

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

ANGUILLA

AXAHCVAP2019/0002

BETWEEN:

ELMOALIS LTD.

Appellant

and

THE ATTORNEY GENERAL OF ANGUILLA

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE
The Hon. Mr. Mario Michel
The Hon. Mr. Gerard St. C. Farara, QC

Chief Justice
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Ms. Tara Carter for the Appellant
Ms. Sherma Blaize-Sylvester for the Respondent

2021: January 29.
May 21.

Civil appeal — Judicial review — Decision of Procurement Board refusing appellant's bid for solid waste management contract — Recommendation of Evaluation Committee — Illegality — Ultra vires — Whether learned judge correctly applied the relevant provisions of the Public Procurement and Contract Administration Act and Regulations in concluding that decision was not illegal and ultra vires — Whether evaluation criteria for bids disclosed in bid documents as required by section 41 of the Public Procurement and Contract Administration Act — Whether responsibility of Evaluation Committee to assess bidders' waste collection vehicles was improperly delegated to a member of the Committee — Whether grading of bids done in breach of the Public Procurement and Contract Administration Act and Regulations — Unfairness — Whether procurement process was unfair — Damages — Whether appellant entitled to damages for loss of profits — Joinder of parties — Whether Attorney General is a proper or necessary party to the judicial review claim

In 2017, Elmoalis Ltd. ("Elmoalis"), submitted a bid/proposal in response to a procurement notice and request for proposals ("the RFP") issued by the Procurement Office in the Ministry of Finance of Anguilla. The proposal was for a 7-year contract for the provision of solid waste collection services across various collection zones in Anguilla. Five other companies submitted proposals. The proposals of all 6 companies were considered by an Evaluation Committee ("the Evaluation Committee" or "the Committee") constituted under the Public Procurement and Contract Administration Act (as amended) ("the Procurement Act" or "the Act"). The Committee comprised three members, including Mr. Leroy Richardson ("Mr. Richardson") who was tasked with inspecting the garbage collection vehicles owned by the bidders for their suitability to fulfil the works under the contract. At the end of the evaluation process, a report was produced by the Committee and sent for consideration by the Procurement Board. The Procurement Board accepted the Committee's recommendations in the report, refused Elmoalis' bid and awarded the contract to another bidder.

Elmoalis sought judicial review of the decision to refuse its bid, and related decisions on the basis that the decisions were *ultra vires* and void for improper delegation, illegality and unfairness. Central to the claim was the allegation that the decisions were arrived at in breach of various sections of the Procurement Act and the Regulations thereunder ("the Regulations"). Elmoalis sought, among other relief, writs of certiorari quashing the decisions and any agreements entered into with the Attorney General and third parties in relation to solid waste management flowing from the procurement process as well as compensation for its losses arising from the procurement process, including loss of profit and declarations to correspond with these orders. Following a trial, the learned judge determined that there was no basis upon which to disturb the decisions and accordingly dismissed the judicial review claim.

Elmoalis, being dissatisfied, appealed. The following issues arose for this Court's determination: (i) whether the learned judge failed to correctly apply the relevant provisions of the Procurement Act and the Regulations in concluding that the decision to refuse Elmoalis' bid was not illegal and *ultra vires* ("the illegality issue"). On the illegality issue, Elmoalis contended that: the evaluation criteria were not disclosed in the bid documents as required by section 41 of the Procurement Act; the responsibility of assessing bidders' waste collection vehicles was improperly delegated to Mr. Richardson; and that the grading of the bids should have been done by all the members of the Committee as required by the Procurement Act, and not by select members; (ii) whether the learned judge erred in failing to conclude that the procurement process was unfair and illegal; (iii) whether Elmoalis is entitled to damages for loss of profits; and (iv) whether the Attorney General was properly joined as a party to the proceedings.

Held: dismissing the appeal and ordering that each party shall bear its own costs, that:

1. A public authority which acts outside of the power conferred on it by law acts *ultra vires* its discretion or illegally. In determining whether a decision is illegal, the court must construe the content and scope of the instrument conferring the duty or power upon the decision-maker. In this case, the remit of the Evaluation Committee was to evaluate bids and report its findings to the Procurement Board following which the Procurement Board decides on the successful bidder. The Evaluation Committee is not a decision maker under the Procurement Act. It is therefore incumbent upon Elmoalis to show

that the Procurement Board's decision-making process, in exercising its own statutory discretion to accept the recommendations of the Evaluation Committee fell within some recognised ground of judicial review. It is not enough to attempt to impugn matters at the level of the Evaluation Committee, without reference to how these matters render the decision-making process of the Procurement Board unlawful.

Council of Civil Service Unions and Others v Minister for the Civil Service [1984] 3 WLR 1174 considered; **Quorum Island (BVI) Ltd v Virgin Islands Environmental Council** BVIHCVAP2009/0021 (delivered 12th August 2011, unreported) followed; **Chief Constable of the North Wales Police v Evans** [1982] WLR 1155 applied; **Belize Alliance of Conservation Non-Governmental Organisations v The Department of Environment and Another** [2003] UKPC 63 considered.

2. The learned judge did not err in finding that the decision to refuse Elmoalis' bid was not illegal and *ultra vires*. It is clear that section 41 of the Procurement Act requires the publication of criteria for the assessment of bids and the respective weight to be attached to each criterion, and that the Committee abides by those published criteria in its evaluation of the bids. The requirements of section 41 were satisfied since the evaluation criteria for all bids were set out in clear terms in the RFP. Further, given that Mr. Richardson's appointment has not been challenged or revoked, he is a lawful member of the Committee and therefore capable of conducting business anticipated by the legislation to be within his purview. It therefore cannot be said that the responsibility of assessing the suitability of the bidders' waste collection vehicles was improperly delegated to him. Additionally, where the details of the decision-making process of a statutory administrative body are not specified by statute, as is the case here, the body is permitted to delegate tasks among itself and to thereafter collectively exercise its decision-making power in the manner contemplated by the statute. The Committee's failure to collectively carry out each step of the evaluation process did not therefore taint the decision-making process with illegality. There is also no basis for concluding that the grading of the bids was not done by all the members of the Committee, as required by the Procurement Act and the Regulations. The evidence before the learned judge showed that the report represented the collective suggestions of each member of the Committee as to the bidders who ought to be awarded contracts.

Section 41 of the **Public Procurement and Contract Administration Act**, Cap. P161, Revised Statutes of Anguilla 2016 considered; **Attorney General of Turks and Caicos v Misick and Others** [2020] UKPC 30 applied; **Selvarajan v Race Relations Board** [1976] 1 All ER 12 considered; **Barnwell v Attorney-General and Another** (1993) 49 WIR 88 considered; **Allingham v Minister of Agriculture and Fisheries** [1948] 1 All ER 780 considered; **R v Monopolies and Mergers Commission, ex parte Argyll Group plc** [1986] 2 All ER 257 considered.

3. The common law duty to act fairly in procurement processes is enshrined under section 2(3)(d) of the Procurement Act which requires public procurement and contract administration to ensure fair treatment of all persons who participate in the procurement process. On the evidence, the statutory and common law obligation to treat bidders fairly cannot be said to have been compromised in this case. Elmoalis has not produced any evidence that matters related to the calculation of the lowest priced bid were either incorrect or were manipulated by members of the Procurement Board, such that Elmoalis would have been the lowest responsive bidder and awarded a contract. The Procurement Board's decision-making process cannot therefore be said to have been unfair, and the learned judge did not err in failing to conclude that it was unfair.

