[2013] JMSC Civ. 12

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2012 HCV 03501

BETWEEN	MINISTER OF TRANSPORT WORKS AND HOUSING	APPLICANT
AND	THE CONTRACTOR GENERAL	RESPONDENT

Mr. Patrick Atkinson, Q.C, Mr. Lackston Robinson, Ms. Carole Barnaby instructed by Director of State Proceedings for the applicant.

Mrs. Samuels-Brown, Q.C. for the respondent.

Judicial Review – Application for Leave – The More Serious Allegations Require Stronger Evidence – Amending Legislation – Whether Inconsistent or Repugnant Public Body Definition – Source – Public Element – Wednesbury Unreasonable

Heard: 10th and 27th July 2012 and 1st February 2013

Campbell, Q.C., J

[1] The applicant is the Minister of Transport Works and Housing and a member of the Cabinet in the Government of Jamaica. The respondent is the Contractor General, established by the Contractor General Act, 1983 (The Act), as a Commission of Parliament.

The Application

[2] On the 22nd June 2012, the applicant filed a Notice of Application for Leave to Apply for Judicial Review of:

(1) A decision of the Contractor General, contained in a letter dated the 14th May 2012, to formally commence the monitoring and investigation of the Independent Oversight Panel (IOP).

(2) The publication of Media Release of April 2012. The applicant sought interlocutory injunctions to restrain the Contractor General from continuing to monitor and investigate the activities of the IOP, and from issuing any further requisitions or publishing any Media Releases in respect of the establishment and activities of the IOP.

(3) An Order pursuant to section 30 (2) of the Contractor-General Act.

[3] Leave for Judicial Review was sought to pursue the following remedies;

(4) A Declaration,

that the IOP, being a voluntary advisory board, is not subject to monitoring and investigative oversight, pursuant to sections 4 and 15 of the Contractor-General Act.

That the Contractor General has no power under the Contractor-General Act to monitor and investigate pre-contractual activities.

The Contractor-General Act does not empower the Contractor General to monitor the activities of a voluntary advisory body not engaged under any government contract or having the authority to award or implement government contracts or to grant, issue, suspend or revoke any prescribed licence.

That the Contractor-General Act does not empower the Contractor General to investigate the activities of a voluntary advisory body not engaged under any government contract or having the authority to award or implement government contracts or otherwise authorized to register contracts, to be engaged in tender proceedings relating to government contracts, or to grant, issue suspend or revoke any prescribed licence.

Certorari

To quash the Requisition of the Contractor General dated the 14th May 2012

Prohibition

An Order of Prohibition prohibiting the Contractor General from issuing any Requisition to the IOP aimed at monitoring and investigating any activity conducted pursuant to its Terms of Reference.

Declaration that the Media Release of the 27th April 2012 is a report of the Contractor General within the meaning of sections 21 and 28 (4) of the Contractor-General Act.

That the Contractor-General exceeded his statutory jurisdiction and acted in contravention of the Contractor-General Act when he published the contents of the Media Release of the 27th April 2012, which release contained adverse findings and conclusions in respect of the establishment of the IOP by the Minister;

Prohibition

A Prohibition prohibiting the Contractor General from publishing further Media Releases relating to the establishment and activities of the IOP without complying with the provisions of section 28 (4) of the Contractor-General Act.

[4] The application came before the court on the 10th July 2012 for the first hearing of the matter. Directions were given for the applicant to file and serve affidavit in response to the affidavit of Craig Beresford, by the 16th July 2012, any response to that affidavit to be filed on or before the 23rd July 2012. There were to be no affidavits after that date. Importantly, the parties were asked to identify the relevant facts and the relevant issues.

The Issues

[5] The applicant identified the issues as follows;

(1) Does the Applicant have an arguable case to challenge by way of judicial review the Requisition and Press Release of April 27th 2012.

(2) In light of the Contractor-General Act, 1983, as amended by Act no. 17 of 1958 and Act no. 1 of 1999, are there serious questions to be tried in respect of the Contractor General's power to; (i) monitor and investigate pre contractual activities generally. (ii) monitor and investigate the activities of a voluntary advisory body established by the Applicant, (iii) issue requisitions to a voluntary advisory body established by the Minister.

(3) In whose favour the balance of convenience lies?

[6] Mrs. Samuels-Brown, QC, did not specifically identify the relevant issues, but focused her client's case, in her written skeleton submissions, in this way "In essence, what the applicants (sic) ask is for the Court to rule in relation to the nature and extent of the Contractor General's powers". The submissions proceeded to examine the relevant standard of the evidence that the applicant had to meet in order to satisfy the court on an application for permission to obtain judicial review. In her oral submissions she said that the power of the Contractor General to make requisitions, is unchallenged, clear and the subject of settled law. Mrs. Samuels-Brown submitted that there was a failure by the applicant to make full and frank disclosure of material events. That the applicant has an alternate remedy by way of interlocutory relief. That in an application for leave, at an inter partes hearing, the court must have regard to the evidence before it and on that basis decide whether the applicant has an arguable case with a reasonable prospect of success. The interim orders sought would have adverse consequences for the Contractor General. The case of **John Lawrence v Minister of Construction (Works) v Attorney General** 1991 28 JLR 265 establishes that the Contractor General's powers extend to pre-contract matters. That the IOP is a public body for the purpose of the Contractor-General Act.

