

**C.O. Williams Construction Limited**

*Appellant*

*v.*

**(1) Donald George Blackman (Minister  
of Transport and Works) and  
(2) The Attorney General**

*Respondents*

FROM

**THE COURT OF APPEAL OF BARBADOS**

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL, DELIVERED THE  
17TH NOVEMBER 1994  
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*Present at the hearing:-*

LORD KEITH OF KINKEL  
LORD BRIDGE OF HARWICH  
LORD OLIVER OF AYLERTON  
LORD LLOYD OF BERWICK  
LORD NICHOLLS OF BIRKENHEAD

*[Delivered by Lord Bridge of Harwich]*

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The process of placing Government contracts in Barbados is regulated by a precise and detailed statutory code contained in Part XII of the Financial Administration and Audit (Financial) Rules 1971 ("the 1971 Rules") made by the Cabinet in exercise of the power conferred by section 39 of the Financial Administration and Audit Act. In 1986 the Ministry of Transport and Works, in accordance with this code, invited tenders for the execution of large scale works of highway improvement referred to as "World Bank Road Maintenance Project, Improvements to Highway 2A - Phase 1". The reference to the World Bank is explained by the fact that a proportion of the cost of the project was to be met by a loan to the Government of Barbados from the World Bank. In due course the appellant company (C.O. Williams Construction Limited) submitted a tender for the work. The only other tenderer was Rayside Asphalt Paving Limited ("Rayside"). The amount of the appellant's tender was less than \$9 million and the amount of Rayside's tender was more than \$10 million for the same work. In the event the contract was awarded to Rayside.

In July 1988 the appellant instituted proceedings for judicial review against Mr. Donald George Blackman, who was then the Minister of Transport and Works, ("Mr. Blackman") and against the Attorney General as representing the Cabinet in respect of the actions taken by Mr. Blackman and the Cabinet in connection with the award of the Highway 2A contract to Rayside. Both respondents applied to strike out the proceedings as disclosing no cause of action or as frivolous and vexatious or an abuse of the process of the court. The respondents' application came before Sir Denys Williams C.J., who, on 27th February 1989, ordered that the proceedings against Mr. Blackman be struck out, but declined to strike out the proceedings against the Attorney General as the respondent representing the Cabinet. Both unsuccessful parties appealed against these decisions. The Court of Appeal, on 3rd February 1993, delivered judgments unanimously affirming the decision of the Chief Justice to strike out the proceedings against Mr. Blackman, but by a majority (Moe and Smith J.J.A., Husbands J.A. dissenting) reversing the decision of the Chief Justice in relation to the Attorney General and ordering that the proceedings against him be also struck out. The appellant now appeals to Her Majesty in Council by leave of the Court of Appeal.

Before addressing the issues to be determined, it will be convenient to refer to the relevant Barbados legislation. Judicial review is governed by the Administrative Justice Act. The sections here primarily in point provide as follows:-

"2. In this Act,

'act' includes any decision, determination, advice or recommendation made under a power or duty conferred or imposed by the Constitution or by any enactment;

'administrative act or omission' means an act or omission of a Minister, public official, tribunal, board, committee or other authority of the Government of Barbados exercising, purporting to exercise or failing to exercise any power or duty conferred or imposed by the Constitution or by any enactment;

...

3.(1) An application to the Court for relief against an administrative act or omission may be made by way of an application for judicial review in accordance with this Act and with rules of court.

...

4. The grounds upon which the Court may grant relief by way of the remedies mentioned in this Act include the following:

(a) that an administrative act or omission was in any way unauthorised or contrary to law;

- (b) excess of jurisdiction;
- (c) failure to satisfy or observe conditions or procedures required by law;
- (d) breach of the principles of natural justice;
- (e) unreasonable or irregular or improper exercise of discretion;
- (f) abuse of power;
- (g) fraud, bad faith, improper purposes or irrelevant considerations;
- (h) acting on instructions from an unauthorised person;
- (i) conflict with the policy of an Act of Parliament;
- (j) error of law, whether or not apparent on the face of the record;
- (k) absence of evidence on which a finding or assumption of fact could reasonably be based; and
- (l) breach of or omission to perform a duty.