Section 2(3)(d) of the **Public Procurement and Contract Administration Act**, Cap. P161, Revised Statutes of Anguilla 2016 considered; **Central Tenders Board and Another v White** [2015] UKPC 39 applied; **Re H.K. (an Infant)** [1967] 2 WLR 962 applied; **Chief Constable of North Wales Police v Evans** [1982] WLR 1155 applied; **Central Tenders Board, London and Clydeside Estates Ltd v Aberdeen District Council** [1979] 3 All ER 876 applied; **Director of Public Prosecutions of the Virgin Islands v Penn** [2008] UKPC 29 applied.

4. As there is no basis to interfere with the learned judge's decision to dismiss Elmoalis' judicial review claim, the possibility of an award for damages occasioned by the alleged unlawful conduct raised by the claim automatically falls away. In any event, to obtain an award of damages in judicial review proceedings, a claimant must plead and prove a recognised private law cause of action, for which damages would be available as a remedy. Outside of the alleged illegalities and unfairness in the procurement process, Elmoalis' claim did not assert any civil liability on the part of the state. There is therefore no private law claim to which Elmoalis' claim for damages for loss of profits could have been appended.

Tchenguiz and another v Director of the Serious Fraud Office [2014] EWCA Civ 472 applied; **Dr. Abner James v The Medical and Dental Council** SLUHCVP2018/0018 (delivered 12th March 2020, unreported) followed; **Central Tenders Board and Another v White** [2015] UKPC 39 distinguished.

5. The named defendant in judicial review proceedings ought to be the public functionary or body whose decision-making process is subject to review. It follows that the Attorney General ought only be named as a defendant to judicial review proceedings where he or she has made the decision in relation to which judicial review has been sought. In this case, the decisions Elmoalis has complained of were not made by the Attorney General but were made by the Procurement Board and the Evaluation Committee. The Attorney General was therefore neither a necessary nor proper party to these proceedings. The Evaluation Committee and the Procurement Board and/or their members were the proper parties to Elmoalis' claim.

Bahamas Hotel Maintenance and Allied Workers Union v Bahamas Hotel Catering and Allied Workers Union and others [2011] UKPC 4 applied; **Quorum Island (BVI) Ltd v Virgin Islands Environmental Council** BVIHCVAP2009/0021 (delivered 12th August 2011, unreported) followed; **Minister of Foreign Affairs v Vehicles and Supplies Limited** [1991] 1 WLR 550 applied.

JUDGMENT

[1] **PEREIRA CJ:** In 2017, the appellant, Elmoalis Ltd. (“Elmoalis”), submitted a bid/proposal in response to a procurement notice and request for proposals (“the RFP”) issued by the Procurement Office in the Ministry of Finance of Anguilla, for a 7-year contract for the provision of solid waste collection services across various collection zones in Anguilla. The bid was refused by the Government of Anguilla’s Procurement Board (“the Procurement Board”). Elmoalis sought judicial review of the decision to refuse its bid, and related decisions on grounds of ‘unfairness’, ‘improper delegation’ and ‘illegality’. The claim for judicial review was dismissed in its entirety by Mathurin J. Elmoalis now appeals to this Court on several grounds, seeking to have the learned judge’s decision set aside, the decision to refuse its bid quashed, to obtain an order for damages for loss of profits flowing from the Procurement Board’s refusal of its bid and other related relief.

[2] The relevant background to the appeal is not disputed and is briefly set out below.

Background

[3] The RFP¹ was issued on 16th August 2017. Elmoalis and 5 other companies submitted proposals. Elmoalis’ proposal sought to secure the contract for waste collection services for Zones 1 and 2. The proposals of all 6 companies were considered by a three-member evaluation committee (“the Evaluation Committee” or “the Committee”) constituted pursuant to section 38 of the **Public Procurement and Contract Administration Act**² (as amended) (“the

¹ See p. 225 onward of the Record of Appeal.

² Cap. P161, Revised Statutes of Anguilla 2016.

Procurement Act” or “the Act”). The Committee comprised Messrs. Michael Cowing, Leroy Richardson and Omari Bourne.

- [4] As part of the bid evaluation process, Mr. Richardson was assigned the task of inspecting the garbage collection vehicles owned by the bidders for suitability to fulfil the works under the contract. At the end of the evaluation process, a report was produced which was signed by all three members of the Committee, and sent for consideration by the Procurement Board under the Ministry of Finance. The report contained the following recommendations:

“Having completed a comprehensive evaluation process, comprising of both a documents review and a review of proposed waste collection vehicles in the field, the Evaluation Committee makes the following recommendations:

1. WASTETECH LTD be awarded the contracts for both Zones 1 and Zone 3.
2. R.B. DEVELOPMENT be awarded the contract for Zone 2.
3. WEBSTERS MANAGEMENT GROUP be awarded the contract for Zone 4.”

- [5] The Procurement Board considered the report and decided to accept the Committee’s recommendations. This meant that Elmoalis was unsuccessful in its bid for Zones 1 and 2. Elmoalis was informed of this outcome by a letter dated 1st February 2018 from the Chief Procurement Officer. So far as is it relevant, that letter states:

“... this correspondence is to inform you that Elmoalis was unsuccessful in its proposals to provide the management of waste collection and recycling services for Zones 1 and 2. This outcome was as a result of the deliberations of an evaluation committee whose recommendations were reviewed and accepted by the Procurement Board in a unanimous decision by the five members present.”³

- [6] Elmoalis filed its judicial review claim seeking to challenge the following decisions (together referred to as “the Decisions”):

- “1. The decision set out in the letter dated 1st February 2018 to refuse the Claimant’s bid for the solid waste management contract; and
2. With respect to the assessment and grading of vehicles, the following decisions:-
 - (i) To delegate to Mr. Leroy Richardson the authority to conduct an exercise for the assessment and grading of vehicles.

³ See p. 320 of the Record of Appeal.

- (ii) The failure to provide evaluation criteria in respect of such assessment and grading of vehicles;
- (iii) To apply grades for vehicles produced assessed and determined by Mr. Leroy Richardson; and
- (iv) The consequent findings in relation to the vehicles which were compiled in an Evaluation Report issued by the evaluation committee in about December 2017.”

[7] Elmoalis claimed that the Decisions were *ultra vires* and void for improper delegation, illegality and unfairness. Central to the claim was the allegation that the Decisions were arrived at in breach of various sections and aspects of the Procurement Act and the **Public Procurement and Contract Administration Regulations**⁴ (“the Regulations”). On the footing of those allegations, Elmoalis sought writs of certiorari quashing the Decisions and any contracts or agreements entered into with the Attorney General and third parties in relation to solid waste management flowing from the procurement process; writs of mandamus requiring the Attorney General to reissue a procurement notice in compliance with the relevant laws, to direct that reasonable time be given to prospective bidders to resubmit proposals for consideration for the solid waste management contracts; and compensation for the claimant’s losses arising from the procurement process, including loss of profit in the sum of \$960,447.73, and declarations to correspond with these orders.

[8] Following a trial of the claim, the learned judge determined, by a written judgment dated 15th March 2019, that there was no basis upon which to disturb the Decisions and accordingly dismissed the judicial review claim.

The Appeal

[9] Elmoalis now challenges the learned judge’s decision, relying on 18 grounds of appeal. Having considered Elmoalis’ skeleton arguments, and the oral arguments advanced by counsel for Elmoalis, Ms. Tara Carter, the grounds admit of the following 3 issues for determination by this Court:

⁴ S.I. No. 35 of 2016.

- (1) whether the learned judge failed to consider and correctly apply the relevant provisions of the Procurement Act and the Regulations in coming to the conclusion that the decision to refuse Elmoalis' bid was not illegal and ultra vires ("the Illegality Issue");
- (2) whether the learned judge erred by failing to conclude that the procurement process was unfair and illegal, in light of evidence that matters related to the calculation of the lowest priced bid were either incorrect or were manipulated by members of the Procurement Board ("the Unfairness Issue"); and
- (3) whether Elmoalis is entitled to damages for loss of profits.

