IN THE SUPREME COURT OF BELIZE, A.D. 2013

CLAIM NO: 69 of 2013

BETWEEN

ZEPHYR SERVICES LIMITED	**CLAIMANT**
AND	
MINISTRY OF FORESTRY FISHERIES AND SUSTAINABLE DEVELOPMENT	**1st DEFENDANT**
ATTORNEY GENERAL	**2nd DEFENDANT**

Keywords: Private Law: Tendering Process; Acceptance of Tenders ; Conclusion of a Contract; Meaning of Intention to Contract; Fairness of Tendering Processes; Processes of Negotiation; Conclusion of Negotiations; Awarding of Contracts; Breach of Contract.

Public Law: Legitimate Expectation**;** Tendering Process; Promises & Representations; Legality of Tendering Process; Abuse of Power by Public Authority.

Before the Honourable Mr. Justice Courtney A Abel

Hearing Dates: 4th March 2014
4th April 2014

Appearances:

Mr. Eamon H Courtney, SC, and with him Ms. Venessa Retreage for the Claimant

Mr. Herbert Panton for the Defendant

JUDGMENT
Delivered on the 4th day of April 2014

Introduction

[1] Belize has abundant natural resources with respect to biodiversity as well as its water, land and sea physical environment. These resources have to be managed, which the Government of Belize has been attempting to do under a system called 'National Protected Areas System'.

[2] This claim in public law has been brought by a private company, ("the Claimant") against the 1st Defendant being a public authority or body within Belize charged with the responsibility of managing its National Protected Areas System ("the Defendant") being undertaken in 2012 under a project entitled "Strengthening National Capacities for the Operationalization, Consolidation and Sustainability of Belize's Protected Areas System." ("the Project").

[3] The Project's aim was to ensure that Belize effectively developed legal, financial and institutional capacities to ensure the sustainability of Belize's natural resources.

[4] In furtherance of the Project consultants were encouraged in 2012 to tender for an advertised consultancy which was budgeted at $200,000.00 to develop business plans in relation to the protected areas and specifically the Project and for which the Claimant put in a bid of $221,054.00.

[5] The Claimant's bid undeniably attracted the highest score under the agreed bidding process and the Defendant declared to the claimant, in writing, the Defendant's "intention to contract" the Claimant for the consultancy on certain term(s) and/or conditions.

[6] The present case involves the interesting question of whether the Claimant's bid was thereby accepted and if so on what terms and/or whether the Claimant thereby had a legitimate or reasonable expectation in Public law to be awarded the contract.

Background

[7] The Claimant is a company incorporated in Belize pursuant to the Companies Act with its registered office situated at No. 33 Zericote Street, Belize City, Belize.

[8] The Claimant is primarily engaged in the business of consultancy[1], training[2] and aerial photography/videography.

[9] The Project was funded by the Global Environment Facility via the United Nations Development Programme. Co-financing for the project was also provided by the OAK Foundation and the Protected Areas Conservation Trust (PACT).

[10] The Project was implemented by the National Protected Areas Secretariat and the Fisheries and Forest Departments, all of which fall under the direct control of the Defendant.

[11] Apparently there was a Project Board which was in some way connected with the management or implementation of the Project of which the only witness for the Defendant, Mr. Wilber Sabido, was a member[3].

[12] On the 26th August 2012 a call for proposals was published in a local newspaper inviting consultants/consulting teams to tender expressions of interest for a consultancy to develop business plans for eight protected areas in Belize.

[13] In addition, by a 'Request for Proposal' dated 27th August, 2012, the Claimant was invited by the Defendant to submit a proposal for the Project[4].

[14] Attached to the request were terms of reference together with the following 5 documents (Annexes) comprising:

i. Instructions to Offerors ……………..(Annex I)
ii. General Conditions of Contract …….(Annex II)
iii. Terms of Reference (TOR)…………..(Annex III)
iv. Proposal Submission Form…………...(Annex IV)

[1] Port development, strategic planning, business planning, supply chain, transport and logistics.
[2] Leadership and institutional strengthening.
[3] Maybe even the Chair (but nothing turns on this minor dispute in the case).
[4] Specifically for the cost of developing business plans for eight (8) defined Protected Areas within Belize which would serve as models for the Protected Areas managers across the system of Protected Areas in Belize, enabling them to accurately determine management costs and potential revenues and identify any shortfall as well as assess the conservation costs of such shortfalls.

v. Price Schedule………………………...(Annex V)

[15] In the Instruction to Offerors, at Annex I, it was provided, in relation to 'Evaluation and comparison of proposals' that:

> *"The Cumulative Analysis (or two-stage with combined weights) procedure is utilized in evaluating the proposals, with evaluation of the technical being completed prior to any price proposal being opened and compared. The price proposal of the Proposals will be opened only for submission that pass the minimum technical score of 70% of the obtainable score of 600 points in the evaluation of the technical proposals.*
>
> *The technical proposal is evaluated on the basis of its responsiveness to the Term of Reference (Tor).*
>
> *In the Second Stage, the price proposal of all bidders, who have attained minimum 70% score in the technical evaluation, will be compared. Each price proposals will be awarded a score with the lowest price being awarded the highest score out of a possible 400 points. The contract will be awarded to the proposal that receives the highest score after the results of the technical proposal and the price proposal have been combined."*

[16] Annex I also provided as follows:

> *F. Award of Contract*
>
> *22. Award criteria, 'award of contract'*
> *The UNDP/SNC –PAS PROJECT reserves the right to accept or reject any Proposal, and to annul the solicitation process and reject all Proposals at any time prior to award of contract, without thereby incurring any liability to the affected Offeror or any*

obligation to inform the affected Offeror or Offerors of the grounds for the UNDP/SNC –PAS PROJECT PROJECT'S action.

Prior to expiration of the period of proposal validity, the UNDP/SNC –PAS PROJECT will award the contract to the qualified Offeror whose Proposal after being evaluated is considered to be the most responsive to the needs of the organization and activity concerned.

23. UNDP/SNC –PAS PROJECT reserves the right at to vary requirements at time of award.
UNDP/SNC –PAS PROJECT reserves the right at the time of award of contract to vary the quantity of services and goods specified in the RFP without any change in price or other terms and conditions.

