[2021] JMFC Full 2

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

CLAIM NO. 2014HCV0461

CORAM:	THE HONOURABLE MR. JUSTICE DAVID BATTS THE HONOURABLE MR. JUSTICE CHESTER STAMP THE HONOURABLE MRS. JUSTICE LISA PALMER HAMILTON

BETWEEN	CENITECH ENGINEERING SOLUTIONS LIMITED	CLAIMANT
AND	NATIONAL CONTRACTS COMMISSION	1st RESPONDENT
	THE INTEGRITY COMMISSION (formerly The Contractor General of Jamaica)	2ND RESPONDENT
	THE MINISTER OF AGRICULTURE & FISHERIES	3RD RESPONDENT
	THE ATTORNEY GENERAL OF JAMAICA	4TH RESPONDENT

Judicial Review –The Contractor General Act –The Integrity Act - Revocation of grade 1 certification –Absence of Regulations – Whether National Contracts Commission (Validation and Indemnity) Act applies – Whether 1st Respondent liable - Reversal of decision to award contract – Whether natural justice applies – Whether constitutional right to fair hearing-- Whether hearing required prior to revocation and/or reversal –Whether decision inevitable and remedy to be refused- Whether 2nd Respondent breached duty of confidentiality - Whether 3rd Respondent liable - Damages- Circumstances in which damages to be awarded in judicial review proceedings.

Ransford Braham QC, Abe Dabdoub and Kimberly Morris instructed by Dabdoub Dabdoub & Co. for the Claimant.

Annaliesia Lindsay and Josemar Belnavis instructed by Lindsay Chambers for the 1st Respondent

Jacqueline Samuels-Brown QC and Lorenzo Eccleston instructed by Kimberly Dawkins of Firm Law & Co. for the 2nd Respondent

Althea Jarrett and Kimberly Clarke instructed by the Director of State Proceedings for the 3rd and 4th Respondents.

IN OPEN COURT

Heard: 3rd, 4th, 5th, 6th & 7th June 2019, 16th &17th November 2020 and 26th March 2021.

BATTS J.

[1] On the first morning of hearing the Claimant applied to change the name of the 1st Respondent from "The Contractor-General of Jamaica" to the "Integrity Commission." The application was granted. There was no objection as the change reflected a change in the name of the institution brought about by the passage of the Integrity Act. It was not the insertion of a new Respondent. All parties, on this first day, agreed there would be no need for cross-examination of any affiant. The bundles, containing pleadings affidavits documents submissions and authorities, were numbered from 1- 9 on the first morning. By the time the hearing ended, in November 2020, that numeration extended to 11. There was an extended adjournment on the 7th June 2019 after the Claimant sought, and obtained, leave to put in additional evidence. This evidence, being a transcript of proceedings from another court, the entire completed application form with attachments and, the 1st Respondent's checklist, was put on affidavit. The Respondents were given an opportunity to respond by affidavit. The hearing and consideration, of the further affidavits and submissions on them, did not resume until the 16th day of November 2020. The delay, in having the matter relisted, was in part due to events related to the Covid 19 Pandemic.

[2] The Claimant was unsuccessful in an oral application, made on the very first morning of hearing, to rely on a new affidavit. That affidavit attached two letters, written in October 2012, containing a legal opinion from the Attorney General's Department. Counsel, Mr. Abe Dabdoub, explained that an application for discovery had been made before the Honourable Mr Justice Campbell (retired) but had never been completed. It was Mr. Dabdoub's submission that in proceedings of this nature the state ought not, except for reasons of national security, to refuse to disclose legal opinions obtained. The Respondents opposed the effort to rely on the documents. Ms. Lindsay pointed out that after Campbell J's retirement, and at a Case Management Conference of 12th July 2018, the Claimant's attorneys stated their readiness to proceed. There was no mention of any outstanding application. It was also submitted that the documents were not relevant as they predated the events giving rise to these proceedings and that neither letter dealt or applied to the Claimant. The Respondents also asserted legal professional privilege.

[3] We ruled that permission to rely on the documents would not be granted and promised to give our reasons in the course of this judgment. The documents, which we perused in order to determine relevance, were not particularly germane to the issues before us. They concerned an opinion in relation to another entity albeit in somewhat similar circumstances. Furthermore, the existence of the documents had been disclosed since the year 2012. The Claimants had had the opportunity to revive its application for inspection and had not availed itself of that. To allow the documents, to go in on the first morning of trial, would engender an adjournment as the Respondents all indicated they would require time for further instructions. The Claim was already delayed and it would not therefore be just, or convenient, to admit the documents into evidence at this very late stage of the proceedings.

[4] With the preliminaries out of the way the substantive hearing commenced on the 3rd June 2019. The matter concerns the Claimant, a private company of limited liability, which had successfully bid for a public sector contract to do certain works.

The Claimant alleges that its certification as a government contractor was revoked, and the decision to award the contract reversed, without it being afforded a fair or any hearing at all. The Claimant seeks declarations and damages as the contract was awarded to another entity. The Respondents say they have done nothing wrong. It is contended that no right to a hearing arose and, in any event, the reasons for the revocation are such that the same decision would have been arrived at even had there been a hearing. They contend that this is an appropriate case for exercise of the court's discretion, in proceedings for judicial review, to refuse relief.