There is also the issue of the joinder of the Attorney General as a named party to the proceedings, which was addressed by counsel at the hearing of the appeal at the instance of the Court.

- [10] As a background of these issues, I will set out the relevant sections of the Public Procurement Act and the Regulations.

The Legislation

The Procurement Act

- [11] The objective of the Public Procurement Act is reflected in section 2 of the Act. Section 2(1) reads:

"The objectives of public procurement are to simplify, clarify and modernize public procurement and to make procurement by the Government more transparent, fair and equitable and to award timely and cost-effective contracts to qualified contractors, suppliers and service providers in accordance with principles and procedures established in this Act."

- [12] Section 7 of the Procurement Act, establishes the Procurement Unit in the Ministry of Finance comprising the Procurement Office, the Procurement Committee and the Procurement Board. Per section 8, the Procurement Office is managed by the Chief Procurement Officer.

[13] The statutory foundation of the Evaluation Committee is Part 4 of the Procurement Act. Section 38, under Part 4, requires the Procurement Committee to establish an Evaluation Committee of at least 3 members prior to the date for the submission of procurement bids or proposals. The section reads:

“(1) Prior to the date for the submission of bids or proposals, the Procurement Committee shall constitute an Evaluation Committee consisting of at least 3 members and forward the names and titles of the members to the Procurement Office.”

[14] The objective of the Evaluation Committee is set out in section 39, in the following way:

“The objective of an Evaluation Committee is to evaluate bids or proposals for large procurements except emergency procurements in accordance with objective evaluation criteria set out in the invitation for bids or requests for proposals to determine if the works, goods or service meet the description of what is being procured.”

[15] Section 40(1) sets out the overarching obligation of the Evaluation Committee when evaluating bids:

“(1) In evaluating bids or proposals for on-stage procurement procedures the Evaluation Committee shall determine which –
(a) bidder is responsible and is determined to have submitted the lowest responsive evaluated bid; or
(b) offeror is responsible and is determined to-
(i) have submitted a proposal that is responsive and capable of acceptance; or
(ii) have submitted the lowest responsive evaluated proposal.”

[16] The criteria used by the Evaluation Committee for evaluating bids must be contained in the bid or proposal documents, and the Committee is required to use those criteria, and no other, in evaluating the bids. Section 41 provides:

“41.(1)The criteria for determining the responsive and successful bid including the relative weight to be attached to each criterion shall be contained in the bid or proposal documents.

(2)The Evaluation Committee shall be responsible for the evaluation of the bids using the criteria in the bid or proposal documents and no other criteria may be used.”

- [17] Section 42(1) requires the Evaluation Committee to report its findings to the Board and to the Procurement Committee. Section 42(2) states that, upon receipt of these findings:

“(2)The Board may–

- (a) accept the findings of the Evaluation Committee;
- (b) reject the findings of the Evaluation Committee;
- (c) request further and better information from the Evaluation Committee; and
- (d) enter into discussions with the Evaluation Committee with the aim of verifying, clarifying or explaining matters arising out of the evaluation report.”

The Regulations

- [18] Regulation 2 defines the bid documents as including the ‘instructions to bidders or offerors regarding the evaluation criteria...’.

- [19] Regulation 10 speaks to the determination of responsible bidders and offerors. It provides:

“(1) The following may be used to determine whether a bidder or offeror is responsible –

- (a) evidence that he possesses or will possess when required the resource capability to perform the contract....
- (b) evidence of his legal capacity to perform the contract if it is awarded...
- (c) evidence of integrity to the effect that the bidder or offeror or any director, officer, manager or supervisor or partner of the bidder or offeror is not or will not be suspended or debarred under Part 5 of the Act;
- (d) where the bidder or offeror carries on or has carried on business in Anguilla, evidence that the bidder or offeror is in good standing with the Government or has made arrangements satisfactory to the Minister of Finance to fulfil his obligations to pay taxes, levies, licence fees and other similar fees and national insurance contributions, as the case may be.”

- [20] Regulation 16 speaks to the steps to be undertaken in the evaluation process in the following way:

“(1)The evaluation process shall be the same for all goods, works and services and consists of the following steps-

- (a) a preliminary evaluation to determine whether the bid or proposal meets the minimum standards of acceptability as set out in the bid or proposal documents and to eliminate bids or proposals which are not substantially responsive;
- (b) a detailed examination of the bids or proposals which include-
 - (i) correction of arithmetic errors.
 - (ii) conversion to a common currency.
 - (iii) quantification of omissions and deviations;
- (c) application of evaluation criteria;
- (d) comparison of bids or proposals; and
- (e) preparation of the Evaluation Report which must contain in clear and logical manner all of the information mentioned in paragraphs (a) to (d) and the recommendations of the Evaluation Committee.”

[21] Regulation 17 speaks to the evaluation of bids or proposals and recommendations. It states:

“17. The Evaluation Committee shall-

- (a) review every bid or proposal that is opened to determine if-
 - (i) the bidder or offeror is responsible, and
 - (ii) the bid or proposal is responsive;
- (c) evaluate each bid or proposal of every responsible bidder or offeror that is responsive in accordance with the evaluation criteria set out in the invitation or bids or requests for proposals; and
- (d) prepare a report setting out particulars of the results of the review and evaluation and its recommendation to the Procurement Committee and the Board.”

Issue 1 – The Illegality Issue

[22] In **Council of Civil Service Unions and Others v Minister for the Civil Service**,⁵ Lord Diplock shortly describes illegality, as a ground for seeking judicial review, to mean that ‘...the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it’.

⁵ [1984] 3 WLR 1174.

Rawlins CJ in **Quorum Island (BVI) Ltd v Virgin Islands Environmental Council**,⁶ in similar vein, stated thusly:

“It is a primary tenet of the rule of law that a public authority must act or make decisions within the bounds of the power conferred on it by law. An authority that acts outside of that power acts *ultra vires* its discretion or illegally.”

[23] The authors of **De Smith's Judicial Review**,⁷ discuss in more expansive terms what is generally known to be the scope of illegality as a ground for seeking judicial review. At paragraphs 5-001 to 5-002, they explain:

“An administrative decision or other exercise of a public function is unlawful under the broad chapter head 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 fulfil a legal duty;
- (d) Exercises discretionary power for an extraneous purpose;
- (e) Takes into account irrelevant considerations or fails to take into account relevant considerations;
- (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 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.” (Underlining supplied)

[24] Elmoalis argues that the learned judge failed to properly apply the laws in respect of the evaluation process to be undertaken by the Evaluation Committee and their duty to objectively assess bids in accordance with sections 38, 39, 40, 41 and 42 of the Procurement Act and regulations 2(1), 16, 17 and 20 of the Regulations. The particulars of the illegality to which Elmoalis refers are as follows:

⁶ BVIHC VAP2009/0021 (delivered 12th August 2011, unreported).

⁷ The Right Hon. Lord Woolf, Jowell J et al: *De Smith's Judicial Review* (8th Edn., Sweet and Maxwell, 2020).

- (i) The evidence was that the evaluation criteria were not disclosed in the bid documents as required by section 41 of the Procurement Act. This is a mandatory requirement under the law and the Evaluation Committee is bound to comply with it.
- (ii) The responsibility of assessing bidders' waste collection vehicles was improperly delegated to Committee member, Mr. Richardson. Such a delegation was not permissible under the Procurement Act.
- (iii) The grading of the bids ought to have been done by all the members of the committee, in accordance with sections 38, 39 and 40(1) of the Act which require (it is argued) the entirety of the decision-making process to be conducted by the Evaluation Committee and not by select members. The evidence was that it was not.

