In The Supreme Court of Bermuda

CIVIL JURISDICTION

2021: No. 364

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN:

MAILBOXES UNLIMITED LIMITED

Applicant

- and -

MINISTER FOR THE CABINET OFFICE

Respondent

JUDGMENT

Judicial Review proceedings, Government procurement processes for services, Delay, Illegality and unlawfulness, Respondent's duty of candour, Code of Practice, Failure to issue a regulation to give effect to a policy, Guidance

Date of Hearing: **5 May 2023**
Date of Ruling: **1 August 2023**

Appearances: **Peter Sanderson, BeesMont Law Limited, for the Applicant**

Eugene Johnston, Attorney General's Chambers, for the Respondent

JUDGMENT of Mussenden J

The Parties

1. The Applicant in this matter is Mailboxes Unlimited Limited ("**Mailboxes**"), a registered local company concerned with the importation of items on behalf of customers.

2. The Respondent is the Minister for the Cabinet Office.

The Judicial Review Application

3. On 24 November 2021, I granted Mailboxes leave to bring judicial review proceedings against the Minister in respect of the decision (the "**Decision")** of the Minister for the Bermuda Post Office (the "**BPO**") to enter into a shopping platform partnership (the "**Partnership**") involving the BPO and an entity described by the Minister as Access USA Shipping LLC ("**AUSA**") and which appears to be connected to an online shopping entity "**myUS.com**" and the procurement procedures relating thereto.

4. The Applicant seeks relief as follows:
    a. A declaration that the Decision to enter into the Partnership was unlawful;
    b. An order of prohibition restraining the Minister from continuing the Partnership;
    c. An order of certiorari quashing the Decision to execute such contract that has been entered into to give effect to the Partnership; and
    d. Such further and other relief.

Statement of Grounds on which Relief is Sought

5. The grounds for which relief is sought are set out in the Form 86A and surround the statutory procedures of procurement of goods and services by the Government as provided in the statutory Code of Practice for Project Management and Procurement (the "**Code**") pursuant to the Public Treasury (Administration and Payments) Act 1969 (the "**1969 PT**

Act"). Mailboxes claims that the Minister and/or his servants/agents have acted unlawfully in failing to follow the Code and that this breach is amenable to judicial review.

Background

6. Mailboxes relied on the First Affidavit of Kenneth Thomson sworn on 16 November 2021 ("**Thomson 1**") which set out the background of the matter.

7. On 24 August 2018, on the Government procurement website, a Request for Information (the "**RFI**") was published. It was expressed to be for the purposes of gathering information about the marketplace in order to assist in the determination of future purchasing options for online cross border and global shopping. It was expressly stated that the RFI was not a formal competitive bidding process.

8. On 24 September 2021, the Respondent made a publicized statement to the House of Assembly stating that there would be a soft launch of an online shopping platform, "**myBermudaPost**", powered by MyUS on 30 September 2021. According to the 2021 budget statement, the Minister stated that the Post Office expected to receive around $600,000 in the year in relation to the planned online shopping platform.

9. In an article dated 9 October 2021, the Bermuda daily newspaper the Royal Gazette (the "**RG**") reported the Minister saying that, because nobody responded to the RFI, no further steps needed to be taken. In an article dated 30 October 2021 the Royal Gazette reported a Ministry spokesperson stating that the procurement project had a value of $24,000 and so falls below the threshold requiring procurement or Cabinet approval.

10. The Respondent's budget report for 2022 stated a projected increase from $203,000 revenue to $553,000 revenue from customs declarations fees, due to myBermudaPost.

11. On 16 November 2021 Mailboxes filed its application for leave for judicial review which was dated 15 November 2021.

12. The Respondent objects to the application for judicial review.

Duty of Candour

13. Samuel Brangman, the Postmaster General (the "**PMG**"), filed an affidavit sworn on 15 December 2021 ("**Brangman 1**") in respect of the Respondent's application to set aside leave to issue judicial review proceedings. In respect of the substantive hearing of the judicial review, the Respondent did not file any affidavit evidence. However, I gleaned some bare evidence from Brangman 1 which I refer to as necessary.

14. At the substantive hearing, Mr. Johnston stated that there was no obligation on the Respondent to file any affidavit evidence as the Respondent's position was that Thomson 1 was sufficient. Mr. Sanderson countered that having no affidavit evidence from the Respondent for the substantive hearing was most unsatisfactory since the parties had then to rely on other documentation such as reports from the RG and the Hansard of Parliament. When the Court asked Mr. Johnston if the Respondent should engage the application for judicial review by filing affidavit evidence setting out its position Mr. Johnston replied that although there was a duty of candour in judicial review proceedings, procurement documents were confidential so that competitors do not access such information by way of the court system. He added that if Mailboxes wanted further disclosure, then had such a request been made, then information could have been provided with the caveat of confidentiality. Thus, the only evidence on behalf of the Respondent in this matter is Brangman 1. I note here that it is ironic that Mr. Johnston put forward his arguments as on the evidence there was no procurement process and thus there would not be confidential documents from competitors.

15. In *Marshall & 12 Others v the Deputy Governor & Others* [2008] SC (Bda) 9 Civ Ground CJ considered the complaint of lack of the respondent's evidence in that case and the drawing of adverse inferences. He stated as follows:

"10. Before turning to the individual points made by the applicants, I need to deal with a general point that they make on the evidence, or rather the lack of it. The applicants contend for a general duty of candour on respondents in public law cases, and they say that the respondents in this case have fallen short of that. They say, therefore, in those cases where the respondents have failed to provide information which must have been available to them, that I should draw adverse inferences.

11. In support of their contention the applicants rely upon two statements by Lord Donaldson MR. These statements of the law are worth setting out in full, as this is by no means the first case to come before the Supreme Court in which the respondents in a public law cases files minimal evidence, leaving the court to grope its way to an assessment of the facts. There also seems to be an assumption on the part of respondents that applications for the judicial review of administrative action can be decided on law alone, in a vacuum and divorced from the facts. That may be so in a limited number of cases, but in most the outcome will turn upon a complex interaction between fact and law. If the court is to do justice on the law, it needs to be put in possession of the facts.