[5] It is convenient here to refer to the matter of the absence of Regulations. It does appear that the 1st Respondent had been acting for some time with no Regulations in place. This notwithstanding that the Contractor- General Act requires same with respect to, qualification for registration and classification, as well as *"the circumstances in which registration may be cancelled and the procedure for such cancellation "* see section 23E (1) (a) to (e) .By a law, the Bill in respect of which is to be found at Tab 4 of Bundle 5 (a) (and which all parties are agreed was passed into law as the National Contracts Commission (Validation and Integrity) Act 2019), the legislature sought to regularise certain acts of the 1st Defendant *"done in good faith and inadvertent as to their being without statutory authority during the validation period"*. The certain acts are listed in section 3 (2) and includes *"the registration and classification of prospective contractors"* but does not expressly include cancellation of the registration or classification. The Respondents relied on this law as curing any defect in procedure. I disagree. The statute prevents a challenge, to good faith actions of the 1st Defendant, on the ground that there were no Regulations in place. Conduct otherwise unlawful (or ultra vires) is not thereby protected. In any event, as indicated, the revocation of registration is not offered protection.

[6] On the other hand, the Claimant's counsel submitted that, in the absence of Regulations, the revocation of the registration was ultra vires null and void. I do not agree. Apart from the well-known presumption, that implicit in the power to grant

is a power to revoke, subsection (4) of section 23 F of the Contractor General Act gives the 1st Respondent power to cancel registration but states it must be *"in accordance with regulations made under section 23 E (1)".* It follows that, although the National Contracts Commission (Validation and Indemnity) Act 2019 does not prevent this claim, the absence of Regulations is not fatal because the 1st Respondent had a statutory power to cancel registration.

[7] It is also, at this stage, convenient to reference the matter of delay. The Respondents assert that the Claimant's delay, and the protracted nature of the proceedings, should preclude the grant of any remedy. The letter of decision, about which complaint is made, is dated the 16th day of December 2013. The application for leave to apply for judicial review was made on the 30th January 2014. There was therefore no relevant delay at that stage and it is not surprising that leave was granted (see Bundle 1 page 490). Thereafter however there were interlocutory applications. A judge reserved judgment on one such application and retired without giving his decision. The blame for the hiatus of 5 years ,2014 to 2019, cannot therefore be left solely at the feet of the Claimant. It represents an institutional failure. The Respondents, it must be said, could also have taken steps to relist or dismiss the claim in the period. Queens Counsel, for the Claimant, frankly indicated that his client was no longer seeking to overturn the award of the contract in 2014. There would therefore be no impact on third parties, nor any detriment to good administration, if this matter was determined in the Claimant's favour. With this I agree. It follows that the matter of delay does not preclude the Court considering this matter and, if necessary, granting an appropriate remedy to the Claimant.

[8] There is no doubt in my mind that, on the undisputed facts of this case, the Claimant's right to natural justice has been infringed. It is now too late in the day to deny a right to a fair hearing where the livelihood of the subject is at stake, or where a privilege granted (such as a licence) is to be revoked, see for example ***McInnes v Onslow [1978] 1 WLR 1520,*** per Megarry V-C @ 1527H to 1532 D.

The Claimant had made a successful application to be registered, by the 1st Defendant, as a Grade 1 contractor. Registration entitled it to be considered for certain public sector contracts. The Claimant tendered for and was informed, by way of public announcement, that its tender had been successful, see paragraphs 23 and 24 and exhibit CM 15 of the affidavit of Clava Mantock Jnr filed on 12th February 2014 (page 29 Bundle 1). The Claimant's registration as a grade 1 contractor was revoked by the 1st Respondent, see letter dated 12th December 2013 paragraph 12 exhibit CM 12 of the same affidavit (Bundle 1 page 428). The Claimant was therefore never awarded the contract for which he had tendered. It is common ground that the contract was subsequently awarded to another entity. The decision, to revoke his status as a Grade 1 contractor, therefore directly impacted the Claimant's ability to earn and carry on its business. The Claimant was given no opportunity, prior to the revocation, to respond to the allegations which precipitated the revocation of its registration. In this context the 1st Respondent had a duty, to give a fair hearing to the Claimant, prior to the decision to revoke a registration already granted. This duty implied by the common law, is I think, underscored by Section 16 subsections (2) and (3) of the Constitution of Jamaica which give a right to a hearing where civil rights or obligations are to be determined by *"any court or authority".*

[9] The Respondents not surprisingly spent a considerable amount of time arguing that a hearing was unnecessary, and relief should be refused, because revocation was inevitable. The reasons, for revocation of registration as a grade 1 contractor, are to be found in the affidavit of Raymond A. McIntyre filed on the 28th March 2014 (Bundle 3 page 3). Mr McIntyre is the Chairman of the 1st Respondent. He indicated that, although there were no Regulations in place, the 1st Respondent had,

