2013. However, this was to no avail, as there was no rescission of that decision. In October 2013, following the termination of the contract, the respondent entered into contractual relations with Grace Kennedy Payment Services/Bill Express (GKPS) for the provision of the said services which were previously contracted with the appellant. This agreement was to take effect on the weekend of 15-17 November 2013.

Application for leave to apply for judicial review

[10] On 1 November 2013, by way of a notice of application for court orders, the appellant sought leave to apply for judicial review of the respondent's decision to terminate the contract. The notice of application was worded in the following terms:

> "1. That Leave be granted to the Applicant to apply for Judicial Review by way of:
>
> (i) An Order of Prohibition prohibiting the Respondent either by its servants and/or agents from continuing discussions and/or negotiations with Grace Kennedy Payment Services Limited ('GKPS')/ Bill Express or any other person and/or entering into implementing any contract with the said GKPS/Bill Express or any other person for the provision of bill collection services without complying with the procedures set out in the Public Sector Procurement Regulations 2008

and the Handbook of Public Sector Procurement Procedures.

(ii) An Order of Certiorari quashing the decision of the Respondent to enter into discussions and/or negotiations and/or awarding a contract to GKPS/Bill Express or any other person for the provision of bill collection services to the Respondent.

(iii) An Order [sic] Mandamus compelling the Respondent to act according to law and comply with the provisions of the Public Sector Procurement Regulations 2008 and the Handbook of Public Sector Procedures before it enters into discussion and/or negotiations with any person for the award of a contract for the provision of bill collection services to the Respondent.

(iv) Alternatively a declaration that the Respondent has unlawfully terminated the Sub-Agency Agreement between the Paymaster Jamaica Limited and The Postal Corporation of Jamaica dated September 1, 2011.

2.

(i) An interlocutory injunction against the Respondent and its servants and/or agents restraining it from continuing any discussions and/or negotiations with GKPS/ Bill Express or any other person providing bill collection services; or from entering into or implementing any contract with GKPS/ Bill Express or any other person for such services until the issues herein are determined by this Honourable Court."

[11] In summary, the above orders were sought on the grounds that:

a) The respondent is a procuring entity which is bound by the Public Sector Procurement Regulations 2008 (the Regulations) and that its action to commence and continue pre-contractual discussions with GKPS is illegal and in contravention of the Regulations.

b) It is prejudiced by the actions of the respondent, in that it has not been given a fair opportunity to participate in the procurement process of the contract awarded to GKPS.

c) The respondent has unlawfully terminated its contract with the appellant without notice being given in good faith to allow the appellant an opportunity to cure any issue or breach.

d) The decision of the respondent to terminate the contract with the appellant was tainted by bias.

e) There are no other available remedies by which the appellant may obtain expeditious and just relief.

[12] The appellant also filed a 2nd application on the same date for interlocutory injunctive relief in similar terms to that outlined in paragraph 2(i) of its notice of application for leave to apply for judicial review. Both applications were heard by Batts

J between 12 and 15 November 2013. In an oral judgment delivered on 14 November 2013, the learned judge dismissed both applications. It appears that on the 15 November 2013, he granted costs to the respondent.

The appeal

[13] The appellant thereafter on 18 December 2013 filed a notice of appeal against the decision of the learned judge. That notice sets out seven grounds of appeal which were stated as follows:

> "1. The learned judge erred in holding that the Public Sector Procurement Regulations 2008 are not applicable to the award of the contract by the Respondent to GKPS/Bill Express under consideration.
>
> 2. The learned judge erred in law and in fact that the issue of bias and nepotism would not stand as grounds for judicial review on the facts of this case, totally ignoring the provisions of the Public Bodies Management and Accountability Act and the common law.
>
> 3. The learned judge erred in finding that the Appellant had and could have pursued alternative remedies as set out in the Public Sector Procurement Regulations 2008 when the said remedies were not alternative remedies for the reasons submitted by the Appellant.
>
> 4. The learned judge erred in finding that in this case there was no suggestion that the Respondent did not have the authority to enter into the contract and was thus acting ultra vires its powers under the Public Sector Procurement Regulations 2008.
>
> 5. The learned judge erred in finding that the Appellant also had alternative remedies under the Contractor General Act and an action for civil action when these are not suitable or adequate alternative remedies as submitted by the Appellant.

6. The learned judge erred in law and fact:

   i. when he found that the un-contradicted evidence is that the Respondent declined to enter into arrangements with the Appellant for the expressed reason that this matter was still outstanding when it was clear that the totality of the evidence had not been put before him;

   ii. the breach of contract is best dealt with by a trial court where the evidence may be tested in the usual manner when the Appellant had sought the remedy of breach of contract by way of a declaration in the judicial review proceedings.

7. The learned judge erred in law in finding that outside of the Public Sector Regulations 2008 the Appellant did not have a legitimate expectation that the award of the contract to GKPS/ Bill Express would be awarded in a fair transparent and non-discriminatory manner."

[14] A supplemental notice of appeal was subsequently filed on 8 April 2014, to add an eighth ground in relation to costs. That ground reads as follows:

> "The learned judge erred in awarding costs to the Respondent. In doing so the learned judge disregarded the provisions of Rules 56.15(5) and 64.6(4)(d) of the Civil Procedure Rules 2002 (as amended)."

[15] At the hearing of the appeal, Mr Leys QC, for the appellant, advised that ground 4 would not be pursued and amended ground 7 to read as follows:

> "Assuming ground 1 applies, the appellant would have a legitimate expectation based on the relevant statute and regulations that the said contract would have been put to tender."

[16] The issues raised by the appeal can therefore be summarized as follows:

1. Is there an arguable case with a realistic prospect of success that the contract between the appellant and the respondent and subsequently with the respondent and GKPS is subject to the Government of Jamaica's procurement regulations and guidelines?

2. Can the issue of bias and nepotism stand as a ground for judicial review in the existing circumstances, independent of the Regulations?

3. Were alternative remedies available to the appellant?

4. Is the issue of legitimate expectation a viable argument on which to grant leave within the context of the Regulations?

5. Was the learned judge in error when he found that:

    i. the uncontradicted evidence is that the respondent declined to enter into arrangements with the appellant for the expressed reason given, when the totality of the evidence was not before him?

ii. The breach of contract is best dealt with by a trial court where the evidence may be tested in the usual manner when the appellant had sought the remedy of breach of contract by way of a declaration in the judicial review proceedings.

6. Did the learned judge err in awarding costs to the respondent?

The role of the appellate court

[17] The court is guided by the principles set out by Lord Diplock in **Hadmor Productions Limited and others v Hamilton and others** [1982] 1 All ER 1042 when considering whether to interfere with the exercise of the discretion of the learned judge below. This court's role is one of review to determine if Batts J made any errors in law or misinterpreted the facts, or if the decision was so aberrant that it is "demonstrably wrong". See also **Attorney General of Jamaica v John Mackay** [2012] JMCA App 1. The appellant must therefore establish sufficient basis for this court to interfere with the exercise of the discretion of the learned judge in keeping with these well established principles.

Issue 1- Is there an arguable case with a realistic prospect of success that the Paymaster contract with the Postal Corporation of Jamaica is subject to the Public Sector Procurement Regulations made pursuant to the Contractor General Act.

Findings of the learned judge

[18] Batts J, at paragraph [4] of his judgment, correctly posited that the principles governing the test to be applied by the court in considering applications for leave to

proceed to judicial review has been set out in the Privy Council decision of **Sharma v Brown Antoine** [2006] UKPC 57, by Lord Bingham at paragraph 14(4) of the judgment. An applicant must satisfy the court that it has an arguable case with a realistic prospect of success not subject to any discretionary bars such as delay or an alternative remedy.

