In The Supreme Court of Bermuda

CIVIL JURISDICTION

2021: No. 364

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN:

MAILBOXES UNLIMITED LIMITED

Applicant

- and -

MINISTER FOR THE CABINET OFFICE

Respondent

RULING

Application to set aside leave to bring Judicial Review proceedings

Date of Hearing: **3 May 2022**

Date of Ruling: **3 June 2022**

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

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

RULING of Mussenden J

Introduction

1. This is an application by Summons dated 20 December 2021 by the Respondent to set aside leave to bring judicial review proceedings.

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

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

4. On 24 November 2021 I granted Mailboxes leave to bring judicial review proceedings against the Minister in respect of the decision (the "**Decision")** of the Minister for the Bermuda Post Office (the "**BPO**") to enter into a shopping platform partnership (the "**Partnership**") involving the BPO and an entity described by the Minister as Access USA Shipping LLC and which appears to be connected to an online shopping entity "**myUS.com**" and the procurement procedures relating thereto. The relief sought was as follows:
    a. A declaration that the Decision to enter into the Partnership was unlawful;
    b. An order of prohibition restraining the Minister from continuing the Partnership;
    c. An order of certiorari quashing the Decision to execute such contract that has been entered into to give effect to the Partnership; and
    d. Such further and other relief.

5. Mailboxes relied on various grounds as set out in Form 86A and the First Affidavit of Kenneth Thompson sworn on 16 November 2021.

6. The Minister brings this application, supported by the First Affidavit of Samuel Brangman sworn on 15 December 2021, on the following grounds:

a. Mailboxes does not have sufficient enough interest in the matter to which this application for judicial review relates, as is required by section 64(2) of the Supreme Court Act 1905 (the "**1905 Act**") and RSC 53/3(7); and/or
b. Mailboxes did not make its application for leave to apply for judicial review promptly and/or within six-months, as is required by section 68(1) of the 1905 Act and RSC 53/4.

7. The Court is asked to rule on the first ground of sufficient interest only whilst the ground of delay will be the subject of argument at a later date if necessary.

The 1905 Act and the RSC

8. Section 64 of the 1905 Act provides as follows:

> *"Application for judicial review*
> *64 (1) An application for judicial review may be made to the Court, in accordance with the Rules of Court, for one or more of the following forms of relief, namely, an order of mandamus, prohibition or certiorari, a declaration or an injunction.*
>
> *(2) No application for judicial review shall be made unless the Court has first granted leave in accordance with the Rules of Court to make the application, and leave may only be granted if the Court considers that the applicant has a sufficient interest in the matter to which the application relates."*

9. The RSC Order 53 rules 3(1) and 3(7) Act set out relevant provisions as follows:

> *"53/3 Grant of leave to apply for judicial review*
> *3 (1) No application for judicial review shall be made unless the leave of the Court has been obtained in accordance with this rule.*
> *…*
> *(7) The Court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates."*

The Minister's Submissions

10. Mr. Johnston submitted that the test the Court must adopt on an application to set aside the an order granting leave is set out in *Sookham v The Children's Authority of Trinidad and*

Tobago [2021] UKPC 29. In summary, the Minister must show that leave should not have been granted. The position must be obvious to the Court after the application is heard.

11. Mr. Johnston submitted that the Court may only grant leave when an applicant shows they have an arguable case worthy of further investigation. The leave stage is designed to prevent unarguable cases consuming Government time and energy. It is also designed to prevent '*busybodies, cranks, and other mischief-makers*' from challenging decisions they have no real business in per Lord Scarman in *R v IRC, ex parte National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617. The applicant must show they have a 'sufficient interest' in the matter to which the application relates per section 64(2) of the 1905 Act and the RSC Order 53 rule 3(7).

12. Mr. Johnston submitted that to determine whether an applicant has a sufficient interest, the Court must look at the argument the applicant intends to make. Then the Court must consider the statutory context, with an eye on whether the law gives any clues about who are owed any duties. If the applicant is one of the persons owed a duty, then they will have sufficient interest. They will also have a sufficient interest if the decision they intend to challenge has an identifiable impact on them (direct or indirect).