[17] The 'Terms of Reference' ("TOR") provided detailed instructions on the submission of proposals and contained the procedure which would be adopted by the Defendant in the evaluation of such proposals and the criteria to be satisfied for any of the submitted proposals to be adopted. Specifically, the TOR provided:

a. A Proposal Submission Form;

b. A Price Schedule

[18] The Proposal Submission Form stated:

"We understand that you are not bound to accept any Proposal you may receive".

[19] The Claimant, in accordance with the TOR, submitted a proposal on the 17th day of September, 2012 and duly signed the Proposal Submission Form.

[20] Eleven consultants/consulting teams secured bidding documents. The Claimant was included among the three short-listed bidders.

[21] The witness for the Defendant, Mr. Wilber Sabido, was present at the meeting that assessed the bids. The assessment of the bids was made in two parts; the technical aspects and the financial aspects each from the stated point of view.

[22] The bids were reviewed and scored using the Cumulative Analysis procedure (two-stage with combined weights). The technical proposal had a value of 600 points and the financial proposal a value of 400 points.

[23] A report dated 25th October 2012 was then prepared for the Contract, Assets and Procurement Committee, correctly showing that the Claimant's proposed price was $221,054.00 and that the funds available were $200,000.00.

[24] It is undisputed that the Claimant received the highest score and on the 2nd November, 2012, the Claimant was sent and received a letter from the Project Manager in the Defendant's Ministry, Mr. Ansel Dubon[5], which stated as follows:

> ***"Ref: Intent to Contract for consultancy to Develop Business Plans for Eight Protected Areas***
>
> *Dear Major Jones:*
>
> *I wish to inform you that the proposals for the consultancy to develop business plans for eight protected areas in Belize have been reviewed using the Cumulative Analysis process as described In the Request for Proposal. The panel felt that all proposals had positive attributes; however, upon tabulation of the scores your team received the highest score. Therefore, it is the project's intention to contract your firm. However, as per the Ministry of Forestry, Fisheries and Sustainable Development's policy and that of the Contractor General, we require a letter from the University of the West Indies indicating 'no objection' to Dr. Saunders's involvement in the consultancy.*

[5] Mr. Sabido had initially testified that he had written this letter but later retracted this evidence no doubt after it was clear that he was not author.

I will be contacting you shortly to arrange a pre-contract meeting to discuss and clarify various aspects of the budget and the terms of Reference.

Please feel free to let us know if you have any questions."

[25] After receiving this letter the Claimant testified to being "*confident that it had secured the contract and fully expected that in accordance with the TOR, the pre-contract meeting was being held for the purpose of finalizing the terms of the contract between the Claimant and the Ministry*".

[26] The pre-contract meeting was arranged and held at the Fisheries Department Office in Belize City on the 6th November, 2012. In attendance at this pre-contract meeting were Mr. Lloyd Jones (the only witness for the Claimant), Dr. Sharmayne Saunders, on behalf of the Claimant, Mr. Ansel Dubon, Mrs. Beverly Wade, Mrs. Arlene Maheia-Young, Mrs. Aretha Mortis and Ms. Cawich, on behalf of the Defendant.

[27] At the trial there is a dispute about what took place at this pre-contract meeting which this court must resolve but there was never any question about Dr. Saunders' involvement in the consultancy. The evidence relating to this pre-contract meeting will therefore be separately considered and evaluated later in this judgment.

[28] Following this pre-contract meeting, and despite the Claimant having considered that it had not only addressed, but had acceded to, all but one of the Defendant's demands, on the 28th of November, 2012 the Claimant received a letter from the Defendant informing it that:

"A meeting was convened on November 21, 2012 amongst members of the Project Board and personnel from the Ministry of Forestry, Fisheries and Sustainable Development to review the status of the status of the various consultancies under the "strengthening National Capacities" Project, including the consultancy to develop business plans.

After much deliberation, a decision was made that the contract for the said consultancy would not be issued to your firm. The process will now be closed until alternate arrangements can be made.

Please feel free to contact me if you desire additional information on the above decision."

[29] The Claimant alleges that the Defendant thereby rescinded its decision to award the contract to the Claimant.

[30] The Claimant, because it felt it had complied with all of the Defendant's requests, the contents of the Defendant's letter and the Defendant's decision 'astounded' the Claimant.

[31] In response to the Defendant's letter dated 28th November 2012, the Claimant, on the same day, sent a formal 'letter of protest' wherein it informed the Defendant of its "utter and complete surprise" at the Defendant's decision, commited itself to the process and requested an urgent meeting to further discuss the matter.

[32] Rather than meet with the Claimant as requested, the Defendant sent a letter to the Claimant on 4th day of December 2012 stating, that:

> *"in no way did we give any indication that the consultancy had been awarded to your firm, as that was not the case. Moreover, during the meeting on November 5th, 2012, we clearly indicated to you that a final decision would be based on the discussions at that meeting and additional submission by your firm. We therefore believe that it is a distortion of the fact for you to say that the project raised an expectation that your firm had been selected to perform the consultancy! Nevertheless, we extend our sincere apology for this apparent mis-understanding.*
>
> *Now then, for your information the decision not to award the consultancy was taken primarily because budgetary tolerances were exceeded. Do let us know if you feel that there is still the*

need for a meeting and we will do our best to accommodate you at the earliest convenient moment."

[33] The Claimant testified that because their financial proposal had been analyzed using the Defendant's Cumulative Analysis method, it was evident to it that based on the contents of this latter letter, the Defendant had not negotiated with them in good faith.

[34] Despite what the Claimant considered was "the irrational and unreasonable" stance taken by the Defendant, the Claimant testified that it still sought to engage the Defendant in meaningful negotiations and fully set forth its position in a letter to the Defendant dated 7th December 2012.

[35] In that letter, the Claimant, among other things, pointed out the irrational manner in which the Defendant had acted and requested that the Defendant reconsider its decision. The Claimant also concluded:

> *"Recognising the importance of this project to Belize's protected areas system, we remain committed to performing the consultancy and assisting the Project Board and MFFSD in setting the NPAS on a sustainable footing. In that vein we are prepared today, as we were on November 6, 2012, to work with the Project Board to ensure the delivery of this consultancy with due consideration for its budgetary constraints. We ask only for a fair chance to do so.*

[36] On the 27th December, 2012 the Defendant responded and indicated that it was not in a position to enter into the Contract with the Claimant and as a consequence, the Claimant thereafter referred the matter to its Attorneys-at-Law, Messrs. Courtenay Coye LLP.