[19] In his determination of whether the appellant had met the threshold test, the learned judge, at paragraphs [6] and [7] of his judgment, stated that the substance of the appellant's case was premised on the applicability of the Public Sector Procurement Regulations. The learned judge found that the respondent is a public entity and carries out public functions and it was arguable that, when contracting to facilitate the provision of public services, the respondent is carrying out a public duty. However, he also found that this factor was not decisive of the issue but that he also had to consider whether the Regulations could arguably be said to apply to the contractual relationship under consideration.

[20] The learned judge examined this issue at paragraphs [9] to [11] of his judgment. He opined that while the Regulations had omitted to define "procure", it had defined "procuring entity" and that there was no dispute that the respondent fell within that category. He noted that the Regulations set out detailed procurement procedures but while the focus of the legislation is procurement, it does not apply to all public sector procurement as regulations 4 and 5 stipulated some exclusions. Batts J also examined the definition of 'public sector procurement' which is contained in the Regulations, that is, 'the acquisition of goods, works and services, by any method, using public funds by

or on behalf of procuring entities for their use; and includes procurement by Government approved authorities acting on behalf of the procuring entity'. He found that:

> "[12] Manifestly, a procurement contract must involve acquisition by use of public funds by or on behalf of the procuring entity. In the contract under consideration the public sector entity is paid to act as the agent for the private sector entity when providing services. The services are provided to the members of the public. The public pays for those services out of which the public sector entity receives a fee or a commission. No doubt the public sector entity receives a benefit, that is, it is paid by the private sector entity and I suppose gets the benefit of persons who are attracted to use the facilities by reason of convenience. However, the public sector entity is not paying the private sector entity for that benefit.
>
> [13] Mr. Leys, QC argued for a broad interpretation of procurement. However I believe it would do far too much damage to the word if this court were to construe a situation in which services are provided and paid for, as amounting to procurement by the provider of the services who is being paid.
>
> [14] I hold therefore that the Public Sector Procurement Regulations are not applicable to the contract under consideration."

Submissions of the appellant

[21] Mr Leys has submitted that the appellant has an arguable case with a realistic prospect of success in relation to the issue of whether the Regulations are applicable to the award of the contract under consideration. He contended that the Regulations are not determinative of the various activities that can be the subject of procurement and, at a minimum are open ended as to the type of activities which could be classified as procurement activities.

[22] Queen's Counsel also argued that the respondent fell within the scope of the definition of "procuring entity" in section 2 of the Regulations as the Government of Jamaica holds a controlling interest in it. The respondent would therefore be bound by the provisions of the Regulations in relation to any procurement activity unless it can fit itself into one of the exceptions listed in section 4, which he submitted, it could not.

[23] He also referred to section 3 of the Regulations and submitted that it is of utmost importance to the resolution of this issue. That section defines the scope of the Regulations which is stated to apply to "all procurement of goods, works, services and 'other activities' carried out by the Government of Jamaica". He concluded therefore that the activity of the respondent in procuring a bill payment service would fall within the term 'other activities'.

[24] Mr Leys submitted further that the procuring entity (the respondent) was acquiring services for the benefit of the public by offering the use of its facilities and that it did this through a concession arrangement. He contended also that the definition of 'public sector procurement' is necessarily wide and was deliberately drafted to catch all type of activities whereby public funds are being used by the procuring entity. He argued that the Regulations only speak to the use of public funds and do not stipulate that the public sector entity should pay the provider of the thing being acquired. In any event, he has asked that the court have due regard to the affidavit of Miss Marks (filed 11 November 2013) where she deposed that under the contract with the appellant, the respondent assumed the responsibility of certain costs which would entail the expenditure of public funds to meet its contractual obligations. These costs include

salaries, rental of premises, utilities, among other things, which were borne by the respondent using public funds. Queen's Counsel posited therefore that it cannot be said that the appellant has no realistic prospect of success.

[25] Additionally, he argued that government contracts are not defined in the Regulations but in the parent Act - The Contractor General Act (section 2) - and while Batts J found that the contract is a government contract for the purposes of the above Act, he construed the term narrowly in reference to the Regulations. He argued that once it can be classified as a government contract, the Regulations should not be interpreted to weaken what Parliament intended, namely transparency. He referred the court to part IV of the Regulations - Tender Proceedings - and in particular, section 7 which refers to tender proceedings for prospective government contracts.

[26] He argued therefore that since this was a government contract which should be awarded within the context of the Handbook of Public Sector Procurement and the Regulations, a fortiori, the relevant contract in consideration ought to have been awarded within those statutory guidelines.

[27] Mr Leys submitted that the Regulations should be given an overly broad and generous interpretation if it is to be truly effective. This ground is one which requires judicial interpretation, and to shut it out peremptorily, as Batts J did, without full argument is to derogate from the principles governing the grant of leave for judicial review. He concluded therefore that the respondent had breached the letter and spirit

of the Regulations when it entered into direct negotiations with GKPS and signed a contract without putting the same to competitive tender.

Submissions of the respondent

[28] Before responding specifically to the submissions of the appellant, Mrs Nicole Foster - Pusey QC, for the respondent, pointed out that the applications before Batts J were filed close to the expiration of the termination notice received by the appellant. She noted that by 7 October 2013, it had been made clear to the appellant that the respondent had refused to reverse its decision to terminate the subsisting contract. The filing of the applications was close to the time when the new contract with GKPS ought to have commenced. In this regard she contended that the request for prohibition and certiorari was therefore untimely. She stated also that it was unnecessary to seek leave to apply for judicial review in relation to the request for a declaration since rule 56.9(1)(c) of the CPR allowed a fixed date claim form to be filed with such a request. In essence, she submitted that the orders as sought before Batts J would be inappropriate.

A. *Whether the actions of the respondent should attract judicial review?*

[29] Queen's Counsel referred the court to Judicial Review Handbook, Michael Fordham, 6th Edition, (Hart Publishing 2012), page 271, paragraph 24.3:

> "It is a first principle of judicial review that remedies are discretionary. One specific basis on which a remedy can be refused in the Court's discretion is where the Claimant unduly delayed and granting a remedy would cause relevant prejudice or detriment."

[30] She submitted therefore that the court ought not to exercise its discretion as requested by the appellant even if it is found that the Regulations apply to the contract under consideration.

[31] Queen's Counsel also argued that the decision of the respondent to terminate the contract with the appellant and to enter into another with GKPS is not amenable to judicial review as the respondent was exercising a private function and not a public one. She relied on the authority of **R (on the application of Tucker) v Director General of the National Crime Squad** [2003] EWCA Civ 03, a decision of the English Court of Appeal, in relation to the criterion by which the question as to whether a decision is amenable to judicial review can be determined. Reference was made to paragraph 24 of the judgment of Scott Baker LJ where he considered this issue in the context of the particular circumstances before him:

> "In **R (on the application of Hopley) v Liverpool Health Authority & others** (unreported) 30 July 2002, Pitchford J helpfully set out three things that had to be identified when considering whether a public body with statutory powers was exercising a public function amenable to judicial review or a private function that was not. These are:
>
> (i) Whether the defendant was a public body exercising statutory powers;
>
> (ii) Whether the function being performed in the exercise of those powers was a public or a private one; and
>
> (iii) Whether the defendant was performing a public duty owed to the claimant in the particular circumstances under consideration."

[32] In analysing the three factors mentioned above, Queen's Counsel submitted that it can be accepted that the respondent is a government company and can qualify as a public body. However, when it entered into a contract with the appellant to provide services to the public on behalf of the appellant as its sub agent, the respondent was not exercising a statutory power, but a private function as a corporate entity able to determine its commercial affairs. It was therefore not performing a public function and was as such, not performing any public duty owed to the appellant in the circumstances.

[33] She submitted that the court should exercise its role as a gatekeeper to keep out hopeless, frivolous or vexatious claims which would result in the waste of the court's time and to ensure that a claim only proceeds to a substantive hearing if it is satisfied that there is a case fit for a substantive hearing. See **Inland Revenue Commissioners v National Federation of Self Employed and Small Business Ltd** [1981] 2 All ER 93 per Lord Diplock page 105h-i; White Book Service, Civil Procedure 2007, volume 1. She submitted therefore that Batts J was right in law to refuse the application for leave.