13. Mr. Johnston submitted however that in procurement cases, the UK courts hold it is more difficult for an applicant to show they have sufficient interest. He relied on the case of *R (Wylde) v Waverly BC* [2017] PTSR 1245 where it was said that the conventional approach "*focused upon purpose and policy of legislation being invoked, leads to a much more restrictive qualification for standing in procurement cases than would apply in judicial review generally*". He argued that the start point was that only 'economic operators' have a sufficient interest to challenge procurement exercises, as *Wylde* at para 13 stated the relevant regulations defined an 'economic operator' as "a contractor, a supplier or a service provider".

14. Mr. Johnston also submitted that the definition does not mean that only economic operators have sufficient interest to make a procurement challenge. He relied on *R (Chandler) v Secretary of State for Children, Schools and Families* [2010] PTSR 749 where the Court

acknowledged that non-economic operators could bring a claim for judicial review but laid out a test for standing which seemed to require the applicant to demonstrate that had the conduct complained of not occurred, there may have been a different outcome which would have had a direct impact on the applicant. The Court in discussing the issue of who may challenge a procurement decision stated:

> *"The failure to comply with [procurement regulations] is an unlawful act, whether or not there is no economic operator who wishes to bring proceedings under [the procurement regulations] and thus a paradigm situation in which a public body should be subject to review by the Court. We incline to the view that an individual who has a sufficient interest in compliance with the public procurement regime in the sense that he is affected in some identifiable way but is not himself an economic operator who could pursue remedies under [the procurement regulations] can bring judicial review proceedings to prevent non-compliance with [the regulations] … especially before any infringement takes place…He may have such an interest if he can show that performance of the competitive tendering procedure … might have led to a different outcome that would have had an impact on him."*

15. Mr. Johnston directed the Court to Mailboxes letter before claim dated 15 October 2021 in which he argued that Mailboxes is attempting to launch a procurement challenge. However, the letter reveals that Mailboxes is concerned with 'distortion of market conditions' and 'taxpayer liability' and 'the wisdom of Government becoming a direct competitor to privately run businesses'. Mr. Johnston cited *Chandler* where the Court stated:

> *"Ms. Chandler is not challenging the Secretary of State's decision because of any interest that she has in the observance of the public procurement regime but because she is opposed to the institution of academy schools. She is thus attempting, or seeking, to use the public procurement regime for a purpose for which it was not created. In all the circumstances, it would in our judgment be outside the proper function of public law remedies to give Ms. Chandler standing to pursue her claim."*

16. Mr. Johnston argued that like Ms. Chandler, Mailboxes cannot show that they have sufficient interest in the procurement exercise. Further, even if Mailboxes was genuinely concerned with BPO's procurement exercise, there is nothing in their letter before claim indicating that they can satisfy the test for showing they have a sufficient interest in procurement challenges. He noted that Mailboxes had not set out how a different procurement exercise may have led to a different outcome, or how the different result would directly affect them. Mr. Johnston argued that Mr. Thompson's statement in his First Affidavit that "*If there had been an open procurement process, the Applicant would likely have considered making a bid on the procurement*" was not enough to satisfy the Court.

17. Mr. Johnston referred to *R (Unison) v NHS Wiltshire Primary Care Trust* [2012] EWHC 624 in which Unison, a union, brought judicial review proceedings on behalf of its members to challenge a decision by various care trusts to outsource services which had been hitherto provided in0house. Eady J made references to *Chandler* stating that it was important to focus carefully on the suggested criteria in Chandler ad not to interpret them too freely. Eady J went on to question whether Unison could show that performance of the competitive tendering procedure might have led to a different outcome that would have a direct impact on it or its members. She stated that it was not known what might have happened if the procedures contemplated under the regulations had been meticulously carried out. She concluded that on the limited evidence before her that Unison was not capable of discharging the burden. Thus, it had not established a 'sufficient interest'.