[25] Before turning to each of these alleged illegalities, I observe that these allegations, like those which were made in the court below, centre on matters that took place at the level of the Evaluation Committee. As stated by Lord Brightman in **Chief Constable of the North Wales Police v Evans**,⁸ judicial review is concerned, not with the merits or demerits of a decision, but with the decision-maker's decision-making process. The Evaluation Committee, of itself, is not a decision maker under the Procurement Act. In **Prineas v Forestry Commission of New South Wales**,⁹ an Australian case referred to in the Privy Council decision of **Belize Alliance of Conservation Non-Governmental Organisations v The Department of Environment and Another**,¹⁰ Cripps J stated in respect of an environmental impact statement, that- '[a]n environmental impact statement is not a decision-making end in itself – it is a means to a decision-making end. Its purpose is to assist the decision-maker'. By analogy, the same is true of the Evaluation Committee. The statutory remit of the Committee is to evaluate bids in accordance with predetermined criteria set out in the request for proposals, and to report its findings to the Procurement Board, pursuant to section 41 the Act, following which the Procurement Board would

⁸ [1982] 3 All ER 141 at 154.

⁹ (1983) 49 LGRA 402.

¹⁰ [2003] UKPC 63.

then accept, reject or otherwise treat with the report prior to making a decision on who is the successful bidder.

[26] The role of the Procurement Board in determining who ought to be awarded a contract, as distinct from the role of the Evaluation Committee in evaluating bids and making a recommendation to the Board, is evidenced by the Chief Procurement Officer's letter to Elmoalis¹¹ where it is stated that Elmoalis' bid had been rejected following the Board's unanimous acceptance of the recommendations of the Evaluation Committee in accordance with its powers so to do under section 42 of the Procurement Act. On the judicial review claim and this appeal, therefore, it was and is incumbent upon Elmoalis to show that the Procurement Board's decision-making process, in exercising its own statutory discretion to accept the recommendations of the Evaluation Committee (as distinct from rejecting it or taking some further action) fell within some recognised ground of judicial review. It is not enough to attempt to impugn matters at the level of the Evaluation Committee in isolation, without reference to how these matters render the decision-making process of the Procurement Board unlawful.

[27] In short therefore, the focus here must be to determine whether the learned judge was wrong in considering that the alleged irregularities at the level of the Evaluation Committee did not impugn the decision of the Procurement Board to reject Elmoalis' bid on the basis of the report of the Evaluation Committee, or whether the evidence before the learned judge ought to have impelled her to conclude that the decision-making process of the Procurement Board was unlawful.

[28] I shall now address each of the alleged illegalities in turn.

(i) Non-disclosure of evaluation criteria for the vehicles

[29] On the point of non-disclosure of the evaluation criteria for the waste collection vehicles, the learned judge reasoned as follows:

¹¹ See p. 320 of the Record of Appeal.

“The Request for Proposal Form (RFP) published in August 2017, (Bundle 2, Tab 14) paragraph 99 states that “the four (4) evaluation criterion in accordance with section 41 Public Procurement and Contract Administration Act shall be as described in Table 9 below.” It also states that a maximum of 20 points shall be given to each of the criterion.

...

Elmoalis has asserted that the EC did not disclose criteria for grading of the vehicles in section 1 above of responsibility criteria. The four criteria and the relative weight to be attached to them were clearly disclosed at Table I of the RFP. The claimant, in essence, is asking the court to reconsider the evaluations on the comparative basis relating to the conduct of the assessment relating to the suitability of vehicles and the amount of vehicles vis- a-vis any proposals for future investments in vehicles.

The EC was appointed to do the evaluation of the bids using the criteria in the RFP. It is, however, for the EC to decide its process once it is within the mandates of the Act. It is not inconceivable that the EC would formulate some system by which they evaluate the criteria to determine points to be awarded. The court cannot substitute its views for that of the EC. Elmoalis has not satisfied the court that the EC has acted outside of the Act so as to warrant a finding that the evaluation was unfair. Further, the claimant has not disputed that the four (4) criteria listed in the RFP were not adhered to. The point appears at most moot when one considers that all of the bidders including Elmoalis were covered in all material aspects of the responsibility criteria in Table 9.”

[30] Elmoalis maintains that the criteria for the assessment of vehicles ought to have been disclosed in the RFP, as distinct from the mere disclosure of the criteria for the assessment of bids. This, it is argued, tainted the entire procurement process with illegality, in so far as section 41 of the Procurement Act requires that the criteria for determining the responsive and successful bid including the relative weight to be attached to each criterion shall be contained in the bid or proposal documents. I disagree for the reasons expressed by the learned judge.

[31] In my view, the plain words used by section 41 of the Procurement Act are entirely decisive of this issue. It is a cardinal rule that the court’s role in statutory interpretation is to give effect to the intentions of the Legislature in enacting the statute. The starting point to this exercise is to determine the natural and ordinary meaning of statutory words, in the wider context of the statute. The Privy Council in its recent decision in **Attorney General of Turks and Caicos**

v Misick and Others,¹² reaffirmed and applied this approach to statutory interpretation, in the context of Regulations issued by the Governor of Turks and Caicos, in the following way:

“In interpreting Regulation 4(6) the first question is what is the natural or ordinary meaning of the particular words or phrases in their context in the Regulations. It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the Governor when making or of the House of Assembly when approving the Regulations that it is proper to look for some other possible meaning of the word or phrase, see *Pinner v Everett* [1969] 1 WLR 1266 at 1273.”

[32] In my view, the words of section 41 are clear and do not give rise to any absurd result. The Court must therefore accord them their natural and ordinary meaning in the wider context of the Procurement Act. What section 41 requires is the publication of criteria for the assessment of bids and the respective weight to be attached to each criterion, and that the Evaluation Committee abides by those published criteria in its evaluation of the bids. This was clearly done. The evaluation criteria for all bids were set out in clear terms in Table 9 of the RFP. Among the criteria set out there, is the requirement for the production of a resource model pertaining to existing or to-be-acquired garbage collection vehicles. At paragraph 1 of Table 9 states:

“1. Provision of a comprehensive resource model including details of specialist existing garbage collection vehicles and/or proposed capital investment in specialist garbage collection vehicles to provide a minimum of two working vehicles for the contract plus access to a specialist collection backup vehicle as contingency”.

[33] According to item 141 of the RFP, the bid assessment criteria were to be graded on a twenty-point scale. Critically, and as the judge observed, the Evaluation Committee in its report stated that it assessed the responsiveness of all the bids it received in keeping with the criteria set out in Table 9.¹³ Using the twenty-point rating scale prescribed at item 101 of the RFP, each of the six bids were assessed at varying levels of responsiveness falling within the point range of 13 to 16 points.

¹² [2020] UKPC 30.

¹³ See section 2.2 of the Evaluation Committee Report at p. 266 of the Record of Appeal.

- [34] What section 41 does not require is the publication of any set of sub-criteria which would be used to assess evaluation criteria set out in the bid documents. In my view, the obligation under section 41 to publish the criteria for the evaluation of bids and the respective weight to be attached to the criteria cannot be equated to an obligation to provide finer details in relation to the assessment of each evaluation criterion in accordance with the grading scheme set up in the RFP.
- [35] In advancing her arguments on behalf of Elmoalis, including on the interpretation of the relevant provisions of the Procurement Act, learned counsel, Ms. Carter, referred to the object and purpose of the legislative scheme created by the Procurement Act and the Regulations. Consideration of the purpose for which an enactment was made is firmly a part of the law on statutory interpretation. As recently as the decision of **Rittson-Thomas and Others v Oxfordshire Country Council**,¹⁴ the United Kingdom Supreme Court stated that it is now well-settled that ‘...the courts should adopt a purposive approach to statutory interpretation where possible’.¹⁵ The purposive approach to statutory interpretation has been adopted and applied by this Court in cases such as **Asiyah Grant v Javier Maduro**¹⁶ and **Rajiv Guinness v Saint George’s University Limited (Owners and Operators St. George’s University) et al.**¹⁷ The practical effect of a purposive approach to interpretation is seen more clearly in cases where there is a genuine ambiguity or tension in the statutory provisions, or where some illogical, anomalous, absurd or unintended result is produced by the natural and ordinary meaning of statute words, as was the case in **Asiyah Grant v Javier Maduro**. Otherwise, as Byron PCCJ noted in **Smith v Selby**,¹⁸ the literal and purposive approaches to interpretation- ‘[i]n most cases... would produce the same result’. The Privy Council in **Misick** also recognised that- ‘...of potential relevance is the principle of effectiveness – i.e. where possible, an enactment will be construed so that its provisions are given

¹⁴ [2021] UKSC 13.