12. The first statement of principle is found in R v Lancashire County Council, ex parte Huddleston [1986] 2 All ER 941. The case concerned a decision by an education authority to refuse an educational grant. His Lordship said:

> *"Counsel for the council also contended that it may be an undesirable practice to give full, or perhaps any, reasons to every applicant who is refused a discretionary grant, if only because this would be likely to lead to endless further arguments without giving the applicant either satisfaction or a grant. So be it. But in my judgment the position is quite different if and when the applicant can satisfy a judge of the public law court that the facts disclosed by her are sufficient to entitle her to apply for judicial review of the decision. Then it becomes the duty of the respondent to make full and fair disclosure.*
>
> *Notwithstanding that the courts have for centuries exercised a limited supervisory jurisdiction by means of the prerogative writs, the wider remedy of judicial review and the evolution of what is, in effect, a specialist administrative or public law court is a post-war development. This development has created a new relationship between the courts and those who derive their authority from the public law, one of partnership based on a common aim, namely the maintenance of the highest standards of public administration.*
>
> *With very few exceptions, all public authorities conscientiously seek to discharge their duties strictly in accordance with public law and in general they succeed. But it must be recognised that complete success by all authorities at all times is a quite unattainable goal. Errors will occur despite the best of endeavours. The courts, for their part, must and do respect the fact that it is not for them to intervene in the administrative field, unless there is a reason to inquire whether a particular*

authority has been successful in its endeavours. The courts must and do recognise that, where errors have, or are alleged to have, occurred, it by no means follows that the authority is to be criticised. In proceedings for judicial review, the applicant no doubt has an axe to grind. This should not be true of the authority. The analogy is not exact, but just as the judges of the inferior courts when challenged on the exercise of their jurisdiction traditionally explain fully what they have done and why they have done it , but are not partisan in their own defence, so should be the public authorities. It is not discreditable to get it wrong. What is discreditable is a reluctance to explain fully what has occurred and why."

13. The second statement came five years later in R v Civil Service Appeal Board, ex parte Cunningham [1991] 4 All ER 410. That case concerned an assessment of compensation for the unfair dismissal of a Prison Officer. His Lordship said:

"In R v Lancashire CC, ex p Huddleston [1986] 2 All ER 941 at 945 I expressed the view that we had now reached the position in the development of judicial review at which public law bodies and the courts should be regarded as being in partnership in a common endeavour to maintain the highest standards of public administration, including, I would add, the administration of justice. It followed from this that, if leave to apply for judicial review was granted by the court, the court was entitled to expect that the respondent would give the court sufficient information to enable it to do justice and that in some cases this would involve giving reasons or fuller reasons for a decision than the complainant himself would have been entitled to. . . .

Those of us with experience of judicial review are very much aware that the scope of the authority of decision-makers can vary very widely and so long as that authority is not exceeded it is not for the courts to intervene. They and not the courts are the decision-makers in terms of policy. They and not the courts are the judges in the case of judicial or quasi-judicial decisions which are lawful. The public law jurisdiction of the courts is supervisory and not appellate in character. All this is very much present to the minds of judges who are asked to give leave to apply for judicial review. Such leave will only be granted if the applicant makes out a prima facie case that something has gone wrong of a nature and extent which might call for the exercise of the judicial review jurisdiction. Whatever the initial position, the fact that leave to apply for judicial review has been granted calls for some reply from the respondent. How detailed that reply should be will depend upon the circumstances of the particular case. He does not have to justify the merits of his decision, but he does have to dispel the prima facie case that it was unlawful, something which would not arise if leave to appeal had been refused. . . .

In fairness to the board it must be emphasised that it is not being uncooperative. It has been advised, mistakenly as I think, that to attempt any justification of a particular award, however surprising that award might by, would be to concede the right of every claimant to reasons. As I have sought to show, this is not so. The

principles of public law will require that those affected by decisions are given the reasons for those decisions in some cases, but not in others. A classic example of the latter category is a decision not to appoint or not to promote an employee or office holder or to fail an examinee. But, once the public law court has concluded that there is an arguable case that the decision is unlawful, the position is transformed. The applicant may still not be entitled to reasons, but the court is.""

16. Ground CJ decided in that case, that despite the lean evidence filed by the respondent, it was not the kind of case where he should necessarily draw inferences adverse to the respondents, or seek to go behind the evidence that was adduced, notwithstanding that it was somewhat lean. Mr. Johnston argued that in this kind of case where confidentiality is statutory then candour must be tempered. In any event, I have found it necessary on some issues to draw adverse inferences against the Respondent and I will return to these issues later as necessary.

The Legal and Policy Framework

The Statutory Instruments Act 1977 (the "1977 SI Act")

17. Relevant parts of the 1977 SI Act are as follows:

"Publication of statutory instruments
5 (1) Subject to subsections (6) to (13), every statutory instrument shall be published in the Gazette within one month of its filing, unless publication by deposit for public inspection is authorized by the enabling Act.
...
(4) A statutory instrument shall not have effect until published.
(5) A statutory instrument shall have effect when published unless in the enabling Act or in the instrument another date is specified."

"Parliamentary scrutiny of statutory instruments
6 (1) Every statutory instrument made by the Governor or a Minister under an enabling Act, or which though made by some other person or authority requires the consent or approval of the Governor or a Minister, shall, unless specifically provided to the contrary in such Act, be subject to Parliamentary scrutiny by way of affirmative resolution procedure or negative resolution procedure as required by subsection (2)."