> "6.… *issued general information to prospective contractors for the application for registration in different grades, and which said information also includes the basis on which one's registration may be revoked. The general information referred to is attached to the application forms issued by the 1st*

> *Respondent which forms have been used since 2001 by all contractors who have applied to become contractors eligible for government contracts, and which total approximately 218 for works 1 – 4 contractors and approximately 1397 for goods and services contractors."*

[10] A sample form, with the "requirements", is at pages 13 – 67 of Bundle #1. The Claimant, in paragraph 10 of the affidavit of Clava Mantock Jnr filed on the 22nd April, 2014 (Bundle 3 page 94), says that form was not the one posted on the website at the time they applied for registration. The actual application form, completed and submitted by the Claimant, is to be found at page 4 of Bundle 10. Mr. McIntyre stated, at paragraph 8 of his affidavit of the 28th March 2014 (Bundle 3 page 5), that:

> '*8. In assessing and processing applications received, the 1st Respondent is statutorily required to consider the financial soundness; technical and managerial competence and experience; level of expertise; specialisation; and equipment and resources of all applicants."*

He confirmed in paragraph 12 that the 1st Respondent, by letter dated 22nd November 2014 (sic), endorsed the recommendation for the Claimant to be awarded the contract by the 3rd Respondent. However, on the 4th December 2013, and upon being advised that the 2nd Respondent was carrying out a re-verification exercise, he advised the 3rd Respondent to put its procurement process on hold. The 2nd Respondent, as a result of the reverification exercise, advised the 1st Respondent of "*erroneous information*" contained in the Claimant's application for registration. This "*erroneous information*" is listed in Paragraph 16 of Mr. McIntyre's affidavit filed on the 28th March 2014 (Bundle 3 page 3). It is the basis of the decision to revoke the Claimant's registration. According to Mr. McIntyre: "*17. This erroneous information the 1st Respondent found to directly impact the financial soundness; technical and managerial experience; and general expertise of the Claimant, areas in which the 1st Respondent was not satisfied of the soundness which it had presumed at the times when the applications for registration were approved."* (Bundle 3 page 3)

Reliance is placed on Item 15, in the general information contained in all application forms (see page 15 Bundle 3), which states in bold letters:

> *"If the information provided by the Applicant on which evaluation and award(s) were based is found to be erroneous then the contractor(s) shall not be registered, or if already registered, the registration will be revoked. "*

[11] The "erroneous information", about which the 1st Respondent was alerted by the 2nd Respondent, and which resulted in the decision to revoke the Claimant's registration is as follows: (Bundle 3 page 7)

> ***"16.1*** *Although the Claimant had only been registered since January 2011 as a change of name of Company its financial records suggested that it did not operate prior to 2011. This is contrary to the Claimant's assertion that it had been in operation since 1989.*
>
> *16.2 The company profile on the Claimant stated that it is a "full service construction and engineering firm delivering infrastructure and construction projects since 1989." However, the Claimant's audited financial statements note that the Claimant was previously incorporated under the name Mantock Electrical Engineer Limited and stated expressly that "after sixteen years of inactivity the company restarted operation in January 2011 under its new name."*
>
> *16.3 The resume of at least two (2) staff members indicated that they worked with the Claimant since sometime in 2010, a year in which the Claimant was not in existence.*

16.4 The resume of at least one (1) staff member indicated that he worked with the Claimant since 2011 which was contradicted by what was written on the actual application for registration, which stated that that employee had only worked for the Claimant for 2 months.

16.5 One project on which the Claimant relied to show its experience in the field was commenced in the year 2010, a year that the Claimant was not in existence.

16.6 The further application for registration received from the Claimant in May 2013 for pipe laying mentioned and relied on two (2) of the projects included in the first application received December 2012, which said projects were "amended" to include the area of pipe laying in the 2014 application. Similarly, the resumes of employees were "amended" to include this area. These "amendments" were made without any reference to the previous information provided that would not have included the "new" information at the time of the December application.

16.7 The General Information mandates/provides that all applications must be accompanied with the requisite evidence of professional qualifications of professional, technical and supervisory staff. However, the information in relation to at least one (1) professional/technical employee did not accompany the Claimant's December application, albeit that it was submitted sometime later in January 2013."

[12] When considering the submission, that relief should be refused because a hearing would have made no difference, the burden of proof rests upon the 1st Respondent. The Claimant, once a breach of a duty to give a fair hearing has been established, has no onus on it to prove that had a hearing been granted the 1st Respondent might have come to some other decision. On the contrary, the breach having been

established, it is for the 1st Respondent to prove that no other decision was possible. Manifestly they have failed to do so. This because, as I will demonstrate below, the evidence has failed to establish either, that no reasonable explanation was possible for the “erroneous” information or, that the “erroneous” information necessarily impacted the ability of the Claimant to qualify for registration.

[13] The Claimant’s explanations and/or response to the alleged “erroneous” information is as follows:

(a). **16.1** (The Claimant’s assertion that it was in operation since 1989 while only being registered since 2011).