[37] On the 16th January, 2013, the Claimant's Attorneys-at-Law sent a letter to the Defendant informing them that:

> *"As a result of the representations and conduct of the Ministry, Zephyr [the Claimant] had a legitimate expectation that it would have been awarded the Contract and that the decision to refuse to to award the Contract was as a result of procedural unfairness and unreasonable and irrational decisions taken by the Ministry."*

[38] In response to this letter, on the 31st day of January, 2013, the Defendant sent a letter to the Claimant's Attorney informing them that they had carefully reviewed the case and confirmed that due process was followed, and that "*…the decision not to award the contract to Zephyr [*the Claimant*] still stands.*"

[39] There was a meeting of the Project Board on the morning of 17th July 2013 at which the witness Wilber Sabido was present along with 7 other Members of the Board (with one member being absent with apologies and one being absent without apologies) and at which Counsel for the Defendant was also present.

[40] This latter meeting took place after permission had already been given by this Court to commence judicial review proceedings against the Defendant. Mr. Panton, Counsel for the Defendant, is on record as having given to the Project Board an update and analysis of the situation with the Claimant and having advised the Project Board of the different consequences from different scenarios.

[41] The following was, inter alia, minuted as having been decided at this meeting:

> *"In reviewing the matter pertaining to business plans, it was agreed that the delay in the process is compromising project delivery, thus on the recommendation of UNDP, the project Board decided to withdraw the activity pertaining to Business Plans from the project's work programme and that the monies be redistributed to support other project related activities, namely the roll-out of the Sustainable Financing Strategy and Plan."*

[42] In his evidence to the Court Mr. Sabido, for the Defendant, testified "*That the Project Board decided to reprogramme project activities so as to address delays to the overall project.*"

[43] A copy of the report of the Project Board entitled 'Report On Decision by Project Board to Re-programme Project Activities and Funds to Address Delays being Encountered Under Output 2.2", dated 29th July 2013, was presented to the court and it confirmed the decision to 'remove' the Project and redistribute the available funds.

[44] It is worth noting that a number of the pages of the minutes of this meeting were missing (pages 2, 4 and 6) and so the Court, being left in the unhappy position of

having had presented at trial an incomplete document (not having all the facts presented to it) is not in a position to give much weight to it and to place much reliance on it, for its decision insofar as the Defendant's case is concerned.

[45] The witness for the Defendant, Mr. Sabido, under cross-examination accepted in that "The Claimant was not responsible for any of these delays" in relation to the delay in the processes of the Project.

[46] The Claimant testified, and it was not contested nor challenged, that in preparing the proposal for submission to the Defendant, the Claimant expended a significant amount of hours in researching and conducting the relevant due diligence on the specified protected areas in an effort to ensure that it presented a sound proposal which took into account the technical and financial aspects of the consultancy. That the Claimant expended a total of 61 hours in preparing the proposal for submission to the Defendant, during which time, the Claimant did not engage in any other projects.

[47] Concerning the financial claim of the Claimant, its witness also without challenge, testified that the budget submitted as part of the requirements for the RFP clearly showed that they (the Claimant) included $182,100.00 (82% of the total budget) as consultancy fees whilst the remainder of the budget was reserved for out-of-pocket expenses and contingencies; 13% and 5% of the budget respectively. Also, that the time spent in preparing the proposal was viewed by the Claimant as an investment that would yield $182,100.00 in revenues if the Defendant had honoured its agreement.

[48] Finally the Claimant testified, again without challenge, that they also engaged the services of Dr. Sharmane Saunders, a lecturer at the University of the West Indies, at a cost of $2,700.00 to help with the development of the proposal.

[49] The Claimant alleges that as a result of the Defendant's actions, the Claimant had therefore suffered direct financial loss.

The Law

[50] The terms of a tendering process is governed by the so-called private law area of the law of contractual obligations, by which the courts will enforce concluded

agreements relating to the terms of such process as well as any concluded agreement which results from such process.

[51] At the risk of oversimplification, determining the question of whether a concluded agreement has been arrived at, may be determined by asking the question whether the parties have reached a final agreement about the terms of the process, or the terms of any agreement resulting from any such process (as the case may be) – often analyzed by reference to offer and acceptance, an intention to create legal relations and the need for consideration (or a party acting to their detriment). But ultimately the question for a court is whether the parties have reached a binding and enforceable agreement (by reference to rules and principles about which large books and treatises have been written).

[52] At the conclusion of an agreed tendering process a question may arise whether an agreement has been entered into by persons engaged in that process i.e. if they have finished negotiating such terms and have arrived at a concluded agreement or contract.

[53] In the tendering process, like the case of ordinary agreements, the contractual process can be analyzed into an offer, being made by the person submitting the tender, and the acceptance, made by the person accepting the tender. This has been summarized by Gallen J in the case of *Pratt contractors Ltd v Palmerston North City Council 1 NZLR 469* as follows:

> "*As Bingham LJ pointed out, the commercial reality is that a tenderer is obliged to expend substantial amounts of time and money in preparing a complex tender and is frequently required also to deposit substantial …of money in order to extablish bona fides. Tenderers will normally be prepared to accept such obligations where they do so in light of obligations which the body seeking the tender indicated it accepts and which relate to the consideration which ultimately is to be given to the tender submitted. To such circumstances it is at least possible to formulate the relationship in terms of offer and acceptance and it*

is in commercial and practical terms, appropriate to be categorized as contractual in nature."[6]

[54] As to whether parties have arrived at a concluded agreement (have finally arrived at an agreement which they have finished negotiating) is often to be determined by a court on the facts of the case applying the applicable law.

[55] Ultimately the court has to determine if the parties have finished negotiating, and have reached an agreement on all matters essential to the agreement and if they have then the court will find that there is a concluded agreement[7].

[56] It is clear that an agreement is incomplete if it:

"*expressly provides that it is "subject to" the resolution of specific points; there is no contract in such a case until either those points are resolved or the parties agree their resolution is no longer necessary for the agreement to enter into contractual force."*[8]

[57] A claim for judicial review, is a public law claim, rather than a private law claim, and includes a claim for the High Court to review the lawfulness of a decision of a public body or a body performing public duties or functions including such duties arising under contract or a promise, representation or assurance given (such as that alleged in the present claim under a tendering process).