5.(1) The remedies that the Court may grant by way of relief on an application for judicial review are

- (a) certiorari, for quashing unlawful acts;
- (b) prohibition, for prohibiting unlawful acts;
- (c) mandamus, for requiring performance of a public duty, including a duty to make a decision or determination or to hear and determine any case.

(2) The Court may, having regard to the scope of the remedies mentioned in subsection (1), grant in addition or alternatively

- (d) a declaratory judgment;
- (e) an injunction;
- (f) restitution or damages in money; or
- (g) an order for the return of property real or personal.

(3) Any of the remedies mentioned in subsections (1) and (2) may be applied for together or in the alternative in an application for judicial review; and the Court may grant one or more of them as law and justice may require, and whether applied for in the original application or not."

The Barbados Cabinet has a general function broadly analogous no doubt to that of the Cabinet in the United Kingdom but expressly defined in Chapter VI of the Constitution of Barbados under the heading "Executive Powers", which provides by section 64:-

"64.(1) There shall be a Cabinet for Barbados which shall consist of the Prime Minister and not less than five other Ministers appointed in accordance with the provisions of section 65.

(2) The Cabinet shall be the principal instrument of policy and shall be charged with the general direction and control of the government of Barbados and shall be collectively responsible therefor to Parliament."

Unlike any United Kingdom legislation of which their Lordships are aware some legislation in Barbados confers specific statutory functions on the Cabinet as such. Thus, section 39 of the Financial Administration and Audit Act delegates to the Cabinet power to legislate over an extensive field in relation to the control of public finance and it is upon delegated legislation made in exercise of this power, which in turn assigns a specific statutory function to the Cabinet, that the present appeal primarily depends.

Part XII of the 1971 Rules is headed "Government Contracts". The code it enacts is elaborate. It is unnecessary to set it out in detail. Its main features presently relevant are as follows. Whenever a Government contract will involve expenditure in excess of \$25,000, tenders are to be invited. The tenders are to be examined in the first instance by a Tenders Committee, or where, as in the instant case, funds borrowed from an international financial institution are to be expended, a Special Tenders Committee. The constitution of these Committees is precisely defined by the Rules as is the procedure they are to follow in dealing with the tenders. Throughout the procedural provisions there are carefully devised safeguards designed to eliminate the possibility of corruption, to protect the public purse from exploitation and to ensure fairness to tenderers. The culmination of the procedure is that the relevant Committee reaches its conclusion as to which tender to recommend and then proceeds in accordance with Rule 148 which provides:-

"The Committee shall send the tenders and its recommendation thereon to the head of department who shall submit the recommendation to the Minister for acceptance. If the Minister does not accept the recommendation of the Committee, the matter shall be submitted to the Cabinet for final decision."

By definitions elsewhere in the legislation the reference in this Rule to the "head of department" is to the Permanent Secretary of the department concerned with the proposed contract and the "Minister" means the Minister of Finance, who, at the material time, was the Prime Minister.

Here, according to the affidavit evidence filed on behalf of the appellant, the Special Tenders Committee recommended that the appellant's tender should be accepted and this recommendation was supported by the World Bank. It is not clear whether there was any formal reference of the

Committee's recommendation by the Permanent Secretary of the Ministry of Transport and Works to the Prime Minister as Minister of Finance, but the question which tender should be accepted was certainly brought before the Cabinet who were urged by Mr. Blackman, who was himself a member of the Cabinet, to accept Rayside's tender in preference to the appellant's and the Cabinet so decided.