The Public Treasury (Administration and Payments) Act 1969 (the "**1969 PT Act**")

18. Section 32B of the 1969 PT Act states as follows:

> *"…*
> *(4) The Director shall issue a Code of Practice for Project Management and Procurement to be followed by all public officers concerned with obtaining goods or services for Government.*
> *(5) The Director shall take steps as he considers necessary to ensure that the Code of Practice for Project Management and Procurement is followed by all public officers.*
> *(6) In this section and sections 32C to 32E—*
>
> *…*
> *"procurement" means the provision of any goods or services to Government otherwise than by a public officer;*
> *"public officer" includes a person employed by, or acting as an agent for, a public authority."*

19. Section 33 of the 1969 PT Act provides as follows:

> *Regulations*
> *"33 (1) The Minister may make such regulations as appear to him to be necessary or expedient for the proper carrying out of the intent and provisions of this Act; provided that before the Minister makes regulations in relation to the Office of Project Management and Procurement, he shall consult the Minister responsible for that Office.*
> *(2) Without prejudice to the generality of subsection (1), the Minister shall make regulations—*
>
> *…*
> *(b) containing the Code of Practice for Project Management and Procurement issued by the Director under section 32B;"*

20. Section 33A(1)(c) of the 1969 PT Act provides for criminal offences and states as follows:

> *"A person who, without reasonable excuse—*
>
> *…*
> *(c) fails to produce documents or information or otherwise obstructs the Director of Project Management and Procurement or any member of the Director's staff in carrying out his functions under section 32B of this Act,*
>
> *commits an offence and is liable on summary conviction to a fine not exceeding $5,000, or to imprisonment for a term not exceeding 12 months, or to both such fine and imprisonment."*

The Code of Practice for Project Management and Procurement

21. The Code was first published on 2 July 2018 and according to its cover page was effective until 30 June 2020. A second edition was published on 27 July 2020 and according to its cover page was effective from 1 July 2020. The Applicant submits that the matter in this case overlaps with that date but that the second edition should apply because it appears that no formal procurement steps were taken prior to 2020. The key distinction pre and post July 2020 is that a contract with a value of $24,000 would be an Intermediate Value contract before July 2020, but would be a Low Value contract after July 2020.

22. The Foreword to the Code states as follows:

> *"Public officers understand that the benefits go far beyond the immediate purchase of goods, services and works for the Government. The rules promote inclusivity, transparency and sustainability in the Government's procurement process. These rules are essential in fostering ethical, transparent, social, economic and environmental efficiencies."*

23. Section 2 of the Code provides various definitions:

> *"Contract" "Contract" means an agreement between the Government and any Person made by executing a formal written agreement or issuance of an official purchase order for the procurement by the Government of goods or services.*
> *"Low-Value Procurement (i)" means contracts or orders with an estimated value of $10,000 to $49,999.*
> *"Procurement" means the provision of any goods or services to the Government otherwise than by a public officer.*
> *"Services" means the time, effort and expertise required by the Government, from time to time, and supplied by a contractor, in accordance with a contract, instead of a tangible product and includes "works" as defined in this section.*
> *"Works" means the provision of physical or mental effort or activity which is directed toward the production or accomplishment of something by the contractor, from time to time, in accordance with the specification.*

24. Section 8(3) of the Code states as follows:

> *"In this Code, the value of a contract is the expected amount of funds (or something of equal value) that will be received by the contractor, including any sub-contractor that carries out the work or provides the goods or services, over the expected lifetime of the contract."*

The Ground of Delay

25. Section 68(1) of the Supreme Court Act 1905 (the "**1905 Act**") states as follows:

"Delay in making of application
(1) The Court may refuse to grant leave for the making of an application for judicial review, or to grant any relief sought on the application, if it considers that—
(a) there has been undue delay in making the application; and
(b) the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration."

26. The Rules of the Supreme Court ("**RSC**") Order 53, rule 4(1) states as follows:

"(1) Delay in applying for relief - An application for leave to apply for judicial review shall be made promptly and in any event within six months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made."

27. In *Maharaj v National Energy Corporation of Trinidad and Tobago* [2019] UKPC, Lord Lloyd-Jones, after a review of the authority in England and Wales as well as Trinidad and Tobago, stated as follows:

"30. Similarly, the decision of Maurice Kay J in Greenpeace II, although a first instance decision, has been influential with regard to the correct approach to delay. In that case Greenpeace sought to challenge by judicial review what it maintained was the defective implementation into domestic law of Council Directive 92/43/EEC of 21 May 1992 ("the Habitats Directive") and the resulting failure of the Secretary of State to have regard to the Directive or the implementing legislation when proposing the grant of exploration licences in relation to the United Kingdom's continental shelf. The question of leave was adjourned to the substantive hearing. At that hearing the judge addressed the following questions in turn:
(1) Is there a reasonable objective excuse for applying late?
(2) What, if any, is the damage, in terms of hardship or prejudice to thirdparty rights and detriment to good administration, which would be occasioned if permission were now granted?
(3) In any event, does the public interest require that the application should be permitted to proceed?"

...
"46. In the Board's view, the approach of the majority in the Court of Appeal was also flawed. For the reasons set out above, the Board considers that issues of prejudice and detriment are not limited to a residual discretion but are capable of having an important bearing on an assessment of promptitude and whether there exists a good reason to extend time. In particular, an approach which seeks to insulate prejudice and detriment in the manner favoured by the majority in the Court of Appeal is likely to

result in a failure to give due weight to an absence of such prejudice or detriment. In the circumstances of the present case the judge at first instance was required to have regard to prejudice and detriment before reaching a conclusion on whether to set aside leave. The Board finds itself in agreement with Jamadar JA's view (para 48) that, reading section 11 as a whole, a judge considering whether there is a good reason for extending time must take account of a broad range of factors, including but not limited to, considerations under subsections 11(2) and 11(3), the merits of the application, the nature of the flaws in the decision-making process, whether or not fundamental rights are implicated and any public policy considerations, to the extent that they may be relevant."