[58] It is important to stress at the outset the distinction between claims in public and private law, even though they may overlap, as a claim for judicial review cannot be used merely to enforce private law rights against a public body[9]. Public law claims involving judicial review proceedings raise distinctly different procedures[10], considerations and a decidedly different approach by the courts to claims in private law (such as in a contract claim simpliciter).

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[6] Taken from the judgment of Sinclair-Haynes J in the Jamaican Supreme Court case of Freight Management Limited v Caribbean Cement Company Limited [2013] JMCC. 2 paragraph 23, and cited with approval.

[7] See the case of Rossiter v Miller (1878) 3 A App Case 11224 at p 1151 referred to in the above case of Freight Management Limited v Caribbean Cement Company Limited at para 27

[8] Chitty on Contract Vol. 1 29th Edition at paragraph 2-110

[9] R. v East Berkshire Health Authority Ez p. Walsh [1985] Q.B. 152 at p. 162

[10] Including short time limits (Part 56(5) of the Rules of the Supreme Court 20015) and the need to obtain permission to apply for judicial review (Part 56(3) of the Rules of the Supreme Court 20015).

[59] It is clear that a legal claim in public law for a legitimate expectation may arise and ought not to be frustrated or disappointed where such a promise, or representation is 'clear, unambiguous and devoid of relevant qualification[11] on a fair reading of the promise or representation as it would have been reasonably understood by those to whom it was made[12].

[60] In public law, it may be the case, but it is neither necessary nor essential, that the Claimant should have relied upon the promise to his detriment[13],

[61] It seems reasonably clear that such a promise or representation by a public body may be susceptible to judicial review where a statement or promise is made that a bid or proposal would be awarded to a person that receives the highest score after the results of the technical proposal and the price proposal have been combined.

[62] Judicial review of a decision of public body may lie, and such decision may be challenged, where a public body gives a promise or assurance which creates a legitimate or reasonable expectation that a person would be entitled to a particular benefit, and it may be so unfair as to amount to an abuse or misuse of power, for the public body to act in a way which would breach that legitimate expectation[14].

[63] It follows that judicial review would lie in relation to a public power etc. which may be found to have been established, where a person may have had a legitimate expectation that a power by a public authority would be exercised in a particular way (with or without conditions) in relation to a decision taken (where there is an extant procedure or process covering the situation) and such expectation has been disappointed or frustrated.

[64] A question can, however, and sometimes does arise for the courts, and may have arisen in this present case, in this area of public law, as to whether a court ought to give effect to, and can produce a substantive benefit or whether the public authority was legally entitled to frustrate such a <u>substantive benefit</u> where a

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[11] See Bingham LJ in R v Inland Revenue Comrs, Ex p MFK Underwriting Agents Ltd [1990] 1 WLR 1545, 1569.

[12] See Francis Paponette and Others (3) v The Attorney General of Trinidad and Tobago [2010] UKPC 32 Privy Council Appeal No 0009 of 2010at page 9 in the Judgment delivered of Judicial Committee of the Privy Council by Sir John Dyson, SCJ.

[13] Ibid page 9

[14] R. v Inland Revienue Commissioners Ex. P. Unilever plc [1996] S.T.C. 68; R. v Inland Revenue Commissioners Ex. P. Preston [1985] A.C. 835.

legitimate expectation has arisen, that had been created by its promise or representations.

[65] It certain cases, which the court might consider a proper case, a public authority may be entitled, not to give effect to, but rather to frustrate such a substantive benefit where a legitimate expectation has been created, if the circumstances are such that it would not be so unfair to allow it to take a new and different course, and, it will not amount to an abuse or misuse of power[15].

[66] But the court ought not to give give effect to such substantive benefit after having established that the legitimacy of the expectation is established, and weighing the requirements of fairness against any overriding interest relied upon for the change of policy, and has decided that it (the court) has been satisfied that it does not amount to an abuse or misuse of power[16]. As noted by the Rt Honourable Mr. Justice de la Bastide and the Honourable Mr. Justice Saunders, in delivering the decision of the Caribbean Court of Justice in the case of *The Attorney General et al v Joseph and Boyce*[17]

> *"..courts must carry out a balancing exercise. The court must weigh the competing interests of the individual, who has placed legitimate trust in the State consistently to adhere to its declared policy, and that of the public authority, which seeks to pursue its policy objectives through some new measure. The court must make an assessment of how to strike the balance or be prepared to review the fairness of any such assessment if it had been made previously by the public authority. As indicated by Dyson, LJ in Rashid "[W]here, for, example there are no wide-ranging policy issues, the court may be able to apply a more intrusive form of review to the decision. The more the decision which is challenged lies in the field of pure policy, particularly in the relation to issues*

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[15] See The Attorney General et al v Joseph and Boyce CCJ Appeal No. CV 2 of 2005; and, R V North and East Devon Health Authority, Ex p Coughlan [2001]QB 213, at para 57.

[16] See Francis Paponette and Others (3) v The Attorney General of Trinidad and Tobago [2010] UKPC 32 Privy Council Appeal No 0009 of 2010at page 10 in the Judgment delivered of Judicial Committee of the Privy Council by Sir John Dyson, SCJ.

[17] CCJ Appeal No. CV 2 of 2005.

which the court is ill-equipped to judge, the less likely it is that true abuse of power will be found""

[67] The burden of proving that there has not been an abuse of power, it seems to me, ought clearly to lie on the Defendant; once the Claimant has established that a legitimate expectation has been created by the Defendant.

[68] Such misuse or abuse of power may arise particularly where the public body has agreed to adopt a process or procedure governing the way in which they will exercise their discretion (such as where they have adopted a tendering process) and made an unqualified representation that it will act in a particular way and there is no overriding public interest justifying the decision to resile from the representation.

[69] The court, in such circumstances, is clearly concerned to ensure that public bodies do not misuse or abuse their powers i.e. by ensuring that they exercise their powers in order to further the purpose(s) for which the powers are being exercised and do not act for an improper or ulterior purpose[18].

[70] In relation to an award of damages the Court is empowered by virtue of Part 56[19] of the Supreme Court (Civil Procedure) Rules, Rule 56.8(1) and (2) to award such damages in the circumstances as set out thus:

> *"(1) The general rule is that where permitted by the substantive law, an applicant may include in an application for an administrative order a claim for any 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…"*

[18] Padfield v Ministry of agriculture Fisheries & Food [1968] A.C. 997.