B. *Interpretation to be placed on Public Sector Procurement*

[34] Queen's Counsel vigorously opposed the appellant's broad interpretation of 'public sector procurement' and stated that the Regulations would not be relevant to the contract under consideration. She submitted that in interpreting statutes, the words used are to be given their ordinary and natural meaning, that is, the golden rule of interpretation. She stated that it is only where their natural and ordinary meaning

result in an absurdity or to some result which cannot reasonably be supposed to be the intention of the legislature, that the court should modify the grammatical and ordinary sense or look for some other possible meaning of the words. See **Grey v Pearson** [1857] 6 HL Cas 61 at page 106; 10 ER 1216 at page 1234 and **Pinner v Everett** [1969] 3 All ER 257, quoted and applied by Brooks JA in **Special Sergeant Steven Watson v The Attorney General, The Commissioner of Police and Linton Latty** [2013] JMCA Civ 6, at paragraphs [19] and [20] of the judgment.

[35] She submitted further that the appellant is seeking to substitute other possible meanings for the terms "procurement" and "other activities" in circumstances where the ordinary and natural meaning is plain, unambiguous and does no violence to the context of the Regulations. She contended that the learned judge, at paragraphs [9] - [14] of his judgment, properly gave effect to the golden rule of construction, as well as giving effect to the natural and ordinary meaning of the words stated in section 2 of the Regulations which defines "public sector procurement".

[36] Queen's Counsel referred the court to clause 5.1(i) of the Public Sector Procurement Policy (The Handbook), which defines procurement as a "purchasing activity" and submitted that there is no evidence that the respondent acquired or purchased any goods, works or services when the parties entered into the sub-agency agreement. She stated that in essence, the respondent worked for the bill collection services company and as such, no money was paid by the respondent to the bill collecting service company as that company paid the respondent a fee or commission

for each transaction. Under those circumstances, there would have been no expenditure of public funds by the respondent.

[37] In relation to the interpretation of "other activities" as included in section 3 of the Regulations, Mrs Foster-Pusey submitted that it cannot be read in isolation but must be read within the context and framework of the Regulations. She stated that the phrase "other activities" being referred to, are those relating to public sector procurement as defined by section 2 and must be read as ejusdem generis (that is, of the same kind) to the words immediately preceding it, which are "procurement of goods, works, services". These, she submitted, are all items that are acquired or obtained by the procuring entity and not given by it.

[38] On this basis, Queen's Counsel submitted that the relevant contract did not arise out of a procurement, so as to warrant the application of the Regulations.

Analysis

Legislative Framework

[39] An examination of the relevant legislative framework is essential in the assessment as to whether the threshold has been met to grant leave to proceed to judicial review.

A. *The Contractor–General Act*

[40] Section 2 defines a "Contractor" as follows:

> "'contractor' means any person, firm or entity with whom a public body enters into any agreement for the carrying out of any building or other works or for the supply of any goods

or services and includes a person who carries out such works or supplies such goods or services for or on behalf of any public body pursuant to a licence, permit or other concession or authority issued or granted to that person by a public body."

It further states that a "government contract":

"includes any licence, permit or other concession or authority issued by a public body or agreement entered into by a public body for the carrying out of building or other works of for the supply of any goods or services."

The legislation also defines "public body" as follows:

"(a) a Ministry, department or agency of government;

(b) a statutory body or authority;

(c) any company registered under the Companies Act, being a company in which the Government or an agency of Government, whether by the holding of shares or by other financial input, is in a position to influence the policy of the company."

[41] Section 4(1)(a) of the Contractor General Act stipulates that:

"4-(1) Subject to the provisions of this Act, it shall be the function of a Contractor-General, on behalf of Parliament-

(a) to monitor the award and the implementation of government contracts with a view to ensuring that-

(i) such contracts are awarded impartially and on merit;

(ii) the circumstances in which each contract is awarded or, as the case may be, terminated, do not involve impropriety or irregularity."

Section 15(1) further states that:

> "Subject to subsection (2), a Contractor-General may, if he considers it necessary or desirable, conduct an investigation into any or all of the following matters-
>
> (a) the registration of contractors;
>
> (b) tender procedures relating to contracts awarded by public bodies;
>
> (c) the award of any government contract;
>
> (d) the implementation of the terms of any government contract;
>
> (e) the circumstances of the grant, issue, use, suspension or revocation of any prescribed licence;
>
> (f) the practice and procedures relating to the grant, issue, suspension or revocation of prescribed licences."

B. *The Public Sector Procurement Regulations (2008)*

Section 2 sets out the following definitions:

> "'procurement contract' means a contract between the procuring entity and a contractor resulting from procurement proceedings."
>
> "'Procuring entity' means any Government Ministry, department, statutory body, executive agency, local government authority, public company or any other agency in which the Government owns the controlling interest, that is to say, at least fifty-one *per centum,* or in which the Government is in a position to direct the policy of the entity, including government approved authorities acting on behalf of the procuring entity;"
>
> "'Public sector procurement'' means the acquisition of goods, works and services, by any method, using public funds by or on behalf of procuring entities for their use; and includes procurement by Government-approved authorities acting on behalf of the procuring entity."

Section 3 sets out the scope of the Regulations, as follows:

> "These Regulations govern public sector procurement in Jamaica and are applicable to all procurement of goods, works, services and other activities carried out by the Government of Jamaica."

C. *The Handbook of the Public Sector Procurement Procedures*

Procurement is defined as:

> "For [Government of Jamaica] purposes, *Public Sector Procurement* is the acquisition of goods, services and works by any method, using public funds, and executed by the procuring Entity or on its behalf."

D. *The Public Sector Procurement Regulations, 2008*

[42] The Contractor-General Act is the parent Act under which the Regulations are promulgated. Section 31 of the Contractor-General Act empowers the relevant minister to make regulations to provide for any matter necessary or desirable in relation to carrying into effect the provisions of the said Act. The Regulations are described as the Public Sector Procurement Regulations 2008. It refers to the Handbook of Public Sector Procurement Procedures and notes that it has been the basis for the regulation of public sector procurement.

[43] It then proceeds to recite in the Preamble the purpose of the Regulations –"to more stringently regulate the procurement of general services, goods and works" which would be legally enforceable and subject to penal sanctions. This is followed by a list of the objectives that it is seeking to promote. It is not necessary for the purposes under consideration to list those.

[44] In examining the Contractor-General Act, the Regulations and the Handbook, it becomes apparent that the Contractor-General has an overarching mandate to monitor and investigate the award of all government contracts. The definition of government contract is not exclusive but inclusive, and on the face of it, could capture contracts such as the one entered into between the respondent and GKPS and previously with the appellant. Batts J made this observation at paragraph [20] of his judgment. The definition is to the effect that it "includes any licence, permit or other concession or authority given by the public body or agreement entered into by a public body for the supply of any goods or services". It is therefore not restricted to only goods or services supplied to the public entity. This is also apparent when one examines the definition of "Contractor" also contained in section 2 of the parent Act.

[45] However, section 3 of the Regulations provides that the scope of the said Regulations is limited to public sector procurement. This is the ordinary and natural meaning of the words used. Part IV of the Regulations (section 7) states specifically that these proceedings are to be conducted according to the procedures outlined in the Handbook. Both the Regulations and the Handbook define "public sector procurement" and "procurement" respectively and speak to the use of public funds by or on behalf of the procuring entity. The court would therefore be examining the relevant contract to assess whether it falls within that criteria. In relation to the use of the words "other activities" included in section 3 of the Regulations, I agree with the submission of Mrs Foster-Pusey that they would relate to the words preceding, which are "all procurement of goods, works and services". The emphasis is on the issue of procurement, whether

of goods, works, services or other activities. Mr Leys' submissions therefore reveal a fundamental flaw in relation to how a procurement contract is to be interpreted.