18. Mr. Johnston referred to the First Affidavit of Mr. Brangman which in turn referred to the "Request for Information ("**RFI**") for BPO Online Shopping Initiative" issued 24 August 2018 with a submission deadline of 21 September 2018. Mr. Brangman stated that the BPO had reached out to the Office of Project Management and Procurement and did everything they were advised to do by that office. Mr. Johnston referred to Mr. Thompson's First Affidavit where he had stated that he was aware of the RFI and that the Minister had issued

a statement published in the Royal Gazette on 9 October 2021 saying that no-one responded to the RFI[1]. Thus, there was no evidence that Mailboxes was interested to apply.

19. Mr. Johnston submitted that there was an alternate procedure for dealing with complaints about procurement procedures. He referred to section 32B of the Public Treasury (Administration and Payments) Act 1969 (the "**1969 Act**") which established the Office of Project Management and Procurement with a Director who pursuant to section 32B(3)(c) had the express function of handling complaints relating to the awarding of Government contracts. Mr. Johnston argued that before judicial review proceedings commenced, Mailboxes should avail itself of the alternate remedy provided by the 1969 Act.

Mailboxes' Submissions

20. Mr. Sanderson submitted that the *Chandler* line of authorities were in respect of UK legislation for public contracts. He argued that the Bermuda legislation does not have the same language as the UK legislation. In any event *Chandler* was an obiter decision. He referred to the case of *R Good Law Project Ltd and Ors v Minister of Cabinet Office* [2021] EWHC 1569 Technical & Construction Court where the Good Law Project was a public interest body that was challenging a government decision. Good Law Project discussed Chandler and showed the flexibility of Chandler which was obiter.

21. Mr. Sanderson submitted that in this case, the evidence of Mr. Thompson showed that Mailboxes was a business that had a depot in the US which receives and consolidates packages for onward shipment and handling to Bermuda. Mr. Thompson had also stated that if there had been an open procurement process, then Mailboxes might have bid. Thus they are a well-placed business entity and in no way can they be described as "busy-bodies". It followed that they are affected as any entry in the market affects them. Mr.

[1] The Royal Gazette article published online on 9 October 2021 states that Mr. Brangman stated "In 2018, the BPO issued a request for information and the only two companies that replied to us were IBC and DHL. Neither of those two companies owned a US address or a facility to accept our mail. Hence we sought another opportunity for the benefit of the post office and our customers. If no-one replies to the RFI, there's no need to take it to the next step."

Sanderson, submitted that if Chandler applied in Bermuda, which he maintained it did not, Mailboxes would still meet the test for standing.

22. Mr. Sanderson submitted that in respect of recourse to the complaints procedure as set out in section 32B(3)(c) of the 1969, the Director of the Office of Project Management and Procurement was not the entity that contracted with MyUS.com. Further, the Director does not have the powers available to it as does the Supreme Court under the judicial review jurisdiction.

Discussion and Analysis

23. In my view I refuse the application to set aside the grant of leave for judicial review for several reasons. First, I disagree with Mr. Johnston that I should be guided by the obiter comments in the *Chandler* case as that case is about UK regulations in respect of procurement which is different from the Bermuda legislation. In my following analysis, I will not apply the principles *Chandler* as urged by Mr. Johnston.

24. Second, I am of the view that Mailboxes has sufficient interest in this matter. In *R v IRC, ex parte National Federation of Self-Employed and Small Businesses Ltd* Lord Scarman stated that it was essential to consider two critical issues: (a) the character of the duty upon [the government body] and the persons to whom it is owed; and (b) the nature of the interest which the applicant has to show. He said "*It is an integral part of the Lord Advocate's argument that the existence of the duty is a significant factor in determining the sufficiency of an applicant's interest.*"

25. Third, in respect of the duty, I refer to the 1969 Act and to the statutory Code of Practice for Project Management and Procurement (the "**Code**"). Mailboxes set out the duty in Ground 1 of the Form 86A stating that public procurement is governed by the Code pursuant to s.32B(4) of the 1969 Act to be followed by all public officers concerned with obtaining goods and services for Government. It appears to me, on the facts of this case, that the Minister engaged the provision of services from a service provider for the

Government. In my view, there was a legal duty of fairness and adherence to the statutory procedure owed by the Minister to the persons who could provide services to the Government.