Respondent's Submissions

28. Mr. Johnston argued that the application for judicial review should be denied because the Applicant had delayed making it and it was out of time. He relied on section 68 of the 1905 Act and RSC Order 53, rule 4. He argued that the rule on delay was an invariable rule unless the Court granted an extension of time. Further, he argued that the Court should only grant an extension for good reason. He relied on the cases of *R v IRC, ex parte National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, *R v Dairy Produce Quota Tribunal for England and Wales, ex parte Caswell* [1990] 2 AC 738 and *Maharaj v National Energy Corporation of Trinidad and Tobago* [2019] UKPC.

29. Mr. Johnston submitted that when deciding if there is good reason, the Court must take into account the factors in section 68 (1)(b) of the 1905 Act that any prejudice or hardship or detriment to good administration which is likely to result from proceeding and granting a remedy. He stressed that Mailboxes has not sought an extension, but even if they had, it would likely be refused because of the impact on third parties and to good public administration. He relied on the case of *Davis v Minister of Economy, Trade and Industry* [2012] Bda LR 58.

30. Mr. Johnston submitted that in a procurement context, time starts to run from the moment the applicant was aware, or should have been aware, that they had grounds for bringing public law proceedings. He relied on *Uniplex (UK) Ltd v NHS Business Services Authority* [2010] PTSR 1377 and *SITA UK Ltd v Greater Manchester Waste Disposal Authority*

[2012] PTSR 645. He argued that when these cases are looked at alongside *Caswell* and *Maharaj*, it is clear that Mailboxes was long out of time when it asked the Court for leave to bring judicial review proceedings on 15 November 2021. He referred to several events in Thomson 1: (i) 6 March 2019 when the Minister indicated that the Post Office would be introducing an online shopping platform; (ii) 27 November 2020 when details of the contract were published on the Government's website; and (iii) 12 March 2021, details of expected expenditure were published.

Mailboxes' Submissions

31. Mr. Sanderson acknowledged the rule on delay. He submitted that there was an expectation that the Respondent would comply with the Code. However, the first indication that the Respondent was not following the Code came with the announcement in the House of Assembly on 12 March 2021 that the Post Office would go ahead with a contract with a named entity AUSA. He argued that Mailboxes had no knowledge of this and it did not appear to have been reported by journalists. He noted that Hansard reports of parliamentary proceedings run to hundreds of pages each time and it is not reasonable to expect members of the public to read through each and every Hansard publication on the off chance that there may be something of relevance to them. He stressed that in matters of procurement, members of the public are entitled to take comfort in the provisions of the Code, which provide for open and transparent bidding processes.

32. Mr. Sanderson referred to various events as follows: (i) when the contract was actually entered – which the Defendant decided not to disclose; (ii) the publicised statement on 24 September 2021 that there would be a soft launch of a shopping platform on 30 September 2021; (iii) Mailboxes' prompt reaction to the announcement by sending a letter before action on 15 October 2021; and (iv) filing this action after the Respondent requested extra time to respond to the letter.

33. Mr. Sanderson argued that the relevant event for starting the clock would have been the entering into the contract, However, the Respondent had chosen not to reveal that date.

Thus, Mailboxes' lack of knowledge amounted to a good reason to extend time. Further, if 12 March 2021 was held to be a relevant date, then there was a good reason to extend the time as the announcement was not picked up on nor did the Government make the media aware via a press release. Mr. Sanderson argued that the whole thrust of this judicial review application is a failure to follow appropriate public procurement procedures. Thus, the lack of public notice, etc. is therefore intrinsic to the unlawful behaviour complained of, and should not be treated as something to shield the Respondent from scrutiny.

Analysis on Delay

34. In my view the Respondent's ground of delay to defeat the application for judicial review should be rejected for several reasons. First, the Respondent has never filed any evidence on the date when the contract was entered by the parties. I recall that at the hearing on the 29 March 2022 Mr. Johnston indicated, albeit begrudgingly, that the date the contract was signed was 18 May 2021. At that time, I calculated that the application for leave for judicial review dated 15 November 2021 and filed on 16 November 2021 was inside the deadline of six months to file the application. To that point, the detail of the involvement of AUSA and myUS.com was first revealed on 12 March 2021 as addressed below and then again on 24 September 2021 in a Ministerial statement to the House of Assembly about a soft launch. However, I agree with Mr. Sanderson that the contract date is the relevant event for the time period to run. Thus, in my view, the application for leave was within time.

35. Second, I reject Mr. Johnston's submission that the relevant events for the time to run were earlier and thus Mailboxes needed to apply for an extension of time. In particular, his argument is that on 6 March 2019 Mailboxes should have been aware of the contract as the previous Minister for the Post Office indicated that it would be introducing an online platform. I accept the evidence of Mailboxes generally that announcements were made in Parliament, reported only in the Hansard and that no media statements were made to bring the matter to the attention of the public. The duty of candour should have caused the Respondent to file some evidence about efforts to publicise the announcement in the interest of transparency, thus I find it rich for the Respondent to take the point now that

Mailboxes should have known of this event on 6 March 2019. In my view, the business of Parliament is serious and important to the people of Bermuda. However, it is wholly unreasonable for a public authority to expect members of the public to be tuned in fully to announcements in Parliament or to peruse the Hansard[1] for any event that could be connected to them. This is moreso in the context of procurement where the Foreword to the Code speaks of inclusivity and transparency. Further, in the parts of the Hansard that I was taken to and on my own review of it, there is nothing in the statement that states that the BPO was entering into a contract or partnership with AUSA as complained of in the Form 86A. In the absence of any evidence from the Respondent that some steps were taken by the Minister to inform the public by way of a media statement, I do draw an adverse inference against the Minister that Mailboxes should have known about the Minister's statement made in Parliament on 6 March 2019.

36. Mr. Johnston also relies on the Minister's statement to the House of Assembly dated 27 November 2020 which according to Thomson 1 was posted online. My views about the duty of candour as set out above apply to this point also. Further, whilst there is a lot of information in the statement about the Post Office, its business plan and future endeavours, there is nothing in the statement that I was taken to or on my own review that states that the BPO was entering into a contract or partnership with Access USA Shipping LLC or myUS.com as complained of in the Form 86A. Thus, I reject the Minister's statement as the event that started the clock running for filing an application for leave for judicial review.