[46] The issue that Batts J would have had to determine is whether the relevant statute and regulations, limited procurement contracts to those involving the expenditure of public funds and whether there was any basis for concluding that the contract under question could possibly fit into that definition, so as to allow scope for judicial consideration.

[47] The use of the words "procurement" and "public sector procurement" are clearly defined and limited to the use of public funds. This view is also fortified by the definition of "Economy" set out under section 5 of the Public Sector Procurement Policy. That term is listed as one of 10 principles to guide the Government of Jamaica's procurement policies:

> "**Economy:** Procurement is a purchasing activity, the purpose of which is to give the purchaser the best value for money. Procurement is a significant area of government spending and its potential to encourage Jamaican business, particularly MSMEs, to increase their formal participation in this market, improve product and service quality, raise business standards, and facilitate entry into international markets, will be fully supported."

[48] The definitions associated with procurement are therefore clear and unambiguous and should be interpreted in accordance with the golden rule. There is no absurdity present in applying the natural and ordinary meaning in the context of the Regulations. It appears that the legislative intention is to ensure that strict procedural guidelines are followed in relation to the use of public funds in acquiring goods, works,

services or other activities. If the relevant contract entered into between GKPS and the respondent is to be considered as a procurement contract, which would attract the provisions of the Regulations, the respondent must have expended public funds for the purposes of acquiring the services.

[49] In his judgment, Batts J, at paragraph [12], described the nature of the contract between the parties. Is there any evidence that would contradict what he has found? Both parties agree that the respondent acts as the sub-agent of the bill collection entity and is paid a commission for so doing. It is not sufficient to justify the argument that public funds are being expended by the respondent because staff, office space and other related expenses are used to facilitate the services of the bill collection provider. This does not meet the criteria of expending public funds to acquire a service as the nature of the arrangements clearly demonstrate that the appellant and in like manner, GKPS would have acquired the right to house their facilities in the post offices and that the respondent acted or is acting as their agent in that regard.

[50] Mr Gentles, at paragraphs 7 and 8 of his affidavit, described services offered by the respondent through contracts with other entities which were also not considered to attract the Regulations. These include DHL Courier services and money remittance services through Moneygram. His evidence is that the commonality between all these contracts is that the respondent provides the services and is paid a fee by the commercial partner. He stated also that none of these situations involved money being paid out to anyone for providing services.

[51] On the other hand, Miss Marks, in her affidavit, referred to similar type ventures of the government or its agencies which contain a concession feature (such as the present contractual arrangements between GKPS and the respondent) that have gone through the process of public tender. Miss Marks referred in particular, to a proposal the appellant made to the relevant ministry in 2009 for the collection of taxes using its bill collection system. She stated that the proposal did not contain any expenditure of public funds, but that the ministry took the view that the proposal would have to go to public tender. A letter (dated 11 February 2009) signed by the Commissioner-General of the Ministry of Finance and Public Service, is exhibited and states that "based on recommendation a decision has been taken to pursue 3rd party collection option through the tender process".

[52] This court cannot determine the basis on which that recommendation was made as there is no evidence to ground what can be termed as a matrix of fact for that consideration. It may have been made for reasons of political transparency. However, there is an essential distinction to be made between the two sets of activities. It is the Government's duty, a public duty, to collect taxes, so, in any event they would be awarding a contract to a private entity to collect government revenues. In relation to other contracts referred to by Miss Marks, the nature of each contract would have to be examined by the court to see if it is subject to the Procurement Regulations.

[53] On the other hand, it cannot be said that the respondent has a public or statutory duty to provide services for the payment of bills as provided by the appellant and GKPS. As previously stated, it may very well be a contract that would be subject to

scrutiny by the Contractor–General but the bar cannot be set any higher. Based on the current state of the legislation, the relevant contract under consideration cannot be included under the rubric of public sector procurement. Mr Ley's challenge to Batts J's ruling on this fundamental issue has no reasonable prospect of success.

[54] I would respectfully agree with Queen's Counsel for the respondent that this ground of appeal must fail.

Issue 2- can the issues of bias and nepotism stand as a ground for judicial review in these circumstances

[55] Batts J dealt with the issues of wrongful termination, bias, nepotism and legitimate expectation at paragraphs [21]-[26] of his judgment. He found that on the facts before him, it was not arguable that the respondent had breached an implied term of good faith that a party be given an opportunity to remedy the problem before the service of termination notice. He likewise found that on the circumstances of this case where the Regulations did not apply, the suggestions of bias and nepotism would not be able to stand as grounds for judicial review.

Submissions of the appellant

[56] Mr Leys contended that while regulation 36 deals specifically with the duty of public officers to declare any potential conflict of interest in relation to the procurement exercise, the issues of bias and nepotism are independent and free standing and would still give rise to judicial review outside of the scope of the Regulations. He argued that the process used to terminate the contract was not done in good faith and that the negotiations leading to the award of the contract with GKPS was tainted. In his

submissions, he drew from the affidavit evidence of Miss Marks in which she deponed that:

> "Worthy of note is that the Company Secretary of the Respondent who also sits on the Board of the Respondent Mr. Patrick McDonald is also a member of the Board of Directors of First Global Financial Services Limited which is owned by Grace Kennedy the parent company of GKPS/ Bill Express. The Chairman of the Respondent is also the brother to the Hon. Michael Hylton Q.C. who represents Bill Express in litigation in the Court of Appeal against the applicant."

[57] He contended that the above named persons were involved in the negotiations with GKPS (as stated at paragraph 16 of the affidavit of Mr Lance Hylton and paragraphs 14 and 18 of the affidavit of Mr Novar Patrick McDonald, both sworn on 8 November 2013). He submitted therefore that there were conflicts of interest.

[58] Queen's Counsel stated that Batts J had totally ignored the provisions of the Public Body Management and Accountability Act (PBMA), in particular section 17 and the common law although these were raised for his consideration.

[59] Section 17 of the PBMA provides as follows:

> "17.-(1) Every director and officer of a public body shall, in the exercise of his powers and the performance of his duties-
>
> (a) act honestly and in good faith in the best interests of the public body; and
>
> (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances including, but not limited to the general

knowledge, skill and experience of the director or officer.

(2) A director who is directly or indirectly interested in any matter which is being dealt with by the board-

(a) shall disclose the nature of his interest at a board meeting;

(b) shall not take part in any deliberation of the board with respect to that matter."

[60] Mr Leys questioned the role of both Mr McDonald and Mr Hylton in the decision making process in relation to the contract being rescinded with the appellant and subsequently awarded to GKPS. He submitted that although Mr Hylton had disclosed his brother's relationship with GKPS, it is clear from Mr Hylton's affidavit that he participated in the board meeting of 14 October 2013 which was convened to deal with the issue of the revocation of the termination notice to the appellant.

[61] Queen's Counsel also contended that Mr McDonald's affidavit demonstrated that he had a financial interest in the outcome of the contract as he was a shareholder in Grace Kennedy and was likely to benefit from the contract entered into with GKPS. He submitted that although Mr McDonald denied that he was present at the meeting of the board on 29 July 2013 when the decision was taken to terminate the contract with the appellant, he was however, a participant in the meeting of 14 October 2013. He stated that this tainted the process of deliberation regarding the finality of the termination notice and was in direct contravention of the PBMA as he did not disclose his interest at this meeting.

Submissions of the respondent

[62] Mrs Foster-Pusey has submitted that while there is a duty of care under the PBMA, it is related to every director and officer. She posited that in relation to Mr Lance Hylton, there is no direct or indirect interest in the matter so the provisions of the Act would bear no relevance to him. She submitted further that Mr Novar McDonald had no financial interest as indicated in his affidavit but, even if it could be argued that he did, this would not be an issue for judicial review. She stated that this is so as the issue of bias was raised in relation to the termination of the appellant and was not being pursued as one of the bases for the grant of leave for judicial review. The appellant was merely seeking an application for a declaration.