[19] Which deals with Constitutional and Administrative Law claims (i.e. public law claims dealing with judicial review applications).

[71] The Eastern Caribbean case of *Delon Charles v. Commissioner of Police*[20], supports the legal proposition that damages can be awarded in a claim for judicial review. Remy, J., in delivering her decision in this case stated as follows:

> *"Damages are not available simply because an application for judicial review is successful…. Further, there is no general right to damages for breach of public law …. According to the learned writers of Judicial Review: A Practical Guide (page 214) one of the circumstances in which damages may be claimed is where the remedy of damages would have been available if the claim had been brought as a private law action."*

The Court Proceedings

[72] On the 6th February 2013, the Claimant filed herein an Urgent Application for Permission for Judicial Review along with an affidavit in support of Lloyd Jones. This application was served on the Defendant on the 14th February 2013 as attested to by an Affidavit of Service filed on the 18th February 2013.

[73] Skeleton Arguments in Support of the Application for Permission to Apply for Judicial Review were then filed on the 6th March 2013, which were followed by Submissions on Behalf of Defendants on the 20th March 2013.

[74] Supplemental Skeleton Arguments in Support of Application for Permission to Apply for Judicial Review were then filed on the 22nd March 2013.

[75] On the same day, 22nd day of March 2013, leave was granted by the court for the Claimant to commence judicial review proceedings against the Defendant and directions were given for the hearing of the application for judicial review and a date for 1st hearing was fixed for the 19th April 2013.

[76] On the 27th March 2013, pursuant to the leave granted a Fixed Dated Claim From (For Judicial Review) & an Affidavit of Lloyd Jones in Support were filed by the Claimant.

[77] On the 14th May 2013 the First Affidavit of Wilbert Sabido was filed on Behalf of Defendant.

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[78] On the 23rd May 2013 a further Affidavit in Support by Lloyd Jones on behalf of the Claimant.

[79] It appears that due to the failure of the Defendant to file documents by the dates directed by the court the pre-trial conference was ultimately adjourned to 24th June 2013. Unfortunately, as a result of the trial Judge demitting??? this case was not progressed until, at the request of the Claimant, the matter was on the 3rd September 2013 reassigned to the present Judge.

[80] There was a Pre-trial Review by the present Judge on the 4th October 2013 and further directions given for filing and serving additional documents and for the trial with a trial date being fixed for the 21st November 2013.

[81] Skeleton Arguments were filed on behalf of Claimants on the 27th February 2014 and on behalf of the Defendants on the 3rd March 2014.

[82] At the trial, which was fixed for 4th March 2014, there was one witness for the Claimant and one witness for the Defendant.

[83] The parties agreed that the 1st, 2nd and 3rd Affidavits of Lloyd Jones, together with the Exhibits shall be admitted into evidence, without objection, with the Defendant not wishing to cross-examine the witness on them.

The factual and legal contentions of the parties to the proceedings

[84] The Claimant alleges that the claim falls within a very narrow factual compass and raises fundamental issues of public law the central question of which is whether the Defendant made a representation to the Claimant which was clear and unequivocal and amounted on the facts of the case to an award of the contract to the Claimant which on the facts of the case the Claimant relied on and from which it is open to the Defendant to resile.

[85] The Claimant's main contention is that the Claimant had promised by its unqualified representation that "the contract will be awarded to the proposal that receives the highest score". That it complied with all the Defendant's requirements. Its bid was evaluated by the Defendant. That based on the Terms of Reference issued by the Defendant and that it had received the highest score of all persons shortlisted, and were so informed by the Claimant, it was in fact awarded the contract and in any event it had a legitimate expectation that it would have

been awarded the contract by the Defendant. Finally that, in the circumstances, the decision not to award the contract to the Defendant was irrational, unreasonable and ought not to be sanctioned by the court.

[86] In these circumstances the Claimant asks the court to quash the decision not to award the contract to the Claimant and to grant the Claimant the appropriate reliefs. The appropriate relief being sought is an award of damages because the Defendant no longer wants the work to be done and have reallocated the money which had been set aside to fund the Project.

[87] The Defendant on the other hand contends that the parties, as a matter of private law and contractual principles, had not finished negotiating and that therefore there was no concluded award by the Defendant to the Claimants of a contract in respect of the Project.

[88] The Defendant on the other hand treats the matter as a matter of private law, and contends that in accordance with ordinary contract law principles the parties had not finished negotiating (the parties were still negotiation on the terms of the contract and had not arrived an agreement) and that there was no actionable promise on which the Claimant can rely, to ground its claim in public law.

The Issues

[89] As noted above the first issue is what took place at the pre-contract meeting.

[90] Also at issue is whether the minutes of the pre-contract meeting is an accurate record of the meeting.

[91] A further issue, which is central to this case, is whether there was an award of contract to the Claimant and if so what the terms of any such award were.

The Evidence Relating to the Pre-Contract Meeting

[92] Mr. Lloyd Jones, on behalf of the Claimant, in his unchallenged testimony to the court stated that at the pre-contract meeting, he was shocked to discover that rather than seeking to finalize the details of the contract, the representatives of the Defendant were then requesting that the Claimant make several changes to its proposal which had already been evaluated and accepted.

[93] Specifically, being requested by the Claimant, so testified Mr. Jones, were:

"i. That the Claimant should strengthen its proposed team (Jones/Saunders) with a person possessing strong financial/investments skills and expertise;

ii. That the ratio of field to home office work was too low and the Ministry wished to see more time spent in the Protected Areas so that the Claimant's proposal should be amended accordingly;

iii. That the United Nations Development Programme (the primary funder of the project) placed a ceiling on daily compensation rates at $700.00 per day so that the Claimant's proposal should be adjusted accordingly.

iv. That the United Nations Development Programme placed a ceiling on per diem rates recoverable in Belize at US$120.00 per day and that the Claimant should adjust its proposal accordingly;

v. That the Project could not support any provision for contingency expenses so that the Claimant's proposal should be amended to reflect the same;

vi. That the Claimant's proposal did not include a line item for conducting a one-day workshop to present the Claimant's Business Plans to key stakeholders in the industry."