37. Mr. Johnston also relies on the event of 12 March 2021 in the House of Assembly during the annual budget debate when the Minister, according to page 781 of the March 2021 Hansard, reported that the Post Office would soon be "*contracting with myUS.com*". I accept the evidence of Thomson 1 that Mailboxes was not aware of that specific announcement, he believed it was not picked up by the media and Mailboxes did not have the resources to read through the volumes of Hansard reports[2]. Again, I rely on my views about the duty of candour and note the absence of any evidence about what efforts the

[1] The March 2019 Hansard of the Bermuda House of Assembly is at least 859 pages
[2] The March 2021 Hansard of the Bermuda House of Assembly is 869 pages

Respondent took to bring the matter to the attention of the public by way of a media statement or otherwise.

38. Third, if the Court is wrong to consider that the time for filing an application for leave for judicial review is the date when the contract was entered, but instead was an earlier date, then I find that there is a good reason for extending the period. To that point, I only consider the event of 12 March 2021 as capable of being considered such a date and no earlier date. Thus, if the Court had to accept that there was undue delay from 12 March 2021, then in my view, in following *Maharaj*, in particular the approach of Maurice Kay J in *Greenpeace II*, the facts of the statements made to the House of Assembly, reported in volumes of Hansard but with no further media reports are reasonable objective excuses for applying late.

39. Further, in respect of the duty of candour owed by the Respondent who chose to file no evidence, I reject Mr. Johnston's submissions about any prejudice or hardship or detriment to good administration which is likely to result from proceeding and granting a remedy. Simply put, other than the fact there is a contract or a partnership, there is no evidence from the Respondent to assist with this particular issue. What Ground CJ stated in *Marshall & 12 Others* in 2008 is still good today, that there seems to be an assumption that these applications can be decided on law alone, in a vacuum and divorced from the facts. Also equally applicable today as it was in 2008, if the Court is to do justice on the law, it needs to be put in possession of the facts.

40. In respect of the third limb of the *Greenpeace II* approach, in my view, the public interest does require that the application be permitted to proceed based, on the all the issues in this case about procurement of goods and services by the Government, when there is a publicly issued Code that was implemented about the methodology of the process that promotes inclusivity and transparency.

The Ground of Illegality

41. In the case of *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 Lord Diplock stated *"By illegality … I mean that the decision-maker must understand correctly the law that regulates his decision-making power and give effect to it."*

42. In *De Smiths Judicial Review 8th Edition 2018*, para 5-001 to 5-003, it states:

"An administrative decision or other exercise of a public function is unlawful under the broad chapter of "illegality" if the decision maker:

(a) misinterprets a legal instrument relevant to the function being performed;

(b) has no legal authority to make the decision;

(c) fails to fulfill a legal duty;

(d) exercises discretionary power for an extraneous purpose;

(e) takes into account irrelevant considerations or fails to take account of relevant considerations; and

(f) improperly delegates decision-making power.

The task for the courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker. The instrument will normally be a statute or delegated legislation, but it may also be an enunciated policy, and sometimes a prerogative or other common law power. The courts when exercising this power of construction are enforcing the rule of law, by requiring administrative bodies to act within the "four corners" of their powers or duties. They are also acting as guardians of Parliament's will, seeking to ensure that the exercise of power is in accordance with the scope and purpose of Parliament's enactments.

At first sight this ground of review seems a fairly straightforward exercise of statutory interpretation, for which courts are well suited. It is for them to determine whether an authority has made an error of law. Yet there are a number of issues that arise in public law that make the courts' task more complex."

Mailboxes' Submissions

43. Mr. Sanderson submitted that the Respondent had disobeyed Court orders regarding a response and disclosure which he stressed was highly irregular in the context of judicial review. Further, as the Respondent had failed to dispute the facts set out in Thomson 1 then it should be inferred that what is stated by the Applicant is correct.

44. Mr. Sanderson submitted that there was a statutory duty to comply with the Code, thus in other words, it is unlawful to fail to comply with the Code.

45. Mr. Sanderson submitted that the Minister's statement that the value of the contract was merely $24,000 cannot possibly reflect section 8(3) of the Code as set out above. He argued that it must be inferred that the Minister's stance must be that funds received by a contractor refer only to funds received from Government in respect of a procurement. His position was that this was erroneous. In the alternative, he argues that even if the Court agrees with the Minister's interpretation, it is still maintained that there was a breach of the procurement process if the contract had a stated value of $24,000.

46. Mr. Sanderson submitted that the suggestion that the value of the contract relates only to funds expended by Government cannot stand up to scrutiny. He noted that the Government has broad powers to enter preferential deals with private companies, in this case, an exclusive ability to use the BPO, a Government body, to assist with package forwarding from the USA. He relied on the Foreword to the Code which stated that public officers understand that benefits go far beyond the immediate purchase of services.

47. Mr. Sanderson set out how the arrangements can be made in the present case, both starting off with the BPO marketing itself locally for customers to be able to use the Post Office to obtain packages forwarded from the USA:
    a. A Bermuda-based customer contracts with, and pays, the BPO to forward a package from a warehouse address in the USA. The BPO then contracts with a private company to provide stateside services;

b. A Bermuda-based customer contracts with, and pays, a private company to forward a package from a warehouse address in the USA. That private company then contracts with the BPO to handle the Bermuda-side operations of getting the package to the customer.

48. Thus, Mr. Sanderson argues that it appears highly artificial to suggest that the funds received by the contractor would be substantially lower in arrangement (b) than arrangement (a). He stressed that both arrangements are allowing a contractor to profit from an exclusive arrangement with the BPO. He argued that if the Respondent's interpretation were correct, it would be possible to structure major infrastructure projects in such a way that they do not even engage the procurement process at all, for example, Government could contract with a private company to build a new causeway, to be paid for with user tolls going to that company. He submitted that this could not have been the intention of the Code.