¹⁵ See para. 33.

¹⁶ BVIHCVAP2019/0001 (delivered 13th November 2019, unreported).

¹⁷ [2018] ECSCJ No. 120 (delivered 3rd May 2018).

¹⁸ [2017] CCJ 13 (AJ).

force and effect rather than rendered nugatory'.¹⁹ This statement by the Privy Council is a reflection of the longstanding presumption of statutory interpretation that the Legislature does not legislate in vain, and intends statutes to be effective for the purposes for which they are enacted. The court is therefore obliged, so far as is possible, to interpret statutory provisions in a manner that does not defeat those purposes. This is even more so, in my view, in cases where the intentions of the Legislature are expressly declared in the text of the statute, as was done in the case of the Procurement Act which declares its purport at section 2(1) (which is set out above).

[36] In my judgment, it is not arguable that the natural and ordinary meaning of section 41 defeats or undermines the purposes of the Act, or produces some illogical, anomalous, absurd or unintended result. The publication of the broad criteria for the assessment of bids (as was done in Table 9) does not defeat the overall objectives of transparency, fairness and equity expressed in section 2(1), as bidders are apprised of the bases on which their bids are to be assessed and the scale on which those bids are assessed by the Evaluation Committee. On the contrary, the natural and ordinary meaning of section 41 promotes those very objectives. While further details of the assessment exercise to be conducted by the Evaluation Committee (including details as to vehicle assessment process) could undoubtedly enhance these objectives, that is altogether a separate consideration and generally irrelevant for the purposes of determining whether the court should abide by the natural and ordinary meaning of the words of section 41, or impose by way of judicial interpretation, a requirement for more detailed requirements to be produced under section 41.

[37] In sum, I am not persuaded that the contents of the RFP did not meet the requirements of section 41. In my view therefore, there is no basis to argue that the learned judge erred in her assessment and application of section 41, or that a misapplication of section 41 impugned the decision of the Procurement Board to accept the report of the Evaluation Committee and refuse Elmoalis' bid.

¹⁹ See para. 40.

(ii) Improper delegation to Leroy Richardson and the Committee's Mode of Decision Making

- [38] The learned judge found that: (i) Mr. Richardson evidenced considerable experience in the field of solid waste management and disposal to warrant him being the logical member of the Committee to carry out the assessments of the vehicles; (ii) the appellants provided no authority for the proposition that the distribution of duties among committee members amounted to illegal or improper delegation; (iii) that Mr. Richardson's role in assessing the vehicles being proposed for use by each of the bidders was not a delegation of the function of the Evaluation Committee to the Mr. Richardson, but rather he was a member of the Evaluation Committee acting within its mandate to ensure that the proposals were responsive.
- [39] On appeal, Elmoalis' position on this issue is three-fold. Firstly, that the learned judge erred in not concluding that Mr. Richardson did not have the expertise required to assess the vehicles and was not a qualified person to conduct the assessment of the vehicle for the purposes of the bid evaluation. Secondly, that the learned judge did not properly apply the relevant provisions of the Procurement Act and the Regulations which entrust the entire Committee with the responsibility for assessing all the evaluation criteria. It was therefore legally impossible for the Evaluation Committee to delegate the assessment of vehicles to Mr. Leroy Richardson who made the sole determination as to the grading of the vehicles. Mr. Richardson therefore could not usurp the function of the Evaluation Committee under section 39 of the Procurement Act which requires the entire Committee to evaluate bids in accordance with the evaluation criteria.
- [40] Thirdly, Elmoalis argues that sections 38(1), 39, 40(1) of the Procurement Act and the scheme of the Regulations mandatorily require the Evaluation Committee's decision-making process to be carried out by the entire committee and not by select members. The Act and Regulations require that the Evaluation Committee carry out the evaluative process as a cohesive grouping before their recommendation was made. This was not done. Elmoalis further argues that the evidence is that only Mr. Cowing presented his scores of each bid; the recommendations given by the Evaluation Committee were not those of the

committee but were those of the Chairman Mr. Cowing only; Committee members Richardson and Bourne had not even read the request for proposal and were unaware of the grading and criteria against which they were to apply. Against this evidence, Elmoalis contends that the decision of the Evaluation Committee was made by Mr. Cowing, only, who had no legal authority to make the recommendations on his own.

[41] In entering upon this discussion, I do so against the backdrop that the Evaluation Committee is not the decision maker. Its ultimate task is to report to the Procurement Board which is not bound to accept its report. First, the complaint that Mr. Richardson had no expertise to carry out the assessment is, in my view, entirely misplaced. It is not disputed that Mr. Richardson was appointed to the Evaluation Committee constituted under section 38 of the Procurement Act. His appointment to the Evaluation Committee has not been challenged in Elmoalis' judicial review claim. Without such a challenge, there is no basis to inquire into his qualification to carry out assessments which were undoubtedly within the province of the Committee. Such a challenge could not be raised 'by the way' as a particular of the Committee's alleged improper delegation of tasks to him, in circumstances where the Procurement Act does not specify who should undertake particular functions of the Committee (a point which I will develop in detail below), but would have to be founded on a substantive review of his appointment to the Committee. Mr. Richardson, therefore, having been appointed to the Evaluation Committee, and his appointment having not been challenged or quashed by a court of law or revoked by the relevant authority is, as it stands, a lawful member of the Committee under the Act and therefore capable of conducting business anticipated by the legislation to be within his purview.

[42] In any event, even if this complaint by Elmoalis was sustainable as presented, the learned judge found, as a matter of fact, that:

"...Mr. Richardson evidenced considerable experience in the field of solid waste management and disposal to warrant him being the logical member of the Committee to carry out such assessments. Given the nature of the procurement, the Court is willing to accept on the balance

of probabilities that this was taken into consideration when he was appointed to the EC by the Procurement Committee.”²⁰

[43] The learned judge’s findings on Mr. Richardson’s competence to conduct the assessment of the vehicles are factual findings. These findings are supported by Mr. Richardson’s *curriculum vitae* which was attached to his affidavit filed by the Attorney General in response to the judicial review claim.²¹ Bearing in mind the well-established rules on appellate intervention with a lower court’s findings of fact,²² there is no basis upon which to assail the judge’s findings, as they were clearly open to her to make on the evidence.

[44] Second, I agree with the learned judge that there was no improper delegation by the Evaluation Committee to Mr. Richardson. Furthermore, I am of the view that the mode of decision making employed by the Committee was not such that would taint the entire process with illegality. It is the law that decision-making powers granted by a statute are to be exercised by the functionary or body, contemplated by the enabling statute as an appropriate decision maker. As a result, where decisions are made by persons who are not contemplated as decision makers under the statute, the decision will be unlawful and illegal. The rule is often referred to by the latin maxim *delegatus non potest delegare* and is described by the authors of **De Smith’s Judicial Review** in the following way:

“It is a well-known principle of law that when a power has been conferred to a person in circumstances indicating that trust is being place in his individual judgment and discretion, he must exercise that power personally unless he has been expressly [or by necessary or reasonable implication] empowered to delegate it to another.”²³ (My insertion)

[45] Similar to the concept of improper delegation is the concept of abdication. In simple terms, a public authority’s basic statutory functions are inalienable. It must own its functions and powers and is not entitled to surrender or ignore them

²⁰ See para. 12 of the learned judge’s judgment.