It will be convenient to address first the appeal in respect of the proceedings against Mr. Blackman. In the appellant's amended statement filed in support of its originating notice of motion, the claim against Mr. Blackman is said to be made against him "in his capacity as ... Minister of Transport and Works ... in connection with an administrative act or decision regarding the award or the recommendation of the award of a public contract for the construction and/or rehabilitation of Highway 2A". Sir Denys Williams C.J., having referred to the definitions of "act" and "administrative act or omission" in section 2 of the Administrative Justice Act, set out his reasons for concluding that the proceedings against Mr. Blackman should be struck out in the following passage:-

"By virtue of the Financial Administration and Audit Financial Rules the Special Tenders Committee (the funds of an international financial institution were involved) had the statutory power of making the recommendation, the Minister of Finance the statutory power of accepting or rejecting it, and where the Minister of Finance did not accept the recommendation, the Cabinet had the statutory power of making the final decision. The Minister of Transport and Works, as such, had no statutory power with respect to the award of the contract. In these circumstances, there being no act or decision of his within the meaning of the Act that is reviewable, there seems to be no justification for allowing the proceedings against him to continue."

This reasoning was unanimously endorsed by the Court of Appeal and their Lordships agree with it.

Before their Lordships it was argued that the action of Mr. Blackman could be brought within the definition of "administrative act or omission" in section 2 on the ground that he had purported to exercise the power of the Minister of Finance under Rule 148 to refuse the Special Tenders Committee's recommendation and refer the matter to the Cabinet for decision. There is nothing in the affidavit evidence filed by the appellant which supports this contention. But in any event the submission of the issue to the Cabinet, which led to the Cabinet's decision, must clearly have been endorsed by the Prime Minister as Minister of Finance. Whatever the outcome of the challenge to the Cabinet's decision, there is no basis on which the court could grant any relief to

the appellant against Mr. Blackman either as an individual member of the Cabinet or in respect of any procedural step leading to the Cabinet's decision. In their Lordships' judgment the proceedings against Mr. Blackman were rightly struck out.

The appeal in respect of the proceedings in which the appellant seeks judicial review of the Cabinet's decision raises the following issues:-

1. Was the decision of the Cabinet to accept the Rayside tender an exercise of prerogative power or of the statutory power conferred by Rule 148 of the 1971 Rules?
2. Is a decision of the Cabinet of the kind here in question such as to be subject in principle to judicial review?
3. If question 2 is answered affirmatively, is there any ground on which the Cabinet's decision might be impugned under section 4 of the Administrative Justice Act?
4. If questions 2 and 3 are answered affirmatively, is there any effective relief which may be available to the appellant?

These issues must of course be considered in the context of an application to strike out. It is well settled that proceedings may only be struck out if it is clear that they are bound to fail.

#### Issue 1.

The contention advanced by Mr. Newman, on behalf of the Attorney General, that in awarding the contract to Rayside, the Cabinet was exercising a prerogative power, seems to their Lordships to be quite untenable. It is trite law that when the exercise of some governmental function is regulated by statute, the prerogative power under which the same function might previously have been exercised is superseded and so long as the statute remains in force the function can only be exercised in accordance with its provisions. Accordingly the Cabinet's only relevant power was that which it was both enabled and required to exercise under Rule 148 of the 1971 Rules.

#### Issue 2.

The fact that the Cabinet has the very broad function conferred upon it by section 64(2) of the Constitution of Barbados, in respect of which it may be immune from judicial review, seems to their Lordships for present purposes to be quite irrelevant. When the Cabinet exercises a specific statutory function which, had it been conferred on a Minister instead of the Cabinet, would unquestionably have been subject to judicial review, their Lordships can see no reason in principle why the Cabinet's exercise of the function should not be subject to judicial review to the same extent and on the same grounds as the Minister's would have been.

The majority of the Court of Appeal held that the definition of an "administrative act or omission" in section 2 of the Administrative Justice Act did not apply to anything done or omitted to be done by the Cabinet. Their Lordships cannot agree. They incline to agree with the view expressed by Husbands J.A. in his dissenting judgment that, by virtue of the provision in the Interpretation Act that "words in the singular shall include the plural", the word "Minister" in the definition may be read in the plural as applicable to the Cabinet when exercising "any power or duty conferred or imposed ... by any enactment". But if this view is not correct, the Cabinet, in their Lordships' judgment, is unquestionably an "other authority of the Government of Barbados".