Background

[7] How did the parties two important National offices come to this sorry pass? Mrs. Samuels-Brown, Q.C, statement in paragraph 2 of her submissions, to the effect that there is not much "factual dispute or difference relative to the basic facts," remains unchallenged. It began with two Chinese companies, China Harbour Engineering Corporation (CHEC) and CMA CGM, making what is described by the applicant as "unsolicited proposals" to the Government of Jamaica for the implementation of three important national projects.

[8] The projects are (i) the completion of the North-South Toll Road (the North - South Toll Highway Project); (ii) A feasibility study of the viability of CHEC developing new berthing capacity at the Port of Kingston, encompassing the Fort

Augusta lands with specifications to accommodate large "New Panamax" vessels and related facilities for the transhipment of cargo (the Fort Augusta Port Project); (iii) a feasibility study of the viability of CMA CGM developing new berthing capacity at the Port of Kingston to be used as its hemispheric hub, encompassing the Gordon Cays, with specifications to accommodate large "New Panamax" vessels and related facilities for the transhipment of cargo (Gordon Cay Expansion Project).

(iv) On the 24th April 2012, the applicant, under whose portfolio the Projects fell, brought the matter to the attention of the Cabinet, and the approvals were given to proceed with negotiations. The Cabinet also approved the appointment, by the applicant of the members of an Independent Oversight Panel (IOP), comprised of three persons. On the 27th April 2012, the Contractor General issued Media Release.

(v) On the 14th May the Contractor General issued a letter to the IOP, stating that he had formally commenced monitoring and investigating the activities of the IOP and requisitioned certain document and information. The Chairman of the newly formed IOP forwarded the Contractor General's letter to the applicant, who sought the advice of the Attorney General, who requested an extension of time within which to respond.

(vi) On the 18th June 2012, the Attorney General advised the Contractor General that he did not share the latter's opinion on the propriety of the requisition, and as a result of the divergence of views, the Court would be asked to determine the matter. The IOP, as a result of the challenge raised to the Requisition, is unwilling to undertake its duties under the terms of reference, until the court has determined the matter.

(vii) On the 19th June, the Contractor General issued another Media Release of correspondence, which it was contended disclosed material from the Attorney General's correspondence. On the 22nd June 2012, the applicant filed its Notice of Application for Leave to Apply for Judicial Review, supported by an affidavit of Omar Davies.

Principles Relevant to Application for Leave

[9] Applications for judicial review are dealt with under **Part 56 of the Civil Procedure Rules.** The Rules maintain the protection that is afforded public

bodies. It is required that an applicant for judicial review must meet the following requirements, among others; as provided by Rule 56.3 (1) that, a person wishing to apply for judicial review must first obtain leave, 56 3. 3.

> (d) whether an alternative form of redress exists, and if so, why judicial review is more appropriate or why the alternative has not been pursued.
>
> (f) whether any time for making the application has been exceeded and, if so, why;
>
> (g) whether the applicant is personally or directly affected by the decision about which complaint is made.

[10] The application for leave ensures that the administration of public bodies is not adversely affected, dealing with frivolous and vexatious applications and allows the court to refuse an applicant from proceeding with an unmeritorious application. The requirement for leave pre-dated the coming in force of the Civil Procedure Rules. The Judicature (Civil Procedure Code) Law 1889, S 56 B provided; (1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefore has been granted in accordance with this section.

[11] Lord Diplock explains the need for leave in judicial review; his-oft quoted comments in the case of **Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd.** (1981) 2 All E.R. 93 at 103 j. is as follows:

> "The need for leave to start proceedings for remedies in public law is not new. It applied previously to applications for prerogative orders, though not to civil actions for injunctions or declarations. Its purpose is to prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived."

[12] The discretionary nature of the remedy on an application for the prerogative orders is an essential consideration. Mrs. Samuels-Brown has alleged that there was a failure to make full and frank disclosure of material evidence in this application. It is clear that even if the applicant adduces evidence to the requisite level commensurate with the gravity of the case, he may still be met with a discretionary bar, such as delay or that he may have an alternate remedy or that he has not made full and frank disclosure. The discretionary nature of the remedy is aptly demonstrated in **Aston Kane v Minister of Home Affairs and Justice** (1975) 13 JLR 109, a decision of the Court of Appeal, the applicant had his firearm licence revoked and by letter dated July 24, 1972, he was advised that his appeal was refused. He had been denied an opportunity for a hearing of his appeal. He filed an application for leave on the 13th February 1973, outside of the one month period then allowed by the Civil Procedure Code. He sought to excuse the delay on the ground that he was unable to get the lawyer of his choice. The Court held that the failure to afford him a hearing was a breach of natural justice, however certiorari being discretionary, the inexcusable delay had disentitled him to redress.

[13] There was no dispute that the onus is on the applicant to demonstrate that the court's intervention is warranted. In the **R v Inland Revenue Commissioners, ex. p Rossminister** {1980} AC 952 per Lord Scarman at 1026H said,

> "An applicant for judicial review has to satisfy the court that he has a case."