49. Mr. Sanderson submitted that if the contract was $24,000, as stated by the Respondent, there was still a failure to follow the Code. The contract would be a Low-Value Procurement, which according to paragraph 11.3 of the Code, for contracts with a value between $10,000 and $49,000, at least three quotes must be received by telephone or in writing, and full details retained on file. Paragraph 11.6 of the Code provides that if it is not possible to obtain three quotes, the efforts made to obtain them should be documented in the file. Paragraph 11.7 of the Code provides that if it is not practicable to obtain quotations, then a waiver must be obtained. As the Respondent did not file any affidavit evidence as to what efforts had been made to comply with the Code, then it can be inferred that the Code was not complied with. Mr. Sanderson argued that this position was supported by the Respondent's statement to the media that as no-one responded to the RFI, then no further procurement steps need to be taken.

The validity of the Code

50. Mr. Sanderson addressed an argument of the Respondent about the validity of the Code on the basis that it had never been published in the Official Gazette. The background was that section 32B(4) of the Act providing that the Director shall issue a Code, was enacted on 21 October 2011. According to a Ministerial Statement dated 7 December 2018, former Minister Walton Brown MP stated that the Code was implemented on 2 July 2018 and that Government intended to operate by it accordingly. A second edition of the Code was published on 27 July 2020 with effect from 1 July 2020, the front cover containing the reference "Cabinet Conclusion#18(20)6". I note here that both versions are available on the Government website.

51. Mr. Sanderson submitted that upon a review of the Official Gazette website, the 2020 Revised Code was not published. In respect of the 2018 Code, it was difficult to determine as the Official Gazette website came into operation in 2018 and it is difficult to research the printed versions. Due to the lateness of the issue being raised, there had not been enough time to research the printed versions.

52. In any event, Mr. Sanderson stressed the oddity of the circumstances where: (a) The Respondent has ministerial responsibility for the Office of Project Management and Procurement; (b) has operated on the basis that the Code is in effect for some five years; (c) has made public representations to that effect; and (d) now seeks to defend non-compliance with the Code on the basis that the Code was not properly published.

53. Mr. Sanderson argued that it was well-established that Ministers have a duty to comply with policies that they have adopted. Thus, as the Minister and broader Government had adopted a policy of implementing the Code, even though it might not have had legal impact as a statutory instrument, they should be held to it accordingly. He relied on the case of *Kambadzi v Secretary of State for the Home Department* [2011] UKSC 23 where Lord Hope stated as follows:

"36. … But there is a substantial body of authority to the effect that under domestic public law the Secretary of State is generally obliged to follow his published detention policy. In R (Saadi) v Secretary of State for the Home Department [2001] EWCA Civ 1512, [2002] 1 WLR 356, para 7, Lord Phillips of Worth Matravers MR, delivering the judgment of the court, said that lawful exercise of statutory powers can be restricted, according to established principles of public law, by government policy and the legitimate expectation to which such policy gives rise. In Nadarajah v Secretary of State for the Home Department [2003] EWCA Civ 1768, [2004] INLR 139, para 54 the Master of the Rolls, again delivering the judgment of the court, said:

> *"Our domestic law comprehends both the provisions of Schedule 2 to the Immigration Act 1971 and the Secretary of State's published policy, which, under principles of public law, he is obliged to follow."*

In D v Home Office (Bail for Immigration Detainees intervening) [2005] EWCA Civ 38, [2006] 1 WLR 1003, para 132 Brooke LJ said that what the law requires is that the policies for administrative detention are published and that immigration officers do not stray outside the four corners of those policies when taking decisions in individual cases. Wade and Forsyth, Administrative Law 10th ed, (2009), pp 315-316 states that the principle that policy must be consistently applied is not in doubt and that the courts now expect government departments to honour their statements of policy. Policy is not law, so it may be departed from if a good reason can be shown. But it has not been suggested that there was a good reason for the failure of officials of the required seniority to review the detention in this case and to do so in accordance with the prescribed timetable."

The Respondent's Submissions

54. Mr. Johnston conceded that the Partnership was made without first following any substantive process in either version of the Code. Thus, he contended that the real question for the Court is whether the Postmaster General had to stick slavishly to the Code. His position was in the negative for two reasons, which he argued was why the application for judicial review should fail.

The Status Argument

55. The Interpretation Act 1951 (the "**1951 Act**") defines a statutory instrument as :

> *"any proclamation, rule, regulation, order, rule of court, bye-law, notice or other instrument made under or by virtue of any provision of law and having legislative effect"*

56. Mr. Johnston submitted that by this definition, the Code could be a statutory instrument, but in order to give it legislative effect, the Statutory Instruments Acts 1977 (the "**1977 Act**") would have to be complied with. The 1977 Act sets out a number of requirements which must be substantially complied with before a statutory instrument is to have effect. Thus, if there is no publication of a document in the Official Gazette, and if a document was not submitted for parliamentary scrutiny, it has no legislative effect. He argued that this was the position taken by the Court of Appeal in *Corporation of Hamilton v Centre for Justice* [2017] CA (Bda) 4 Civ.

57. Mr. Johnston argued that the Code can only have legislative effect if the Minister of Finance makes the type of regulations found in section 33 of the 1969 Act. Before those regulations are made, the Code is mere guidance and exists only as internal Governmental control. He relied on the cases of *R v London Borough of Islington, ex parte Rixon* 32 BMLR 136 and *R (Munjaz) v Mersey Care NHS Trust* [2006] 2 AC 148.

58. Mr. Johnston argued that when interpreted correctly, section 32B(4) of the 1969 Act defines the Director of Project Management and Procurement's power to issue a particular type of code of practice with a certain scope, it does not demand that such code be followed. That task was left to section 33. He submitted that the Minister of Finance has not published regulations in the form allowed by section 33(2)(b). Absent those regulations, the Postmaster General was only required to consider the code and take advice from the Director, which he did.