The Claimant’s certificate of incorporation shows a change of name in the year 2011. The company was actually incorporated on the 11th July 1989. (Paragraph 18 Third Affidavit of Clava Mantock Jnr. Bundle 3 page 100). The certificate of incorporation on change of name is at page 271 of Bundle 1.

(b). **16.2** (16 years of inactivity although allegedly in operation since 1989) The Claimant says the fact that the company was dormant did not mean it did not do work. The use of the term “restart” referenced a restart in its new name. They point to works undertaken in 2010 and reference exhibits in support; see paragraph 19 Third Affidavit of Clava Mantock Jnr. (Bundle 3 page 101) and exhibit CMB (pages 113 to 117). In other words, the corporate structure may not have been maintained, (returns audited accounts etc.) but the principals of the company had been doing work in its name.

(c) . **16.3** (Staff members worked with the Claimant since 2010 although it was not then in existence). The Claimant again points to the certificate of incorporation which

shows that the company was incorporated in 1989 but later had a change of name. It was therefore not erroneous to say persons were on staff in 2010.

(d). **16.4** (An employee is alleged to have been with the Claimant for 2 months although representing that he had worked with the Claimant since 2011). The Claimant identifies this employee as Mr. Sheldon Reid. It explains that Mr. Reid worked on projects the Claimant had done as subcontractors for Rogers Land Development Company Limited and names the projects. Mr. Reid was, upon the completion of those projects, "*contacted about his working as a consultant in relation to the Claimant's application for registration".* The Claimant asserts that Mr. Reid would be the best person to contact for an explanation of the statement in his resume. The Claimant speculates that Mr. Reid, when preparing his resume, may have thought he was working for the Claimant when in fact it was for Rogers Concrete, see paragraph 21, 3rd Affidavit of Clava Mantock Jnr. (Page 102 Bundle 3).

The situation is further elucidated or complicated, depending on one's perspective, by a transcript from another court's proceedings earlier referred to (see paragraph 1 above). The transcript is attached to the supplemental affidavit of George Knight filed on 16th January 2020 (pages 93 to 121 of Bundle 10). It contains the printed ruling of the learned trial judge in related criminal proceedings. In her ruling the learned Parish Court Judge adverted to the evidence of Mr. Sheldon Reid. She states that, in evidence before her, Mr. Reid was adamant that he had never worked for the Claimant nor had he given out a resume. He did however admit that, within the construction industry,

resumes are "*passed around*" and that an engineer's name may be found on "*multiple applications as consultant to allow persons to bid on contracts".* Furthermore, Mr Reid admitted that he gave his updated resume to Rogers Land Development, and that, that company told him the resume would be passed to persons to bid on jobs (see page 113 Bundle 10). To top it all he admitted, when shown a report of the call log, that he had spoken to one "RM" from the office of the Contractor General. That person's name (R. McFarlane) appears on the 1st Respondent's checklist (page 83 Bundle 10). Finally, on this aspect, I will quote the Parish Judge's findings:

> *"There is evidence on the application that Mr. Reid was called and that he verified all that was on the resume to Ruddly McFarlane. Mr. Reid could not refute or deny that this was done. The only person that would challenge that is Mr. McFarlane – the crown chose not to call him. He is available and findable by all indications. The industry practice indicates that the passing of resumes and consultancy work thereon is an acceptable practice*."

The 1st Respondent's check list, for review of the contractor's application for registration (page 83 Bundle 10), has (at page 84 Bundle 10) the following entry under the heading *"staff verification*":

> *"Sheldon Reid – assigned on the application form as a professional staff (as indicated on application form). On January 10, 2013 at 8:45 a.m. via telephone conversation (Reid/McFarlane), Mr. Reid stated that he works part-time for Cenitech Engineering Solutions Limited as a Construction Engineer for civil, building and road works projects. He also stated that he is a planning engineer for Keir Jamaica*

Limited for the past six (6) years (sic) and has worked on major project for the company such as the Dry River Bridge Construction and the Norman Manley International Airport building construction. He stated that he is not employed with the Government."

My reason, for referring to all this information, is not to make a finding one way or the other as to Mr Reid's status. Rather it is to demonstrate that there might have been considerable material for the 1st Respondent to consider had it afforded the Claimant an opportunity to be heard.

(e). 16.5 (A project the Claimant relied on to show competence was in 2010, a year the Claimant was not in existence). Again the Claimant points to the evidence of its incorporation in 1989 to refute the assertion of erroneous information (see discussion at (a) above). The Claimant also posits photographic evidence of the said projects which were undertaken either directly or as sub-contractors, see paragraphs 22, 23 and 24 of Third Affidavit of Clava Mantock Jnr.
(Page 102 Bundle 3).

(f). **16.6** (The insertion of pipe laying expertise in the further application when it had been omitted at first). The Claimant says, by way of explanation, that its initial application did not include "pipe laying" as the Claimant was not then seeking to be certified in that area. There was it says no erroneous or misleading information contained in either application, see Bundle 3 page 103.