Counsel for the Respondent submitted that the standard required, on an application for leave to obtain judicial review must be evidence before the Court to satisfy it, that there is an arguable ground for judicial review, having a realistic prospect of success. Mrs. Samuels-Brown submitted that the more serious the allegations, the stronger must be the evidence relied on. The strength of the evidence must be capable of proof at the

hearing of the application, it is not evidence to depend upon 'potential arguability'. In **Sharma v Brown-Antoine and Others** (2006) UKPC 780. In the judgments of Lord Bingham and Lord Walker at page 787.

> "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; See R v Legal Aid Board, ex. p Hughes (1992) 5 Admi LR623, 628 and Fordham, Judicial Review Handbook 4th Edn (2004), p 426. But arguability cannot be judged without reference to the nature and gravity of the issue 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 a 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."

[14] The learned Attorney General has submitted that the test enunciated in Sharma is not relevant in that there is no likelihood of success when all that is sought is an interpretation of a statute.

[15] How serious are the allegations or how serious are the consequences. The affidavit of Minister Omar Davis, in support of the application for leave, dated June 21, 2012 indicates the applicant's view of the seriousness of the consequences, at paragraph 6, states;

> "That the completion of the Mount Rosser Bypass has been stalled for many years and the Bypass remains incomplete due to serious geotechnical difficulties affecting a section of the Bypass. Its incompletion is also a result of unresolved differences between the National Road Operating and Construction Company Ltd. (NROC)

> and Bougyes TP, the contractor previously engaged to do the works."

And at paragraph 9,

> "The project represents strategic investments that would positively impact Jamaicans transportation and infrastructure network, port and trade related activities and the economic development of Jamaica. Hundreds of millions of United States dollars would be invested in Jamaica and there would be the creation of thousands of jobs for Jamaicans."

[16] The affidavit of Craig Beresford dated the 23rd July 2012 that, since the application has been filed, government officers/public bodies that previously complied with Requisition of the Office of the Contractor General, has now declined to do so (see para. 4).

[17] What is the strength and quality of the evidence that has been adduced by the applicant? In respect of allegation that the Contractor General has misconstrued his powers under S 4 and 15 of the Contractor General's Act and acted ultra vires when he issued the Requisition to the IOP. The applicant submits that the Contractor General's Act was amended by Act no. 1 of

[18] 1999. This amendment established the National Contracts Commission (NCC), whose principal function is to promote the "efficiency in the process of award of government contracts" (see s 23 c). That in discharging its function, the NCC is empowered in accordance with S 23D. It was submitted that prior to 11th February 1999, the only oversight body established by the Act was the Commission of Parliament, the Contractor General.

Amending Legislation – whether inconsistent or repugnant

[19] Having recited the sections empowering both the NCC and the Contractor General, Counsel for the applicant submitted at paragraph 39 of the written submissions;

> "It was under this pre 11th February 1999 legislative scheme where the NCC was not in existence and where only the Contractor General had monitoring and investigative powers under the

> Contractor –Generals Act and in this context that Mr. Justice Courtney Orr in **Lawrence v Ministry of Construction (Works) and the A.G.** (1991) 28 J.L.R. 265, that the act empowered the C ontractor General to monitor the pre-contract stages of government contracts and to obtain information from public bodies prior to the award of such contracts."

[20] It was argued on behalf of the applicant that the substantial amendments to the Act brought about by the Act No. 1 of 1999, eight years after the decision in **John Lawrence**, and in light of the language of the statute in respect of the objects and powers of the NCC vis-a vis the functions and powers of the Contractor General under s 4 and 15, it was submitted that pre-contract over-sight is reserved to the NCC and not the Contractor General as existed prior to the amendments of the Contractor-General Act by Act 1 of 1999.

[21] Mrs Samuels-Brown submitted that the statutory authority of the Contractor General to make the Requisition was unambiguous and subject to settled law, and relied on **John Lawrence v Ministry of Construction** (supra) works, at page 269,

> "The proper interpretation of the Act is one which empowers the Contractor General to monitor the pre-contract stages of government contracts and to obtain information from public bodies prior to the award of such contracts." (Emphasis added).

[22] In **John Lawrence**, Dr. Barnett, who appeared for the applicant, the Contractor General, had submitted that the functions of the Contractor General were couched in very broad terms and pointed to section 4 to substantiate this. In particular, pursuant to Sections 4 (3) and 4 (4), the Contractor General may require any public body to furnish him at such times and in such manner as he may direct, information with regard to the award of any contract (s4(3)) or the grant, issue suspension or revocation of any prescribed licences (s4(4)). This, argued Dr. Barnett, was so because Ministers exercise executive power, and are members of the Cabinet, which is the principal source of policy which exercises a general control of government, including the award of contracts and expenditure of large sums of money. Therefore, Dr. Barnett's submission continued, the Contractor General is an instrument created by Parliament to make more

effective the answerability of the Executive, which is answerable to Parliament. Dr Barnett noted that section 15 and s 16 of the statute gave the Contractor General a wide discretion as to when he carries out his investigation. He submitted that S4 (1) showed that the monitoring function of the Contractor General is continuing and purposive; and it was to ensure that contracts are awarded properly. He had a specific duty to monitor that the contracts awarded and terminated were done without impropriety or irregularity. Dr. Barnett relied upon the grammatical construction as well as the mischief to be remedied to support his submission.