²¹ See pp. 131-133 of the Record of Appeal.

²² See for example *Yates Construction Company Ltd v Blue Sands Investments Limited* BVIHCVAP2012/0026 (delivered 20th April 2016); *Ming Siu Hung and others v J F Ming Inc and Others* [2021] UKPC 1.

²³ See n. 7 at para. 5-159.

unless permitted to do so by the empowering statute. As the author of **Administrative Law**²⁴ states:

“Closely akin to delegation, and scarcely distinguishable from it in some cases, is any arrangement by which a power conferred upon one authority is in substance exercised by another. The proper authority may share its power with some one else, or may allow some one else to dictate to it by declining to act without their consent or by submitting to their wishes or instructions. The effect then is that the discretion conferred by Parliament is exercised, at least in part, by the wrong authority, and the resulting decision is ultra vires and void.”

- [46] It is also recognised that where a statute is not prescriptive of the specific manner in which an administrative body is to operate, it is usually within the remit of that body to determine its own procedure, of course, in accordance with the broader overarching principles of law attendant on decision making by public officials. This is borne out by the decision of the English Court of Appeal in **Selvarajan v Race Relations Board**²⁵ where it was held at page 19 that, in the absence of an express statutory prescription, an administrative body is the ‘master of its own procedure’. At page 20, Denning MR further stated:

“The maxim *delegatus non potest delegare* applies strictly to judicial functions. But it is different with a body which is exercising administrative functions or which is making an investigation or conducting preliminary enquiries, especially when it is a numerous body. The Race Relations Board has 12 members. The employment committee has seven members. It is impossible to suppose that all of them need sit to determine a matter. Nor that all of those who sit should have read all the papers or heard all the evidence. But I do think that two or three, at any rate, must have done so. If there is a quorum of, say, three, I should think a quorum must have done so. That is the ordinary accepted method of carrying on business. It should be applied here also.”

- [47] The effect of these pronouncements is that where a statutory administrative body is vested with a statutory discretion, and the fine details of the decision-making process are not specified by statute, the body is permitted to delegate tasks among itself and to thereafter collectively exercise its decision-making power in the manner contemplated by the statute and in keeping with the principles of public law. This position has been recognised and applied by the

²⁴ H.W.R. Wade, *Administrative Law* (6th edn., Oxford University Press: 1988) at p. 368.

²⁵ [1976] 1 All ER 12.

Court of Appeal of Guyana in **Barnwell v Attorney-General and Another**²⁶ and is, in my view, reflective of the current state of the English common law.

[48] It is however not open to the one member of a statutory body to purport to act on behalf of the body in circumstances where the legislation does not sanction such action. In **Allingham v Minister of Agriculture and Fisheries**,²⁷ it was held that a county War Agricultural Executive Committee could not delegate to its executive officer the task of deciding what crops should be grown on particular plots of land; and that in consequence, a notice issued by an executive officer ordering the defendant to grow sugar-beet on a particular plot was ineffectual. The court held that, the proper construction of the statute entitled the defendant to have the decision of the executive committee and of no-one else, and therefore the executive officer's actions were not a lawful exercise of the committee's statutory powers.

[49] Similarly, in **R v Monopolies and Mergers Commission, ex parte Argyll Group plc**²⁸ a take-over bid had been referred by the Government to the Monopolies and Mergers Commission which was empowered by statute not to proceed with a reference if the bid was abandoned. The chairman decided not to proceed with the reference. The Court of Appeal held that the decision not to proceed with the reference was unlawful as the enabling legislation did not permit the chairman to exercise that power separately from the commission. Sir John Donaldson MR remarked at page 265:

"I am reluctantly driven to the conclusion that, while I think that the commission must be taken to have tacitly accepted and approved this practice by the chairman as being the only sensible and practical way of dealing with abandonments with sufficient promptitude at a stage when the commission had not yet in any real sense entered on the reference, it was not within its power to do so and the chairman cannot derive any authority independently from the Act."

[50] The necessary starting point to determining whether the allegations of improper delegation or abdication of the Evaluation Committee's decision-making power

²⁶ (1993) 49 WIR 88 at 109.

²⁷ [1948] 1 All ER 780.

²⁸ [1986] 2 All ER 257.

have been made out, is to construe the terms of the statute to determine whether what was done in a case, was contemplated by the statute. The relevant provisions of the Procurement Act and the Regulations are set out above. Elmoalis' arguments on this point are premised on the assumption that the Procurement Act and the Regulations require the Evaluation Committee to meet, and collectively carry out every task within its remit, together, with there being no possibility of the division of labour amongst the members of the committee. They do no such thing. Beyond the clear requirements for the assessment of bids in accordance with predetermined criteria, the Procurement Act and the Regulations do not prescribe the granular details of the procedure to be followed by the Evaluation Committee in the execution of its statutory mandate. None of these provisions which regulate the work of the Evaluation Committee, create a statutory requirement that the Committee meet to collectively assess the responsiveness of a proposal to every criterion set out in the RFP, or restrict or purport to dictate the manner in which the Committee carries out its function in assessing the bids in accordance with the predetermined criteria. Neither do they by necessary or reasonable implication require the evaluation criterion to be assessed by all the members of the Committee or prevent the Committee from dividing the work among its members based on the respective competences of the Committee's members in the bid evaluation process, and in thereafter producing its collective report to the Procurement Board.

- [51] By its arguments, Elmoalis essentially seeks to have the courts read words into the plain statutory language which would seek to regulate the manner in which an evaluation is done by the Committee, in circumstances where such manner is not already prescribed by the Act. It is clear that Parliament did not intend to establish any procedural framework as to the manner in which the assessment is to be done, and the roles of the three members of the Committee are to undertake in making its recommendations to the Procurement Board. In the circumstances therefore, the general position evidenced by **Selvarajan v Race Relations Board** would apply, and it was within the province of the Committee to determine its own internal procedures and to divide work among itself in the execution of the evaluation process. Against that background, and in the absence of any other pleaded or argued basis to conclude otherwise, the judge

was therefore correct to determine that the delegation to Mr. Richardson of the task of inspecting the bidders' waste collection vehicles was not an improper delegation of the Committee's powers. Further, the Committee's failure to meet physically or as a 'cohesive grouping' to (together) carry out each step of the evaluation process, did not taint the decision-making process with illegality.

[52] As to the complaint that the learned judge did not expressly consider the evidence adduced on behalf of Elmoalis in relation to the alleged role of Mr. Cowing in the production of the Committee's report by essentially singlehandedly exercising the powers of the Committee, in my view, this complaint does not take the matter any further. The law evidenced by **Allingham** and **Ex parte Argyll Group plc** is clear that, if Mr. Cowing exercised the Committee's functions, singlehandedly, the functions of the Evaluation Committee would have been illegally usurped and performed by him, with the effect that there would have been at least an arguable case that illegalities at the level of the Evaluation Committee could have impugned the decision-making process of the Procurement Board who refused the Elmoalis' bid on the basis of the Committee's report.