[63] Queen's Counsel contended that a government company is not necessarily subject to judicial review in respect of its business affairs. She also stated that there would have to be exceptional circumstances that would lead to judicial review and that an entity formed to operate in the commercial sphere and carrying out commercial activities would be subject to the principles applicable to companies formed under the Companies Act. Complaints about the actions of directors would therefore be pursued in accordance with remedies available under the aforementioned Act or the PBMA. Similarly, the issues, such as bias, would be related to the duty of directors to act in good faith and so should be pursued in the realm of company law.

[64] Queen's Counsel submitted further that the PBMA provides its own enforcement provisions. She referred to section 25 of the said Act, in particular section 25(k) which refers specifically to fiduciary duties as described in section 17. If there is some breach,

the Attorney-General is to bring an application before the court in relation to the matter. If the court is satisfied that there has been some contravention, then the court is empowered to grant various orders, such as a pecuniary penalty or an injunction against the person engaged in the conduct. She submitted that there is no provision for granting writs of mandamus or certiorari especially in relation to commercial acts. She argued that commercial decisions are not amenable to judicial review, but would be a cause of action for breach of contract if wrongful termination is being alleged. It is her submission that the contract in question that existed between the parties is fundamentally a commercial transaction and relied on her submissions above, that the issues are not amenable to judicial review.

Analysis

[65] Section 4(a) of the Contractor-General Act empowers the Contractor-General to monitor the award of government contracts including their termination, in particular, whether they are awarded impartially and on merit. Complaints can therefore be made to the Contractor-General to initiate an investigation in relation to whether impropriety or bias existed in relation to government contracts. The evidence reveals that such an investigation was actually commenced by the Contractor-General and that he had invited Miss Marks to provide a statement in relation to the termination of the respondent's contract. See paragraph 20 of her affidavit.

[66] Based on the PMBA there are penalties also that could be imposed in relation to what is being alleged. These actions are all independent of judicial review. In the absence of the Regulations applying, was Batts J wrong therefore in not exercising his

discretion to grant leave to the respondent to request a declaration that the contract was wrongfully terminated?

What was the nature of the function carried out by the respondent?

[67] Mr Michael Gentles spoke to the mandate of the respondent at paragraph 5 of his affidavit: that the respondent is:

> "...to be the commercial arm of the Post and Telecommunications Department [PTD] with a mandate in the short to medium term to develop the products and expertise which would best leverage its expensive postal network across the island while continuing to deliver mail in the most efficient form and with modernized mobility."

[68] Batts J stated at paragraph [7] of his judgment that the respondent is a public entity carrying out public functions and that it was arguable that the respondent was carrying out a public duty at the time it was contracting to facilitate the provision of services to the public. However, on a proper assessment of the circumstances, no statutory duty can be said to exist to offer bill payment services to the public, neither can it be maintained that the respondent was performing a public duty owed to the appellant outside the scope of the Regulations. See **R (on the application of Tucker) v Director General of the National Crime Squad** at paragraph [31] of this judgment.

[69] In relation to the issues of bias and nepotism, it is questionable whether the relationship between Mr Lance Hylton and Mr Michael Hylton could be considered sufficient to establish such an allegation. In relation to Mr McDonald, there may be scope for debate as to whether he acted appropriately. However, Mrs Foster-Pusey is

correct that the remedies available on judicial review are discretionary in nature and this would be a live issue for consideration since the respondent has already entered into a contract with GKPS. The attendant prejudice and detriment associated with any interference with such a contractual relationship would be a relevant factor for consideration in any decision to grant leave.

[70] The court would have to be satisfied that Batts J erred in his assessment as to whether the matter was one fit for a substantive hearing. Once the learned judge had found, as this court also has done, that the Regulations did not apply to the relevant contract under consideration, then it would certainly be open to Batts J to assess the evidence before him and to come to the conclusion that he did concerning the lack of suitability of the issue for a review court. This ground of appeal therefore fails.

Issue 3 - were alternative remedies available to the appellant?

[71] The learned judge dealt with this issue at paragraphs [15] to [20] of his judgment. He found that the appellant had failed to satisfy the court that there was no available alternative remedy in that it had failed to trigger the procedure for relief provided for in the statute.

[72] At paragraph [16] of his judgment, Batts J stated:

> "Regulations 29-33 set out an elaborate review and appeal process and provides that: 'a contractor or prospective contractor that claims to have suffered loss or injury due to a breach of these provisions by a procuring entity may seek review'. True it is that Regulation 29(2)(a) says that the election of method of procurement is not subject to review, however complaints of bias and nepotism are, as well as

> complaints of failure to disclose. It therefore could have been pursued on appeal."

[73] Batts J also noted that the Regulations and Handbook of Public Sector Procurement Procedures do not mandate that breaches or alleged breaches of procurement procedures will preclude a party from proceeding with a contract already entered (rule 2.5 of Handbook). He noted also that the rules allow an aggrieved bidder to apply for judicial review if the bidder fails to get address from the administrative review process (rules 29 to 32). The remedy of damages is available to the aggrieved contractor as well as criminal sanctions (rules 39 and 40 respectively). The possibility of judicial review is available to the contractor if certain conditions are met (rule 32(2)).

[74] Batts J acknowledged that the position may have been otherwise if there was a credible complaint that the respondent had acted ultra vires, in the sense of doing something it had no authority to do, as opposed to the proffered complaint that the respondent has done something it is authorised to do but in a wrongful mode.

[75] The learned judge further found that a second alternative remedy was available to the appellant by means of investigations conducted by the Contractor-General and in the final analysis, the appellant had the possibility of civil action for any alleged breach of contract. Therefore, he concluded that the application for leave would also fail based on the alternative remedies available under the Regulations as well as The Contractor-General Act.

Submissions of the appellant

[76] Queen's Counsel contended that it was inconsistent for the learned judge to deem that the Regulations were inapplicable but then to support his ruling by finding that the appellant failed to avail itself of the remedy found thereunder. He has asked that the court also consider that, the respondent, by failing to act in accordance with the Regulations, precluded the tender process. The appellant would therefore not be a tenderer or a competitor within the spirit of the Regulations and the jurisdictional basis for the appellant to bring itself within the provisions of the Regulations would not have been triggered. He stated that if it had been, this would have enabled the appellant to invoke its processes.

[77] In relation to the complaint lodged by the appellant with the Contractor-General, Mr Leys submitted that the powers of the officer are mainly investigative and that he has no power to quash the unlawful act. Accordingly, the appellant is left without an alternative remedy which could lead to the quashing of the decision of the respondent.

Submissions of the respondent

[78] Queen's Counsel submitted that, if the court should take the view that the contract is governed by the Regulations, the learned judge would be correct in law to find that there was an alternative remedy available in Part VIII of the Regulations. Part V111 governs the review and appeals process. She pointed the court in particular to Regulation 29(1) which provides that:

> "A contractor or prospective contractor that claims to have suffered loss or injury due to a breach of these provisions by a procuring entity may seek review."

[79] Counsel relied on the dicta of McCalla CJ in **Christopher Coke v The Minister of Justice and others,** Claim No 2010 HCV 02529, judgment delivered on 9 June 2010, where McCalla CJ referred to rule 56.3(3)(d) of the CPR which deals with the question of the existence of an alternative means of redress. She stated at paragraph 24:

> "...there is an abundance of authorities which state that where the applicant has alternate redress the application for leave ought to be refused. See **R v (Sivasubramanian) v Wandsworth County Court** [2003] 1 WLR 475. In that case the court held that permission to claim judicial review would normally be refused where there was a suitable alternative remedy such as a statutory appeal procedure. The court held that there was a coherent and sensible statutory scheme governing appeals from county court decisions which an applicant ought not to be permitted to bypass by pursuing a claim for judicial review, unless there were exceptional circumstances."