[23] Mr. Douglas Leys for the respondent had submitted that the meaning of the statute could be gleaned from the statute itself that the ultimate source of the Contractor General's power is Parliament to which the Contractor General was obliged to report. He relied on Section 2, which spoke of *issues* in the definition of contract, and not *to be issued*. According to Mr. Leys submission, the definition of "contractor" also supported what the court referred to as the "ex post facto" theory.

[24] The learned judge accepted Dr. Barnett's submission as being the correct one, "whether looked at from the point of view of avoiding absurdity, or that of ensuring the desired result based on the language used, or that of carrying out the policy and object of the legislature. See page (269, letter I).

> "I hold that the proper interpretation of the Act is one which empowers the Contractor General to monitor the pre-contract stages of government contracts and to obtain information from public bodies prior to the award of such contracts. I am of the opinion that the ordinary meaning of the words in light of the context and grammar suggest no other interpretation."

[25] The Attorney General's attack on the decision in **John Lawrence** is based substantially on the ground that the 1999 amendment to the Act, has established the National Contracts Committee as the entity to deal with the pre-contract stage of contracts. There is no specific provision in the amendment brought to this court's attention that it is said has amended or repealed the provisions of the

Act which the Supreme Court considered and construed in **John Lawrence**. The Amendment adds a Part 111A, entitled National Contracts Committee to the Act that contained four parts prior to the amendment. Each part carries a separate title, Part 11 is entitled, The Contractor General; Part 111 is entitled, Investigations of the Contractor General. There is no reference in Part 111A to any of the other parts. The judgment in **John Lawrence** has unequivocally held that the Contractor General is empowered to monitor the pre-contract stage. If the Legislature intended to replace the Contractor General's role with that of the National Contracts Committee, why not expressly so state this contrary intention. This is more so where there was a decision of the Supreme Court, which has hitherto been unchallenged which declares the pre-contract rights of the Contractor General to monitor contract.

[26] The legislation establishing the National Contract Committee (NCC) is not inconsistent with or repugnant to the Contractor-General Act, N.C.C's main function is to examine applications for government contracts and assessing the capacity of the applicants to perform the contracts. The Contractor General, on the other hand, is a monitor who investigates who should warn of impending breaches and to hand over information to the relevant authority so that further action can be pursued.

[27] The **Interpretation Act 1968** provides at S 58; "Where one Act amends another Act the amending Act shall, so far as it is consistent with the tenor thereof, and unless the contrary intention appears, be *construed as one with* the amended Act."

[28] In The **Attorney General of Antigua and Barbuda and Anor v Lewis (Artland**) **(1995) 51 WIR 89**, the Court of Appeal was considering the question of implied and partial repeal of a statute. The Court relied on para. 966 and 969, **44 Halsbury Laws of England (4th Edn.).**

[29] 966. **Repeal by implication is not favoured by the courts, for it is to be presumed that Parliament would not intend to effect so important a matter**

as the repeal of a law without expressing its intention to do so. However, if provisions are enacted which cannot be reconciled with those of an existing statute, the only inference possible is that, unless it failed to address its mind to the question, Parliament intended that the provisions of the existing statute should cease to have effect, and an intention so evinced is as effective as one expressed in terms.

> "The rule is, therefore, that one provision repeals another by implication if, **but only if, it is so inconsistent with or repugnant to that other than the two are incapable of standing together**. If it is reasonably possible so to construe the provisions as to give effect to both, that must be done, and their reconciliation must in particular be attempted if the later statute provides for its construction as one with the earlier, thereby indicating that Parliament regarded them as compatible, or if the repeals expressly effected by the later statute are so detailed that failure to include the earlier provision among them must be regarded as such an indication."(Emphasis added)

[30] The applicant has not demonstrated that the amendment of 1999 is so inconsistent with or repugnant to the Contractor-General Act that the two are incapable of standing together. Neither has there been any demonstration by the applicant that it is not reasonably possible to construe them together. Both entities have co-existed since the establishment of the NCC; there is not a tittle of evidence of incompatibility or any express repeals. I respectfully concur with the opinion expressed in **John Lawrence**, as to the power of the Contractor General to investigate and obtain information from public bodies prior to the award of such contracts. I find that the amendment of the Act by Act 1 of 1999 has not affected, amended or alter the power of the Contractor General to investigate public bodies prior to the award of a contract.

Is the Independent Oversight Panel a "public body" for the purposes of the Contractor-General Act?

[31] Challenge has been raised to the issuance of a Requisition to the Independent Oversight Panel (IOP) which the applicant describes as a voluntary advisory body, established to report to the Minister on pre-contractual activities. The essence of the challenge to the Contractor General's decision is that the IOP is

not a" public body", as required by Sections. 4 (2) (3) (4), of the Act, that the Contractor General's role, conducting an investigation, is outwith the S. 15

[32] Section 4 (2) of the Act empowers the Contractor General to be advised of the award or variation of government contracts, given access to all books, records, documents, stores or other property belonging to the government or used in connection with the grant, issue, supervision or revocation of any prescribed licence and to be given access to any premises or location where work on government contract is being carried out.