26. Fourth, in respect of the sufficiency of interest, Lord Scarman stated that that was a mixed question of law and fact noting that the legal element in the mixture is less than the matters of fact and degree. Lord Scarman cited *Gouriet v Union of Post Office Workers* [1978] A.C. 435, 482 where Lord Wilberforce stated "*The modern position in relation to prerogative orders: These are often applied for by individuals and the courts have allowed them liberal access under a generous conception of locus standi*." Lord Scarman went on to say that in "*determining the sufficiency of an applicant's interest it is necessary to consider the matter to which the application relates and it would be wrong in law for the court to attempt an assessment of the sufficiency of interest without regard to the matter of the complaint*."

27. Mr. Johnston referred to Mailboxes letter before claim highlighting in essence that Mailboxes was concerned with protecting its own interests rather than the procurement process. I disagree. The first bullet point of the letter identifies a concern with the procurement process and later on the letter addresses possible breaches of procedural fairness and/or legitimate expectations. In the First Affidavit of Mr. Thompson he sets out that the nature of his business is consolidating and importing packages into Bermuda from the USA on behalf of customers. He went on to state that on 27 November a statement was published on the Government website stating that the BPO intended to move forward with a public-private partnership for package forwarding and consolidation services from the USA. On 12 March 2021 the Minister announced that the BPO would soon be contracting with myUS.com for these services. As I understand it, Mailboxes is saying that it has the ability to offer the same services. Having regard to the facts in this case and the statements of Lord Scarman, in my determination, I am satisfied that Mailboxes has a sufficient interest.

28. Fifth, Mr. Johnston highlighted that Mr. Brangman had stated that Mailboxes was aware of the RFI but did not submit an expression of interest. There were references to the

statements of Mr. Brangman and the Minister that only two companies submitted information but which had deficiencies with the further statement that "*Therefore, if no-one replies to the RFI there's no need to take it to the next step*." It seems to me that a RFI is a different animal from a formal bid submitted to offer services. The RFI introduction stated that the Government through the Ministry of the Cabinet Office with responsibility for Government Reform is requesting information from interested parties for the purposes of gathering information about the marketplace in order to assist in the determination of future purchasing options for online cross border and global shopping. It also included that submissions should include a completed and signed Respondent Submission Form that acknowledges, amongst other things, that the RFI and any respondent submissions will not create a legal relationship or obligation regarding the procurement of any good or service (the "**Acknowledgment**"). Thus, I do not understand that the Minister is saying that in order to be considered to submit a formal bid that a potential applicant had to submit the RFI. If there was any doubt on that point, the Acknowledgment seems to remove all doubt that submitting the RFI was a pathway to being allowed to submit a formal bid. In my view, in respect of determining 'sufficient interest', there is no merit in this argument that Mailboxes failed to submit a completed RFI.

29. Sixth, I have considered the arguments of Mr. Johnston that the 1969 Act provides a complaint procedure which is set out in section 41 of the Code. I have perused that section. Section 41.8 provides that a Complainant should be fully aware that complaints will only be considered from a bidder/proponent if they have submitted a bid in good faith in response to a bidding process. It seems clear from the statements of the Minister and Mr. Brangman that there was no bidding process in this matter. On that basis, the complaint procedure in the Code is not an alternate remedy for the circumstances of Mailboxes. Further, I agree with Mr. Sanderson that the complaint procedure in the Code does not provide the Director of Procurement with the powers of the Supreme Court in the judicial review jurisdiction.

Conclusion

30. In light of the reasons as set out above, I am satisfied that Mailboxes has sufficient interest pursuant to section 64(2) of the Supreme Court Act 1905 and RSC 53/3(7) to be granted leave to commence judicial review proceedings. On that basis, in following *Sookham v The Children's Authority of Trinidad and Tobago* the Minister has failed to show that leave should not have been granted. Further, it is not obvious to me that the grant of leave should be set aside. Therefore, I decline the Minister's application to set aside the grant of leave.

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

Dated 3 June 2022

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