[80] Queen's Counsel also relied on the case of **R v Commissioner of Police ex parte Detective Constable Glen Riley** [2013] JMSC Civ 113, to bolster her submission that judicial review is not lightly granted where alternative remedies exist.

Analysis

[81] This ground obviously becomes of less importance once the determination is reached that the Regulations do not apply. However, Batts J did consider the issue as another reason to refuse the orders sought.

[82] Regulation 29(1) as set out above, speaks to a contractor or prospective contractor seeking review. The definition of "contractor" has been set out in paragraph 39 of this judgement. The Regulations define "prospective contractor" as any person, firm or entity proposing to obtain the award of a government contract.

[83] Based on these definitions, the appellant would not qualify as a contractor as it would not have been entering into a contract with the respondent. It is possible however, though somewhat artificial, that the appellant could qualify as a prospective contractor. In this regard, Batts J could be considered to have been correct that the appellant would have had an alternative remedy, one which had the potential to lead to judicial review. However, based on the existing circumstances, would a complaint by the appellant as provided by the Regulations be a suitable alternative remedy?

[84] The appellant had been seeking to prevent the termination of an existing contract. Questions may arise as to whether the appellant could be considered an aggrieved bidder claiming to suffer loss due to a breach of the provisions. But, in the event that it could, regulation 30 sets out the initial procedure as follows:

- A complaint is lodged to the head of the procuring entity.
- The complaint would then be copied to the relevant procurement committee with responsibility for approval of the award recommendation. This should be within 14 days.

- The complainant and procuring entity are to attempt agreement on the resolution of the complaint.

- Failing this resolution, the head of the procuring entity is to issue a written decision to the complainant stating the reasons for the decision and indicate that any appeal should be lodged with the National Contracts Committee (NCC) within 14 days of the contractor's receipt of the procuring entity's decision.

- Any appeal from the review of the NCC is to be lodged within 14 days of that Committee's decision to the Procurement Appeals Board (PAB).

- The PAB is to recommend a resolution within 14 days of the receipt of the appeal request.

- If the NCC and the procuring entity fail to comply with the recommendation of the PAB, the contractor may institute judicial review.

[85] Bearing in mind the process as outlined, Mr Leys' submission that the appellant would not be a tenderer within the spirit of the Regulations in order to trigger the jurisdictional process for review has merit.

[86] Batts J should have had regard to the issue of the suitability of alternative remedies within the context of the appellant's assertion that the Regulations applied to

the contract in question. This was the foundational plank of the application for leave. The respondent has vigorously opposed any such determination and would be the procuring entity to which any complaint would first be directed. As a result, even if the appellant could be said to be an aggrieved bidder, the possibility of any meaningful review process would be virtually non-existent.

[87] Similarly, the investigation by the Contractor-General would not lead inescapably to a judicial determination as to whether the Regulations would apply. Section 20 of the Contractor-General Act directs the Contractor-General, after an investigation, to inform the "principal officer of the public body concerned and the Minister having responsibility....of the result of that investigation". He is also to make recommendations that are considered necessary. Batts J also found that civil redress for breach of contract would have been available to the respondent. However, civil redress would not have allowed for the determination of the substantive issue raised - whether the contract was subject to the Regulations. To that narrow extent therefore, I am of the opinion that Batts J was in error in making such a finding that suitable alternative remedies existed. However, bearing in mind the determination in relation to issue 1, this ground of appeal provides no basis to interfere with the learned judge's decision.

Issue 4 – assuming that the Regulations apply, is the issue of legitimate expectation a viable argument on which to grant leave.

Submissions of the appellant

[88] Mr Leys submitted that the appellant had a legitimate expectation that, if the respondent was soliciting providers of bill collection services, there would be compliance

with some formal, discernible selection procedure in which it would be given the opportunity to participate. He further contended that the existence of the Regulations and the tender process outlined have served to bolster this expectation. He relied on **Chief Immigration Officer of the British Virgin Islands v Burnett** (1995) 50 WIR 153 (a majority decision) where Vincent Flossiac, CJ, at page 161 stated as follows:

> "According to the *audi alteram partem* rule, where any authority (person or body of persons) intends to exercise a constitutional, statutory or prerogative power and thereby to make or take a judicial, quasi-judicial or administrative decision or action which will adversely affect the status, rights, interests or legitimate expectations of any other person (the complainant), the authority is under a common-law duty (and may also be under a constitutional or statutory duty) to observe certain formalities and the complainant has a correlative common-law right (and may also have a correlative constitutional or statutory right) to the observance of those formalities before such a decision or action is made or taken."

[89] According to Queen's Counsel, there is a legitimate expectation (outside of the application of the Regulations) that a public entity such as the respondent would carry out its dealing in a fair and transparent manner and that contracts such as the one under consideration would not be arbitrarily awarded to entities connected to members of the board.

Submissions of the respondent

[90] Queen's Counsel adopted her submissions in relation to the issue of whether the contract was subject to the Regulations and stated that the respondent was merely serving as a sub-agent of the appellant and not seeking to procure its services. She also submitted that where the provision of a service to the public body is absent, the

contract cannot be deemed to be a "government contract", therefore neither GKPS nor the appellant can be regarded as having been awarded such a contract. She argued that this is a commercial transaction and the provisions of the Contractor-General Act do not apply. It is her submission that the learned judge was correct in his findings in law in relation to whether legitimate expectation would arise.

Analysis

[91] Counsel (who appeared before Batts J) argued that the issue of legitimate expectation would arise even if the Regulations did not apply. However, Mr Leys has not sought to argue that point before this court. He has asked that the issue of legitimate expectation be addressed within the context of the Regulations. The concept of legitimate expectation is a function of the rules of natural justice. As summarized by Albert Fiadjoe, Commonwealth Caribbean Public Law, 3rd edition at page 35:

> "Natural justice involves the application of procedural requirements designed to achieve fairness in the decision making process. A failure to do so is controlled by the courts basing themselves on the ultra vires doctrine."

[92] Fiadjoe, at page 236, summarised the principles of natural justice as the imposition of certain procedural safeguards on a body or person whose decisions may affect the rights, interests and legitimate expectation of others. Lord Bridge of Harwich in **Lloyd v McMahon** [1987] AC 625, page 702 to 703 expressed as follows:

> "My Lords, the so- called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when anybody, domestic, administrative or judicial, has to make a decision which will

> affect the rights of individuals depends on the character of the decision making body, the kind of decision it has to make and the statutory or other framework in which it operates. In particular, it is well established that when a statute has conferred on anybody the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional safeguards as will ensure the attainment of fairness."

[93] In examining this concept of legitimate expectation, the Chief Justice in **Chief Immigration Officer of the British Virgin Islands v Burnett** at page 160, referred to Lord Roskill in **Council of Civil Service Unions and others v Minister for the Civil Service** [1984] 3 All ER 935 at page 954, where he stated:

> "The principle may now be said to be firmly entrenched in this branch of the law. As the cases show, the principle is closely connected with 'a right to be heard'. Such an expectation may take many forms. One may be an expectation of prior consultation. Another may be an expectation of being allowed time to make representations, especially where the aggrieved party is seeking to persuade an authority to depart from a lawfully established policy adopted in connection with the exercise of a particular power because of some suggested exceptional reasons justifying such a departure."

[94] The court would therefore be guided by the statutory powers conferred upon the public body making the decision which affects the rights of individuals to ensure that the proper procedure is followed. The court would also introduce, where necessary, additional safeguards to ensure that fairness is attained. Legitimate expectation may therefore be a relevant concept for consideration even if it is not entrenched within the statutory provisions.

[95] Batts J made no finding that the concept of legitimate expectation would not arise within the context of the Regulations. As such, Mr Leys' submissions before this court are misconstrued. In relation to this issue, the learned judge found that there must be some conduct or representation by the state giving rise to an enforceable right and that counsel below, "absent the applicability of the Regulations, could point to nothing except a notional duty of fairness which could give rise to the alleged legitimate expectation" (paragraphs [25] and [26] of Batts J's judgment).