Sections 4, 15, 17 and 18 of the Act provide that the power and reach of the Contractor General to demand access to books and records and to investigate extend not only to public bodies, offices, contractors, but to any other person. Section 4 (3) and (4) gives the Contractor General power to require information relative to the award of any contract.

Section 18 authorises the Contractor General to summon "any official member of a public body or any other person" to furnish information or produce documents relevant to his investigation. In John Lawrence's case, the court accepted that the functions of the Contractor General were concluded in very broad terms; specific reference was made to Section 4.

[33] Mrs. Samuels-Brown submitted that, according to the terms of reference, the IOP has been appointed to perform duties on behalf of the Government of Jamaica in relation to a specie of contract. It therefore falls within the category of "agency of government" so that power of the Contractor General, relative to "public bodies", applies to the IOP and its members relative to the performance of these functions. Further, and in any event, the Contractor General's authority includes "any other person" and as well to "such persons" which would include the IOP and its members.

Discussion

[34] Public Body is defined in the Contractor-General Act to include "agency of government and "authority". See also The Public Authority Act 1942, S 2 (1), which seeks to protect persons acting in *execution of statutory or other public*

duties. The Public Bodies Management and Accountability Act at S. 2 defines public body to mean a statutory body or *authority or any government company*. The designation "public body" in administrative law denotes an entity which is susceptible to judicial review as contrasted with private or domestic tribunals. They derive their source of power from statute, subsidiary legislation or the prerogative. In **Council of Civil Service Union v Minister of the Civil Service [1984] 3 All ER. 935**. Lord Diplock says of these bodies, at page 949 j, "For a decision to be susceptible to judicial review, the decision maker must be empowered by public law (and not merely, as in arbitration, by agreement between private parties) to make decisions that, if validly made, will lead to administrative action or abstention from action by an authority endowed by law with executive powers which have one or the other of the consequences mentioned in the proceeding. The ultimate source of the decision making power is nearly always nowadays a statute or a subordinate legislation made under the statute, but in the absence of any statute regulating the subject-matter of the decision, the source of the decision making power may still be the common law itself, i.e., that part of the common law that is given by lawyers the label "the prerogative". The court has the power to examine these bodies that have public element in their function to make a determination whether they are public bodies or not, that is whether they are amenable to judicial review.

[35] In **R v Criminal Injuries Compensation Board, ex. Parte Lain**, the government set out in a White Paper proposal for the making of compensation to victims of crime. It was an experimental, **non statutory scheme** that was set up to make ex gratia awards, under this scheme, a Compensation Board was established. An application was made under the scheme by an aggrieved beneficiary who applied for certiorari and was met with the argument that it was not set up by statute, therefore not amenable to judicial review. Lord Diplock said at page 779, letter G.

> "If new tribunals are established by acts of government, the supervisory jurisdiction of the High Court extends to them if they possess the essential characteristics on which the subjection of inferior tribunals to the supervisory control of the High Court is based."

Lord Parker, at 778 B, said;

> "The only constant limits throughout were that the body concerned was under a duty to act judicially and that it was performing a public duty."

Private or domestic tribunals have always been outside the scope of certiorari since their authority is derived solely from contract. The IOP is not contractual; its source is the Terms of Reference given by the prerogative as in the case of ex parte Lain(supra). The duties the IOP performs are public duties. It has been empowered by an act of the executive to make decisions that, if validly made, will lead to administrative action or abstention from action by an authority endowed with executive powers.

[36] The function to be performed by the IOP requires it to monitor and review various aspects of these government projects. It is to satisfy itself that "there has been no gift or improper or inappropriate benefit to any Jamaican public official. Its functions are not dissimilar to the statutory functions of the Contractor General. See **R v Panel on Mergers and Takeovers Ex Parte Datafin** (1987) 1QB 815. The court held that the supervisory jurisdiction of the High Court was adaptable and could be extended to anybody which performed or operated as an integral part of a system which performed public law duties. The judgment of Lloyd LJ, recognized that the source of power was not the only test as to whether a body is subject to judicial review. See page 847;

[37] One of the test proposed by the learned author of **Judicial Review Handbook**, **Michael Fordham** (1994), page 195 at para 26.6, to determine the reviewability of a body in order to say whether it is a public body, is referred to as the "but for test". The question is asked, whether the non-statutory body's activities would be the subject of statutory regulation were it not for the body's existence. The question may be phrased thus, "If the IOP did not exist and in the absence of the Contractor-General Act, would there be the need for statutory regulations to perform the functions of the IOP? The answer to this must be yes, in any event, the terms of reference of the IOP closely mirrors the main function of the

Contractor-General Act, which further underlines that what the Terms of Reference contains are public law elements. I find that the IOP is a "public body" for the purposes of the Contractor-General Act and therefore amenable to the powers prescribed by that Act in relation to such bodies.

In any event, the Act extends the Contractor General's reach to "any other person" and to "such person" as, in his view, can provide relevant information.

Full and Frank Disclosure – Material – Non-Disclosure

[38] Mrs. Samuels-Brown alleges that the applicant has not made full and frank disclosure in his affidavit in support of his application for leave to apply for judicial review. An application for leave to apply for judicial review requires full and frank disclosure in the applicant's affidavit. Where there is suppression of material facts, the application may be refused without considering the writs.