(g.) **16.7** (The failure to submit professional qualification for one employee). The Claimant says the allegedly "new information", which was

supplied in January 2013, was an updated qualification because the staff member's qualification had been about to expire in December 2012. The submission, the Claimant asserts, was at the request of the 1st Respondent's staff member, see paragraph 26 Third Affidavit of Clava Mantock Jnr (Bundle 3 page 103).

[14] It bears repeating that it is no part of the duty of this court to substitute our opinion, of the alleged erroneous statements or the explanations proffered, for that of the

1st Respondent. Nor is it our role, purpose, or intention, to determine the truth or otherwise of the said allegations and explanations. The only question we are called upon to answer is whether the Respondents have proved, on a balance of probabilities, that the decision to revoke the Claimant's registration would have been the same even had there been a hearing. The Respondents rely, in further proof of this assertion, on the fifth affidavit of Raymond McIntyre filed on the 1st July 2020 (page 122 Bundle 10). He was content, in that affidavit, to reference his previous affidavits which outlined the 1st Respondent's procedures. In respect of the documents, attached to the affidavit of George Knight filed on the 26th July, 2019 (Bundle 10 pages 1 to 87), Mr McIntyre deponed as follows (with highlights I have taken the liberty to insert), see Bundle 10 page 122 :

"4. What I can say and confirm is the Claimant did make an application to be registered by the 1st Respondent and its application appears to include what has been mentioned as Exhibit 1 in the George Knight affidavit. What are apparently missing are the financial reports, the content of which would reveal that the Claimant ***<u>may not have been considered</u>*** *for the grades in which it was registered, due to the absence of the past three years of audited financial statements. The financial statements submitted by the Claimant were exhibited by me in my second affidavit marked "RM6".*

5. In addition, in his affidavit, Mr. Knight has stated that the documents represented in Exhibit 2, to his knowledge and belief, form part of the

audit and due diligence conducted by the 1st Respondent into the Claimant's December 2012 application. However, I refer to and reiterate paragraphs 10, 11, 12, 13, 14 and 15 of my second affidavit that speaks to the manner in which the processing of the Claimant's application was carried out and the fact that a full audit was not carried out on the Claimant's application. This lead to the Claimant

being registered in categories/grades to which it would not have been entitled.

6. *The documents that formed a part of Exhibit 2 were not all prepared at the same time and as such Exhibit GK2 should not be represented on one document.* ***Unfortunately, some of the checks as evidenced by those documents were conducted by the same person, which ought not to have been done.***

7. *The latter documents that are entitled "assessment review" were computer generated reports which were done as a result of data that was input by the technical officers carrying out the various reviews.* ***In this particular instance, the records show that the data was input by the same technical officer being Mr. Ruddly McFarlane.***

8. *The documents that have been exhibited, insofar as the 1st Respondent is concerned, support its position that the Claimant ought not to have been registered, and if registered, not in the grades that it was.* ***The Claimant on the strength of its own document was not qualified to be registered in the grades that it was.***

9. *The information that the Claimant relied on in support of its application was not consistent with the 1st Respondent's requirements****. Further, the information provided by the Claimant was found to be erroneous in some instances which went***

contrary to the expectation of forthrightness expected of all applicants."

[15] My first observation is that the 1st Respondent's Chairman has not, in this affidavit, specifically addressed the explanations put forward and has not said how, if at all and/or why, they could not have affected the decision. Secondly, he is varying the explanation for the revocation. It seems it is not now a matter of erroneous information submitted but that the Claimant, even on the information submitted, did not qualify for the grade in which they were registered. This is a startling statement. It is an admission that the 1st Respondent had, when registering the Claimant, made an error. What however was the error? We are not told if the 1st Respondent's commissioners misread the Claimant's documentation or misunderstood it. We are not told if the error was in the level of qualifications mandated for an entity to be in that category or whether the commissioners had erred in the application of the mandated qualifications. More fundamentally in no affidavit has the 1st Respondent condescended to detail the requirements for the category, and/or said, precisely where the Claimant's qualifications fell short. There is an admission by the 1st Respondent of organisational failure insofar as the same technical person (R. McFarlane) handled all aspects of vetting and verification of the Claimant's applications.

[16] I note secondly that prior to the Claimant providing explanations, for the alleged erroneous statements in its applications, the Respondent's stated reason for revoking registration/certification was the alleged misstatements. The 1st Respondent, having seen the explanations, has provided no analysis of them, or of the evidence in support, to demonstrate why the explanations are unsatisfactory. There is no challenge to the certificate of incorporation of 1989, no challenge to the suggestion that Mr. Reid may have been a contractor for hire, or to the assertion that this is an accepted industry practice, no denial that the submission of further information in January 2014 was at their employee's request, neither is there evidence that the additional information, about pipe laying experience, was false. In short there is no evidence to support a finding that, given the explanations

proffered, the 1st Respondent's decision would necessarily have been the same. Similarly, and as stated in the preceding paragraph, there is no evidence to support the statement that the Claimant has failed to meet stated qualifications for the category in which it had been registered.