[94] Mr. Lloyd Jones, on behalf of the Claimant, also testified that despite being surprised at the request for amendments, he sought to address all the concerns of the representatives of the Defendant and on 9th November 2012, he responded by letter to Mr. Ansel Dubon, the Project Manager, addressing each and every issue raised at the 6th November 2012 meeting.

[95] Specifically, the Claimant, in this letter of the 9th November 2012:

i. Added Mr. Ervin Perez as a person possessing the requested strong financial skills and expertise which was reflected in an upward revision in the price;

ii. Adjusted the field to home office work ratio so that the field work represented a total of 23.3 % of the overall level of effort;

iii. Adjusted its rates to ensure that the daily compensation rates did not exceed the UNDP ceiling of $700.00 per day;

iv. Requested the Defendant to reconsider its offered rate and accept the proposed rate reflecting a 16.2% reduction from the original proposal;

iv. The provision for contingency expense was removed from the Claimant's proposal;

v. The one-day workshop was included in the Claimant's proposal and a line item included to reflect the cost of the workshop.

[96] Concerning this pre-contract meeting the Claimant's witness, Mr. Jones, also testified that:

(a) There was no clear communication of an intent to contract after negotiations/discussions as alleged by the Defendant's witness. That while there was mention by the Project Manager of the fact that contract had not yet been executed, neither the witness himself (Mr. Jones) or Dr. Saunders objected to this being stated because as a matter of fact, they had not signed a contract.

(b) It was never the Claimant's understanding that there were "issues that needed to be addressed…before a concluded contract could be executed." Even if this was the intent of the Defendant, this position was never communicated to the Claimant.

(c) That they were led to believe that the meeting was to discuss matters such as milestones in the project, presentation of the project report, payment schedules timelines, etc.

(d) That, however, the Project Board did raise certain issues, including but not limited to the addition of a third person to the Claimant's team and increasing the amount of days spent in the field, and that they, the Claimant, undertook to propose alternatives that would be mutually acceptable to both parties. That it was in response to the issues raised by the Project Board, the Claimant responded by letter dated 9th November 2012.

(e) The response contained in the letter of 9th November 2012, did not, in their view, operate to invalidate the Claimant's proposal which had been analyzed in accordance with the provisions of the TOR and accepted pursuant thereto.

(f) If, as the Defendant's witness suggested, the intent of the Project Board at the meeting was to encourage the Claimant to reduce their costs but by requesting that a third person be added to the team and that more field work (acknowledging that increasing the field hours would be more costly) be conducted, this was clearly not in keeping with such an intention. In fact, the Claimant's witness testified, both he and Dr. Saunders advised the Project Board of the inevitable increase in the budget if these requests were to be incorporated; and that they were induced by the Project Board to respond to the requests despite the additional costs implications.

(g) The Claimant was never told that their proposal exceeded "budgetary tolerances" at the pre-contract meeting, and that any assertion that they were so informed was blatantly untrue. That instead, as a matter of fact, even when the Project Board wrote to the Claimant on the 28th November, 2012 to inform them (the Claimant) that the Defendant would not contract with the Claimant as agreed, there was no explanation given as to why such a decision was taken. That it was only after the Claimant, by letter of the 28th November, 2012, wrote to the Defendant expressing its "surprise" at the decision of the Project Board that the Defendant responded on 4th December 2012 informing the Claimant that "budgetary tolerances were exceeded."

(h) Since the Project Board had raised issues which the Claimant had indicated would increase the budget rather than reduce the same, Dr. Saunders inquired as to the proposed budget for the project. At this point, their proposal having already been accepted, they did not believe that US$221,054.00 which had been proposed, was in excess of the budget for the project.

(i) That when the budget was not disclosed to them, despite requests being made which would operate to increase the proposal costs, Dr. Saunders indicated to the Project Board that it was not negotiating in good faith. That they did not however consider that their proposal, which had been evaluated and accepted, was no longer valid.

(j) That they were simply accommodating requests being made by the Project Board and was of the opinion that if the Project Board could not be reasonably accommodated, they would work within the limits of their accepted proposal rather than amend the same.

(k) Additionally, that the evidence of the Defendant's witness, by suggesting that the budget for the project was not disclosed to Dr. Saunders since, if it had been disclosed, it was feared that the Claimant would draft its budget to "take advantage of every penny being used.", was evidence of lack of good faith. That the lack of good faith is borne out by the fact that at the date of the meeting, based on the allegations of the Defendant, the Claimant's proposal had already exceeded the project budget and that additional requests were being made which would further increase the budget, so that this could not have been a legitimate concern of the Defendant or a legitimate reason to withhold the budget information being requested.

(l) The Evidence of the Defendant's witness that he was not aware of the training component of the consultancy was disputed as the Claimant's proposal, which was prepared by himself and Dr. Saunders, made it abundantly clear that there was knowledge of the training workshop.

(m) Finally that the issue was only raised at the meeting of 6th November 2012 because in his experience both as a consultant and as a contractor, the contractor (in this case the Defendant) would normally assume the responsibility for the logistics of the workshop. That they were of the view that they (the Claimant) would be responsible to plan and execute the workshop but that the Defendant would be responsible for securing the venue and other logistical matters.

[97] It was also contended by the Claimant that the Defendant not only induced the Claimant to respond to requests which would have increased the budget but, assured the Claimant that the increase, if any, would not have impacted on the contract.

[98] The Claimant also contended that the ability of the Project Board to accept and reject any proposal, as stated in the Instructions to Offerors, cannot be used by the Defendant as a valid reason for failure to contract with the Claimant. That because the Claimant had received the highest score after a full evaluation had been conducted, and as such, the Defendant was bound to contract with the Claimant. That the power to reject proposals clearly could not extend to proposals which had been already accepted.

[99] The Claimant denies that the meeting ended with the Claimant agreeing to all the suggestions made by the project team and they undertook to have an amended budget by 12th November 2012, but contend that they were not negotiating but were making an earnest attempt to address issues raised by the Project Board at the meeting of the 6th November 2012.

[100] Concerning the minutes the Claimant, via its witness, testified

(a) That neither he nor Dr. Saunders, who were attending the meeting for the Claimant, was ever asked to review or approve the contents of the same.

(b) Additionally, the purported minutes, as exhibited, does not appear to have been approved by any member of the Project Board in attendance at the said meeting as it remains unsigned and undated.