[53] While it is true that there was evidence adduced at trial before the learned judge, that Mr. Cowing as chairperson of the Committee did not receive completed evaluation forms from the other committee members, and that committee members, Mr. Richardson and Mr. Bourne, had not read the RFP and at that time was unaware of the grading criteria which they were to apply, the evidence before the learned judge also showed that each member of the Evaluation Committee had their respective contributions to the decision-making process culminating in the report produced by the Committee, which was signed by all three members of the Committee and which the Committee members said represented their collective suggestions as to the bidders who ought to be awarded contracts for each zone.²⁹ This was not a case where the Chairman had purported to make a recommendation to the Procurement Board, and

²⁹ See paras. 4 and 5 of the affidavit of Omari Bourne filed on 27th June 2018; paras. 4 and 18 of the Affidavit of Michael Cowing filed on 3rd July 2018; and paras. 4 and 5 of the supplemental affidavit of Michael Cowing filed on 30th July 2018.

retrospectively sought ratification of the Committee members, or where the members of the Committee played no part in the decision-making process. The Committee members had varying degrees of involvement in the process, and, in the final analysis, agreed with the proposals suggested to them by Mr. Cowing. This is the case even of Mr. Bourne who, played a minimal role in the evaluation of the bids, but in the final analysis, after considering the draft report that was produced by Mr. Cowing, agreed that the report represented his recommendations.³⁰ In the circumstances, I am unable to conclude that the evidence suggests that what was done by the Evaluation Committee was anything but a lawful exercise of the powers conferred upon it by the Procurement Act and the Regulations. There is therefore no basis to upset the decision of the learned judge on this basis.

Issue 2 – The Unfairness Issue

- [54] In **Central Tenders Board and Another v White**,³¹ the Privy Council stated quite pithily that- ‘there is no dispute as a general principle of public law that tenderers for public contracts should be afforded fair and equal treatment’. In **Re H.K. (an Infant)**,³² Lord Parker CJ stated:

“Good administration and an honest or bona fide decision must, as it seems to me, require not merely impartiality, nor merely bringing one's mind to bear on the problem, but acting fairly; and to the limited extent that the circumstances of any particular case allow, and within the legislative framework under which the administrator is working, only to that limited extent do the so-called rules of natural justice apply, which in a case such as this is merely a duty to act fairly.”

- [55] The duty to act fairly in procurement processes undertaken pursuant to the Procurement Act is also enshrined at section 2(3)(d) which requires public procurement and contract administration to ‘ensure fair treatment of all persons who participate in the procurement process’. Lord Hailsham LC in **Chief Constable of North Wales Police v Evans** stated the court’s role in cases hinged on unfairness in the following way:

“It is important to remember in every case that the purpose is to ensure that the individual is given fair treatment by the authority to which he

³⁰ See pp. 237 to 248 of the Transcript of Proceedings, Part IV of the Record of Appeal.

³¹ [2015] UKPC 39.

³² [1967] 2 WLR 962.

has been subjected and that it is no part of the purpose to substitute the opinion of the judiciary or of the individual judges for that of the Authority constituted by law to decide the matter of question.”

[56] Critically, as with every case where there is some challenge to the lawfulness of a decision-making process, it is for the court to determine where on the spectrum of illegality the impugned conduct lies and to determine the attendant consequences having regard to the statutory context within which the decision is made. This is borne out by a number of decisions including **Central Tenders Board, London and Clydeside Estates Ltd v Aberdeen District Council**,³³ and **Director of Public Prosecutions of the Virgin Islands v Penn**.³⁴

[57] Each bidder was required to place in its proposal documents a projected rate at which its proposed contract price would increase annually. Elmoalis argues that the Evaluation Committee report reflected its projected increase rate as 2.7% instead of the 3% it stated in its proposal documents. This point was not strenuously argued before us, and quite properly so, as it does not advance the matter in any way, for the simple reason that the error in the Evaluation Committee’s report was corrected by the Procurement Board. The evidence before the learned judge was that the Board did not consider Elmoalis’ bid in the context of the erroneously stated 2.7%, but used the 3% rate of increase. As the learned judge found, this error, had it not been corrected by the Procurement Board, was in fact beneficial to Elmoalis as the projected increase rate of 2.7% would have lowered the overall costing of Elmoalis’ proposal thereby making Elmoalis’ bid more attractive.³⁵ Furthermore, and as the learned judge observed, even ascribing the similar 2.7% CPI to Elmoalis (and not the corrected 3% annual rate quoted by it) this would not have had the result of Elmoalis being the lowest responsive bidder for the simple reason that its base price was in any event higher.

[58] Ms. Carter focused her arguments on a document produced by the Chairman of the Procurement Board, Dr. Wycliffe Fahie, entitled “No Annual Increase in CPI

³³ [1979] 3 All ER 876 at 883, per Lord Hailsham of St. Marylebone LC.

³⁴ [2008] UKPC 29.

³⁵ See para. 29 of the learned judge’s judgment.

for Life of Contract in GOA Estimate”. The document contains a series of figures including the bid amounts submitted by each bidder for each zone, and the projected average annual increase in the cost of the contract works proposed to be carried out by each bidder for the period of the contract.³⁶ Elmoalis’ projected rate of increase was 3% annually. Waste Tech projected that its price would increase by 5% annually. RB Development opted not to insert a fixed rate of increase in its proposal, and instead indicated that its prices would increase with the Consumer Price Index (the “CPI”). An average projected price increase of 2.7% was assigned therefore to RB Development’s bid. In his evidence, Dr. Fahie agreed that he was the one who determined to apply the rate of 2.7% on the basis that the CPI averaged 1.9% for the past 5 years, so a higher figure was assigned to provide a safety net in the event that there was moderate inflation in the projected period. In the final analysis, RB Development’s was the lowest priced proposal for Zone 2 and was awarded the contract for that Zone on the recommendation of the Evaluation Committee.

[59] Elmoalis argues that the CPI inserted by Dr. Fahie in relation to RB Development’s bid was arbitrary and that the effect of its insertion was that the conclusion that RB Development had the lowest priced proposal was influenced by the projected CPI assigned to its bid. Elmoalis argues that the project CPI could have been higher had some less arbitrary process been used, and therefore that the decision-making process was unfair. I do not agree.

[60] It is true that the rate of increase for RB Development’s bid was inserted by Dr. Fahie. It is also true that the rate inserted by Dr. Fahie was speculative of the future CPI, and was lower than the rates which were proposed by other bidders, including Elmoalis. I am not of the view however that these circumstances, of themselves, amounted to unfairness in the decision-making process. A projected CPI had to be chosen, and Dr. Fahie’s reasons for choosing the rate of 2.7% were explained by him in his affidavit evidence and in his oral evidence before the learned judge. Elmoalis has not produced any evidence as to the correct method which was to be used to predict the CPI or any evidence that a

³⁶ At item 94 of the RFP, proposals were required to indicate the proposed method for raising fees on an annual basis.

higher CPI was appropriate in the circumstances, such as would be necessary to justify an argument that the chosen CPI rendered the decision-making process unfair, unreasonable or illegal. I hasten to say that it could very well be that the CPI being determined at a rate which was higher than the average CPI for the past 5 years was beneficial to Elmoalis, if it is that, using less arbitrary scientific and/or mathematical processes, the projected CPI would in fact have been consistent with the average for the previous 5 years. Again, the difficulty here with making any sort of assessment of this nature, is that Elmoalis has not produced any evidence to assist with making a firm conclusion one way or the other as to whether, in these circumstances, the projected CPI assigned to RB Developments was such that could render the entire process unfair. On the evidence, the statutory and common law obligation to treat bidders fairly cannot be said to have been compromised in this case. In all the circumstances, I am not persuaded that the decision-making process was unfair or illegal, and the learned judge did not err in failing to conclude that it was.