<u>The Threshold Argument</u>

59. Mr. Johnston submitted that even if the Code had legislative effect, it did not apply to the Partnership. The Code only applies when there is a 'procurement', which is when a good or service is provided to the Government by a person who is not a public officer (or agent of the Government). He relied on section 32B(6).

60. Mr. Johnston argued that the Partnership does not constitute Access USA providing any service to the Post Office. AUSA has assumed no function of the Post Office. They

consolidate customer's parcels overseas and send them to Bermuda. Once on island, the Post Office does what it does with all mail under its charge. Thus, he argued it does not matter how AUSA and the Post Office value this arrangement.

61. Mr. Johnston submitted that the Bermuda position on this is consistent with EU and UK law citing *R (Law Society) v Legal Services Commission* [2007] EWHC 1848 (Admin) and *JBW Group Ltd v Ministry of Justice* [2012] EWCA Civ 8. He argued that these cases invalidated the position expressed in paragraph 20 of Thomson 1.

Analysis on Illegality

62. In my view the application for judicial review on the ground of illegality or unlawfulness succeeds for several reasons.

The Status Argument

63. First, as a starting point, there is no dispute that the Code was not published by way of a regulation as set out above. Pursuant to the 1969 PT Act the Minister was required to make a regulation for the Code which was issued by the Director who had a duty to do so. However, on 7 December 2018, the then Minister for the Cabinet Office announced to the House of Assembly that the Code was implemented on 2 July 2018 but steps were never taken to issue a regulation to give effect to the Code. Thus, the situation is that there is an implemented Code issued without the authority of a regulation.

64. Second, thus as Mr. Johnston stated, the issue becomes whether the PMG had to stick slavishly to the Code. In *R v London Borough of Islington, ex parte Rixon* the respondent had fallen below the legal requirements of a local authority. There it was held that "*If the statutory guidelines were to be departed from, it must be for good reason, articulated in the course of some identifiable decision making process. In the absence of such considered decision, the deviation from the statutory guidance was a breach of the law."* In *R (Munjaz) v Mersey Care NHS Trust* it was held that "… *the relevant code did not have the binding force of legislation and was guidance rather than instruction, but it was not mere advice*

and should not have been departed from without cogent reasons, which should be critically scrutinized by the court."

65. Thus, in the absence of a published regulation, in my view, the Code is a guidance which should not be departed from without cogent reasons. This approach is also fortified by *Kambazdi* which highlights the principle that a public official is generally obliged to follow his published policy. In the present case, there was a second edition of the Code that was published. The foreword to the Code promoted the principles of inclusivity and transparency in the procurement process as well as setting out that the rules are essential in fostering certain efficiencies. To my mind, the guidance is particularly strong when considering that sections (4) and (5) of section 32B of the 1969 PT Act mandate that the Code is to be followed by all public officers concerned with obtaining goods or services and that the Director shall take steps to ensure that the Code is followed by all public officers. It follows, that any reasons for departing from it must be cogent in the sense that they are clear and convincing.

66. Third, I return to the duty of candour and the fact that the Respondent has not filed any evidence in the substantive hearing for the Court to consider. Thus, there has been no explanation provided to the Court as to what the process was that was undertaken or whether the Code was followed or departed from. Thomson 1 set out the facts of the various statements made to the House of Assembly in respect of this matter. In my view, those statements do not reveal cogent reasons about the decision making process in respect of selecting AUSA. To search wider for any cogent reasons, I refer to Brangman 1 which provides a gloss that (i) Mailboxes did not respond to the RFI; (ii) even if they did, they would not qualify to be selected; and (iii) BPO reached out to the Office of Project Management and Procurement and did everything that were advised to do by that office. In my view, none of this amounts to any cogent reasons about the selection process, whether it was adhered to or not, and certainly it does not provide cogent reasons for departing from the Code, which I address below. In order for the Court to critically scrutinize the cogency of the reasons then it should have been provided with the evidence of those reasons.

67. In light of the reasons as set out above, the Respondent's status argument fails.

The Threshold Argument

68. Fourth, Mr. Johnston's basic argument is that the selection of AUSA was not a procurement of services but it was an arrangement where the Respondent entered into a partnership with AUSA. In the absence of any affidavit evidence of the Respondent on this point, the Court has had to review the various statements and documents to get to the nub of this point.

69. In the RG article dated 9 October 2021, in respect of a question about the Government plan for the BPO to work with myUS.com, the PMG is quoted as saying that in 2018, the BPO issued a RFI and only two companies replied which did not meet the requirements. He added "*If no one replies to the RFI, there's no need to take it to the next step.*" In my view, the PMG linked the developments with AUSA to the RFI. Turning to the RFI, a cursory review of the document reveals that the Government procurement process was mentioned no less than five times. Also, it was made clear in the RFI that in effect it did not create any rights for any party or bind the Government in a procurement process. In my view, at the time of the issuance of the RFI and since, the intention of the Government was to procure a service. There is no evidence from the Respondent to refute this.

70. In the RG article dated 30 October 2021 a spokesman for the Cabinet Office was quoted as saying "*At this time, it is essential to clarify that the BPO's myBermudaPost service agreement is with Access USA Shipping LLC and valued at $24,000. It falls below the threshold that requires procurement and Cabinet approval."* In my view, this statement indicates that the BPO had procured a service which had a value of $24,000. There is no evidence from the Respondent to refute this. I should note here that, in my view, the Cabinet spokesman statement that it falls below the threshold that requires procurement and Cabinet approval misses a key point, namely that the Code has a procurement process for Low-Value Procurement, which are contracts or orders with an estimated value of $10,000 to $49,999.