[17] It follows that, a breach of natural justice having been established, the Claimant is entitled to a remedy. The Respondents submit that the remedy, on the facts of this case, is limited to a declaration. Certiorari, submits Ms. Jarrett on behalf of the Attorney General's Chambers, would be an act of futility. This is because the contract in question was awarded to someone else many years ago and, the Claimant's registration, would in any event have expired by effluxion of time on the 16th July 2016 see, affidavit of Clava Mantock Jnr filed 30th January 2014 and exhibit CM 4 Bundle 1 page 307. A rehearing to consider whether the registration is to be revoked, is therefore impractical. Damages cannot, she submits further, be awarded as a matter of law. This position had also been advanced by Ms. Analesia Lindsay for the 1st Respondent. It was submitted that, in judicial review proceedings, damages could not be awarded unless there is pleaded a cause of action in private law (contract or tort) available to the Claimant. Counsel relied on the decision of Mangatal J (as she then was), in ***Delapenha Funeral Home Limited v The Minister of Local Government and Environment Claim*** *N**o.** **2007HCV01554*** **(unreported judgment delivered 13th June 2008)**. In that case Mangatal J decided that in proceedings, for judicial review of administrative action, damages could not be recovered unless a private law cause of action was pleaded, such as contract, tort or breach of statutory duty. The learned Judge stated at paragraph 119 of her judgment:

> *"119. Although under the Civil Procedure Rules 2002 Part 56 damages may be recovered in judicial review proceedings, I take the view that no new right to damages is introduced by the new rules, it is simply a matter of procedural convenience that private law damages may be included in a claim for judicial*

review…"

Justice Mangatal referenced two English publications, Clive Lewis' "Judicial Remedies in Public Law" 3rd edition and De Smith Woolf & Jowell "Judicial Review of Administrative Action" 5th edition paragraphs 19-010. The latter publication referenced *R.S.C. Order 53 rule 7(1), and the Supreme Court Act s 31(4) (UK),* which includes a power to award damages on an application for Judicial Review *"where they could also have been awarded in an action begun by writ".* The learned authors also discussed the need for reform at paragraphs 19-065 to 19-071. The current English rule, enacted in 1981, is quoted below.

[18] Justice Mangatal's decision, to my mind, is inconsistent with the clear words of Order 56.1 (4) and 56.10 of Jamaica's Civil Procedure Rules 2002. Those sections state:

> *"56 1(4) In addition to or instead of an administrative order the court may, without requiring the issue of any further proceedings, grant*
>
> *(a) an injunction*
>
> *(b) restitution or damages; or*
>
> *(c) an order for the return of any property real or personal*
>
> *"56.10 (1) The general rule is that, where not prohibited by substantive law, an applicant may include in an application for an administrative order a claim for any other relief or remedy that –*
>
> *(a) Arises out of, or*
>
> *(b) Is related or connected to,*
>
> *the subject matter of an application for an administrative order.*

(2) In particular the court may award -

(a) damages;

(b) restitution; or

(c) an order for return of property,

to the Claimant on a claim for Judicial Review or for relief under the Constitution if –

(i) the Claimant has included in the claim form a claim for any such remedy arising out of any matter to which the claim for an administrative order relates; or

(ii) the facts set out in the Claimant's affidavit or statement of case justify the granting of such remedy or relief; and

(iii) the court is satisfied that, at the time when the application was made the Claimant could have issued a claim for such a remedy.

(3) The Court may however at any stage -

(a) direct that any claim for other relief be dealt with separately from the claim for an administrative order; or

(b) direct that the whole application be dealt with as a claim and give appropriate directions under Parts 26 and 27; and

(c) in either case make any order it considers just as to costs that have been wasted because of

the unreasonable use of the procedure under this part."

The provisions are not identical to the equivalent provisions in England. The English have an Act of Parliament, being the Supreme Court Act 1981, which says simply:

> *"(4) On an application for judicial review the High Court may award to the applicant damages, restitution or the recovery of a sum due if—*
>
> *(a) the application includes a claim for such an award arising from any matter to which the application relates; and*
>
> *(b) the court is satisfied that such an award would have been made if the claim had been made in an action begun by the applicant at the time of making the application."*

[19] Justice Mangatal applied traditional English common law notwithstanding the distinctive, and more expansive, wording of the Jamaican rule. To be fair this point does not seem to have been the subject of argument before her. I have cautioned elsewhere about the danger of following uncritically decisions of courts outside this jurisdiction see, ***Airlinks Wireless Network Limited v D.R. Holdings Limited et al [2020] JMCC Comm 29*** **(unreported judgment delivered 27th November 2020) at para 31.** It is apparent that the framers of our rules were concerned to expand, not restrict, the remedies available. Why else would they frame the rules in this expansive and positive way. It contrasts with the conservative wording of the English equivalent. The court is, in judicial review proceedings, to be able to award damages unless prohibited by "*substantive*" law. The law "*prohibiting*" an

award of damages relates to questions of causation, proof of loss, contribution and so on. The rule focuses on the availability of the remedy not whether a private law cause of action has been pleaded.