Issue 3 – Whether Elmoalis was entitled to damages for loss or profits

- [61] I have found that there is no basis to interfere with the learned judge's decision to dismiss the Elmoalis' judicial review claim. The possibility of an award for damages occasioned by the alleged unlawful conduct raised by the claim therefore automatically falls away.
- [62] I would remark however, that the power of the Court to award damages in the context of a judicial review claim is uncontroversial, and is discussed in several judgments, including the judgment of Lord Woolf in the House of Lords decision of **M v Home Office**.³⁷ As a matter of procedure, rule 56.1 of the **Civil Procedure Rules 2000** ("CPR") provides that the court may grant damages on an application for judicial review, in addition to or instead of an administrative order, without requiring the issue of any further proceedings.
- [63] The legal principles on the availability of an award of damages in judicial review proceedings are also settled. It is simply not sufficient for a party to assert, as

³⁷ [1994] 1 A.C. 377 at 412.

a basis for entitlement to an award of damages, that they were treated unfairly by a public authority and that they have suffered pecuniary harm as a consequence. To obtain an award of damages in judicial review proceedings, a claimant must plead and prove a recognised private law cause of action, for which damages would be available as a remedy. This was recently confirmed by the English Court of Appeal in **Tchenguiz and another v Director of the Serious Fraud Office**³⁸ and has been applied by this Court in, for example, the recent decision of **Dr. Abner James v The Medical and Dental Council**.³⁹ Further, the decisions of the House of Lords in **X (Minors) v Bedfordshire County Council**⁴⁰ and the Privy Council in **Kirvek Management and Consulting Services Ltd v Attorney General of Trinidad and Tobago**,⁴¹ show that a claim involving illegal conduct (in breach of a statutory duty) by a public officer will only exceptionally give rise to a right to mount a private law claim.

- [64] Elmoalis' judicial review claim in this case sought- '[d]amages and all monetary compensation for the Claimant's losses including loss of profit in the sum of EC\$960,447.73'⁴² on the basis that 'had the evaluation committee functioned according to the law, [Elmoalis] could have likely been a successful bidder for zones 1 and 2'.⁴³ Loss of profits is a head of damages and not a cause of action. As Ms. Carter quite correctly acknowledged, outside of the alleged illegalities in the procurement process, Elmoalis' claim did not assert any civil liability on the part of the state. There is therefore no civil claim to which a claim for damages for loss of profits could be appended. The circumstances of this case are therefore manifestly different from the hypothetical claim for damages for loss of chance on the footing of breach of implied contract by an underbidder against the Central Tenders Board of Montserrat, as discussed in **Central Tenders Board and Another v White**⁴⁴ which was relied on by the appellant.

³⁸ [2014] EWCA Civ 472 at paras. 9 and 14.

³⁹ SLUHCVAP2018/0018 (delivered 12th March 2020, unreported). See also generally The Right Hon. Lord Woolf, Jowell J et al: *De Smith's Judicial Review*, (8th Edn., Sweet and Maxwell, 2020) and Clive Lewis: *Judicial Remedies in Public Law* (6th Edn., Sweet & Maxwell, 2020).

⁴⁰ [1995] 2 AC 633.

⁴¹ [2002] UKPC 43.

⁴² Relief (j) in the Elmoalis' fixed date claim form, at p. 6 of the Record of Appeal.

⁴³ See para. 24 of the affidavit of Carleen Gumbs at p. 20 of the Record of Appeal.

⁴⁴ See also *Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council* [1990] 3 All ER 25.

Accordingly, there is no basis upon which this Court could, in any event, consider the question of damages in the context of Elmoalis' claim. On any view, the arguments on this issue fail.

Joinder of the Attorney General

[65] The propriety of the Attorney General's joinder as a party to Elmoalis' claim was not addressed by the learned judge, and was raised at the hearing of the appeal. Indeed, it is with increasing frequency that Attorneys General across the jurisdiction of the Court are joined as parties to judicial review proceedings in circumstances where the Attorney General was not a decision maker, or was not by law, required to be joined as a party to proceedings.

[66] In this case, it is not disputed that the decisions Elmoalis has complained of were not made by the Attorney General but were made by the Procurement Board and the Evaluation Committee in the context of the Procurement Act and the Regulations. The reason advanced by Elmoalis for naming the Attorney General as defendant to the claim is that:

“...the Defendant, who is the Honourable Attorney General, Mr. John McKendrick... pursuant to section 13(2) of the *Crown Proceedings Act*, R.S.A. c. C160 is the party [sic] who civil proceedings against the crown should be named.”

[67] It is foundational that the named defendant in judicial review proceedings ought to be the public functionary or body whose decision-making process is subject to review. The Privy Council in **Bahamas Hotel Maintenance and Allied Workers Union v Bahamas Hotel Catering and Allied Workers Union and others**⁴⁵ put it this way- ‘[j]udicial review is directed to official decision-making, and the official who took the relevant decision is the natural Respondent to such proceedings’. The default position therefore is that the Attorney General (or any party for that matter) ought only be named as a defendant to judicial review proceedings where he or she has made the decision in relation to which judicial review has been sought.⁴⁶

⁴⁵ [2011] UKPC 4.

⁴⁶ See also *The Central Tenders Board and Another v White* (trading as White Construction Services) [2015] UKPC 39 at para. 1.

[68] Whether, as Elmoalis pleaded in its fixed date claim form, the Attorney General is a proper party to these proceedings under the **Crown Proceedings Act**⁴⁷ was answered by this Court in **Quorum Island (BVI) Ltd v Virgin Islands Environmental Council**. In **Quorum**, Rawlins CJ interpreted section 19 of the Crown Proceedings Act of the Territory of the Virgin Islands, which is in all material respects identical to section 19 of the Anguillan **Crown Proceedings Act**, and concluded that the BVI Crown Proceedings Act does not require the Attorney General to be a necessary or proper defendant in judicial review/prerogative type proceedings as they are not civil proceedings within the definition of the legislation. The proper defendant in prerogative proceedings is the person or authority whose decision is challenged. The ratio of Rawlins CJ in **Quorum** stands together with pronouncements of the Privy Council in **Minister of Foreign Affairs v Vehicles and Supplies Limited**⁴⁸ and **Bahamas Hotel Maintenance and Allied Workers Union v Bahamas Hotel Catering and Allied Workers Union and others** in relation to comparable legislation in countries outside this Court's jurisdiction.

[69] To these pronouncements, I would add that CPR 56.4(4) provides that a judge may direct that notice of the hearing of an application for leave to seek judicial review be given to the Attorney General of the relevant Member State or Territory. Service of an application for leave to seek judicial review on an Attorney General is not the same as the joinder of an Attorney General as a defendant to a judicial review claim. This rule of procedure therefore does not in any way undermine the general position that the decision-maker is ordinarily the proper party to judicial review proceedings.

[70] On the basis of all these authorities, the Attorney General was neither a necessary nor proper party to these proceedings. The decisions challenged were made by the Evaluation Committee and ultimately by the Procurement Board who were exercising powers under the Procurement Act in accordance with the Regulations. These bodies and/or their members were therefore the proper defendants to Elmoalis' claim.

⁴⁷ Cap. C160, Revised Statutes of Anguilla 2016.

⁴⁸ [1991] 1 WLR 550.

Costs

- [71] The learned judge ordered Elmoalis to pay costs to the Attorney General in an amount to be agreed or assessed. Elmoalis has not advanced any grounds of appeal specifically challenging the learned judge's costs order notwithstanding that the judge did not make a finding that Elmoalis (as claimant) acted unreasonably in applying for judicial review or in the conduct of its application in keeping with CPR 56.13(6). On the face of the record, it does not appear to me that Elmoalis acted unreasonably in bringing or conducting its judicial review claim so as to warrant a costs award being made against it. The appropriate costs order on this appeal in my view therefore is that each party is to bear its own costs.

Disposition

- [72] For all the foregoing reasons, I would make the following orders:
- (1) The appeal is dismissed.
 - (2) Each party shall bear its own costs.

I concur.
Mario Michel
Justice of Appeal

I concur.
Gerard St. C. Farara, QC
Justice of Appeal [Ag.]

By the Court

Chief Registrar