71. Thus, it is difficult to accept Mr. Johnston's arguments that there was no procurement of a service. If he is right, then the question begs as to what is the $24,000 for? In the absence of an explanation from the Respondent, the Court is entitled to infer from the evidence that the Respondent agreed to pay and paid AUSA the sum of $24,000 to enter the service agreement. Thus, in my view, as stated above, the PMG, the RFI document and the Cabinet spokesman all indicated that a service was being procured. Mr. Johnston invited the Court to consider several cases on this point. The question in the case of *JBW Group Limited* was whether particular contracts should be classified as public service contracts or as service concession contracts in light of some regulations which implemented a directive that defined the types of contracts. Similarly, in *R (Law Society)* the issue was about unified contracts, public service concessions and regulations which defined the types of contracts. However, in the present case, the Code's definitions include contracts, goods and services and there is a section on contracts. On my review, no part of the Code deals with classifying contracts into sub categories. Further, there is no evidence from the Respondent on this point. Thus, I reject Mr. Johnston's arguments that these cases support his arguments. Also, I reject his arguments that there was no procurement of a service.

72. Fifth, I turn to the Cabinet spokesman point that the value of the service agreement was $24,000 and thus fell below the threshold for procurement and Cabinet approval. Mr. Johnston did not advance this argument in his submissions. However, Mr. Sanderson has taken points that: (i) it can be inferred that the value of the contract must be greater than $24,000 relying on section 8(3) of the Code as to the full amount to be received by AUSA over the life of the contract; and (ii) the Code would still be breached even if the contract was $24,000. I will not address point (i) as in the absence of affidavit evidence from the Respondent and AUSA, it will be an exercise in speculation. In respect of point (ii), the Code sets out at section 11 the rules for Low-Value Procurement as summarised by Mr. Sanderson above. There are clear duties to be followed for Low-Value Procurement. Thus, I agree with Mr. Sanderson that in the absence of evidence that the Respondent had complied with the Code, then it can be inferred that it was not complied with.

73. Sixth, the evidence shows that the service agreement had a value of $24,000. In the absence of an explanation from the Respondent, the Court will have to infer that the $24,000 figure was arrived at after some discussion or negotiation. Further, the Court is also entitled to infer that before the process started, the service agreement figure was unknown, in particular it was unknown that it would be a Low-Value Procurement, an Intermediate-Value Procurement or a High-Value Procurement. To that point, the Code sets out the Pre-Procurement Procedures at section 7, the Estimating Contract Values at section 8, the use of Specifications at section 9 and then the Threshold Values and Procurement Methods at section 11. It appears to me that the estimated value would determine the process, for example along with other requirements, low value estimates would require three quotes based on a telephone or a written request, intermediate value estimates would require three quotations and high value estimates would require a competitive procurement process unless a waiver was granted. However, there is no evidence to show that any of these pre-procurement procedures were followed or that an estimated value was ever determined. Thus, who is it to say that at the start of the process the value was going to be a Low-Value Procurement and thus a competitive procurement process was never going to be needed.

74. Seventh, in light of the reasons above, the Respondent's threshold argument fails. I find that the Respondent has departed from the Code and has failed to provide cogent reasons for doing so. In respect of the ground of illegality or unlawfulness, I rely on the case of *Council of Civil Service Unions* to conclude that, based on the evidence, the Respondent did not understand correctly the law that regulated his decision making power and the need to give effect to it. In the absence of a regulation, which on the evidence no-one seemed to know at the material time, the Code was implemented and even a second edition was issued. There is a legitimate expectation that public officials will be guided by the Code which includes certain actions when the Code is departed from. I also rely on the extract from *De Smiths Judicial Review 8th Edition 2018* set out above. I find that based on the evidence and my reasoning above, the Decision is unlawful because the Respondent misinterpreted the Code in arriving at the Decision and that he failed to fulfill his legal duties in respect of the Code.

Relief Sought

75. I have considered the relief sought in this case. In light of the reasons set out above, I make the declaration that the Decision to enter into the Partnership was unlawful.

76. I have now considered the relief of an order restraining the Minister from continuing the Partnership and an order to quash the Decision. Mailboxes in its written submissions stated that if the Court was not willing to quash the contract itself, there still needed to be some supervision of the Respondent's practices. Also, Mailboxes argued that as the Respondent provided no evidence for the substantive hearing, it is unknown when the contract is due to expire. Thus Mr. Sanderson argued that the Court should order the Respondent to produce the AUSA contract with a view to making a mandatory order that the Contract will not be renewed without opening the process up to a proper procurement process.

77. In my view, the Court would benefit from information provided by the Respondent about the contract, in particular, the end date of the contract and the impact of quashing the decision immediately or allowing it to terminate at the end of the contract. For example, if the contract is for a fixed term and due to expire within a reasonable time, then it may be that the decision is not quashed immediately because many users of the service may be adversely affected. Thus, the contract can end on the contract end date and then the proper procurement process could be undertaken if the BPO wished to continue such a service. If it is an unlikely open-ended contract then the Court may consider quashing the decision at some reasonable point in the near future to allow for a proper procurement process to be undertaken if the BPO wished to continue the service. In light of these circumstances, in my view it would be fair to all parties for the Court to grant leave to the Respondent to file if it wishes, within 14 days of the date of this Judgment, affidavit evidence about the end date of the contract and the impact of restraining the Minister from continuing with the contract and quashing the decision immediately or allowing the contract to run its course. Likewise, I grant leave to Mailboxes to file a reply affidavit within 14 days thereafter. I will then hear submissions at an expedited date to be set by the Registrar with any written

submissions to be filed three days before the hearing after which the Court will make a decision on the reliefs sought of prohibition and certiorari.

Conclusion

78. In summary:
    a. I declare that the Respondent's Decision was unlawful; and
    b. In respect of the relief of prohibition and certiorari I adjourn the matter for further evidence and submissions.

79. Unless either party files a Form 31TC within 7 days of the date of this Ruling to be heard on the subject of costs and/or damages, I direct that costs shall follow the event in favour of Mailboxes on a standard basis, to be taxed by the Registrar if not agreed.

Dated 1 August 2023

HON. MR. JUSTICE LARRY MUSSENDEN
PUISNE JUDGE OF THE SUPREME COURT