[96] He made no further findings in relation to the applicability of legitimate expectation within the context of the Regulations. At paragraph [26] of his judgment, he stated further:

> "...I do not regard as inherently unfair the decision by the Crown to contract with one person rather than another. Such, a decision, taken on a commercial basis, may be made for a miscellany of reasons. It is precisely because the common law afforded no relief in such circumstances that the Contractor General's Act and the Regulations were passed. Parliament decided that those Regulations should apply to procurement contracts. The Applicant would wish by utilizing the device of legitimate expectation that this court extend its application to other types of contracts. I am satisfied that this would not be a legitimate extension of the common law."

[97] This reasoning, in the circumstances, cannot be faulted. This ground of appeal therefore fails.

Issue 5- 1. Whether the learned judge erred in fact when he found that the respondent declined to enter into arrangements with the appellant for the expressed reason given when the totality of the evidence was not before him.

2. Whether the learned judge err in law when he found that the breach of contract is best dealt with by a trial court where the evidence may be tested in the usual manner when the appellant had sought a remedy by way of a declaration in the judicial review proceedings.

Submissions of the appellant

[98] Mr Leys contended that the exercise of the provision of clause 18.1 of the sub-agency agreement by the respondent was unlawful as it was done in bad faith. He argued that it was therefore an unlawful termination as the respondent had failed to notify the appellant of any purported breaches as provided for by virtue of clause 18.5. This clause allows either party to terminate the agreement if either party fails to perform any of its obligations and the failure is not remedied within 30 days after written notification is received.

[99] Queen's Counsel submitted that the allegations by the respondent of unreconciled payments should not have led to the no-fault termination clause being used (18.1) and that the intent of the parties when the sub-agency agreement was executed was to allow opportunities to cure breaches. He noted that the appellant took decisive steps to rectify the same once notification had been received. However, despite the appellant's action to rectify the perceived breaches, the respondent nevertheless served the appellant with a termination notice and commenced discussions with GKPS. He submitted that the learned judge should have had regard to the above, as well as the connection of Mr Novar Patrick McDonald to GKPS. He submitted further that the evidence in the Mark's affidavit (at paragraph 24) denying that the reason for termination of the contract was due to unreconciled payments should have alerted the

learned judge to the fact that he was acting precipitously in his conclusions concerning the reasons for termination.

[100] Queen's Counsel submitted that bad faith can be discerned from the course of dealings between the parties based on the abovementioned factors. He referred the court to **Yam Seng Pte Ltd (a company registered in Singapore) v International Trade Corporation Ltd** [2013] EWHC 111 [QB]. He stated that the case provided useful guidance on the existence of an implied duty of good faith in commercial contracts. In conclusion, Mr Leys contended also that the finding of the learned judge is flawed as the appellant is entitled to seek an administrative order by way of a declaration that there was a breach of contract by virtue of rule 56.7(c) of the CPR.

Submissions of the respondent

[101] Mrs Foster-Pusey referred to Judicial Review Handbook, Michael Fordham, 6th edition, Hart Publishing and quoted an excerpt, page 397, paragraph 34.5:

> "...'Private law' functions (or questions) are generally thought inapt for judicial review. There may be a 'private body' never challengeable by judicial review, or a 'public body' exercising a private function [e.g. employment]. In either case, there is unlikely to be immunity from judicial scrutiny, rather the scrutiny will be for some private law claim."

[102] She submitted that the remedies regarding breach of contract are within the purview of private law and not judicial review. She submitted further that the decisions in question are not amenable to judicial review. She again relied on her earlier

submission that the Regulations do not apply to the contract in question and therefore the appellant seeking a declaration for breach of contract within the realm of judicial review is misguided and misconceived.

Analysis

[103] Batts J reasoning on this issue is set out at paragraphs [21] and [22] of his judgment:

> "[21] ...The Applicant contends...that notwithstanding the clear words of the contract, a 90 day notice ought not to have been issued as there is implied in every commercial contract a duty of good faith. This duty of good faith requires that at the very least the other party is given an opportunity to remedy the problem before a 90 day convenience notice is served.
>
> [22] The cases cited in support of this legal proposition speak to an implied duty of honesty. 'Good faith' as a term of art may connote fiduciary or other duties. Even if there is merit in the proposition, on the facts before me it is not arguable that the Respondent has been in breach of such a duty. This is because the issue relating to the unreconciled payments had been the subject of dialogue and written communication. The uncontradicted evidence is that in July 2013 the Respondent declined to enter into arrangements with the Applicant for the expressed reason that this matter was outstanding. In any event it is my view that the question whether or not there is breach of the contract is best dealt with by a trial court where evidence may be lead and tested in the usual manner."

[104] Clauses 18.1 and 18.5 of the sub-agency agreement are set out as follows:

> "18.1 Either party may terminate this Agreement by giving the other party ninety (90) days prior notice in writing, SAVE and EXCEPT that either party may terminate this Agreement with immediate effect in the event of non compliance with the terms of this Agreement by the other party."

> "18.5 Subject to the requirements of all applicable laws, this agreement may otherwise be terminated by either party if either party fails to observe or perform any of its obligations under this agreement and such failure is not remedied within 30 days after written notification thereof is given by the other party, or in the case of failure to pay any material amount due under this agreement, with immediate effect."

[105] Several paragraphs of the affidavit of Miss Audrey Marks, sworn on 1 November 2013, set out the view of the appellant in relation to the respondent's reason for the termination of the contract. At paragraph 25, Miss Marks stated that immediate to the termination notice being served, the position of the appellant was that all commission payments due to the respondent were made on a timely basis. However, contrary to that position, Miss Marks at paragraph 27 of her affidavit further deposed that:

> "From the introspection conducted by the Applicant of what could have lead to this early termination the only issue that could be identified where there was a difference with the Respondent was confirmed to be a reconciliation claim which had been submitted two years late by the Respondent and for which the Applicant had not met its committed time line to settle. This claim represents reconciliation differences deducted from the commissions paid to the Respondent."

She also stated at paragraph 30 that:

> "On or about August 19 or 20, 2013 I made contact with the Chairman of the Finance Committee of the Respondent Mr. Ian Kelly and he agreed to a meeting with me to discuss this issue. We subsequently met on August 21, 2013 along with Directors Vassell Brown and Shawn Sydial of the Respondent. During the discussions with these representatives, they informed me that the issue that led to the termination notice was an outstanding reconciliation issue. The Applicant then committed to an immediate resolution by offering to pay the full amount of the claim by December 31, 2013 even if the same were to be regarded as an advance of the reconciliation exercise being concluded."

[106] Miss Marks also exhibited to her affidavit a letter dated 24 October 2013, in response to a letter from the Office of the Contractor-General which invited both parties to discuss the matter of the termination notice. In this letter, Miss Marks noted at page two that:

> "Indeed to the extent that one may be tempted to search for a possible cause, the only issue that comes to mind is the length of time it may have taken for Post Corp and Paymaster to sort out a reconciliation difference that had arisen in our accounting for a specific period. Even so, that matter, once brought to our attention was worked through and settled, and could hardly have provided the basis for such an extreme decision."

[107] For the respondent, Mr Michael Gentles in his affidavit, sworn on 8 November 2013, averred (at paragraph 11) that the "straw that broke the camel's back" related to the non payment of debt due from the appellant to the respondent. It was further averred that there had been a "long history of conflict" between the parties and that the disputed sums have not been settled. The affidavit of Lance Hylton, sworn on 8 November 2013, also spoke to the issue of a "long outstanding debt" owed by the appellant to the respondent which was at the fore of the Board's decision to terminate the contract with the appellant.