### Issue 3.

In considering an application to strike out it is normally not necessary to look beyond the pleaded case of the party against whom the order is sought. In an application seeking judicial review the only pleading required as such is the statement filed under the Rules which sets out the grounds on which the applicant seeks relief. Here the appellant's statement in terms challenges the validity of the Cabinet's decision on each of the grounds listed in paragraphs (a), (d), (e), (f) and (g) of section 4 of the Administrative Justice Act. The statement clearly discloses a cause of action. But it is a debatable question whether, when proceedings are brought under the Barbados Administrative Justice Act which, in contrast to an application for judicial review in the United Kingdom, may be brought without leave, the court should also look at the affidavit evidence filed by the applicant and determine the issue as to whether the proceedings should be struck out by reference to the capacity of the evidence to support the case as pleaded. The case was argued on the basis that the issue depended on the sufficiency of the evidence, and their Lordships are content to assume, without deciding, that this is the correct approach.

The primary evidence relied on by the appellant as indicating the reasons which motivated the Cabinet to accept Rayside's tender in preference to the appellant's is in the affidavit of a Mr. Peter Scott, a journalist, which gives a summary of a speech made in the House of Assembly by Mr. Blackman on 14th June 1988 with reference to the decision of the Cabinet, together with a newspaper report of a speech by the Prime Minister a few days later referring to Mr. Blackman's speech as having "outlined why Government had decided to award the multi-million-dollar contract for the Highway 2A road project to Rayside over C.O.W. Construction". At an earlier stage the admissibility of Mr. Blackman's speech was contested on the ground of parliamentary privilege, but the appellant has now secured the permission of the Speaker of the House of Assembly to tender it in evidence

and its admissibility is no longer in dispute. Their Lordships were informed that a verbatim transcript of the speech would in due course be available.

It would be quite inappropriate at this stage for their Lordships to comment in detail on the effect of this evidence. They need say no more than that it is, in their judgment, sufficient to sustain a prima facie case for impugning the Cabinet's decision on one or more of the grounds on which it is attacked under section 4 of the Administrative Justice Act.

#### Issue 4.

The question whether the appellant has any prospect of obtaining effective relief in the proceedings is, in their Lordships' judgment, the most difficult question which arises, although it was not canvassed in the courts below. It is obviously impossible now, when Rayside has finished or nearly finished the contract works, to put the clock back and reverse the effect of the Cabinet's decision. The relief claimed by the appellant is a declaration that the Cabinet's decision was invalid and damages. In these circumstances Mr. Newman, for the Attorney General, forcibly argued:-

- (i) that the possible grant of a declaration alone would be academic and of no value to the appellant and could not justify the continuation of the proceedings;
- (ii) that the appellant, even if successful in striking down the Cabinet's decision, has no remedy in damages at common law;
- (iii) that section 5(2)(f) of the Administrative Justice Act, on its true construction, was only intended to authorise the recovery in judicial review proceedings of damages otherwise recoverable at common law, not to create an independent cause of action for damages sustained in consequence of an administrative malfeasance under section 4.

Their Lordships appreciate the force of these arguments and would be inclined to accede to the first and second. But the interpretation of section 5 of the Administrative Justice Act raises a question of difficulty and importance which it would be quite inappropriate for their Lordships to determine without the benefit of any opinion expressed by the courts in Barbados and on an application to strike out.

For these reasons their Lordships will humbly advise Her Majesty that the appeal against Mr. Blackman be dismissed, the appeal against the Attorney General be allowed, the order of the Court of Appeal be set aside and the order of Sir Denys Williams C.J. be restored. So far as costs are concerned, their Lordships understand that Mr. Blackman, as a former Cabinet Minister, has been represented by the Attorney General throughout. They think that in these circumstances it will both meet the justice of the case and



simplify taxation to award costs to the appellant with a suitable deduction in respect of costs unnecessarily incurred by the joinder of Mr. Blackman as a respondent to the appeals. The Attorney General must pay to the appellant 85% of its costs in the Court of Appeal and before the Board.

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