[39] The learned author of "A Practical Approach to Civil Procedure" Stuart Sime, Ninth Edition, refers to the principle in respect of freezing orders, but it applies with equal force to an ex parte application for leave for judicial review. Page 409, para 35.5.3.3;

> "A consequence of freezing injunction applications being made without notice is that a claimant applying for a freezing injunction is under a duty to give full and frank disclosure of any defence or other facts going against the grant of the relief sought. This duty extends both to facts within the actual knowledge of the claimant and to facts which would have been known on the making of reasonable inquiries. A breach of an advocate's duty to the court may also result in the loss of the order: Sidhu v Memory Corporation plc [2000] CPLR 171 CA**. If the applicant is found to be guilty of material non-disclosure, the order will ordinarily be discharged as a right regardless of the merits on the full facts. R v Kensington Income Tax Commissioners, ex p Princess Edmond de Polignac [1917] 1 KB 486."**

[40] In **Rex v General Income Tax Commissioners for Kensington; Ex parte Polignac**, Vol 116 [1917] LTR 136, a princess obtained a rule nisi directed at the tax commissioners prohibiting them from proceeding upon an assessment that she was a resident in the United Kingdom. The Commissioners had identified a certain house as being her own, or in which she had a lease, and in which she, for a period of time, actually resided. The lady had alleged, in an affidavit in support of her application, that she spent time with friends at the identified house, which was that of her brother. If that were so, she was not resident, and could not be properly assessed. The trial court found her statement as to the ownership of the house, untrue. Lord Reading, C.J., at pg, 136:

> *"I think it is desirable to state that when this court comes to the conclusion that on an application ex parte made for a rule nisi, or for any grant of process of this court, the affidavit placed before it was not candid and did not fairly state the facts, but stated them in such a way as to mislead the court as to the true facts, this court ought, for its own protection and in order to prevent its process being abused in any way to refuse to proceed any further with the examination of the application made by the person who had put forward. It's a jurisdiction inherent in the court to protect itself."*

[41] Lord Reading cautions that there is a requirement of careful consideration before the court comes to such a conclusion. I heed that caution. Where the court finds that full and frank disclosure has been lacking, the court may refuse to consider the matter on the merits. The Minister's affidavit in support of the application was dated 21st July 2013, the same day the contractual documents were signed with CHEC, in relation to the Toll Road Bypass Project. The Minister's affidavit for leave was filed the following day, 22nd July 2012. The reference to the negotiations with CHEC fails to disclose events of the negotiations beyond the approval that was given by Parliament on the 24th April 2012.

[42] The IOP and the actions of Requisitions taken by the Contractor General in respect of it were central and material to the Attorney General's decision to seek the determination of the court. The Terms of Reference of the IOP, which was

exhibited to the Minister's affidavit in support of the application at paragraph 12, states that the IOP was to:

> 12. Brief the Minister and make recommendations to the Minister as to **whether or not the GOJ should enter into binding agreement with the Project Companies** (or their nominated contracting vehicles) on the terms and conditions which have been negotiated. (Emphasis mine)

In respect of the Bypass Project, binding agreements had already been executed by the GOJ.

[43] The fact that the respondent had notice of the hearing does not relieve the applicant of his duty to make full and frank disclosure on an application for leave. If support is needed for such a finding, I refer to discussion in the judgment of my learned sister, Mangatal J., **In Hon. Shirley Tyndall, O.J., et al v Hon. Justice Boyd Carey (Retd.),** Claim No. 2010 HCV 00474, Supreme Court decision, delivered on the 12th February 2010, paragraph 16. The Minister's omission was first identified in the affidavit of Craig Beresford dated 6th July 2012, made on behalf of the respondent. It was then addressed in the affidavit of Minister Omar Davis, dated the 16th July 2012, at paragraph 9 (a), after admitting the signing of the Toll Road Bypass Project Agreement stated, "but the applicant will contend that the signing of the said agreements is irrelevant to the issues raised in the application for leave at judicial review."

There is no suggestion that the omission is intentional, or was calculated to mislead the court. Although, as the authorities indicate, there is no requirement for an intentional omission, mere inadvertence would be enough to disentitle the applicant. However, having heard the submission on the other grounds, the court will determine the issue on those grounds.

Media Releases

[44] The applicant has contended procedural impropriety on the part of the Contractor General for a failure to follow the procedures prescribed by the enabling statute,

and in so doing failed to take relevant matters into account. In paragraph 44, the applicant contends, inter alia;

> "The Contractor General was therefore required pursuant to section 21 and section 28 (4), to advise the individuals alleged to have acted unlawfully and lay a special report before the Parliament before he published the same in a Media Release. Omar Davies, at paragraph 16 of his affidavit avers that no such report was laid before Parliament and as one of the numbers against whom the allegation of unlawfulness in establishing the IOP was levelled. This, a clear failure by the Contractor General, an administrative body to observe the procedural rules expressly laid down in the legislative instrument which gives it power."

[45] Mrs. Samuels-Brown, in response, in her written submissions, says at paragraph 21, in relation to the attempted challenge to the Media Release, it appears that there is a perception that there is some connection between the Contractor General's obligation to submit reports to Parliament on the one hand and his right to make the public aware as holder of a public office and at paragraph 22, the submission continues, "There is nothing in the law which renders it illegal, ultra vires or inconsistent with the Contractor General's duties for him to communicate with the public relative to matters that touch and concern the execution of his duties."