[20] The principle, to be gleaned from the English cases, is summarised by Stuart Sime in his treatise "**A Practical Approach to Civil Procedure".** In his 5th edition at page 500 Sime wrote:

> *"An award of damages may be made on an application for judicial review, but only in conjunction with the other remedies available in judicial review claims (CPR r 54.3(2). Damages may be awarded if the court is satisfied that, if the claim had been made in ordinary proceedings, the applicant could have been awarded damages."*

This means that in proceedings for judicial review (applications for administrative orders) damages will only be awarded if damages would have been available as a remedy in ordinary civil proceedings. The rule is speaking to the circumstances in which damages are awarded and not whether or not some other cause of action has been pleaded. In other words, so long as the fact situation before the judicial review court would support an actionable wrong, an award of damages may be made. The court must be satisfied that the circumstances giving rise to an award of damages existed at the time the application for judicial review was filed. It is therefore, not the order for certiorari but, the facts and circumstances which resulted in certiorari being applied for which give rise to the award of damages.

[21] Damages may be awarded in this case even if I am wrong, about the construction to be given to our Judicial Review rules, and it is the English approach which is applicable. This is because the Claimant, on the facts, had remedies at law which attract damages. The Claimant may have brought a claim for Constitutional redress in the form of damages independently and/or instead of this claim for judicial review. Our Constitution, by subsections (2) and (3) of section 16, provides:

> "*16 (1) ……*

(2) In the determination of a person's civil rights and obligations or of any legal proceedings which may result in a decision averse to his interests, he shall be entitled to a fair hearing within a reasonable time by an independent and impartial court or authority established by law

(3) all proceedings of every court and proceedings relating to the determination of the existence or the extent of a person's civil rights or obligations before any court or other authority, including the announcement of the decision of the court or authority, shall be held in public."

The decision, to revoke the Claimant's registration as a Grade 1 contractor, impacted his right to tender for the contract and to have that tender accepted. This means the Claimant has a remedy at law for breach of its constitutional right to a fair hearing. A claim for Constitutional relief can be made in an action for tortious remedies. In **Doris Fuller (Administratrix Estate Agana Barrett Deceased) v The Attorney-General (1998)35JLR 525;(1998)56WIR 337** claims for assault, battery and, false imprisonment, were joined with a claim for breach of Constitutional rights. Damages were awarded accordingly. In **Re: Maharaj No.2 [1979] AC 385** damages were awarded for breach of the Constitutional right to a fair hearing, per Lord Diplock at page 397:

"Nevertheless, de facto rights and freedoms not protected against abrogation or infringement by any legal remedy before the Constitution came into effect are, since that date, given protection which is enforceable de jure under section 6 (1): cf Oliver v Buttigieg [1967] 1 AC 115"

The equivalent to Trinidad's section 6(1) is found in section 19 of the Jamaican Constitution. It bears noting also that the new Charter of Rights, passed in 2011, allows the court to give Constitutional relief even where an alternate

remedy is available see, section 19(4), whereas before the availability of an alternate remedy was a bar to Constitutional relief. Furthermore, the 1st Respondent's implicit admission, of an administrative failure (paragraph 15 above), gives rise to the real prospect of a claim in negligence. Therefore, even accepting a restricted interpretation of Order 56, an award of damages is an available remedy in this case. It is unnecessary, to plead the cause of action, provided the relevant facts are alleged, or contained in supporting affidavits, as per Order 56.10 (2) (ii) see, paragraph 18 above.

[22] I pause to indicate that Mr. Braham, of the inner bar, submitted that the tort of malfeasance in public office arose on the facts of this case. I think not. That tort, and it is eloquently discussed with clarity by Mangatal J (see paragraphs 124 to 129 of her judgment), requires proof of a malicious intent. There is nothing in the evidence before us to suggest that the Respondents so acted. The failure to give a hearing was nothing more than an error or, if you will, an oversight. The 1st Respondent, upon receiving information from the 2nd Respondent acted upon it without giving the Claimant an opportunity to respond. They may have felt they were doing their duty. If so they went about it in the wrong way. That is insufficient to amount to malfeasance in a public office.

[23] If damages are available as a remedy, as I have found, then the remedy of certiorari will not be meaningless. Certiorari will quash the decision to revoke the Claimant's registration as a Grade 1 contractor. It will mean that either, the Claimant had been wrongfully deprived of the award of a contract or, at a minimum, the Claimant lost an opportunity to convince the 1st Respondent that its registration ought not to be revoked. The evidence is that the 3rd Respondent had called a press conference and publicly announced its intention to award the contract to the Claimant. It seems therefore that, but for the revocation of the registration, the contract would have been awarded to the Claimant. Similarly, not having been granted a hearing, the Claimant lost an opportunity to defend its right to maintain the registration. It is that lost opportunity which may have to be valued in order to assess the appropriate compensation. For reasons outlined, in paragraph 24

below, it is not for this court to determine the appropriate measure of damages. I make no finding as to whether the Claimant's loss was the value of the contract or the value of the opportunity to defend its registration, or something else. It suffices, at this juncture, to demonstrate that there has been a loss and that it flows from wrongful conduct which caused certiorari to issue. The fact that the assessment of damages will be difficult, involving probabilities and uncertainties, is of no great moment. Courts have, from time to time, been called upon to quantify loss in even more opaque circumstances. The court will do the best it can on the available evidence.