[108] The termination notice served on 16 August 2013, omitted to state the reason for the termination of the contract, however the subsequent discussions held between the parties revealed that the major issue driving the termination was connected to the unreconciled commission payments. The appellant did not dispute the existence of

unreconciled payments and indeed stated that immediate steps were taken to rectify same.

[109] In **Yam Seng Pte Ltd (a company registered in Singapore) v International Trade Corporation Ltd**, a decision of the Queen's Bench Division, Legatt J examined the issue of whether there was a general application of the principle of good faith as an implied duty in the performance of contracts. He noted that the House of Lords had recognised that "commerce takes place against a background expectation of honesty" (paragraph 136). He stated also that "what good faith requires is sensitive to context" (paragraph 141) and that "the test of good faith is objective in the sense that it depends not on either party's perception of whether the particular conduct is improper but on whether in the particular context the conduct could be regarded as commercially unacceptable by reasonable and honest people" (paragraph 144).

[110] It is difficult therefore to conclude that the learned judge misinterpreted the facts when he found that the uncontradicted evidence supported the view that the respondent declined to enter into arrangements with the appellant due to the issue of unreconciled payments. Similarly, it is difficult to conclude that he erred or could be shown to be palpably wrong in his determination that issues relating to the alleged breach of contract "is best dealt with by a trial court where evidence may be lead and tested in the usual manner".

[111] Furthermore, an examination of clause 18.5 also belies any reliance placed on it by the appellant as it allows for immediate termination if either party fails to pay a material amount due under the agreement. The respondent alleges through Mr Gentles that the unreconciled amount of $3,200,770.54 was owed by the appellant between April 2007 and March 2013.

[112] There is no merit therefore in this ground of appeal.

Issue 6 - did the learned judge err in awarding costs to the respondent?

Submissions of the appellant

[113] Mr Leys submitted that Batts J disregarded the provisions of rules 56.15(5) and 64.6(4)(d) of the CPR in awarding costs to the respondent. He submitted further that the learned judge did not indicate on what basis he was awarding costs against the appellant and that there is a natural assumption that he was wrong if reasons are not given. He referred the court to the Full Court decision of **Danville Walker v The Contractor General** [2013] JMFC Full 1(A) where costs were ordered on a limited basis against the unsuccessful applicant. Sykes J dissented in that judgment in relation to the section of the CPR to be used in deciding on the issue of costs that could be awarded at an application for leave for judicial review. The majority decision stated that costs could be considered under rule 56.15(5) as this was the preliminary stage of an application to file an administrative order. Sykes J was of the view that the appellant had not yet obtained leave to apply for such an order and that rule 56.15(5) dealt with the general rule that should apply to costs in relation to an application for an

administrative order. He concluded that the proper rule to be applied would therefore be the general rule in civil proceedings, that is, rule 64.6(1).

The relevant rules are set out below.

> "56.15 (5) The general rule is that no order for costs may be made against an applicant for an administrative order unless the court considers that the applicant has acted unreasonably in making the application or in the conduct of the application."
>
> "64.6(1) If the court decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party."

[114] It is clear that the emphasis for each is different. The general rule in relation to administrative orders under rule 56.15(5) is that no order for costs should be made against the applicant unless the court considers the applicant was unreasonable in making the application or in the conduct of the application. The general rule under 64.6 is that the order for costs should be that the unsuccessful party pay the costs of the general party. However, the court is empowered also by virtue of rule 64.6(3) and (4) to have regard to certain factual circumstances in deciding who should be liable to pay costs. At the end of the day, the court would have a discretion under both rules as to whether the unsuccessful applicant/party should pay costs, if any.

[115] The Full Court in **Danville Walker v The Contractor General**, agreed that costs would be ordered against the unsuccessful applicant. This was based on that court's conclusion that the applicant had engaged in unreasonable conduct in pursuing

a renewed application for leave after the first application had been refused before a single judge. The Full Court adopted the principles set out in **Mount Cook Land v Westminster City Council** [2004] 2 Costs LR 211, which has been set out in the judgement of Sykes J at paragraphs [18] and [19] of the judgment:

> "[18] With this in mind and given the importance of judicial review and its special place in our democracy I am in favour of a rule that says that costs should not generally be awarded against an unsuccessful applicant for leave in the absence of exceptional circumstances. Of the factors to be considered when deciding whether exceptional circumstances exist identified by Auld LJ ([76]), I would adopt proposition number five which states:
>
> Exceptional circumstances may consist in the presence of one or more of the features in the following non-exhaustive list:
>
> (a) the hopelessness of the claim:
>
> (b) the persistence in it by the claimant after having been alerted to facts and/or of the law demonstrating its hopelessness:
>
> (c) the extent to which the court considers that the claimant, in the pursuit of his application, has sought to abuse the process of judicial review for collateral ends- a relevant consideration as to costs at the permission stage, as well as when considering discretionary refusal of relief at the stage of the substantive hearing, if there is one; and
>
> (d) whether, as a result of the deployment of full argument and documentary evidence by both sides at the hearing of a contested application, the unsuccessful claimant has had, in effect, the advantage of an early substantive hearing of the claim.

> [19] The point being made is that despite the fact that judicial review are civil proceedings and applications for leave are governed by the costs regime in Part 64, I am of the view that the special nature of these proceedings make them sui generis and not to be thought of in the same way as private law proceedings between private citizens."

[116] Mr Leys contended that no order for costs should have been made against the appellant as it had not acted unreasonably in the making of the application or in the conduct of the application. He argued that the circumstances are to be totally distinguished from **Danville Walker v The Contractor General** which concerned a renewed application for leave and where the Full Court stated the reasons why exceptional circumstances existed. He pointed out also that no costs were allowed at the initial application for leave and the costs at the Full Court hearing were limited to the oral submissions of counsel (made at the renewed hearing).

Submissions of the respondent

[117] Queen's Counsel for the respondent has submitted that Batts J was correct as it was within his discretion to award costs to the respondent and the award was reasonable in all the circumstances. She referred the court to **Bolton Metropolitan District Council and Others v Secretary of State for the Environment (Practice note)**, 1995 1 WLR 1176, in relation to the issue being one of the court's discretion.

[118] She has submitted further that once the learned judge had ruled that the Regulations did not apply, the appellant's continued pursuit of the matter in the realm of public law amounts to an abuse of process. She has asked that the court bears in mind that the nature of the hearing for application for leave was significantly contested

and involved detailed and extensive legal arguments as well as a consideration of an injunction; the award of costs to the respondent in all the circumstances was therefore proper and justifiable.

[119] Queen's Counsel has also submitted that once the learned judge found that the matter was outside of the public law remit, then he was not obliged to consider rule 56.15(5) of the CPR; that he therefore properly gave due regard to and applied rule 64.6(1) which provides the general rule that the unsuccessful party to pay the costs of the successful party. However, she submitted further in the alternative that, even if the court were to find that the matter does in fact concern public law, costs were properly awarded as the conduct of the party was unreasonable in that it failed to exhaust all alternative remedies available to it under the Contractor-General Act.

Analysis

[120] Batts J indicated (at paragraph [27] of his judgment) that he would hear submissions on costs. There is no written reason given for the award of costs and the parties have not submitted as to what was urged upon Batts J. As Mrs Foster-Pusey has submitted, the matter is within the sole discretion of the court and the parties had an opportunity to be heard. See **Gorstew Limited v Her Hon Mrs Lorna Shelly-Williams et al** [2017] JMCA App 34 and **Sans Souci Ltd v VRL Services Ltd** [2012] UKPC 6. Whether Batts J arrived at his decision based on rule 56.15(5) or 64.6(1) would not have significantly affected his discretion in awarding costs as he was at liberty to assess the conduct of the appellant in pursuing the application. It would be impossible for this court therefore to review or to come to a conclusion that his

discretion was exercised wrongly on any basis. The court therefore will not interfere with the award of costs by Batts J to the respondents. This ground of appeal therefore fails.

[121] It is for these reasons that this court made the orders as set out in paragraph [3] above.