[101] The Defendant, through its witness Mr. Wilber Sabido, at first presented to the court, in an Affidavit of 13th May 2013, an unsigned document which purported to be minutes of this meeting and in a later Affidavit of the 28th February 2014, presented to the court a further document which allegedly had been erroneously omitted from the earlier Affidavit and which was supposed to have been the signed and approved minutes. As it turned out this latter document presented to the court, for some unexplained reason, was also the wrong minutes being instead alleged signed Minutes of a Project Board Meeting on the 17th July 2013.

[102] Mr. Wilber Sabido for the Defendant, under cross-examination accepted that the request for the Claimant to employ an additional person was made by the Government of Belize and that no doubt this would involve an additional costs. He was therefore not surprised that this particular account was way above what they had budgeted.

[103] Mr. Wilber Sabido, the Chair of the Project Board of the Project, for the Defendant, also testified that he believed that if a new higher budget was presented that it had not had the benefit of the scrutiny of the project management team and subjected to the same review using the Cumulative Analysis procedure, and as a result that bid could not be considered. Also that he was shocked to see that instead of a reduction of the budget the budget had increased from $221,054 to $226,814.

[104] The Defendant suggests that from the actions of the Claimant it was still negotiating, and that "Clearly our intention was to move Zephyr Services towards the left in the direction of our budget tolerances and instead they moved to right, beyond their original budget."

[105] It is to be noted that the only witness for the Defendant, Mr. Wilber Sabido, was not present at this pre-contract meeting and therefore could not have given a firsthand account of what took place.

[106] As to what took place during this pre-contract meeting I am therefore left with little or no alternative but to accept the unchallenged account of the witness for the Claimant who was present at this meeting.

[107] Because of the unchallenged evidence of the witness for the Claimant, the fact that the Defendant's witness was not present at the pre-contract meeting and also because in my view the evidence of Mr. Sabido as well as he was himself, largely discredited at the trial, I do not accept the account of the Defendant's version of events as compared to that of the Claimant's.

[108] More particularly I do not accept the version of what took place at the pre-trial meeting as set out in the alleged unsigned minutes of this meeting as contained in Exhibit WS 2 of the Affidavit of the Defendant's witness where it differs from the evidence of the Claimant's witness who was present at the meeting.

Findings of fact and Law Relating to Disputed Matters

[109] For the purposes of determining the case in relation to the disputed matters I find the following facts on the balance of probabilities:

(a) The funds available for the consultancy in relation to the Project were $200,000.00., but that may not have been known to the Claimant.

(b) The terms of reference (TOR) provided detailed instructions on the submissions of proposals, the procedure which would be adopted in the evaluation of such proposals and the criteria to be satisfied for any submitted proposals.

(c) That the TOR, the forms provided and used by the Claimant for submission of proposals (which was not bound to be accepted by the Defendant) and a price schedule, constituted agreed contractual documentation in the case.

(d) That it was agreed by the parties that the bid would be evaluated using the Cumulative analysis procedure in two stages comprising the technical aspects of the proposal and its price with scores and procedures applying to each.

(e) There was, in the circumstancs of the present case, a clear representation or promise made by the Defendant that the contract would be awarded to the proposal that received the highest score after the results of the technical proposal and the price proposal had been combined but with the right being reserved to the Defendant to accept or reject any proposal and to annul the solicitation process and reject all proposals at any time prior to an award of contract.

(f) That it was agreed that prior to expiration of the period of proposal's validity, an award of the contract would be made to the qualified offeror whose proposal was evaluated and considered to be the most responsive to the needs of the organization and activity concerned and the right was reserved at the time of the award of contract to vary the quantity of

services and goods specified without any change in price or other terms and conditions.

(g) That there was thereby a legally binding commitment by the Defendant to the agreed bidding process and to award the contract to the person who met its criteria.

(h) The Claimant in reliance upon the representations made by the Defendant and in compliance with requirements provided by the Defendant, on the 17th September 2012 submitted is proposal and the Claimant by such submission entered into contractual relations with the Defendant.

(i) Also as a matter of public law, the Claimant was agitated (as it were) into a situation which created certain reasonable expectations and created certain rights and obligations from which would flow possible legal consequences, based upon the terms which it had stipulated and which together constituted the part of the contractual documentation in the case and created and constituted actionable representations.

(j) Following review of the Claimant's bid/proposal the Claimant received the highest score.

(k) On the 2nd November 2012 the Claimant was informed that its proposal received the highest score and that it was therefore intended to contract the Claimant subject to the confirmation from the University of the West Indies that they had no objection to Dr. Saunder's involvement in the consultancy. As I have already found (in setting out the background of the present case) there was never an issue about the Claimant satisfying the condition relating to Dr. Saunders' involvement in the consultancy; and in any event, it does not appear to have played and important or essential fact or matter in relation to the award of the contract to the Claimant.

(l) That this response, on a fair reading of the terms of this letter, would have been reasonably understood by the Claimants to be a clear representation or promise made by the Defendant that the contract would be awarded to them (subject to them resolving Dr. Saunders involvement).

(m) This is particularly so when considered alongside the promise by the Defendant that the contract would be awarded to the proposal that receives the highest score after the results of the technical proposal and the price proposal had been combined.

(n) That it was agreed that a pre-contract meeting would be arranged to discuss and clarify various aspects of the budget and the terms of reference.

(o) The Claimant was therefore entitled to believe, subject to resolving the matter of Dr. Saunder's stated involvement with the consultancy and subject to clarifying budgetary matters, that it would be awarded the contract.

(p) That a pre-contract meeting was arranged and held on the 6th November 2012.

(q) That the substantive (non-budgetary) changes to the Claimant's proposal which were requested by the Defendant at the pre-contract meeting were in breach of contract with the Claimant and of their legitimate expectations that they would be awarded the contract as the matters raised were not matters relating to the conditions which had been expressed to the Claimants and which had therefore formed conditions of the Defendant's intention to award the contract to the Claimant.

(r) I accept, however, that the Defendants were entitled to raise budgetary matters including that they could have insisted that the Claimant bring their proposal within the budget of BZ$200,000.00, but were not entitled to impose on the Claimant any matter which would have resulted in an increase of the proposal.