[24] It was the Claimant's suggestion, to which there was no serious opposition, that in the event damages were to be assessed it be done in separate proceedings. The Full Court has, on more than one occasion, separated the issues of liability and damages. I agree with the approach. The evidence in proof of damages can be considered separately from the evidence as to liability. Separation also enhances efficiency because damages will be assessed by a single judge whose entire focus will be on matters related to the issue of damages. This court can give the necessary directions in that regard.

[25] On the matter of the liability of the 2nd, 3rd and 4th Respondents different considerations apply. The 4th Respondent as Attorney General will I suppose be liable vicariously for the acts and/or omissions of the 1st Respondent or, as the Crown's representative, have an interest in the amount of damages to be assessed. The 2nd Respondent is a creature of, and therefore governed by, the Contractor General Act. The Claimant asserts that the 2nd Respondent acted ultra vires its statutory power as its reporting powers are limited by section 20. I do not agree. Section 21 clearly allows for disclosure in certain circumstances in the course of an investigation. Similarly, section 24 (1) (b) allows for disclosure where he thinks it necessary in the discharge of his functions. The 2nd Respondent operates in tandem with the 1st Respondent. They are both institutions established to achieve the same public good. That is to ensure lawful public expenditure. It certainly would be odd if, in the course of investigations, the 2nd Respondent

uncovered evidence of fraud but was prohibited from divulging same to the 1st Respondent. What is important is the use to which the 1st Respondent put the information. Early release of such information can prevent further fraud. The 2nd Respondent cannot be responsible for the 1st Respondent's failure to act appropriately. I do not therefore find that the 2nd Respondent is liable or in breach of any duty to the Claimant.

[26] The 3rd Respondent, similarly, cannot be faulted for not awarding the contract after the 1st Respondent revoked the Claimant's registration. It is true that the 3rd Respondent publicly announced the award of the contract to the Claimant. However, the contract had not yet been signed. The 3rd Respondent acted as any reasonable Minister of Government would in the circumstances which presented itself. Indeed, it would have been unreasonable and wrong to, ignore the advice of the 1st and/or 2nd Respondents and, go ahead and contract with a contractor whose registration had been revoked. Neither can the 3rd Respondent be faulted for going ahead with the project. There is no evidence to suggest that that decision was due to an improper purpose, wrong considerations or unreasonable in the Wednesbury sense. In short there is no basis in law to challenge the decision of the 3rd Respondent. The contract had not been signed and hence the Claimant has no cause of action against the 3rd Respondent who, to my mind, acted lawfully and reasonably given the information in its possession.

[27] On the matter of costs, the Claimant has been successful against the 1st and the 4th Respondents. The latter as representing the Crown which bears ultimate responsibility for the 1st Respondent's conduct and exposure. Costs therefore will follow the event in the usual way. As regards the other Respondents, against whom the claim has failed, regard must be had to Order 56.15 (5). That provision, as explained in ***Julian Robinson v The Attorney General of Jamaica [2019]***

JMCC Full 5 2018HCV01788 **(unreported judgment on costs dated 30th May 2019)**, is designed to protect unsuccessful applicants for Judicial Review so as not to discourage other litigants. In this case it cannot be said that the decision to join the 2nd and 3rd Respondents was unreasonable. Firstly, because the Claimant

could not have been privy to the inner workings or interplay between these state agencies and secondly, because the allegations of breach of a duty of confidentiality and of a legitimate expectation were not on the evidence far-fetched. Although I imagine that ultimately all costs will be paid from the consolidated fund it is appropriate to make a Bullock order for the costs of the other Respondents.

[28] It therefore follows that an order for certiorari is appropriate with damages to be assessed against the 1st and 4th Respondents.

STAMP, J

[29] I have had the benefit of reading the draft judgment of Batts J. I concur and have nothing to add.

PALMER HAMILTON, J

[30] I too have had the benefit of reading the draft judgment of Batts J. I also concur, and have nothing useful to add.

BATTS, J
BY THE COURT:

[31] It is Declared that the 1st Respondent acted in breach of the principles of natural justice when it revoked and/or cancelled the Claimant's registration in the categories and grades set out hereunder:

Categories	**Grade**
Building	1
Civil Engineering Works	1
General Road Works	1
Interior Construction works	3

(ii) Certiorari will issue to quash the 1st Respondent's decision, made on the 11th day of December 2013 and contained in a letter dated the 12th day of December 2013, to cancel and/or revoke the Claimant's registration as referenced at paragraph (i) above.

(iii) Damages are to be assessed in favour of the Claimant and against the 1st and 4th Respondents by a judge alone in open court.

(iv) A Case Management Conference, with respect to the assessment of damages, is to be listed by the Registrar of the Supreme Court in the upcoming term and, at which, directions with regard to the assessment of damages shall be given.

(v) Costs will go to the Claimant, and to the 2nd and 3rd Respondents, against the 1st and 4th Respondents. Such costs to be taxed or agreed.

……………………………
BATTS J

……………………………
STAMP J

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PALMER HAMILTON, J