[46] In what circumstances, if any, does the Contractor-General Act allows for the publication of news releases outside of the annual report, pursuant to s 28? The special report in accordance with Sections 19, 20, 21 and 23 of the Act deals with the Contractor General's duty to make reports and provides him with immunities and privileges. The Act in instances bars the Contractor General from making reports.

[47] The Act expressly prohibits the making of report or comment thereon from the Contractor General to any other source, other than the Cabinet, in relation to investigations into grant or issue of any licence or contracts entered into for purposes of defence or for the supply of equipment to the security forces, see S5 (2). The Contractor General is also expressly restricted from communicating with any person for any purpose, any document or information of which he was

notified by the Cabinet Secretary, on direction of the Cabinet, that the disclosure of deliberations or proceedings of the Cabinet, or committee thereof, of secret and confidential nature, is likely to be injurious to the public interest. (2) prejudice relations with other countries or international organizations; (3) prejudice the detection of offences (See Section 19). The impugned Media Releases do not fall into either of these expressly prohibited categories. There is an admission that much of the Media Releases consist of matters already in the public domain.

[48] After conducting an investigation, the Contractor General is mandated to inform in writing the principal officer and the relevant Minister of the result of the investigation and to make recommendations (See S. 20). However, when, during the course of an investigation or at its conclusion, he unearths evidence of breach of duty or misconduct or criminal offence, he should refer the matter to a person competent to make the appropriate actions, and shall lay a special report before Parliament (S. 21).

[49] All documents, information and things disclosed to the Contractor General, are to be regarded as secret and confidential, except a disclosure "which a Contractor General thinks necessary to make in the discharge of his functions or for the purpose of executing any of the provisions of sections 20, 21 and 28. "The Contractor General may be required a report on any matter being investigated by him. He must submit an annual report and may submit on any investigation which he thinks needs special attention. He may publish in the public interest, from time to time, reports relating to these matters, he is required to lay the reports before both houses before such publication.

[50] Ms. Samuels-Brown says there is nothing here that renders it ultra vires to communicate with the public matters that touch and concern the execution of his duties. However, the nub of the applicant's submission is that publication is only permissible of any particular matter or matters investigated or being investigated by him which, in his opinion**,** require the special attention of Parliament, only after it has been laid before both houses, and in this instant, it was not laid before the Houses.

[51] The Contractor General is not subject to the direction and control of any other person. Section 17 allows for the Contractor General to adopt whatever procedure he considers "appropriate to the circumstances of a particular case, and, subject to the provisions of this Act, may obtain information from such person and in such manner and make such enquires as he thinks fit. S18 (3), provides, "For the purposes of an investigation under this Act, a Contractor General shall have the same powers as a Judge of the Supreme Court in respect of the attendance of witnesses and the production of documents". The functions of the Contractor General speaks to the "mischief" that the legislation came to remedy. To monitor the award and the implementation of Government contracts with a view to ensuring that awards are impartial and on merit, that there is no impropriety or irregularity in their award or termination, etc. It would not be a misdescription to attach the label of "watchdog" or monitor, with the peculiar characteristic that Justice Orr attaches to that description, to the role of the Contractor General, in the execution of his functions.

[52] In the affidavit of Craig Beresford, 6th July 2012, he enumerates the matters that had alerted him that this project needed to be monitored by his Office. These matters have not been traversed by the application. The bid from CHEC was unsolicited, was not subjected to open, transparent and competitive international tender process. Perhaps the greatest cause of concern that the NROCC, a signatory to the agreement with CHEC had signalled the Contractor General's Office dated 20, 2011, that the Project was not commercially viable in contrast to how the project had been presented. NROCC had committed its own advisor to review the Project and had shared the results of their analysis with CHEC. The government has granted a fifty year concession to CHEC in respect of toll charges for the toll roads use. These were legitimate and reasonable concerns for any Contractor General. Another point of concern was the admitted absence of a Detailed Comparable Estimate in respect of the Project. It was a concern that, in the absence of such an estimate, the government was incapable of making an informed decision.

[53] The Applicant had intimated on a previous occasion that he had concerns with the use of $62 million for the purchase of furniture from funds which had been

allocated for the Palisadoes Shoreline Protection and Rehabilitation Project contracted to CHEC. Whilst he sat on the seat on the Opposition Benches, the applicant had assured the respondent of his concern relative to CHEC and JDIP. The Contractor General had documented, in his annual report, what he regards his statutory responsibility to share with the public the principles by which his office was guided (paragraph 30). Craig Beresford affidavit at 31, states;

> "The timely, uniformed and regular dissemination of information to the media, via written OCG Media Releases is a strategic and deliberate initiative of the OCG. The initiative was specifically designed by me to educate, update and/or to inform the nation about certain OCG issues, initiatives, positions and concern, inclusive of matters that are related to OCG Special Investigations and Public Sector procurement related issues which the OCG has deemed to be of sufficient public interest to warrant immediate publications to its stakeholders," and at paragraph 33, "Further, I do verily believe that separate and apart from reports to Parliament, the Contractor General which is accorded him by statute, to exercise his own discretion relative to the release of information to the public."