(s) Specifically, I find that the Claimant could not insist on the Claimant strengthening of its proposal team and the conducting of a one-day workshop.

(t) In all the circumstances of the case I do not accept that the parties were therefore still involved in an overall negotiation of the terms of the bid/proposal. That stage had already been passed and there was only a

limited area of negotiation, in relation to matters which were unimportant points, which may have been up for negotiation.

(u) As there was no issue at the trial that Dr. Saunder's involvement in the consultancy was in any way a problem (that the University of the West Indies had indicated its objection), I do not consider that the meeting of this condition was in anyway an obstacle to satisfying this precondition to awarding the contract to the Claimant.

(v) I therefore find that the decision of the meeting of the Defendant on the 21st November 2012 was not only in breach of contract but more importantly, was in the circumstances of the case unreasonable and a denial of the Claimant's legitimate or reasonable expectation to be awarded the contract.

(w) I also find that the Defendant was unreasonable in not reconsidering the decision when requested by the Claimant by letter dated 7th December 2012 where it had indicated that "*we are prepared today, as we were on the November 6, 2012 to work with the Project Board to ensure the delivery of this consultancy with due consideration for its budgetary constraints".* I find that in all the circumstances of the case the decision not to reconsider its decision not to award the contract to the Claimant, as set out in its letter dated 27th December 2012 was unreasonable.

(x) The question arises whether the Defendant was in the circumstances of the present case entitled to frustrate the legitimate expectation that had been created by its promise or representations. The question is whether there was a sufficient public interest to override the legitimate expectation to which the promise or representations had given rise. In relation to this matter, as noted, I find that the Claimant has discharged its burden of proving the legitimacy or reasonableness of its expectation.

(y) I do not find however, that the Defendant has managed to discharge the burden which had shifted onto it, by identifying any overriding interest on which it could properly rely, to justify the frustration of this expectation. In my view the Defendant has singularly failed to present any credible

evidence to the court which identifies any legitimate or overriding interest to protect, which can be put in the balance against the requirements of fairness. The evidence in the case by which the Defendant may have done so were (a) the pre-contract meeting, (b) the meeting of the Project Board on the 17th July 2013 and, (c) the Report dated 29th July 2013. But the admission of all such pieces of evidence has been surrounded with considerable technical difficulties of admission and proof.

(z) Although the decision to reprogramme the Project (to address delays) may be in the area of the Defendant's policy, this court is left with the clear impression that the Defendant was not actually engaged in an area of pure policy which, rather than helping the Defendant's own case (by tending to prove that there is a public interest to protect), instead rather suggest on balance that the Defendant's conduct was in a grey area which may have amounted to a misuse of power, by attempting to frustrate any attempt by the Claimant to obtain for itself a fair or just result by the present proceedings.

(aa) This has lead this court to conclude that good administration requires that the Defendant, as a public authority, ought to be given an opportunity to be held to its promises, representations, procedures and processes by awarding the contract to the Claimant or alternatively be penalized in damages for failure to do so. Furthermore, that public confidence may be undermined in the Defendant, as a public authority, if it were not held to such a reasonable standard of conduct.

(bb) The court has determined therefore, the Defendant should not be so penalized as to warrant the payment of damages without getting some value for its money; and so it has determined that the Defendant should be given the option to make the award of the Contract to the Claimant which the Claimant was reasonably led to expect from the Defendant.

(cc) The Court agrees with the Claimant's submissions that if the matter was a private law action, it would have been entitled to damages for breach of contract.

[110] Generally I found that the Defendant's case was flawed in that they considered that this case was not a public law case about the conduct of a tendering process involving a public body; but instead considered that it was simply a case in contract by misinterpreting the post tender letter sent to the Claimant by which there was an agreement to award to the Claimant as the highest bidder the contract related to the Project.

[111] Specifically I felt that the Defendant was committed to a tendering process and effectively departed from this agreed process by unfairly seeking to impose on the Claimant new and different requirements after the award of the contract. They did this by (as it were) 'moving the goal post' after the Claimant had a vested right, a legitimate expectation in public law, that they would be awarded the contract once they met the agreed and reasonable requirements of the contract (including the sum budgeted for the award).

Costs

[112] In the circumstances of my findings on the case I find that the Defendant shall pay the Claimant's cost at the prescribed scale with the claim being valued at $200,000.00., the budgeted value of the contractual award.

Disposition

[113] For the reasons given above, I have come to the conclusion that the Defendant is obliged to reconsider its decision of the 21st November 2012, not to award to the Claimant the consultancy relating to the Project.

[114] I also find that such reconsideration should be in accordance with law as I have found above, which is that it shall to award the contract to the Claimant provided that the Claimant bring itself within the budget of $200,000.00 and otherwise conform with the terms of its bid. The Defendant may impose, in good faith, such other reasonable and logistical terms and conditions which necessarily arise from the agreed terms and conditions of the tendering process.

[115] If the Defendant is not prepared to comply with its promise to award the bid to the Claimant on the terms set out above then I find that the Claimant is entitled to damages as such an award would have been available to the Claimant if the claim had been brought as a private law action in contract.

[116] In the present case I accept the unchallenged evidence of the Claimant that it expended a total of 61 hours in preparing the proposal for submission to the Defendant, during which time, the Claimant did not engage in any other projects.

[117] I also accept the unchallenged evidence of the Claimant that the budget submitted as part of the requirements for the RFP clearly showed that they included $182,100.00 (82% of the total budget) as consultancy fees whilst the remainder of the budget was reserved for out-of-pocket expenses and contingencies; 13% and 5% of the budget respectively. Also, that the time spent in preparing the proposal was viewed by the Claimant as an investment that would yield $182,100.00 in revenues if the Defendant had honoured its agreement.

[118] I also accept the unchallenged evidence of the Claimant that it also engaged the services of Dr. Sharmane Saunders, a lecturer at the University of the West Indies, at a cost of $2,700.00 to help with the development of the proposal.

[119] In these circumstances I have assessed damages which the Defendant may be liable to pay to the Claimant in the sum of $182,100.00 which they have claimed.

[120] As a result if the Defendant is not able to award the contract to the Claimant I find that it is liable to pay the Claimant the sum of $182,100.00 in damages.

[121] I grant liberty to either part to apply to the court for directions as to time limits for the implementation of the terms of this Judgment.

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The Hon Mr. Justice Courtney A. Abel