[54] The affidavit of the applicant does not traverse the allegations contained in paragraph 28 of Beresford's affidavit filed the 6th July 2012, inter alia, (i) concerning on-going investigation of US$400 in relation to the JDIP, which was awarded to CHEC in 2009. (ii) The applicant, then Opposition Minister, was on record in Hansard, saying that he wanted the Contractor General and the Auditor General to implement a system to audit the contracts under JDIP. (iii) The parent company of the CHEC had been debarred by the World Bank, under the Bank "Fraud and Corruption", "Sanctioning Policy," as a result. (iv) CHEC has been declared ineligible to be awarded any World Bank financed contracts that are related to roads and bridges. (v) A Chinese official was sentenced to death for taking bribes from CHEC. (vi) The son of the Prime Minister of Bangladesh was sentenced to six years in prison for taking bribes from CHEC.

[55] The applicant did respond to paragraphs 30 – 35 to the effect that any power or discretion vested in the Contractor General under the Contractor General's Act as it relates to publication, is not untrammelled, must be exercised lawfully and

intra vires the power granted by the enabling legislation. The applicant has not denied that the power or discretion that is asserted on behalf of the Contractor General exists. As noted, Section 17 allows for the Contractor General to adopt whatever procedure he considers "appropriate to the circumstances of a particular case" S17 is dealing with the procedure in respect of investigation. The OCG has maintained that his functions include informing the Jamaican people, whom he regards as stakeholders.

[56] In John Lawrence, ORR J, in adverting to the meaning of important words used in the statute, the court defined "circumstances" as that which stands around or surrounds the state of affairs surrounding and affecting an agent. What is the "state of affairs" in this particular case, it is unchallenged that, a project of dubious commercial viability is being executed by CHEC, a company that has been debarred under the World Bank's Fraud and corruption policy, and against whom there has been serious allegations of bribery. CHEC has made an unsolicited bid to the Jamaican Government. Orr J. said of the word "monitor" which the court found is the undoubted role of the Contractor General, "I find this meaning most appropriate and regard it as summing up the role of the Contractor General, a lizard supposed to give a warning of the approach of crocodiles."

[57] S24 (1) (b), although the OCG is to regard all documents, information and things disclosed to him in the execution of his duties under the Act as being secret and confidential, any disclosure that he thinks necessary to make in the discharge of his functions under or for the purpose of executing any of the provisions of S20, 21 and 28, is not deemed inconsistent with any duty imposed on him. Such a duty would be abstaining from a publication until a report is lain before both Houses.

[58] The main aim of the Contractor-General Act in carrying out its functions in monitoring the award and the implementation of government contracts, seeing they were awarded impartially and on merit and that there was no impropriety or irregularity. Was to satisfy the legitimate interests of Parliament and the wider public that their investigation would be seen as independent and thorough. In the

proper discharge of its functions, the Contractor General might judge that it was necessary to make certain news releases which may contain material from some of their investigation to the wider public if the legitimate interests of Parliament and the wider public were to be met.

Was the Contractor General's decision to publish the Release Wednesbury unreasonable?

[59] The applicant submits that the decision of the Contractor General, 2012 to publish and, in publishing the Media Release of April 27, 2012, was Wednesbury unreasonable and an abuse of his discretion in light of the fact that the said Media Release was published on May 14, 2012 after the Minister's announcement in Parliament on April 24, 2012 and before the purported and to commence the monitoring and investigation of the activities of the IOP.

[60] The applicant has admitted that 'some aspects of the Media Release dated April 27, 2012 speak to matters already in the public domain. There is nothing shown to demonstrate which portions were not in the public domain. The Contractor General's asserts that none of the contents of the release consists of information derived from any record, books, documents or information obtained by the Contractor General in the exercise of his functions and which was not already in the public domain. Given the role of the OCG, as a monitor to issue warnings, I see nothing irrational about his decision to issue the releases before he instituted a formal investigation. In the **Council of Civil Service Union**, Lord Diplock at page 951 defined the ingredients that the applicant must prove to be entitled to the remedy here requested. By 'irrationality' I mean what can by now be succinctly referred to as '*Wednesbury* unreasonableness' (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly

wrong with our judicial system. The Contractor General would have been seized with the concerns expressed in the affidavit of Craig Beresford dated the 6th July 2012, paragraph 28. There is no evidence that the decision was outrageous or illogical or breached moral standards. There is no evidence before me that the Contractor General has taken into account any matter that ought not to be or disregarded any matter that he ought to have taken into account. This court cannot act as an appellate authority but must confine its role to that of a review court to see if he has acted in excess of his authority. I cannot say that no reasonable Contractor General, faced with these circumstances, would not act as this Contractor General did. Section 15 permits the Contractor General to undertake an investigation on his own initiative or as a result of representations made to him.

[61] Application for leave to apply for judicial relief is refused. Application for interlocutory injunction to restrain the Contractor General to monitor and investigate the activities of the IOP is refused.

[62] Application for interlocutory injunction restraining the Contractor General from issuing further requisition or publishing any Media Releases in respect of the IOP is refused. All applications for prerogative orders are refused.

[63] An order under S. 20 of the Contractor-General Act is refused. All consequential orders and relief sought are refused. No order for cost.